

# A Presentation of the



**December 2, 2008**

# **Obstacles to Improvements in Iowa Drainage Districts**

**And Just About Anywhere Else that Drainage  
Improvements are Needed or Desired**

**9<sup>th</sup> Annual Minnesota & Iowa Drainage Research Forum**

**Cabela's \* Owatonna, Minnesota**

**December 2, 2008**

## Iowa Drainage Districts History

- 1906 core of governing laws enacted
- 1913 Iowa Constitution amended to enable acquisition of rights-of-way
- 1914-21 federal guaranteed corn price
- 1906-25 >80% of districts established
- 1922-48 very little activity, repairs or improvements
- 1950s tile drain design capacity standards increased to current standards

# Iowa Drainage Districts Limitations

Sources: Des Moines River Basin Study, Drainage Report 1983 USDA/NRCS, Elliot, Chenoweth, etal. Drainage Needs and Returns in North-Central Iowa, ASAE 1983, Kanwar, Johnson, Schult, Fenton & Hickman

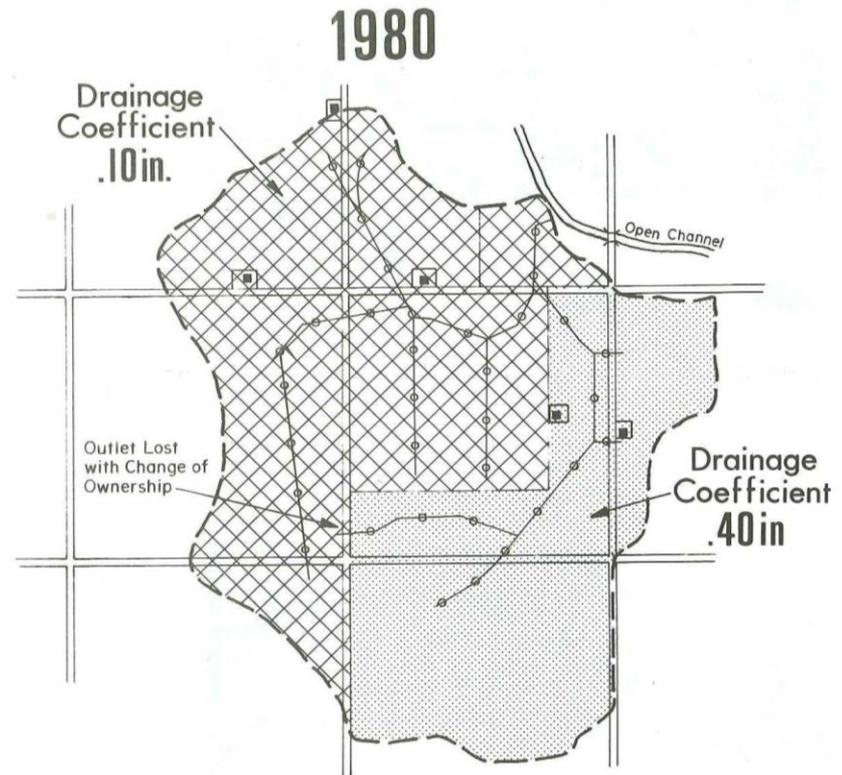
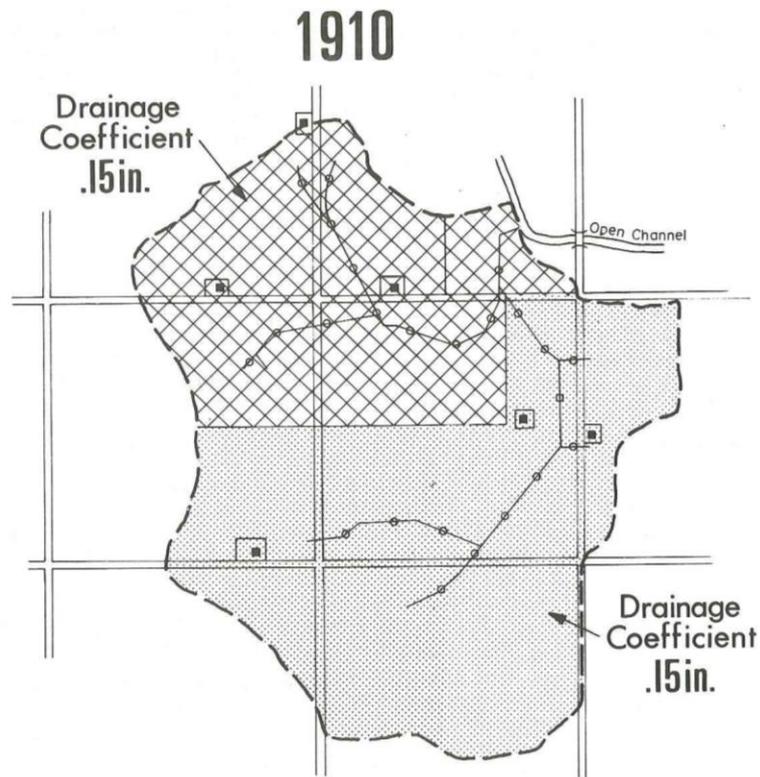
- Referenced 1983 studies analyzed drainage districts in 10 Iowa counties in upper Des Moines River Basin
- Crop yields in drainage districts in study area are reduced by 32% from potential by limited drainage
- 95% of the study area was drained by inadequate drain tile mains
- 69% of on-farm drainage systems are newer and have adequate design capacity
- Improving drain tile mains only will eliminate 80% of limitation

# Obstacles to Drainage Improvements

Source: Des Moines River Basin Study, Drainage Report , USDA/SCS 1983, Elliot, Chenoweth, etal

- High Cost
- Opposition by Those Who Feel Drainage is Adequate
- Older Landowner with Short Term Investment Needs
- Poor Understanding of Benefit Assessments
- Opposition to Open Ditches
- Absentee Landowners Not Caring to Make the Big Investment in the Land
- Inadequate Outlet
- Absentee Landowners Lacking Community Ties to Promote the Project
- Money Not Available
- Lack of Leadership
- Politicians Unable to Put on Their Trustee Hats
- Hatfield-McCoy Syndrome
- Determined Opponents Who Will Threaten, Bully, Mislead and Lie

# Opposition by Those Who Feel Drainage is Adequate



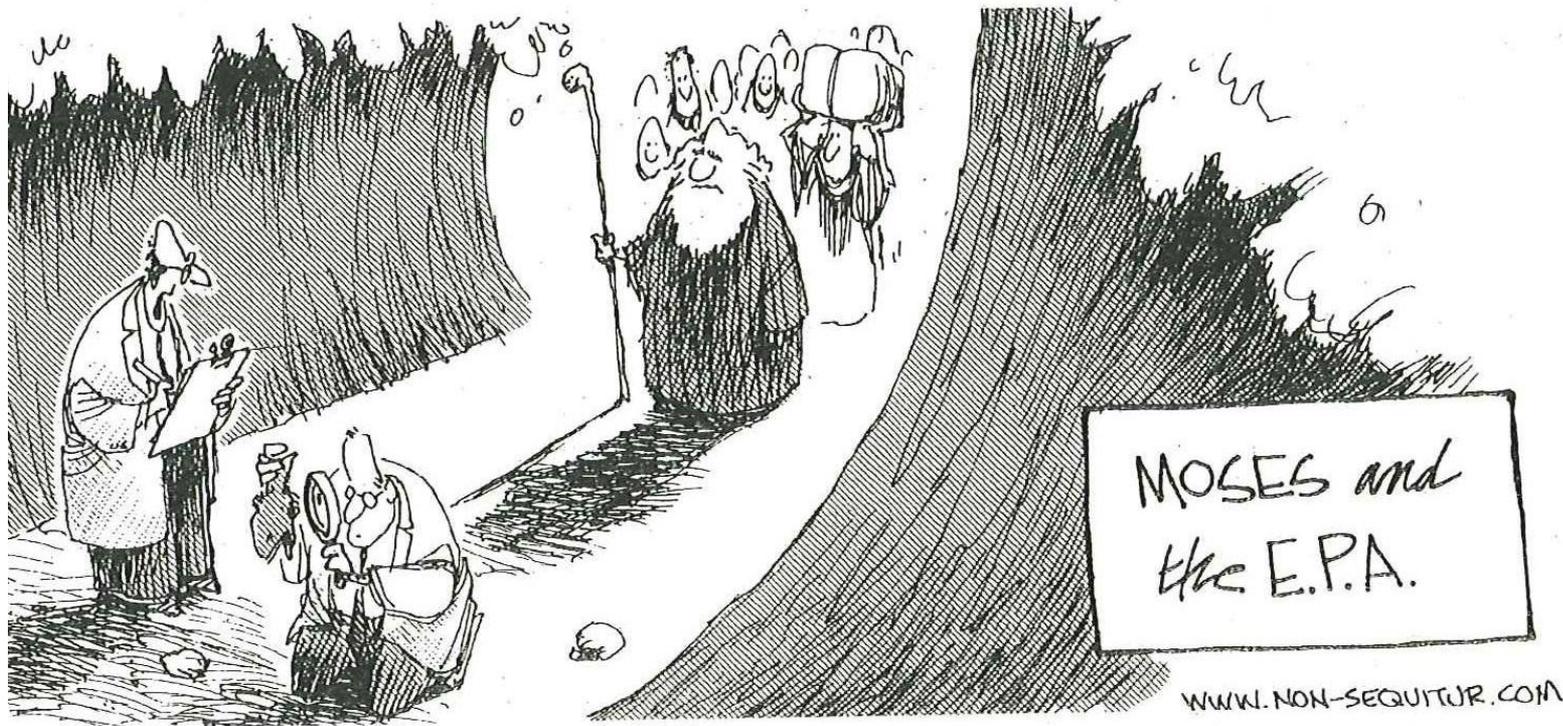
# Poor Understanding of Benefit Assessments

- Too much reliance upon old assessment schedules – Take the time and spend the money to do it right!
- Failure of trustees to recognize legal obligations to order reclassification
- Failure of the benefit commission to use all the tools and data bases available to do a good job.

# Politicians Unable to Put on Their Trustee Hats

- Trustees are charged to make the decisions that are in the best interests of the entire drainage district. Politics and friendships are supposed to be ignored.
- Silence from a landowner is almost always an indication of support for the project.
- It is impossible to make everyone happy – don't try.
- Road crossings costs are secondary to the needs of the landowners – make decision as if no roads exist.
- You've got to spend money to make money!

# Added & Growing Obstacles to Drainage Improvements Since December 23, 1985



*Yes, we appreciate the rush, but you'll just have to wait until our environmental impact report has been completed.*

# **Added & Growing Obstacles to Drainage Improvements Since December 23, 1985**

- Wetland Conservation Provisions of the Food Security Act of 1985 (December 1985)
- Bureaucratic Addition of Farmed Wetland to FSA Regulation (September 1987)
- Extension of Federal CWA Sec 404 Jurisdiction to Farmed Wetland (1989)
- Endangered Species....State & Federal
- Expansion of Water Quality Standards Reach
- Stormwater Pollution Prevention Plans

# Farmed Wetland Regulatory History

- July 1985 Congressman Daschle Proposes Swampbuster – all cropped land would be “grandfathered”.
- December 23, 1985 Farm Bill Signed
- March 1986 Proposed rule does not include wet cropland
- September 1987 “Farmed Wetland” first appears anywhere in federal regulations in farm bill final rule.

# Farmed Wetland Regulatory History

- 1989 Corps of Engineers changes definition of “under normal circumstances” so that crop cover is no longer considered normal – farmed wetland now is jurisdictional under Clean Water Act!
- 1990 MOA Between USDA, USEPA, USFWS & USACE defining farmed wetland jurisdiction
- June 1993 Commence Date for Certified Wetland Determinations – Older Determinations No Good!
- September 1996 Interim Final Rules – These “interim” rules are still in effect!!!

# **USDA Bureaucratic Power Grab**

**Administrative rules which expanded swampbuster's reach to include Farmed Wetland jurisdiction have never been subject to full public comment and review.**

1987 Jurisdiction was added to the final rule with no opportunity for comment.

1996 Comments were solicited but 12 years later final rules in response to the comments were not issued.

# USEPA/USACE Bureaucratic Power Grab

1981 – USEPA adopts CWA Sec 404(b)(1) Sequential Assessment Guidelines Rule. Farmed Wetland is not mentioned, yet the rule is still unchanged and is used to prevent farmed wetland conversion.

[AVOID – MINIMIZE – MITIGATE]

[ALL WETLANDS ARE CLASSIFIED AS “SPECIAL AQUATIC SITES” AND MAY ONLY BE CONVERTED IF IT IS NECESSARY AND UNAVOIDABLE.]

1992 – Congress orders return to use of Corps’ 1987 Wetland Delineation Manual. USACE complies but retains Regulatory Guidance Letter 90-07 which retains 1989 manual’s definition of “normal circumstances”.

## Important Court Cases

- 2001 – Supreme Court Decision in SWANCC v USEPA eliminates Clean Water Act jurisdiction over isolated wetlands, including most farmed wetland
- 1999 – U.S. 8<sup>th</sup> Circuit Court of Appeals finds in Barthel v USDA that landowners may improve drainage as needed to restore best historic productivity of farmed wetland.

# Administrative Responses to Court Cases

- The Corps of Engineers has chipped away at SWANCC by redefining “tributaries” to include dry road ditches and “adjacent” to include separations of hundreds of feet, but in Iowa they have not been so bold.
- The NRCS has all but ignored the Barthel findings and still holds to drainage as it existed on December 23, 1985.

# Swampbuster Obstacles

## **Drainage Districts Cannot Secure Wetland Determinations From the USDA**

Worthwhile projects are at the mercy of every landowner independently requesting and providing their determinations. Opponents can take advantage of trustees unwilling to put them out of farm program compliance.

# Swampbuster Obstacles

## **Farmed Wetlands Impair the Improved Drainage of Adjoining Non-Wetlands**

Farm program penalties and/or the mitigation costs discourage drainage improvements of adjoining non-wetland areas by greatly increasing the cost.

# Swampbuster Obstacles

## **State and Local NRCS Units Impose Their Own Rule Interpretations and Conditions**

Iowa – Tile drain improvements don't count toward hydrologic changes in watershed

South Dakota – has a 20-year limit on photographs for wetland conventions

Minnesota – has a special encirclement policy tripling tile drain separation from pothole wetlands

# Swampbuster Obstacles

## **NRCS Will Not Make a Predictive Analysis in Repair vs. Improvement Comparisons**

District or individual seeks improvement of existing drain. Due to poor condition of drain wetlands have formed. NRCS insists on seeing that repair converts wetlands before allowing improvement without mitigation.

# Swampbuster Obstacles

## **NRCS Requires Acre for Acre Mitigation for Converted Farmed Wetlands**

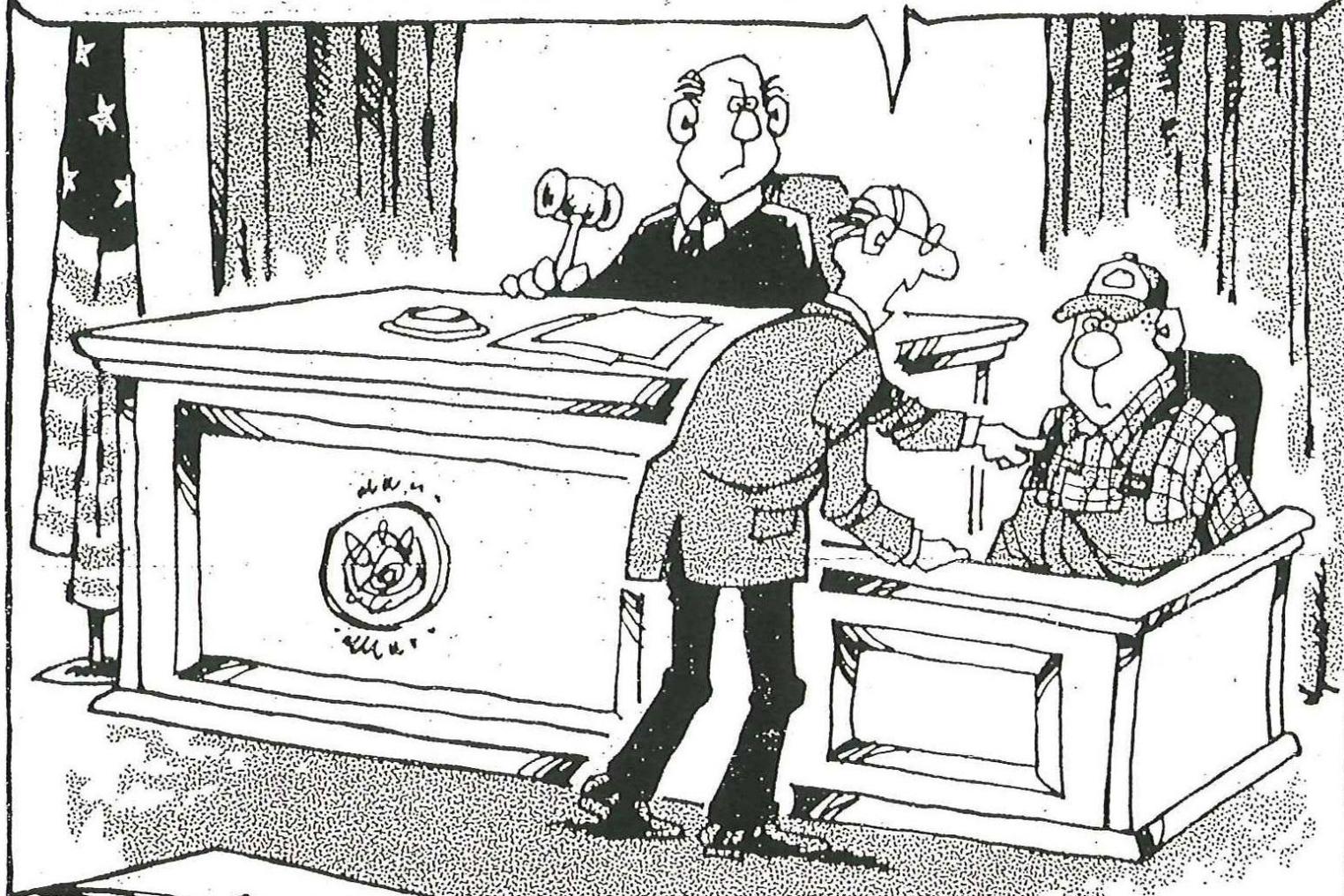
This is one of those policy decisions contained in the National Food Security Act Manual which was not exposed to public comment and rulemaking. Obviously, regularly cropped tile-drained farmed wetland isn't that valuable!

# Swampbuster Obstacles

## **The Appeal Procedure is Often Biased**

- Local officials don't have reasons to change.
- Higher agency officials are too interested in supporting the lower decision than in truth.
- NAD hearing officers have an interest in not being overturned by the NAD Chief.
- NAD Chief rarely finds the agency wrong.

SO YOU ADMIT IT! YOU WANT TO IMPROVE THE DRAINAGE OF THE WET CROPLAND THAT YOUR FAMILY HAS FARMED FOR 70 YEARS. DON'T YOU KNOW THAT MAKES YOU A SWAMPBUSTER?!









# **The Surface Ditches Built by the Barthels in 1966**

**1967 Aerial Photo**



# 8<sup>th</sup> Circuit Court Findings

*“Certainly there is no worse statute than one misunderstood by those who interpret it. We conclude that the agency’s interpretation misses the clear focus of the Swampbuster provisions and the implementing regulations.”*

*Barthel v USDA, Docket No. 98-2754*

*Filed June 18, 1999*

# 8<sup>th</sup> Circuit Court Findings

*“The statute and regulations mandate that the Barthels should be able to have the water and farming regime they had before December 23, 1985.”*

*Barthel v USDA, Docket No. 98-2754*

*Filed June 18, 1999*

**The phrases “prior to December 23, 1985” or “on of before December 23, 1985” appear 8 times in the 8<sup>th</sup> Circuit Court Ruling.**