

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

Ralph P. Stroman, Special Referee
Case No. 2009-CP-26-1909
Appellate Case No. 2012-212984

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants
and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director
of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM

Bucksville Farms, Inc., and Benjamin J. Creel, individually and
as surviving Director of Bucksville Farms, Inc., are Appellants,

and

Randy A. Beverly, LLC, Donald Godwin, LLC,
Randy A. Beverly and Donald Godwin, are Respondents.

RECORD ON APPEAL
VOLUME I

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald)
Godwin, LLC,)

Plaintiffs,)

vs.)

Bucksville Farms, Inc.,)

Defendant & Third Party)
Plaintiff)

vs.)

Randy A. Beverly and Donald)
Godwin,)

Third Party Defendants &)
Fourth Party Plaintiffs,)

vs.)

Benjamin J. Creel, individually and)
as surviving director of Bucksville)
Farms, Inc.,)

Fourth Party Defendant.)

ORDER OF REFERENCE
(With Consent Of All Parties)

FILED
HORRY COUNTY
2010 JUN 22 PM 2:59
MELANIE HUGGINS-WARD
CLERK OF COURT

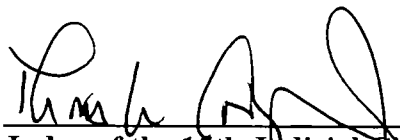
It appears that pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, that
this action is one which may be referred to a Special Referee upon the consent of all parties;
Now therefore, on Motion of Plaintiff's Attorney, and by and with the consent of all parties;



0001

IT IS HEREBY ORDERED that this action be and the same hereby is referred to RALPH P. STROMAN as Special Referee to take the testimony arising under the pleadings and to make his finding of fact and conclusions of law with the authority to enter final judgment pursuant to Rule 53(e) SCRPC with any appeal being directly to either the South Carolina Supreme Court or the South Carolina Court of Appeals as provided by the South Carolina Rules of Appellate Procedure.

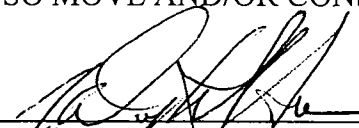
AND IT IS SO ORDERED.



Judge of the 15th Judicial Circuit

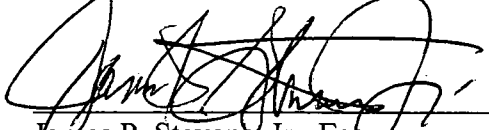
Dated: June 14, 2010

I SO MOVE AND/OR CONSENT:



J. Dwight Hudson, Esq.
Attorney For: *Randy A. Beverly,
Individually and LLC AND for
Donald Godwin, individually and
LLC*

I SO MOVE AND/OR CONSENT:



James P. Stevens, Jr., Esq.
Attorney For: *Bucksville Farms,
Inc. AND for Benjamin J. Creel,
Individually and as surviving director
of Bucksville Farms, Inc.*

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald
Godwin, LLC,
Plaintiffs,

vs.

Bucksville Farms, Inc.,
Defendant & Third Party
Plaintiff

vs.

Randy A. Beverly and Donald
Godwin,
Third Party Defendants &
Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and
as surviving director of Bucksville
Farms, Inc.,
Fourth Party Defendant.

FINAL JUDGMENT PURSUANT
TO RULE 53(e), *SCRPC*

RECORDED
12 MAR 15 AM 9:58
CLERK OF COURT

This matter came before the Court on January 12-13, 2012 for a properly noticed and scheduled hearing by the parties' consent to an Order of Reference recorded June 22, 2010 and pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, for a for a full and final hearing with any appeal to the SC Supreme Court or the SC Court of Appeals as provided by the *SC Rules of Appellate Procedure*. Present at trial were Randy A. Beverly and Donald Godwin, as principals of the Plaintiffs and, individually as Third Party Defendants & Fourth Party

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Plaintiffs, together with their attorney, J. Dwight Hudson. [Hereinafter referenced as Beverly and/or Godwin or as Plaintiffs] Also present at trial was Benjamin J. Creel, individually and as surviving director or principal of Bucksville Farms, Inc. [Hereinafter referenced as Creel or Defendant] Based upon the record in this cause, the testimony of a number of witnesses, the evidence properly introduced at Trial, and the proposed Orders subsequently submitted by the parties, as well as the law of South Carolina, I find that Judgment should be entered as hereinafter provided.

Factual Findings

This action arises from a real estate sales agreement dated October 2, 2005 between the parties whereby the Plaintiffs agreed to buy and the Defendant agreed to sell an approximately 317.5 acre tract of land in Horry County, parts of which contained fairly substantial wetlands. The agreement contemplated a series of four (4) closings or takedowns to take place approximately a year apart. (Defendant's Exhibit 33) Of the anticipated takedowns, two (2) occurred. The problems culminating in the filing of this action occurred after the second takedown and meant that the third and fourth takedowns never occurred and this action was filed. During the pendency of this action, the Defendant sold the disputed part of the property to a third party.

As noted above, the contract between the parties was dated and signed on October 2, 2005 and is entitled "Agreement To Buy And Sell Real Estate In Multiple Closings." In addition to other provisions which I do not find directly relevant to the determination of this matter, the Contract between the parties, which was drafted by the Defendant's (Seller's) Attorney, contains the following provision as to default and remedy:

20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: *(i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser.* Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.

All of the parties had known each other for a number of years and Creel is Beverly's nephew, the son of Beverly's late sister. Creel is also a licensed attorney who is not currently engaged in active practice. In the way of people who know each other well, for quite some time matters were arranged and conducted with more regard to their personal circumstances than the terms of the agreement. The Court finds that neither the seller nor the buyer abided by the strict terms of the contract for quite some time.

However, prior to the third takedown the personal and financial circumstances of the parties had changed. The Plaintiffs, (the buyers) needed bank financing for the third take down and the bank required a wetlands delineation. For that reason, Beverly & Godwin were insisting on compliance by Creel with a contractual provision requiring Creel to provide a boundary survey including a wetlands delineation for the third piece before it could be taken down. Creel took the position that the buyers had arranged for the delineation of the first two tracts and that either (a) an estimate of wetlands done for Beverly and Creel by the same surveyor who delineated the first two pieces should suffice or (b) an error by the surveyor that resulted in an

Army Corps certification of wetlands on the remaining land which the surveyor testified had not been actually surveyed, tested and delineated should suffice.

The instant action was filed by Randy A. Beverly, L.L.C. and Donald Godwin, L.L.C. against Bucksville Farms, Inc. on February 26, 2009 as a Declaratory Judgment action, seeking, *inter alia*, a determination that the contract had terminated and that no party was in any way bound by its terms or provisions, and the contract was completely ended.

As noted above, it is undisputed that during the pendency of this action, the seller, Creel and/or Bucksville Farms, sold the remainder of the property covered by the disputed contract to a third party for consideration stated on the deed which is of record with Horry County and which was introduced and admitted into evidence in this action.

Conclusions of Law

Three facts make it unnecessary to rule upon most of the complicated facts and issues regarding wetlands, surveys, and other matters regarding this case. Those facts are: (1) the parties' signed a contract that contains a provision about default and remedy and that contract was introduced and admitted into evidence; (2) the parties' contract was drafted by the Defendant – Creel's – attorney; and (3) After the plaintiffs – Beverly and Godwin – filed this DJ action and while this case was pending, Creel sold the disputed remainder of the land for value to a third party and that deed is of record and was admitted in this case.

In addition to the testimony, the parties submitted extensive materials, memorandums and proposed orders. All submitted material was reviewed and considered, along with the exhibits properly introduced at trial. At trial all exhibits and testimony were taken subject to a later ruling as to objections. The Court now denies the admission of exhibits and testimony not properly introduced.

South Carolina law regarding issues of contracts and/or land sales contracts is clear, and application of the law to the facts of this case leads to a decision that the contract is terminated and no damages shall be awarded.

In this state, the foremost rule of contract interpretation is ascertaining and giving legal effect to the parties' intentions as determined by the language of the contract. McGill v. Moore, 381 SC 179, 672 SE2d 571 (2009) If the contract language is clear and unambiguous, that language determines the force and effect of the contract. Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 SC 582, 703 SE2d 207 (2010) Construction of a clear and unambiguous contract presents a question of law for the Court. US Bank Trust National Association v. Bell, 385 SC 364, 684 SE2d 199 (Ct. App. 2009) Any ambiguity in an agreement must be resolved against the drafter. WDI Meredity & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004)

The parties' **Agreement To Buy And Sell Real Estate In Multiple Closings**" contains the following provision as to default and remedy:

20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: (i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser. Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.

Under the terms of the cited provision, which was drafted by the seller (Creel's) attorney, in the event of a default or breach both parties are entitled to two (2) potential remedies – Specific Performance or retention of the Earnest Money. Only the purchasers (plaintiffs Beverly & Godwin) are entitled to seek damages outside of the Earnest Money, and such damages are to be awarded only if the seller (Creel) breached the agreement willfully or intentionally, which I do not find. Under these facts, I find that both parties were under certain constraints imposed by a dwindling economy and a very difficult real estate market, and the Court Finds that the parties' actions compelled by those factors were not "willful" or "intentional" within the meaning of the default and remedy provision of the agreement.

It appears that the contract contemplated that the Earnest Money (\$50,0000) would serve as the fund for liquidated damages available to either party in the event of default, breach, or the other party had failed, refused or was unable to consummate the purchase and sale by the closing date. However, it appears that the Earnest Money was actually transferred to Creel as part of the prior closings and that this was done and the prior closings completed, without objection or protest as to the application of the said Earnest Money funds which should have been held until the last closing, at the conclusion of the agreement. For this reason, it is unnecessary that this Court look to the award of the Earnest Money as damages to either party, since all parties accepted the money previously being credited or transferred to Creel.

ORDER OF THE COURT

BASED ON THE RECORD IN THIS CAUSE, UPON THE LAW OF THE STATE OF SOUTH CAROLINA AND UPON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

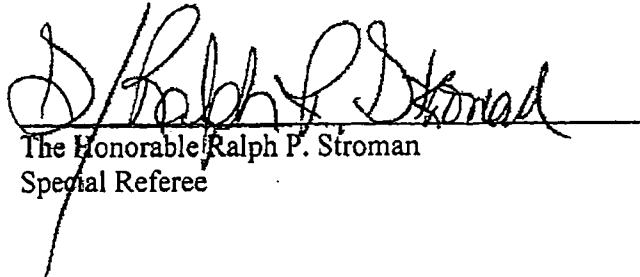
- 1) Because Bucksville Farms, Inc. and/or Creel on behalf of Bucksville Farms elected to sell the remainder of the real property subject to the present Agreement

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after litigation had been filed and while this matter was pending, the remedy of Specific Performance is no longer available to either party;

- 2) Despite the provisions of the **Agreement** as to Earnest Money being held to serve as a fund for liquidated damages available to either party in the event of breach, the parties hereto chose to have the Earnest Money transferred to the seller, Bucksville/Creel, during one of the first two closings. Therefore, the Earnest Money is unavailable as damages to any of the parties and that unavailability was by the joint consent and agreement of the parties hereto;
- 3) Paragraph 20 of the **Agreement To Buy And Sell Real Estate In Multiple Closings** gives only the purchasers, Beverly and Godwin, the right to pursue damages in addition to the Earnest Money. (The Court notes that this agreement was drafted by the attorney for the seller.) However, the purchasers only have the right to seek any other remedy at law or in equity if there was a willful or intentional breach by the Seller and this Court does not find any such willful or intentional breach.
- 4) Based upon the foregoing, the Court declares that pursuant to South Carolina law and Paragraph 20 of the parties **Agreement To Buy And Sell Real Estate In Multiple Closings**, that the said **Agreement To Buy And Sell Real Estate In Multiple Closings**, entered into by the parties hereto on October 2, 2005 is fully and completely ended and terminated and no party has any further rights, responsibilities, duties, liabilities, benefits, expectations or claims of any type relative to the same, and the said **Agreement is declared to be concluded**; and
- 5) No party is awarded damages and all parties are to pay their own attorney's fees and costs.

AND IT IS SO ORDERED.


The Honorable Ralph P. Stroman
Special Referee

Dated:

05/14/12

0009

RECEIVED

AUG 20 2012

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald
Godwin, LLC,

Plaintiffs,

vs.

Bucksville Farms, Inc.,

Defendant & Third Party
Plaintiff

vs.

Randy A. Beverly and Donald
Godwin,

Third Party Defendants &
Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and
as surviving director of Bucksville
Farms, Inc.,

Fourth Party Defendant.

ORDER

HORRY COUNTY
12 AUG 15 PM 1:44
MELANIE HARRIS-WARD
CLERK OF COURT

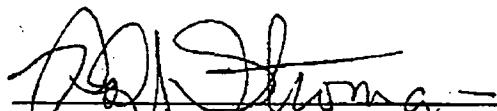
Defendant/Third Party Plaintiff & Fourth Party Plaintiff(s), Bucksville Farms, Inc. and/or Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc, filed and served a **Motion For Reconsideration** dated May 23, 2010. This motion came on for a hearing before me on July 25, 2012. At the conclusion of the hearing on that date this motion was taken under advisement.

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After a careful, thorough, and complete review of relevant law and of the record, including the motion as well as all parties' returns, replies and/or responses thereto, I find that there is no basis for granting the motion and find it appropriate to deny the motion.

IT IS THEREFORE ORDERED that the **Motion For Reconsideration** is denied.

AND IT IS SO ORDERED.



The Honorable Ralph P. Stroman
Special Referee

Dated:

August 8, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Randy A. Beverly, LLC, and
Donald Godwin, LLC)

Plaintiffs,)

v.)

Bucksville Farms, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-287909

COMPLAINT
Declaratory Judgment Action
(Non Jury)

FILED
CLERK OF COURT
JUGGINS
HARRIS COUNTY
PH 12-31

The Plaintiffs, Randy A. Beverly, LLC and Donald Godwin, LLC, (hereinafter collectively "Plaintiffs") bring this action pursuant to the South Carolina Declaratory Judgment Act and would respectfully show unto the Court that:

1. The Plaintiffs are both limited liability companies organized and existing under the laws of the State of South Carolina.

2. The Defendant, Bucksville Farms, Inc., (hereinafter "Defendant") is a corporation organized and existing under the laws of the State of South Carolina.

3. The subject of this Complaint is a contract for the purchase and sale of 317.5 ± acres, less and except certain identified acreage in Horry County, South Carolina (hereinafter "Subject Property").

4. This Court has personal and subject matter jurisdiction over the parties in this case, and venue is proper.

5. On or about October 2, 2005, Plaintiffs and Defendant entered into an "Agreement to Buy and Sell Real Estate in Multiple Closings" (hereinafter "Contract") wherein the Plaintiff's agreed to buy and the Defendant agreed to sell the Subject Property in phases, or

"Takedowns". A true and accurate copy of the Contract is attached hereto as "Exhibit 1" and incorporated herewith by reference, excepting that upon information and belief, the Contract included as "Exhibit A" a description of the Subject Property. However, Plaintiffs do not have a copy of the Contract that includes said exhibit.

6. The Contract requires that a minimum of fifty (50) "upland" acres be purchased at each Takedown, and the purchase price for each Takedown was to be calculated by the number of upland and/or wetland acres in each parcel. The price per acre classified as an "upland" acre is significantly greater than the price per acre classified as a "wetland" acre.

7. Pursuant to Paragraph 9 of the Contract, the Defendant was obligated to deliver to the Plaintiffs a boundary survey and wetlands survey delineating the locations and acreage calculations for the uplands and wetlands within the Subject Property.

8. Upon information and belief, no wetlands delineation survey for the Subject Property was ever provided to the Plaintiffs.

9. Upon information and belief, the Takedown for the first phase occurred on or about June 8, 2006 (hereinafter "First Takedown"), at which point Plaintiffs purchased 51.08 acres of the Subject Property. There were no wetlands associated with this purchase.

10. Upon information and belief, the Takedown for the second phase occurred on or about June 1, 2007 (hereinafter "Second Takedown"), at which point Plaintiffs purchased 50.88 acres of the Subject Property. There were no wetlands associated with this purchase.

11. Pursuant to terms of the Contract, the Takedown for the third phase was to occur on about June, 2008. As to the Third Takedown, Plaintiff desired to purchase property which fronted Highway 701, as was purchased in the prior two Takedowns, and was contiguous to the Second Takedown property. However, the Defendant has failed to provide the Plaintiffs with a

wetlands delineation survey for the portion of the Subject Property Plaintiffs desire to purchase. Plaintiffs are informed and believe there are wetlands on some portion of this proposed purchase.

12. The Defendant's failure to perform and provide the Plaintiffs with the wetlands delineation survey is a material breach of the Contract and entitles Plaintiffs to terminate the Contract.

13. A justiciable controversy exists between the parties hereto, and accordingly, the parties hereto have, or claim to have, interests that will be effected by the Court's determination as to whether or not a material breach has occurred on the part of the Seller, thereby entitling Plaintiff to terminate the Contract.

14. Pursuant to Paragraph 27 of the Contract, Plaintiffs are entitled to attorney's fees and costs associated with this action.

WHEREFORE, the Plaintiffs, pray that this Court hear the parties and construe the Contract between the parties, declaring that a material breach has occurred on the party of the Seller, thereby entitling Plaintiffs to terminate the Contract, declaring that no further rights or obligations exist between the parties, awarding the Plaintiffs attorney's fees and costs of this action, and granting any other such relief as may be just and proper.

SIGNATURE PAGE TO FOLLOW

Respectively submitted,

McNAIR LAW FIRM, P.A.



Richard M. Smith, SC Bar #7967

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Attorneys for Plaintiffs

Pawleys Island, South Carolina
February 24, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2009-CP-26-1909

Randy A. Beverly, LLC, and)
Donald Godwin, LLC,)

Plaintiffs,)

vs.)

Bucksville Farms, Inc.,)

Defendant and)
Third-Party Plaintiff,)

vs.)

Randy A. Beverly and)
Donald Godwin,)

Third-Party Defendants.)

**ANSWER, COUNTERCLAIM AND
THIRD-PARTY COMPLAINT**

FILED
HORRY COUNTY
2009 JUN -1 PM 1:28
MELANIE HUGGINS
CLERK OF COURT

TO: PLAINTIFFS AND THEIR ATTORNEY RICHARD M. SMITH, AND THIRD-PARTY DEFENDANTS:

Defendant Bucksville Farms, Inc., making answer, counterclaiming and cross-complaining against the Third-Party Defendants, respectfully alleges as follows:

FOR A FIRST DEFENSE

1. That the Complaint fails to set forth facts sufficient to constitute a cause of action or claim against this answering Defendant and should therefore be dismissed pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

FOR A SECOND DEFENSE

2. That the Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted, explained, qualified and/or denied.

3. That this Defendant has no information upon which to form a belief as to Paragraph 1 of the Complaint and therefore denies the same.

4. That Defendant Bucksville Farms, Inc., admits Paragraph 2 of the Complaint.

5. That this answering Defendant admits so much of Paragraph 3 of the Complaint which alleges that the subject of the Complaint is a contract for the purchase of 317.5 acres, a copy of which was attached to the Complaint; that the remainder of said paragraph is denied and the Defendant craves reference to the written Contract for the exact terminology thereof.

6. That the Defendant admits Paragraph 4 of the Complaint.

7. That the Defendant admits Paragraph 5 of the Complaint with the exception that this Defendant does not have any information concerning whether or not the Plaintiffs have a copy of Exhibit A which was supposedly attached to the Contract.

8. With regards to Paragraphs 6 through 14 and the remainder of said Complaint, the Defendant denies the allegations thereof and craves reference to the terms of the Contract.

FOR A THIRD DEFENSE

[Modification of Contract]

9. That this answering Defendant realleges all the above allegations as though repeated herein verbatim.

10. That the Plaintiffs entered into a course of dealing with the Defendant during the first two purchases [hereinafter referred to as "takedowns"] whereby it notified the Defendant that the Plaintiffs would take the necessary steps to obtain a boundary and wetlands survey and would charge the Defendant for the costs thereof at closing; that said charges were assessed against Defendant on the second takedown.

11. That prior to the closing date of the third takedown, the Plaintiffs hired a surveyor who prepared a survey plat outlining the legal description of the remaining tracts and delineated wetlands; that the Plaintiffs, prior to the first, second and third closings, also hired an environmental surveying, engineering and testing company to assist the Plaintiffs in preparing its takedown survey and delineating the wetlands and/or assisting in the determination of the wetlands identified on all four takedowns.

12. That after the first takedown purchase, the Plaintiffs and Defendant modified the Contract by agreeing to engage in a silvaculturing program whereby the proposed tract of land to be purchased would be maintained and ditched so as to create more uplands and provide the Plaintiffs with more land to be developed; that this subsequent modification was at the specific request of the Plaintiffs.

13. That the parties partially performed the oral modification of the Contract by ditching the property for which the seller paid.

14. That through the course of dealings between the parties and because of the above-agreed modification, the Contract was orally modified and the Plaintiffs were provided with a wetlands delineation map prior to the third takedown.

15. That the Defendant performed all acts required of it in the written Contract and the oral modification of said Contract thereby binding the Plaintiffs to move forward with the third takedown purchase.

16. That this Defendant pleads a subsequent oral modification of the written Contract as a complete defense to the Plaintiffs' Complaint.

FOR A FOURTH DEFENSE

[Waiver and Estoppel]

17. That the Defendant realleges all the above allegations as though repeated herein verbatim.

18. That because of the above actions of the Plaintiffs as set forth in the preceding defense, the Plaintiffs have waived any rights it had pursuant to the written Contract and as established by the oral modification of the Contract and is now estopped to claim any breach on the part of this answering Defendant.

19. Therefore, this answering Defendant pleads a waiver and estoppel as a complete defense to the Plaintiffs' Complaint.

FOR A FIFTH DEFENSE

[Course of Dealing]

20. That this answering Defendant realleges all the above allegations as though repeated herein verbatim.

21. That the first two takedown purchases completed by the Plaintiffs required no survey by this answering Defendant and the lack thereof was not disputed by the Plaintiffs, as is stated in the Third and Fourth Defenses above.

22. Therefore, any survey required by the Plaintiffs on the third and/or fourth takedown would not be required because of the course of dealings of the parties.

23. That this answering Defendant pleads an agreed altered course of dealing between the parties as a complete defense.

FOR A FIRST COUNTERCLAIM AND
FOR A FIRST CROSS COMPLAINT

[Breach of Contract]

24. That this answering Defendant incorporates all the above allegations as though repeated herein verbatim.

25. That the Plaintiffs are both limited liability companies organized and existing under the laws of the State of South Carolina; that the Third-Party Defendants are both residents of Horry County, South Carolina.

26. That this answering Defendant is a corporation organized and existing under the laws of the State of South Carolina.

27. That the subject of this Counterclaim and Cross Complaint is a Contract for the purchase of real estate, said Contract being attached hereto and made a part and parcel of this Counterclaim and Cross Complaint and marked as Exhibit 1.

28. That the real estate which is the subject of this action is in Horry County, South Carolina, and the court has personal and subject matter jurisdiction over the parties in this case and venue is proper.

29. That the written Contract, attached hereto and marked as Exhibit 1, was subsequently modified at the specific request and instance of the Plaintiffs and the Third-Party Defendants as is more particularly set forth in the Third, Fourth and Fifth Defenses above.

30. That according to the written Contract and the subsequent oral modifications set forth hereinabove, the Plaintiffs and the Third-Party Defendant became bound to proceed with the first and second takedowns [purchases] and did so, leaving only the third and fourth takedowns to be completed according to the terms of the Contracts between the parties.

31. That this answering Defendant relied upon the written Contract and the subsequent oral modifications requested by the Plaintiffs and the Third-Party Defendants.

32. That this answering Defendant has performed all conditions precedent to require that the Plaintiffs and Third-Party Defendants complete the purchase in the third and fourth takedowns.

33. That the failure of the Plaintiffs and the Third-Party Defendants to complete their obligations pursuant to the written Contract and the oral modifications constitutes a breach of contract.

34. That as a result of the breach of the written Contract and the oral modifications thereof, this answering Defendant has sustained damages in the amounts that would have been required to be paid on the third and fourth takedowns [purchases], has incurred additional, consequential and incidental damages as a result of the Plaintiffs' and Third-Party Defendants' refusal to close on the third and fourth takedowns, has incurred additional penalties in payoff of Defendant's underlying mortgage of which the Plaintiffs and Third-Party Defendants had knowledge and was aware and has incurred a loss of pre-judgment interest at the legal rate.

~~35. That according to the terms of the written Contract in~~ Paragraph 27, the Defendant is entitled to reasonable attorney fees and costs associated with this First Counterclaim and Cross Complaint.

FOR A SECOND COUNTERCLAIM AND
A SECOND CROSS COMPLAINT

[Breach of Contract Accompanied by Fraudulent Acts]

36. That this answering Defendant realleges the allegations of its First Counterclaim and First Cross Complaint as though repeated herein verbatim.

37. That prior to and subsequent to the second takedown [purchase], the Plaintiffs and Third-Party Defendants specifically requested of the Defendant that the date of the third takedown be delayed in order that it could acquire a boundary and wetlands survey and delineation adjoining and abutting Highway 701, which was a major highway and consisted of more valuable property than the remainder of said tract of land.

38. That the Plaintiffs and Third-Party Defendants specifically requested that the Defendant delay the closing date of the third takedown in order to perform a land management device or practice known as silvaculturing, wherein and whereby any land consisting of wetlands could be ditched and maintained so that the wetlands would dry out and become uplands, thereby giving the Plaintiffs and Third-Party Defendants more developable property.

39. That the Plaintiffs and Third-Party Defendants discovered that the silvaculturing could only be performed by the present owner, the Defendant herein, and that if the land was purchased without silvaculturing prior to the purchase, the Plaintiffs and Third-Party Defendants could not use silvaculturing thereafter to obtain more uplands property.

40. That the Defendant agreed to perform the silvaculturing as requested by the Plaintiffs and Third-Party Defendants so long as the completed purchase of all the real estate was consummated on or before the fourth takedown.

41. That upon information and belief, the Plaintiffs and Third-Party Defendants hired a third party to perform the

silvaculturing and charged the Defendant during the second closing.

42. That in addition thereto, the Plaintiffs and Third-Party Defendants requested that this answering Defendant allow them to dump soil or dirt on the remainder of the Defendant's property and assured the Defendant that they would consummate the closing of the third and fourth takedowns.

43. That the Defendant, relying on said request, allowed the Plaintiffs and Third-Party Defendants to dump 30,000 cubic yards of construction dirt on the remainder of his land.

44. That the Plaintiffs and Third-Party Defendants also advised the Defendant all throughout the transaction and the performance of the contracts listed above that it would take the necessary steps to obtain a boundary survey and wetlands delineation survey in order to complete the respective takedown purchases, leaving this answering Defendant to believe that he was not required to provide said boundary and wetlands survey.

45. That the Plaintiffs and Third-Party Defendants had no intention of completing the closing on the third and fourth takedowns.

46. That prior to the execution of the Contract, marked as Exhibit 1, this Answering Defendant had hired a real estate agent to market his property and had, prior to the execution of the Contract attached hereto, obtained an offer to purchase said property upon similar terms as set forth in Exhibit 1.

47. That the Plaintiffs and Third-Party Defendants

approached the Defendant and requested that the Defendant decline the offer by the third party and to sell the property to the Plaintiffs and Third-Party Defendants.

48. That the Plaintiffs and Third-Party Defendants misrepresented to this answering Defendant that it would purchase all the property set forth in the written Contract.

49. That upon information and belief, the Plaintiffs and Third-Party Defendants did not intend to finalize the purchase of the entire tract of land and intended only to purchase the property abutting Highway 701 which did not consist of wetlands.

50. That the Plaintiffs and Third-Party Defendants engaged in the above actions which constituted an unlawful appropriation of the Defendant's property by design, constituted a breach of the covenant of good faith and fair dealing, and such actions are characterized by dishonesty in fact.

51. ~~That the above-described actions on the part of the~~ Plaintiffs and Third-Party Defendants constitute a breach of contract accompanied by fraudulent acts.

52. That as a result thereof, the Defendant has been damaged in the amount that would be due under the Contract on the third and fourth takedowns, together with pre-judgment interest, and consequential and incidental damages as a result of the breach.

53. That the Defendant is also informed and believes he is entitled to pre-judgment interest on the monies which should have been paid according to the terms of the written Contract for the

third and fourth takedown purchases.

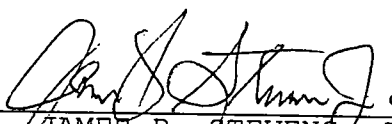
54. That this answering Defendant is also informed and believes he is entitled to reasonable attorney fees according to Paragraph 27 of the written Contract.

55. That the Defendant is informed and believes he is entitled to punitive damages against the Plaintiffs and Third-Party Defendants in an amount deemed just and proper by the Court and jury.

WHEREFORE, this Defendant/Third-Party Plaintiff prays as follows:

- A. That the Complaint be dismissed;
- B. That he have judgment against the Plaintiffs and Third-Party Defendants, both jointly and severely, for actual damages, consequential and incidental damages caused by the breach of contract;
- C. For pre-judgment interest at the statutory rate of 8% per cent;
- D. For attorney fees pursuant to Paragraph 27 of the written Contract;
- E. For punitive damages in amount deemed just and proper by the Court and jury;
- F. For the costs and disbursements of this action; and
- G. For such other and further relief as this Court may deem just and proper.

STEVENS LAW FIRM, P.C.

By: 
JAMES P. STEVENS, JR. - 05340
Post Office Drawer 127
Loris, SC 29569-0127
843.756.7652; FAX: 843.756.3785
E-Mail: stevenslawfirm@aol.com

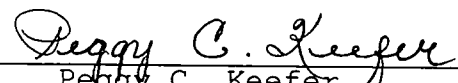
Attorneys for Defendant and Third-
Party Plaintiff

May 28, 2009.

FILED
Horry County
2009 JUN -1 PM 1:29
MELANIE HUGGINS
CLERK OF COURT

CERTIFICATE OF MAILING

I CERTIFY a copy of the ANSWER, COUNTERCLAIM AND THIRD-PARTY
COMPLAINT was mailed to Richard M. Smith, Attorney for Plaintiffs,
this 29th day of May, 2009.


Peggy C. Keefer

ADDENDUM TO CONTRACT

WHEREAS, the undersigned have entered into an Agreement to Buy and Sell Real Estate in Multiple Closings dated even date herewith; and

WHEREAS, the parties wish to supplement their Agreement by this Addendum.

NOW THEREFORE, in consideration of these premises and the mutual covenants and agreements herein contained, the parties agreed as follows:

1. If the Seller desires to effect a tax free exchange with regard to the sale of the Property, then Purchaser agrees that it will reasonably cooperate with Seller in Seller's efforts to effectuate a tax deferred like kind exchange under Section 1031 of the Internal Revenue Code. Such cooperation shall include approval of Seller's use of a qualified intermediary, and Seller's assignment to the qualified intermediary of Seller's rights to the sales proceeds, provided Purchaser shall not be required to release Seller from any liability under this Agreement or to receiving a deed from anyone other than the Seller. Further, the Purchaser shall not incur any additional expense or assume any liability greater than that contemplated by this Contract as a result of Seller's election.

2. The Purchaser agrees that it will allow the Seller to tie into any utilities that Purchaser has constructed on the Property in order to service the 40 acre parcel retained by Seller. Purchaser's agreement is contingent on Seller submitting the plans for such connection to Purchaser for approval so that Purchaser can determine compatibility with existing systems and insure minimal interference with Purchaser's property. The costs of this connection by Seller shall be borne solely by the Seller and Seller shall also be responsible for any upgrades to existing lines or pumping stations that may be required by Seller's intended use of the retained parcel.

Dated this 2nd day of October, 2005.

WITNESS:

Kate Adams
M. L. Johnson

BUCKSVILLE FARMS, LLC

By: Benjamin J. Creel
Its: President

Kate Adams
M. L. Johnson

RANDY A. BEVERLY, LLC

By: Randy Beverly
Its: Member

Kate Adams
M. L. Johnson

DONALD GODWIN, LLC

By: Donald Godwin
Its: Member

0028

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald)
Godwin, LLC,)

JUL 16 2009

Plaintiffs,)

vs.)

Bucksville Farms, Inc.,)

Defendant & Third Party)
Plaintiff)

vs.)

**AMENDED ANSWER, REPLY &
FOURTH PARTY COMPLAINT**

Randy A. Beverly and Donald)
Godwin,)

Third Party Defendants &)
Fourth Party Plaintiffs,)

vs.)

Benjamin J. Creel, individually and)
as surviving director of Bucksville)
Farms, Inc.,)

Fourth Party Defendant.)

The Plaintiffs, Randy A. Beverly, LLC and Donald Godwin, LLC, amending their Answer, Reply and Fourth Party Complaint within thirty (30) days of filing/service within the meaning of Rule 15(a), *SCRCP*, would show unto this Honorable Court as follows:

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1. Each allegation of the ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT not hereinafter admitted, qualified or otherwise explained is deemed denied and strict proof demanded thereof. Further, Randy A. Beverly, LLC and Donald Godwin, LLC and Randy Beverly and Donald Godwin are hereinafter referenced as Plaintiffs. Bucksville Farms, Inc. and Benjamin J. Creel are hereinafter referenced as Creel.

FOR A FIRST DEFENSE
(Response to Allegations)

2. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

3. Paragraph 1 is denied and strict proof is demanded thereof.

4. In response to Paragraph 2, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

5. Paragraphs 3-8 do not appear to require a response from the Plaintiffs. However, to any extent such a response is required, Plaintiffs deny the same, demand strict proof thereof, re-assert and re-allege the allegations of their Complaint and incorporate the same herein by reference.

6. In response to Paragraph 9, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

7. Paragraph 10 is denied. There was no "course of dealing," there was simply a different economic reality and different market conditions. Plaintiffs were able to purchase the first two parcels with cash and therefore did not need all of the formal documents that a bank would have required for such a purchase. An opinion letter was obtained stating that the first two (2) parcels did not contain wetlands and the Plaintiffs agreed to close those tracts based on the opinion, which they could do as a cash purchase.

0030

8. Paragraph 11 is denied. Prior to the third takedown, the economy and the market had experienced a serious downturn. The Plaintiffs did not have cash in hand to fund the third parcel purchase and they therefore approached Conway National Bank. Plaintiffs advised Creel that they would have to get a loan for the third (3rd) takedown and that they would need the formal documents and specifications, including the wetlands delineation which Creel had never provided. No closing date was set for the 3rd takedown because Creel advised the Plaintiffs that due to his current financial predicament he could not afford to pay for a wetlands delineation. Because the Plaintiff never obtained the wetlands delineation the 3rd takedown was never surveyed and, as stated above, no closing date was set.

9. Paragraphs 12 and 13 are denied. The Contract was never modified in this manner and the Plaintiffs never asked that it be modified in this manner. Therefore, there was no oral modification for the parties to have performed, partly or otherwise. In fact, at the time that the original "Agreement to Buy And Sell Real Estate In Multiple Closings" was signed, or even prior to the agreement being signed, Creel asked the Plaintiffs not to takedown the parcels with wetlands issues initially, and asked that Plaintiffs delay taking down the parcels with wetlands in order to allow Creel to do some ditching and some silvaculture to try to clear up some of the wetlands. Creel made the request because under the Agreement, the purchase price for upland property that could be developed was significantly higher than the purchase price for wetlands property that could not be developed. However, Creel never did anything to remedy the wetlands property and if the sale closed with those acres delineated as wetlands, they could not be developed. Therefore, Plaintiffs did pay someone to do some ditching. But Creel never had the wetlands delineation done so the third (3rd) takedown closing was never set.

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10. Paragraphs 14, 15, and 16 are denied. There was no oral modification of the written contract and the Plaintiffs were never provided with the wetlands delineation by Creel. Instead, Creel advised that he could not afford to have the delineation done. The Defendant, Creel, did not perform his obligations under the contract and instead breached the contract in such a material manner that the Plaintiffs are entitled to a judgment of the Court declaring the contract null and void and invalidated by Creel's breach or breaches.

11. In response to Paragraph 17, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

12. Paragraphs 18 and 19 are denied. Plaintiffs affirmatively allege that the claimed oral modification never occurred and the Plaintiffs have waived none of their rights under the contract. Further, Plaintiffs have they waived any of their rights under the law and are not estopped from claiming Creel's breach and seeking a Court determination of the same together with consequent damages.

13. In response to Paragraph 20, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

14. Paragraphs 21, 22 and 23 are denied. As noted above, there was no "course of dealings" relieving Creel of all of his obligations under the Agreement. As Creel was aware at the time, Plaintiffs were operating under a better economy at the time of the first 2 takedowns and had cash for those purchases and were able to close after receiving an opinion as to the wetlands. The 3rd takedown would have occurred in a much different economy, and Plaintiffs advised Creel they would have to get a bank loan for the 3rd takedown and that the bank would insist on the wetlands delineation, surveys, and other formalities not strictly required for a cash closing. Since Creel could not obtain the wetlands delineation, he profited from the fortunate.

0032

circumstances allowing the first 2 takedowns to be cash closings and closed the parcels without advising Plaintiffs that he did not intend to follow through with his obligations under the contract.

15. In response to Paragraph 24, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

16. Paragraph 25 is admitted.

17. Plaintiffs deny Paragraph 26 and allege that Bucksville Farms, Inc. is not a corporation and that Benjamin J. Creel is a surviving director of the former Bucksville Farms, Inc. corporation.

18. Only so much of Paragraphs 27 and 28 as allege that this action concerns an Agreement for the sale/purchase of real estate in Horry County, SC is admitted. All other allegations, implications and inferences made by or to be drawn from the said Paragraphs 27 and 28 are denied.

19. Paragraph 29 is denied. The Agreement was not modified and Plaintiffs never asked that it be modified. The Agreement stands as it is written.

20. Plaintiffs admit only so much of Paragraph 30 as alleges that they proceeded with the First and second takedowns. All other allegations, implications and inferences made by or to be drawn from the said Paragraph 30 are denied.

21. Paragraphs 31 and 32 are denied. Plaintiffs allege that there was no oral modification of the subject Agreement and that they requested no such modification. Further, Creel has not performed his part of the agreement in a number of aspects, including his failure to procure and provide the necessary wetlands delineation.

22. Paragraphs 33, 34 and 25 are denied. Plaintiffs have performed and completed all of their obligations under the Agreement but could not proceed further because of Creel's failure to comply with the terms of the Agreement. Because the Plaintiffs have complied with the Agreement but Creel has breached the same, Plaintiffs allege Creel is entitled to recover nothing and that they are entitled to have the Contract declared null and void and/or to damages for Creel's breach of the contract including reasonable attorney's fees and costs.

23. In response to Paragraph 36, Plaintiffs incorporate the allegations of their Complaint and all allegations of this pleading.

24. Paragraph 37 is denied. It was Creel's obligation to provide the wetlands survey and delineation and necessary certification from the Corps of Engineers and the parties were to split the costs of the perimeter survey. Further, Plaintiffs did not delay the takedown date for the third takedown. In fact, the Plaintiffs wrote Creel advising that they were ready to close if he got the wetlands survey and delineation and Corps of Engineers' certification. Creel never obtained the wetlands delineation or certification and the bank would not fund a loan for the purchase without those documents which the Agreement required Creel to provide.

25. Paragraphs 38, 39, 40, 41 42 and 43 are denied and strict proof is demanded thereof. Ditching and silvaculture prior to takedowns subsequent to the second one would have provided some additional developable land. However, the wetlands acreage sold for less than the non-wetlands acreage under the terms of the contract. It was Creel who was in a poor financial posture and it was Creel who asked from the early stages of the parties' dealings that the Plaintiffs not start the takedowns with the wetlands acreage in order to give Creel time to have some ditching and silvaculture done. That would have increased the amount of money Creel would make from the sales of the parts of the tract that contained wetlands. Based upon Creel's

very early request that he be given time for ditching and silvaculture, Plaintiffs did think that some of the wetlands would become developable before their purchase. When Creel did nothing in terms of the ditching and silvaculture he had represented he would do and requested time to do, Plaintiffs retained someone to do some of those services. However, Creel never proceeded with his obligations under the Agreement and never obtained the wetlands survey and delineation and necessary certification from the Corps of Engineers.

26. Paragraphs 44 and 45 are denied. The Agreement obligated Creel to obtain the wetlands survey and delineation and certification from the Corps of Engineers and Creel did not comply with this obligation and informed the Plaintiffs that he could not afford to obtain the delineation and certification. Plaintiffs stood ready to complete their obligations under the Contract but could not do so until Creel provided the wetlands survey, delineation and Corps of Engineers' certification. During this time, the Plaintiffs wrote Creel to confirm that they were ready to close once Creel obtained the survey, delineation and certification.

27. Plaintiffs do not have independent information as to what offers Creel may or may not have had for the subject property and therefore deny the allegations of Paragraph 46. As to any written document, Plaintiffs crave reference to the same as to the terms thereof.

28. Paragraph 47 is denied. Plaintiffs did not ask Creel to decline any offer in order to sell to them.

29. Paragraphs 48, 49, 50 and 51 are denied. The Plaintiffs entered the subject Agreement in good faith and carried out their obligations under the agreement. The third and fourth takedowns did not occur because Creel failed to carry out his obligations under the agreement and failed to obtain the wetlands survey, delineation and certification. Creel's failure to live up to the Agreement and to perform his obligations thereunder made it impossible for the Plaintiffs to

purchase parcels 3 or 4 because the bank would not loan money without the wetlands survey, delineation and certification.

30. Paragraphs 52, 53, 54 and 55 are denied. As stated herein and hereinabove, Creel breached the parties' agreement but the Plaintiffs fully fulfilled their obligations under Creel's breach made it impossible for them to complete the remaining purchases. Because the Plaintiffs have complied with the Agreement but Creel has breached the same, Plaintiffs allege Creel is entitled to recover nothing and that they are entitled to have the Contract declared null and void and/or to damages for Creel's breach of the contract including reasonable attorney's fees and costs.

FOR A SECOND DEFENSE

(Rule 8 and 12 Defenses; Motion To Dismiss
Beverly and Godwin individually; Motion To Dismiss
All Claims/Causes Of Action By The Dissolved Corporation)

31. The foregoing allegations are incorporated by reference herein as fully as though the same were repeated verbatim

32. The Plaintiffs assert all affirmative defenses under and pursuant to Ruled 8 and 12, South Carolina Rules of Civil Procedure, including the defense of failure to state a cause of action for which relief can be granted pursuant to Rule 12 (b)(6) of the South Carolina Rules of Civil Procedure and the Plaintiffs are informed and believes that the Answer, Counterclaim and Third Party Complaint should be dismissed with prejudice. Further, the Plaintiffs allege that Bucksville Farms, Inc. was dissolved on January 30, 2008 and that the corporation ceased to exist under South Carolina law at that time and that therefore, all claims, requests for relief, and causes of action alleged by the defunct corporation in its ANSWER, COUNTERCLAIM AND

THIRD-PARTY COMPLAINT are null and void, fail to state a cause of action for which relief can be granted and should be dismissed.

33. Plaintiffs also allege that based upon the facts, the pleadings, and the record in this matter as well as the law of South Carolina, that there is no basis for any individual liability as to Beverly or Godwin as any of their acts or failures to act, which are denied, were in a corporate and not an individual capacity. Plaintiffs therefore move the Court that Beverly and Godwin be dismissed as individual parties to this lawsuit and that all claims against Beverly and Godwin, individually, be dismissed with prejudice.

FOR A THIRD DEFENSE
(Unclean Hands)

34. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

35. Plaintiffs allege that to the extent Creel seeks equitable relief or call upon the equitable powers of this Court, its inequitable conduct constitutes unclean hands and bars the granting of relief to Creel.

FOR A FOURTH DEFENSE
(Offset)

36. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

37. Plaintiffs allege that they have suffered damage by reason of Creel's conduct and allege that they have the right of offset if any amount of money is owed to or due to the Creel by way of damages.

0037

FOR A FIFTH DEFENSE
(Waiver)

38. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

39. Plaintiffs are informed and believe and on such information and belief allege that the Creel was engaged in conduct that constitutes a waiver of its rights, if any, under the contract alleged, the existence of which under the terms claimed by Creel is specifically denied. By reason of said waiver, Plaintiffs are excused from further performance of the obligations under the contract.

FOR A SIXTH DEFENSE
(Release)

40. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

41. Plaintiffs allege that Creel's actions constituted a full release and waiver of any and all claims, which Creel may have against the Plaintiffs, which is/are denied.

FOR A SEVENTH DEFENSE
(Equitable Estoppel)

42. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

43. Plaintiffs allege that any and all causes of action in the ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT based upon or in any wise related to any contract for the sale of this property are barred by reason of acts, omissions, representations and courses of

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conduct by Creel by which the Plaintiffs were led to rely to their detriment, thereby barring, under the doctrine of equitable estoppel, any of the said Causes of Action asserted by Creel.

FOR AN EIGHTH DEFENSE
(Failure of Consideration)

44. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

45. Plaintiffs allege that Creel's claims based upon any alleged contract are barred as a result of a failure of consideration.

FOR A NINTH DEFENSE
(Mutual Mistake)

46. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

47. Plaintiffs are informed and believe and thereon allege that if there presently exists or ever existed any or all of the alleged rights, claims, or obligations, which Creel seeks by way of his/its claims, counterclaims, third party claims and all causes of action alleged, the said affirmative relief is unenforceable by reason of mutual mistake.

FOR A TENTH DEFENSE
(Laches)

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48. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

49. Plaintiffs allege that Creel is estopped from asserting all of the claims, counterclaims, third party claims and all causes of action alleged in their ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT based upon the doctrine of laches, and Plaintiffs pleads the doctrine of laches as a full and complete defense and bar to Creel's claims.

FOR AN ELEVENTH DEFENSE
(Accord and Satisfaction)

50. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

51. Plaintiffs allege that any debt owed to Creel, which is denied, has been fully paid and satisfied, and Plaintiffs plead the affirmative defense of Accord and Satisfaction as a full and complete defense and bar to Creel's claims and causes of action.

FOR A TWELFTH DEFENSE
(Statute of Frauds)

52. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

53. Any claim or cause of action by Creel based upon or in any wise stating or referring to an alleged oral modification to the Contract of Sale for the real estate involved herein is void on the grounds that it was not in writing within the meaning of §32-3-10, *Code of Laws, SC*.

FOR A THIRTEENTH DEFENSE
(Reservation of Right To Amend)

54. Plaintiffs re-allege and incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

55. Plaintiffs reserve the right to amend this pleading and assert all additional defenses, including affirmative defenses, which the discovery process indicates may be applicable to this matter and it reserves the right to assert all such defenses and does not waive any additional or further defenses including affirmative defenses.

FOR A FOURTEENTH DEFENSE
(Failure to Mitigate)

56. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

57. Plaintiffs are informed and believe and based thereon alleges that Creel has failed to mitigate and lessen damages, if any he/it sustained, as required by law and is barred from recovery by reason thereof.

FOR A FIFTEENTH DEFENSE
(Unconstitutionality of Punitive Damages)

58. Plaintiffs re-allege and incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

59. An award of punitive damages against the Plaintiffs, directly or by indemnification, under South Carolina law violates the fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §3 of the South Carolina Constitution in that:

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- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of the Plaintiffs violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. Creel's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, §3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Plaintiffs.

60. Creel's claim for punitive damages violates the federal doctrine of separation of powers and Article I, §3 of the South Carolina constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A SIXTEENTH DEFENSE
(Incorporation of All Other Pleadings)

61. Plaintiffs incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

62. To the extent that the same are not inconsistent and to the extent that the same are applicable, the Plaintiffs incorporate by reference herein all pleadings and/or motions that he has filed or will file in this action herein.

FOR A SEVENTEENTH DEFENSE
(Incorporation of All Defenses/Motions By All Parties)

63. Plaintiffs incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

64. To the extent that the same are not inconsistent and to the extent that the same are applicable, Plaintiffs incorporates by reference herein all defenses pled in this matter by any party and/or all motions made by any party including, but not limited to, all affirmative defenses.

**FURTHER ANSWER AND/OR REPLYING, AND BY WAY OF
FOURTH PARTY COMPLAINT**

65. Upon information and belief, the Fourth Party Defendant, Benjamin J. Creel, is a citizen and resident of the County of Horry, State of South Carolina and that the said Benjamin J. Creel is a surviving director and/or officer of Bucksville Farms, Inc., a corporation which was organized and existed under the laws of South Carolina but which, upon information and belief and based upon the records of the Secretary of State of South Carolina, administratively dissolved on January 30, 2008.

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66. This action arises from an alleged real estate contract for the purchase/sale of land which is situate in Horry County South Carolina.

67. This Court has personal and subject matter jurisdiction over the parties and this action and venue in Horry County is proper.

68. As a surviving director and/or officer of a dissolved corporation, the Fourth Party Defendant [Hereinafter referenced as Creel] is individually liable and accountable under the facts and circumstances of this matter. Further, Creel is and should be individually and personally liable in his own right under the facts and circumstances of this case.

FOR A FIRST FOURTH PARTY COMPLAINT
(Incorporation of Complaint/Request for DJ and
Request For Attorneys Fees and Costs)

69. Plaintiffs incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

70. The Plaintiffs incorporate by reference herein their Complaint, dated 2/24/2009 and recorded 2/26/2009, a copy of which is attached hereto.

71. Because Bucksville Farms, Inc. is a dissolved corporation of which Creel is a surviving director, the Plaintiffs allege as to Creel herein all allegations made in the attached and incorporated Complaint against Bucksville Farms, Inc.

72. Plaintiffs allege that Creel's failure to perform and provide the Plaintiffs with the wetlands delineation survey is a material breach of the Contract and entitles the Plaintiffs to terminate the Contract.

73. Further, Plaintiffs allege that Creel's mismanagement of the corporation and of the assets of the corporation which became his individual assets at the dissolution, and his individual

financial status as to liens and other obligations rendered or may have rendered him unable to meet the obligations formerly of the corporation which became his personal obligations at the dissolution and also constitutes a material breach of the Contract.

74. Pursuant to §15-53-10, et. seq. Code of Laws of South Carolina, as amended, Plaintiff asks that this Court declare the rights, status and legal relations as between the Plaintiff and Defendants concerning the contract between the parties and the Plaintiffs ask that the Court hold that based on a material breach or material breaches by Créel that the Plaintiffs are allowed to terminate the contract. .

75. Pursuant to the Contract between the parties, the Plaintiffs are informed and believe that they are also entitled to Attorneys Fees and Costs and ask that this Court so Order and award them the same.

FOR A SECOND FOURTH PARTY COMPLAINT
(Breach of Contract)

76. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

77. Plaintiffs allege that the parties had a contract under which they were to buy Créel was to sell certain real property in multiple closings with a minimum of fifty "upland" acres at each Takedown, with the purchase price calculated by the number of upland and/or wetland acres to be purchased in each Takedown or transaction. The purchase price of the upland acres was significantly greater than that of the wetland acres. To allow the multiple sales to occur, the contract required Créel to deliver to the Plaintiffs a boundary survey and wetlands survey delineating the locations and acreage calculations for the uplands and wetlands within the subject

tract. No such survey was ever completed or delivered.

78. The parties were able to proceed with the first two Takedowns without a completed boundary and wetlands survey because the economy was better and the Plaintiffs, at the time, had cash in hand to make the purchases and no loans or bank closing documents/paperwork was involved.

79. The Takedown for the third phase was to occur on or about June of 2008. In the Third Takedown, as in the first Two, the Plaintiffs wished to purchase property fronting Highway 701, with the specified third tract being one adjoining the property purchased in the Second Takedown. However, by June of 2008 the economy and real estate was in a different posture, so that the Plaintiffs did not have cash in hand to make the purchase. They advised Creel that they would have to obtain a loan for the Third Takedown and that the bank required the boundary and wetlands survey which the Contract always contemplated.

80. The Plaintiffs believe that there are some wetlands on the property they proposed to purchase in the Third Takedown whereas the parties understood and believed that there were no wetlands in the first Two Takedowns, which fact also lessened the need for the boundary and wetlands surveys as to those parcels.

81. The parties also understood that it was Creel's desire that the Plaintiffs purchase the first two tracts first because they did not have wetlands and Creel asked for additional time to allow him to do some ditching and some silvaculture on the other tracts to try to clear up some of the wetland property. Creel failed to do the necessary ditching and silvaculture.

82. Further, Creel wanted the Plaintiffs to buy a third piece of property that was not contiguous to the first two tracts they purchased. By that point, the IRS had used part of the property as security for a tax debt owed by Creel for inheritance and/or other taxes.

Additionally, some of Creel's other business ventures were in financial trouble and filing Bankruptcy. These facts concerned the Plaintiffs as to whether the Third Parcel fronting Highway 701 would still be owned by Creel and clear for purchase in the future if it was not purchased now. The Contract gave the Plaintiffs the right to choose which parcels they would purchase.

83. The Plaintiffs understand that Creel's financial posture has changed significantly from what it was at the time this Contract was signed, and they understand and believe that his mismanagement of Bucksville, his other companies and other businesses and of his personal assets, have rendered him unable to live up to his obligations under the Contract at this time for a number of reasons.

84. Plaintiffs are informed and believe that all of the foregoing constitutes material breaches of the contract between the parties. The Plaintiffs have incurred damages as a direct and proximate consequence of Creel's breaches of this Contract and they have incurred Attorney's fees and costs. Plaintiffs are informed and believe that they are entitled to a judgment of this Court for all actual and consequential damages and sums due and damages incurred as a proximate result of said breaches, including Attorney's fees and costs as per the parties' Agreement.

FOR A THIRD FOURTH PARTY COMPLAINT
(Breach of Contract Accompanied by Fraudulent Acts)

85. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

86. Creel's failure to complete and deliver the boundary and wetlands survey, his failure to do the ditching and silvaculture work he indicated that he intended to do on some of the wetlands

tracts, his failure to pay inheritance taxes and properly manage his business and personal assets, and his failure to be in a position or posture to allow the Plaintiffs to purchase or Takedown the third tract that they selected, being contiguous and adjacent to some of the prior property purchased, constitute fraudulent acts and/or fraudulent intent, dishonesty in fact, and were motivated by a desire to attempt to force the Plaintiffs to purchase tracts without the proper boundary or wetlands surveys and to purchase tracts that did not adjoin the first pieces of property purchased, even though Creel was aware that his financial position and the acts referenced above jeopardized his ability to be able to deliver the adjoining tract or parcel, which would have placed the Plaintiffs in the position of receiving two contiguous tracts and a third tract which did not adjoin them and which could not be used for the purposes intended and would have denied the Plaintiffs the basis of the bargain for which the parties negotiated and contracted.

87. The Plaintiffs have been damaged in not having received the benefits they bargained and contracted for, and in not receiving the future income and profits which they could expect if the contract were followed as written and as previously agreed by the parties.

88. The Plaintiffs believe they are entitled to a judgment for actual and proximate damages, including lost value, lost profits and lost future profits and value. Further, pursuant to the contract, the Plaintiffs are entitled to reasonable Attorneys Fees and Costs.

FOR A FOURTH FOURTH PARTY COMPLAINT
(Breach of the Covenants Of Good Faith and Fair Dealing)

89. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

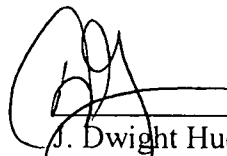
90. Creel had a duty to exercise good faith in his dealings with the Plaintiffs.

91. Creel breached his duty of good faith as hereinabove set forth.

92. As a result of the actions of Creel, the Plaintiffs have been damaged, have lost profits, the land they purchased has lost value, they have lost future profits and value.

93. Creel's conduct was in bad faith and breached his duty of good faith and fair dealing under the Uniform Commercial Code, as codified in the State of South Carolina and as a matter of Common Law and Plaintiffs are entitled to a judgment for all damages provided by the UCC, South Carolina statutory and common law, including all actual and proximate damages and including under this contract, reasonable Attorney's Fees and Costs.

WHEREFORE, having replied to and answered the ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT and having alleged a Fourth Party Complaint herein, the Plaintiffs ask that the Defendants/Third Party Plaintiff's ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT be dismissed with prejudice, that they have the relief requested herein, including, but not limited to, judgment against the Defendants/Third party Plaintiff's and against the Fourth Party Defendant as requested, but also for such other and further relief deemed just and proper by this Court.



J. Dwight Hudson, Esquire
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1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889

*Attorney for: Plaintiffs/Third Party
Defendants/Fourth Party Plaintiffs*

Dated:
July 15, 2009

0049

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2009-CP-26-1909

Randy A. Beverly, LLC, and
Donald Godwin, LLC,

Plaintiffs,

vs.

Bucksville Farms, Inc.,

Defendant and
Third-Party Plaintiff,

vs.

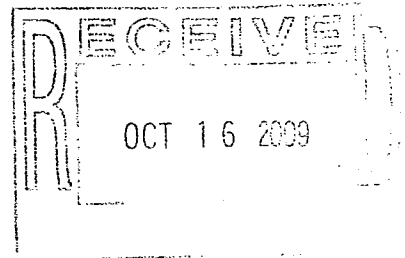
Randy A. Beverly and
Donald Godwin,

Third-Party Defendants
& Fourth Party
Plaintiffs,

Vs.

Benjamin J. Creel,
Individually and as surviving
Director of Bucksville Farms,
Inc.

Fourth Party Defendant.



**DEFENDANT BENJAMIN CREEL'S
ANSWER AND COUNTERCLAIM
TO THE FOURTH PARTY
COMPLAINT**

FILED
HORRY COUNTY
2009 OCT 14 PM 12:03
MELANIE HUGGINS
CLERK OF COURT

**TO: FIRST AND FOURTH-PARTY PLAINTIFFS AND THIRD PARTY
DEFENDANTS AND THEIR ATTORNEY J. DWIGHT HUDSON:**

Benjamin Creel, making answer and counterclaim to the
Fourth-Party Complaint respectfully alleges as follows:

FOR A FIRST DEFENSE

1. That the Complaint fails to set forth facts sufficient to constitute a cause of action or claim against this answering Defendant and should therefore be dismissed pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

FOR A SECOND DEFENSE

2. That this answering Defendant realleges all the above allegations as though repeated herein verbatim

3. That the Defendant denies each and every allegation of every Fourth Party Complaint not hereinafter specifically admitted, explained, qualified and/or denied.

4. In response to Paragraph 2, this answering Defendant incorporates those allegations in his counterclaims and all allegations of this pleading set forth herein.

5. Paragraphs 3-6 do not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

6. Paragraph 7 is denied as stated.

7. Paragraph 8 is denied as stated.

8. Paragraph 9 is denied as stated.

9. Paragraph 10 is denied as stated.

10. Paragraph 11 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-

asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

11. Paragraph 12 is denied as stated.

12. Paragraph 13 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

13. Paragraph 14 is denied as stated.

14. Paragraph 15 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

15. Paragraph 17 is denied.

16. Paragraph 18 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading.

17. Paragraph 19 is denied as stated.

18. Paragraph 20 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

19. Paragraphs 21 and 22 are denied.
20. Paragraph 23 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.
21. Paragraphs 24 through 26 are denied as stated.
22. Paragraphs 27 and 28 do not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.
23. Paragraph 29 are denied.
24. Paragraph 30 is denied as stated.
25. Paragraph 31 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.
26. Paragraph 32 is denied as stated.
27. In response to Paragraph 33, Plaintiffs, as individuals, breached an implied covenant of good faith and fair dealing in commencing contractual obligations that are subject to this lawsuit and are personally liable for actual and consequential damages that this answering Defendant has sustained.
28. Paragraph 34 does not appear to require a response from

this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

29. Paragraph 24 is denied as stated.

30. Paragraph 36 does not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

31. Paragraph 37 is denied.

32. Paragraphs 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 61, and 63 do not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

33. Paragraphs 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 60, 62, 64 and 65 are denied as stated.

34. This answering Defendant admits Paragraph 66 -67.

35. This answering Defendant denies Paragraph 68.

36. Paragraphs 69 and 70 do not appear to require a response from this answering Defendant. However, to any extent such a response is required; this answering Defendant denies the same and re-asserts the allegations in his counterclaims and all allegations of this pleading set forth herein.

37. Paragraph 71 is denied as stated.

38. That this answering Defendant denies paragraphs 72 and 73 of Plaintiffs' fourth-party complaint.

39. This answering defendant is informed and believes that the Plaintiffs and Third-Party Defendants are not entitled to the requests set forth in Plaintiffs' fourth-party complaint paragraph 74 through 75 and moves to strike their requests for attorney fees.

40. In response to paragraph 76 of Plaintiffs' fourth-party complaint, this answering Defendant incorporates the allegations in his counterclaims and all allegations of this pleading set forth herein.

41. In response to paragraph 77 of Plaintiffs' fourth-party complaint, this answering Defendant craves reference to the written contract, the oral modification of said written contract, and the court's interpretation thereof and denies the remainder.

42. In reference to paragraph 78 of Plaintiffs' fourth-party complaint, this answering defendant admits that there was no survey completed for the boundary and wetlands on the first two takedowns and denies the remainder as stated.

43. In reference to paragraph 79 of Plaintiffs' fourth-party complaint, this answering defendant admits that the third takedown was suppose to occur in June of 2008 and denies the remainder of paragraph 79 as stated.

44. This answering Defendant denies paragraph 80 and 81 as stated.

45. Paragraphs 82, 83, and 84 are denied and this answering defendant is informed and believes that the Plaintiffs and Third-Party Defendants are not entitled to the requests set forth in Plaintiffs' fourth-party complaint paragraph 84 and moves to strike their requests for attorney fees.

46. In response to paragraph 85 of Plaintiffs' fourth-party complaint, this answering Defendant incorporates the allegations in his counterclaims and all allegations of this pleading.

47. This answering Defendant denies paragraphs 86 through 88 of Plaintiffs' fourth-party complaint.

48. In response to paragraph 89 of Plaintiffs' fourth-party complaint, this answering Defendant incorporates the allegations in his counterclaims and all allegations of this pleading.

49. This answering Defendant admits that he and all parties involved in the contract subject to this lawsuit had a duty to exercise good faith in their dealings and completion of the contract subject to this lawsuit.

50. This answering Defendant denies paragraphs 91 through 93.

FOR A THIRD DEFENSE

[Modification of Contract]

51. That this answering Defendant realleges all the above allegations as though repeated herein verbatim.

52. That the Plaintiffs entered into a course of dealing with the Defendant during the first two purchases [hereinafter referred to as "takedowns"] whereby it notified the Defendant that

the Plaintiffs would take the necessary steps to obtain a boundary and wetlands survey and would charge the Defendant for the costs thereof at closing; that said charges were assessed against Defendant on the second takedown.

53. That prior to the closing date of the third takedown, the Plaintiffs hired a surveyor who prepared a survey plat outlining the legal description of the remaining tracts and delineated wetlands; that the Plaintiffs, prior to the first, second and third closings, also hired an environmental surveying, engineering and testing company to assist the Plaintiffs in preparing its takedown survey and delineating the wetlands and/or assisting in the determination of the wetlands identified on all four takedowns.

54. That after the first takedown purchase, the Plaintiffs and Defendant modified the Contract by agreeing to engage in a silvaculturing program whereby the proposed tract of land to be purchased would be maintained and ditched so as to create more uplands and provide the Plaintiffs with more land to be developed; that this subsequent modification was at the specific request of the Plaintiffs.

55. That the parties partially performed the oral modification of the Contract by ditching the property for which the seller paid.

56. That through the course of dealings between the parties and because of the above-agreed modification, the Contract was orally modified and the Plaintiffs were provided with a wetlands

delineation map prior to the third takedown.

57. That the Defendant performed all acts required of him in the written Contract and the oral modification of said Contract thereby binding the Plaintiffs to move forward with the third takedown purchase.

58. That this Defendant pleads a subsequent oral modification of the written Contract as a complete defense to the Plaintiffs' fourth-party Complaint.

FOR A FOURTH DEFENSE

[Waiver and Estoppel]

59. That the Defendant realleges all the above allegations as though repeated herein verbatim.

60. That because of the above actions of the Plaintiffs as set forth in the preceding defense, the Plaintiffs have waived any rights it had pursuant to the written Contract and as established by the oral modification of the Contract and is now estopped to claim any breach on the part of this answering Defendant.

61. Therefore, this answering Defendant pleads a waiver and estoppel as a complete defense to the Plaintiffs' fourth-party Complaint.

FOR A FIFTH DEFENSE

[Course of Dealing]

62. That this answering Defendant realleges all the above allegations as though repeated herein verbatim.

63. That the first two takedown purchases completed by the Plaintiffs required no survey by this answering Defendant and the lack thereof was not disputed by the Plaintiffs, as is stated in the Third and Fourth Defenses above.

64. Therefore, any survey required by the Plaintiffs on the third and/or fourth takedown would not be required because of the course of dealings of the parties.

65. That this answering Defendant pleads an agreed altered course of dealing between the parties as a complete defense.

FOR A FIRST COUNTERCLAIM

[Breach of Contract]

66. That this answering Defendant incorporates all the above allegations as though repeated herein verbatim.

67. That the subject of this Counterclaim is a Contract for the purchase of real estate, said Contract is the same as the contract that is attached to Bucksville Farm, Inc.'s Answer, Counterclaim, and Third and Fourth Party Cross Complaints as Exhibit 1 and this answering Defendant wishes to make that Exhibit a part and parcel of this Counterclaim.

68. That the real estate which is the subject of this action is in Horry County, South Carolina, and the court has personal and subject matter jurisdiction over the parties in this case and venue is proper.

69. That the written Contract made a part and parcel hereof was subsequently modified at the specific request and instance of

the Plaintiffs and the Third-Party Defendants as is more particularly set forth in the Third, Fourth and Fifth Defenses above.

70. That according to the written Contract and the subsequent oral modifications set forth hereinabove, the Plaintiffs and the Third-Party Defendants became bound to proceed with the first and second takedowns [purchases] and did so, leaving only the third and fourth takedowns to be completed according to the terms of the Contracts between the parties.

71. That this answering Defendant relied upon the written Contract and the subsequent oral modifications requested by the Plaintiffs and the Third-Party Defendants.

72. That this answering Defendant has performed all conditions precedent to require that the Plaintiffs and Third-Party Defendants complete the purchase in the third and fourth takedowns.

73. That the failure of the Plaintiffs and the Third-Party Defendants to complete their obligations pursuant to the written Contract and the oral modifications constitutes a breach of contract.

74. That as a result of the breach of the written Contract and the oral modifications thereof, this answering Defendant has sustained damages in the amounts that would have been required to be paid on the third and fourth takedowns [purchases], has incurred additional, consequential and incidental damages as a result of the Plaintiffs' and Third-Party Defendants' refusal to

close on the third and fourth takedowns, has incurred additional penalties in payoff of Defendant's underlying mortgage of which the Plaintiffs and Third-Party Defendants had knowledge and was aware and has incurred a loss of pre-judgment interest at the legal rate.

75. That according to the terms of the written Contract in Paragraph 27, the Defendant is entitled to reasonable attorney fees and costs associated with this First Counterclaim.

FOR A SECOND COUNTERCLAIM

[Breach of Contract Accompanied by Fraudulent Acts]

76. That this answering Defendant realleges the allegations of its First Counterclaim as though repeated herein verbatim.

77. That prior to and subsequent to the second takedown [purchase], the Plaintiffs and Third-Party Defendants specifically requested of the Defendant that the date of the third takedown be delayed in order that it could acquire a boundary and wetlands survey and delineation adjoining and abutting Highway 701, which was a major highway and consisted of more valuable property than the remainder of said tract of land.

78. That the Plaintiffs and Third-Party Defendants specifically requested that the Defendant delay the closing date of the third takedown in order to perform a land management device or practice known as silvaculturing, wherein and whereby any land consisting of wetlands could be ditched and maintained so that the wetlands would dry out and become uplands, thereby giving the

Plaintiffs and Third-Party Defendants more developable property.

79. That the Plaintiffs and Third-Party Defendants discovered that the silvaculturing could only be performed by the present owner, the Defendant herein, and that if the land was purchased without silvaculturing prior to the purchase, the Plaintiffs and Third-Party Defendants could not use silvaculturing thereafter to obtain more uplands property.

80. That the Defendant agreed to perform the silvaculturing as requested by the Plaintiffs and Third-Party Defendants so long as the completed purchase of all the real estate was consummated on or before the fourth takedown.

81. That upon information and belief, the Plaintiffs and Third-Party Defendants hired a third party to perform the silvaculturing and charged the Defendant during the second closing.

82. That in addition thereto, the Plaintiffs and Third-Party Defendants requested that this answering Defendant allow them to dump soil or dirt on the remainder of the Defendant's property and assured the Defendant that they would consummate the closing of the third and fourth takedowns.

83. That the Defendant, relying on said request, allowed the Plaintiffs and Third-Party Defendants to dump 30,000 cubic yards of construction dirt on the remainder of his land.

84. That the Plaintiffs and Third-Party Defendants also advised the Defendant all throughout the transaction and the performance of the contracts listed above that it would take the

necessary steps to obtain a boundary survey and wetlands delineation survey in order to complete the respective takedown purchases, leaving this answering Defendant to believe that he was not required to provide said boundary and wetlands survey.

85. That the Plaintiffs and Third-Party Defendants had no intention of completing the closing on the third and fourth takedowns.

86. That prior to the execution of the Contract, this Answering Defendant had hired a real estate agent to market his property and had, prior to the execution of the Contract, obtained an offer to purchase said property upon similar terms as set forth in the Contract that is made part and parcel of this answer and counterclaim.

87. That the Plaintiffs and Third-Party Defendants approached the Defendant and requested that the Defendant decline the offer by the third party and to sell the property to the Plaintiffs and Third-Party Defendants.

88. That the Plaintiffs and Third-Party Defendants misrepresented to this answering Defendant that it would purchase all the property set forth in the written Contract.

89. That upon information and belief, the Plaintiffs and Third-Party Defendants did not intend to finalize the purchase of the entire tract of land and intended only to purchase the property abutting Highway 701 which did not consist of wetlands.

90. That the Plaintiffs and Third-Party Defendants engaged in the above actions which constituted an unlawful appropriation

of the Defendant's property by design, constituted a breach of the covenant of good faith and fair dealing, and such actions are characterized by dishonesty in fact.

91. That the above-described actions on the part of the Plaintiffs and Third-Party Defendants constitute a breach of contract accompanied by fraudulent acts.

92. That as a result thereof, the Defendant has been damaged in the amount that would be due under the Contract on the third and fourth takedowns, together with pre-judgment interest, and consequential and incidental damages as a result of the breach.

93. That the Defendant is also informed and believes he is entitled to pre-judgment interest on the monies which should have been paid according to the terms of the written Contract for the third and fourth takedown purchases.

94. That this answering Defendant is also informed and believes he is entitled to reasonable attorney fees according to Paragraph 27 of the written Contract.

95. That this answering Defendant is informed and believes he is entitled to punitive damages against the Plaintiffs and Third-Party Defendants in an amount deemed just and proper by the Court and jury.

WHEREFORE, this answering Defendant prays as follows:

- A. That the Complaint against him personally be dismissed;
- B. That the court strike Plaintiffs' and Third Party Defendants' requests for attorney fees;

- C. That he have judgment against the Plaintiffs and Third-Party Defendants, both jointly and severally, for actual damages, consequential and incidental damages caused by the breach of contract;
- D. For pre-judgment interest at the statutory rate of 8¾ per cent;
- E. For attorney fees pursuant to Paragraph 27 of the written Contract;
- F. For punitive damages in amount deemed just and proper by the Court and jury;
- G. For the costs and disbursements of this action; and
- H. For such other and further relief as this Court may deem just and proper.

STEVENS LAW FIRM, P.C.

By: Natalie S. Stevens-Graziani
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Attorney for Fourth-Party Defendant

October 13, 2009.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald)
Godwin, LLC,)

Plaintiffs,

vs.

Bucksville Farms, Inc.,

**Defendant & Third Party
Plaintiff**

vs.

Randy A. Beverly and Donald
Godwin,

Third Party Defendants &
Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and
as surviving director of Bucksville
Farms, Inc.,

Fourth Party Defendant.

**REPLY TO DEFENDANT CREEL'S
ANSWER AND COUNTERCLAIM TO
THE FOURTH PARTY COMPLAINT**

To: Defendant and Third-Party Plaintiff and Fourth Party Defendant:

The First Party Plaintiffs, Randy A. Beverly, LLC and Donald Godwin, LLC, and the Third Party Defendants and the Fourth Party Plaintiffs, Randy A. Beverly and Donald Godwin (Hereinafter referenced as Beverly and Godwin) would REPLY to the Fourth-Party Defendant

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Benjamin J. Creel's (Hereinafter referenced as Creel) ANSWER AND COUNTERCLAIM TO THE FOURTH PARTY COMPLAINT and would show unto this Honorable Court as follows:

1. Each allegation of the subject ANSWER AND COUNTERCLAIM TO THE FOURTH PARTY COMPLAINT not hereinafter admitted, qualified or otherwise explained is deemed denied and strict proof demanded thereof.

FOR A FIRST DEFENSE
(Response to Allegations)

2. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

3. Paragraph 1 is denied and strict proof is demanded thereof.

4. In response to Paragraph 2, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

5. Paragraphs 3-50 do not appear to require a response from Beverly and Godwin. However, to any extent such a response is required, Beverly and Godwin deny the same, demand strict proof thereof, re-assert and re-allege the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

6. In response to Paragraph 51, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

7. Paragraph 52 is denied. There was no "course of dealing," there was simply a different economic reality and different market conditions. Beverly and Godwin were able to purchase the first two parcels with cash and therefore did not need all of the formal documents that a bank

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would have required for such a purchase. An opinion letter was obtained stating that the first two (2) parcels did not contain wetlands and Beverly and Godwin agreed to close those tracts based on the opinion, which they could do as a cash purchase.

8. Paragraph 53 is denied. Prior to the third takedown, the economy and the market had experienced a serious downturn. Beverly and Godwin did not have cash in hand to fund the third parcel purchase and they therefore approached Conway National Bank. Beverly and Godwin advised Creel that they would have to get a loan for the third (3rd) takedown and that they would need the formal documents and specifications, including the wetlands delineation which Creel had never provided. No closing date was set for the 3rd takedown because Creel advised Beverly and Godwin that due to his current financial predicament he could not afford to pay for a wetlands delineation. Because Beverly and Godwin never obtained the wetlands delineation the 3rd takedown was never surveyed and, as stated above, no closing date was set.

9. Paragraphs 54 and 55 are denied. The Contract was never modified in this manner and Beverly and Godwin never asked that it be modified in this manner. Therefore, there was no oral modification for the parties to have performed, partly or otherwise. In fact, at the time that the original "Agreement to Buy And Sell Real Estate In Multiple Closings" was signed, or even prior to the agreement being signed, Creel asked Beverly and Godwin not to takedown the parcels with wetlands issues initially, and asked that Beverly and Godwin delay taking down the parcels with wetlands in order to allow Creel to do some ditching and some silvaculture to try to clear up some of the wetlands. Creel made the request because under the Agreement, the purchase price for upland property that could be developed was significantly higher than the purchase price for wetlands property that could not be developed. However, Creel never did anything to remedy the wetlands property and if the sale closed with those acres delineated as

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wetlands, they could not be developed. Therefore, Beverly and Godwin did pay someone to do some ditching. But Creel never had the wetlands delineation done so the third (3rd) takedown closing was never set.

10. Paragraphs 56, 57, and 58 are denied. There was no oral modification of the written contract and Beverly and Godwin were never provided with the wetlands delineation by Creel. Instead, Creel advised that he could not afford to have the delineation done. Creel did not perform his obligations under the contract and instead breached the contract in such a material manner that Beverly and Godwin are entitled to a judgment of the Court declaring the contract null and void and invalidated by Creel's breach or breaches.

11. In response to Paragraph 59, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case

12. Paragraphs 60 and 61 are denied. Beverly and Godwin affirmatively allege that the claimed oral modification never occurred and that they have waived none of their rights under the contract. Further, Beverly and Godwin have not waived any of their rights under the law and are not estopped from claiming Creel's breach and seeking a Court determination of the same together with consequent damages.

13. In response to Paragraph 62, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

14. Paragraphs 63, 64 and 65 are denied. As noted above, there was no "course of dealings" relieving Creel of all of his obligations under the Agreement. As Creel was aware at the time, Beverly and Godwin were operating under a better economy at the time of the first 2 takedowns and had cash for those purchases and were able to close after receiving an opinion as to the wetlands. The 3rd takedown would have occurred in a much different economy, and Beverly and

Godwin advised Creel they would have to get a bank loan for the 3rd takedown and that the bank would insist on the wetlands delineation, surveys, and other formalities not strictly required for a cash closing. Since Creel could not obtain the wetlands delineation, he profited from the fortunate circumstances allowing the first 2 takedowns to be cash closings and closed the parcels without advising Beverly and Godwin that he did not intend to follow through with his obligations under the contract.

15. In response to Paragraph 66, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

16. So much of Paragraph 67 as alleges the existence of a certain Agreement for the sale/purchase of real estate in Horry County, SC between certain of the parties hereto is admitted. However, as to the parties and the terms involved, Beverly and Godwin crave reference to the contract as the best evidence thereof.

17. Paragraph 68 is admitted.

18. Paragraph 69 is denied. The Agreement was not modified and Beverly and Godwin never asked that it be modified. The Agreement stands as it is written.

19. Beverly and Godwin admit only so much of Paragraph 70 as alleges that they proceeded with the First and second takedowns. All other allegations, implications and inferences made by or to be drawn from the said Paragraph 70 are denied.

20. Paragraphs 71 and 72 are denied. Beverly and Godwin allege that there was no oral modification of the subject Agreement and that they requested no such modification. Further, Creel has not performed his part of the agreement in a number of aspects, including his failure to procure and provide the necessary wetlands delineation.

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21. Paragraphs 73, 74 and 75 are denied. Beverly and Godwin have performed and completed all of their obligations under the Agreement but could not proceed further because of Creel's failure to comply with the terms of the Agreement. Because Beverly and Godwin have complied with the Agreement but Creel has breached the same, Beverly and Godwin allege Creel is entitled to recover nothing and that they are entitled to have the Contract declared null and void and/or to damages for Creel's breach of the contract including reasonable attorney's fees and costs.

22. In response to Paragraph 76, Beverly and Godwin incorporate the foregoing allegations along with all allegations of all pleadings that they have or will hereafter file in this case.

23. Paragraph 77 is denied. It was Creel's obligation to provide the wetlands survey and delineation and necessary certification from the Corps of Engineers and the parties were to split the costs of the perimeter survey. Further, Beverly and Godwin did not delay the takedown date for the third takedown. In fact, Beverly and Godwin wrote Creel advising that they were ready to close if he got the wetlands survey and delineation and Corps of Engineers' certification. Creel never obtained the wetlands delineation or certification and the bank would not fund a loan for the purchase without those documents which the Agreement required Creel to provide.

24. Paragraphs 78, 79, 80, 81 82 and 83 are denied and strict proof is demanded thereof. Ditching and silvaculture prior to takedowns subsequent to the second one would have provided some additional developable land. However, the wetlands acreage sold for less than the non-wetlands acreage under the terms of the contract. It was Creel who was in a poor financial posture and it was Creel who asked from the early stages of the parties' dealings that Beverly and Godwin not start the takedowns with the wetlands acreage in order to give Creel time to have some ditching and silvaculture done. That would have increased the amount of money

requests for relief, and causes of action alleged by the defunct corporation are null and void, fail to state a cause of action for which relief can be granted and should be dismissed and that if the Court determines the Agreement to have been between the defunct corporation and Beverly and Godwin, that the Agreement should also be declared null and void and that any and all claims by Bucksville Farms, Inc. or Creel should therefore be dismissed.

32. Beverly and Godwin also allege that based upon the facts, the pleadings, and the record in this matter as well as the law of South Carolina, that there is no basis for any individual liability as to Beverly or Godwin as any of their acts or failures to act, which are denied, were in a corporate and not an individual capacity. Beverly and Godwin therefore move the Court that Beverly and Godwin be dismissed as individual parties to this lawsuit and that all claims against Beverly and Godwin, individually, be dismissed with prejudice.

FOR A THIRD DEFENSE
(Unclean Hands)

33. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

34. Beverly and Godwin allege that to the extent Creel seeks equitable relief or call upon the equitable powers of this Court, its inequitable conduct constitutes unclean hands and bars the granting of relief to Creel.

FOR A FOURTH DEFENSE
(Offset)

35. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

36. Beverly and Godwin allege that they have suffered damage by reason of Creel's conduct and allege that they have the right of offset if any amount of money is owed to or due to the Creel by way of damages.

FOR A FIFTH DEFENSE
(Waiver)

37. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

38. Beverly and Godwin are informed and believe and on such information and belief allege that the Creel was engaged in conduct that constitutes a waiver of its rights, if any, under the contract alleged, the existence of which under the terms claimed by Creel is specifically denied. By reason of said waiver, Beverly and Godwin are excused from further performance of the obligations under the contract.

FOR A SIXTH DEFENSE
(Release)

39. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

40. Beverly and Godwin allege that Creel's actions constituted a full release and waiver of any and all claims, which Creel may have against Beverly and Godwin, which is/are denied.

FOR A SEVENTH DEFENSE
(Equitable Estoppel)

41. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

42. Beverly and Godwin allege that any and all causes of action in Creel's pleading or pleadings based upon or in any wise related to any contract for the sale of this property are barred by reason of acts, omissions, representations and courses of conduct by Creel by which Beverly and Godwin were led to rely to their detriment, thereby barring, under the doctrine of equitable estoppel, any of the said Causes of Action asserted by Creel.

FOR AN EIGHTH DEFENSE
(Failure of Consideration)

43. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

44. Beverly and Godwin allege that Creel's claims based upon any alleged contract are barred as a result of a failure of consideration.

FOR A NINTH DEFENSE
(Mutual Mistake)

45. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

46. Beverly and Godwin are informed and believe and thereon allege that if there presently exists or ever existed any or all of the alleged rights, claims, or obligations, which Creel seeks by

way of his/its claims, counterclaims, third party claims and all causes of action alleged, the said affirmative relief is unenforceable by reason of mutual mistake.

FOR A TENTH DEFENSE
(Laches)

47. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

48. Plaintiffs allege that Creel is estopped from asserting all of the claims, counterclaims, third party claims and all causes of action alleged in Creel's pleading or pleadings based upon the doctrine of laches, and Beverly and Godwin plead the doctrine of laches as a full and complete defense and bar to Creel's claims.

FOR AN ELEVENTH DEFENSE
(Accord and Satisfaction)

49. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

50. Beverly and Godwin allege that any debt owed to Creel, which is denied, has been fully paid and satisfied, and Beverly and Godwin plead the affirmative defense of Accord and Satisfaction as a full and complete defense and bar to Creel's claims and causes of action.

FOR A TWELFTH DEFENSE
(Statute of Frauds)

51. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim herein.

52. Any claim or cause of action by Creel based upon or in any wise stating or referring to an alleged oral modification to the Contract of Sale for the real estate involved herein is void on the grounds that it was not in writing within the meaning of §32-3-10, *Code of Laws, SC*.

FOR A THIRTEENTH DEFENSE
(Reservation of Right To Amend)

53. Beverly and Godwin re-allege and incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

54. Beverly and Godwin reserve the right to amend this pleading and assert all additional defenses, including affirmative defenses, which the discovery process indicates may be applicable to this matter and it reserves the right to assert all such defenses and does not waive any additional or further defenses including affirmative defenses.

FOR A FOURTEENTH DEFENSE
(Failure to Mitigate)

55. Each of the foregoing allegations is incorporated by reference herein as fully as though repeated verbatim.

56. Beverly and Godwin are informed and believe and based thereon alleges that Creel has failed to mitigate and lessen damages, if any he/it sustained, as required by law and is barred from recovery by reason thereof.

FOR A FIFTEENTH DEFENSE
(Unconstitutionality of Punitive Damages)

57. Beverly and Godwin re-allege and incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

58. An award of punitive damages against Beverly and Godwin, directly or by indemnification, under South Carolina law violates the fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §3 of the South Carolina Constitution in that:

- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of Beverly and Godwin violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. Creel's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, §3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Beverly and Godwin.

59. Creel's claim for punitive damages violates the federal doctrine of separation of powers and Article I, §3 of the South Carolina constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A SIXTEENTH DEFENSE
(Incorporation of All Other Pleadings)

60. Beverly and Godwin incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

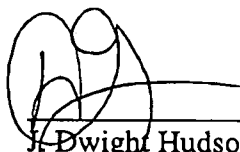
61. To the extent that the same are not inconsistent and to the extent that the same are applicable, Beverly and Godwin incorporate by reference herein all pleadings and/or motions that they have filed or will file in this action herein.

FOR A SEVENTEENTH DEFENSE
(Incorporation of All Defenses/Motions By All Parties)

62. Beverly and Godwin incorporate the foregoing allegations herein by reference, as fully as though the same were repeated verbatim.

63. To the extent that the same are not inconsistent and to the extent that the same are applicable, Beverly and Godwin incorporate by reference herein all defenses pled in this matter by any party and/or all motions made by any party including, but not limited to, all affirmative defenses.

WHEREFORE, having replied to Creel's ANSWER AND COUNTERCLAIM TO THE FOURTH PARTY COMPLAINT herein, Beverly and Godwin ask that the same be dismissed with prejudice, that they have the relief requested in all pleadings that they have or will file in this action and for such other and further relief deemed just and proper by this Court.



J. Dwight Hudson, Esquire
Hudson Law Firm
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889

Attorney for: Beverly & Godwin

Dated:
November 12, 2009

Certification of Service:

This is to certify that the foregoing was served by HUDSON LAW OFFICES by and through its agents, servants and employees on November 12, 2009 by placing the same in the United States mail, postage prepaid, and by forwarding the same via e-mail and facsimile transmission, addressed and directed as follows

James P. Stevens Jr. Esq.
Attorney at Law
PO Drawer 127
Loris, SC 29569-0127
Fax: 756-3785
Email: stevenslawfirm@aol.com

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1 deposition. May we proceed? All right. Mr. Bellamy,
2 give your full name and address for the record, please?

3 A. Randy Allen Beverly, Senior, 220 Wahee Place,
4 Conway, South Carolina.

5 Q. All right. And give me your occupation today.

6 A. I'm in real estate. I own a real estate sales office. I
7 own a construction company, and I do some real estate
8 development.

9 Q. All right. What licenses or certifications do you hold
10 professionally in real estate or any other related fields?

11 A. I'm a licensed real estate broker, and I have been since
12 '77. And I've had a construction -- residential
13 construction license since '82, '83.

14 Q. Okay. Give us the benefit -- and this is just for
15 qualification purposes and for the record here. Give us
16 the benefit of your educational background and
17 professional education after any formal education, such
18 as high school or college. Just bring us up to date with
19 all of your educational background.

20 A. I graduated from Conway High School in '68. I
21 attended Coastal Carolina for two years, from -- well,
22 briefly in there between going off to the military, but
23 '68 to about '71. I went to Carolina, the University of
24 South Carolina in '72. I did not graduate from college,
25 but I did attend three years. '74, I got in the real estate

1 business, real estate sales, and with the J. P. McAlpine
2 Company, and worked for Mr. Mack till about '77.
3 Opened -- me and a guy named Tommy Lee opened
4 our own real estate office in '77, had it till about '82,
5 and then opened my own office in '82, and actually had
6 a real estate office ever since, of my own, since '82.
7 Got in the construction business about '82 or '83,
8 residential construction, started doing some houses,
9 and still do. Started developing some real estate, I'm
10 estimating somewhere around the mid 80s. Started
11 doing some residential real estate development, you
12 know, buying raw land, going in, putting in roads,
13 water, sewer, cutting up lots, and selling some lots,
14 building on some lots. And that's primarily what I've
15 been doing since the mid 80s.

16 Q. Can you give us an example, just for the record, of
17 some of the developments that you've been involved in
18 over the years, either in individual homes, or tracts of
19 land, or condominium complexes? Just kind of give us
20 an overview of some of those projects?

21 A. I developed about a sixty lot subdivision on 544 called
22 Cabot's Creek back in the mid 80s. Then right beside
23 that, next door, I did a little development called
24 Bradford Creek. Had about fifty lots in it. And built a
25 good many houses in both those subdivisions. I didn't

1 build all of them. I mean, I didn't build houses on all
2 the lots. Late 80s, developed a little single-family
3 detached condo project down in the Shore Drive area
4 of Myrtle Beach, between Myrtle Beach and North
5 Myrtle Beach, called Arbor House. There's about
6 twenty-three units in it. After that, developed a piece
7 on 544 called Castlewood that was a right long-range
8 development. It took us about twelve or thirteen years
9 to develop it. We developed it over -- in several tracts.
10 There's about -- there was seven phases of Castlewood.
11 It took us about thirteen years to develop it and build it
12 out, and I built a good many houses. There's about
13 seven hundred residential lots and houses in
14 Castlewood on 544.

15 Q. Would that experience, Mr. Beverly, involve -- being
16 involved in the infrastructure, and all the land planning,
17 and what it takes to really -- for a construction
18 company to get out there and build a stick-built house?

19 A. That's correct. That's what we really did. We bought
20 the raw land. We took it from the ground up. I mean,
21 we had the engineering done, the wetlands delineation
22 done. We oversaw and contracted out the, you know,
23 water and sewer, storm drainage, paving the roads,
24 curb and gutter, the whole nine yards, surveying all of
25 it. And when we got through, we had a finished

1 subdivision, ready to build houses on. And then we
2 built a lot of the houses in the subdivision.

3 Q. Great. All right. Was the project that was the -- if it
4 had been carried to its fruition, intended for this land
5 out on Highway 701, was it intended to be developed
6 for housing?

7 A. That's correct. That's correct. That's really the only
8 thing I've ever done, is residential development. That's
9 right.

10 Q. You really don't do commercial?

11 A. No. I've never developed anything commercial. I've
12 bought a few commercial buildings that were existing.
13 I've never developed anything commercial.

14 Q. Okay, great. This particular lawsuit is in the name of
15 Randy A. Beverly, LLC and Donald Godwin, LLC,
16 which of course are limited liability companies. Randy
17 A. Beverly, LLC, are you the managing partner or sole
18 partner in -- or sole owner of that LLC?

19 A. That's correct.

20 Q. All right. Was that LLC in good standing legally at the
21 time of this contract, I believe, in October of '05 and
22 throughout all the pertinent times, up until today? Has
23 it been in good legal standing with the state?

24 A. That's correct.

25 Q. All right.

1 A. As far as I know.

2 Q. Okay. And as far as you know, Donald Godwin, LLC,
3 would it have been in good standing with the state at
4 all pertinent times?

5 A. That's correct, as far as I know.

6 Q. All right. And it would be both your LLC and Donald
7 Godwin's LLC that were the principals in this
8 development, and signatories to this contract with Mr.
9 Creel?

10 A. That's correct.

11 Q. All right. A Complaint's been filed, and the Court will
12 have and does have all of these documents, but we'll
13 have to identify them and refer to them as we go along.
14 But the contract involved in this case is dated in
15 October, as I understand it, of '05. I will show you a
16 copy of it and ask you to identify it as such. It appears
17 to be Plaintiff's Exhibit Number 1 in the Beverly
18 deposition. We're going to use those for the record,
19 those designations, so that we can keep things straight
20 without having to re-introduce them again and go
21 through that process. But let me show you that, and
22 identify -- if you can identify and recognize that as the
23 contract that's involved in this litigation today?

24 A. That appears to be the contract, or a copy of the
25 contract, that we executed in October of '05 for the

1 tract of land on 701 South, yes.

2 Q. All right. Is that contract -- who was this contract
3 prepared by, the contract that is Plaintiff's Exhibit
4 Number 1 in the Beverly deposition?

5 A. Gem McDowell over at the McNair Law Firm at the
6 time. I don't think Gem's over there any more, but he
7 was Benjamin's attorney.

8 Q. And who hired Gem McDowell, and who directed
9 Gem McDowell or chose Gem McDowell to prepare
10 this contract?

11 A. Benjamin.

12 Q. And Benjamin would be Benjamin Creel?

13 A. Benjamin Creel. I'm sorry. Yes.

14 Q. All right. Just for the record, and I think this might
15 appear somewhere else, but I'm not sure if it just got
16 caught up in conversation, so but in testimony,
17 Benjamin Creel is actually a relation to you?

18 A. Yes. His mother -- his mother is my sister, or was my
19 sister. Benjamin's my nephew.

20 Q. All right. And all the parties here, of course, obviously
21 including you and Benjamin, have known each other
22 for ...

23 A. All of his life.

24 Q. ... many, many years.

25 A. All of his life. That's right. I remember when he was

1 born.

2 Q. Okay. In addition to this contract that you just
3 identified, just to speed things up, I'm going to ask you,
4 have you had any other dealings both before '05 with
5 Benjamin Creel, involving real estate transactions, both
6 before and afterwards? I'm kind of turning the floor
7 over to you, if you could just kind of give the Court a
8 summary of transactions that you have had with Mr.
9 Creel.

10 MR. STEVENS: Your Honor, I object to that. It
11 doesn't have any relevance to this case at all. I think
12 we're delaying things.

13 JUDGE: Well, I'm going to let him proceed,
14 Thank you, sir. As I will most everything else.

15 A. Now, Dwight, so any kind of real estate dealings at all,
16 you're talking about? I mean ...

17 Q. Yeah, just the -- y'all's familiarity in the real estate
18 business and transactions among yourselves, both
19 before this contract and since this contract, if there are
20 any.

21 A. It goes back a right good ways. Right after Benjamin's
22 daddy died, Paul, Benjamin ended up being -- from
23 Paul's estate, he was my partner in the marina right
24 here behind us at Kingston Pointe Marina. So he and I
25 owned that jointly together. Actually, he, and I, and

1 Raymond Smith. And then we bought Raymond Smith
2 out, I don't know, sometime in the 80s. I don't know.
3 And so Benjamin and I had the marina together, and
4 also we built the Cypress Inn, the bed and breakfast
5 that's down there on the marina. And we owned that
6 building jointly, Benjamin and I, or Kingston Pointe
7 Marina actually owned it, and we leased it to a couple
8 out of Atlanta, Georgia.

9 Q. Is that still the case today, joint ownership?

10 A. No, no, no, no.

11 Q. Okay. I'm sorry. Go ahead.

12 A. And I don't remember the date. Somewhere back
13 probably early 90s, I think, Dwight, Benjamin came to
14 me and wanted to sell his interest in the marina, and so
15 I got with Donald Godwin, and Donald and I actually
16 bought Benjamin's fifty percent interest in the marina
17 back in the early 90s sometime or another. So actually
18 now I own seventy-five percent of Kingston Pointe
19 Marina, and Donald owns twenty-five percent, that
20 twenty-five percent being half of what Benjamin used
21 to own.

22 Q. Okay. Were those transactions both before or after this
23 particular contract?

24 A. Well before. Well before.

25 Q. Well before. Okay.

1 A. Yes, sir. Yes, sir.

2 Q. Go ahead.

3 A. And as far as I remember, I don't remember being in
4 any other real estate partnerships with Benjamin. But
5 I'd say sometime around late 90s, '96, '97 -- so I don't
6 know. I don't know. Benjamin came to me and was
7 having some financial difficulties, and was wanting to
8 borrow some money against some of the real estate he
9 had, use it for collateral. And so I -- I mean, do you
10 want what specific real estate we're talking about?

11 Q. Well, you don't need to get into those specifics. Just
12 generally the projects and generally ...

13 A. Yeah. Well, anyway ...

14 Q. ... what those transactions were.

15 A. ... what I basically did was loan him some money on
16 several pieces of property.

17 Q. That's fine.

18 A. And he would deed the property to me. Rather than it
19 being a deed and a mortgage, he'd deed it to me, and I'd
20 give him an option to buy the property back at the
21 specified time. Sometime it was two years later.
22 Sometime it was a year later. And most of the time, I
23 gave some extensions on those dates, his options to
24 buy it back. And most of those properties -- one of
25 them he bought back two or three times. I mean, you

1 know, he'd buy it back, and I'd loan him some money
2 again later on. But most of those properties -- and
3 there were probably three or four, maybe five pieces --
4 I ended up -- you know, he didn't buy back. One piece
5 in particular, a farm out at Four Mile, he bought it back
6 from me and kept it. I mean, I never -- I never loaned
7 him any more money on it. But several other pieces, a
8 piece in Marion County, a couple of pieces here in
9 Horry County that I ended up ownership of.

10 Q. Any other business transactions going with him today?

11 A. Yes. Oh, yes. Yes. Yes, one of the pieces I bought
12 from him, he's the tenant in, a convenience store on
13 12th and Main in Conway. He runs a convenience
14 store in that building.

15 Q. Okay. The purpose of this tract, this purchase, was for
16 residential development, as you ...

17 A. That's correct. In fact, we've got it engineered.

18 Q. That was going to be my next question.

19 A. It's already been completely engineered.

20 Q. What has been done on the land? Without breaking it
21 down into particular tracts, generally what's been done
22 on the project?

23 A. We went ahead and engaged the services of Shoreline
24 Engineering from out in north Conway, North Main
25 Street, to go ahead and design the water, sewer, storm

1 drainage, retention. Everything to take it to permitting
2 process, and that first hundred acre tract that we bought
3 has been design engineered and permitted. I mean,
4 actually you could -- my understanding from the
5 engineering firm is we could literally, you know, get a
6 land disturbance permit in a week, which is the big
7 hurdle to cross in our business. You get a land
8 disturbance permit, you can start pushing dirt.

9 Q. Okay. And the -- so engineering is expensive. Did
10 you say about how much money had been spent on that
11 engineering?

12 A. Probably a hundred and twenty-five to a hundred and
13 fifty thousand dollars of engineering fees have been
14 spent on that tract.

15 Q. And what would they have been -- where would they
16 have been located generally in the tract, and what
17 would have been their purpose? Are we talking about
18 the water and sewer, lift stations? What are we talking
19 about?

20 A. Definitely, you know, water and sewer, and a lift
21 station. We were going to put a lift station kind of in
22 the middle of the whole tract, so hopefully it would
23 service most of the tract. You know, a lift station --
24 you know, what you're doing is gravity flowing sewer
25 to it. So if you can kind of get it centrally located, you

1 can get more lots to access to it. And of course, that
2 was designed. A big four-lane road -- there's a dirt
3 road that bisects the property called Shelley Farm
4 Road, and we were going to kind of use that as the
5 main entrance for the overall development. And it was
6 a big four-lane road that would go in and service the
7 whole piece of property.

8 Q. Okay. Getting back to the contract, and then we'll get
9 to the maps. The contract, obviously everybody's had
10 some experience in real estate, so give me a -- and give
11 the Court a capsule sketch of what the contract was
12 designed to do as far as purchasing the various tracts
13 involved, and any of the duties of both the buyer and
14 the seller in that process.

15 A. Okay. And I -- and of course, the contract will tell you
16 exactly. But we were buying it in fifty acre tracts over
17 about a four or five year period. I don't ...

18 Q. If you want to refer to that, just, you know, go ahead.

19 A. I don't remember exactly how many years it was, but
20 we were to buy fifty acres, at least fifty acres of
21 uplands every year for four or five years, and then
22 close the remaining tract at the end of that period. And
23 of course, we had to close fifty acres, you know, the
24 first year. At the signing of the contract, shortly
25 thereafter, sixty days, ninety days, whatever it was, we

1 had to close the first fifty acre tract, and which we did.

2 And also, at the -- to give a little history on the
3 contract, Dwight, I don't know if this is pertinent or
4 not. I don't know, but ...

5 Q. Yeah, do that. I might not have asked you enough
6 questions on the contract itself.

7 A. The -- Benjamin, of course, being my nephew -- and
8 we'd had some business dealings, obviously,
9 previously, like we'd talked about, had actually called
10 me, I'm guessing probably six months before we
11 executed this contract, and indicated to me he was
12 going to be selling that tract of land, which I was very
13 familiar with the whole piece from Paul over the years,
14 his daddy. And wanted to know maybe if Donald and I
15 were interested in it, and you know, said it was going
16 to be somewhere around eighteen to twenty thousand
17 dollars an acre for three hundred and some acres. And
18 I mean, that was just more money than I could stand.
19 And I told Benjamin, I said, "I appreciate you kind of
20 giving us first shot at it, but that's out of our ballpark,
21 what we can afford to do." So we just, you know,
22 didn't even have more conversation about it, and then
23 I'm saying four or five, six months later, Benjamin
24 called me and said he had listed the property with a
25 firm up at Myrtle Beach, Chris Bethea and his firm,

1 and they had some people that were interested in
2 buying it. And what Chris had proposed was maybe
3 some breakdown, fifty acres a year over a four or five
4 year period, which, you know, obviously makes it a
5 little more digestible for a small developer, like we are.
6 So I told Benjamin, I said, based on those terms, you
7 know, we'd have some interest, if he can break it down,
8 you know, close to fifty acres each year. And I believe
9 the first tract was at seventeen thousand dollars an acre,
10 and then it escalated each year a thousand dollars a
11 year, seventeen, eighteen, and nineteen. So the first
12 phase would have been eight hundred and fifty
13 thousand dollars, and the second phase would have
14 been nine hundred thousand dollars. And that was
15 something a little more affordable for us, rather than
16 having, you know, to buy the whole tract and pay five
17 and a half million dollars for it up front. So from there,
18 I told Benjamin we had some interest, and we talked
19 about it a little bit more. And he said, well, he'd get his
20 attorney, which was Gem McDowell over at the
21 McNair Law Firm, to draw up some legal documents,
22 some contracts. And we ended up with this, and we
23 beat it around a little bit and discussed it, and ended up
24 signing it. And then somewhere -- I don't know the
25 exact dates, but I think maybe within a hundred and

1 twenty days or so after the signing of the contract,
2 somewhere thereabouts, we closed the first phase.

3 Q. All right. Now, the contract calls for wetlands to be
4 determined among surveys and things like that. What's
5 your understanding of the terms of the contract as far
6 as who's responsible for providing wetlands
7 delineations?

8 A. Actually, back when we first started getting serious
9 about maybe taking it out in fifty acre tracts, Benjamin
10 had told me that -- and I guess it would be the
11 northeastern corner of the tract. No, it would be the
12 southeastern corner of the tract. That he had some
13 wetlands issues there that he would like to have a little
14 bit of time to try to resolve, that being, you know,
15 through some silviculture, some ...

16 Q. Let me go ahead and show you what's been already
17 marked as -- well, we have Defendant's Exhibit 28 on
18 this poster board here. It's been introduced as other
19 exhibit numbers throughout the depositions, but I'll ask
20 you, does this look like a survey that has been done on
21 the project?

22 A. That's correct. That's a survey we had done.

23 Q. Right. Would this help you explain what you were just
24 testifying to in any of the ...

25 A. Yeah.

1 Q. ... other locations of the tracts themselves?

2 A. Yes, sir. Actually this corner here, Conway being back
3 this way, this being 701. But the corner furthest from
4 Conway, which as I said, would probably be the -- I
5 guess that's the southeastern corner of the tract. He
6 said he had some wetlands issues in there, and he'd like
7 to have a little bit of time to try to dry some of that up
8 and get some of the wetlands, you know, reclassified as
9 uplands with some silviculture, some -- which is legal,
10 to go in and do some ditching and so forth. So he had
11 asked us not to start here. He said, "You know, start
12 anywhere you want to, but don't start here at this end of
13 the tract that's in question, actually." So we closed the
14 first phase, would be the -- I guess the northeastern
15 corner of the tract, right on 701, which would be the
16 closest to Conway. The first fifty acres was up in here.

17 Q. All right. Would that be -- I guess for the record, if
18 you could kind of read on the map these particular
19 things, and I'm afraid some of them don't necessarily
20 have exactly specific identification?

21 A. Yeah, I see. Okay. This is not a part of the survey
22 here, see?

23 Q. Okay.

24 A. This is out of the survey. This is what's basically been
25 surveyed.

1 Q. All right. So where you said they had the wetlands
2 issues, it was not part of the survey?

3 A. Not part of this survey, no.

4 Q. Right. So part of this out here ...

5 A. This is part of phase one and part of phase two. Some
6 of phase two went into this corner here, where there's a
7 little field. There's no wetlands in it.

8 Q. And that's designated Parcel A, and then a portion of a
9 tax map number, now and formerly of Bucksville
10 Farms?

11 A. Well, the Parcel A, Dwight, is this whole piece right
12 here.

13 Q. Okay. Okay.

14 A. Which is eighty-eight -- eighty-six? Is that what it is?

15 Q. Right.

16 A. This whole parcel here.

17 MR. STEVENS: I've already got Parcel A and
18 Parcel -- the first and second takedown on another
19 board here, if you want it.

20 A. Yeah. And the first phase is fifty acres of this eighty-
21 six acres.

22 Q. Right.

23 A. The second phase we took is the remaining thirty-six
24 acres out of this tract, and fourteen acres over on this
25 side of Shelley Farm Road, which is an open field right

1 here.

2 Q. Okay. All right. And I believe they're shown on some
3 other exhibits ...

4 A. The two phases of it.

5 Q. Right. Okay.

6 A. But the piece in question actually is kind of this area
7 right in through here, on the bottom of that map there.

8 Q. All right. Good.

9 A. That contains a good bit of wetlands.

10 Q. All right. Okay. I interrupted you a bit, and that was
11 just for the record, and also to maybe show the Court
12 exactly what we're talking about. But go ahead with
13 your explanation.

14 A. What explanation was that?

15 Q. Well, let's see. We were talking about the development
16 and the takedown. You were explaining the contract
17 and the takedowns.

18 A. Oh, yeah. Okay. Yeah, Benjamin asked me at that
19 time, prior to the signing of the contract, that you
20 know, if I would, start where we wanted to, but don't
21 start on this corner, this phase, this end here, because
22 he wanted to try to clear up some wetlands. And I sure
23 didn't have a problem with that. So we started here and
24 closed fifty acres here, then the next fifty acres. And
25 the third phase would have been the tract here that's in

1 question. And of course, that would have been over
2 two years later, after the signing of the contract, before
3 we were ready to close that phase. And of course, you
4 know, the contract stipulates, you know, Benjamin was
5 to provide us with a wetlands survey. And so we asked
6 for that, particularly because of the wetlands issues that
7 were there. There's some pretty serious wetlands
8 issues on this part right here. And so we asked, you
9 know, prior to closing for some -- for a wetlands
10 certification on that phase prior to closing, for two
11 reasons. One, we wanted to know what wetlands were
12 there, but the other reason, the banks, prior to loaning
13 any money on any real estate in Horry County, any
14 acreage, requires a wetlands delineation before they'll
15 even talk to you about loaning you some money.

16 Q. Right. And a wetlands delineation, what is the final
17 word or the gold standard? When is property actually -
18 - when are wetlands actually delineated that you can,
19 for lack of a better term, take to the bank?

20 A. Yeah. Well, somebody like Mr. Oates is better -- he's
21 more qualified than I am. But in our business, once we
22 get a letter of certification from the Army Corps of
23 Engineers, certifying that the map that you have
24 prepared and sent to them, which shows the wetlands
25 on the property, they come out themselves and do a

1 field study to be sure what you have delineated as
2 wetlands is accurate. And after they've evaluated, then
3 they'll write you a letter stipulating that that is a true
4 and accurate delineation of the wetlands on that
5 particular tract. And with that letter from the Corps of
6 Engineers, you can go to the bank. And that's kind of,
7 like I said, gold seal. I mean, that's the real deal.

8 Q. Will anything less than that do, such as an aerial
9 photograph, or soil maps, or anything else, do as far as
10 getting money ...

11 A. Oh, no, no, no.

12 Q. ... from a bank?

13 A. That won't do for a bank. Plus, I mean, a buyer's not
14 going to -- I mean, an educated buyer will not accept
15 that. I mean, that's just an estimation, and that's based
16 on, you know, somebody -- that's without even going
17 out in the field and walking on it. I mean, the aerial
18 photos are fairly accurate, but they sure aren't precisely
19 accurate.

20 Q. All right. Now, the first two takedowns, I believe,
21 occurred, and it's my understanding that both you and
22 Mr. Godwin's LLCs commissioned the actual survey
23 that we're looking at here today, initially. It's my
24 understanding the first two takedowns did not involve
25 any loan, and very little wetlands. Could you explain

1 that to us and how that took place?

2 A. The first phase, which was, like I say, the -- I would
3 say it would be the northeastern corner up in here, we
4 closed fifty acres, and we had some money in 1031s
5 that we were able to use to close that phase, and also
6 the second phase. We had some money, some 1031s.
7 But in between -- what happened between the signing
8 of the contract and the closing of the first phase, it was
9 a fairly short period of time. So after we got the first
10 phase closed, we commissioned Chuck Oates with
11 S&ME to do a wetlands evaluation for us, and so he
12 did and found -- well, when I say did, he did, upon our
13 request, went out and did a wetlands evaluation on the
14 phase we'd already closed, the next phase we were
15 going to close. He excluded this area here. We had
16 asked him to exclude it, because at Benjamin's request.
17 He obviously wanted us to leave that alone, to try to
18 clear up some wetlands issues in there. And we ...

19 Q. That would be the silviculture? The silviculture,
20 clearing it up ...

21 A. Yeah, that's right.

22 Q. ... with silviculture you mentioned?

23 A. That's right. That's right.

24 Q. Okay.

25 A. Which is very legal. I mean, nothing wrong with that.

1 And so when he was doing this wetlands evaluation
2 back in here for us, and we had the Corps out to
3 evaluate, they found a little piece of wetlands up in
4 here, which was the first phase that we closed, and in
5 fact, we already owned it. And so on the second
6 closing, when we closed the second fifty acres, we got
7 credit back for that little piece of wetlands there. I
8 can't remember how much it is. It's -- it's less than a
9 half an acre.

10 MR. STEVENS: Point three two, I believe.

11 A. Point three two?

12 Q. Point three two?

13 A. Yeah.

14 Q. Okay.

15 A. That little piece.

16 Q. So it's less than an acre.

17 A. So anyway, on the next closing, the second closing, we
18 got credit for that little piece of wetlands there that we
19 overlooked in the first phase.

20 Q. Okay. And the second phase took place without any
21 lender involved. Is that ...

22 A. No, we had some 1031 money as well, that we were
23 able to use to close the second phase as well.

24 Q. All right. And I believe -- were they fifty acre tracts
25 that ...

1 A. I believe almost exactly fifty acres in each tract, you
2 know, maybe plus or minus one acre or something.
3 But it was right at exactly fifty acres in both of them,
4 pretty close.

5 Q. And I believe to make that fifty, the fourteen ...

6 A. We took fourteen acres or so off that corner there,
7 which is an open field, which is obviously good dirt
8 there, with it being a field that they planted on daily.

9 Q. All right. As far as your engineering, where would the
10 engineering have been directed and projected to be,
11 such as I believe you said the lift station's about
12 approximately where on the property?

13 A. Yeah, and I'm not really sure, because I haven't seen
14 those engineering plans recently. But if I remember
15 right, right in here on this corner here of Flossie Road
16 and Shelley Farm Road, right in here on this corner is
17 was where we had proposed to put the lift station. That
18 way, we felt like we could kind of gravity flow
19 everything this way and that way, you know, from here
20 back this way, and hopefully this way, to get to that
21 one lift station, hopefully. We never really got that
22 confirmed, but the land drops off pretty sharp back in
23 here, so I'm not positive. I'm pretty sure we could get,
24 you know, whatever development we were to do in
25 here, we could get to that lift station, but I'm not

1 positive about this back in here.

2 Q. All this property is potentially what the partnership
3 would have developed, the limited liability
4 partnerships with you and Mr. Godwin?

5 A. That's correct.

6 Q. These tracts?

7 A. No, no. Not that one, now. Actually, from the contract
8 itself, it excludes, I think, forty acres, and that was
9 what was excluded right there, which is -- there's a
10 pond there, an old home place or something. But that
11 was excluded from our contract that we'd be buying.
12 Now, also, you know, with the contract, we would be
13 buying this right here as well. I mean, this survey
14 excludes that, but we would have been buying that in
15 the third phase.

16 Q. All right. Did the contract dictate where the properties
17 had to be on the takedown, or was that your ...

18 A. That was our discretion.

19 Q. That was your discretion?

20 A. The only thing -- and this was verbal. The only thing,
21 Benjamin had asked us not to start on that corner there.
22 And of course, I didn't have a bit of problem with that.

23 Q. All right. And what were some of the criteria that you
24 wanted to accomplish in these takedowns? Was the --
25 did you want the property to be contiguous, or ...

1 A. Oh, yeah. Well, yeah, contiguous as well as -- you
2 know, we'd like for it to be as close to the sewer and
3 water as possible, so we don't have to pull any further
4 than we have to, to develop it. And of course, yeah, we
5 wanted -- I mean, you know, the last big development
6 that Donald and I had done was that Castlewood there
7 on 544. That was about seven hundred lots, and we
8 just did one phase right after another. I mean, we just -
9 - so we were able to kind of continue. You know, once
10 we built a little momentum, we were able to continue
11 that momentum in each phase that we did, because it
12 was a continuation of one subdivision. So it was
13 imperative for us to keep it. I mean, we didn't want a
14 hundred acres here, and then, you know, a quarter mile
15 away, have another hundred acres. We wanted it all to
16 be contiguous, so we could continue developing one
17 phase after another phase.

18 Q. Okay. On the tract here that the actual fourteen acre
19 field came out of, and that you testified that Mr. Creel
20 wanted to do some silviculture to improve the -- the
21 purpose of that is to improve the highlands as opposed
22 to the wetlands percentages?

23 A. That's correct.

24 Q. All right. Did -- to your knowledge and information,
25 did Mr. Creel pursue that silviculture?

1 A. Not to my knowledge.

2 Q. All right. What information do you have that he did, or
3 that he might have tried to do, if any?

4 A. Well, I had some conversations with Benjamin about it.
5 I mean, he and I at the time were, you know, speaking
6 on a fairly regular basis, or talking on a fairly regular
7 basis. And he -- you know, he had indicated he'd
8 called Truitt Hardwick about getting it done, but you
9 know, just never -- he never got anything done. So I
10 mean, we were getting -- I say "we," me and Donald
11 Godwin were getting a little concerned that there was
12 no activity over there as far as trying to get any of the
13 wetlands cleared up. So we took it upon ourselves to
14 engage the services of -- I forget the name of this
15 company. Four Oaks Development Company, I think.
16 A guy named Matt Johnson had a backhoe and dump
17 truck and stuff. And so we engaged his services to go
18 in there and just kind of clean out some existing
19 ditches, in hopes of trying to dry up some of the
20 wetlands. So we did that after the closing of the first
21 phase, after about eight or nine months, and Benjamin
22 hadn't done anything toward getting it done. We took
23 the initiative to get that done ourselves. And then, of
24 course, Benjamin reimbursed us when we closed the
25 second phase, the fee, I remember like twelve or

1 fourteen thousand dollars, whatever it was. We took
2 that out of the closing of the second phase, and ...

3 Q. Did anything at that time change any of the -- were
4 there any agreements to change the responsibilities in
5 the written contract ...

6 A. No.

7 Q. ... as to whose responsibility it would be for the
8 silviculture?

9 A. No. We were just concerned nothing was getting done.
10 I mean, it was just -- I mean, the meter was running,
11 and we knew that was going to have to be the third
12 closing. And seeing nothing being done, we felt like
13 that, you know, if any -- if we were going to dry up any
14 of the wetlands, we had to hurry up and get the -- yo
15 know, get the ditches cleaned out, so the wetlands
16 would be drying up and hopefully be ready for us,
17 when we got ready to close that third phase.

18 Q. So the tract that had the wetlands problem had not been
19 surveyed, and it was to be the third takedown of you
20 and Mr. Godwin?

21 A. That's correct. Hadn't been surveyed recently, now. It
22 might have been surveyed way back in the 50s or 60s
23 or something, when Bobby Gilland owned it. I don't
24 know. But we hadn't had it surveyed.

25 Q. And the reason for that is it was contiguous to the other

1 tracts?

2 A. Exactly. Exactly.

3 Q. All right. Did the fact that it might be on 701 have any
4 appreciable weight with y'all's decision or desire that
5 that contiguous tract be the third takedown?

6 A. Not that it was on 701. I mean, we -- by that time, we
7 had already had our water and sewer worked out. I
8 mean, so the fact of this frontage here on that tract
9 being on 701, that didn't -- I mean, actually, from a
10 residential development, that's really a drawback. I
11 mean, most people don't want to live on a busy
12 highway, so that was no advantage to us. The
13 advantage to us was that it was contiguous to what we
14 had already owned, and see, our lift station was already
15 engineering designed to go right here. So we would
16 put it right at the lift station. I mean, it's literally right
17 straight across Shelley Farm Road where our lift
18 station had already been -- at that time, our lift station
19 had already been engineering designed.

20 Q. What were some of the other concerns as to close next
21 on the contiguous tract as opposed to some of these
22 tracts at the rear?

23 A. Well, one thing, of course, is the water and sewer. I
24 mean, the lift station already had been engineered,
25 planned, and designed for right there, right straight

1 across from Shelley Farm Road from that tract. Plus,
2 we had some concern that, you know, if we jump back
3 here in the back and close fifty acres that -- with some
4 of the financial difficulties that Benjamin was
5 experiencing at that time, we were concerned that, you
6 know, if we got ready to close, he may not own it any
7 more. I mean, there were just a lot of things going on
8 in Benjamin's life at that time that were not very good,
9 and we were concerned that if we -- if we didn't keep it
10 contiguous, that we may not be able to buy the piece
11 that would make it contiguous, when it got to that point
12 two years later, or whenever it might be.

13 Q. All right. And would -- you don't need to get in a
14 whole lot of detail. What were some of the financial
15 problems, or your understanding, that Benjamin might
16 be experiencing, that caused your concerns about his ...

17 A. Well, I mean, that period of time was when I was
18 loaning him some money. And when I say some
19 money, I mean, there was a time he owed me two
20 million dollars on various pieces of real estate, and of
21 which most of it he did not redeem. One tract he --
22 one, about a forty acre farm, he bought back from me.
23 But the rest of the property I ended up with. I mean, he
24 didn't -- he was not able to redeem the property from
25 me. So based on that, I knew he was having some

1 trouble. And of course, about that same time, he filed
2 bankruptcy with that North American Institute of
3 Aviation, out at the airport, a flight school he owned
4 out there. So there was a lot of things swirling around.
5 It was, you know, I mean, just -- I hated it, but it was
6 just one of the situations where Benjamin was
7 struggling financially, and it was obvious. It was
8 obvious.

9 Q. All right. Any other items on this map you would want
10 to point out to the Court, while I've got it up here? My
11 arm's getting tired.

12 A. No.

13 Q. I can bring it back in a minute. All right. Now, there
14 obviously, as a result of this contract, there was a
15 disagreement, and you and Mr. Godwin filed the
16 declaratory judgment action basically to terminate the
17 contract. Can you tell me the real impetus, what
18 triggered taking that action?

19 A. The -- Benjamin's lack of getting any wetlands
20 delineation done. I mean, it clearly stipulates in the
21 contract that he'll provide a wetlands delineation, and
22 we had several conversations -- or I say "we," I did,
23 with Benjamin about getting that third phase, the
24 wetlands delineated on it. For whatever reason, he just
25 would not do it.

1 Q. Was there any doubt in your mind that he understood it
2 was his responsibility, or that he was saying, "Well,
3 y'all did it before. You've got to do it now. On the
4 first two takedowns, you did it, so you ..."

5 A. No, I mean, he actually -- he actually brought me a
6 little estimation of a wetlands delineation -- not a
7 delineation, but an estimation of the wetlands on that
8 third phase, that I understand that he'd gotten from
9 S&ME, which is just a -- basically an infrared aerial
10 photo that they -- you know, those wetlands people use
11 just as a kind of a little guideline to go by. But there's
12 nothing accurate about it. But he brought me that and
13 asked me if I'd go ahead and close with that. But I
14 mean, you know, the banks obviously won't even --
15 and I wouldn't. I mean, I -- I mean, a knowledgeable
16 real estate developer wouldn't buy a piece of property
17 based on an aerial photo of some estimated wetlands.

18 Q. With what he showed you at that time, would that have
19 been acceptable to any bank, where you'd have to
20 borrow money ...

21 A. No bank that I deal with.

22 MR. STEVENS: Object to that, Your Honor. He
23 can't testify what would be acceptable to a bank
24 without a bank officer here.

25 JUDGE: I agree, but I'm going to let him go

1 ahead.

2 Q. I think it's within his experience and knowledge,
3 knowing what the banks require.

4 A. I can tell you -- I can tell you Bill Benson at Conway
5 National Bank had already told me -- I mean, because I
6 had had the conversation with him ...

7 MR. STEVENS: Hearsay, Your Honor. That's
8 hearsay.

9 JUDGE: It is. Just tell us what you know.

10 Q. Just tell what the banks require, what you know the
11 banks require.

12 A. I know the banks require ...

13 Q. The question would be what the banks require.

14 A. I know Conway National Bank requires a wetlands
15 delineation certified by the Army Corps of Engineers
16 before they'd loan me any money on that tract. Now,
17 maybe somebody with more financial wherewithal than
18 myself, maybe they might could swing it, but I
19 couldn't.

20 Q. And how long are wetlands delineations good for, to
21 your knowledge?

22 A. Five years, I believe, Dwight.

23 Q. Did you inform Mr. Creel of the urgent need for the
24 wetlands delineation on that contiguous tract?

25 A. Yes, I did.

1 Q. What was his response?

2 A. In fact, when he brought me the little estimation, he
3 wrote me a little note with it. I actually wasn't in the
4 office the day he came by, and he wrote me a little
5 handwritten note that, you know, he hoped I would
6 accept that, that he was going through some financial --
7 he said, "As you know, I'm going through some
8 financial difficulty, and I hope maybe you'll accept this
9 wetlands here that I got from Chuck Oates." And I
10 don't know if that meant he literally couldn't afford to
11 get it done, but at no time did he ever ask me to get it
12 done.

13 Q. Was that the estimation you referred to earlier?

14 A. Yes, that's correct.

15 Q. And I'm going to refer you to the Plaintiff's Exhibit
16 Number 1 in the Benjamin Creel deposition, and ask
17 you, is that that note you just referred to, that he wrote
18 citing what you just testified to? Go ahead. Take that
19 and read it. And it's fairly short. Go ahead and publish
20 it for the Court, if you can read all of his writing.

21 A. "Randy, this was ..." And it was dated September 2nd
22 of 2008. It says, "Randy, this was prepared by Chuck
23 Oates, whom I understand did the work on the first two
24 tracts. He also said that he chose the area surveyed
25 from maps provided to him by Southern Asphalt, and I

1 would note that this wetlands survey includes slash
2 covers the field adjacent to 701, which y'all have
3 already purchased. So please take that into account.
4 Chuck's recommendation is that this portion of the
5 property receive further ditching and time. As you
6 know, I am in a cash crunch, and would like to close
7 either on this property or another portion as soon as
8 possible. Please let me know how you wish to
9 proceed. I look forward to receiving a survey of what
10 y'all do wish to purchase at this time in the near future.
11 Sincerely, Benjamin."

12 MR. STEVENS: Your Honor, I have Defendant's
13 Exhibits 1 through 27, and I'm going to hand that to --
14 he was referring to that, so you might follow along.

15 JUDGE: Thank you.

16 Q. It's in several different places, I believe. Okay. And
17 what was your response to that letter from Mr. Creel?

18 A. Is that that -- you know, all that was, was an
19 estimation, you know, from aerial photos, and that, like
20 I had indicated to Benjamin earlier, you know, in order
21 for us to receive funding from a bank, we had to have
22 an actually certified delineation from the Corps of
23 Engineers. And somewhere along the line there, our
24 attorney, which was handling our real estate for us at
25 the time -- still is -- wrote Benjamin -- or I think maybe

1 wrote maybe Mr. Stevens a letter, verifying that very
2 thing. That you know, they provide us with a wetlands
3 delineation certified by the Corps, we would close.

4 Q. Okay. And I believe that lawyer was your son, Allen
5 Beverly?

6 A. That's correct.

7 Q. All right. And those letters have also been introduced
8 as Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3, which I
9 believe was to Mr. Creel's attorney, Mr. Stevens, back
10 in July the 11th of '08 and October the 8th of '08. And
11 I'll show you those two, and ask you to identify those,
12 and if they are the letters which you just referred to?

13 A. Yeah, that's the letters I remember having ...

14 Q. Were those letters ...

15 A. ... Allen to write on our behalf on ...

16 Q. Were those letters prepared at your direction and to
17 your attorney, and directed to be sent to Attorney
18 Stevens?

19 A. To Benjamin's attorney. That's correct.

20 Q. After review by you?

21 A. That's correct. That's correct.

22 Q. And the letters basically state what to Mr. Stevens, in
23 behalf of Mr. Creel?

24 A. That evidently your client misunderstands what kind of
25 wetlands delineation we need. We need a wetlands

1 delineation certified by the Army Corps of Engineers.

2 We got the wetlands delineation they provided us,
3 which was not certified by any governmental body.

4 Q. And does that letter also state that once that's provided,
5 you would purchase the property?

6 A. That's correct.

7 Q. All right. What's your understanding about the present
8 ownership of the property?

9 A. I understand that -- are you talking about the property
10 in question here?

11 Q. Yes.

12 A. I understand it belongs to Larry Paul. Well, I mean, in
13 fact, Benjamin's told us in his deposition that it belongs
14 to Larry Paul.

15 Q. All right. And prior to it going to Larry Paul, did Mr.
16 Creel contact, to your knowledge, either you or Mr.
17 Godwin and offer the tract to you at the same terms or
18 any other terms ...

19 A. No, sir.

20 Q. ... before selling it?

21 A. No. No.

22 Q. The contract that you basically identified, it appears to
23 have one addendum to it referring to, I think, 1031, I
24 believe you mentioned, the swap?

25 A. Yeah, that's correct.

1 Q. Is there any other written addendums or amendments to
2 that contract?

3 A. None that I'm aware of, no, sir.

4 Q. Has Mr. Creel ever requested that the contract be
5 amended in any way, since that other amendment and
6 the initial signing of the contract back in October of
7 '05?

8 A. None that I remember. Actually, this amendment here
9 -- I'm quoting from memory here. That's been
10 obviously, what, six years ago. But actually I think
11 that amendment was signed at the same time the
12 contract was signed. I mean, it was all part of the
13 original contract, I'm pretty sure.

14 Q. Were there any other negotiations with Mr. Creel
15 concerning the value of the property or repurchasing,
16 or purchasing the other takedowns, say as a result of
17 the crash in the economy, or anything like that as being
18 a factor?

19 A. Well, of course, all of it is still subject -- we did make
20 some other offers in lieu of cash, but of course, they
21 were still subject to a wetlands delineation, to trade
22 some other property with Benjamin, some property that
23 I had acquired from him through a loan default, that
24 was directly in front of the -- his residence, where he
25 lives. He had indicated he had some interest in trying

1 to acquire that back, so I had made him an offer to
2 deed him a portion of that property, which is on
3 Highway 501, just beyond Wal-Mart, for a portion of
4 the payment on this, on the third phase, once the
5 wetlands delineation was done. And he chose not to do
6 that. He said he preferred to have the cash.

7 Q. All right. Did he ever tell you at any time, and
8 particularly in this time period, in discussing the
9 wetlands delineation, that he was not responsible for
10 the wetlands delineation?

11 A. Did Mr. Creel ever indicate that to me?

12 Q. Right.

13 A. No.

14 Q. Did you ever ask him, "Why haven't you contacted the
15 Corps, and why haven't you done the wetlands
16 delineation," for whatever it's worth?

17 A. You know, there again, Dwight, this has been seven
18 years ago, and Benjamin and I, you know, were talking
19 back and forth a lot. I don't remember us having a
20 verbal conversation about why he had not. I think that
21 little handwritten note he gave me explained probably,
22 to me, the reason why he -- he said he was just in a
23 cash flow crunch, and -- but I mean, it's not terribly
24 expensive. I mean, I would guess Chuck could
25 probably give you a better idea. But I don't know,

1 maybe surveying everything, fifteen, twenty thousand
2 dollars, he could have gotten it done, I would think.
3 That's a guess, though.

4 Q. Did Mr. Creel ever mention to you or say to you that
5 he thought, based on past conduct, the fact that you did
6 the first two tracts on a cash takedown, which had very
7 little wetlands, that he deemed that a change in the
8 contract, and that you were responsible for doing the
9 rest of the wetlands delineations? Did he ever tell you
10 that?

11 A. No. He never asked me to get the wetlands delineated
12 on that third phase.

13 Q. Did he ever -- again, did he ever say that he thought
14 that you and Mr. Godwin were responsible for doing
15 that wetlands, you know, and providing it to
16 yourselves, as opposed to him?

17 A. Not to me, he did not.

18 Q. Now, I believe you and Mr. Godwin had some
19 partners, eventually, in this project. Is that right?

20 A. At a later date, that's correct. We sold some interest in
21 those first two phases to an investment group from up
22 in the New Jersey, Connecticut area.

23 Q. And that would be -- one of the principals in that group
24 would be Mr. Steve Sciaretta, whose deposition we
25 have taken?

1 A. Steve Sciaretta was -- I would call him the managing
2 partner for that group. He's the only one of the group I
3 ever -- well, yeah, he is the only one of the group I ever
4 met. I think there were a couple other guys involved,
5 but I never met them.

6 Q. And could you tell the Court briefly the agreement
7 with Steve Sciaretta's group? I believe it's 701 South,
8 or something to that effect.

9 A. Which is also us. I mean, we're part owners of 701
10 South.

11 Q. Explain that to the Court.

12 A. When I say "we," I'm talking about Donald Godwin
13 and myself own fifty percent of that. And we sold fifty
14 percent interest in the first two phases to Steve
15 Sciaretta and his group for somewhere around thirty
16 thousand an acre, was the base value that we put on it.
17 And they were -- they were in for the long haul. They
18 were prepared to stay with us for -- and you know, they
19 had copies of the contract. I mean, we wasn't -- and I
20 mean, obviously, we had already closed the first two
21 phases, so that was public record as to what we had
22 paid for it. So there was no need for us to try to hide
23 anything from them. So they knew exactly what our
24 contract or agreement was. And they were still
25 prepared -- I mean, I think that's based on his

1 deposition, they were still prepared to close the third
2 phase as soon as we could get a wetlands delineation.
3 That's one reason we had our attorney to write Mr.
4 Stevens a letter notifying him that as soon as we could
5 get a wetlands delineation, we were prepared to close.

6 Q. Okay. And what is the status with the partners, Mr.
7 Sciaretta, as a result of the wetlands delineation not
8 being provided?

9 A. Well, they were just like us. Obviously, they were not
10 prepared to close without some kind of -- I mean, and
11 they're knowledgeable people. In fact, I think he's an
12 attorney. I don't know if he practices any more or not,
13 but he's a pretty sharp guy. And obviously they were
14 not willing to close, as well, without some kind of
15 wetlands delineation. So now they're still our partners
16 in the first two phases of it, the first hundred acres.

17 Q. Have you -- without trying -- if anybody has said
18 anything, don't say that. It would be hearsay. But has
19 Larry Paul ever contacted either you or Mr. Godwin, to
20 your knowledge, concerning the purchase of this
21 property or his ownership of the property now?

22 A. He's never contacted me, and Donald I talk pretty
23 regularly. If he's contacted Donald, he didn't mention -
24 - Donald didn't mention it to me.

25 Q. And again, before the sale took place from Mr. Creel to

1 Mr. Paul, did you have any knowledge that it was
2 going to take place?

3 A. No. No, I did not.

4 Q. Had not been advised by Mr. Creel?

5 A. No, I had not.

6 MR. HUDSON: Okay. I think that's probably
7 about all I have right now. I'll turn it over to Mr.
8 Stevens and or the Court. Thank you.

9 CROSS-EXAMINATION OF MR. BEVERLY BY
10 MR. STEVENS:

11 Q. Mr. Beverly, you've testified that the contract required
12 Benjamin Creel to provide an Army Corps of
13 Engineers certification. Is that what you're telling the
14 Court today?

15 A. That Bucksville Farm was to provide a wetlands
16 delineation. That's in the contract.

17 Q. That isn't what I asked you. You testified under oath to
18 the Court just a moment ago that the contract provided
19 that Ben Creel was to provide you, prior to the closing,
20 with a certification by the Army Corps of Engineers as
21 to the wetlands?

22 A. That's my understanding, yes.

23 Q. Well, I want you to get the contract and look it over,
24 and tell me where you get that from. You and your
25 lawyer wrote back and forth about paragraph nine of

1 that contract. Let me direct you to that and see if you
2 see anything in that paragraph that says Ben Creel is
3 supposed to get a certification from the Army Corps of
4 Engineers. (CONFERRED QUIETLY WITH MR.
5 HUDSON OVER DOCUMENT) Just for the record,
6 I'm going to read paragraph nine. "Survey," that's
7 underlined. "Seller shall furnish a boundary survey of
8 the property referenced in the attached Exhibit A
9 indicating the true and correct legal description thereof,
10 delineating the boundary lines of said property and all
11 wetlands, and carving out a forty acre parcel to be
12 retained by the seller. The purchaser shall obtain the
13 takedown surveys for the acquisition of each takedown
14 of the property." Parentheses, "Takedown survey. The
15 cost of all takedown surveys will be paid for by the
16 purchaser and the seller in equal proportions." Would
17 you agree with me that that paragraph does not require
18 Ben Creel to get a certification by the Army Corps of
19 Engineers?

20 A. It doesn't specify the Army Corps of Engineers, but it
21 does say a delineation ...

22 Q. A delineation ...

23 A. ... of boundary lines and ...

24 Q. All right.

25 MR. HUDSON: Let him finish his answer.

1 A. And not an estimation. Not an estimation.

2 Q. All right. Let's go back to -- let's go back to paragraph
3 nine of the contract. Excuse me, paragraph seven of
4 the contract that deals with feasibility period.

5 A. Paragraph which one, now?

6 Q. Seven.

7 A. Either I'm missing some of the contract, evidently, or I
8 may have it ...

9 Q. You got it?

10 A. ... out of order here. Mine goes from -- the pages aren't
11 numbered. The pages go from paragraph two to
12 paragraph eight.

13 Q. Okay.

14 A. Wait a minute. I may have them out of order.

15 Q. Wait a minute. I think I have an extra copy. Hang on
16 one second. I do. Hang on one second.

17 A. I don't have a ...

18 Q. That's all right. I've got one, so you can read it along
19 with me. Here we go. (PROVIDED DOCUMENT TO
20 WITNESS) Paragraph seven. Would you read the first
21 four lines of it?

22 A. Of seven?

23 Q. Yes.

24 A. "Feasibility period. The feasibility period is the period
25 beginning at midnight on the date of which is a

1 hundred and twenty days following the seller's delivery
2 of a boundary survey and wetlands survey made by a
3 professional surveyor, licensed with South Carolina.
4 The seller is not ..."

5 Q. Parentheses? Parentheses?

6 A. Yeah. "The seller is not required to have the wetlands
7 permitted with the US Army Corps of Engineers."

8 Q. Okay. Now, let me ask you this. Who is Jamie
9 McLean?

10 A. Jamie McLean is -- he actually is employed with
11 Donald Godwin. He's a homebuilder, so he does a
12 little developing himself. He's a Conway boy.

13 Q. Okay. Do you and Donald, in your development
14 business, usually call on Jamie McLean to do things for
15 you?

16 A. Yes, we do.

17 Q. And those things include getting surveys, correct?

18 A. That's correct.

19 Q. Wetlands delineations?

20 A. He had those -- he authorized those to be done, that's
21 correct.

22 Q. All right. And you authorize him to hire and get
23 somebody to do the wetlands delineation, correct?

24 A. On what -- what are you talking about? On anything?

25 Q. In the normal course of business in your development,

1 if you ask him to go hire experts to do wetlands
2 delineation?

3 A. That's correct.

4 Q. And let me ask you this. Have y'all -- did you also
5 contact -- or did you or Donald contact James McLean
6 to get him to hire ...

7 A. Chuck Oates?

8 Q. No, not Chuck Oates. Matt Johnson with Twin Oaks
9 to do silviculture?

10 A. That's correct.

11 Q. You did that?

12 A. I -- yeah, and I say I did. Jamie might have -- I'm
13 pretty sure I talked to Matt myself.

14 Q. And you also asked Mr. McLean to contact the
15 surveyor to do the survey, correct?

16 A. That's correct.

17 Q. And you asked Mr. McLean, who works for Mr.
18 Godwin, to do -- to contact Mr. Oates to do the
19 wetlands delineation, did you not?

20 A. That's correct.

21 Q. All right. And in fact, he did that, didn't he?

22 A. He did what?

23 Q. Mr. McLean contacted Chuck Oates and reported back
24 to you that they were ready to do the work, and gave
25 you the bids on it, didn't he?

1 A. That's correct.

2 Q. All right. And you then, in turn, approximately a little
3 less than two months after you signed the contract, told
4 Ben Creel that you had taken it upon yourself to do the
5 -- to acquire the surveys and to do the wetlands
6 delineation?

7 A. I don't remember telling Benjamin that, and I don't
8 think it had been two months after the contract. If it
9 would have been two months after the contract, we
10 would have found the little piece of wetlands on the
11 first phase. But somewhere after the signing of the
12 contract, we went ahead and took the liberty of getting
13 the remaining part of the property delineated,
14 excluding that third phase, because Benjamin had
15 asked me not to get that third phase delineated, because
16 he was wanting to try to get some silvicultural
17 practices in there, and get some of ...

18 Q. I understand that.

19 A. ... of it dried up.

20 Q. I understand that.

21 A. But we didn't put -- that wasn't part of the wetlands
22 study.

23 Q. That wasn't my question. My question was, you told
24 Ben Creel that you were taking it upon yourself to do
25 the surveys and to get the wetlands delineation done,

1 didn't you?

2 A. I don't remember telling him that, no. But we did. We
3 did do that. We did do that, but I don't ...

4 Q. Would you deny, sir, that you wrote him and sent him
5 a fax showing him that which is in Exhibit 1,
6 Defendant's Exhibit 1, and that's that S&ME proposal
7 to do the wetlands delineation?

8 A. I mean, I wouldn't deny that, but no means.

9 Q. You wouldn't deny that?

10 A. No, sir.

11 Q. Well, let's see if we can't clear that up. We would
12 move to introduce number -- Defendant's Number 1,
13 Your Honor.

14 MR. HUDSON: Has that previously been
15 introduced?

16 MR. STEVENS: It's a document that you
17 produced.

18 MR. HUDSON: Has it been introduced in any of
19 the depositions?

20 MR. STEVENS: No.

21 MR. HUDSON: Well, let me see what you're
22 talking about.

23 MS. GRAZIANI: Yeah. It's Defendant's Exhibit
24 2 of Beverly's deposition.

25 MR. HUDSON: Oh, so it has been?

1 introduced before. It was my understanding all the
2 exhibits were what had been introduced before.

3 JUDGE: I'm going to let it in. Thank you.

4 (DEFENDANT'S EXHIBIT 2 WAS ADMITTED)

5 CROSS-EXAMINATION OF RANDY BEVERLY
6 CONTINUED BY MR. STEVENS:

7 Q. I'm going to look over your shoulder, if you don't
8 mind, so you and I will be on the same page, and we
9 won't have any -- this is a fax cover sheet. I'm
10 referring to Exhibit Number 2, Your Honor. Is that
11 right?

12 A. That's correct.

13 Q. And it's from Beverly Construction Company, Inc.?

14 A. That's correct.

15 Q. That's you?

16 A. That's correct.

17 Q. And it's dated November the 23rd, 2005. Am I
18 correct?

19 A. That's correct.

20 Q. And it's attention, Ben Creel. Am I correct there?

21 A. That's correct. That's correct.

22 Q. And the number of pages is six, total, including the fax
23 page?

24 A. That's correct.

25 Q. Read -- is that your writing there?

1 A. Yes, it is.

2 Q. Additional comments, read in the record what you said.

3 A. "This is one proposal for survey work and one for
4 wetlands delineation. Jamie said he now thought it
5 would be Monday before he received the other bids.
6 Have a nice Thanksgiving, Randy."

7 Q. All right. Let's look at the first document. Flip it over.
8 What is that?

9 A. This is a bid from Carolina Land Surveyors to do a
10 perimeter survey on the property out at 701 South that's
11 owned by Bucksville Farms.

12 Q. All right. Now, let's look at Defendant's Exhibit
13 Number 28. I think I can get -- I'm going to hand you
14 Defendant's Exhibit Number 31, which is the same as
15 28, but has got some markings, so we can follow along.
16 That -- the cost of that, or the bid on that, was what?

17 A. It says tax map number one sixty-nine zero zero zero
18 three zero two seven (169-00-03-027).

19 Q. No, the bid.

20 A. Oh, the bid -- the price is ten thousand, four hundred
21 dollars.

22 Q. Okay. And this map, is this the map you paid that
23 amount for?

24 A. I'm not sure. I can't verify that, now.

25 Q. All right. The legend of the map -- let me do this, now.

1 The map, when was it surveyed?

2 A. Surveyed on 10/16 of '07.

3 Q. Okay. And who is the wetlands survey -- excuse me.

4 What is the legend there?

5 A. It says, "Wetlands survey of four parcels, being a
6 portion of tax map one sixty-nine zero zero zero three
7 zero two seven (169-00-03-027), Bucks Township,
8 Horry County, South Carolina, for Donald Godwin."

9 Q. Okay. Now, this particular map has Parcel A, Parcel
10 B, Parcel C, and Parcel D. Do you see that?

11 A. That's correct, yes.

12 Q. All right. Parcel A is above the Shelley Farm Road,
13 correct?

14 A. That's correct.

15 Q. And Parcel B is below the Shelley Farm Road and to
16 the -- for the sake of orientation, the top of the map
17 being north, it would be to the east of the power line
18 easement?

19 A. That's correct.

20 Q. All right. Parcel C is north of the Shelley Farm Road,
21 and at the junction of Bucksville Road, correct?

22 A. That's correct.

23 Q. That's toward the back of the property?

24 MR. HUDSON: Can I help you hold this, and
25 maybe the judge can see it?

1 Q. He's -- I've got it right there.

2 MR. HUDSON: Is it the same -- I don't know if
3 I've got it.

4 JUDGE: I've got it.

5 MR. HUDSON: Can you see it?

6 JUDGE: Yeah.

7 MR. HUDSON: Okay. All right.

8 Q. I'm just doing this so he can see the same thing,
9 everybody on the same ...

10 JUDGE: This is the same map.

11 MR. HUDSON: Yes. Okay.

12 Q. Everybody on the same page?

13 MR. HUDSON: Right. Okay.

14 Q. Okay. And Parcel D is the back parcel, and it's on the
15 east side of Bucksville Road. Correct?

16 A. That's correct.

17 Q. Okay. Now, you had indicated earlier, on cross-
18 examination, that the tract here on the -- I'm going to
19 call it the southwestern corner, okay?

20 A. Okay.

21 Q. Was held out from wetlands delineation, so that there
22 could be some silviculture work?

23 A. That's correct. That was a request from Benjamin prior
24 to signing the contract.

25 Q. Okay. And who told the surveyor to hold it out?

1 A. I would think Jamie McLean.

2 Q. Jamie McLean?

3 A. Because we all knew not to do anything with this as of
4 yet. It would be the third phase to close.

5 Q. All right. Now, the next document in that fax to Ben
6 Creel is the proposal by S&ME, Mr. Chuck Oates. Am
7 I correct there?

8 A. That's correct.

9 Q. It's dated November the 21st, 2005?

10 A. Uh-huh.

11 Q. And it says, "Proposal for wetlands delineation, two
12 hundred and eighty acre, Highway 701." Am I correct?

13 A. That's correct.

14 Q. All right. Now, if you take out the southwestern
15 portion of that entire tract, which you said was held out
16 for wetlands delineation, that would reduce the total
17 amount down to around two hundred and twenty acres,
18 wouldn't it?

19 A. That's probably pretty close.

20 Q. Okay. Give or take an acre?

21 A. Uh-huh.

22 Q. All right. And the portion over here -- just for
23 orientation, the portion over here in the -- below
24 Shelley Farm Road, and at the junction of Bucksville
25 Road, is a portion that Ben Creel had wanted to keep to

1 himself, and it wasn't a part of the contract, right?

2 A. That's correct. I think it's referring to -- the contract
3 was about forty acres, I believe, in that tract that he
4 wanted retained, that was excluded from the contract.

5 Q. And you've written on this map, "Creel"?

6 A. That's correct.

7 Q. All right. Now, and in this contract, it says the scope
8 of services is that, "S&ME will conduct a wetlands
9 determination delineation for the proposed project site.
10 The purpose of the wetlands determination slash
11 delineation is to identify the presence and location of
12 jurisdictional and non-jurisdictional wetlands within
13 the boundaries of the proposed project," correct?

14 A. That's correct.

15 Q. All right. Excuse me. And the next page is
16 approximately seven things he was going to do to
17 identify the wetlands and delineate it, right?

18 A. That's correct.

19 Q. All right. And then the work schedule and so forth,
20 and that includes the seven pages -- excuse me, six
21 pages, including the cover fax page, to Ben Creel,
22 correct?

23 A. That's correct.

24 Q. All right. Ben Creel, to the best of your knowledge,
25 did not contact Chuck Oates. Jamie McLean contacted

1 Chuck Oates?

2 A. Are you talking about at the time of this agreement
3 here, or at any time?

4 Q. At the time you sent him this particular fax?

5 A. To my knowledge, he had never had any contact with
6 Chuck Oates, to my knowledge.

7 Q. And to your knowledge, Mr. Creel had not contacted
8 the surveyor, Carolina Land Surveyors?

9 A. To my knowledge, no.

10 Q. And do you know who the surveyor was that did it?
11 Who was the surveyor, the particular name of the man?

12 A. Sean Williams, I'm pretty sure, was the principal owner
13 of Carolina Land Surveyors.

14 Q. So then on November the 23rd, 2005, you had
15 indicated to Ben Creel that you had hired the wetlands
16 delineator and the surveyor, and they were going to go
17 do their business?

18 A. No. I was asking for his okay on it. I mean, we were
19 getting -- they were not contracts you've got there.
20 That's proposals.

21 Q. They're proposals.

22 A. And obviously, Benjamin had to share in the cost of
23 that, so that's why I was sharing those proposals with
24 him.

25 Q. And you took them out of the first and second

1 takedown, didn't you, the cost of that?

2 A. I would think we would have. I don't specifically
3 remember doing that, but we should have done that.

4 Q. You took out -- you took out the cost of the silviculture
5 in the first -- excuse me, the second takedown?

6 A. That's correct.

7 Q. That's the Twin Oaks?

8 A. That's correct.

9 Q. And I think it was somewhere around ten thousand
10 dollars?

11 A. I was thinking twelve. But anyway, ten to twelve,
12 somewhere around there.

13 Q. Let's see if we can get that correct. It was the one that
14 was nine hundred and fifteen thousand total, right?
15 The second takedown?

16 A. That sounds correct.

17 Q. I'm going to let you look at Exhibit Number 9, Your
18 Honor, Defendant's Exhibit Number 9, and I think it is
19 item five seventeen on the settlement sheet. I've
20 highlighted that. Is that where you deducted ...

21 A. Yeah, the cost of ...

22 Q. ... the silviculture cost?

23 A. Yeah. The cost for Twin Oaks for the cleaning out of
24 the ditches they did, ten thousand, three hundred and
25 twenty-two dollars and sixty cents.

1 Q. Okay. Did y'all pay him directly and then deduct it
2 from the price?

3 A. That's correct.

4 Q. Do you remember when you paid Twin Oaks?

5 A. I do not.

6 Q. Now, when you did the first takedown, did you and
7 Mr. Godwin sit down there and figure out what you
8 were going to take? Looking at the first parcel, you
9 knew you were going to take at least fifty, per the
10 terms of the contract?

11 A. That's correct.

12 Q. All right. And so was it you and Mr. Godwin that
13 decided where you were going to take the first
14 takedown?

15 A. That's correct.

16 Q. It was your decision, and your decision alone?

17 A. Our decision.

18 Q. Our decision. Excuse me. And so what did you do --
19 do you remember in the reading of the contract, it says
20 you're required to do a takedown survey and give it to
21 Mr. Creel. Am I right?

22 A. That seems right.

23 Q. Well, let's look at the contract again. Paragraph nine,
24 which is the one that you and your lawyer wrote back
25 and forth about, says, and I quote, "Purchaser..." --

1 that's you, right?

2 A. That's correct.

3 Q. "... shall obtain the takedown surveys for the
4 acquisition of each takedown of the property,"
5 parentheses, "takedown survey," end parentheses?

6 A. That's correct.

7 Q. So it is your responsibility, under the terms of the
8 contract, to provide Ben Creel with an identification of
9 what portion of this two hundred and eighty acre tract
10 you're going to buy on the first takedown?

11 A. That's correct.

12 Q. Okay. Now, I want to show you what's been marked as
13 exhibit -- Defense Exhibit 29. I don't think that's our
14 the exhibits, but can you see this pretty well?

15 A. No.

16 Q. Why don't you come down here, so that the Court can
17 look at it, too?

18 JUDGE: What parcel is that labeled as?

19 Q. That is actually, Your Honor, up there in the top
20 portion here. There's a line drawn across ...

21 JUDGE: What part? Does that purport to be
22 maybe approximately a half of A?

23 A. Yeah. A little over half of it. I think there was eighty-
24 six acres in Tract A, and that's fifty acres.

25 MR. HUDSON: That's one of these. One of these

1 should be that.

2 Q. Your Honor, I think it will help out if this -- this thing
3 was marked by Mr. Beverly during his deposition.

4 JUDGE: I got it. I got it.

5 Q. So there's approximately fifty-one point oh eight acres,
6 correct?

7 A. That's correct.

8 Q. And this was done by -- this was done by Carolina
9 Land Surveyors, again?

10 A. That's correct.

11 Q. Did you hire him and pay him?

12 A. That's correct.

13 Q. All right. And then what did you do with that plat?
14 Did you give it to Ben Creel, or did you send it over to
15 the closing attorney?

16 A. I would -- of course, that's been -- whatever year that
17 was, '06. I would think I would have given Benjamin a
18 copy of it prior to closing.

19 Q. Okay. So ...

20 A. And the closing attorney as well would have had a
21 copy.

22 Q. So you had this done, and when was this done? I think
23 it's surveyed 5/12/06.

24 A. 5/12 of '06, yeah. May 12th of '06.

25 Q. And the first takedown was in June of '06, correct?

1 A. If that's what the closing statement says. I really don't
2 remember exactly when it was, but it would have been
3 shortly after this map was done, I would think.

4 Q. I think the record reflects sometime in June, and that's
5 one of the exhibits, Your Honor, the closing statement.
6 My associate, my partner here, says 6/6/06. And that is
7 Exhibit -- the closing statement is Exhibit 7, Your
8 Honor. Now, did you ever tell Ben Creel that you were
9 moving forward with the wetlands delineation, and that
10 you were going to get the US Army Corps of Engineers
11 certification on Parcel 1?

12 A. On Parcel 1?

13 Q. Yeah.

14 A. Yeah, I think that exhibit you showed earlier confirmed
15 that.

16 Q. Well, let me let you ...

17 A. The proposal from Chuck Oates.

18 Q. Now, let's talk about your letter of April the 18th, 2006
19 to Ben Creel, where you're advising him that you want
20 to do the first takedown -- this is April the 18th, 2006 -
21 - you want to do it within thirty days. I don't know
22 why it wasn't done in thirty days, but ...

23 A. I don't, either.

24 Q. ... I want to direct your attention to this Defendant's
25 Exhibit Number 3, and I want to direct your attention

1 to the highlighted language there. Would you publish
2 that for the record?

3 A. "Our preliminary wetlands evaluation has been
4 submitted to the US Army Corps of Engineers and is
5 awaiting a field audit."

6 Q. Okay. So y'all took it upon yourself to do -- submit the
7 wetlands delineation on ...

8 A. Phase 1.

9 Q. ... the first takedown to the Army Corps of Engineers?

10 A. That's correct.

11 Q. Okay. And you told Ben Creel that, didn't you?

12 A. That's correct.

13 Q. Now, that went out -- on without a hitch. Am I correct
14 there?

15 A. That's correct.

16 Q. And you told him that you hadn't got the certification
17 yet, but if there was any wetlands on Tract 1, or the
18 first takedown, you would deduct it out of the second
19 takedown?

20 A. That's correct.

21 Q. Okay. And in fact, looking at Defendant's Exhibit 28,
22 which is the big map, there ended up being some
23 wetlands up there at the top of the tract that you said --
24 I think it shows that it is point three two acres
25 wetlands?

1 A. That's correct.

2 Q. And you asked -- how much did you take out of the
3 second takedown for that?

4 A. I really do -- I don't have any idea.

5 Q. Did you tell ...

6 A. It's on the closing statement. I mean, I don't remember.

7 Q. Did you tell Ben that you wanted a credit for sixteen
8 thousand dollars, for a full acre?

9 A. I don't remember that. But I don't know why I would
10 have. I think it was seventeen thousand, is what we
11 was paying for it. I don't know why it would have
12 been sixteen, but ...

13 Q. Well, the first takedown was sixteen thousand.

14 A. Okay.

15 Q. So you had point three two acres. Am I correct?

16 A. No, the first takedown -- according to the contract, the
17 first takedown was seventeen thousand an acre, not
18 sixteen. But I don't have the closing statement in front
19 of me. The closing statement will reflect what it is, but
20 I believe it's seventeen.

21 Q. Well, let's look at the letter that you wrote to him about
22 the second takedown. This is Exhibit -- Defendant's
23 Exhibit Number 8, Your Honor, if you want to follow
24 along. Is this a letter that you wrote to Ben Creel on
25 March the 12th, 2007 about the impending second

1 takedown?

2 MR. HUDSON: Is this -- what exhibit is this in
3 which deposition?

4 Q. It's not in a deposition. It's an exhibit that y'all
5 produced to us in the Request for Production of
6 Documents. It is the March the 12th, 2007 letter from
7 Randy Beverly and Donald Godwin to Ben Creel. I'm
8 not sure whether it was introduced in any deposition or
9 not. It may have been.

10 MR. HUDSON: Well, I will object to it. I
11 thought, for the record ...

12 MS. GRAZIANI: It's Defendant's Exhibit
13 Number 3 -- it's Exhibit Number 3 in Beverly's
14 deposition.

15 MR. HUDSON: Okay. Defendant's 3 in
16 Beverly's deposition. Just give me that information,
17 and that will be fine. That's fine. Thank you.

18 Q. Is that a letter that you and Donald wrote to Ben Creel?

19 A. That looks -- yes, that is.

20 Q. And that's March of 2007?

21 A. That's correct.

22 Q. And the second takedown was sometime in June. Am I
23 correct?

24 A. I don't know.

25 Q. Of 2007?

1 A. It would say in here, that we'd like to close on or before
2 June 9th of 2007. So I'm assuming that's probably
3 somewhere around that date.

4 Q. And what did you -- read the highlighted section that
5 you wrote Mr. Creel.

6 A. "Our wetlands evaluation has been submitted to the US
7 Army Corps of Engineers and a field audit is waiting."

8 Q. Okay. So you're telling him you had the wetlands
9 delineation done, and you submitted it to the Army
10 Corps of Engineers ...

11 A. That's correct.

12 Q. ... on the second takedown? All right. So what we've
13 got now, Mr. Beverly, is we're awaiting the third
14 takedown, right?

15 A. That's correct.

16 Q. All right. And what is the next step that is required
17 under the terms of the contract for the third takedown
18 to occur?

19 A. Well, first Benjamin's got to provide us a wetlands
20 survey.

21 Q. Well, how would he provide a wetlands survey if he
22 doesn't know what portion of it you're going to take
23 down?

24 A. Well, we made that real clear to him. We wanted to
25 take that next portion, which would be the -- from the

1 map you've got here, the bottom of Farm Shelley Road,
2 or Shelley Farm Road. And he was quite familiar with
3 that. That's why he brought that little estimation of that
4 particular tract. And we couldn't get a boundary
5 survey done, Mr. Stevens, until we knew how much
6 wetlands was there. We had to take at least fifty acres
7 of uplands.

8 JUDGE: Is that Parcel B that you're saying you
9 were going to take down?

10 Q. Why didn't you just report ...

11 A. Are you talking about this map here, Your Honor?

12 Q. ... what you were planning on taking?

13 JUDGE: Show me which one we're talking
14 about. Just hold it for him, please, so I can understand
15 it, what it is. It looks like it's B, if I understand what
16 he's saying.

17 A. No, no, no, Your Honor. It would be a portion of TMS
18 number one sixty-nine zero zero zero three zero two
19 seven (1680003027), which would be on your map, it
20 would be here. See, this is 701 out here.

21 JUDGE: Okay.

22 A. Just to kind of get you up to speed, Your Honor, the
23 first phase we bought was fifty acres up here. There's
24 eighty-six acres here.

25 JUDGE: About half of it, yeah.

1 A. We bought thirty-six -- the next phase was thirty-six
2 acres of this, and then a fourteen acre field that's right
3 here.

4 JUDGE: Okay.

5 Q. Your Honor, I jumped ahead of myself. Let me back
6 and ...

7 A. What would have been the third phase would be the
8 remainder of this, and whatever else it would take to
9 get fifty acres of uplands.

10 JUDGE: I got you. Thank you.

11 A. Just to kind of get you oriented, Your Honor, the old
12 banner plane landing strip is right there, 701.

13 Q. Let me kind of -- I jumped ahead of myself. Let me
14 back up and do the second takedown. Is this the
15 second takedown on Exhibit Number -- Defendant's
16 Exhibit Number 30?

17 A. Yeah, that looks like it, yeah.

18 Q. All right. So that we can ...

19 JUDGE: What's -- what the phase on the map?
20 What's the ...

21 Q. So that we can orient the Court on what the second ...

22 JUDGE: What's it labeled as?

23 Q. Defendant's Exhibit Number 30.

24 JUDGE: No, I mean the piece you're talking
25 about, the takedown piece.

1 Q. It's a portion of TMS one sixty-nine dash zero zero
2 dash zero three dash zero two seven (169-00-03-027).

3 JUDGE: Well, there's a couple of them got that.

4 Q. Yeah.

5 A. It's really not shown on that map that you're looking at,
6 Your Honor.

7 Q. I'm going to show you where that is in just a second.
8 This is above or north of the Shelley Farm Road, and
9 west of the Flossie Road, and above -- for the sake of --
10 for the sake of getting a quick identification, I'm going
11 to put an asterisk on this tract below the Shelley Farm
12 Road and west of the power line, so that we'll call it the
13 asterisk tract. All right?

14 A. I got you.

15 Q. And now, let's look at ...

16 JUDGE: Dwight, did you see that?

17 MR. HUDSON: I did.

18 Q. So as we look at -- as we look at the second takedown
19 as it relates to the full map, it would -- did you mark
20 the second takedown there above the Shelley Farm
21 Road and this portion which you dotted out, which is a
22 field, which is this portion here?

23 A. That's correct.

24 Q. That's the portion of it below Shelley Farm Road?

25 A. That's correct.

1 Q. And so that we get a better idea of where it may be --
2 let me hold Chuck Oates's deposition. Did you already
3 introduce those maps?

4 MR. HUDSON: They are part of his -- they
5 should be -- the originals of them should be in Chuck's
6 original deposition.

7 Q. That's what I'm going to do, so we can go ahead and
8 get it done now.

9 MR. HUDSON: Well, the Court has -- should
10 have a complete copy of them. Just identify them as in
11 the deposition.

12 Q. I'm going to use Plaintiff's Exhibit Number 5 in Chuck
13 Oates's deposition. Okay. You with me now?

14 A. Yeah.

15 Q. Okay. Looking at Exhibit Number 5, which is Chuck
16 Oates's -- in Chuck Oates's deposition, this clear -- it
17 looks like a field. Is that the area here?

18 A. Pretty much so. I mean that ...

19 Q. Not exactly ...

20 A. It might take a little bit of the woods, but I think it's
21 primarily that field. That's ...

22 Q. That's the wrong -- that's the wrong -- excuse me. Here
23 it is. That is this portion at the junction of US 701,
24 Highway 701 and Shelley Farm Road, below Shelley
25 Farm Road, correct?

1 A. That's correct. Pretty much that field there. There may
2 be a little teeny bit of woods in there, but it's primarily
3 that field.

4 Q. So my question to you here is this. You did the second
5 takedown, and you did not have a wetlands delineation
6 on that tract, that field right there, did you?

7 A. Yes, we did. As far as I know, I did. I mean, to my
8 understanding, we had it.

9 Q. Well, I understand what you're saying, that everything
10 below Shelley Farm Road on 701 was not delineated
11 by Chuck Oates?

12 A. I didn't say that.

13 Q. Well, is that a fact that Chuck Oates did not delineate
14 the area below Shelley Farm Road and the junction of
15 701?

16 A. You'd have to ask Chuck that, and he's here. You can
17 ask him.

18 Q. We'll ask him.

19 A. But my understanding is that the second phase -- we
20 got ready to close the second phase, is when we found
21 that little piece up here that was in the first phase, of
22 wetlands. So it was my understanding that this had
23 already been delineated. All of phase two had been
24 delineated, but only phase two. I mean, we had left
25 this wooded area out back here, there again at

1 Benjamin's request, because of the serious issues he
2 had with wetlands in that wooded area.

3 Q. Well, that's what I was asking. I thought you had
4 indicated to the Court earlier that everything here on
5 this particular tract that was not platted, was not
6 delineated, that was excluded from his delineation?

7 A. I don't think that was the case.

8 Q. Okay. We'll ask him that.

9 A. Yeah. I mean, it was my understanding that all of
10 phase two, which is this fifty acres here, whatever it is,
11 was delineated, and that's when we found the little
12 point three acres up here at the top. But the wooded
13 area that would be, you know, in the lower part of
14 Flossie Road was -- I mean, Shelley Farm Road, was
15 the area that was eliminated from the wetlands
16 delineation because of the serious issue of the wetlands
17 that were there.

18 Q. Okay. Now, we'll move to introduce this formally.

19 MR. HUDSON: I think it's in.

20 JUDGE: Well, it's in pursuant to your ...

21 Q. Yeah, it is.

22 JUDGE: Because deposition attachment. Is that
23 correct?

24 MR. HUDSON: That's correct. Plaintiff's 5 in the
25 Oates deposition.

1 Q. Then as I understand, from what we've covered thus
2 far, on both the first and second takedowns, you had
3 hired the surveyor to finish it. You'd hired Chuck
4 Oates to do a wetlands survey, and you went ahead,
5 and you closed. Am I correct?

6 A. That's correct.

7 Q. And you closed both times without a certification by
8 the Army Corps of Engineers?

9 A. No.

10 Q. When did the Army Corps of Engineers certify ...

11 A. My understanding, prior to closing phase two, we had a
12 certification from the Corps of Engineers. That's my
13 understanding. That's how we found the little -- you
14 know, at the closing on phase two, there was some
15 credit given back to us for that little three tenths of an
16 acre that was wetlands in phase one.

17 Q. Did the Army Corps of Engineers certify the whole
18 tract?

19 A. No.

20 Q. I'm going to hand you Exhibit -- Defendant's Exhibit
21 Number 14, which is a letter from Tommy Fennel,
22 Chief Northeast Branch of the Department of Army,
23 Army Corps of Engineers. And it's addressed to
24 Southern Asphalt, care of S&ME, Inc., and ask you if
25 that is not a certification of the entire tract of Parcel A,

1 Parcel B, Parcel C, and Parcel D?

2 A. Now, say that again? I was looking at the letter while
3 you were talking about -- Parcel A what now?

4 Q. Parcel A, Parcel B, Parcel C, and Parcel D?

5 A. And I think so. I think this probably does cover that.
6 But I mean ...

7 Q. What's the date of that letter?

8 A. November the 27th of '07.

9 Q. That was after the second takedown, right?

10 A. That was what, now?

11 Q. That was after the second takedown. The second
12 takedown was June of '07, right?

13 A. Could have been. Could have been.

14 Q. Could have been? You know that, don't you? You
15 know that, don't you?

16 A. And I'm sure it was afterwards. I'm sure.

17 Q. Okay. All right. So essentially, the Army Corps of
18 Engineers had certified everything with the exception
19 of this asterisk parcel, which y'all were trying to
20 silvilculture?

21 A. From the looks of the letter. I know they did not
22 delineate that tract there, that's referred to as the
23 asterisk tract.

24 Q. They didn't certify it?

25 A. They didn't even look at it.

1 Q. Okay.

2 A. To my knowledge, now. I'll say Chuck would be the
3 better one to answer that. But to my understanding,
4 they didn't even evaluate that particular phase of it.

5 Q. All right. Now, am I right that under the terms of the
6 contract, paragraph nine, before you go through the
7 takedown, you've got to do a survey, and -- what do
8 you call it? A takedown survey, and tell him what
9 you're going to take, correct?

10 A. That's correct.

11 Q. I want to hand you two documents that y'all produced
12 in the Request for Production.

13 MR. HUDSON: Were these introduced in any
14 deposition?

15 Q. No. Y'all produced it.

16 MR. HUDSON: Okay. All right. The same
17 objection.

18 Q. This is exhibits ...

19 MR. HUDSON: That it's the depositions of the --
20 I mean, exhibits of the depositions.

21 Q. This is Exhibits 10 and 11.

22 JUDGE: Of the same deposition?

23 Q. No, of my exhibits, Your Honor, the Defendant's ...

24 JUDGE: Okay. All right.

25 MR. HUDSON: And those haven't been

1 introduced in any of the depositions. That's really the
2 substance of my objection.

3 JUDGE: 10 and 11?

4 Q. Look like these.

5 JUDGE: 10 AND 11. Okay. I've got them.

6 Q. Now, I want to ask you about these two documents,
7 and it looks like 10 was prepared before Number 11,
8 because there's more writing. Do you see that? What
9 I'm asking you is, who did this?

10 A. I really -- I really don't know who did it, but to be
11 honest with you, I'd guess -- do you want me to give
12 me a definite answer? I don't know.

13 Q. If you do know?

14 A. I don't know.

15 Q. If you do know.

16 A. I don't.

17 Q. Okay. Who do you think may have done it?

18 A. I think that Jamie McLean did it.

19 Q. Okay.

20 A. It looks kind of like his writing.

21 Q. The reason I'm asking you, if you look at number ten,
22 you've got eighty-six acres, and then you've got what
23 appears to be the first two takedowns. You see one and
24 number two, and you've got the field marked off there?

25 A. Yeah.

1 Q. Okay. And I've got some numbers over here on the
2 left-hand side. It looks like -- I can't -- it looks like
3 "tab." I can't read that. It's got forty-two thousand,
4 eight hundred and eighty-two. Do you know what that
5 is?

6 A. I have no idea.

7 Q. Okay. Then on Exhibit 11, it looks like it's the
8 proposed third phase.

9 A. That's correct.

10 Q. Did you write that?

11 A. It doesn't look like my writing.

12 Q. Okay. Okay.

13 A. The only thing that looks like my writing is actually
14 that little fifty acres right there, looks like it might be
15 mine, but ...

16 Q. Do you think you may have been sitting down and
17 talking with somebody when this was done?

18 A. Probably. I would think so, but I don't -- I mean, I
19 don't know that, but probably so.

20 Q. All right. I just wanted to know who that ...

21 A. I don't -- I still don't know that. I'm not telling you ...

22 Q. I understand. Neither do I. I just wanted to know if
23 you knew.

24 A. My guess would be Jamie.

25 Q. Your guess would be Jamie McLean?

1 A. That's correct.

2 Q. Now, you are saying that you never had a plat of the
3 third takedown?

4 A. No. Not an actual survey off for that third takedown,
5 because didn't know how many wetlands -- how much
6 wetlands we had. According to the contract, each
7 phase had to be at least fifty acres of uplands. So in
8 order to do a survey of the third takedown, we had to
9 know how many acres of it was wet, so we could
10 include at least fifty acres of uplands in the survey for
11 the third takedown.

12 Q. What were you planning on taking in the third
13 takedown? The asterisk tract in Parcel B?

14 A. That's correct.

15 Q. Any more?

16 A. If it would have took that to get fifty acres, yes. I
17 mean, I just don't know what would have -- I don't
18 know how much wetlands was in those two tracts
19 there. Had there been fifty acres of uplands remaining
20 in those two tracts, then it would have been just those
21 two tracts. We may have had to go across Shelley
22 Road over there and taken some over there. I just don't
23 know.

24 Q. If there -- if Parcel -- the asterisk parcel in Parcel B did
25 not have fifty acres of uplands, you would have to gone

1 into Parcel C ...

2 A. That's correct.

3 Q. ... for the third takedown? Do you know whether there
4 was fifty acres of uplands in the asterisk parcel in
5 Parcel B?

6 A. I do not.

7 Q. Did Chuck Oates give you a preliminary on the
8 wetlands showing you that there wasn't fifty acres in
9 that? Do you know?

10 A. I don't remember seeing that.

11 Q. Okay. And you're telling the Court today, under oath,
12 that neither you nor Donald Godwin got a survey
13 showing the wetlands on the asterisk tract?

14 A. That's correct.

15 Q. And you're as sure of that as anything you've said
16 under oath today?

17 A. A survey of the wetlands?

18 Q. Yeah.

19 A. I'm sure of that.

20 Q. You don't have a survey by Carolina Land Surveyors
21 showing the wetlands, like you have here on Exhibit
22 Number 31, where you show the wetlands on Tract A,
23 and the wetlands back here on Tract C? You don't
24 have any survey by Carolina Land Surveyors showing
25 a survey of the asterisk tract with the wetlands?

1 A. Not to my knowledge. I've never seen that.

2 Q. Do you know whether Donald Godwin ever got one
3 done?

4 A. Well, I can't speak for Donald, I guess.

5 Q. I'm going to hand you exhibit -- Defendant's Exhibit
6 Number 12. And Your Honor, for the purpose of these
7 questions, I -- at the very back, I have blown up that
8 particular exhibit, because it's hard to read. And I've
9 blown it up to show the acreage and so forth.

10 MR. HUDSON: This was not introduced in any
11 deposition? Same objection.

12 Q. We didn't know about it until you produced it.

13 MR. HUDSON: Well, I produced it a while back.
14 Anyway, same objection, Your Honor, but I understand
15 we're letting everything in subject to objections. That's
16 fine.

17 Q. Look at Exhibit Number 12? What is that?

18 A. It looks like a -- it may be a perimeter survey, but that's
19 not a survey of wetlands, if that's what you're referring
20 to.

21 Q. What is it?

22 A. It's an estimation of wetlands, not a survey. I mean, a
23 survey will have meets and bounds on it. You know
24 that. That's just a line drawn through ...

25 Q. Who's that done for?

1 A. It says it's done for Donald Godwin. But that's not a
2 survey of wetlands. And Mr. Williams is here, and you
3 can get him to verify that after I get off the stand. But
4 that's not a survey of wetlands, as you very well know.

5 Q. I don't know. I'm just a lawyer.

6 A. I'm sure you've been around enough real estate to
7 realize that's not a survey.

8 Q. No, I'm normally in the courtroom instead of the deed
9 room, so I kind of need some help.

10 A. Well, I'm helping you, then. That's not a survey.

11 Q. Well, this particular survey was done, and it was done
12 for Donald Godwin, wasn't it?

13 A. Yes, it was.

14 Q. And you never delivered that -- did you intend for that
15 survey to be the third takedown survey?

16 A. No, I had not.

17 Q. You're saying you don't know anything about that
18 survey?

19 A. I never remember seeing this survey, no.

20 Q. Well, why ...

21 A. But there again, it doesn't matter. I mean, it's not a
22 wetlands survey.

23 Q. Well, let me ask you this.

24 A. Yeah.

25 Q. In the Request for Production of Documents, I asked

1 you, by and through your attorney, to produce your
2 entire file. And in your entire file, that document was
3 in it.

4 A. Okay. Well, I wasn't trying to hide anything from you.

5 Q. Well, I was wondering.

6 A. What do you mean, you were wondering?

7 Q. I was wondering, because you said that there was no
8 other survey.

9 A. No, you asked me if there was a survey of the wetlands
10 on phase three -- on the asterisk phase.

11 Q. I asked you if there was a third takedown survey.

12 A. And you asked me if there was an -- if I had ever seen
13 an actual survey of the wetlands on the asterisk piece.

14 Q. Okay.

15 A. And I still to this day have not seen a survey of the
16 wetlands ...

17 Q. Is that the ...

18 A. ... on the asterisk piece. Still haven't seen that.

19 Q. Does that particular -- does that particular tract, that
20 survey, show -- and let me -- I guess I need to see the
21 blown-up copy. This is Exhibit Number 32, for the
22 record, which is a blow-up of this particular tract. And
23 it is blown up. Can you tell me whether the legend
24 shows what is uplands and what is wetlands?

25 A. Not definitely.

1 Q. All right. But it does have a legend showing that what
2 is uplands and what is wetlands, right?

3 A. An estimation of what is uplands and what is -- but it's
4 not a survey, because there's no meets and bounds on
5 this property line here. All that is, is that same, that
6 photo you saw -- showed me earlier, the aerial photo of
7 the estimation of the wetlands.

8 Q. If this was ...

9 A. That is not a survey.

10 Q. This was done by ..

11 A. It could be a perimeter survey.

12 Q. This was done by Carolina Land Surveyors?

13 A. That's correct.

14 Q. Could it be that this was supposed to be the takedown
15 survey, which you never delivered to Ben Creel?

16 A. It would have been, had we got the wetlands ...

17 MR. HUDSON: Objection to the form of the
18 question.

19 A. ... surveyed. But the wetlands were never surveyed.

20 Q. Well, you had to tell him what document -- what tract
21 you were going to take.

22 A. I told him that. I told him that. That's why he brought
23 me that little aerial photo, that was an estimation.

24 Q. That document ...

25 A. Which is what that is.

1 Q. That document shows the difference between the
2 wetlands and uplands, doesn't it, acreage-wise?

3 A. It shows an estimation of ...

4 Q. Fine. An estimation, then.

5 A. That's correct.

6 Q. You didn't need ...

7 A. But that's not a survey. The wetlands were not
8 surveyed.

9 Q. You didn't ...

10 A. And like I say, Sean Williams is here. You can get him
11 on the stand and ask him. He's a better judge of that
12 than I am.

13 Q. We'll talk about that when he gets up here. But the
14 bottom line is, you didn't need to be so particular when
15 you did the first takedown, did you?

16 A. Well, we knew there were no wetlands there.

17 Q. Well, you were wrong, weren't you?

18 A. Benjamin told us in the very beginning that there was
19 an issue with that asterisk tract there.

20 Q. But you were wrong, weren't you?

21 A. And he wanted to try to let's clear up ...

22 Q. You said, "I'll take it out of the second takedown."

23 MR. HUDSON: Object to the form of the
24 question.

25 Q. You said, "I'll take it out of the second takedown,"

1 right?

2 A. If there are some wetlands in there, I'd take it out of the
3 second one.

4 Q. And that's what you did, didn't you? That's what you
5 did, didn't you?

6 A. That's correct.

7 Q. And Exhibit Number 13 is what y'all paid for this
8 particular survey, isn't it?

9 A. I wouldn't know this.

10 Q. Seven hundred and fifty dollars?

11 A. This is a bill for seven hundred and fifty dollars. No
12 question about that. But I don't know if it's that --
13 when you say that particular survey, the one we just
14 looked at?

15 Q. Yeah.

16 A. I mean, it could have been for that one. I don't know.

17 Q. Okay.

18 A. I don't have any way of -- I don't have any knowledge
19 to know that this bill is for that particular survey.

20 Q. It's right after that survey was drafted, wasn't it?

21 A. I don't even remember the date on the survey, so ...

22 Q. The survey was October the 16th of 2007.

23 A. And it's seven hundred and fifty ...

24 Q. So this bill is ...

25 A. Seven hundred and fifty dollars?

1 Q. Yeah. This bill is November the 5th, 2007.

2 A. And how much is the bill?

3 Q. Seven hundred and fifty dollars.

4 A. I know it's not for surveying wetlands. I can tell you
5 that. I mean, surveying wetlands is a lot more
6 expensive than that. To survey thirty or forty acres of
7 wetlands is time-consuming and expensive.

8 Q. Okay.

9 A. So I don't know what that bill's for, but it's not for
10 surveying thirty or forty acres of wetlands. I can
11 confirm that.

12 Q. Well, it's ...

13 A. Not for seven hundred and fifty bucks.

14 Q. It would be the next -- it would be the next billing
15 cycle after this particular plat was done, right?

16 A. I don't remember the date on that plat. I can't confirm
17 that.

18 Q. All right. And November the 5th, 2007 couldn't have
19 been for the first or second takedown, because they had
20 already occurred, right?

21 A. That's correct.

22 Q. And you'd already paid ten thousand and some odd
23 dollars for this big survey, right? For the survey of the
24 whole tract?

25 A. I think that's correct. Everything except the asterisk

1 piece would be the whole tract.

2 Q. All right. Excuse me just a second, Your Honor. Now,
3 as I understand, you took the position that the -- before
4 the third takedown, because you didn't get a wetlands
5 delineation, that the contract was null and void?

6 A. Say that again?

7 Q. You took the position that because you didn't get a
8 wetlands delineation, a survey of the wetlands
9 delineation, the contract was null and void?

10 A. That's correct.

11 Q. You actually insisted that you have a Army Corps of
12 Engineers certification before you closed?

13 A. We asked for that, but we never even got a survey of
14 the wetlands.

15 Q. Okay. So you took the position, did you not, that you
16 weren't going to perform, and you declared the contract
17 null and void. Am I correct?

18 A. At some point, yes.

19 Q. And you weren't going to deal any more with the rest
20 of the property?

21 A. Well, we had asked Benjamin to provide us with a
22 survey of the wetlands on numerous occasions, but ...

23 Q. I understand ...

24 A. ... he never did.

25 Q. ... that you said that, but you ...

1 MR. HUDSON: Let him answer. Let him answer
2 your question.

3 Q. When you took that position, you didn't make any
4 further effort to say, "Let us go ahead and close on
5 everything except the asterisk tract"?

6 A. That's correct. We would not do that. We wanted it to
7 be contiguous to what we had.

8 Q. All right. Your Honor, we would move to introduce
9 the rest of the exhibits that we've handed up.

10 (THE REMAINDER OF DEFENDANT'S EXHIBITS 1-32,
11 EXCLUDING DEFENDANT'S 2, WHICH HAD BEEN
12 PREVIOUSLY ENTERED, WERE ADMITTED)

13 Q. Now, there's a couple of things I wanted to do, ask you
14 about. You had indicated that you and Mr. Godwin
15 had entered into some kind of agreement for the
16 purchase of the first two takedowns by some other
17 company or some other person?

18 A. That's correct. A group.

19 Q. Who was that?

20 A. Steve Sciaretta is the only individual I can call by
21 name.

22 Q. Claremont South Carolina Independent Enterprises,
23 LLC sound familiar?

24 A. That sounds familiar, yeah.

25 Q. And you sold the first two takedown to him?

1 A. No.

2 Q. How did you do it?

3 A. We sold the first two takedowns to 701 South, LLC, I
4 think is the legal entity. And Claremont, Steve
5 Sciaretta and his group owns fifty percent interest in
6 701 South.

7 Q. Okay. How much did they pay you for that?

8 A. Somewhere around three million.

9 Q. Somewhere around three million. How much did they
10 pay Donald Godwin?

11 A. What do you mean, paid? That's what they paid ...

12 Q. Both of you?

13 A. Yeah. Donald Godwin, LLC and Randy Beverly, LLC.
14 It was somewhere around three million.

15 Q. Okay. And in return for that, you gave them all the
16 property?

17 A. We gave them a half interest in the hundred acres.

18 Q. What happened to the other half interest?

19 A. Donald Godwin, LLC -- well, I say that. Donald
20 Godwin and I still own -- we own half of 701 South.
21 We own a fifty percent interest in 701 South.

22 Q. You and Claremont South Carolina Enterprises, Steve
23 Sciaretta, and the Mahan brothers, I think, organized an
24 LLC when?

25 A. I don't know.

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1 Q. Sometime before the second takedown, wasn't it?

2 A. Right -- yes, sir. I think it was before the second
3 takedown, yes.

4 Q. Right. And so you knew that the second takedown was
5 going to take effect, and they paid you three million
6 dollars?

7 A. Somewhere thereabouts.

8 Q. So y'all technically ...

9 A. There's a record of what it was. I don't remember what
10 it was exactly.

11 Q. You and Mr. Godwin made over a million dollars
12 profit on those first two takedown sales, didn't you?

13 A. That sounds right.

14 Q. And retained half interest in it?

15 A. That sounds right.

16 Q. You're a pretty good businessman.

17 A. Well, I say that. No, we didn't make that kind of profit
18 and retain half interest. I mean, I think three million
19 was the total price.

20 Q. Okay. You got some dollars, though, didn't you?

21 A. We got some -- well, of course, we had some dollars
22 invested in it. I mean ..

23 Q. I understand, but you got some dollars ...

24 A. We had two million dollars invested in the property.

25 So basically, we -- yeah, we might have got some

1 money out of it, but it was money we'd already put in
2 it.

3 Q. All right.

4 A. We'd invested about a million nine already in the
5 property.

6 Q. Now, the third takedown was supposed to occur June
7 of 2008. Am I correct?

8 A. I don't remember what the date is.

9 Q. Well, if the first takedown was June of 2006, and the
10 second takedown was a year later, June of 2007, the
11 third takedown would have been approximately ...

12 A. Based on those dates, that's probably right.

13 Q. All right. Did the fact that Mr. Sciaretta, having called
14 you and told you that they weren't going to participate
15 in the purchase of the third takedown, have anything to
16 do with your decision not to go forward with the
17 purchase of the third takedown?

18 A. No.

19 Q. But he did say that, didn't he ...

20 A. Yes, he did.

21 Q. ... in Exhibit Number 20?

22 A. Well, I'd have to look at that exhibit and confirm that
23 that is Exhibit 20. But he did ...

24 Q. Am I correct?

25 A. He did -- they did decide not to participate in the third

1 takedown, based on the terms of our original
2 agreement. But we renegotiated those terms, and they
3 were prepared to close on the third phase at a lesser fee
4 than what the original contract called for.

5 Q. Okay. But what happened? Did they find out how
6 much y'all paid for ...

7 A. Oh, they knew that in the beginning. I mean, that's -- I
8 mean, it's public record. I mean, when we were
9 negotiating the close -- I mean, the deed ...

10 Q. What public record?

11 A. The deed that we -- what we paid for the first phase
12 was public record.

13 Q. It doesn't show how much you paid an acre. The deed
14 doesn't show how much you paid an acre, does it?

15 A. All you've got to do is divide the number of acres into
16 the dollar volume, and it will tell you.

17 Q. All right. But it doesn't ...

18 A. He is an attorney.

19 Q. You didn't record the contract in the courthouse, did
20 you?

21 A. No, I don't think so.

22 Q. And what they were going to pay was thirty thousand
23 dollars an acre, right?

24 A. That seems correct.

25 Q. About fifty percent more than what you paid for it?

1 A. Pretty close.

2 Q. Okay.

3 A. But they knew what we paid for it. Like I say, it was
4 public record. I mean, it was ...

5 Q. So you say?

6 A. That's correct. And of course, Steve Sciaretta probably
7 confirmed that in his deposition, I would think.

8 Q. Okay. Give me just one second. Now, you had
9 indicated Ben Creel had prepared -- or had the contract
10 prepared. Isn't it so that when you were talking about
11 it, you first decided, no, you weren't going to buy it,
12 correct?

13 A. That's when it was all a whole tract in one lump sum,
14 correct.

15 Q. And then this thing was turned over to Talbot, the
16 realtor, and you then found out that Hall Construction
17 was making bids at that time, didn't you?

18 A. I don't remember who it was, but Benjamin had called
19 me and said they had somebody that was -- that was
20 negotiating the purchase of it in phases.

21 Q. And he told you that ...

22 A. And wanted to know if we were interested.

23 Q. He showed you the contract, didn't he?

24 A. He may have.

25 Q. Okay. And you knew that the contract was originally

1 drafted on behalf of Hall Construction by Lynn

2 Stevens, correct?

3 A. I didn't know that.

4 Q. Okay. And Gem McDowell's right across the hall from
5 Lynn Stevens. Don't you know that?

6 A. I didn't know that, either.

7 Q. Okay. All right. Now, you had indicated in direct
8 examination that the contract -- or I thought I heard
9 you say that the contract called for silviculturing?

10 A. No, I never said that.

11 Q. Okay. So am I right in that the contract did not call for
12 silviculturing?

13 A. No, it did not.

14 Q. But am I correct in that the agreement between you,
15 and Donald, and Ben was to allow silviculture
16 practices to occur on the asterisk tract, to see if you
17 could dry up some wetlands?

18 A. To give Benjamin a chance to dry up some wetlands on
19 that ...

20 Q. That would benefit you, would it not?

21 A. That would be more upland for us, so we didn't have a
22 problem with giving him some time to do that. And
23 that's why we chose not to start at that end of the
24 property with our closings, to accommodate ...

25 Q. Let me ask you this ...

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1 A. ... him, and try to get some of the wetlands dried up,
2 yes.

3 Q. Okay. I'm sorry. You finished?

4 A. Uh-huh.

5 Q. Okay. Isn't it a fact that you were the one that asked
6 Ben Creel to do the silviculture?

7 A. No. I didn't even know there were some wetlands
8 problems down there. I did not know that.

9 Q. Didn't Chuck Oates bring up the issue of silviculture?

10 A. Well, when you say bring it up, I mean, silviculture ...

11 Q. Isn't he the one that suggested it first?

12 A. Not to my knowledge.

13 Q. And S&ME was hired by you and Donald, right?

14 A. Well, this was after the closing, to my knowledge.
15 They came in after we'd already closed the first phase.

16 Q. But S&ME was hired before the first takedown, in
17 November of 2005.

18 A. They were hired well before that for some other
19 properties we had done.

20 Q. Okay.

21 A. They had done some other work for us, yes.

22 Q. And had they ever -- had they ever recommended
23 silviculture on this other ...

24 A. Oh, silviculture's been talked about, you know, in our
25 profession for years.

1 Q. So it wasn't anything new to you?

2 A. It was not, no.

3 Q. Okay. So are you certain that Ben Creel was the one
4 that suggested silviculturing the asterisk tract, and not
5 you?

6 A. It wouldn't have been me. I didn't -- I honestly, unless
7 -- Benjamin brought it to me about the fact there was
8 some wetlands issues in that asterisk tract. I did not
9 know that.

10 Q. I understand that.

11 A. I still -- well, I have worked on that asterisk tract.

12 Q. But that wasn't ...

13 A. But in signing the contract, I had not walked on that
14 tract, so I had no idea that there were some wetlands
15 issues there. Benjamin brought it up to me.

16 Q. Well, we'll take it for a fact that there were some
17 wetlands issues on the asterisk tract. That wasn't my
18 question. My question was, wasn't it you that brought
19 up the silviculturing of the asterisk tract?

20 A. And I'm not saying it wasn't me. I mean, because I --
21 we had had a lot of conversation over the years on
22 other properties we owned and developed about
23 silviculture, so I was knowledgeable of the silviculture
24 practice.

25 Q. When you say "we," are you talking about you and

1 Donald?

2 A. That's correct. That's correct.

3 Q. Okay. Had you ever had any issues in purchasing or
4 selling land between you and Ben Creel that had to do
5 with silviculture before this?

6 A. No. Not that I remember. Not that I remember.

7 Q. Let me make sure that I'm absolutely -- you did not
8 give Ben Creel a survey, a takedown survey, of the
9 third takedown. Can we agree on that?

10 A. That's correct.

11 MR. STEVENS: That's all I have. Your Honor,
12 before we get any further, can take a little ten minute
13 break?

14 JUDGE: Let's do a fifteen minute break.

15 (A SHORT BREAK WAS TAKEN OFF THE RECORD)

16 REDIRECT EXAMINATION OF MR. BEVERLY

17 BY MR. HUDSON:

18 Q. All right. I just have a couple more questions, Mr.
19 Beverly. Looking again at Plaintiff's Exhibit Number 8
20 -- and of course, I think that's the overall tract in the
21 Oates deposition, all of the tracts, clearly y'all went
22 ahead and had some additional -- some of the back --
23 I'll call them the back tracts surveyed and delineated.
24 Would that be correct?

25 A. Yes, sir. We had that done. That was in that original

1 proposal that Mr. Stevens was showing me earlier for, I
2 think, ten thousand five hundred dollars for the
3 perimeter survey for all the tracts except for phase
4 three.

5 Q. Okay. Now, looking at this exhibit, it looks like there
6 was very little or minimal wetlands on those tracts,
7 those back tracts?

8 A. That's correct.

9 Q. All right. In fact, in one of them, it doesn't appear that
10 there's any?

11 A. Well, I think two of the tracts, it shows none, which
12 would be tract -- Parcel B and Parcel -- I don't see that
13 it's really labeled, or something, but I guess the tract
14 which would be kind of northeast of Shelley Farm
15 Road, and then the back tract between Bucksville Road
16 and the river. There is some wetlands. There's some
17 wetlands here and some wetlands up in here, and a
18 little piece here.

19 Q. Right.

20 A. But not very much wetlands at all on the remaining
21 part.

22 Q. Right. Right. Let me put this -- excuse me for a
23 minute, while I get the big one here. Okay. So doing
24 what you just did, we talked about this is that back
25 tract, and you just pointed out these ...

1 A. Wetlands, yeah.

2 Q. ... these wetlands here, right in there. There's a finger
3 there in the edge there, and in this tract ...

4 A. Appears from that, there appears to be no wetlands in
5 there.

6 Q. No wetlands? And why did y'all go ahead and
7 authorize the survey of those tracts?

8 A. And the wetlands delineation?

9 Q. Yes.

10 A. You know, I mean, you know, that was our future
11 phases to close. We were getting -- going ahead and
12 getting it all done while we had the people out there
13 working, to get it all done at one time, so when we got
14 ready to close, it wouldn't be a holdup.

15 Q. Was it fairly evident there was minimal wetlands on
16 those tracts?

17 A. Yeah, that's correct.

18 Q. All right. How about this tract here? And it's called
19 Parcel B. Now, as I understand, there's confusion
20 between what was submitted to the Corps, and the
21 surveyor. And can you tell us the status of Parcel B?

22 A. Right now -- and I think I remember somebody asking
23 me earlier how long the wetlands delineation letters are
24 good for, and I'm pretty sure that's five years. And
25 there's a wetlands delineation that covers that -- is that

1 Parcel B? Is that what that map refers to?

2 Q. This says Parcel B right here.

3 A. Yeah. Yeah, that parcel there, there is a wetlands
4 delineation letter from the Corps, certifying that there
5 are no wetlands on that tract. But somebody else that
6 knows more than me can certify -- can testify to later
7 on, there are some pretty serious wetlands on that tract.
8 It was kind of an oversight that, you know, when Mr.
9 Oates did the wetlands delineation on this tract for us,
10 he did not include that tract in his wetlands evaluation
11 and the delineation that he did.

12 Q. And that would have been because there was a right
13 good bit of wetlands on ...

14 A. Well, that was kind of part of that whole tract that
15 Benjamin had asked us not to get delineated, and let
16 him try to do a little silviculture and see if he could get
17 some of it cleared up. So we had asked Chuck, based
18 on Benjamin's request, not to evaluate that tract B, as
19 well as the tract between the power lines and 701 out
20 there, which is referred to on that as the asterisk tract.
21 Those two tracts there were supposed to have been left
22 out of the wetlands delineation that was going to be
23 performed by S&ME, which is Mr. Oates. And he left
24 those out. He just did that other ...

25 Q. He being ...

1 A. ... those other two parcels there.

2 Q. He, being Chuck Oates?

3 A. That's right.

4 Q. Chuck Oates left those out?

5 A. Chuck Oates, yeah. He left that out of his wetlands
6 delineation. But what happened, when the surveyor,
7 you know, somebody such as Chuck goes out and flags
8 wetlands, and a surveyor has to actually go out and
9 actually survey those wetlands, and put that actual
10 survey on a map that shows exactly where those
11 wetlands are on the ground. And the surveyor just
12 inadvertently included that Tract B, or Phase B,
13 whatever it's labeled there, in his survey that was
14 presented to the Army Corps of Engineers. And Chuck
15 just didn't recognize it was on that map that was sent to
16 the Corps. And so, you know, the Corps certified it.
17 So right now, there's a wetlands letter out there that's
18 good till -- I mean, probably another year or so,
19 certifying there are no wetlands on there. But there are
20 some pretty serious wetlands, I mean, on that tract.
21 But right now, you could do what you want to on it.

22 Q. So the certification by the Corps was through mistaken
23 inadvertence in the chain of ...

24 A. The surveyor inadvertently included that phase in with
25 his survey, the wetlands survey that he did for the

1 Corps.

2 Q. Right.

3 A. And Chuck Oates just overlooked the fact that it was
4 on that survey, when he submitted that survey to the
5 Corps.

6 Q. And the Corps themselves overlooked it as well?

7 A. That's right. That's right.

8 Q. So just basically just something included that ...

9 A. And I mean, I really think at that time -- and there
10 again, Chuck Oates can verify this better than I can.
11 But I'm assuming probably at that time, you know,
12 there was a lot of work going on, development work,
13 and they were stretched pretty thin, the Corps. So they
14 didn't come out every time and look over every little
15 piece of property you did. And I think -- probably one
16 thing, too. I think S&ME and Chuck Oates has a good
17 reputation with the Corps of Engineers. You know,
18 typically what they flag as wetlands is -- I'm assuming,
19 now, that the Corps kind of feels like they do a good
20 job, and so didn't feel like they had to look over their
21 shoulder, so they didn't come out and maybe look at
22 that quite as closely as they would have, had somebody
23 else been doing it.

24 Q. So as I understand it, your going ahead and delineating
25 and surveying these two back tracts was because it had

1 minimal wetlands, and you intended to proceed?

2 A. We -- yeah, we were going to be closing, anyway. I
3 mean, we needed it -- in fact, we've got a lot of dirt
4 stockpiled on that very back tract, whatever that tract
5 is. I don't even know -- what's that back tract labeled
6 on your map, Dwight?

7 Q. Delta D, Parcel D here?

8 A. Right there, yeah, yeah, yeah. Right at the very end of
9 Shelley Farm Road and Bucksville Road, the very end
10 there, about where your finger is. Yeah, we've
11 probably got a hundred and fifty thousand dollars
12 worth of dirt stockpiled there that we were going to use
13 for mucking and filling, when we got ready to develop
14 it. And of course, I had called Benjamin, you know,
15 before we put the dirt there, and asked just -- and he
16 said he didn't have a problem with it, I mean, to be
17 putting -- stockpiling dirt there. And of course, you
18 know, now he's got -- or Larry Paul's got a lot of good
19 dirt. I mean, it's good material. That's why we put it
20 there.

21 Q. Right.

22 A. It was material that was coming off another site, that
23 was good, good dirt, and we knew that with some of
24 the soil conditions out there, we were going to need
25 some dirt. So we stockpiled, like I say, probably a

1 hundred and twenty-five, a hundred and fifty thousand
2 dollars worth of dirt on that tract right there, on the
3 very back tract there.

4 Q. To your knowledge, was Benjamin Creel made aware
5 of the mistaken inadvertence by the Corps on issuing a
6 certification letter on ...

7 A. At some point he was, yes. Now, exactly when that
8 was, I don't know. On Tract B, you're talking about?

9 Q. Tract B, yes.

10 A. Yeah.

11 Q. All right. And what is your understanding on this, the
12 field on the asterisk tract that was included in the
13 second takedown? Why was that okay to buy?

14 A. It was uplands. I mean, they were good uplands there,
15 yeah.

16 Q. Okay. So ...

17 A. And to my understanding, Chuck had gotten that
18 certified. But ...

19 Q. Okay. So for the record, when we read back, the field
20 is pretty much -- it's a given that that's an upland?

21 A. Yeah. Yeah, it's kind of hard to dispute that.

22 Q. You don't farm wetlands?

23 A. When you're farming, that's right. When you're
24 farming in the swamps, usually. Usually. Usually,
25 when you see a field on a tract of land, it's usually

1 considered uplands. For one, you've got to have some
2 vegetation, you know, that meets their criteria for it to
3 be wetlands.

4 Q. So it's a pretty safe bet that it's got to be uplands, if it's
5 ...

6 A. Pretty much so.

7 Q. ... if it's a field?

8 A. Pretty much so.

9 MR. HUDSON: All right. Okay. I think that's
10 all I have right now. The Court might have some
11 questions as to the way we're approaching this thing, or
12 he might want to wait, or --at any time, we can do that.
13 All right. That's all I have right now.

14 JUDGE: Anything else?

15 MR. STEVENS: No further questions.

16 JUDGE: All right. Come down.

17 MR. BEVERLY: Now, I don't know who all this
18 stuff -- I think, Jimmy, the ones with the holes on the
19 left side are yours, I think. Is that -- and I think ...

20 MR. STEVENS: Probably this ...

21 MR. BEVERLY: Y'all decide. I believe -- I can
22 tell you, the ones Dwight gave me didn't have -- no,
23 that's backwards. The ones that Dwight gave me didn't
24 have holes punched on them.

25 MR. STEVENS: That's mine.

1 MR. BEVERLY: I had them backwards. I
2 apologize. And I believe this is yours, too, Dwight.

3 MR. HUDSON: Very good. Okay. We'll call
4 Mr. Chuck Oates. We're calling him now, Your
5 Honor. He does apparently have an appointment of
6 great importance, at least tomorrow, and we want to
7 make sure we get his testimony in, and we not have a
8 problem with scheduling. So we want to ensure that
9 his testimony is taken now.

10 JUDGE: Come on up. Thank you.

11 COURT REPORTER: Do you solemnly swear
12 or affirm the testimony you're about to give will be the
13 truth, the whole truth, and nothing but the truth.

14 CHARLES OATES: I do.

15 COURT REPORTER: Okay. Please state your
16 full name.

17 CHARLES OATES: Charles Clentis Oates,
18 Junior.

19 DIRECT EXAMINATION OF CHARLES OATES
20 BY MR. HUDSON:

21 Q. Okay. State your full name for the record? You got
22 his full name already? Did I hear you getting that?
23 Okay. All right. Mr. Oates, introduce yourself to the
24 Court, and tell us what you do and what those job
25 duties consist of.

1 A. Okay. Again, my name is Charles Oates, Junior. I
2 work with S&ME, Incorporated. It stands for Soils and
3 Material Engineering. I've been with S&ME doing
4 natural resources, wetlands, environmental work since
5 2002, and became the department manager for the
6 natural resources environmental division in 2006.
7 Primary daily activities include delineation of
8 wetlands, dealing with clients, business management,
9 environmental site assessments, protected species
10 assessments.

11 Q. All right. And give us the benefit of your educational
12 background and professional training that qualifies you
13 to do what you just explained that you do,
14 professionally.

15 A. Graduated high school 1988, West Florence High
16 School. Attended Francis Marion University about a
17 year, a year and a half, doing the business degree
18 program. Quickly found out that sitting behind a desk
19 is not how I wanted to make a living. Changed gears,
20 came to Horry Georgetown Technical College. I have
21 an associate's degree in forestry management. Within a
22 month or two of graduating with the associate's degree,
23 I went to work with a local firm in Conway doing
24 natural resources and wetlands work, and that was in
25 1994. And other than a short stint a round '99 and

1 2000, where I decided I was going to try the business
2 thing again, I've continuously done natural resources
3 and environmental work since '94, with that short nine
4 month stint.

5 Q. All right. And would your experience in the field
6 include projects that are what you did in this project,
7 for Mr. Beverly and Mr. Godwin, as far as making a
8 determination of wetlands on property here in Horry
9 County?

10 A. Yes. The Corps of Engineers has no certification
11 process, or any kind of professional licensing, that
12 would allow someone to -- or enable them to delineate
13 wetlands. Basically, anyone can do it, but it is
14 definitely something that with years, the more years of
15 experience that you obtain doing field surveys, truly
16 the better you get at problematic sites.

17 Q. All right. And I think the Court knows, for the most
18 part, exactly how this works. But has -- as of the time
19 that this took place, that your job duties and your
20 project on this tract of land, had it changed any
21 appreciably in what you do to determine what wetlands
22 are, when you go out and flag things?

23 A. Has it changed from then to today?

24 Q. Yes.

25 A. Yes, there has been some pretty substantial changes

1 with the US Army Corps of Engineers.

2 Q. Okay. What kind of changes, if any, were in effect at
3 the time you did this project for Mr. Beverly and Mr.
4 Godwin?

5 A. At the time that we did this work, it's still the three part
6 criteria under the Clean Water Act, to determine if
7 something is or is not a wetland. And I will try and go
8 into detail, and if I'm boring you, please stop me. But
9 you know, the details -- the three criteria are that ...

10 Q. Well, we're doing this for the record. I think the Court
11 has got some pretty good experience in the field. But
12 just for the record, we'd like to get it in the record as to
13 what your criteria is, and how you make your
14 judgments.

15 A. Yes, sir. The three part criteria, hydrophytic
16 vegetation, the soils, either hydric or non-hydric soils,
17 and then the third component is the groundwater
18 hydrology. So on a natural site, if all three components
19 are present, then it would be considered a wetland. If
20 one of the components is missing, then it's not
21 considered a wetland. At this time, when we did this
22 was under the 1987 US Army Corps of Engineers
23 Wetlands Delineation Manual. They had to prove all
24 three criteria. You had to prove hydrology was
25 present. You had to prove the vegetation. and prove

1 the soils. Manipulation of a site can greatly alter one
2 of those two. Typically, the vegetation's going to grow
3 back, but some site manipulation can enhance or
4 remove shallow water hydrology in wetlands, which
5 would be underbrushing, planted pines, silviculture
6 exemptions, cleaning out of existing ditches. However,
7 today, that third component, the hydrology component
8 has changed, with the Corps of Engineers adopting the
9 regional supplement to this manual, where they have
10 regionalized it for the coastal plain. And now the US
11 Army Corps of Engineers can assume hydrology,
12 whereas in the past we had to prove the presence or
13 absence of hydrology. Now it gives them the ability to
14 actually assume that hydrology is present.

15 Q. So it sounds like the Corps of Engineers policies and
16 procedures can change as it applies to the primary
17 criteria that have always been there, but how they
18 approach it could change, and has changed over the
19 years?

20 A. And it changes weekly, monthly, yearly.

21 Q. When they issue a certification letter, how long is that
22 good for?

23 A. They give it to you for five years, to allow you to do
24 your development. When they first started, they were
25 two years, and I believe that they were just inundated

1 with projects not being completed in two years, and
2 they extended them to five years. And five is the
3 absolute maximum that they will extend a letter out.

4 Q. What happens at the end of five years? Do you renew
5 it, or what happens there?

6 A. Historically, the Corps of Engineers would just do an
7 extension for five more years. However, with recent
8 lawsuits and changes in the way they've conducted
9 their policy, they'll take the previous determination and
10 use it as supporting documentation, but they do a
11 complete new site audit. We have to completely
12 resubmit, as if it were a new project, and they do a new
13 site visit and re-evaluate the site, using whatever
14 standards are in place at that time.

15 Q. All right. On an initial delineation and submission to
16 the Corps for certification, what do you typically
17 provide to the Corps for them to do that? And more
18 specifically, what was provided to them in this
19 instance?

20 A. The Corps of Engineers has a very minimum set of
21 requirements that they typically want. They'd like to
22 see if you have a tax map, if you can give them an
23 approximately boundary on a tax map, and then an
24 aerial photograph, some type of sketch, if you found
25 wetlands, where they are. And then their standard data

1 forms, which outline the three criteria that I had
2 previously spoke about, which would be the type of
3 vegetation you found on the site, the type of soils you
4 encounter on the site, and the presence or absence of
5 the hydrology you encounter on the site. That's at the
6 minimum. But with the Corps of Engineers, as with a
7 lot of federal agencies, the more information you can
8 provide them to make their job easier, sometimes the
9 quicker things can happen. So we've always tried to go
10 above and beyond. So typically on our sites, including
11 this one, we'll provide an accurate vicinity map, with
12 the site shown on a zoomed-out vicinity map. Zoom in
13 a little more on a USGS topographic survey, so that
14 can help see if there's any blue line streams, or kind of
15 get an idea of what the topography is on the site. Then
16 we'll supply an aerial photograph with the approximate
17 boundary on it, and the approximate location of
18 wetlands we may or may not have found on the site.
19 We'll do a soils map overlay to show them the type of
20 soils that the NRCS, or the Natural Resource
21 Conversation Service, mapped the areas as. And then
22 these are the fifth piece, or the fifth figure that we'll
23 include, is a national wetlands inventory map, which is
24 the US Fish and Wildlife Service, in 1994, did a broad
25 brushstroke of the US to determine how much wetlands

1 were left, and at what rate were wetlands disappearing
2 from the US. And we'll do an overlay on the property
3 boundaries with that, as well.

4 Q. So the Corps uses all of those, all that information ...

5 A. All the pieces of information I mentioned are readily
6 available to the public. So typically, what we found in
7 the past, is actually those are pieces of information the
8 Corps will go to and grab prior to conducting a site
9 survey or site visit, to get an idea of what they may
10 encounter when they get in the field. So that's -- we
11 provide that information to them, just to expedite the
12 process, where they're not out on the various different
13 websites trying to pull that into their file.

14 Q. From the time of submission to the Corps of all the
15 documents and information you've just told us about,
16 back in the time periods in question that we're dealing
17 with here today, how long would it typically take to get
18 a certification from the Corps, giving you five years to
19 develop the property?

20 A. The best that I can remember, 2006, 2007, and 2008
21 were boom years. I know for our company, that was
22 when the economy was on its best, I guess, before we
23 got where we are today. And the Corps of Engineers
24 had opened up an office in Conway, a field office, to
25 try and relieve some of the pain from the Charleston

1 office having to travel up here and do these site visits.
2 So they did have a very small field office in Conway,
3 in North Conway, but the Charleston office was still
4 handling all the submissions of reports, all the final
5 paperwork. So by the time we finished our work, in
6 order to engage the Corps of Engineers, we had to mail
7 everything to Charleston. Charleston would collect
8 enough weekly packages that they felt that they would
9 ship back to Conway. Which oddly enough, was six
10 miles from my office, but I still couldn't hand-deliver
11 it. So it goes to Charleston, logs in, comes back to the
12 Corps, gets assigned to a project manager, sitting on
13 his desk in numerical order, on a date stamp on when it
14 was -- when they received it. So they're working their
15 way down through their stack. So the timeframe can
16 really be dependent upon, number one, the project
17 manager and his workload, and number two, how
18 efficient that project manager is as going through his
19 workload. This particular site -- and again, in 2006,
20 2007 they were getting inundated with files because of
21 all the development. And in Horry County being a
22 coastal county with wetlands, developers know that
23 they want a Corps letter, a letter or some certification
24 from the Corps prior to starting development on
25 properties, because of where we are situated in the

1 landscape. So they were pretty backed up, and it could
2 take -- six months, eight months, to a year was not
3 uncommon in 2006 through 2008.

4 Q. Now, you're in your profession, and obviously you
5 would deal with the Corps by submitting the packages
6 on a regular basis, it sounds like. Is the Corps -- do
7 they entertain requests or provide information to
8 developers or individuals? In other words, could you
9 go to the Conway office, or a developer go to the
10 Conway office and get information or submit any kind
11 of request?

12 A. Yes, they could submit a -- are you talking about -- I
13 mean, I guess can I ask you, a request for their
14 approval of wetlands, something ...

15 Q. Right.

16 A. ... they'd come in and say this is wetlands? Yes. Yes,
17 sir. Anyone can submit, because there is no
18 professional labor licensing board, or anything
19 associated with wetlands delineation, yes, anyone -- a
20 homeowner or anyone could submit a request to the
21 Corps of Engineers.

22 Q. Okay. And you, through experience, have dealt with
23 the Corps many times prior to this situation we're
24 dealing with here today. Would that be a fair
25 statement?

1 A. Yes, sir. Back to 1994.

2 Q. All right. Tell us about how many times you have
3 delineated properties, particularly similar properties in
4 Horry County, and submitted packages to the Corps
5 prior to this particular one?

6 A. This was submitted to the Corps in 2006, so at one
7 time the company I was with, we were averaging
8 between eighty and a hundred delineations per year.
9 So from '94 -- it's not uncommon to say maybe over
10 four hundred delineations that I had completed and
11 submitted to the Corps of Engineers.

12 Q. Would you have considered you had a good working
13 relationship with the Corps of Engineers?

14 A. I did then, and I do now.

15 Q. Would they always come out and check behind you for
16 submissions?

17 A. In the early '90s, not necessarily. They did not. But as
18 time went on, and the market increased, and more
19 people started doing delineations, then they did start
20 doing more site visits for everyone.

21 Q. Okay. All right. Now, we -- you've been deposed in
22 this case?

23 A. Yes, sir.

24 Q. And so you've been asked a lot of questions, and seen
25 most of the documents, and that sort of thing. But I'll

1 ask you about this plat here. It's Exhibit Number 28,
2 and this is the one in which you delineated several
3 tracts on here. Is that correct?

4 A. Yes, sir.

5 Q. All right. Can you tell us and point out to the Court
6 which ones you delineated, and what you delineated
7 here?

8 A. Can I come around to ...

9 Q. Sure. Come on down and just point it out to him. He
10 has a copy of the plat there.

11 A. The sites that I personally walked during the
12 delineation process is Parcel A, Parcel C, and Parcel D,
13 and Parcel F.

14 Q. All right. And ...

15 A. And a portion of what we're calling the asterisk tract.

16 Q. Okay. I'm going to mark ...

17 A. I don't see any asterisk.

18 Q. I'm going to mark an asterisk on Number 28 as well. Is
19 that okay? I'm not sure I ...

20 MR. STEVENS: What did you ask me for?

21 (LAUGHTER)

22 Q. All right. Tell me what you were saying before I think
23 I might have interrupted you on the asterisk tract?

24 A. What we represented to the Corps of Engineers in our
25 submittal, which was my Exhibit 10 during my

1 deposition, was all of Parcel A, Parcel C, Parcel D, and
2 then what was included as the agriculturally open field
3 area on the asterisk tract.

4 Q. That was submitted to the Corps?

5 A. That was submitted to the Corps of Engineers for their
6 approval.

7 Q. All right. And that approval letter was Number 10?

8 A. Number 11.

9 Q. Number 11. That's right. The submission was Number
10 10.

11 A. Yes, sir.

12 Q. All right. Now, tell us about -- since you're involved in
13 -- were involved in this, about Parcel B. And I
14 mentioned that to Mr. Beverly on the stand, about
15 maybe some inadvertence or confusion with that
16 particular tract.

17 A. Do you want me to do it here?

18 Q. I think you can take your seat.

19 A. We did not -- well, if I could back up, once we submit
20 it to the Corps of Engineers, the Corps is not required
21 to have the consultant available for their site visit. So
22 by submission of our report, it gives them permission
23 to go on the property and audit our work. So when we
24 submitted our findings in April the 19th to the US
25 Army Corps of Engineers, sometime shortly thereafter

1 they conducted a site visit on their own, without me
2 being there, which typically doesn't happen, but it's my
3 understanding they were on route to another site. They
4 grabbed all the files they had for that road trip and
5 visited the site, at which time, at a later date, I received
6 a call from Mr. Ralph Huff of the US Army Corps of
7 Engineers, who was the project manager, stating that
8 he did not a hundred percent agree with my
9 determination on Parcel A, that during their
10 observation and their walkthrough, they observed a
11 small area near the property line that they felt like still
12 had characteristics to be considered a wetland. Part of
13 that was they had previously done work on the adjacent
14 property, and this was just a continuation across the
15 property line. Mr. Huff showed me on a map the area
16 that he wanted me to go back and look at. So shortly
17 after that is when I went back and delineated the very
18 small -- and I think, without being able to see it from
19 here, you described it as the point three two acre
20 wetland in Parcel A. So once I received this plat to
21 submit to the Corps of Engineers -- and this is all going
22 back to your question about the inadvertent addition of
23 Parcel B ...

24 Q. Right. Right.

25 A. ... I received a stamped, signed, survey plat to hand-

1 deliver to the Corps of Engineers for them to complete
2 their file and ship it to Charleston for signature
3 authority. The primary thing I did, which is a fault on
4 my part, was make sure that that small wetland finger
5 was accurately depicted on Parcel A. I did not catch
6 the fact that Parcel B was inadvertently -- had a bold
7 line around it. In the hurry of things, as we were trying
8 to satisfy our client, we took it to the Corps of
9 Engineers, and they, in turn, issued us a jurisdictional
10 determination letter based on the plat. I think everyone
11 may be aware, but just in case you're not, the only way
12 the Corps of Engineers can tie my work down to the
13 real world is by signed, sealed, surveyed plat.
14 Accurate boundaries, distance, bearings, callouts. If
15 there's ever a problem in five or ten years, they'll go
16 back to that survey, hire their own surveyor to come
17 out and re-stake an area. So once the plat was
18 delivered to them, I can't assume what they did, but
19 there's no reason they would have walked Parcel B,
20 because I never showed Parcel B on anything I
21 submitted to them, which was -- our submittal to the
22 Corps did not include Parcel B. So I think they missed
23 it as well. I can't -- they shouldn't have walked it,
24 because it was nothing that we submitted. But -- so it
25 was, on our part, inadvertently added, and the Corps

1 approved it. So I personally have not stepped foot on
2 Parcel B. It's not something that we were originally to
3 look at. That was something that we were originally
4 told not to go into, which we didn't.

5 Q. Okay. And doing your work out there, Mr. Oates, who
6 hired you to do the work?

7 A. Jamie -- well, Jamie McLean was the contact person
8 that I had dealt with, on future projects or projects prior
9 to that, and this project as well.

10 Q. Right. Who was your understanding that Jamie
11 McLean was working for, representing, and how was
12 the final bill ...

13 A. Right. Jamie didn't represent himself as working for
14 Southern Asphalt. I think that was my assumption,
15 because they were an approved client in our office.
16 They already had existing client numbers, and they
17 were in our system. So knowing that Jamie worked for
18 Southern Asphalt or Donald Godwin, I in turn assumed
19 and wrote it up as Southern Asphalt, and sent it to
20 Jamie.

21 Q. All right. So Jamie McLean is the one that you
22 basically got your instructions from out in the field, as
23 to what to go forward with?

24 A. Jamie was my sole point of contact throughout the
25 entire project.

1 Q. Okay. Did you ever have any contact with Benjamin
2 Creel at any point during this -- what we're here today
3 about, the survey and the subsequent attempts at
4 rectifying any wetlands?

5 A. Mr. Creel and I didn't speak about the project until
6 2008, after we had already completed our wetlands
7 work and obtained the Army Corps of Engineers letter.

8 Q. And could you give us the benefit of when that
9 occurred and what was said?

10 A. With the meeting with Mr. Creel?

11 Q. Yes.

12 A. Do you mind if I look at my notes? This is ...

13 Q. Absolutely.

14 A. ... where I wrote from my ...

15 Q. Refer to anything, and ..

16 A. The deposition was a long time ago.

17 Q. ... show opposing counsel, if he needs to look at it, as
18 well.

19 A. Okay. I just have some dates from my ...

20 Q. Do you have a copy of your deposition as well?

21 A. I do. And it's easier to just -- there's some dates I
22 extracted from that.

23 Q. And I have some exhibits here.

24 A. But sometime in around -- we believe it was August of
25 '08, Mr. Creel had asked me to prepare to do a

1 wetlands delineation on what we're calling, I guess, the
2 asterisk tract, for the Court's order. But it was -- he
3 asked me to come by his office and let's look at doing a
4 wetlands delineation on the asterisk tract, which I did.
5 I went by his office. Prior to that, Mr. McLean had
6 asked me to give him a thumbnail sketch of what we
7 thought the wetlands may look like on the asterisk
8 tract, so we did, and that was in June. So in June of
9 '08, Mr. McLean had asked me to provide an
10 approximation sketch of the land from the power line
11 right-of-way up to 701, over to the agricultural field.
12 And we did. We did a little thumbnail sketch, utilizing
13 the soil survey, the Fish and Wildlife survey, some
14 aerial interpretations, and provided that to Mr.
15 McLean. And then that was in June of '08.

16 Q. I'm not sure if you have a ready reference to any of the
17 exhibits to your deposition, but they're sitting here in
18 order, if you can use in explaining your answers, please
19 refer to any of these exhibits, if you could. All right.
20 And go back again, and let's see. You met with Jamie
21 McLean before you met with Benjamin Creel about the
22 asterisk tract?

23 A. And I apologize for backtracking. But once we receive
24 the Corps of Engineers certification letter and supply
25 that to our client, we've completed all our contractual

1 agreements. We would close our file up, and it's put
2 away, and we'll basically move onto the next project.
3 So Mr. McLean contacted me after that was done,
4 which we were -- the Corps of Engineers letter is dated
5 November the 27th of '07. So that letter, we probably
6 actually received it on, through US mail, maybe three
7 or four days later. So we were right there at the
8 holidays. So a copy of that letter was, you know,
9 provided to Mr. McLean, and we closed our file up, put
10 it up, and started with our next project. In June of 2008
11 was when Mr. McLean asked me to give them an
12 approximation or a sketch of what we thought the
13 wetlands may be like on the asterisk tract. So we went
14 and pulled the file back out again. And to better
15 familiarize ourselves with what the boundary situations
16 were with the asterisk tract, we pulled out the survey
17 that was provided by Carolina Land Surveyors, that the
18 Corps of Engineers approved. That's when the -- we
19 found out that Tract B was inadvertently added in. I
20 mean, literally, the file was tucked away, and almost a
21 year later was when we found out that Tract B was not
22 supposed to be included in the Corps letter, but it was.
23 We brought that to Mr. McLean's attention. When we
24 met with Mr. Creel, he asked me to do a wetlands
25 delineation on the front tract. So I went by Mr. Creel's

1 office in Conway and provided him with a copy of ...

2 Q. When would this have been? I'm just trying to keep up
3 with this.

4 A. August of '08.

5 Q. August of '08?

6 A. Roughly a month after Mr. McLean had asked me to
7 do a thumbnail sketch.

8 Q. Good. All right.

9 A. And the thumbnail sketch that I'm talking about is
10 basically a wetland approximation, will be Plaintiff's
11 Exhibit Number 5 from my deposition, which shows
12 the majority of the wooded area as potentially being a
13 wetland.

14 Q. All right. Is that a delineation, official delineation, or
15 would that be an official document, or just an
16 estimation -- of the Corps, or just an estimation?

17 A. It's an estimation of what my personal opinion of
18 wetlands are, based on remote sensing. There's no
19 field-truthing on this. This was utilizing the soil
20 survey, and then on Exhibit Number 6, is the US Fish
21 and Wildlife Service overlay, as well. And that's just --
22 there's no one hundred percent accurate, sole source
23 piece of information. So when we start overlapping
24 these pieces of information, you get an idea of what
25 you may encounter in the field. So ...

1 Q. That Exhibit 5, that would -- would that have the same
2 weight as a certification from the Corps of Engineers?

3 A. No, sir.

4 Q. It would not?

5 A. This has never been submitted to the Corps of
6 Engineers. This is just my opinion.

7 Q. Okay.

8 A. Exhibit 6, which is similar to Exhibit 5, but it does
9 include the property on the south side of the power line
10 right-of-way, which was inadvertently added in during
11 this survey. This was -- once we alerted Mr. McLean
12 and everyone that -- everyone, I mean Mr. Creel -- that
13 there was wetlands, potentially wetlands on that tract
14 that the Corps certified as all uplands, the question
15 came up, "Well, what do you think? How much is it?"
16 And again, without field-truthing, utilizing aerial
17 photographs, we came up with an idea of what may
18 have been missed by the Corps of Engineers.

19 Q. All right. Which of these ...

20 A. So that was Exhibits 5 and 6.

21 Q. Which of these exhibits were supplied to Mr. Creel in
22 August of '08?

23 A. I am assuming -- and I don't know, because I don't
24 have records. But -- and Mr. Creel may be able to
25 answer that. But I know Exhibit 5 was the one that I

1 prepared for Mr. McLean, so I probably would have
2 carried this to Mr. Creel. There was no additional
3 work done. I just showed him and actually told him
4 this was what we had supplied to Mr. McLean.

5 Q. That exhibit seems to have some language blocked out,
6 superimposed over the map itself. What is that placed
7 there for? Essentially, what does it say?

8 A. Well, developers -- a lot of developers will do a
9 thumbnail sketch of the site just to see if it's even worth
10 looking at to go further. And this is basically some
11 language that we put in to let people know that this is
12 just an approximation. It's not been sent to the Corps
13 of Engineers. It expresses -- it has no warranty or no
14 other warranties are expressed or implied, and the
15 client recognizes the US Army Corps of Engineers has
16 the sole authority to determine the presence or absence
17 of wetlands. That this is just basically our opinion of
18 what may or may not be on the site, but it does -- it
19 states it's just an approximation.

20 Q. Prior to that August '08 meeting with Mr. Creel
21 involving those -- that exhibit, or possibly those two
22 exhibits, did you ever, prior to that, previously have
23 any conferences or meet with Mr. Creel concerning
24 any silviculture or anything on the asterisk tract, or
25 anywhere else on the tracts?

1 A. I had none.

2 Q. You did not?

3 A. No, sir.

4 Q. Did you have any contact from him at all, to your
5 knowledge?

6 A. No, sir.

7 Q. Did you have any contact from anybody that
8 represented that they were working for Mr. Creel, and
9 wanted to talk to you about silviculture, or what to do
10 about minimizing the wetlands on the asterisk tract or
11 the other tract?

12 A. I had not. No, sir.

13 Q. Well, can you give us the benefit basically, to the best
14 of your recollection -- I know it's been quite some time
15 -- of what was discussed on August the 8th with Mr.
16 Creel, when you were talking about the estimation that
17 you've identified as Exhibit, I believe, 5?

18 A. It was Exhibit 5, and he may have seen Exhibit 6,
19 because it was dated August of 2008.

20 Q. Okay.

21 A. So I'm not sure. They're both similar, except for
22 Exhibit 6 shows the additional land on the other side of
23 the power line right-of-way, which was already -- but
24 Exhibit 5 is what I believe that I probably showed him,
25 and it shows the majority of the wooded areas being

1 wooded. And I made some recommendations to Mr.
2 Creel prior to going in and having us just actually go
3 straight out and delineate the wetlands, actually flag
4 the wetlands. Because we had just come out of a pretty
5 dry winter in '06, and the area, while it still had the
6 hyrophytic vegetation, and it was mapped as hydric
7 soils and wetlands by the two remote sensings, it was
8 my recommendation that while it was still dry, to go in
9 there and thin the timber, harvest some of the timber.
10 And at that time, there was a practice that was very
11 popular, and it was underbrushing or mulching the
12 understory. Basically, when you're finished, you have
13 sparsely spread mature trees, and then you come in
14 after the logging operating with a mulching machine,
15 and it's very park-like, open, and it allows the property
16 to, for lack of a better term, breathe. It's not choked in
17 by all the thick vegetation. It allows the wind to blow
18 across it, sunlight to beat down on it. Typically, on
19 agricultural tracts, you'll -- once you start that process,
20 you can find some of the older ditches that may have
21 been in there, and try and go in and clean out some of
22 those ditches, which is legal under the silviculture
23 exemptions, to clean the ditches out and just regain
24 some flow on the property, and take a look at it later in
25 the summer and see if it has dried out any.

0208

1 Q. Do you folks, in your company, do that?

2 A. No, sir.

3 Q. Silviculture, you do not?

4 A. No, sir.

5 Q. You stick with the delineation and the hydrology of the
6 -- marking the hydrology of the plant life, and that sort
7 of thing, and getting delineations finalized in
8 conjunction with a survey?

9 A. Yes, sir.

10 Q. Okay. All right. What was Mr. Creel's -- did you
11 make those recommendations to him?

12 A. I did make them directly to Mr. Creel, in his office.

13 Q. And what was his response?

14 A. I don't -- I honestly don't recall, but I do remember
15 leaving the meeting thinking that he was going to talk
16 to some folks about going in and doing some work on
17 the site.

18 Q. All right. Did you make any observations, or were you
19 able to make any observations of the area, of this
20 particular tract which you and Mr. Creel were talking
21 about, at any time subsequent to August the 8th --
22 August of '08?

23 A. Only by driving down US Highway 701 South, either
24 coming or going from Georgetown, and just glancing
25 over on pass-bys to see if anything were being done.

1 Q. All right. Were you able to tell if any activity,
2 silviculture activity, was being undertaken on the
3 property at anytime that you observed?

4 A. From the highway, I could not.

5 Q. Did you ever go back and walk on the property?

6 A. No, sir. I didn't have permission to walk on the
7 property. We were asked to stay out.

8 Q. Okay. This little fifteen acres in the second takedown
9 gets a little confusing, because it was across the road
10 there. But would you say that that's been delineated
11 officially or not? You tell me what you've done.

12 A. Fifteen acres being the agricultural field area?

13 Q. Yes, the field, the agricultural field.

14 A. It has been delineated, correct.

15 Q. And who did that, and how was that done?

16 A. I did the field. I walked the field and delineated the
17 field to determine that no wetlands were in the field.

18 Q. All right. So it has been?

19 A. The field has, yes, sir. And that was based on my
20 Exhibit 10, which we -- our Corps of Engineers
21 submittal, you can see that that was included in what
22 we asked the Corps to look at.

23 Q. Okay. Let me make sure that we've -- in explaining the
24 process out here, I want to ask you, in addition to 5 and
25 6, your Exhibits 1, 2, 3, and 4, and 7, and 8, do they

1 help explain anything that -- in your listening to the
2 testimony today, that might be a big confusing, or that
3 we have misinterpreted? Is there any additional
4 information here that you can use to explain to us some
5 of the intricacies of the delineation process, maybe,
6 that happened on this project? It's kind of an open
7 question, but ...

8 A. It is a very open question, but I'm sure that on
9 Plaintiff's Exhibit 1, there's a handwritten note by Mr.
10 Casey Wollard, who works in my department, that says
11 ...

12 Q. Tell us what that means. That's good.

13 A. Mr. Casey Wollard is an employee of S&ME, works in
14 my department, and assists me with wetland
15 delineations. Going back to the contract stage of this
16 property, Mr. McLean provided us an aerial
17 photograph with an approximate boundary on it and
18 asked for a proposal. We provided a proposal on
19 November 21st, 22nd, 2005, right at the holidays. We
20 received authorization to proceed by Mr. McLean on
21 January the 5th of '06, shortly after we returned from
22 our holidays. It was my advice at that time to Mr.
23 McLean that we could hold off till the spring before we
24 start any field observations, just for the benefit of the
25 growing season to start, and for the property to be in

1 the best shape it could be in. We started our field work
2 sometime around April the 10th, completed and mailed
3 everything to the Corps of Engineers around April the
4 19th. Prior to starting that work, after we told Mr.
5 McLean it would be better to wait until the springtime
6 to do the site visits, we did make a visit to the site on
7 this date right here, which is March the 8th of '06, at
8 which time Mr. McLean, myself, and Casey Wollard
9 were standing by the side of Highway 701, before we
10 stepped in there to see what the site looked like. And
11 Mr. McLean helped us or directed us in outlining a
12 piece of property not to delineate, that we were not to
13 go into, because the landowner was going to be doing
14 some work of their own. At which time, we created a
15 figure that we stuck in our file, which is Plaintiff's
16 Exhibit 1, and then subsequently Plaintiff's Exhibit 2,
17 where we reshaped the property that was now going to
18 be our subject property boundary, and where we were
19 not to go, basically. Exhibit 2 has some hash marks,
20 where we pretty much indicated to ourselves, let's not
21 walk in there. That's not where we're supposed to be.
22 So that was March the 3rd of '06, and we agreed we
23 were getting pretty close to springtime. Let's go ahead
24 and pull the trigger, and start the field work, which we
25 did roughly a month later.

1 Q. Very good. Okay. All right. Thank you. I think that
2 covers it very well. The meeting that you had in
3 August of '08 with Mr. Creel took place where? In
4 your office?

5 A. In Mr. Creel's office in Conway.

6 Q. In Mr. Creel's office?

7 A. On Main Street.

8 Q. All right. Did you have any other conferences or
9 conversations, other than meeting with Mr. Creel, after
10 that?

11 A. No, sir, unless it was a telephone call. Nothing that
12 was -- that we met about, no, sir.

13 Q. All right. To your knowledge, did he ever hire
14 anybody or contact anybody to do any of the
15 silviculture or activities that might minimize the
16 amount of wetlands on the asterisk tract and the
17 adjacent tract?

18 A. Not to my knowledge, no, sir. We were never
19 contacted.

20 MR. HUDSON: Okay. I think that's all I have. I
21 think Mr. Stevens might have a few questions, and then
22 I might have a few more. Thank you.

23 CROSS-EXAMINATION OF MR. OATES BY MR.
24 STEVENS:

25 Q. Just so I understand this, the first person that contacted

1 you was Jamie McLean?

2 A. Yes, sir.

3 Q. And he advised you that he was representing or he was
4 talking for Donald Godwin or Randy Beverly?

5 A. He did not advise me of that. No, sir.

6 Q. Well, you found that out sometime during the period of
7 time that you were working, didn't you?

8 A. At the end of the project, actually.

9 Q. Okay. Did you know who -- did they tell you that they
10 owned the property? That is, did Mr. McLean tell you
11 he owned it?

12 A. No. No, sir. He did not own it. They were under
13 contract.

14 Q. Did he tell you who owned it?

15 A. No, sir. He did not.

16 Q. You didn't know who owned it?

17 A. I didn't have to.

18 Q. Well, I understand that, but they didn't tell you that Mr.
19 Creel had anything to do with the property?

20 A. No, sir. No, sir.

21 Q. And when he first -- when he first asked you, and you
22 submitted a bid to him back in, I think -- was it
23 November of 2005?

24 A. Yes, sir.

25 Q. All right. You did a drawing -- this is Exhibit Number

1 9 in your deposition -- showing the outline of the
2 property that you were supposed to do the wetlands
3 delineation. Am I correct?

4 A. That is based on the tax parcel information, yes, sir.

5 Q. All right. That particular document is in your file, and
6 that's how it was when he first contacted you, when
7 you first started doing this -- began to do the work,
8 right?

9 A. Yes, sir.

10 Q. All right. And it included the entire two hundred and
11 eighty acres?

12 A. Yeah. Well, we were told it was approximately two
13 hundred and eighty acres.

14 Q. And that -- for clarification, if you look at this exhibit -
15 - here, we'll do it this way. Exhibit 31, you see the
16 parcel that's got the asterisk on it?

17 A. Yes, sir.

18 Q. That's the southwestern-most portion of that whole
19 tract there. Am I correct?

20 A. It's the northwestern portion, yes, sir.

21 Q. It's the -- north is up here. That would be the
22 southwestern, right?

23 A. Well, if you did follow the north arrow, and you
24 assume north is that way, that's correct.

25 Q. Okay. All right. And Parcel B is just right across the

1 power line, right?

2 A. Yes, sir.

3 Q. Okay. And looking at Exhibit 9, that includes the
4 asterisk parcel and the parcel just across the power line,
5 which is designated as Parcel B on this big plat, right?

6 A. Yes, sir.

7 Q. That's the one you said the Army Corps of Engineers
8 made a mistake and certified it as all uplands?

9 A. Correct.

10 Q. All right. So when you first started out, this included
11 the asterisk tract and Parcel B?

12 A. Correct.

13 Q. All right. This is the one we're looking at. Okay.
14 Now, at some point in time, Jamie McLean -- do you
15 know whether or not Mr. Beverly sent your contract
16 and all to Mr. Creel?

17 A. I do not.

18 Q. Did he tell you?

19 A. No, sir. I didn't know Mr. Beverly was in the project,
20 either.

21 Q. Okay. You heard him testify that he did fax your
22 contract to Mr. Creel, didn't you?

23 A. I heard that.

24 Q. I'm going to hand you Exhibit Number 2, which is also
25 in your file.

1 A. Yes, sir.

2 Q. And that appears to be another type of map, but it has
3 originally the same drawing of the entire tract,
4 including the asterisk tract and tract Parcel B, right?

5 A. Yes, sir.

6 Q. And somebody's marked lines through it, apparently to
7 take that out.

8 A. Mr. Casey Wollard, in my department, did that.

9 Q. Okay. Who is Casey Wollard?

10 A. He's an environmental technician that works in my
11 department, that assists me in flagging wetlands on
12 large projects.

13 Q. Well, was that at the instruction of Mr. McLean to take
14 it out?

15 A. As noted on your previous exhibit.

16 Q. I ain't got to that yet. Let's look at Exhibit Number 1.

17 A. If you want to stick to Exhibit Number 2, did Mr.
18 McLean tell me to draw these hash marks?

19 Q. Yeah.

20 A. No, that was for my own identification.

21 Q. But is -- was as a result of Exhibit Number 1?

22 A. Exactly. Yes, sir.

23 Q. Okay. Now, Exhibit Number 1 is Exhibit 9, but
24 instead of the red boundary line, somebody has marked
25 in magic marker black boundary lines, right?

1 A. Yes, sir.

2 Q. And up in the left-hand corner, it says, "Changed by
3 Jamie McLean, 3/8/06."

4 A. That's correct.

5 Q. And so am I correct that -- did one of y'all do the
6 drawing, or did Mr. McLean do the drawing and send it
7 to you?

8 A. Mr. Casey Wollard did the drawing.

9 Q. Casey Wollard did the drawing?

10 A. In my department of S&ME, did the drawing.

11 Q. And he said, changed by Jamie McLean?

12 A. Correct.

13 Q. And on March the 8th, 2006?

14 A. Yes, sir.

15 Q. So what, in effect, that did was to take the asterisk
16 parcel and Parcel B out of the wetlands delineation?

17 A. It was no longer in our project study area.

18 Q. You didn't tell Mr. Creel that that was done, did you?

19 A. I didn't know who Mr. Creel was at that time.

20 Q. Okay. But you didn't do that, though?

21 A. I didn't do what?

22 Q. I'm just asking you the question. Is there any
23 possibility that anybody at your office called Mr. Creel
24 and says, "We have taken out the asterisk parcel and
25 Parcel B. We're not going to do the delineation on

1 that"?

2 A. No.

3 Q. Okay. Thank you. Now, do you remember when we
4 took your deposition, and we talked about sometime in
5 2008, Jamie McLean called you? Do you remember
6 that?

7 A. Yes, sir.

8 Q. And during your deposition, you said something about
9 Jamie McLean telling you, "Well, we might have to
10 buy that piece of property down there."

11 A. I don't recall it, but if it was in my deposition, if I said
12 that, then yes.

13 Q. Okay. Well, the judge will see it.

14 A. Yes, sir.

15 Q. All right. And he asked you to go out there and do a
16 wetlands delineation then?

17 A. He did not.

18 Q. Well, what was he over there doing?

19 A. I don't know.

20 Q. Did you do this -- these Exhibit 6 -- 5, 6, and 7 as a
21 result of his visit to you?

22 A. I did those exhibits as a result of Mr. McLean's
23 telephone call, asking me to do an approximation or a
24 sketch of what we may find out there.

25 Q. I apologize. I misunderstood what you said on direct.

1 A. Yes, sir.

2 Q. So what -- I'm looking at Exhibit 5. That's Exhibit 5 to
3 his deposition, Your Honor, Mr. Oates's deposition,
4 and it looks like that. And it looks like it deals with the
5 asterisk tract. Did you do this?

6 A. I did, personally.

7 Q. Okay. And just so that we'll understand, over here in
8 the legend, you've got a red -- the legend said the red
9 line, what's in the red line, totals forty-six point --
10 excuse me, forty-nine point six acres?

11 A. Approximately.

12 Q. Okay. Approximately?

13 A. Correct.

14 Q. And within that red line is the field that was bought at
15 the first takedown, correct?

16 A. Yes, correct.

17 Q. And we know that the field that was in the -- excuse
18 me. The field is in the second takedown. I'm sorry.
19 That fourteen point four one acres, as shown on Exhibit
20 30, right? I'll let you look at it.

21 A. This is the first I've seen of any takedowns or so.
22 Okay.

23 Q. Okay. That says fourteen point four one acres?

24 A. It does.

25 Q. Am I correct that's the field that's shown on Plaintiff's

1 Exhibit ...

2 A. Without it being overlaid on the aerial, it's impossible
3 to say if it's all field. But it matches the approximate
4 vicinity.

5 Q. Approximate. Okay. All right. So if you take forty-
6 nine point six and subtract fourteen point four one, and
7 you've got here approximate location of jurisdictional
8 wetlands, and you say there's twenty-eight point three
9 acres?

10 A. Approximately.

11 Q. How much -- I don't know how good you are at math --
12 approximately how much, then, taking out the field and
13 the wetlands, how much uplands in that particular tract,
14 the asterisk tract, would remain?

15 A. If you round it from fifty minus thirty, you're going to
16 leave about twenty.

17 Q. Fifty ...

18 A. Or what was your question again, again?

19 Q. My question is forty-nine ...

20 A. If you know the answer, you can give it.

21 Q. I don't know the answer. I haven't got my calculator.
22 But if you take forty-nine point six minus fourteen,
23 that's about thirty-six, and then you subtract twenty-
24 eight. That's about six to eight acres left, right?

25 A. Okay. I agree with that.

1 Q. Okay. So it was around in that area, what you
2 estimated would be uplands?

3 A. As an estimate, yes, sir.

4 Q. Okay. Now, how did it come that you -- did you do
5 Exhibit 6?

6 A. Yes, sir.

7 Q. What is the difference between Exhibit 6 and 7?

8 A. Exhibit 6, the background is the US Fish and Wildlife
9 Service national wetland inventory database map, and
10 the background on Exhibit 7 is the NRCS soil survey
11 background.

12 Q. Okay.

13 A. Two pieces of remote sensing image.

14 Q. All right. You have included in that -- you've got the
15 asterisk tract, but you've also got the Parcel B on that
16 big plat, right?

17 A. Correct.

18 Q. And that's a total of ninety point -- ninety acres, plus or
19 minus, and you've got the approximate location of
20 jurisdictional wetlands to be approximately fifty acres?

21 A. Yes, sir.

22 Q. And that would include -- on this map, would include
23 the field that was used in the third takedown, which
24 would be fourteen point four one acres. So we're
25 talking about, if you subtract fifty from ninety, that's

1 forty, and subtract another fourteen, that's about thirty-
2 six acres?

3 A. That sounds right. Yes, sir.

4 Q. In both acres -- both tracts?

5 A. Yes.

6 Q. Right. So if that would be the case, and if -- let's
7 assume for the sake of this question, if the contract
8 called for Mr. Godwin and Mr. Beverly to purchase at
9 least fifty acres in the third takedown, he would have
10 had to go beyond asterisk parcel and Parcel B, and go
11 into Parcel C, wouldn't he? Wouldn't they?

12 A. I don't know where they would have to go, but all I can
13 tell you is they would need additional land. Thirty-six
14 doesn't make fifty, so I don't know where they would
15 go.

16 Q. Okay. I think you've answered that question. All right.
17 When you talked to Mr. Creel, did you tell him you
18 had already done that, the survey?

19 A. The approximation?

20 Q. Yeah.

21 A. Yeah, I gave him a copy of it.

22 Q. Did you -- I think you said that you heard a telephone
23 call from Mr. McLean, and Mr. Beverly, and Godwin,
24 and they talked that they may have to purchase, and
25 what they would need to do to purchase that asterisk

1 tract?

2 A. Well after the -- yes, sir. You're talking about -- have
3 you got a date on that, or ...

4 Q. I don't. I just -- I'm looking at my notes. I'm actually
5 looking at my partner's notes, okay?

6 A. Yes, sir.

7 Q. That was a statement in your deposition.

8 A. Yes, sir.

9 Q. Do you recall what that was all about?

10 A. Other than the fact that they needed to take down
11 additional properties, based on the contract, and that
12 was it.

13 Q. Was that in August?

14 A. I don't know. That's what I was asking you. I'm not
15 sure.

16 Q. I think in direct examination you said he got in touch
17 with you first in June of '08.

18 A. He did.

19 Q. Okay. Did he talk to you any more after June or not?

20 A. I'm sure we ...

21 Q. Did he talk to you again in August?

22 A. I'm sure we did, after I talked with Mr. Creel, and let
23 him know the recommendations we made to Mr. Creel
24 for the silvicultural work.

25 Q. And you were still advising him to allow silviculture to

1 take effect?

2 A. I was -- I had let Mr. McLean know that I spoke with
3 Mr. Creel, and gave him some advice as to what I felt
4 like he should do over there, would be to go in and
5 harvest some timber, thin it out, underbrush it, clean
6 the site up, and then let's take another look at it at a
7 later date.

8 Q. Would that be silviculture?

9 A. That is correct, yes, sir. That's all under the silviculture
10 exemption.

11 Q. That would make wetlands possibly become uplands?

12 A. I believe what I told Mr. Creel is what I tell all my
13 clients. If you don't do anything, you will get nothing
14 back. If you want to try and get something back, then
15 you have to put effort into it, and that would be making
16 an attempt to open the site up, and then let's take
17 another look at it, once it's dried out.

18 Q. Well, my question was that the effect of trying to do
19 that would try to be -- would be to try to transmute, I
20 guess is a better word, wetlands into uplands?

21 A. Or at least the marginal transition zones, yes. The
22 areas that, if you left alone, that would be wet, you
23 would try and transition those into uplands.

24 Q. In your deposition, did you testify -- I don't know. I'm
25 just reading notes. That the Army Corps of Engineers

1 doesn't always come out to determine the wetlands?

2 A. Yes. That was correct at that time.

3 Q. I think you said they could do what is known as a
4 desktop delineation or something like that?

5 A. At that time, yes, sir. They could.

6 Q. They don't do that any more?

7 A. Oh, no, sir.

8 Q. When did they stop that?

9 A. After the Rapanos decision, which was the US
10 Supreme Court, somewhere around probably 2009,
11 2010, where everything has to be visited now..

12 Q. That would be after the date of this ...

13 A. Correct.

14 Q. ... third takedown, which was supposed to be in 2008?

15 A. Yes, sir.

16 MR. STEVENS: Excuse me. That's all I have.

17 JUDGE: Thank you.

18 REDIRECT EXAMINATION OF MR. OATES BY

19 MR. HUDSON:

20 Q. Just a couple more questions, Mr. Oates. Since the plat
21 and the delineation that we're talking about here today,
22 have you been out -- back out to the -- been asked to do
23 anything else on this tract for Mr. Paul or anybody else
24 on this tract, by way of wetlands delineation?

25 A. No, sir.

1 Q. You have not?

2 A. No, sir. The last time I stepped on the property was
3 when we flagged the small finger of wetlands the
4 Corps of Engineers required us to flag.

5 MR. STEVENS: We would -- out of an
6 abundance of caution, we would object to that and
7 move to -- it's not admissible, because that calls for
8 hearsay.

9 MR. HUDSON: I think that's all I have.

10 MR. STEVENS: I don't have anything further.

11 MR. HUDSON: That's all I have. Thank you,
12 Mr. Oates. Appreciate it.

13 MR. STEVENS: Thank you so much.

14 MR. HUDSON: Have you got any questions?

15 JUDGE: Would you object to letting him go as a
16 witness, since he's not ...

17 MR. HUDSON: Absolutely. I think that's ...

18 MR. STEVENS: Absolutely.

19 MR. HUDSON: He needs to get going.

20 JUDGE: Thank you for coming.

21 MR. STEVENS: Thank you so much.

22 MR. HUDSON: Are we going to take a short
23 break for lunch?

24 JUDGE: Yeah, let's do that.

25 (A LUNCH BREAK WAS TAKEN OFF THE RECORD

1 SEAN WILLIAMS: I do.

2 COURT REPORTER: Please tell me your name.

3 SEAN WILLIAMS: Sean Travis Williams.

4 DIRECT EXAMINATION OF SEAN WILLIAMS BY
5 MR. HUDSON:

6 Q. Okay. Mr. Williams, you are, as I understand it, a
7 surveyor with Carolina Land Surveyors?

8 A. Yes, I own the company.

9 Q. All right. And how long have you been in the
10 surveying business?

11 A. About eleven years, I guess.

12 Q. All right. And your -- what certifications, licenses do
13 you hold?

14 A. A South Carolina license, a professional licensed
15 surveyor.

16 Q. So you're a registered land surveyor in the state of
17 South Carolina?

18 A. Yes.

19 Q. All right. And that includes generating maps, or
20 surveys of maps, after you've performed the field work
21 on the surveys?

22 A. Yes.

23 Q. How many folks work with you?

24 A. Right now, just myself and another.

25 Q. Okay. And how many -- just by way of qualification,

1 how many surveys have you actually done and maps
2 generated prior to -- let's see if there's even a date on
3 this thing. Prior to this map that's here in front of you.

4 MR. STEVENS: October the 16th, 2007.

5 Q. There it is, Exhibit Number 32.

6 A. Prior to that one?

7 Q. Right.

8 A. I mean, it would have to be an estimate. Probably four
9 hundred.

10 Q. Okay. And who hired you to perform the work out on
11 this particular tract?

12 A. Jamie McLean was my contact.

13 Q. All right. And this was under his direction and control,
14 as far as what you were told to do and what you
15 performed ...

16 A. Yeah, he's the only one that I spoke with about it.

17 Q. Okay. I'm going to show you this map, and the reason
18 you're up here is to really explain what you recall about
19 this particular map that we're talking about here today.
20 And I'll ask you to look at that and see if you recognize
21 it, and then I'll ask you a couple of questions about it,
22 and we'll be done.

23 A. Okay. Yeah, I recognize it.

24 Q. All right. And what is that?

25 A. It's entitled a boundary survey of two parcels, split

1 from tax map number one six nine zero zero zero three
2 zero two seven (169-00-03-027).

3 Q. Okay.

4 A. And sketch of estimated wetlands.

5 Q. All right. And that was -- that was completed at the
6 direction of Jamie McLean?

7 A. Yes.

8 Q. Okay. And is that document, that map, can you --
9 would that be sufficient to, say, deed a property, or is
10 that a wetlands delineation? What is that map basically
11 good for, legally, as you understand it in your land
12 surveying experience?

13 A. Well, looking at it, it's got ...

14 MR. STEVENS: I'm going to object to that
15 question, in that it calls for a legal conclusion, which I
16 don't think he's qualified, as to whether or not that's
17 sufficient to use to convey or to prepare a deed.

18 JUDGE: Well, I agree. Rephrase your question.

19 Q. Well, I ...

20 JUDGE: I think he can answer it with reference
21 to it in his area.

22 Q. That's right. That was my question, in his area of
23 expertise as a land surveyor, what would that typically
24 be used for?

25 JUDGE: Go ahead and answer.

1 Q. Could it be used for a deed?

2 A. Yeah, it could be. It's got a legal description on the
3 boundary, so you can draw up a legal description from
4 the boundary. It's got meets and bounds on it, on the
5 boundary portion only.

6 Q. On the boundary portions only?

7 A. Right.

8 Q. Is there -- could it be used to determine or delineate
9 wetlands?

10 A. No, it's just got a sketch of it. It would have to have
11 meets and bounds on the wetlands. And if it was going
12 to be submitted to the Corps, they require meets and
13 bounds on it. And you actually couldn't even record it,
14 because it's got wetlands shown on it, but without
15 meets and bounds. The county won't even let you
16 record that.

17 Q. All right. Is there any requirements on maps that they
18 be -- to be -- well, tell me, what's the difference in a
19 survey and map? And I'm using these terms loosely.
20 Are there any requirements for one as opposed to the
21 other, to comply with the laws and to generate surveys
22 that you are licensed to generate? Such as, do you
23 have to sign anything or put any information on there,
24 as a surveyor?

25 A. Well, there's minimal standards, and it's got to have my

1 signature and seal on it.

2 Q. Does that map have your signature and seal on it?

3 A. No.

4 Q. All right. So do you recall why this was generated?

5 A. I mean, to the best of my knowledge, I would say that
6 he just asked me to kind of sketch on there where the
7 wetlands would be at.

8 Q. And how would you have done that? Would you have
9 used any other documents to do that?

10 A. Well, I just got a -- like a little sketch from Chuck
11 Oates, and just kind of overlaid it on mine and
12 sketched it on there.

13 Q. All right. You wouldn't have done any field work?
14 You don't do field work?

15 A. No, not on wetlands, we don't.

16 MR. HUDSON: Okay. All right. I think that's
17 all I have. Answer any questions Mr. Stevens might
18 have. Thank you.

19 JUDGE: You're reserving your objections?

20 MR. STEVENS: Yeah.

21 CROSS-EXAMINATION OF SEAN WILLIAMS BY

22 MR. STEVENS:

23 Q. Who does the map say it's for?

24 A. Donald Godwin.

25 Q. And did you actually draft this one, or did some

1 draftsman do that?

2 A. It looks like my initials on there.

3 Q. Okay. Isn't that your seal here?

4 A. It is.

5 Q. All right. So your seal's on the tract, isn't it?

6 A. The seal's on the plat.

7 Q. Okay.

8 A. But it's not a raised seal.

9 Q. Well, this is a copy, okay?

10 A. Right.

11 Q. What's the date? Can you make out the date? It looks
12 like 10/16/07. Is that right?

13 A. Yeah.

14 Q. Okay. And you're telling me, and you're telling the
15 Court, that that -- that the county won't let you record
16 that plat, because there's no meets and bounds on the
17 wetlands?

18 A. I've had them deny them in the past because of that.

19 Q. Isn't it a fact that the county doesn't restrict recording
20 of a plat just because it depicts wetlands, but you have
21 the dimensions on the boundary lines?

22 A. I'm sorry. What are you saying, now?

23 Q. The county, all they care about is that you have the
24 dimensions on it, on the boundary lines, right?

25 A. Well, I've had them decline from recording before,

1 because it didn't have a Corps of Engineers number in
2 the notes, when it had wetland lines on it.

3 Q. Okay. But they have recorded them with wetlands
4 indicated on a plat?

5 A. As long as it had the Corps' number on it.

6 Q. Are you saying -- are you saying under oath today that
7 the county wouldn't record this plat?

8 A. From my experience in the past? No.

9 Q. No, no, no. Would the county refuse to record this
10 plat?

11 MR. HUDSON: I think he was trying to answer
12 the question before you interrupted him with another
13 question.

14 A. I can't say. You can turn it in to the planning
15 department, but ...

16 Q. You didn't put it to the -- you didn't put it to the county
17 to record it, did you?

18 A. No, I didn't.

19 Q. That's not your job. That's Mr. Beverly's and Mr.
20 Godwin's job, isn't it?

21 A. Well, sometimes I record plats.

22 Q. All right. But you usually rely on them. You give
23 them the plat, and then they take it to the attorney, and
24 the attorney records the plat, correct?

25 A. For the most part.

1 Q. Okay. Now, you say Jamie McLean asked you to do
2 this. Am I correct?

3 A. Right.

4 Q. All right. And you say you took a wetlands estimate
5 from Chuck Oates to do it?

6 A. That's right. He's the wetlands person that I dealt with
7 on the ...

8 Q. That's what I want to ask you about. We have
9 introduced wetlands maps that Chuck Oates had.
10 Excuse me just a second. My exhibits are out of order.
11 Here we go. And you say you took it from these
12 maps? I'm looking at Exhibits 5, 6, and 7 of Chuck
13 Oates's deposition.

14 A. It looks like the same line.

15 Q. It looks like the same line?

16 A. Yeah.

17 Q. All right. Do you have any reason to believe that the
18 wetlands changed?

19 A. I don't know.

20 Q. So that the lines would change?

21 A. That the wetland lines would change?

22 Q. Yeah.

23 A. I don't have any reason to believe that.

24 Q. Between -- well, then let's get a little bit more detailed
25 here. If you look down at the bottom of these

1 particular documents, what are the dates that they were
2 created?

3 A. June, 2008; August, 2008; and August, 2008.

4 Q. June -- June and August. Two of them August, one of
5 them June, right?

6 A. Right.

7 Q. Your plat is dated October of '07, correct?

8 A. Right.

9 Q. Explain to me how you took these documents that were
10 created in 2008 and overlaid it on a plat that you drew
11 in 2007?

12 A. I didn't say that I used these. I'd have to search my
13 records to see which ones that I used.

14 Q. Okay. You heard Mr. Oates testify that he didn't do
15 these until 2008, didn't you? You were here.

16 A. I was here. I wasn't listening the whole time.

17 Q. Wasn't listening. Okay. Assuming that Mr. Oates
18 testified under oath that he didn't do these until 2008.

19 A. Right.

20 Q. Assume that.

21 A. Okay.

22 Q. Then explain to me how you got the wetlands
23 delineation in 2007?

24 A. Well, either him -- either Chuck Oates or Jamie
25 McLean.

1 MR. HUDSON: Object to it being a delineation.

2 Q. Who? Do what, now?

3 A. Either Chuck Oates or Jamie McLean gave me an
4 aerial photo.

5 Q. An aerial photo?

6 A. Yeah. That's what these are, is aerial photos.

7 Q. Okay. Now ...

8 A. I overlaid it off of that.

9 Q. But these are done with lines that were drawn by
10 Chuck Oates. Would you agree to that?

11 A. Yeah.

12 Q. All right. Let's look at another aerial photo. I'm going
13 to hand you Exhibit Number 4 to Mr. Oates's
14 deposition. All right. You see the area -- let's kind of
15 get ourself oriented here. The area here, there's the --
16 there's a line.

17 A. Right.

18 Q. There's the field. Tell me how you can tell from that
19 what was wetlands and what was uplands?

20 A. I can't from that.

21 Q. Okay. Well, where did you get your aerial photo to do
22 it?

23 A. Like I said before, either from Jamie McLean or Chuck
24 Oates. I'd have to check my records to see what ...

25 Q. Where are your records?

1 A. Nobody subpoenaed them.

2 Q. You didn't bring them? Did anybody subpoena your
3 records?

4 A. No.

5 Q. We didn't know you were going to testify today. I'm
6 wondering why you didn't bring your records with you.

7 A. Nobody asked me to.

8 Q. Nobody asked you to. You have no explanation why
9 the wetlands delineation here on this particular thing,
10 the area that you show as wetlands, where you got it
11 from?

12 A. Not without looking at my records.

13 Q. Not without looking at your records. But there's no
14 question but that you didn't take them off of Chuck
15 Oates's records, did you?

16 A. Say that again, now?

17 Q. You did not take that wetlands delineation on that plat
18 off of these three ...

19 A. Not off of those three, if they were created in 2008.

20 Q. All right. Do you have any records from Chuck Oates
21 that you used to show the wetlands?

22 A. Not with me, no.

23 Q. You didn't have any before, did you?

24 A. I've got records from when I did the job.

25 Q. You didn't have any records from Chuck Oates

1 delineating the wetlands down here on the asterisk
2 tract, did you?

3 A. I don't know, without looking at my records.

4 Q. You heard Chuck Oates testify today that Jamie
5 McLean told him not to do a wetlands delineation,
6 didn't you?

7 A. Like I say, I wasn't listening the whole time.

8 Q. You weren't listening.

9 MR. HUDSON: I object to the form of the
10 question. He's saying "delineation," and this is not a
11 delineation, by anybody's ...

12 Q. Well, that remains to be the question ...

13 MR. HUDSON: ... by anybody's testimony.

14 Q. ... as to what delineation means, Your Honor. There's
15 no definition of delineation in the contract, so ...

16 JUDGE: As I understand his testimony, he's
17 testifying that he did an approximation of the edge of
18 it, based on a prior aerial photograph. Is that what
19 you're saying?

20 A. Yes.

21 Q. Not from Chuck Oates?

22 A. I would have to check my records to see where the
23 aerial photo came from.

24 Q. Okay. Well, it's a shame we don't have the records
25 here. How do you spell Sean?

0239

1 A. S-E-A-N.

2 Q. S-E-A-N? Excuse me one second. Oh, who did you
3 charge for that?

4 A. I don't know. I'd have to check my records.

5 Q. Okay. Let me see if I can help you. We had
6 previously introduced Defendant's Exhibits Number 10
7 and 11, and I want to ask you if you had anything to do
8 with those two documents. Did somebody sit down
9 and talk to you about that?

10 A. Not that I recall, no.

11 Q. All right. Exhibit Number 12 is a small map of that,
12 which was behind -- this was behind it in documents
13 produced. Is that your bill?

14 A. Yeah, that's a bill from my company.

15 Q. Is it a bill for this right here?

16 A. I don't know. On that tract, we did a lot of work, so I
17 don't know how many different bills we sent out for it.

18 Q. Okay. The -- your original bill is ten thousand and
19 some odd dollars, correct? That's for that big plat over
20 there.

21 A. From -- it was that ballpark.

22 Q. All right. Did you do any further plats between that
23 plat and the time you did the first takedown plat?

24 A. I don't know, and I don't really know what the
25 takedowns are. You know, it's never been explained to

1 me.

2 Q. Well, you drew them. I just wanted to know whether
3 you remember them. Exhibit Number 29, this -- you're
4 Carolina Land Surveyors, right?

5 A. That's right.

6 Q. Did you do this one?

7 A. Yes.

8 Q. Okay. And is that certified?

9 A. Yes.

10 Q. It is? Is it certified by the Army Corps of Engineers?

11 A. Oh, I don't know about that. It doesn't have a Corps
12 number on it that I see. If you're talking about certified
13 by me, it's got my signature, and you can see where the
14 raised seal was.

15 Q. Okay. Look at this, now. Okay?

16 A. Okay.

17 Q. That's what you did, right?

18 A. Right.

19 Q. And you did it for?

20 A. Donald Godwin.

21 Q. Donald Godwin. And when did you do it?

22 A. 5/12/06.

23 Q. All right. That bill is what? What's the date?

24 A. 11/5/07.

25 Q. So that bill certainly wasn't for this takedown, was it?

0241

1 That plat, was it?

2 A. I'm going by the price of it. No, I doubt that.

3 Q. You wouldn't bill it before you did it, would you?

4 A. No.

5 Q. All right. Now, this is Exhibit Number 30, which has
6 been identified as the map of the second takedown.

7 Did you do that?

8 A. Yes.

9 Q. All right. Is that certified by the Army Corps of
10 Engineers?

11 A. I don't see a Corps number on it, no.

12 Q. Okay. And it's done for who?

13 A. Donald Godwin and Randy Beverly, LLC.

14 Q. Okay. And what's the date of it? Can you see that?

15 A. 2/12/07.

16 Q. 2/12/07. That bill wasn't for this one, was it?

17 A. No. It says a wetland survey, and that's not a wetland
18 survey.

19 Q. Okay. Did you do any other maps that you can tell us
20 about?

21 A. Not without going through my records. Like I say, we
22 did a lot of work out there, so I don't -- it's been four
23 years.

24 Q. All right. This particular map, which is Exhibit
25 Number 32 and Exhibit Number 12, was dated October

1 16th of 2005, right?

2 A. I'm sorry. Which one, now?

3 Q. That's October of 2005, right? Excuse me.

4 A. October of '07.

5 Q. Of '07. And this one is November of '07, correct?

6 A. Correct.

7 Q. Okay. That's about the next billing cycle, after you --
8 do you usually bill at the first of the month?

9 A. Just whenever they've accumulated.

10 Q. And it's seven hundred and fifty. Would this bill be for
11 this particular plat? Could Exhibit Number 13 be the
12 bill for Exhibit Number 32 and 12?

13 A. I'd say no, because it says a wetlands survey. And it's
14 probably a survey of the whole tract, that shows
15 wetlands delineated on it.

16 Q. Well, what was the ten thousand dollars for?

17 A. A boundary survey.

18 Q. A boundary survey. Okay. You're saying that this is
19 not the bill for this particular plat?

20 A. For this one particular plat?

21 Q. Yeah.

22 A. No, I wouldn't think so, not for a sketch.

23 Q. Do you have azimuths on this particular tract? Is that
24 the asterisk tract?

25 A. Which one is the asterisk tract?

1 Q. This one.

2 A. I thought the asterisk tract was all of it.

3 Q. No, the asterisk tract is the southwestern corner,
4 southwestern-most corner of it.

5 A. There's bearings and distances on the boundary, yes.

6 Q. All right. And what I'm asking you is, can you deny
7 that that was the bill for that particular piece of survey?

8 A. I can't deny it right now, not without looking at my
9 records, no.

10 Q. Okay. And it's close in period of time to the time that
11 you did the plat, right?

12 A. Right.

13 Q. It's about, what, three weeks after you did the plat,
14 correct?

15 A. Correct.

16 Q. Tell me again, who asked you to do it?

17 A. Jamie McLean.

18 Q. Do you remember when he asked you to do it?

19 A. No, I do not.

20 Q. Did he tell you why he wanted you to do it?

21 A. Probably not.

22 Q. You don't remember?

23 A. No.

24 MR. STEVENS: That's all.

25 MR. HUDSON: No further questions. Thank

1 you.

2 JUDGE: You may come down. You want to
3 excuse him, also?

4 MR. HUDSON: We can.

5 JUDGE: Thank you for coming.

6 MR. HUDSON: Thank you. We call Jamie
7 McLean. Come on down.

8 COURT REPORTER: Raise your right hand,
9 please. Do you solemnly swear or affirm the testimony
10 you're about to give will be the truth, the whole truth,
11 and nothing but the truth?

12 JAMES MCLEAN: I do.

13 COURT REPORTER: And your name?

14 JAMES MCLEAN: My full name? James
15 Michael McLean, Junior.

16 DIRECT EXAMINATION OF JAMES MCLEAN BY
17 MR. HUDSON:

18 Q. Okay. Jamie, give me your occupation, please, sir.

19 A. I work for Southern Asphalt. We do -- I help Donald
20 with different aspects of Southern Asphalt, doing
21 construction work, and building houses, and doing land
22 development.

23 Q. And you work for Donald Godwin, and is Donald
24 Godwin a principal in Southern Asphalt?

25 A. Absolutely. Yes, sir.

1 Q. All right. Do you work for Donald Godwin in any
2 other capacities, with any of his other businesses or
3 organizations?

4 A. Every one of them that he asks me to.

5 Q. All right. Did you -- and I think it's been established
6 that you were involved in this tract here, in the
7 surveying of the property with the surveyor, and Chuck
8 Oates, the delineation of the wetlands?

9 A. Absolutely, yes, sir.

10 Q. All right. Let me ask you this. Did you, yourself, ever
11 come into contact or deal with Benjamin Creel on this
12 tract?

13 A. No, sir.

14 Q. You never did?

15 A. No, sir.

16 Q. Okay. Tell me what you did on this tract for -- I'm
17 going to just use Donald Godwin.

18 A. Sure.

19 Q. I think it's Donald Godwin, LLC. Would that have
20 been the organization that you would have been ...

21 A. Yes, sir.

22 Q. ... directed by?

23 A. Yes, sir.

24 Q. All right. Tell me your initial involvement with this
25 and what you did.

0246

1 A. We -- Donald and Randy told me that they were
2 looking at purchasing this tract, or they had an
3 agreement to purchase this tract, and to start getting
4 some bids for surveying work and for wetland work on
5 it. And that's where I started at, and they chose to go
6 with Chuck and Sean to do the surveying and the
7 wetland work. And I just kept pushing them to get that
8 done.

9 Q. All right. So you got more than one bid, but Carolina
10 or Chuck ...

11 A. I'm pretty sure we got more than one bid. Usually we
12 get a bid from Chuck and the Brigman Company for
13 the wetlands, and I don't even know if -- who we got a
14 bid from for the surveying work, if there was anybody
15 other than Sean.

16 Q. Okay. Being involved in a project like this, what is
17 your work experience, and have you had any work
18 experience previously, involving the same type work?

19 A. Absolutely, yeah.

20 Q. Give me your work history, if you would, prior to this.

21 A. Prior to this, we -- I've worked for Donald and Randy
22 doing several different subdivisions throughout Horry
23 County.

24 Q. Prior to working with Randy and Donald, what other
25 experience have you had in like projects for any other

1 companies or any other entities?

2 A. Prior to working for Donald, I worked for the Brigman
3 Company in Conway doing wetland delineations and
4 forestry work.

5 Q. All right. And how long did you do that?

6 A. For three years after I graduated college.

7 Q. All right. And where did you go to college?

8 A. Horry Georgetown Tech, associate's degree in forestry,
9 and Clemson University, forest management and
10 environmental studies.

11 Q. Okay. And you got out of Clemson ...

12 A. In 2000.

13 Q. ... in 2000?

14 A. Uh-huh.

15 Q. And then ...

16 A. Went straight to work for the Brigman Company, and
17 then left the Brigman Company and came to work for
18 Donald.

19 Q. All right. And how many projects would you say that
20 you've been involved with, with the Brigman Company
21 or whatever, in delineating -- I assume it's delineating
22 wetlands?

23 A. Uh-huh. Probably two hundred.

24 Q. All right. And with the Brigman Company, what
25 would y'all do? What services did y'all provide,

1 besides just delineating the wetlands? What did that
2 entail?

3 A. We would take a raw piece of land. The developer
4 would come to us. We would go out, and we would
5 flag the wetlands, meet with the surveyor, have the
6 surveyor put the wetlands on the map, and then we
7 would take it on to the Corps and get it approved by the
8 Corps, and then do any permitting work, if it needed it,
9 afterwards.

10 Q. All right. And dealing with this type project, would
11 you, in the past, ever be involved with any financial or
12 lending institutions as to what they might need from
13 the Corps?

14 A. Not really. That's not my realm. I just -- I push things
15 in the field, you know, get the work done.

16 Q. So you're out in the field?

17 A. That's right.

18 Q. All right. So tell me again, what did you first do once
19 y'all decided on Mr. Oates and Mr. Williams?

20 A. Yeah.

21 Q. All right. Tell me what happened next.

22 A. I talked to Chuck, and we met out there, and I think the
23 first -- I took an aerial photograph and took the
24 county's GIS, and put it on it, and we had much like the
25 map that he shows as his subject property. Dropped

1 one of those off at his office with the tax map number,
2 told him that this was the tract that we were looking at,
3 to give me a proposal on it. Got his proposal on it. He
4 went out there and, you know -- and we met, and
5 turned him loose to do the work.

6 Q. Okay. All right. And on these tracts, you of course
7 went out -- you're out in the field, and you actually
8 walked all these tracts at one point or another. Would
9 that be fair?

10 A. I did. I have walked them all, yes, sir.

11 Q. All right. And the first two takedowns and these two
12 back parcels -- I think it's C and D -- what kind of
13 wetlands were involved in those?

14 A. The first two takedowns, I think that they just had that
15 little small finger wetland, the point three two acre.
16 And then I think on the back tract, there was a river
17 swamp and kind of the -- like a ditch that came up, and
18 a kind of channelized run, that I think that was on D.
19 D is the one at the very, very back, and I think there's
20 about two acres of wetlands on it.

21 Q. And are you familiar with maps and surveys that
22 actually show wetlands delineated on it?

23 A. Yes, sir.

24 Q. All right. Does this map that's Exhibit Number 1 show
25 the wetlands delineated?

1 A. Yes, sir. It does.

2 Q. Okay. And how can you tell that? How are these
3 wetlands delineated as opposed to maybe one that just
4 shows little plants or wavy lines?

5 A. Sure. This has meets and bounds around it, so the
6 Corps could come back and recreate it, if they thought
7 there was a violation or something.

8 Q. All right. So these are actually surveyed, delineated
9 and surveyed wetlands?

10 A. Points.

11 Q. Points?

12 A. Yes, sir.

13 Q. All right.

14 A. Chuck hangs flags, and then the surveyor goes out and
15 surveys from flag to flag.

16 Q. All right. So these, on these little finger wetlands here
17 on Tract D, each of these points, would they be a flag?

18 A. They would. Yes, sir.

19 Q. Okay. All right. And that would be also on Phase 1 up
20 here in Tract A?

21 A. Uh-huh.

22 Q. I think they actually had to enlarge it ...

23 A. To blow it up to ...

24 Q. ... because that's so small?

25 A. Yes, sir.

1 Q. All right. So that would be the -- all of those
2 nomenclatures there would be the actual flags, the
3 wetlands as flagged or delineated?

4 A. That is correct, sir.

5 Q. Okay. All right. What's your understanding as to why
6 Mr. Beverly and Mr. Godwin went ahead and surveyed
7 Tract A, C, and D, and delineated it, and did not do so
8 with the asterisk tract and Tract B?

9 A. I was told by them to leave out everything, basically, if
10 you're going down Shelley Farm Road, to the right. To
11 leave it out, that I guess Benjamin was going to be
12 doing some silvicultural work over there.

13 Q. All right. And were the Tracts A -- in the first two
14 takedowns, Tract A, and C, and D, what kind of
15 wetlands were really involved in those, the extent of
16 the wetlands?

17 A. It really wasn't much. Tract A would have been
18 probably the most difficult to delineate. Tract C and D
19 at the back are just agricultural fields, which you would
20 not find wetlands in. If something's under cultivation,
21 they usually don't take jurisdiction over it. And then
22 the back line of it is just river swamp. So that's why I
23 told Chuck just to let's go ahead, and let's do that, you
24 know, and it would be done.

25 Q. All right. Would he have been doing that, anyway? Is

1 that a great, extra expense?

2 A. No. No, I mean, while he was out there, I mean, he'd
3 just go ahead and do it.

4 Q. All right. And this wetlands, or the fact that these
5 tracts didn't involve much wetlands, were they readily
6 apparent to a gentleman with your experience ...

7 A. Yes, sir.

8 Q. ... that wetlands were not heavily involved in those
9 tracts?

10 A. That is exactly right.

11 Q. All right. What's your information on the engineering
12 that was done, and what ...

13 A. The engineering for the two tracts, the takedown one
14 and takedown two, have been completely engineered,
15 everything approved through the county, the land
16 disturbance permit ready to go. And we designed it in
17 such a way to have a double drive going down Shelley
18 Farm Road, and we put the pump station at the corner
19 of Shelley Farm Road and Flossie Road, hopefully to
20 accommodate the future phases of the development.
21 And that way you wouldn't have the cost of the pump
22 station but one time, being a very, very big ticket item.

23 Q. And the future phases would be C and D back here?

24 A. That's correct. Yes, sir.

25 Q. And possibly B?

0253

1 A. B, yes.

2 Q. And how about the Creel tract here? What was your
3 understanding of that? It's marked "Creel" on the
4 Exhibit 31.

5 A. Yeah. To stay out of that, that that portion of the
6 property was not for sale, and was not included in this.

7 Q. All right. Okay, where -- there's that map. It's right in
8 front of me. Okay. We just had Mr. Williams testified
9 as to this map here, and answered several questions by
10 Mr. Stevens, in addition to myself. Do you recognize
11 that plat? It's Exhibit Number -- with all the
12 attachments, is 32?

13 A. Yes, sir.

14 Q. All right. Tell us how and why that was generated by
15 Mr. Williams.

16 A. I'm not -- I'm sure that it was generated by Mr.
17 Williams under my direction. Now, I can't tell you
18 exactly why we did it. I'm not a hundred percent sure,
19 but I know that he did it under my direction, because I
20 told him to.

21 Q. Okay. And what is it? What does it consist of? I see
22 some lines, and then it looks some -- maybe little
23 plants or trees.

24 A. It looks like where the -- I guess it's calling this Parcel
25 B? Or it looks like they've approximated a wetland

1 line in there and put an upland acreage and a wetland
2 acreage for the asterisk tract.

3 Q. Is that a delineated wetlands on that map?

4 A. No, sir.

5 Q. All right. And what would it take to delineate the
6 wetlands on that map, to have it a true delineation?

7 A. Well, first of all, you'd go flag them in the field, and
8 then the surveyor would come behind you, and he
9 would survey that line. And then it would be
10 delineated.

11 Q. All right. So what is your understanding of any legal
12 import or weight that this estimate, I will call it, of
13 wetlands is good for?

14 MR. STEVENS: Your Honor, I object.

15 Q. For what purposes is that generated?

16 MR. STEVENS: I object to that. He can't testify
17 to what the legal import would be.

18 Q. I think it's within his experience, subject to his
19 objection, within his experience, he's got to be dealing
20 with that.

21 JUDGE: He's probably right, but I'm going to let
22 him answer it.

23 A. It would be an estimate of the ratio of wetlands to
24 upland acres.

25 Q. All right. And why would a developer or whatever,

1 why would you want that estimate?

2 A. If you were -- if it was a piece of land that you were
3 getting ready to buy, you would kind of want to see the
4 configuration of it and, you know, and see if it was
5 developable or not.

6 Q. Okay. So before you would go out and do any real
7 delineation, you would want to try to get some sort of
8 estimate?

9 A. That's correct.

10 Q. It's not readily apparent?

11 A. That's right.

12 Q. All right. And again, I think I asked you this earlier.
13 Did you ever or have you ever dealt with Benjamin
14 Creel in connection with this project?

15 A. No, sir.

16 Q. Has he ever attempted to contact you, that you know
17 of?

18 A. No, sir.

19 Q. All right. To your knowledge in being involved with
20 this project, other than what we understand Mr. Matt
21 Johnson did by cleaning out some ditches at one point,
22 to your knowledge, has any silviculture been
23 performed on these two tracts that were not delineated?

24 A. No, sir.

25 Q. At any time?

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1 A. Not since we -- I can't speak to what happened before
2 we were instructed to go out there and do that. But
3 since then, no, sir.

4 Q. Been none?

5 A. None.

6 MR. HUDSON: All right. Okay. I think that's
7 all we have. Answer any questions Mr. Stevens might
8 have, and I might have a couple more. Thank you.

9 CROSS-EXAMINATION OF JAMES MCLEAN BY
10 MR. STEVENS:

11 Q. If no silviculture's been done on the tract, why did you
12 pay Twin Oaks?

13 A. I didn't pay Twin Oaks.

14 Q. Well, why did they deduct it off of the purchase price
15 on the second takedown?

16 A. That was between Mr. Beverly and Mr. Johnson.

17 Q. Do you know Mr ...

18 A. Matt Johnson.

19 Q. ... Matt Johnson?

20 A. Yeah.

21 Q. Twin Oaks?

22 A. Twin Oaks, yes, sir.

23 Q. Do you know that he went out there and did ditching
24 and so forth?

25 A. Just from the testimony today.

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1 Q. And do you know that Donald and -- Godwin and
2 Randy Beverly had Mr. Johnson and Twin Oaks, his
3 business, Twin Oaks, deducted from the second
4 takedown?

5 A. I heard that. You asked Randy that earlier, yes, sir.

6 Q. To the tune of ten thousand and some odd dollars, I
7 think, right?

8 A. Yes, sir.

9 Q. You never heard about that?

10 A. I did not.

11 Q. When you were over there trying to take care of this
12 property for Mr. Godwin and Mr. Beverly, did you go
13 out there and look, and see whether he was doing it?

14 A. I did not, no, sir. It was not between me and Mr.
15 Johnson. Like I say, that was something that Randy
16 hired Mr. Johnson to do.

17 Q. When you first talked to Mr. Chuck Oates, you told
18 him you wanted him to do wetlands delineation on the
19 entire tract, didn't you?

20 A. I dropped off an aerial photo demarcating the entire
21 tract, except for the forty acres that Mr. Creel was
22 going to keep.

23 Q. That's the one way over here, right?

24 A. Yes, sir.

25 Q. But it included the asterisk tract in Parcel B, didn't it?

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1 A. That is correct. Yes, sir.

2 Q. And he submitted a proposal to you for delineating
3 wetlands for two hundred and eighty acres, correct?

4 A. That is correct. Yes, sir.

5 Q. And then you met with him on March the 8th, and you
6 decided, pursuant to instructions of Mr. Godwin and
7 Mr. Beverly, to take out the asterisk parcel and Parcel
8 B, correct?

9 A. That is correct.

10 Q. All right. Now, did Randy Beverly tell you at that time
11 to contact Mr. Creel and tell Mr. Creel, "Mr. Creel,
12 we've taken out the asterisk parcel and Parcel B"?

13 A. No, sir.

14 Q. You never called Mr. Creel and told him, "We're not
15 going to delineate the asterisk parcel and Parcel B"?

16 A. That's correct.

17 Q. Did Mr. Beverly tell you that he had sent the contract
18 from S&ME to Mr. Creel, showing that they had hired
19 him?

20 A. No, sir. He didn't tell me that.

21 Q. He had hired the surveyor?

22 A. No, sir.

23 Q. This was sent to Mr. Creel. Do you deny that?

24 A. No, sir. I cannot.

25 Q. After you did that, and took off Parcel B and the

1 asterisk parcel, to your knowledge, nobody told Mr.
2 Creel, "We backed up. We're not going to do the
3 wetlands delineation there"?

4 A. No, sir. I was told not -- I was told not to do the
5 wetlands delineation on that parcel.

6 Q. After the fact?

7 A. Yes. After Chuck's proposal.

8 Q. Okay. In the first -- are you familiar with a letter that
9 was sent to Mr. Creel in the first takedown?

10 A. I heard you read it earlier.

11 Q. And he said that they had done the wetlands
12 delineation, and they were going to certify it, get it
13 certified by the Corps of Engineers?

14 A. If you say that's what it says, that's what it ...

15 Q. That's what it says. You didn't call Mr. Creel, and you
16 have no knowledge of anyone calling Mr. Creel and
17 saying, "Hey, we need you to do the wetlands
18 delineation. Contrary to the -- contrary to the fax that
19 Mr. Beverly sent you in 2005, we've decided now we
20 want to tell you to do it." Nobody told -- you didn't tell
21 -- anybody tell you that?

22 A. No, sir.

23 Q. All right. And the second takedown, a letter to Mr.
24 Creel says the same thing, doesn't it? That, "We're
25 going to do the wetlands delineation, and we're going

1 to get certified by the Corps of Engineers," doesn't it?

2 A. If you say so.

3 Q. I say so. It's in the letter.

4 A. Okay.

5 Q. Do you have any knowledge, or have you been
6 instructed by Mr. Godwin or Mr. Beverly, to tell Ben
7 Creel, "We are expecting you to do the wetlands
8 delineation on takedown two, and we're expecting you
9 to get the certification from the Army Corps of
10 Engineers"?

11 A. No, sir. I've never been instructed.

12 Q. Have you read the contract?

13 A. No, sir.

14 Q. They didn't tell you that on the third takedown, that
15 uplands acreage was at nineteen thousand dollars, and
16 wetlands was at one thousand dollars?

17 A. They may have told me that.

18 Q. You knew that, didn't you?

19 A. I might have known that, yeah.

20 Q. All right. Was there anything preventing Mr. Beverly
21 or Mr. Godwin to do silviculture practices after they
22 bought it?

23 A. Besides the fact that they don't own the land, no, sir.

24 Q. Well, I mean, they could have bought it and done it
25 themselves, too, right?

1 A. Sure.

2 Q. All right. So had they gone ahead and bought the
3 asterisk parcel and Parcel B, which was mostly
4 wetlands, it would have cost them a heck of a lot less
5 money, wouldn't it, at one thousand dollars an acre for
6 wetlands?

7 A. As opposed to nineteen thousand dollars an acre for
8 uplands?

9 Q. Yeah.

10 A. Yeah. Yes, sir.

11 Q. A whole bunch, nineteen times that, wouldn't it?

12 A. Yes, sir.

13 Q. All right. So if Parcel B and the asterisk parcel, taking
14 into consideration reducing it that field, that fourteen
15 point four acres, and calculating the uplands, which I
16 think we've done, and I think it came out to around
17 twenty-four, twenty-six acres in both parcels, they had
18 to buy fifty per the terms of the contract at that time.

19 A. All right.

20 Q. All right. You follow me so far?

21 A. Yes, sir.

22 Q. They would have had to go into Parcel C and get
23 another twenty-four to twenty-six acres, right?

24 A. C being the ...

25 Q. C is over here.

1 A. I would assume so. Yes, sir.

2 Q. All right. To meet the terms of the contract, right?

3 A. The fifty acre minimum.

4 Q. All right. And it would have been to their benefit to go
5 in there and buy Parcel B and parcel -- the asterisk
6 parcel as wetlands, and then go and do their own
7 silviculture, because they could get that at a thousand
8 dollars an acre?

9 A. If you believe that it would -- that silviculture ...

10 Q. Okay.

11 A. Then you would have to define the silviculture
12 exemptions. Not everybody believes in it as heavily as
13 Mr. Oates does.

14 Q. Okay. I don't know too much about it, but ...

15 A. Well, do you want me to explain the silviculture
16 exemption?

17 Q. No, not really. I don't want to ...

18 A. Okay.

19 Q. I've heard enough about it.

20 A. Okay.

21 Q. The bottom line is -- the bottom line is this: in the
22 contract to purchase Mr. Creel's land in four
23 takedowns, that contract required them to take
24 whatever land was there within those particular tracts,
25 whether it was wetlands or uplands, didn't it?

1 A. Yes, the way I understand.

2 Q. Your answer is yes?

3 A. Yes.

4 Q. So it doesn't matter whether it's uplands or wetlands, to
5 the extent that they were obligated to buy that
6 property?

7 A. I assume so. If that's what the contract says.

8 Q. All right. And it would have behooved them to buy the
9 property, it being wetlands, at a thousand dollars an
10 acre, rather than waiting around and trying to make it
11 uplands, and paying nineteen thousand dollars more an
12 acre, right?

13 A. Well, it would -- they would have had to spend money
14 on it to ...

15 Q. Not nineteen thousand dollars an acre, though, would
16 it?

17 A. Well, it ...

18 Q. Silviculture's going to cost -- on twenty acres, twenty-
19 six acres of wetlands on asterisk parcel, twenty-six
20 times nineteen is what? That's a lot of money, isn't it?

21 A. That's a lot of money.

22 Q. Do you think silviculturing would cost that much?

23 A. I can't attest to that, but it would have been -- it would
24 have been a sizeable amount. I don't know if it would
25 have been nineteen thousand dollars an acre.

1 Q. That would be around four hundred -- over four
2 hundred thousand dollars, wouldn't it?

3 A. You're better at math than I am.

4 Q. Not really, but it is a lot of money, and don't you agree
5 with me that silviculture costs would approach
6 nowhere near that?

7 A. I can't agree to that totally. No, sir.

8 Q. Okay. Hang on a second. You said you worked for the
9 Brigman Company?

10 A. I did. Yes, sir.

11 Q. And you said you walked all through there?

12 A. All through where?

13 Q. Each tract.

14 A. The property?

15 Q. Yes.

16 A. Yes, sir. I have. I wouldn't say I've walked every inch
17 of it, but I've walked through.

18 Q. Couldn't you give an estimate on the amount of
19 delineation for wetlands? You're a forester.

20 A. I could, yes.

21 Q. Okay. You had the experience, didn't you, to do it?

22 A. Yes, sir.

23 Q. Because you did it for Brigman, didn't you?

24 A. I did. Yes, sir.

25 Q. Did you tell Donald and Randy that?

1 A. They knew that.

2 MR. STEVENS: Oh, okay. Thank you. That's
3 all.

4 REDIRECT EXAMINATION OF JAMES MCLEAN
5 BY MR. HUDSON:

6 Q. Just another question or two, Mr. McLean. Attorney
7 Stevens asked you a lot of questions about the uplands
8 and wetlands, and that sort of thing. Do you know
9 whether or not Beverly and Godwin LLCs, as
10 developers, and obviously developing this thing, would
11 have had the same rights to do the silviculture on these
12 undelineated tracts as the owner, Benjamin Creel?

13 A. They had no right to be on the piece of property, if they
14 didn't own it.

15 Q. Would they have had the right to do silviculture after
16 they bought it, as developers?

17 A. As developers, no. Because a silviculture -- that's what
18 I was going to tell Mr. Stevens. A silviculture
19 exemption is an exemption while you are practicing
20 silviculture. When your use of the property changes to
21 a development, you no longer have a silviculture
22 exemption. Silviculture is just for timber management.

23 Q. All right. So for these purposes, it would have served
24 Mr. Beverly and Mr. Godwin no useful purpose to go
25 in and buy a bunch of wetlands, because they would

1 not have been able to do silviculture to increase the
2 uplands?

3 A. I agree. Yes, sir.

4 MR. HUDSON: That's all I have. Thank you.

5 RE-CROSS EXAMINATION OF JAMES MCLEAN
6 BY MR. STEVENS:

7 Q. But if they were in a contract to purchase that tract of
8 land, regardless of what was wetlands or uplands, they
9 still had to purchase it, correct?

10 A. Sir?

11 MR. HUDSON: I object.

12 Q. The contract says they've got to ...

13 MR. HUDSON: That's a leading question, and
14 really an issue before the Court.

15 Q. The contract states that they have to purchase, at some
16 point in time, depending on how they do the takedown,
17 the asterisk tract and Parcel B. Would you disagree
18 with that?

19 A. Say it one more time.

20 Q. The contract that Donald Godwin and Randy Beverly
21 signed ...

22 MR. HUDSON: This is really re-cross. I think I
23 did the redirect and he did the cross. I really think this
24 is ...

25 JUDGE: I agree, but I'm going to let him finish.

1 Q. They had an obligation under the terms of the contract
2 to buy these tracts of land, regardless of whether it was
3 uplands or wetlands?

4 A. Yes, if they have a contract, and the contract so states.

5 MR. HUDSON: And he's calling for legal
6 conclusions, which are before the Court.

7 Q. At some point in time, they had to buy it, correct?

8 A. I assume so, if they signed the contract.

9 Q. It was up to them to pick out which portions they
10 wanted to buy, correct, in each takedown?

11 A. I assume so.

12 Q. Now, you said that you handled -- I want to say two
13 hundred of these wetlands delineations for Mr.
14 Godwin?

15 A. No, no, no. Not for Mr. Godwin.

16 Q. Well, how many did you handle for them?

17 A. For Mr. Godwin?

18 Q. Godwin and Beverly.

19 A. I would say probably -- over my course of working
20 with the Brigman Company and working for them?

21 Q. Yeah.

22 A. Maybe twenty.

23 Q. Did they always call you and ask you to get it done?

24 A. Just -- well, not when I was with the Brigman
25 Company. I mean ...

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1. Q. Okay. When you were with them?

2. A. Yes. Since I've been working for Mr. Godwin, it has
3. been my job.

4. Q. Is that because they wanted to make sure it was done
5. correctly, and that they could have control over it?

6. A. I would assume so.

7. MR. STEVENS: Okay. That's all I have.

8. MR. HUDSON: No further questions.

9. JUDGE: Thank you. You may step down.

10. MR. HUDSON: We call Mr. Godwin. Go ahead?

11. JUDGE: Yes, sir.

12. MR. HUDSON: He should be the last witness.

13. JUDGE: Do you want to break for about five
14. minutes before we start with him?

15. (A SHORT BREAK WAS TAKEN OFF THE RECORD)

16. COURT REPORTER: Do you solemnly swear or
17. affirm the testimony you're about to give will be the
18. truth, the whole truth, and nothing but the truth?

19. DONALD GODWIN: I do.

20. DIRECT EXAMINATION OF DONALD GODWIN
21. BY MR. HUDSON:

22. Q. Okay. Mr. Godwin, we -- I don't think we all heard
23. that, but your name and address for the record, please?

24. A. My name is Donald Desmond Godwin. I live at 115
25. Woodmont Lane, Pawleys Island, South Carolina.

1 Q. And are you the manager of Donald Godwin, LLC?

2 A. Yes, sir. I am.

3 Q. All right. And are there any other members of that
4 LLC?

5 A. No, sir.

6 Q. All right. Was that LLC, Donald Godwin, LLC, in
7 good standing and in existence at the time of this
8 contract and all time periods up until now?

9 A. Yes, sir.

10 Q. And give us your occupation or what you do for a
11 living?

12 A. My main business is I own and operate a company
13 called Southern Asphalt, that specializes in grading and
14 paving infrastructure work. Also involved in a lot of
15 other entities. Garbage business, propane business,
16 real estate, build houses, commercial rental. Just a
17 whole lot of stuff.

18 Q. All right. And of course, Donald Godwin, LLC was a
19 principal in this development here that we're -- this
20 contract that we're here today about?

21 A. That's correct.

22 Q. Had you done those a number of times, similar type
23 projects in the past ...

24 A. Yes, sir.

25 Q. ... before this contract?

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1 A. Yes, sir.

2 Q. All right. And you've had contracts in the past with
3 Mr. Beverly?

4 A. I've done probably ten, twelve subdivisions with Mr.
5 Beverly. We've had a -- seemed like we had a good
6 little click together, and we've been partners a long
7 time.

8 Q. Good. And in the past, have you had any business
9 dealings and or contracts with Mr. Creel?

10 A. No, sir.

11 Q. Have not? All right. And ...

12 A. Other than the fact that one time I bought a piece of
13 property he had at the Marina down here, through
14 Randy. I think that's about the only dealings I've had
15 with him.

16 Q. Jamie McLean just testified, and he's still in the
17 courtroom here now. And I believe he works for you
18 in your different ...

19 A. Yes, sir.

20 Q. ... one or more of your different ...

21 A. He's employed by Southern Asphalt, but he does a lot
22 of inside work for a lot of my companies, LLCs, and he
23 performs a lot of -- you know, he just does a lot of
24 different things for me.

25 Q. Okay. His participation in this project, as far as the

1 survey and the wetlands delineation, was he doing that
2 in behalf of Donald Godwin, LLC and ...

3 A. Right. He was ...

4 Q. ... Randy Beverly, LLC?

5 A. He was working -- he was working for Donald
6 Godwin, LLC and Randy Beverly, LLC, correct.

7 Q. All right. And you've been here listening to the
8 testimony today?

9 A. Yes, sir.

10 Q. And since it started. Okay. And have you, during any
11 of these events, since the contract was signed in
12 October of '05, have you ever heard or been given the
13 indication from Benjamin Creel that he was expecting
14 Donald Godwin, LLC or Randy Beverly, LLC to do
15 any wetlands -- or do the wetlands delineations on the
16 asterisk tract and Parcel B, which we've identified as
17 being inadvertently approved as no wetlands by the
18 Corps?

19 A. It was my understanding from the very beginning that
20 -- and I got involved through Randy. Randy brought it
21 to me. And it was my understanding, right after we
22 signed the contract, that Randy had a meeting with
23 Benjamin, and Benjamin had asked him to start on one
24 end of the property, to close -- take the closeouts, and
25 leave what we call asterisk tract, asterisk, and give him

1 the time to get the silviculture done, because he said he
2 had some issues with the wetlands, and he thought that
3 he wanted to make sure that he got all the uplands he
4 could. So therefore, he asked Randy if we would allow
5 him to go ahead and close on the first two tracts, to
6 leave that one as a third tract. That would give him
7 two years to do the silviculture work, and then we
8 would close on the third tract.

9 Q. All right. Did you folks know in advance, before the
10 closing of the first two tracts, that there were minimal,
11 if any, wetlands on those two tracts?

12 A. Not really, other than the fact that I had Mr. McLean,
13 maybe, to go out and look at the infrared map, or just
14 kind of go out and look at the property. And he came
15 back and reported there was hardly any -- probably not
16 anything that would give us any kind of issues on the
17 first closing.

18 Q. All right. And you folks performed some engineering
19 on the tract?

20 A. Yes, sir. We had hired Shoreline -- I think it was
21 Shoreline Engineering to go out and engineer the first
22 fifty acres, and then, with the engineer plan, to carry on
23 through the whole two hundred plus acres, so we could
24 go back through. Actually, we'd met with the county a
25 couple of times. Our first -- we wanted to just do the

1 first two phases. The county wanted us to do a lot of
2 turn lanes, if we were going to only do the two, A and
3 B, what we closed. So we wanted to do -- we wanted
4 to make sure we did a master plan, to do the whole two
5 hundred plus acres. So the county went back in and
6 made us do a four lane road through the first two, down
7 Shelley Road, or whatever that road is, in order to get
8 back to the rest of it. And it was a big, huge expense,
9 because we had to do that for -- they call it a
10 thoroughfare road that went all the way through, like a
11 four lane highway. So that's the reason we had -- the
12 engineering was so expensive on it, because -- and the
13 infrastructure cost was going to be so expensive, just
14 on the first two phases, because our plans were to go
15 all the way through.

16 Q. All right. And I think my initial question was -- or one
17 of my initial questions was, has Benjamin Creel ever
18 indicated to you that he expected you and Mr. Beverly
19 to do the wetlands delineation and produce a Corps
20 approved letter on the two tracts that were not surveyed
21 and delineated for wetlands, i.e., the asterisk tract and
22 Parcel B?

23 A. No, sir. That was all left up to him.

24 Q. Was there ever any confusion in your mind?

25 A. No, sir. No, sir.

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1 Q. What is your understanding of the relationship between
2 a landowner and a developer purchasing -- or
3 potentially purchasing property? Who is entitled to do
4 silviculture? Are there any restrictions on the
5 developers?

6 A. I don't really know a whole lot about it, but what I've
7 been told was ...

8 MR. STEVENS: Object to what he's been told,
9 Your Honor. That's hearsay.

10 Q. What's your understanding through experience?

11 A. My understanding ...

12 MR. STEVENS: It's based upon hearsay, Your
13 Honor. I move to -- I object to it, and I don't think he
14 can testify to it.

15 JUDGE: I'll note your objection.

16 MR. HUDSON: We'll proffer it. Go ahead.

17 A. Okay. It's my understanding that the -- once a
18 developer buys the property, he loses his right to do the
19 silviculture. The actually original landowner, that
20 actually has been farming the property, or growing
21 timber, or whatever he's doing with it, then it's his
22 responsibility, and he's the only one that can have the
23 silviculture work done. But once it's transferred into
24 another entity, and our entity would be an LLC for
25 development, then we lose our rights for silviculture.

1 Q. All right. Did you ever go out on the property and
2 observe any silviculture being performed by Mr. Creel,
3 or anyone at his direction or on his behalf?

4 A. No, sir. I do remember that Randy and I had a
5 conversation about -- I think that this gentleman with --
6 Matt Johnson, about getting Matt to go out. And
7 Benjamin was kind of dragging his feet, and so we -- I
8 think Randy talked with him about it, so we kind of
9 took it on our own. Randy hired Matt Johnson to go
10 out and maybe do -- clean out some temporary ditches
11 and stuff, to try to see if we can't get that -- get the
12 process speeded up. But Mr. Creel, I mean, he just --
13 he just wouldn't respond at all. I mean, he just
14 wouldn't do anything.

15 MR. HUDSON: Okay. I think that's all I have.
16 That's all I have right now. Answer any questions Mr.
17 Stevens might have. Thank you.

18 CROSS-EXAMINATION OF DONALD GODWIN
19 BY MR. STEVENS:

20 Q. Let me ask you this: were you aware that Randy
21 Beverly, on November the 23rd, 2005, sent the email to
22 Ben Creel, with the quotes for surveying and a
23 wetlands delineation?

24 A. I don't recall, but I'm sure I was aware of it. But I don't

25 ...

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1 Q. You told -- you told your man, Jamie McLean, to
2 contact S&ME, didn't you?

3 A. Yes, sir.

4 Q. And you normally do that, don't you, when you're
5 buying property, you and Randy, or either you by
6 yourself? If you're going to develop, don't you want to
7 keep control of what the wetlands are, and what's going
8 on out there?

9 A. Normally, yes, sir.

10 Q. Okay. Do you recall asking the surveyor to do that
11 October the 16th plat that we've been talking about?

12 A. No, sir.

13 Q. On asterisk?

14 A. I don't remember that.

15 Q. He says it's done for you.

16 A. Well, I mean, just because it says it's done for me, it
17 might have been done for one of my companies, but I
18 don't remember that.

19 Q. It's got your name down there. I was just -- you don't
20 recall doing it?

21 A. No, sir. I don't.

22 Q. If somebody sent me a bill for it, I'd say, "What do you
23 mean, you're doing it for me." I mean, you didn't
24 question it?

25 A. Well, he -- I don't think he sent me a bill, I don't think.

1 Q. Would he have sent it by Mr. McLean?

2 A. He might have sent the company a bill. I don't look at
3 all the bills.

4 Q. But there's no question that Mr. Beverly sent Mr.
5 Creel, before even the first takedown, the bids from
6 Carolina Land Surveyors for doing the surveying work,
7 and the proposal from S&ME to do -- and I quote --
8 "Proposal for wetlands delineation on two hundred and
9 eighty acres."

10 A. Yes, sir.

11 Q. No question about that?

12 A. Yes, sir.

13 Q. That's what he did, correct?

14 A. Yes, sir.

15 Q. Okay. You don't think that would lead Mr. Creel to
16 believe that y'all were taking care of it, and you were
17 going to take it out on his side of the settlement
18 statement?

19 A. No. I can assure you that Mr. Creel knew, on the
20 asterisk tract, that Randy Beverly and myself was not
21 going to be involved in the silviculture. That was
22 understood up front.

23 Q. The silviculture.

24 A. And the wetlands delineation on that particular part.

25 Q. This document shows two hundred and eighty acres,

1 which included the asterisk tract.

2 A. Well, I don't care what the document shows, but it was
3 an understanding that Mr. Creel was going to take care
4 of that particular piece of the property himself.

5 Q. When was that understanding?

6 A. Right after we went to contract, and we found out that
7 there were some issues with -- when Benjamin went
8 back to Randy and told Randy there were some issues
9 with part of the property, and wanted to know if we
10 would consider closing -- starting the takedown on the
11 other end.

12 Q. Okay.

13 A. So when we got to the third takedown, which was the
14 tract -- the asterisk tract, that would give him two years
15 to do the work and have a delineation prepared, so he
16 would know exactly what the wetlands were.

17 Q. Okay. Two years?

18 A. Two years.

19 Q. Did you tell him, "Well, I'm not going to do that now.
20 You've got to do it."

21 A. He knew he had to do it. That was ...

22 Q. Answer the question. Did you tell him that?

23 A. I didn't even talk with him.

24 Q. Okay. All right. Excuse me a second. Let me ask you
25 this. You had a contract to purchase in four

1 takedowns, right?

2 A. Yes, sir.

3 Q. The fact that there was wetlands out there did not
4 excuse you from purchasing the tract, did it?

5 A. That's correct.

6 Q. Because whatever it was, when you -- sometime during
7 that four year period of time, you were obligated to pay
8 for whatever the tract contained, correct?

9 A. But we wanted to be able to close on contiguous
10 property, and our contract said he was supposed to --
11 we were supposed to have a wetlands delineated piece
12 of property, so we could know exactly what was
13 uplands and what was wetlands.

14 Q. Okay.

15 A. There is no such document that shows us on the
16 asterisk part, so why would -- why would we want to
17 close on something that we can't -- if we skip to the
18 next parcel and close forty acres on the back side, that
19 would not be contiguous. How could we get to it?

20 Q. You've asked me two questions, and you know I'm the
21 lawyer. Do you really want me to answer those
22 questions?

23 A. I do. I do.

24 Q. Well, let's -- I'm not going to be the answering of the
25 questions, and you're really supposed to answer my

1 questions. But the answer to the question is, you were,
2 at some point in time, obligated to buy the tract,
3 whether it was wetlands or uplands, correct?

4 A. No, sir. I was obligated to buy it after it was
5 delineated.

6 Q. Okay.

7 A. By the contract.

8 Q. Does the contract -- does the contract define the term
9 "delineation"?

10 A. I don't know if the contract defines it, but I think
11 everybody in this room knows what delineation is on a
12 wetland.

13 Q. I don't.

14 A. Well, I'll guarantee you Mr. Creel does.

15 Q. Excuse me from the -- I'm just a lawyer. Did you ever
16 look up what delineation means?

17 A. No, sir.

18 Q. Okay. There was a -- in that tract, that plat that you
19 don't remember on October of 2007, some
20 identification as to how many acres was wetlands, and
21 how many acres was uplands.

22 A. That was an estimation.

23 Q. All right.

24 A. Not a delineation.

25 Q. But all you had to do, did you not, was to go ahead and

1 tell your surveyor to get out there and get the
2 delineation, didn't you?

3 A. No. How could you do that?

4 Q. Exactly the same way you did it over here on Exhibit
5 Number 31.

6 A. No, we had S&ME to go out, and he had to -- he
7 flagged the wetlands, and he had to send it to the
8 Corps, to get the Corps of Engineers to ...

9 Q. Why didn't you get him to do that?

10 A. It was not my responsibility. It was not our
11 responsibility. That was Mr. Creel's responsibility.

12 Q. Okay. And you -- it wasn't important to you when you
13 closed number one, was it? The first one?

14 A. Yes, it was important.

15 Q. Well, you closed it without the delineation.

16 A. And the reason we did is because it was only point
17 three acres of wetlands on it.

18 Q. Okay. And you can't see ...

19 A. We thought there was none on it.

20 Q. You and your lawyer keep saying that Mr. Creel had
21 the responsibility to get a certification from the Army
22 Corps of Engineers.

23 A. That's our understanding.

24 Q. Right. That's not what the contract says, though, is it?

25 A. That is what my understanding is.

1 Q. Well, your understanding, let's see if we can tax your
2 understanding. On paragraph seven, look at the
3 parentheses portion of paragraph seven. What does it
4 say?

5 A. It says, "Feasibility period, the seller is not required to
6 have the wetlands permitted within the US Corps of
7 Engineers." That's during the feasibility period.

8 Q. All right. Well, you show me, then, on paragraph nine,
9 which y'all are relying so heavily on, where does it say
10 he has to have a certification from the Army Corps of
11 Engineers?

12 A. It says, "delineating the boundary lines of said
13 property, and all wetlands, and carving out forty acre
14 parcel retained by the seller." And it says by survey.
15 There was no survey of ...

16 Q. I'm talking about the certification by the Army Corps
17 of Engineers. (TO MR. HUDSON) Are you looming
18 over my shoulder?

19 MR. HUDSON: I was just going to let you each
20 have a copy, so you wouldn't be looking on the same
21 one.

22 Q. That's okay. I'm finished.

23 MR. HUDSON: Is that it?

24 Q. No. You were required under paragraph nine,
25 "Purchaser shall obtain a takedown survey for the

1 acquisition of each takedown of the property,"
2 parentheses, "takedown survey." Where's the
3 takedown survey for the third takedown?

4 A. There is not one, to my knowledge.

5 Q. Did you see the September the 2nd handwritten note
6 from Benjamin Creel, right here? And he says, "I look
7 forward to receiving a survey of what y'all do wish to
8 purchase." Did you see this note?

9 A. I probably did.

10 Q. Well, why didn't you get him a survey of what y'all
11 wished to purchase?

12 A. I can't answer that.

13 MR. STEVENS: Okay. That's all I have. Thank
14 you.

15 MR. HUDSON: If Jimmy has another witness in
16 addition to Benjamin, we would have another witness
17 tomorrow as well. I was just trying to finish today, and
18 the reason we weren't going to call ...

19 MR. STEVENS: Who?

20 MR. HUDSON: Who was going to be your
21 witness? It was my impression that just Benjamin was
22 the only ...

23 MR. STEVENS: No, I had one other one. Luke -
24 - I've given you that. Luke Barefoot.

25 MR. HUDSON: Okay. The only other one we'd

1 MR. HUDSON: No objection.

2 MR. STEVENS: We would call Mr. Creel.

3 Excuse me. Mr. Creel wondered if he could take a
4 bathroom break.

5 MR. HUDSON: No objection.

6 JUDGE: Sure. Let's take about fifteen minutes.

7 (A SHORT BREAK WAS TAKEN OFF THE RECORD)

8 MR. STEVENS: Go ahead and take the witness
9 stand.

10 MR. HUDSON: I got no objection to whatever's
11 comfortable for Mr. Creel, if you need to make some
12 adjustments up there, Sunny.

13 BENJAMIN CREEL: I'm sure this will be fine.

14 COURT REPORTER: Do you solemnly swear
15 or affirm the testimony you're about to give will be the
16 truth, the whole truth, and nothing but the truth?

17 BENJAMIN CREEL: I do.

18 COURT REPORTER: Please state your full
19 name for the record.

20 BENJAMIN CREEL: Benjamin Julian -- J-U-L-
21 I-A-N -- Creel, C-R-E-E-L.

22 DIRECT EXAMINATION OF BENJAMIN CREEL

23 BY MR. STEVENS:

24 Q. Look at my exhibits there. That's what I want, that
25 right there. Mr. Creel, you were here when Exhibit 32

1 was introduced, which appears to be the southwestern
2 tract of the entire tract, and the one adjacent to it,
3 which is below the Shelley Farm Road?

4 A. Yes, sir.

5 Q. Now, prior to this lawsuit, had you ever seen this tract,
6 this plat?

7 A. No, sir.

8 Q. All right. Did you have an opportunity to look at this
9 plat as a result of the -- Mr. Beverly and Mr. Godwin's
10 attorney producing documents pursuant to a Request
11 for Production of Documents?

12 A. I'm almost certain that's how I first came to see it.

13 Q. All right. Now, under paragraph nine of the contract,
14 did you understand that you were to get a takedown
15 survey from the buyers, so that you would know what
16 section they were going to buy of this entire three
17 hundred and seventeen acre tract?

18 A. That's correct, and that's exactly what took place on the
19 first two takedowns.

20 Q. Okay. And that -- you're referring to Exhibit 29, which
21 is the plat of the first takedown?

22 A. That's correct.

23 Q. They provided you with that particular plat?

24 A. Yes, sir.

25 Q. And that was the first takedown? That's what you call

1 a takedown plat?

2 A. Yes, sir.

3 Q. Okay. Or takedown survey. Then on the second
4 takedown, did they provide you with a takedown
5 survey? And I refer you to Exhibit Number 30?

6 A. Yes, sir.

7 Q. Okay. So you knew what they wanted to buy?

8 A. Yes, sir.

9 Q. Okay. And on each of those, did they ask you for a
10 wetlands delineation?

11 A. No, sir.

12 Q. On each of those, did they ask you for an Army Corps
13 of Engineers certification?

14 A. No, sir.

15 Q. You weren't required to give them an Army Corps of
16 Engineers certification, were you, under the terms of
17 the contract?

18 A. No, sir.

19 MR. HUDSON: Object to the form of the
20 question.

21 Q. Were you obligated to give them a certification from
22 the Army Corps of Engineers on any of the takedowns?

23 A. No, sir. The contract specifically says that a Corps of
24 Engineers survey is not required. I can't remember
25 which paragraph it's in.

1 Q. I think we referred to paragraph seven earlier. There
2 was a handwritten note by you to -- it's right here.
3 There's a handwritten note by you to Mr. Beverly,
4 which has been identified as Exhibit Number 21.
5 Starting with -- in the bottom -- that's September the
6 2nd, 2008. Look down on the bottom of it, where it
7 says -- starts with, "please."

8 A. "Please let me know how you wish to proceed. I look
9 forward to receiving a survey for what y'all do wish to
10 purchase at this time in the near future."

11 Q. All right. Now, had you received this plat here -- that
12 is, Exhibit Number 32 from Godwin and Beverly --
13 would you have closed on that particular tract?

14 A. No, sir.

15 Q. Why not?

16 A. Because paragraph twenty-two, I believe it is, of the
17 contract, specifically says that the southwest portion of
18 the tract is to be held till the final takedown.

19 Q. Okay. Let me hand you -- I don't know whether this
20 has been introduced, Your Honor, but I'd like to go
21 ahead and mark it as an exhibit.

22 (DEFENDANT'S EXHIBIT 33 WAS MARKED)

23 JUDGE: Show it to Mr. Hudson.

24 MR. STEVENS: It's the contract.

25 MR. HUDSON: It's the contract again?

1 JUDGE: That's fine. I can ...

2 MR. HUDSON: ... use -- sort out the numbers.

3 DIRECT EXAMINATION OF BENJAMIN CREEL

4 CONTINUED BY MR. STEVENS:

5 Q. Now, I want to direct your attention to the last sentence
6 of paragraph twenty-two. What does that say?

7 A. Paragraph twenty-two addresses the takedown
8 schedule, and it goes through the various and sundry
9 discussions about that. And the last sentence is,
10 "Notwithstanding any of the foregoing, the parties
11 agree the purchaser will take down the southwest
12 portion of the tract at the last closing, which tract will
13 be more specifically delineated on the schedule
14 attached," la-di-da.

15 Q. So the last closing was to include the southwest portion
16 of the tract?

17 A. Yes, sir.

18 Q. Was that because of the silviculture that was going on?

19 A. It was because we did not know, when we signed the
20 contract, how much wetlands was in this portion. But
21 we knew that there was some, and it was to allow the
22 maximum amount of time to get it dried out, if
23 possible.

24 Q. So up until -- right on up through August, when you
25 wrote that note, of 2008, they still had not told you

1 what portion of this tract that they were going to
2 purchase on the third takedown?

3 A. That's correct.

4 Q. All right. Had you had that map there, you would not
5 have -- you would have called their attention to this
6 particular language?

7 A. Yes, sir.

8 Q. All right. Now, I want to ask you about the
9 silviculture. Who was the one that first suggested
10 silviculturing?

11 A. I don't remember who made the very first suggestion
12 about silviculture. I did not know that word until a
13 couple of years later. I just knew that there were
14 forestry practices that could be used to basically
15 convert what might be wetlands into uplands.

16 Q. Well, who made the first suggestion that it had to be --
17 that it would be best to wait on the southwestern tract,
18 or to submit the southwestern tract to ditching and
19 whatever is involved in silviculturing, to hopefully dry
20 up the wetlands? Whose idea was it?

21 A. I think it was Randy's idea. I know that he called me to
22 tell me about Mr. Hardwick doing some work on the
23 adjacent property, and suggested that I call him. But I
24 don't remember who first came up with that idea. But I
25 think it was Randy, though, and it's a good idea.

1 Q. Did you call Mr. Truitt Hardwick to do the ditching
2 and so forth out there?

3 A. I called Mr. Hardwick. I think that he and I rode out
4 there. And my understanding, he was going to call me
5 back and give me a price, and he never did that. It was
6 about that time that I got sick, and then at some point
7 in there, I learned that Randy and Donald had hired
8 Matt Johnson to do the work, and were going to charge
9 me at the second closing, which is what took place.
10 And I had no problem with that.

11 Q. Okay. And that's on the second closing, they took off
12 from your side of the settlement statement. Matt
13 Johnson, Twin Oats is his company, a charge for doing
14 the ditching and so forth out on the southwestern tract?

15 A. Yes, sir.

16 Q. Okay. Now, did you -- do you recall when the --
17 excuse me. After the second closing, and before the
18 third closing, did the Plaintiffs, Mr. Godwin and Mr.
19 Beverly, write you a letter saying that they were not
20 going to go forward with the closing?

21 A. There were various and sundry letters back and forth,
22 and negotiations which began in March of 2008. But
23 ultimately, yes, I received correspondence from them
24 or their attorney that they considered the contract to be
25 null and void, I think is the terminology that was used.

1 Q. Okay.

2 A. And I believe that was a letter from Randy's son, Allen.

3 Q. Okay. Let me ask you this: at the time of the third
4 closing -- the third closing was supposed to occur
5 sometime in June of 2008. Am I correct?

6 A. Yes, sir. That was the schedule. June of 2008 should
7 have been the third closing.

8 Q. All right. And you heard the testimony that this entire
9 tract, with the exception of the southwestern portion,
10 that tract on the southwestern portion, had been
11 surveyed, had the wetlands delineated, and had
12 certification by the Army Corps of Engineers. You
13 heard that yesterday, did you not?

14 A. Yes, sir.

15 Q. And there was introduced a letter by the Army Corps
16 of Engineers that the entire tract, with the exception of
17 the southwestern tract, had been certified by the Army
18 Corps of Engineers back in November of 2007?

19 A. Yes, sir.

20 MR. HUDSON: I would remind opposing
21 counsel of the same objection that he did to me, to ask
22 questions as opposed to basically making statements or
23 testifying.

24 Q. I'm referring, Your Honor, to Defendant's Exhibit
25 Number 14. Is this the Army Corps of Engineers

1 letter?

2 A. Yes, sir.

3 Q. And what's the date of that letter?

4 A. November 27, 2007.

5 Q. And which portions of the entire tract did they say they
6 had certified?

7 A. It says here, "The project area is depicted as Parcels A,
8 B, C, and D on the survey plat you submitted that was
9 prepared by Carolina Land Surveyors, dated October
10 16th, 2007, and entitled 'Wetlands Survey of 4 Parcels,
11 being portions of TMS numbers dadada, Bucks
12 Township, South Carolina, for ...'

13 Q. So he's identified ...

14 A. ... for Donald Godwin.'"

15 Q. He's identified Parcels, A, B, C, and D ...

16 A. Yes, sir.

17 Q ... in his letter?

18 A. Yes, sir.

19 Q. And this particular plat is -- shows the wetlands
20 delineation?

21 A. Yes, sir.

22 Q. It shows the -- they had earlier said that the wetlands
23 delineation was not shown on the first takedown on
24 Tract A, but they closed it. Am I correct?

25 A. That is correct.

1 Q. All right. But on this particular plat, which is -- what's
2 the date?

3 A. October 16th, '07.

4 Q. Okay. They came back and found that there were
5 some wetlands on Tract A?

6 A. Yes, sir. That was actually found in between the first
7 closing and the second closing.

8 Q. And Tract C, which is above Shelley Farm Road, has
9 no wetlands delineated on it?

10 A. No, sir. There is none.

11 Q. All right. And Tract D has some wetlands delineated?

12 A. Yes, sir. Not very much, but there's a little bit.

13 Q. Okay. And Tract B has no wetlands delineation?

14 A. That's correct.

15 Q. Evidently the Army Corps of Engineers or somebody
16 made a mistake, from what we heard yesterday?

17 A. That's my understanding.

18 Q. All right. Did you have any part to play in submitting
19 this plat to the Army Corps of Engineers, or did
20 somebody else do that?

21 A. Somebody else did all of it.

22 Q. Okay. Now, you said that they wrote a letter to you. I
23 think your letter -- prior to -- about the time of the
24 closing, did you get a letter from Greg Martin, dated
25 June the 18th, 2008? That's Exhibit -- Defendant's

1 Exhibit Number 18, Your Honor.

2 A. It's actually on Greg Martin's letterhead, but it's
3 actually from Randy's son, Allen.

4 Q. Okay.

5 A. But yes, sir. I did receive this letter.

6 Q. Look at this letter and tell me whether or not it says, as
7 the language you mentioned earlier, about the null and
8 void? Read that particular language for me.

9 A. What this letter asserts is, "Due to Bucksville Farms,
10 Inc.'s breach, by failing to provide said boundary
11 survey and wetlands delineation, Randy A. Beverly,
12 LLC and Donald Godwin, LLC do hereby declare the
13 contract forever null and void."

14 Q. Okay.

15 MR. HUDSON: What's the date on that?

16 Q. June 18th, 2008. All right. As a result of that letter,
17 did you write a letter to Randy Beverly and Donald
18 Godwin? Defendant's Exhibit Number 17, Your
19 Honor. What's the date of that letter?

20 A. The date on this letter is June 12th, 2008. But yes, sir.
21 This is my letter and my signature.

22 Q. All right. Was that in response to what you had gotten
23 from Allen Beverly?

24 A. No, sir. I think this letter preceded Allen's letter.

25 Q. Okay. It preceded Allen's letter?

1 A. I think so.

2 Q. Hang on a second. Let me double check. I stand
3 corrected. That letter came before Mr. Beverly wrote -
4 - Mr. Allen Beverly wrote that letter. Allen Beverly's
5 letter was June the 18th. Your letter's June the 12th?

6 A. Correct.

7 Q. All right. What were you saying there?

8 A. Do you want me to publish it?

9 Q. Yeah.

10 A. "Dear Randy and Donald, I'm in receipt of your recent
11 correspondence regarding our discussions to rectify
12 your breach of our contract on the Bucksville property.
13 Last time we met in Randy's office, I came to the
14 realization that I can neither compel nor convince you
15 to do anything close to what I think is reasonable
16 regarding the 501 property. I also came to the
17 realization that you can neither compel nor convince
18 me to do anything close to what you think is reasonable
19 regarding that property. I offered to double your
20 money, and you said the least you would accept was to
21 quintuple your money. My opinion is that we can talk
22 and write back and forth about this until we are, quote,
23 blue in the face, end quote, to no avail. As a much
24 older, wiser friend of mine put it, 'They've already
25 screwed you on that deal. Stick to the contract in

1 hand.' I have decided to take his advice by doing what
2 I can compel you to do, that being to perform on the
3 contract, pay my damages, and pay my attorney's fees.
4 I'm regretful that you are forcing me to do this, but I
5 see that I have no choice. I estimate that I will already
6 have incurred three thousand dollars in fees because of
7 your breach, and as of June 14th, I will have incurred a
8 two thousand -- ten thousand, eight hundred and
9 seventy-five dollar mortgage penalty because of your
10 breach. If you wish to avoid a minimum of twenty
11 thousand dollars more in attorney's fees, please advise
12 me of your intention to, quote, make me whole, end
13 quote, under the terms of our contract by Friday, June
14 20th, 2008. Otherwise, litigation will commence."

15 Q. Now, was that in response to some kind of offer by Mr.
16 Beverly to revise the agreement as it relates to the third
17 takedown?

18 A. Yes, sir. There were various and sundry negotiations
19 that went on between March and June of 2008.

20 Q. Okay. I'm referring to Defendant's Exhibit Number 16,
21 dated May the 29th, '08. Is that the letter from Mr.
22 Godwin and Mr. Beverly?

23 A. Yes, sir.

24 Q. Were they attempting to modify the terms of the
25 contract for this specific purchase of property?

1 A. Yes, sir. What they were -- they were offering, instead
2 of paying all cash on the next takedown, they were
3 offering to trade some cash and some acreage on 501.

4 Q. Is that where the 501 matter came up?

5 A. Yes, sir.

6 Q. Who owned that 501 property?

7 A. Randy.

8 Q. What was he going to do? What was he going to do
9 with regards to the 501 property?

10 A. They offered to carve out a small portion of the useable
11 frontage.

12 Q. On 501?

13 A. And run the entire depth of the property, and trade that,
14 and two hundred thousand dollars for the third
15 takedown.

16 Q. Okay. Was that in response to a letter that you wrote
17 on May the 9th, 2008? I hand you that. That's
18 Defendant's Exhibit Number 15, Your Honor.

19 A. It was in response to -- like I say, we were passing the
20 letters back and forth, and we had various and sundry
21 meetings. But I think that the correspondence that
22 preceded this was this.

23 Q. When you say this, you're talking about ...

24 A. This being -- this being ...

25 Q. ... Defendant's Exhibit 16?

1 A. Yes, sir.

2 Q. And 15 preceded 16?

3 A. Yes, sir.

4 Q. And that's dated?

5 A. May 9th, 2008.

6 Q. All right. Let me hold that just one second. In here,
7 you're saying, "As to our recent discussions, it is my
8 understanding you wish to delay the last two closings
9 under the contract, fifty acres at nineteen thousand per
10 acre currently scheduled to close June the 6th, 2008,
11 and the remaining approximately one hundred and
12 thirty acres at twenty thousand per acre, currently
13 scheduled to close June the 6th, 2009. For this delay,
14 you have offered me thirty then forty thousand dollars,
15 to be applied to the purchase price." And essentially
16 what you're saying here is that you deny -- you refuse
17 that. Am I correct?

18 A. Yes, sir.

19 Q. Okay. Is that when Mr. Beverly and Mr. Godwin came
20 up with the idea to exchange 501 property instead of
21 paying the funds?

22 A. Yes, sir. Well, I think we had actually discussed that.
23 I can't remember when that -- when the meeting took
24 place, when we discussed that. But I think there was a
25 meeting prior to this letter, where we discussed it.

1 Q. Okay. Now, at that point in time, did you retain me as
2 your attorney?

3 A. I think that ...

4 Q. I think in July the 2nd, 2008?

5 A. Yes, sir.

6 Q. All right. What's the -- that's Exhibit Number what?

7 A. Exhibit Number 19.

8 Q. And that's a letter from me to?

9 A. Mr. Allen Beverly.

10 Q. Okay. In response to what? Mr. Beverly's letter?

11 A. I guess so, yeah.

12 Q. Okay. Without going through that, were there letters
13 going back and forth between the attorneys?

14 A. Yes, sir. I think so.

15 Q. All right. And then, at some point after those letters, is
16 when you wrote this handwritten note asking them to
17 tell you what they wanted on the takedown? I think it
18 was August ...

19 A. September.

20 Q. ... September.

21 A. September 2nd, I believe is the date.

22 MR. HUDSON: What number is that, so we can
23 keep up?

24 A. This is 19.

25 MR. HUDSON: Defendant's Exhibit 19?

1 A. Yes, sir.

2 Q. When you got -- when you sent that particular
3 September the 2nd letter, did you hear anything?

4 A. Well, the conclusion of the letter was asking them for,
5 you know, the next -- if I remember correctly. Do you
6 have it there, Jimmy? Let me look at it and refresh my
7 memory.

8 Q. I'll read it. "I look forward to receiving a survey of
9 what y'all do wish to purchase at this time in the near
10 future."

11 A. Yeah.

12 Q. Did you get anything?

13 A. No, sir.

14 Q. All right. Now, you didn't get anything from Mr.
15 Godwin or Mr. Beverly, correct?

16 A. Certainly no survey. I think there might have been
17 more attorney letters, but certainly no survey.

18 Q. All right. You didn't get any more letters from them,
19 either, did you?

20 A. Not that I recall, no.

21 Q. I want to hand you exhibit -- Defendant's Exhibit 23,
22 which is a letter from Mr. Allen Beverly to me. Did
23 you have an opportunity to read that?

24 A. Yes, sir.

25 Q. All right. Well, read the highlighted portion of the

1 letter.

2 A. This is ...

3 MR. HUDSON: What date is that?

4 A. October 8th, 2008. And this is, once again, on Greg
5 Martin's letterhead over Allen Beverly's signature,
6 addressed to James P. Stevens. "Your client provided
7 an unofficial wetlands estimation from a non-
8 government body that could change substantially from
9 the final Army Corps of Engineers official wetlands
10 determination."

11 Q. Okay. Now, they're still asking for an Army Corps of
12 Engineers certification?

13 A. Correct. Which the contract specifically says is not
14 required from me. I apologize if that was
15 editorializing.

16 Q. The next section -- the next document is Defendant's
17 Exhibit Number 24, dated October 30th, 2008. Do you
18 recognize that particular letter?

19 A. Yes, sir.

20 Q. Who's it to, and who's it from?

21 A. This is from the Stevens Law Firm over your signature,
22 to Allen Beverly.

23 Q. And did that respond to his letter?

24 A. I'm sure it did.

25 Q. Okay. Now, after that -- hang on just one second. Let

1 me look at -- look at the first set of -- first highlighted -
2 - what -- could you publish that for the record?

3 A. The first highlighted portion?

4 Q. Yeah.

5 A. "The assertion that the buyers are waiting on the seller
6 to provide a wetlands delineation certified by the US
7 Army Corps of Engineers is unfounded. Please see the
8 enclosed letter from the Army Corps of Engineers,
9 dated November 27th, 2007, which has been provided
10 to your client for a sufficiently reasonable time, well
11 before June of this year." And this is dated October the
12 30th, 2008.

13 Q. All right. What did you -- did you or are you aware of
14 any further response to that particular letter?

15 A. No, sir. Other than this lawsuit.

16 Q. All right. And the lawsuit is dated February 24th,
17 2009, and filed -- I can't read it. It looks like February
18 24th, 2009. The 26th, 2009. And that's -- everything
19 stopped then, right?

20 A. Yes, sir.

21 Q. And what did you do as a result of that lawsuit?

22 A. Well, I paid you a bunch of money, but ...

23 Q. Go ahead.

24 A. But since they had made it very, very abundantly clear
25 that they were not going to perform, and had filed this

1 DJ action to have the contract declared null and void,
2 like Dwight said earlier, I do have my law degree. I
3 don't practice any more, but I'm still licensed. But I do
4 know enough to know that I had to mitigate my
5 damages. So I went looking for another buyer on the
6 property. Plus, I needed the money to pay my bills.

7 Q. Okay.

8 A. Or my debts.

9 Q. Were you relying on these funds from the third and
10 fourth takedown to pay your bills?

11 A. Absolutely.

12 Q. Now, Mr. Hudson was talking a lot about bankruptcy
13 and all this. Who filed bankruptcy?

14 A. The North American Institute of Aviation.

15 Q. When did they file bankruptcy?

16 A. In February of 2009, long after all this other stuff.

17 Q. Okay. And was that after you got the lawsuit? Was it
18 2009 or 2010?

19 A. No, it was 2009.

20 Q. Okay.

21 A. I think. I think the filing -- which I don't think is
22 related at all, but I think the actual filing date on that
23 bankruptcy was February 15th.

24 Q. Okay.

25 A. And I think the filing of the lawsuit was ...

1 Q. February 26th.

2 A. ... February 26th or something.

3 Q. Well, let me ask you this: would the fact that -- was
4 that aviation business a corporation?

5 A. Yes, sir.

6 Q. Would that fact that the bankruptcy had been filed by
7 the aviation corporation have any effect on you
8 providing Mr. Godwin and Mr. Beverly with a clear
9 title to the rest of the property?

10 A. Absolutely not. It didn't stop me from providing clear
11 title to the ultimate buyer.

12 Q. Who's that?

13 A. Larry W. Paul.

14 Q. Okay. Now, he's also asked you, did you -- when you
15 were trying to find somebody to buy the property, to
16 mitigate your damages, whether you called Mr.
17 Beverly and Mr. Godwin up and offered to sell them
18 the same property at the same price you sold it to Mr.
19 Paul. Did you hear that?

20 A. Yes, sir.

21 Q. Do you have any response to that?

22 A. No, I did not call them. They had made it abundantly
23 clear that they weren't going to perform. By that time,
24 I think the sale took place about seven months after this
25 litigation was commenced, so we were deep in

1 litigation. I had a contract with them. So no, I already
2 had a price established if they were going to buy it, and
3 they weren't honoring it. So no, I did not bother calling
4 them.

5 Q. Okay. Now, did you sell to Mr. Paul the entire tract
6 that is set forth in this particular plat?

7 A. Everything other than what Donald and Randy had
8 already bought, plus the portion, forty-two, I think it is,
9 acres that I was planning to reserve.

10 Q. So you sold Mr. ...

11 A. I sold him everything I had left.

12 Q. You sold everything you had left there?

13 A. Yes, sir.

14 Q. And when you sold the remaining portion of the tract
15 that Mr. Godwin and Mr. Beverly had not purchased,
16 did you sell it in one deed, or did you sell it in two
17 deeds?

18 A. No, sir. It was two separate deeds.

19 Q. Okay. When you say you sold him the tract that is
20 marked "Creel," that's the one you excluded from their
21 contract? That is, the Plaintiff's contract, correct?

22 A. That is correct.

23 Q. And you sold the rest of it, excluding the one you had
24 expected to reserve, to Mr. Paul for how much?

25 A. Four hundred and ninety thousand dollars, if I

1 remember correctly.

2 Q. And how much did you sell the tract that you were
3 expected -- which you expected to reserve for yourself
4 to him for?

5 A. A hundred and ten thousand dollars, if I remember
6 correctly.

7 Q. So if the math's correct, the total price of the whole
8 thing was six hundred thousand?

9 A. Yes, sir.

10 Q. Okay. So to the extent that you were applying
11 mitigation to your damages, it would be four hundred
12 and ninety thousand?

13 A. Yes, sir.

14 Q. We'd move to introduce this document.

15 MR. HUDSON: Looks like this is Luke Barefoot
16 here. I mean, was he asked anything about this? I
17 don't remember Luke Barefoot saying anything about
18 this. I don't remember seeing this exhibit, or this thing
19 being produced.

20 MR. STEVENS: All right. I'll take out ...

21 A. It's just a cover letter, I think.

22 MR. HUDSON: And I think anything from the
23 Clerk's office, deeds of public record would have to be
24 certified from the Clerk's office, pursuant to the rules,
25 if you're introducing a public record. And that would

1 be fine, if we need to do that, to paint a complete
2 picture for the Court, then we can do that. But I would
3 have those present now.

4 JUDGE: Is the deed certified?

5 MR. STEVENS: No. It's a copy.

6 JUDGE: If you want to do that, then I want you
7 to introduce it and substitute the certified copy.

8 MR. HUDSON: Well, these things weren't
9 produced before. We would object on that grounds.
10 But if we're getting into the public records and any of
11 the Larry Paul transaction, we would also want the
12 right, in our case, in our cross-examination, to have any
13 and all public records in connection with these
14 transactions with Larry Paul or the sale.

15 JUDGE: I agree.

16 MR. HUDSON: In proper form, certified.

17 JUDGE: Maybe you'd rather do that. In a day or
18 two, you can send them.

19 MR. HUDSON: That's right.

20 JUDGE: But in the meantime, let's temporarily
21 mark the ones, even if they aren't certified, so I'll have
22 an opportunity to look at them.

23 MR. STEVENS: That's okay. We can do it at
24 break. Mark that one for me as 35.

25 (DEFENDANT'S EXHIBITS 34 & 35 WERE MARKED)

1 MR. HUDSON: But that we would -- Jimmy and
2 I submit complete copies of what's determined to be, or
3 what our position is, is the complete public records
4 between Mr. Creel and Larry Paul.

5 JUDGE: Right.

6 DIRECT EXAMINATION OF BENJAMIN CREEL
7 CONTINUED BY MR. STEVENS:

8 Q. Now, you indicated that you sold the remainder of the
9 property to Mr. Paul for four hundred and ninety
10 thousand dollars?

11 A. I think, if my memory's correct. Let me see the deed,
12 and I'll make sure.

13 Q. All right.

14 A. That's correct.

15 Q. Okay. What's the date of the deed, right up at the top
16 there? Here.

17 A. It looks like it's October 1st, 2009.

18 Q. Okay. This was after the time for the fourth takedown.
19 Am I correct?

20 A. Yes, sir. The fourth takedown should have been in
21 June of 2009.

22 Q. And this was after they filed the lawsuit, correct?

23 A. Yes, sir.

24 Q. We'd move to introduce that, subject to getting a
25 certified copy. All right. Looking at Exhibit Number

0309

1 35, is that the deed for the piece of property that you
2 had reserved for yourself, that wasn't under the
3 contract?

4 A. Yes, sir.

5 Q. Okay. Mr. Creel? All right. Why did you separate it
6 out like that?

7 A. Well, obviously we were already in litigation, and
8 knowing that we were going to have to do a damage
9 calculation, we had to separate this property, which
10 was not under the contract, from the property that was
11 the subject of the contract.

12 Q. Okay. And so you mitigated your damage to the extent
13 of four hundred and ninety thousand dollars?

14 A. Yes, sir.

15 MR. HUDSON: Object to the testimony.

16 Q. Do you know what the term liquidated damages
17 means?

18 A. Yes, sir.

19 Q. Okay. What does it mean?

20 A. It means damages that are set forth, either set out
21 specifically or are reasonably certain in advance.

22 Q. Okay. Are the damages which you are asking this
23 Court, would you consider them to be liquidated
24 damages?

25 A. Yes, sir.

1 Q. Okay. Now, when you first began determining what
2 your damages were, did you calculate your damages
3 considering Parcel B as being all uplands?

4 A. I think so.

5 Q. And after the testimony yesterday, then did you go
6 back and recalculate your damages, and considering
7 Parcel B as portions of it being wetlands?

8 A. Yes, sir.

9 Q. All right. So I think the testimony was that the
10 southwest portion in Parcel B, from a plat there, shows
11 fifty acres as wetlands?

12 A. I think that's correct.

13 Q. Did you correct your damages to reflect that?

14 A. Yes, sir.

15 Q. All right. Let me hand you Exhibit Number 25.

16 A. Yes, sir.

17 Q. All right. Based upon the corrected version, without
18 pre-judgment interest, what are your damages for the
19 Plaintiffs failing to complete the contract, without pre-
20 judgment interest?

21 A. One -- mitigation for ninety ...

22 Q. Let me ask that question a different way.

23 A. One million, nine hundred and forty-five thousand
24 dollars.

25 Q. Is that taking -- is that reducing the gross amount by

1 the mitigation?

2 A. Yes.

3 Q. All right. Let me hold that just a second.

4 A. Give me one second.

5 Q. Okay.

6 A. Can I have a sidebar, Your Honor? Where did we get
7 that from? I remember ...

8 Q. That's your pre-judgment interest.

9 A. Okay. I got you. Okay. I understand.

10 Q. Look down at net damages.

11 A. I got you. I got you. I understand. Okay. That figure
12 comes up from there. I got you.

13 Q. What is the -- what is the net loss, after mitigation, in
14 this case?

15 A. Net damages?

16 Q. Yeah.

17 A. One million, nine hundred and forty-five thousand
18 dollars.

19 Q. Okay. What -- did you do a calculation as to pre-
20 judgment interest? Did you do it?

21 A. Yes, sir.

22 Q. All right. What -- to what date did you do it?

23 A. It was several months ago. I think it was at the time of
24 the mediation, but I don't see the date on here.

25 November, 2011.

0312

1 Q. Okay. And that is from June ...

2 A. June of 2008, when the original third takedown should
3 have taken place.

4 Q. All right. Now, you did calculate pre-judgment interest
5 on the first -- excuse me, on the third takedown. Did
6 you calculate it on the fourth takedown?

7 A. Should have been, yes, sir.

8 Q. Yeah. And that's from June the 9th -- excuse me, June
9 of 2009?

10 A. Yes, sir.

11 Q. To November?

12 A. Yes, sir.

13 Q. All right. And then did you do the calculations as to
14 the wetlands?

15 A. Yes, sir.

16 Q. Okay. And the pre-judgment interest calculation total
17 is what?

18 A. Five hundred and ninety-five thousand, seven hundred
19 and twenty-four dollars.

20 Q. So what is your -- what is the total damages you're
21 requesting the Court give you, including pre-judgment
22 interest?

23 A. Two million, five hundred and forty thousand, seven
24 hundred and twenty-four dollars.

25 Q. Okay.

0313

1 A. Plus attorneys fees.

2 Q. All right. Your Honor, we had introduced Exhibit
3 Number 25 with the damages calculated, with Parcel B
4 as all uplands. Now, this is a revised one, which we'd
5 like to introduce, and we'll clean it up and redo it.

6 JUDGE: Have you seen that, Dwight?

7 MR. HUDSON: I'm not sure what he just said,
8 cleaning it up and redoing it. Well, we'd like to have it
9 in advance and with a good explanation of how he's
10 figuring things.

11 MR. STEVENS: I just -- we just went over that,
12 if you were listening.

13 MR. HUDSON: Well, I also heard wetlands in
14 this, and to my knowledge, the wetlands haven't been
15 delineated. But anyway, I'm not sure what he's asking.
16 If he wants a better clarification on some of these
17 numbers, we would object. Of course, if the Court
18 would entertain it, we would like to see it in advance so
19 that we can, you know, thoroughly analyze it.

20 JUDGE: You're going to redo it? Is that what
21 you propose to do?

22 MR. STEVENS: Yeah.

23 JUDGE: I'll let you send that in later, along with
24 the deeds.

25 MR. HUDSON: We would like the same ...

CONTINUED BY MR. STEVENS:

Q. There had been testimony yesterday concerning Claremont Industries and a company or an LLC by the name of 701 South. You heard that?

A. Yes, sir.

Q. I want to hand you Exhibit Number 26, which was produced by the Plaintiff's attorney in response to Request for Production, and ask you, have you seen that?

A. Yes, sir. I have seen it.

Q. Read that for the Court. Who's it to, and who's it from?

A. It's from Claremont South Carolina Enterprises, LLC, with a New Jersey address, and it's addressed to Donald Godwin, LLC and Randy Beverly, LLC.

Q. Who signed it?

A. Stephen R. Sciaretta, if that's the right way to pronounce that.

Q. That's the one whose deposition was introduced by Mr. Hudson yesterday?

A. Yes, to my understanding.

Q. Okay.

MR. HUDSON: Let me enter a possible objection here. Is this letter an exhibit to that deposition?

MR. STEVENS: I don't know.

MS. GRAZIANI: Yes.

1 MR. HUDSON: You sure? It is in that
2 deposition?

3 MS. GRAZIANI: Exhibit 4.

4 MR. HUDSON: Okay. Because I don't think Mr.
5 Creel can authenticate this letter, or has anything to do
6 with it. But if it's been introduced in Mr. Sciaretta's,
7 then I object to the line of question, since he's really
8 not privy to that letter.

9 MR. STEVENS: I just want to ask him ...

10 MR. HUDSON: But it is in evidence through the
11 deposition.

12 MR. STEVENS: I just want to ask him had he --
13 read that for us.

14 MS. GRAZIANI: It's Exhibit 3, Plaintiff's
15 Exhibit 3, to Sciaretta's deposition.

16 MR. HUDSON: Okay. Thank you.

17 DIRECT EXAMINATION OF BENJAMIN CREEL

18 CONTINUED BY MR. STEVENS:

19 Q. Read the -- it's one paragraph, five lines. What does it
20 say?

21 A. "Dear Donald and Randy, this will confirm our
22 discussion on my last visit to South Carolina that the
23 Mahans, parentheses, Byram Land Development, LLC
24 and we, Claremont South Carolina Enterprises, LLC
25 have elected, and therefore 701 South, LLC has elected

1 not to exercise the option for the remaining land on 701
2 south, as more particularly described in the contract
3 between you and 701 South, LLC, dated May 31, 2007.
4 Please advise if you should need anything further with
5 respect to this matter. Best regards, Steve Sciaretta."

6 Q. Okay. Now, did you know anything about this at the
7 time of right before the third takedown, or when the
8 third takedown was supposed to occur?

9 A. No, sir.

10 Q. Did you know that -- at that time, did you know that
11 Randy Beverly and Donald Godwin had entered into a
12 contract with Claremont Industries and so forth,
13 whereby they were to get thirty thousand dollars an
14 acre for uplands property?

15 A. No, sir.

16 Q. Now, your contract on the third takedown, if I'm
17 correct, was for nineteen thousand dollars an acre for
18 uplands?

19 A. The third takedown was nineteen. The fourth
20 takedown was twenty.

21 Q. Okay. Excuse me one second. This is a letter from
22 Claremont Industries dated May the 14th, 2008, signed
23 by Stephen Sciaretta, addressed to Donald E. Godwin
24 of Donald E. Godwin, LLC. I'm going to publish some
25 of this and ask you about your knowledge of this, if

1 you had any knowledge. "Dear Donald, confirming
2 out conversation of last week, please be advised that I
3 have spoken with the Mahans, and they as well as my
4 brother and I would agree to participate in the next
5 phase closing for the 701 slash Creel property on an
6 equal basis with you and Randy. It is our
7 understanding that this closing is on fifty acres
8 contiguous to the one hundred acres we closed on last
9 year, and that the price is twenty thousand dollars per
10 acre. Therefore, we will purchase the property in the
11 name of 701 South, LLC, and each of the members,
12 Donald E. Godwin, LLC, Randy A. Beverly, LLC,
13 Claremont South Carolina Enterprises, LLC, and
14 Bryram Land Development, LLC will contribute two
15 hundred and fifty thousand for the purchase, plus a pro-
16 rata share of the incidental closing costs and title
17 insurance." Did Donald Godwin and Randy Beverly
18 tell you that they were going to buy the third takedown
19 in the name of 701 South, LLC?

20 A. No, sir.

21 Q. Did you know about this?

22 A. No, sir.

23 Q. And it goes on to say, "In addition, we will enter into
24 an option agreement to purchase the final two phases
25 under the same terms as your present contract with

1 Creel, which we understand at the same per acre price
2 as stated above, plus one thousand dollars per acre each
3 year between now and closing. We would provide you
4 with at least four months notice of our intent to
5 exercise each of the options, which we understand will
6 be for the closings in June, 2009, approximately fifty
7 acres, and June, 2010, approximately ..." And then he's
8 got, "2010, approximately eight acres." Were the
9 closings to be in 2009 and 2010?

10 A. No, sir. That was never agreed to.

11 Q. Did Stephen Sciaretta, Donald Godwin, or Randy
12 Beverly call you and tell you, "Well, in this third
13 takedown, we're not going to buy it in our name. We're
14 going to buy it in Highway 701 South, LLC"?

15 A. No, sir. I'm curious, what's the date on that?

16 Q. May the 14th, 2008, which would have been about a
17 month prior to the third closing. Now, we've talked
18 about this fax that was sent to you by Randy Beverly
19 back in November of 2005, before the first takedown,
20 sending you the proposals on the survey and the
21 proposals on the wetlands delineation by S&ME. And
22 when you got that, what did you think?

23 A. I don't recall my reaction, other than, you know, I was
24 glad things were moving forward and that, you know,
25 they were getting the work done.

1 Q. Getting what work done?

2 A. The survey and the wetlands. Surveying the property
3 and surveying the wetlands.

4 Q. Okay. At that point in time, did you move forward
5 with trying to get a wetlands survey and a wetlands
6 delineation?

7 A. No, sir. I knew they were doing it.

8 Q. All right. Did you and Randy talk about what was in
9 that fax ...

10 A. Not that I ...

11 Q. ... before he sent it to you?

12 A. Not that I recall.

13 Q. And he sent to you what the surveyor was going to
14 charge, around ten thousand dollars to do the survey?

15 A. If I remember correctly. I don't have it in front of me.

16 Q. All right. So when's the first time that you heard from
17 Mr. Beverly and Mr. Godwin that all of a sudden they
18 wanted you to do a wetlands survey?

19 A. The first time I recall that being mentioned by anyone
20 was in one of Allen Beverly's letters.

21 Q. Okay.

22 A. They certainly never asked me to do it.

23 Q. Now, this map, which is Exhibit Number 31, is
24 showing surveyed 10/16/07. Was that after the second
25 takedown, but before the third takedown?

1 A. That's correct.

2 Q. And looking at this map, does it appear that they have
3 done the wetlands survey and everything, with the
4 exception of the southwest tract?

5 A. That's correct.

6 Q. And done the delineation of the wetlands?

7 A. That's correct.

8 Q. All right. Has Mr. Beverly or Mr. Godwin contacted
9 you with regards to attempting to buy the rest of this
10 property?

11 A. No, sir.

12 Q. Have they shown any interest in buying the property
13 since ...

14 A. Not to me.

15 Q. ... since the second takedown?

16 A. No, sir.

17 MR. STEVENS: That's all I have.

18 MR. HUDSON: Your Honor, this will take some
19 time. Can we take a short break?

20 A. Thank you.

21 JUDGE: Let's take about a fifteen minute break.

22 (A SHORT BREAK WAS TAKEN OFF THE RECORD)

23 CROSS-EXAMINATION OF BENJAMIN CREEL

24 BY MR. HUDSON:

25 Q. Okay. Mr. Creel, we met before, and I took your

1 deposition. You're familiar with your deposition and
2 have gone over that in some detail, I'm sure?

3 A. Yes, sir.

4 Q. And of course, it's introduced many times about your
5 educational background. You're still a licensed
6 attorney in South Carolina, even though you're -- I
7 understand you don't keep up your CLEs, so you won't
8 get appointed, and you really don't practice?

9 A. My bar status is inactive.

10 Q. Inactive. Thank you. I couldn't remember that term.
11 All right. And I believe you went to the Citadel
12 undergraduate school?

13 A. That's correct.

14 Q. All right. And as I recall, maybe, in talking to you in
15 the past, and maybe your daddy and some others, you
16 were first in your class, weren't you?

17 A. Actually, I graduated second in my class.

18 Q. Second in your class. Excuse me.

19 A. I was first for a while, but ended up being second.

20 Q. Well, that's good. Congratulations. That's great. And
21 you went straight from undergrad at the Citadel into
22 law school?

23 A. That's correct.

24 Q. Okay. And of course, you practiced for a couple of
25 years, anyway, or two or three years with the Bellamy

1 firm?

2 A. That's correct.

3 Q. Primarily concentrating in real estate areas?

4 A. No, sir. I worked in the tax -- in Mr. Epps's department
5 back there.

6 Q. Okay. Estates and ...

7 A. Yeah, estate ...

8 Q. ... things like that?

9 A. Estate planning, T&E, that sort of thing.

10 Q. Okay. And I believe you left there and then went to
11 work for the family business with your dad in various
12 real estate projects, and the oil business, and
13 convenience store business?

14 A. Well, our day-to-day operations at that time was the
15 convenience store business, but Daddy did have some
16 real estate investments, and I assisted him with those.

17 Q. Right. You assisted him with those, and you did some
18 investing on your own after he passed away, and you
19 have extensive experience in real estate?

20 A. Not as much as these guys, but I concede that I am not
21 an idiot about real estate, Dwight.

22 Q. So in fact, in this instance, you had this contract
23 prepared yourself by Gem McDowell. It got to Gem
24 McDowell through you, and I believe you ...

25 A. That's partly correct. Actually, the original contract

1 was done by Lynn Gatlin for an offer that was made by
2 Hall Development. But then, when we ended up -- and
3 I think all this is in my deposition. But when we ended
4 up making the deal we made, with Gem as my
5 attorney, Lynn gave the contract to Gem, and he made
6 the revisions, changed the names and such, and that
7 was the contract we ended up with.

8 Q. All right. And of course, we talked about being related
9 to Mr. Beverly and knowing Mr. Godwin all your life.
10 Of course, Gem McDowell, the lawyer, I think is
11 married to Larry Paul's daughter. At least, I assume
12 they still are together.

13 A. That's correct.

14 Q. And so we've got kind of a close-knit cast of characters
15 here in this lawsuit, in all phases. So everybody knows
16 each other, and I assume would it be a fair statement
17 that folks, during all times, pertinent times involved
18 here, were generally speaking with each other? There
19 wasn't any -- up until the lawsuit, anyway, were
20 generally conversing on a somewhat regular basis
21 about ...

22 A. Well, I always ...

23 Q. ... different things?

24 A. I very seldom have ever spoken with Donald. All my
25 contacts have been primarily with Randy over the --

1 occasionally, I have talked or met with Donald. But
2 ninety-five percent of my -- as regards this matter, and
3 the creation of the contract, and the first two phases
4 and everything, almost all of my contact was with
5 Randy. But yes, everybody knows everybody.

6 Q. And you would see Randy and talk with Randy
7 frequently?

8 A. Yes, sir.

9 Q. And there's been, you know, some testimony that
10 maybe you didn't know some things, or weren't aware
11 of some things, and we've talked about this fax, of the
12 proposals of the survey and some wetlands delineation.
13 And anyway, the information concerning moving this
14 project forward, and you received that. Do you
15 remember reading it?

16 A. I remember receiving it, and I don't remember reading
17 it in detail, but I remember getting it and saying --
18 thinking to myself, good, you know. Things were
19 moving forward.

20 Q. Well, don't you remember talking with Randy and or
21 Donald on a frequent basis about what was going on in
22 the bids, and how much money was involved, and this,
23 that, and the other, and wetlands, and all these different
24 subjects that would have been involved in this matter
25 that we're litigating here today?

1 A. I don't remember -- I definitely didn't speak with
2 Donald, and I don't remember specifically talking to
3 Randy about the bids, if that's what you're specifically
4 asking about. But you know, periodically Randy
5 would -- you know, we would talk, and he would say,
6 "Well, this is what we're doing," or, "This is what we're
7 planning to do next," or what have you.

8 Q. Well, you got a lot of money, potentially, and you did
9 receive a lot of money in these first two takedowns.
10 We're talking about pretty good sums. So you had to
11 have had, did you not, a pretty keen interest in this
12 project, and what was going on, and what your duties
13 were in the contract that you had Gem McDowell
14 basically prepare?

15 A. Yes, I did. But also, as noted in my deposition, I spent
16 a great deal of time in the hospital in '06 and '07, and
17 was not in the mix of things. Even when I wasn't in the
18 hospital, I was always recuperating, or frequently
19 recuperating.

20 Q. I believe we got into that, and I kind of embarrassed
21 myself, because I did not realize you had had that
22 extent of illness, when we were in your deposition. So
23 I just needed a little bit of explanation, and we kind of
24 pinpointed, and you said you spent twenty-eight days
25 in the hospital.

1 A. That was at one stretch.

2 Q. One stretch, and most of -- most of the time, you were
3 ...

4 A. I was ...

5 Q. ... at home, recuperating or whatever?

6 A. Between September of '06 and December of '07, I had
7 seven major surgeries, and spent a total of I don't know
8 how many days in the hospital.

9 Q. Well, you were carrying on, when you were not in the
10 hospital -- and maybe while you were in the hospital,
11 to some extent. Were you carrying on some business?

12 A. Best I could.

13 Q. Right. And you had income coming in from different
14 sources?

15 A. Sure.

16 Q. Okay. All right. Well, I'm just ...

17 A. They didn't cut off my paycheck, because I was in the
18 hospital. I do own my company.

19 Q. You weren't totally out of commission mentally and
20 physically?

21 A. No. Not all the time, anyway.

22 Q. Okay. And I think during this time -- it was in your
23 deposition -- you were having some financial
24 difficulties in various enterprises, and were fighting
25 those battles as well. Is that a fair statement, based on

1 your previous testimony?

2 A. I can't remember if '06 and '07 were particularly good
3 years or particularly bad years. My memory is not that
4 good. But it's fair to say that things have been
5 challenging since -- at least since we had that fire at
6 North American in 2002.

7 Q. Okay. And just without belaboring it too much, on the
8 financial difficulties, you were dealing with a tax lien
9 problem as a result of your father's estate, and were
10 having to deal with that and pay it over time?

11 A. Well, it wasn't a problem, just a matter of -- I mean, it's
12 not like the IRS was beating on the door. I just had to
13 send them a big check every year. And I never missed
14 one of those, even during those bad times.

15 Q. But they did file a lien, as they normally do?

16 A. Oh, yeah. They filed -- that's completely normal.

17 Q. It was ...

18 A. I mean, they filed a -- it was not a lien for non-
19 collection. Anytime they enter into a 6166 agreement,
20 even before the first payment is due, they file liens. I
21 think the requirement is there has to be security for a
22 6166 selection equaling a hundred and fifty percent of
23 the tax.

24 Q. And that lien, obviously, would have applied to this
25 property at the time of the contract, at the time of the

1 first two takedowns?

2 A. At the time, but we got it released.

3 Q. Right. Right. And I believe, as far as Bucksville
4 Farms -- that's the name of your legal entity that the
5 property was in at the time of the contract -- really had
6 been administratively dissolved by the state at the time
7 of the signing of the contract, had it not?

8 A. Yes, and as I explained to you in my deposition,
9 Dwight, that that was a matter of sending one piece of
10 paper to Columbia to satisfy some computer up there.

11 Q. All right. And also, during this time period,
12 appreciable time period before this contract ...

13 A. Let me go back to that, Dwight. They got clear title.
14 They got clear title, and Larry Paul got clear title. I
15 don't know why you want to keep on asking about this
16 administrative dissolution, but go ahead.

17 Q. Okay. All right. So my question was, and you
18 answered it, Bucksville Farms had been
19 administratively dissolved at the time of this contract?

20 A. Yeah, because I had to send one piece of paper to
21 Columbia. I don't know if it was at the time of the
22 contract or not, but I know that there have been times
23 when that has happened, and we have to send this piece
24 of paper to Columbia, and that's it.

25 Q. Okay. All right. And in time periods before this

1 contract, October of '05, and really pretty much up to
2 today's date, you've had a number of business dealings
3 and real estate transactions with Mr. Beverly, had you
4 not?

5 A. Certainly.

6 Q. He's your kin?

7 A. Yes.

8 Q. You've really borrowed a good bit of money from him
9 over the years, have you not?

10 A. Well, there's been times when he's borrowed from my
11 father or me, and there's been numerous times when
12 I've borrowed from him.

13 Q. Okay. Well, that was my question. You had borrowed
14 money numerous times from him?

15 A. That's correct.

16 Q. All right. And that would also be with Mr. Paul, Larry
17 Paul? Over the years, you have borrowed a good bit of
18 money from him?

19 A. That's correct.

20 Q. All right. And you still owe money to him, I believe.

21 A. That's correct.

22 Q. And do you still owe money to Mr. Beverly?

23 A. Not that I know of.

24 Q. Well, if you don't know, you don't know, whatever
25 your answer is.

0330

1 A. I mean, there's been so many transactions. But I don't
2 think so.

3 Q. Okay.

4 A. My rent's paid up through the end of the month.

5 Q. And that would be rent on what?

6 A. A convenience store on Main and 12th here in
7 Conway. Randy owns the real estate, and we operate
8 it.

9 Q. And this would be, as you testified in your deposition,
10 that would be the convenience store that you actually
11 sold to Mr. Beverly, and Mr. Beverly leased it back to
12 you?

13 A. That's correct.

14 Q. And I believe y'all had some transactions as well,
15 where he purchased property, and you repurchased
16 some or part of it ...

17 A. Sometimes.

18 Q. ... or all of it back, with Mr. Beverly?

19 A. That's correct.

20 Q. All right. Have you had any dealings with Mr. Paul
21 like that in the past?

22 A. I'm sure I have. I sold him my condo a few years ago
23 and bought it back, or mortgaged it.

24 Q. When you say your condo, is this the one at Kingston
25 Pointe?

0331

1 A. That's correct. And you know, there's been various
2 mortgages and such over the years. But as I also told
3 you, you know, I can't remember every transaction.
4 But if you're trying to establish that we have a
5 relationship, I concede that.

6 Q. Okay. It seems like June and July was a -- and August,
7 maybe, the summer of '08, a lot of these letters and
8 things were going back and forth as to try to -- in
9 dealing with the contract, maybe trying to modify it,
10 see what was required, what you needed to produce.

11 A. It actually started in March, but ...

12 Q. Well, and prior to that, sure. But it looks like also,
13 according to the records -- and we'll introduce these
14 records in certified form and whatever, that on July the
15 1st of '08, you have a seven hundred and fifty thousand
16 dollar mortgage to Larry Paul. Do you remember that
17 one? That covered the subject tracts?

18 A. Yes, I remember that.

19 Q. Okay. And that included the subject tracts that we're
20 litigating about here today?

21 A. I think that's right. Yes, sir.

22 Q. The subject of the contract?

23 A. Yes, sir.

24 Q. Has that mortgage been satisfied?

25 A. Yes.

0332

1 Q. Was it satisfied at the time of the sale that you
2 mentioned to Larry Paul, when you were attempting or
3 at least setting out some of your alleged damages for
4 four hundred and ninety thousand dollars?

5 A. I can't remember -- I can't remember which rabbit I
6 pulled out of what hat with regard to that, Dwight.

7 Q. Okay. Well, if you don't remember, fine, but we'll
8 check the records. But there is a record for the note
9 about that, and has that been satisfied?

10 A. I'm not making a payment on it, so it must be satisfied.

11 Q. Okay. Are you behind on any other payments to Larry
12 Paul at the present time?

13 A. Actually, at the present time, I owe him about ten or
14 twelve thousand dollars in interest.

15 Q. I want to go over some of these letters, and of course
16 the contract, with you. Of course, I've got your
17 deposition. I'll try to give you a copy of that. It will be
18 a little more convenient. If you need to refer to any
19 page numbers, you can do this with this condensed
20 copy. It's a little easier to handle. But I'm not
21 necessarily going to that right this minute. Now, we've
22 had several copies of the contract, and they've got
23 different numbers on them. But the one I'm going to --
24 that I have in my hand, that I'll be referring to at this
25 particular time, is Plaintiff's Exhibit Number 1 to the

1 Beverly deposition, which is identical to the others, as
2 far as I can tell. It's the contract of October of 2005,
3 and contains an Exhibit A, one addendum to the
4 contract, which talks about a 1031 IRS exchange
5 situation, which everybody's, I think, aware of. And
6 also, the -- in paragraph two of that addendum, the
7 forty acre tract, pond, that you're retaining applies to
8 that.

9 A. Uh-huh.

10 Q. And I believe your testimony has been there's no other
11 written changes, addendums at all, to this particular
12 contract?

13 A. That's correct, as far as I know.

14 Q. All right. And the contract calls for any changes or
15 addendums in the contract obligations to be in writing,
16 does it not?

17 A. Yes, it does, but we all learned in our first year of law
18 school, parties can change the contract anytime they
19 want to by their words or their actions. And here we
20 have a clear course of dealing. Of course, that's just ...

21 Q. And also, I think, in paragraph ...

22 A. Jimmy's got the restatement over there.

23 Q. Got the what?

24 A. Restatement of contract.

25 Q. Oh, okay. Okay. Well, good. Last time I saw that was

1 in law school, I think. You're right.

2 MR. STEVENS: I believe it.

3 Q. I know Jimmy's got it memorized. Paragraph twenty-
4 seven E also says "waiver."

5 A. Uh-huh. Yes, sir.

6 Q. "Failure by purchaser or seller to insist upon or enforce
7 any of its rights hereunder shall not constitute a waiver
8 thereof." What does that mean to you, as a lawyer, of a
9 contract that you prepared? Or had prepared by Mr.
10 McDowell, excuse me?

11 A. To me, that means just what it says. I mean, I don't
12 think it needs an interpretation.

13 Q. Okay. And also we're talking about -- we have talked
14 about paragraph seven, which is talking about the
15 feasibility period.

16 A. Uh-huh.

17 Q. I'm reading this part to you, and I think it's been read
18 before. It says, "The feasibility period is the period
19 ending at midnight on the date which is a hundred and
20 twenty days following the seller's delivery of a
21 boundary survey and wetlands survey, made by a
22 professional surveyor, licensed in South Carolina.
23 Parentheses, seller is not required to have the wetlands
24 permitted with the US Corps of Engineers, end
25 parentheses."

0335

1 A. Uh-huh.

2 Q. All right. During the feasibility period?

3 A. I don't know that it limits itself to the feasibility period,
4 and I don't think that it's up to you and me to interpret
5 this contract. I think that's the judge's job.

6 Q. Okay. All right. That's your testimony? You're a
7 lawyer? What's your opinion?

8 A. I already told you, I think -- in this context, I think that
9 interpreting the contract is the judge's job. But it does
10 not say that it's limited to the feasibility period, in my
11 opinion.

12 Q. Well, you as a party to this contract ...

13 A. I've already ...

14 Q. ... let's say you have a right to interpret it or give your
15 opinion.

16 A. I just gave it to you.

17 Q. Okay. So during the feasibility period, you didn't have
18 to provide a ...

19 A. No, I ...

20 Q. ... wetlands delineation?

21 A. I just told you, I don't think that that provision about
22 the Corps is limited to the feasibility period.

23 Q. In paragraph nine, what we've been over many times in
24 the testimony, including your deposition, it says,
25 "Seller shall furnish a boundary survey of the property

1 referenced in Exhibit A, indicating the true and correct
2 legal description thereof, and delineating the boundary
3 lines of said property and all wetlands, and carving out
4 a forty acre parcel to be retained by the seller," which
5 is you. There's no parentheses saying that the Corps of
6 Engineers' approval is not required for that paragraph,
7 which is the production of the survey and the wetlands
8 delineation.

9 A. Nor does it say that it is required.

10 Q. But the wetlands -- and in your previous testimony,
11 you admitted that it was your responsibility to have a
12 wetlands delineation?

13 A. That's what the contract says, but ...

14 Q. Right.

15 A. ... then Donald and Randy started doing it, so there was
16 no need for me to be duplicating what they were doing.
17 The fact is ...

18 Q. Okay. And -- I'm sorry.

19 A. ... and they finished it.

20 Q. Go ahead. Excuse me. I'm sorry.

21 A. I'm done.

22 Q. Okay. Well, the fact is -- and it's been testified to by
23 Mr. Oates and my clients that what was delineated was
24 really tracts that had a minimum or hardly -- or no
25 wetlands on them. So they went ahead and had them

1 delineated while the survey was being prepared, and
2 you were aware of that?

3 A. Yes. They were sending me copies ...

4 Q. Okay.

5 A. They were sending me the take ...

6 Q. Right.

7 A. ... the takedown surveys, and I'm pretty sure Randy
8 sent me the big map, when it was completed.

9 Q. So he did send you the big map, when it was
10 completed? So you were aware of it?

11 A. The big one of the whole property, yeah.

12 Q. And there's no question about the asterisk property was
13 to be ...

14 A. And I got Mr. Barfield to do the survey of the forty-
15 two acres years -- you know, back shortly after we
16 signed the contract, and gave it to them.

17 Q. Do you need to point that out?

18 A. The one on here that says the Creel tract.

19 Q. That's your forty acres?

20 A. Yeah. I think it's actually forty-two ...

21 Q. Right. Okay.

22 A. ... is what it ended up being, but yeah, that's correct.

23 Q. Okay. But there's no doubt this asterisk -- and we
24 talked about that many times -- the asterisk tract was
25 the one that had the wetlands trouble, in addition to

1 part B, which inadvertently got approved as no
2 wetlands with the Corps, and apparently still exists
3 today, to the benefit, I suppose, of Mr. Paul. Is that
4 true?

5 A. That's my understanding.

6 Q. Okay.

7 A. From the testimony that I have heard.

8 Q. Did Mr. Paul know that when you sold him the
9 property?

10 A. I don't remember.

11 Q. That's a pretty big deal, it seems to me. I mean, you
12 wouldn't have told him?

13 A. Well, no. Well, I don't think I knew it at that time.

14 Q. In 2009, you didn't know that?

15 A. About the error, I don't think so.

16 Q. Okay. Well, you knew, when you sold it to Mr. Paul,
17 that you had to delineate either the asterisk tract or
18 Parcel B, which you knew had some wetlands issues
19 involved with it? You knew that you hadn't done any
20 delineation or survey?

21 A. I knew that I hadn't done it. That's correct.

22 Q. Well, did you think somebody else was doing it or had
23 done it for you?

24 A. Well, I knew that part of the property had been done, at
25 least, because of the two takedowns that had already

1 been done. But this was not a -- I don't know, Dwight.
2 I can't remember. As I've told you before, I can't
3 remember the order in which everything happened
4 exactly.

5 Q. But all the information was provided to you, certainly
6 in conversations with Randy in what had been done on
7 this property, and what needed to be done?

8 A. Yes. I mean, up until things started going sour, so to
9 speak, we were communicating on a regular basis.

10 Q. And you knew it was your responsibility, and you were
11 undertaking that responsibility, to do the mitigation or
12 silviculture of the wetlands on the asterisk tract, and in
13 fact, contacted ...

14 A. Mr. Hardwick.

15 Q. ... Truitt Hardwick, and at least him we know about, to
16 help you do that, and so you could carry out your
17 responsibility?

18 A. I called Mr. Hardwick, as I testified to earlier. We're
19 getting repetitive. And I think we went out to the
20 property. I'm not certain. My recollection is, he was
21 supposed to be getting me back a price, and he didn't.
22 That's my recollection. And then at some point
23 thereafter, I found out that Randy had taken the
24 initiative and hired Matt Johnson, so I didn't worry
25 about chasing down Mr. Truitt.

1 Q. Did you ask -- this assumption that you just said about
2 Mr. Johnson, did you ask Mr. Beverly about that?
3 Says, "Hey, it looks like you're doing this in its entirety
4 for me. I don't have to do anything. I appreciate that"?
5 Did you ever talk to Randy Beverly and say that?

6 A. I don't remember, Dwight. What difference does it
7 make?

8 Q. So you just might not have mentioned it at all, just
9 ignored it?

10 A. I'm sure at some point I said, "Thanks for getting that
11 done."

12 Q. And what -- do you remember if there was any
13 response from Randy at all, if that's what -- if that's
14 what you said, you might have said?

15 A. I would assume he probably said, "You're welcome,
16 and it will come out of your proceeds at the next
17 closing."

18 Q. And did you clear it up with him, say, "Well, is that
19 everything? Is it done? Can I go ahead -- can I go
20 ahead and do a wetlands survey now?"

21 A. The prospect of me getting a wetlands survey done was
22 never brought up until Allen found that provision in the
23 contract, which none of us knew was in there. If we
24 had known it was in there, they probably would have
25 asked me to do it, and they probably would have

1 charged me something at closing for what they were
2 paying for, which is apparently, according to the
3 contract, I was supposed to be doing. But they didn't
4 do either of those things.

5 Q. So you're kind of telling me, I think, if I -- in that
6 testimony you've just told us, are you saying that
7 neither you, nor Mr. Beverly, nor Mr. Godwin knew
8 what was in the contract as to who was to produce the
9 wetlands survey ...

10 A. I'm ...

11 Q. ... delineation?

12 A. I'm saying I don't know if we knew it or not, but
13 nobody brought up the prospect of me doing a
14 wetlands survey until we were getting ready to go to
15 litigation, and I got that letter from Allen. But I do
16 know that on the closing statements, there's no charge
17 to me for the work that they did. So that leads me to
18 believe that none of us were aware of it. But in any
19 event, just like Jamie McLean testified to yesterday, it
20 is their practice on all twelve projects that he's worked
21 on, they never let anybody else handle the wetlands
22 and that sort of thing, because they want to maintain
23 control of it. Which makes perfect sense to me. I'm
24 not a developer, but if I was, that's the way I'd want to
25 do it.

0342

1 Q. Well, you had the contract prepared, and you read the
2 contract before you signed it?

3 A. I don't -- I read the pertinent provisions. I can't tell you
4 that I read all the boilerplate.

5 Q. Well, that's not exactly boilerplate, some of these
6 responsibilities. But did you read it and understand the
7 contract?

8 A. Well, that provision -- I mean, I certainly signed it,
9 Dwight. But that provision was boilerplate, left over
10 from the Hall Development draft, I'm pretty sure.

11 Q. While we're on ...

12 A. And once again, I knew that they were getting the work
13 done, so even if I had known, why would I go
14 duplicate their efforts? It doesn't make sense.

15 Q. Okay. Let me ask you some questions here about this.
16 You had mentioned Mr. Beverly and some of the
17 letters going back and forth, and these are two of the
18 letters that you've seen before, from Mr. Beverly to Mr.
19 Stevens, your lawyer, shortly after -- or at least the first
20 one, shortly after apparently you'd testified that you
21 hired him.

22 A. You're talking about Mr. Allen Beverly?

23 Q. Allen, yes. Yes, excuse me. The attorney. The first
24 letter is dated July the 11th of '08, and the second one
25 is October the 8th of '08. The first one is Plaintiff's

1 Exhibit Number 2 in the Beverly deposition, and the
2 October 8, 2008 letter is Exhibit 3, Plaintiff's Exhibit 3,
3 in the Beverly deposition. Now, look at those, and
4 you've seen them before. Do you recognize those
5 letters?

6 A. Yes, sir.

7 Q. And were you were informed by your lawyer, in
8 actuality, of those letters and what Mr. Beverly said in
9 those letters of what you needed to do, and we'll close?

10 A. Yes, I'm sure I was.

11 Q. Okay. And it basically asked you to provide a
12 wetlands delineation survey approved by the Corps of
13 Engineers, and that they would close, did it not?

14 A. Well, the thing about it having to be approved by the
15 Corps of Engineers was their fabrication, but anyway,
16 he does quote the provision from the paragraph you
17 read a few minutes ago. So even though, you know,
18 they had been doing all this, I did endeavor to get
19 things completed.

20 Q. Well, what was your response to that, when you
21 learned of that? Is it fair to say that pretty soon after
22 your attorney got that letter in July, that you learned
23 the position, said, "Hey, give us this wetlands
24 delineation and approved by the Corps, if it's going to
25 be worth anything," which all of them are worthless,

1 you would agree, without being approved by the Corps
2 -- you would agree with that, wouldn't you? What did
3 you do?

4 A. I think, when I got this letter, it was at that time that I
5 went to see ...

6 Q. Well, it would have been ...

7 A. ... I think ...

8 Q. It would have been after you went to see Mr. Stevens.
9 I didn't want to put words in your mouth, but this letter
10 is from Mr. Beverly to Mr. Stevens. I didn't mean to
11 put words in your mouth.

12 MR. STEVENS: Your Honor, I object. Your
13 Honor, I object to him making a statement. He
14 interrupted his answer, and I'd appreciate him allowing
15 him to answer the question. He's interrupting ...

16 Q. Okay. And I did interrupt you. Go ahead and finish.

17 MR. STEVENS: Let me finish my objection.
18 Before he starts interrupting the answer, then starts
19 making a speech. I object to that.

20 JUDGE: All right. Just ask him the question.

21 Q. If I interrupted your answer, complete your answer. I
22 apologize.

23 A. I think -- what was -- now I forgot the question.

24 Q. You went to see -- you were going to see somebody.

25 A. What was the original question?

1 Q. After you -- when -- after you learned of this, what did
2 you do? After you learned of this letter from Mr.
3 Beverly to Mr. Stevens of what would be required and
4 we would close, what did you do, if anything, about
5 complying?

6 A. I think that was when I went to see Chuck Oates to talk
7 to him about doing the work.

8 Q. Okay. And ...

9 A. Dwight, I've got a request.

10 Q. Sure.

11 A. I've got a pinched nerve in my neck.

12 Q. You want me to get over here? I'll do that. I
13 understand. I was just trying to get a little bit closer
14 and be facing the judge. Is this okay?

15 A. Sure.

16 Q. Okay. Well, go ahead. Were you finished with your
17 answer?

18 A. I was done with my answer.

19 Q. Okay. So you said you went to see Chuck Oates?

20 A. That's correct.

21 Q. All right. And what happened with Chuck Oates?

22 A. I went in -- he said we met at my office. I remember
23 meeting at his office, I think. But in any event, we
24 met. And I asked him about doing some work on this
25 property, and he said, "Is this Donald Godwin's

1. property?" And I said, "Well, no, but they're in the
2. process of buying it. He and Randy Beverly are in the
3. process of buying it." And he said, "I've already done
4. the work on this property." And I said, "Okay." So he
5. gave me something. I can't remember which one of
6. these multicolored things that it was. And I'm pretty
7. sure it was at that time that I wrote the note. My
8. secretary was out that day, and I'm not a very good
9. typist. So that's the reason I just did that handwritten
10. note, and took it over and dropped it off at Randy's
11. office. He wasn't there at that moment.

12. Q. All right. And that would have been the note that we
13. talked about? I think it was Plaintiff's Exhibit 1 in your
14. deposition, where you basically refer to being in a cash
15. crunch?

16. A. Well, that's ...

17. Q. Part of it?

18. A. Those are two words of a hundred, yeah.

19. Q. All right. But isn't it that time, also, that Mr. Oates was
20. telling you how to do some silviculture mitigation in
21. connection with getting a wetlands delineation on the
22. asterisk tract?

23. A. I can't remember the exact order of things, Dwight.

24. Q. Okay.

25. A. If you'd show me the documents, it will refresh my

1 memory.

2 Q. Okay. And that letter -- I want to make sure that the
3 previous letter -- and I'm going to go ahead and take a
4 chance on taking this one out, because they're all so
5 hard to find. But this letter that you're saying you
6 dropped by Randy's after meeting with Mr. Oates -- it's
7 Plaintiff's Exhibit Number 1 in your deposition -- also
8 had attached to it, as delivered to Mr. Beverly, this
9 particular -- I'm going to call it aerial photograph.
10 Figure one, dated -- source date 2006. Was that
11 attached to your note, when you delivered it to Randy?

12 A. It was one, or something like that, yeah.

13 Q. And that's what Mr. Oates showed you?

14 A. Yeah.

15 Q. As having done some work?

16 A. I think he gave me a couple of them. I'm not sure.

17 Q. All right. I want to make sure they're all together. I'm
18 not sure that that first exhibit I had -- we'll introduce it
19 with the map. I'm not sure that that first time it was
20 introduced, it had the map attached to it.

21 (CONFERRED WITH COURT REPORTER) Okay,
22 so the judge would have that? Well, he would have the
23 original. Okay. Well, we've got so many. We've got
24 his, and then we've got letters, and I think I introduced
25 this earlier, so I wanted to make sure about that. Okay.

1 So that would be with that infrared -- I'm going to call
2 it the infrared map attached to the note of September
3 2nd, 2008. Okay. So September 2nd, 2008 is after you
4 met with Mr. Coates.

5 A. Oates.

6 Q. Did I say Coates? I meant to say Oates. And that
7 would have been after you received a letter and learned
8 of the -- what you could do to close, from the letter that
9 Mr. Beverly, Allen Beverly, wrote your lawyer, Mr.
10 Stevens, which was delineated. But let me ask you
11 this. The asterisk tract has never been delineated by
12 you, has it, the wetlands?

13 A. Well, depends on how ...

14 Q. And it was ...

15 A. ... you define delineation. I mean, if you read the
16 definition of delineation, it just means set out by lines.
17 But to my knowledge, it hasn't -- to my knowledge, it
18 hasn't been approved by the Corps. But ...

19 Q. And it wasn't done at the time you conveyed it to Larry
20 Paul in 2009?

21 A. No.

22 Q. And you never responded to Mr. Beverly and or Mr.
23 Godwin that you weren't going to proceed with it, you
24 weren't going to delineate it, and you weren't going to
25 have a survey prepared, as you've acknowledged was

1 your responsibility under the contract?

2 A. Well, of course I didn't, because the next letter I got
3 from Allen said that the contract was null and void, in
4 their opinion, and then they filed a lawsuit against me
5 for a declaratory judgment, which that was a race to the
6 courthouse, when we were getting ready to sue them
7 for breach of contract. But anyway, we were ...

8 Q. Wasn't the null and void letter from Mr. Beverly before
9 you went to see Mr. Stevens?

10 A. I can't remember.

11 Q. Okay. Well, the dates are what they are. But you have
12 not prepared at any point in time, up until today's date,
13 been involved in delineating the wetlands on the
14 asterisk tract?

15 A. Not me, no.

16 Q. Okay.

17 A. Others have, but not me.

18 Q. Okay. And the contract, again, that is Plaintiff's
19 Exhibit Number 1 to the Beverly deposition, is the one
20 that I'm using, also has the condition in it that -- I think
21 it's paragraph twenty-seven G, as in golf, that time is of
22 the essence?

23 A. Sure.

24 Q. Which, as lawyers, we all know that that's kind of a
25 key provision, that things are to be complied with, and

1 complied with timely?

2 A. Yeah. That was one of the things I quoted to Randy
3 and Donald on a fax, before one of our meetings, when
4 I had learned that they were under the impression that
5 they had an option. So I quoted them the specific
6 performance language, and the time is of the essence,
7 and one other one. I can't remember which.

8 Q. Now, when was this meeting? Is this another -- this
9 sounds like maybe Mr ...

10 A. This was ...

11 Q. ... Barefoot.

12 A. This was back in the spring, when we were going --
13 either spring or early summer, when we were having
14 these negotiations going back and forth, and passing
15 faxes and letters back and forth, and meetings in
16 Randy's office, and this sort of thing. But I made a
17 copy of certain pages of the contract and sent them a
18 fax before one of our meetings. Because I remember
19 on the cover sheet, I wrote, "Gentlemen, please review
20 the -- if you have not already done so, please review
21 the attached before our meeting," at whatever time the
22 meeting was.

23 Q. Where did you get the impression -- where and how
24 did you get the impression that Mr. Beverly and Mr.
25 Godwin thought the contract was an option as opposed

1 to a contract?

2 A. I got it from Luke.

3 Q. From who?

4 A. From Luke.

5 Q. Oh, Luke told you?

6 A. Yeah. Luke told me that ...

7 Q. You didn't think of that yourself after reading the
8 contract? Luke told you that they thought it was an
9 option?

10 A. Yeah. This was before things got adversarial. But
11 Luke told me that Randy had told him, just as he
12 testified earlier, that they weren't going to exercise
13 their option. And I said, "Well, I better look at the
14 contract." So I looked at the contract and saw that it
15 said specific performance and the other provisions, that
16 it was not an option. So that's when I sent Randy and
17 Donald that fax, and we already had a meeting
18 scheduled for that afternoon. The way this whole thing
19 got started was, they wanted -- they were -- the original
20 purpose of these meetings was, they called me and
21 asked me to meet them at Randy's office, and they
22 wanted to -- and now, after seeing those letters from
23 their partners, now I understand this better. But they
24 wanted to delay the closings, the third and fourth
25 closings, throw them back each one year. And we

1 were negotiating about the possibility of doing that,
2 and that's the way this whole thing got started.

3 Q. So those negotiations, and maybe trying to amend
4 contracts, happens a lot in contracts, do they not? And
5 it all happened before you went to the lawyer, and Mr.
6 Beverly, Allen Beverly, wrote Mr. Stevens and said,
7 "Give us a survey."

8 A. It was months before that. There was never any
9 mention of me getting a wetlands survey, like I said,
10 until Allen found that provision, and they used that as
11 an excuse to breach the contract.

12 Q. But nobody was hiding that provision. You knew the
13 provision was in there. You had the contract prepared
14 by Mr. McDowell.

15 A. I don't know if I knew it or not, but I certainly knew
16 that they had -- just like they always do, just once again
17 like Jamie testified, that they were handling the
18 wetlands.

19 Q. Your attorney also brought up ...

20 A. But I ...

21 Q. I'm sorry.

22 A. Once again, if you want to be repetitive, I'll be
23 repetitive. I think if they had realized it was in there,
24 I'm pretty sure they would have charged me for the
25 work that they were paying to get done, but they didn't.

1 So I really don't think any of us knew it was in there.

2 Q. You had read -- as part of the contract, your attorney
3 asked you -- Mr. Stevens asked you a question, and I
4 think you at least cited part of this. The last little
5 paragraph, paragraph twenty-two, it says,
6 "Notwithstanding any of the foregoing, the parties
7 agree that the purchaser will take down the southwest
8 portion of the tract at the last closing, which tract is
9 more specifically delineated in Schedule blank attached
10 hereto." And of course, there's no schedule listed
11 there, and there's no schedule attached.

12 A. Uh-huh. I guess that's ...

13 Q. What did you think about completing that part of the
14 contract, so you could tell what they're talking about?

15 A. I guess that was just -- filling in the name of the
16 schedule was one detail that got missed when we
17 signed the contract. But there's no question where the
18 southwest portion of the property is.

19 Q. No question?

20 A. I mean, southwest doesn't lie.

21 Q. Even though it's specifically delineated in schedule
22 blank, attached hereto? Because all of these tracts
23 would have a southwest portion. They'd have a
24 northeast, and then a northwest, and ...

25 A. That whole farm has one southwest corner.

1 Q. So you're talking about the whole farm? How do you
2 know that?

3 A. Let me show you.

4 Q. The southwest portion of the tract at the last closing.

5 A. Let me show you.

6 Q. Well, my question is, shouldn't it be shown on the
7 attachment that's not there?

8 A. The tract, in the context of this contract, you asked for
9 my opinion. I think it's pretty darn clear to a twelve
10 year old that the tract, in this context, means the whole
11 tract. The whole tract is what's on that map over there,
12 and it has one southwest portion, one southwest corner.

13 Q. So you're clear on that part?

14 A. I'm clear on that part.

15 Q. That's your legal attorney's opinion on that one?

16 A. Like I say, I think a twelve year old could figure that
17 one out.

18 Q. Okay. How soon after that July the 8th letter, I believe
19 it is, from Mr. Beverly, Allen Beverly to Mr. -- to your
20 lawyer -- I'm sorry. July the 11th of '08. Did you
21 learn that all you needed to do was to go ahead and get
22 the wetlands survey delineated and deliver it to Mr.
23 Beverly and Mr. Godwin? How soon after that did you
24 ...

25 A. Are you asking me when did I receive a copy of that

1 letter?

2 Q. When did you receive that information?

3 A. I don't know, Dwight.

4 Q. Would it have been a day or two after that? On the
5 same date?

6 A. I mean, I'm sure that when Mr. Stevens received that
7 letter, I'm sure that he or his staff very judiciously
8 forwarded me a copy of it. But you want to know what
9 date? I don't know.

10 Q. And you followed up with Mr. Oates and, I believe,
11 Mr. Hardwick about doing some silviculture?

12 A. No, the call to Mr. Hardwick had taken place back in
13 November of 2006.

14 Q. Earlier on?

15 A. Yeah. It was after -- because, I mean, Matt Johnson
16 did the work prior to the second closing, which was in
17 June of '07. But my call to Mr. Hardwick was in
18 November of '06. And then subsequently, they hired
19 Matt Johnson, and he did the work, and it was
20 completed before June of '07, because the charge was
21 on the closing statement.

22 Q. Well, what work did you understand that he did?

23 A. Mr. Johnson?

24 Q. Yes.

25 A. My understanding was that he cleaned out some

1 existing ditches and did some under-growing.

2 Q. Was that all of the work that either Mr. Hardwick or
3 Mr. Oates said would be necessary to do silviculture
4 and increase the uplands?

5 A. I don't -- at that time, I don't think anybody had given
6 me an opinion of what needed to be done.

7 Q. Did you ever talk to Randy Beverly or Mr. Godwin
8 about that, other than the ditching on the property,
9 what else and when it would be necessary?

10 A. Not that I remember.

11 Q. Do you remember how long you would have had to do
12 the silviculture on the asterisk tract?

13 A. It's a matter of -- it's a matter of -- it's a matter of time.
14 When you say, "how long you have to do it," I mean,
15 you go out there, and you do the work, and then you
16 wait. So I don't understand your question.

17 Q. Well, is there any time limit to it that you could
18 perform it, as a ...

19 A. Not that I'm aware of.

20 Q. The ...

21 A. And I apologize for getting frustrated, Dwight, but I
22 really think this is repetitive, but go ahead.

23 Q. No problem. No problem. I was just asking you the
24 time limit, and then had you ever talked with Randy
25 Beverly or Donald Godwin about what all would be

1 necessary, if anything, other than what you're saying
2 Mr. Matt Johnson did?

3 A. Well, if you want to -- I think it's what's advisable.
4 You know, this is not an exact science. But the first
5 time Randy called me, you know, when we were
6 speaking about this concept -- and I don't -- I know I
7 didn't know the word "silviculture" at that time. I don't
8 know if Randy knew it. But what we talked about was
9 just, you know, the general concept of getting
10 somebody out there to do what steps were legal and
11 advisable to get some of the water out of the ground,
12 and when to do it. I know we talked about the fact that
13 the best time to do it is in the springtime, when the
14 sap's rising in the trees. We did talk about that.

15 Q. And in talking with Randy, based on your experience
16 in real estate, as well, from whatever sources, or all of
17 the above, you knew that the landowner had to perform
18 that silviculture, didn't you, before the sale, because the
19 developer could not, and wouldn't be allowed to do so
20 by the Corps?

21 A. Yes, that has always been my understanding.

22 Q. And you understand that the Corps of Engineers really
23 controls wetlands in the State of South Carolina and
24 the United States of America, and without their final
25 okay as to what is wetlands on a particular tract of

1 land, you really don't have anything that you can rely
2 on in any business transaction. You would agree with
3 that, wouldn't you?

4 A. I don't know if I want you to repeat that speech or not,
5 but repeat it please.

6 Q. All right. Let's read that back, since it was a speech.

7 MR. STEVENS: I object to it, because it's a
8 speech, number one. And number two, it -- he is
9 asserting things in his question that he's already
10 disputed. He's making a speech. I object to it.

11 JUDGE: I'm going to let him answer. He can
12 explain his answer, if he wants.

13 (A PORTION OF THE RECORD WAS READ BACK)

14 Q. Okay. I -- basically, that is two questions, and I
15 apologize for asking two questions. It was two
16 questions. One is, in talking to Randy ...

17 A. Do I know -- do I know ...

18 Q. ... did you learn who does the silviculture?

19 A. Do I know that the Corps is the authority? Yes, I know
20 the Corps is the authority. Does that answer one of
21 your questions?

22 Q. That answers that last one, I think so.

23 A. Okay. Do I know ...

24 Q. The other was about who could do the silviculture
25 before the sale to a developer?

1 A. Okay. Yes, I was aware -- I can't remember from what
2 source. But yes, I was aware that these practices have
3 to be done by foresters and not developers, or people
4 who were -- people who were owning land, just
5 growing trees and that sort of thing, not busting it up
6 for condos.

7 Q. And it has to be done before the sale? And so ...

8 A. Well, it depends on ...

9 Q. ... before the sale of wetlands ...

10 A. It depends on who you're selling it to. But if you're
11 selling it for development purposes, yes.

12 Q. All right.

13 A. But if you're selling it to another forester, or somebody
14 who's growing timber, then no, it doesn't have to be
15 done before you any sale.

16 Q. And of course, you're dealing with a developer here in
17 this contract?

18 A. Yeah.

19 Q. And what I'm trying to get clear -- and this is kind of
20 going to be an open question. But just tell me if you
21 ever had a conversation with Randy and or Donald
22 after you received the proposals for the boundary and
23 the wetlands delineation proposals from S&ME, I think
24 is the name, you know, and what it was going to cost,
25 how things were going? I mean, did -- it seems to me

1 y'all talked frequently. Did you not have any curiosity
2 to talk about these things as they were taking place?

3 A. Which things?

4 Q. The survey, the boundary, the wetlands, the asterisk
5 tract, Tract B, to keep up with, really, the subject
6 matter of the contract?

7 A. As I've already testified to, Dwight, we talked
8 periodically. Randy would keep me updated. We
9 didn't talk every week. We didn't necessarily talk
10 every month. But you know, when -- the day that they
11 got the first boundary survey completed, he didn't -- he
12 did show me -- I misspoke there. The takedown survey
13 is what I meant. I remember when they got the
14 boundary survey completed, he showed it to me,
15 because I remember him telling me originally -- can I
16 see that, please?

17 Q. What do you want? The big one?

18 A. Yes. I do remember this conversation. I remember
19 him telling me that -- originally he said, "I think we're
20 going to take down this piece first." I said, "Well,
21 okay." This is Parcel C. And I don't think this is
22 relevant to anything, but I'm answering your question.

23 Q. You were having conversations about the tract?

24 A. But then, when he brought me the first takedown
25 survey, it actually showed, you know, what we now

1 know was the first takedown. So yeah, we talked about
2 stuff every now and then. But you know, not every
3 week, not every month. But yeah, we talked about
4 stuff.

5 Q. Well, I'm trying to ...

6 A. And then, you know, he actually ...

7 Q. I'm sorry. Go ahead.

8 A. He actually mailed me the takedown survey, because
9 we've got the cover letter in evidence, where it talks
10 about our preliminary wetlands survey, la-di-da-di-da.

11 Q. What I'm trying to figure out is, you basically allege, as
12 part of your causes of action, that you were misled, you
13 were under the impression that they were doing
14 anything, and that you had a right to rely on that,
15 because you relied to your detriment, all of those type
16 things. And you, as an attorney, experienced in real
17 estate with personal transactions and a good knowledge
18 of real estate, had been in touch with them on a regular
19 basis, which you just testified ...

20 MR. STEVENS: Your Honor, I wonder if there
21 might be a question in this particular speech. I object
22 to all of this.

23 JUDGE: Just ask him.

24 MR. STEVENS: Ask him a question.

25 Q. I was really patterning myself after Stevens's

1 testimony.

2 MR. STEVENS: You don't pattern yourself after
3 me, I guarantee you that.

4 Q. Then how can you allege the things in your Answer
5 and your Counterclaim, that you were misled, or did
6 not know what was going on, or what your
7 requirements were under this contract?

8 A. Dwight, I didn't draft the pleadings. I was certainly led
9 to believe, by a very clear course of dealing, that they
10 were taking care of the wetlands, and that's what they
11 did on the first two takedowns. This whole thing is not
12 about a wetlands survey. It's about those letters from
13 their New Jersey guys.

14 Q. But in July you had information that, "Give us this
15 survey. Give us this wetlands delineation, and we'll
16 close." It didn't even say a minimum amount of
17 anything. It said, "Give us -- on this tract, give us a
18 wetlands delineation, and we'll close." And you have
19 apparently done nothing.

20 A. No, that's when I went to see Chuck Oates.

21 Q. Okay. And then after seeing Chuck Oates, you
22 apparently did nothing?

23 A. I mean, we've been through ...

24 Q. Why not?

25 A. We've been through this, Dwight.

1 Q. Tell me again, because I'm trying to understand.

2 Explain it to the Court. Why not go ahead and do the
3 map, as set out in the contract, the delineation,
4 approval of the Corps, and close the deal?

5 A. After -- do you have ...

6 Q. What do you need?

7 A. Jimmy, let me just see our pack of exhibits. I can ...

8 MR. STEVENS: I think I left some of them. Are
9 you talking about Exhibit Number 18, when they
10 declared the ...

11 A. No, I want the whole ...

12 MR. STEVENS: ... contract null and void?

13 A. I want all the correspondence from the time period he's
14 talking about.

15 MR. STEVENS: I think I got it right there, but I'll
16 see if this one ...

17 Q. While you're looking for that, and that question ...

18 A. It's a very simple answer, really.

19 Q. Okay. Well, give me that.

20 A. Before anybody could have gotten -- in my opinion,
21 before anybody could have gotten it completed, we get
22 this letter from Allen saying, "We consider the contract
23 to be null and void."

24 Q. Do you have that -- you've been walking back and
25 forth. Have you got that letter?

1 MR. STEVENS: Yeah, I just took it to him. It's
2 right there.

3 Q. This is null and void?

4 A. Is that the one?

5 Q. Let me see. Okay. I believe that is it. It does say "null
6 and void," June the 18th of '08. Okay. Okay. But of
7 course, Mr. Bellamy's letter to Mr. Stevens is July
8 11th, about a month after receiving ...

9 A. Okay.

10 Q. ... apparently some other correspondence. So the offer
11 ...

12 A. Where's the correspondence after that?

13 Q. I don't know, but -- here it is, July the 11th, which is
14 after this null and void letter.

15 A. Well, then I gave them the letter on September 2nd that
16 says, "Send me the boundary survey of what you want
17 to close on," and then I think September 20th is --
18 there's another letter dated September 20th.

19 MR. STEVENS: It's in that stack.

20 A. Okay. September 2nd, "I look forward to receiving a
21 survey of what y'all do wish to purchase at this time in
22 the near future." Jimmy's letter ...

23 Q. Excuse me. I'll grab that and -- go ahead, excuse me.

24 A. Allen writes to Jimmy on October 8th. "Your client
25 provided unofficial wetlands estimation from a non-

1 governmental body," which is all I was required to do.
2 That was October 8th, and I can't remember what
3 happened then. But y'all filed a lawsuit in February of
4 2009.

5 Q. I'm trying to find dates on these things, and they're just
6 not legible.

7 MS. GRAZIANI: (INAUDIBLE)

8 Q. Defendant's Exhibit 32. (INAUDIBLE; TALKING TO
9 MS. GRAZIANI)

10 MR. STEVENS: You've got the original, because
11 you sent it to us.

12 MS. GRAZIANI: It's 10/27/07.

13 Q. Say again?

14 MS. GRAZIANI: 10/27/07. The same date as
15 the larger one.

16 Q. I can't read the dates on these.

17 MR. STEVENS: Yeah, it is. Yeah, there is.
18 (INAUDIBLE; CONFERRING WITH MS.
19 GRAZIANI AND MR. STEVENS)

20 Q. All right. I think we've found out that this legible map
21 is a better copy of the asterisk tract of Defendant's
22 Exhibit 32. We can put this Plaintiff's Exhibit
23 whatever, 32A or something?

24 COURT REPORTER: Everything else has been
25 Defense. Do you want this Plaintiff's 1, or do you just

1 want to continue ...

2 Q. Plaintiff's 1, I guess. I've been going by depositions.

3 (PLAINTIFF'S EXHIBIT 1 WAS MARKED)

4 Q. But this does appear to be a better, bigger, more
5 legible copy of that. And the date on this map, as far
6 as being drawn, is what date? Well, I -- let me read it
7 for you. 6/19/08.

8 A. Yes.

9 Q. All right. And I believe Mr. Sean Williams -- this is
10 basically a perimeter survey, so this was in existence
11 and introduced by your own lawyer. So it was there in
12 June of '08.

13 A. No, we got that from you.

14 Q. So you're saying that you never went and -- you and
15 Mr. Beverly never talked about that being available?
16 Did you ever tell him that that's what you needed?

17 A. This map, I never saw this map until we got it in
18 discovery.

19 Q. Did you ever ask Mr. Beverly, Randy Beverly,
20 responding to Mr. Allen Beverly's letter to your
21 lawyer, says, "Get us the boundary survey"?

22 A. Yeah. I just read it to you in my letter.

23 Q. That that was the condition?

24 A. "I look forward ..." Do you want me to read it again?
25 "I look forward to receiving a survey of what y'all do

1 intend to purchase at this time in the near future."

2 Q. And of course, what you were talking about, and what
3 your responsibility was, the asterisk tract and Tract B,
4 to be contiguous to the asterisk tract?

5 MR. STEVENS: Object to the form of that
6 question, Your Honor.

7 Q. Isn't that correct?

8 A. Well, I know that they had indicated that they wanted
9 to go contiguous, but I, to this day, have still not gotten
10 a boundary survey of what they intended to buy, like
11 they did on the first two takedowns.

12 Q. What would be contiguous would be the asterisk tract,
13 would it not?

14 A. Yes, it would be, but they still never brought me the
15 survey.

16 Q. And you never had the asterisk tract delineated?

17 A. For the fourth time, no.

18 MR. HUDSON: That's all I have. Thank you, sir.

19 REDIRECT EXAMINATION OF BENJAMIN

20 CREEL BY MR. STEVENS:

21 Q. In cross-examination, Mr. Hudson kept making
22 statements and speeches about your company not being
23 -- or being dissolved at the time you signed the
24 contract. My question here is, do you recognize that
25 particular document as the Secretary of State's history

1 on the corporation of Bucksville Farms?

2 A. Yes, sir. I do.

3 Q. All right. Now, let's look down here. It shows that
4 there's a forfeiture ...

5 A. I can't see this.

6 Q. It shows that there's a forfeiture on 8/20/1998. Is that
7 correct?

8 A. Yes, sir.

9 Q. And it shows reinstatement on what date?

10 A. August 5th, 2004.

11 Q. And it shows a forfeiture again on what date?

12 A. January 30th, 2008.

13 Q. So when Mr. Hudson said it was forfeited at the time
14 that you signed the contract, that was incorrect?

15 A. That's -- according to this.

16 Q. All right. Let's go a little further. This administrative
17 dissolution number two was determined to be a
18 forfeiture in error, and it was reinstated the following
19 year. Am I correct?

20 A. Yes, sir. That's what it says.

21 Q. It says, "Forfeiture in error by DOR."

22 A. Uh-huh.

23 Q. Is that a yes?

24 A. Yes, sir.

25 Q. All right. We would move to introduce this.

1 MR. HUDSON: I have no objection. If he's
2 saying contract, he's probably referring -- and I meant
3 to say the lawsuit naming Defendants at that time, and
4 I think that's what the records would show. And he
5 never denied it.

6 Q. Well, the record shows that it wasn't in forfeiture at any
7 time since nineteen -- 2004.

8 MR. HUDSON: Well, we might dispute that, but
9 ...

10 Q. Well, I don't think you can.

11 MR. HUDSON: ... I'll submit some records, and
12 what our records show that, at the time of the lawsuit, I
13 think that it was necessary to name him, as the way we
14 did it.

15 (DEFENDANT'S EXHIBIT 36 WAS MARKED)

16 Q. All right. Now, we're going back and forth about the
17 letters. The letter -- and I want to get the correct
18 language here. The letter from Allen Beverly -- here.
19 From Allen Beverly, looking at the last sentence of the
20 first paragraph, read that into the record.

21 A. "Should the Bucksville Farms, Inc. dispute this
22 position and feel the need to bring an ..."

23 Q. No, the last sentence of the first paragraph.

24 A. Oh, I'm sorry. I'm sorry. "Because of Bucksville
25 Farms, Inc.'s failure to comply with this paragraph by

1 never providing such boundary and wetland surveys, it
2 is our position that Bucksville Farms, Inc. has been in
3 breach of the contract in question -- of the contract in
4 question. Due to Bucksville Farms, Inc.'s breach, by
5 failing to provide that boundary survey and wetlands
6 delineation, Randy A. Beverly and Donald Godwin,
7 LLC do hereby declare the contract forever null and
8 void."

9 Q. Do you know whether or not Donald Godwin and
10 Randy Beverly were a judge at that time?

11 A. Not as far as I know, they were not.

12 Q. But they are putting themselves up in a position of a
13 judge declaring this contract null and void. Is that
14 right?

15 A. The word "unilateral" comes to mind.

16 Q. Unilateral.

17 MR. HUDSON: Was that -- that's not a speech.
18 That's a question?

19 Q. That was a speech.

20 MR. HUDSON: Just say a question mark after
21 you finish your speech.

22 Q. All right. Null and void? (LAUGHTER) All right.
23 Now, there was letters back and forth. But the question
24 here is -- and I want to make sure that I understand
25 what you said. You're asking them on your September

1 the 2nd, 2008 letter, "Please let me know what part
2 you're going to purchase." Am I correct?

3 A. Yes, sir.

4 Q. All right. And this map that has appeared now, which
5 is the map you've identified, you have never seen this
6 map that's is Plaintiff's Exhibit Number 1, which is also
7 Defendant's Exhibit Number 32, you never saw these
8 maps until after they filed the lawsuit, and after you
9 submitted Request for Production of Documents, and
10 they submitted it?

11 A. That's correct.

12 Q. And you heard Mr. Beverly yesterday say under oath,
13 he's never seen this map?

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes, sir.

17 Q. All right. You haven't heard him say that now he's had
18 a revelation, that now he now remembers it, did you?

19 A. No, sir.

20 Q. All right. So after that letter, I think the last letter from
21 Mr. Allen Beverly, who is the son of Randy Beverly,
22 the last letter of this whole letter shooting match was a
23 letter from your attorney -- that's me -- to Mr. Allen
24 Beverly, correct?

25 A. Correct.

1 Q. Do you know of any response to this particular letter ...

2 A. Let me see which one that is.

3 Q. ... other than the lawsuit?

4 A. Yeah, this is the October the 30th letter. I do not recall
5 getting anything after this, other than -- until the
6 litigation was commenced.

7 Q. And that was in February of 2009. Am I correct?

8 A. Yes, sir.

9 Q. And as I understand from the terms of the contract, in
10 paragraph twenty-two, the last sentence requires that
11 the southwestern section tract be taken down in the
12 fourth takedown?

13 A. Correct.

14 Q. Was there a discussion between y'all that that was
15 going to be done that way, to allow silviculture, to
16 allow the land to become ...

17 A. I'm sure that's the reason it was originally put in there.

18 Q. Okay. Had they come back and give you this plat here,
19 this Plaintiff's Exhibit Number 1 ...

20 A. Now, Jimmy, let's not us get repetitive. I've been
21 harping on Dwight for being repetitive.

22 Q. I know. But had they given you this particular plat and
23 say, "We want to buy it with the wetlands as delineated
24 there at a thousand dollars an acre ..." -- you see?

25 A. Yes, sir.

1 Q. And this plat shows, does it not, that in this particular
2 plat, it shows that -- by the way, Your Honor, this
3 particular plat shows the southwestern tract as being
4 Parcel B in this one, and what is identified as Parcel B
5 on the other tracts is Parcel C. But it shows that Parcel
6 B, excluding the field that they took down in the
7 second takedown, has how many acres?

8 A. This is the first legible copy of this I've seen.

9 Q. Up here.

10 A. Thirty-four point five eight.

11 Q. All right. Now, let's go down to the legend on the
12 drawing itself. Does it show how many wetlands acres
13 there are, and how many upland acres there are?

14 A. I see an upland of six point oh seven.

15 Q. So the map shows the southwestern tract having six
16 point oh seven acres?

17 A. Yeah, and wetland, twenty-eight point five two.

18 Q. Twenty-eight point five two. Had they given you this
19 particular map, would you have sold them that
20 southwestern tract?

21 A. No, I would have invoked paragraph twenty-two.

22 Q. Okay. Thank you. That's all I have.

23 MR. HUDSON: Just a couple more questions on
24 these maps, and we'll ...

25 Q. Excuse me. Before you -- let me get this one other

1 question. Was Bucksville Farms ever in financial
2 trouble such that they could not have given a clear title
3 on these tracts?

4 A. No, sir.

5 MR. STEVENS: Okay. Thank you.

6 MR. HUDSON: Is that it?

7 MR. STEVENS: Yes.

8 RE-CROSS EXAMINATION OF BENJAMIN

9 CREEL BY MR. HUDSON:

10 Q. Hopefully the last map question. Have we talked about
11 this one?

12 A. Yes, sir.

13 Q. That's been involved in just about all the testimony?

14 A. Yeah.

15 Q. And this shows a delineation of a wetlands on the tracts
16 ...

17 A. Yes, sir.

18 Q. ... one, two, three. It shows your retention of forty
19 acres retained. Shows Tract B, that was inadvertently
20 included ...

21 A. Yes, sir.

22 Q. ... by the Corps?

23 A. Yes, sir.

24 Q. And it's got the asterisk tract. And when did you see
25 this, this overall tract -- this map? It's dated in '07.

1 A. I can't remember when Randy first showed it to me.

2 Q. 11/2/07. Pretty soon after it was done, right?

3 A. Probably.

4 Q. Okay. And the asterisk tract really consists of a
5 boundary survey of the asterisk tract. So what we've
6 got left here is an asterisk tract and part B, which is a
7 kind of a gift to Larry Paul, it turns out, on the
8 wetlands issue. But we've got boundary surveys on
9 both of those, do we not?

10 A. What are you saying, Dwight?

11 Q. Well, those are boundary surveys. You said you asked
12 for a boundary survey, and you already had it.

13 A. It doesn't say -- I don't have a boundary -- what the
14 contract says, Dwight, is they're to provide us a
15 boundary survey, just like that one right there on
16 takedown number two, setting forth what they wanted
17 to buy in the subsequent takedown.

18 Q. But you had the asterisk tract. You had a boundary
19 survey. And you knew it needed a wetlands
20 delineation.

21 A. That third -- that was written on there at Randy's
22 deposition a couple of weeks ago.

23 Q. Well, that's true. That was the next tract that was going
24 to be taken down, and needed delineating. It's a
25 contiguous tract.

1 A. I did not know that. No way in heck I could know that.

2 Q. You didn't know what?

3 A. There's no way in heck I could know what they wanted
4 to buy on the next takedown until I got the letter and
5 the thing in the mail, just like Randy did on number
6 one and number two.

7 Q. And what was left was there in the boundary surveys,
8 correct?

9 A. What?

10 Q. Both of these tracts, the asterisk tract and Parcel B, are
11 -- have their boundaries delineated, correct? You have
12 boundary surveys of those two tracts?

13 A. I think the confusion here may be partially my fault.
14 I'm talking about what the contract calls a takedown
15 survey. That is a takedown survey. Do you follow
16 me?

17 Q. A boundary survey?

18 A. The contract calls that the boundary survey. The
19 contract calls that a takedown survey.

20 Q. Well, wouldn't the boundary ...

21 MR. STEVENS: Please refer to what you're
22 referring to.

23 A. I'm sorry.

24 MR. STEVENS: It will be difficult to tell

25 Q. Well, let me ask you this. Wouldn't the -- it depend on

1 uplands and lowlands, or wetlands and uplands, as to
2 having fifty acres of uplands? So you would need --
3 what you have here is what's left there, at least to fulfill
4 the contiguous requirement, and what ...

5 A. Well, Dwight, I ...

6 Q. ... you need is this wetlands delineation to know what
7 kind of uplands you had?

8 A. I did not follow that at all. What's your question?

9 Q. You need a wetlands determination to be able to figure
10 out what you're going to take down. Here's a boundary
11 survey to include, so they can do a takedown survey
12 after you -- they know what kind of wetlands are on it?

13 A. Now I think I understand what you're trying to get out,
14 Dwight. It's kind of a chicken and an egg thing,
15 maybe. But all they've got to do is have an estimate of
16 the wetlands, and then they can determine from that
17 what they need to purchase, to meet the minimum fifty
18 acres of uplands in each takedown. It doesn't take a
19 genius to figure that out.

20 Q. You did no wetlands delineation in the last tracts. It
21 hadn't been -- you did not do any of it, or pursue it?

22 A. Pardon me?

23 Q. You did not pursue it, even after saying, "Just give us a
24 wetlands delineation"? You did not pursue it after
25 receiving the letter saying, "Just do it, and we'll close"?

1 A. Because I found out it was already done.

2 MR. HUDSON: Okay. That's all I have. Thank
3 you.

4 RE-REDIRECT EXAMINATION OF BENJAMIN
5 CREEL BY MR. STEVENS:

6 Q. What you're saying is the takedown survey was never
7 given to you, showing which part of this remaining
8 about a hundred and some odd acres that they wanted
9 to buy in the third takedown?

10 A. The third takedown survey was never provided to me.

11 Q. Was never provided to you?

12 A. Correct.

13 Q. And that's required, under the terms of the contract?

14 A. Correct.

15 Q. And also, under the terms of the contract, the
16 southwestern tract is not to be taken down in the third
17 takedown, but in the fourth takedown?

18 A. Correct.

19 MR. STEVENS: Okay. Thank you.

20 MR. CREEL: Am I done?

21 MR. HUDSON: That's all I have.

22 JUDGE: You're done. Thank you. Anything
23 else?

24 MR. HUDSON: Just the motions that we talked
25 about earlier, for the record.