

# Managing Puddles

*The endless pain of dealing with unaccountable bureaucrats.*

*By Joyce Morrison*

Arlen and Cindy Foster of rural Fulton, S.D., have always loved farming. Their heritage dates back to Arlen's grandfather homesteading in S.D. in 1886. Cindy's brother farms the land that has been in the hands of her family for four generations. The Fosters raise livestock and grain on part of the land Arlen's grandfather homesteaded over one hundred years ago. When agency overreach tries to take the family's land, they are not willing to hand it over without a battle. It has nothing to do with the size of the takings—it is the principle.

Government intervention in farming began with the Soil Conservation Service, established under the U.S. Department of Agriculture in 1935 during the Dust Bowl to conserve soil and water. The agency expanded over the years and in 1994 was reorganized and renamed the Natural Resources Conservation Service (NRCS).

Congress passed the Swampbuster Act on Dec. 23, 1985. Swampbuster meant no more draining of "wetlands." Swampbuster and other government programs were put into place requiring the farmers' compliance in order to be eligible for various farm program payments.

A wetland is a place where there is shallow water or soggy soil at least part of the time. Even a mountain or desert can have a wetland if it has a low spot where water collects and certain plants grow. Most wetlands found on farms are small enough that farmers call them puddles or wet spots. Draining was always the best choice to deal with the problem until the government put a stop to the practice in some determined cases.

There are areas called "dry wetlands" that are covered with water two or three weeks each year which Green groups believe are important for ducks and geese when they fly north in the spring. Frogs lay eggs in wetlands that are dry by the end of summer. Eight-tenths of an acre in the middle of Arlen's field would most closely fit as a dry wetland, and although it is a wet spot when the snow thaws, it has been farmed for more than 100 years.

At first the Swampbuster Act was not strictly enforced in the state until Green

groups sued the South Dakota NRCS to demand compliance. These groups have no vested interest in the property but are accepted as NGO (non-governmental organization) stakeholders in the decision making.

Green groups and farm organizations held several meetings to map out the criteria for determining what constituted a wetland. In 2000, Cindy attended these meetings and when she saw the writing on the wall, just to



PHOTOS COURTESY CINDY FOSTER

### *Simplified Wetlands Delineation from "The Professional Geologist"*

(1) If it's wet, it's wet; (2) If it's dry, it's dry; (3) If it's wet but not overly dry, or dry but not overly wet, refer to items (1) and (2); (4) If it's wet but could be dry, or dry but could be wet, refer to item (3); (5) If it is neither wet nor dry, refer to the Atmospheric Delineation Manual; (6) If it's wetter than dry or dryer than wet, then it is damp. If it is damper than what would be considered dry, then refer to item (1). But if it is dryer than wet but would be considered damp, but not as damp as what would be considered wet, or is dryer than a damp wet area, then refer to item (1).

be safe, she requested an official wetland determination on four quarters of family ground.

Due to office overload at that time, the director was unable to make the determination. This director moved on and a new one was hired. Cindy says, "On his first visit to our farm, it was obvious that he was looking for wetlands like a man looking for gold." He said he would be back the next day with his laser equipment to survey

established drainage ditches. Apparently he was not aware of the court decision where the focus was to be on the wetland and not the ditch. If this new director was that determined to find a problem, the Fosters thought it best to withdraw their request for determinations.

They began the process again when regional personnel became available. Their hope was that their farm would be declared wetland free but the NRCS found one spot to be a wetland. Determinations were made with appeal options but the Fosters chose not to appeal at that time.

"We were never prohibited from farming the depression, but in order to stay in compliance and be eligible for crop insurance and other farm programs, we were prohibited from draining excess water to plant a crop or to save a growing crop," Arlen says. "This meant I could not pull a shallow ditch for approximately 300 feet and drain off the excess water that would drown out the crop in about 50 percent of years."

This was in 2004 and nothing changed until 2008 when the Fosters took pictures to document the snowdrifts between the trees and the wetland site to prove this was the cause of the wetland. A tree belt planted in 1936 catches snowdrifts up to six feet deep and when the snow melts, it runs into a depression. This could be classified as an "artificial wetland." In July 2008, Arlen and Cindy signed the 1026 form in the Farm Service Agency office requesting a reconsideration of the wetland determination. Months later they received the determination that the land was still a wetland.

An appeal was made to the USDA's National Appeals Division (NAD), but before the case could be scheduled, the NRCS rescinded its determination, meaning the process had to start all over again. Another field visit determined it was still a wetland. Later on the Fosters did have a hearing with NAD with their lawyer and an NRCS representative in attendance. It was months later when they received news the NAD hearing officer had ruled in favor of NRCS. One last step in the administrative appeal process was to request a director review. The director agreed with the NAD hearing officer. This was the final appeal before litigation.

The federal district court ruled in favor of NRCS on the basis of "deferring to the expertise of the agency." Next step was the 8th U.S. Circuit Court of Appeals. Months later a decision that read like it was "written

by a freshman law clerk" affirmed the district court opinion. The Pacific Legal Foundation accepted the case and the petition for *certiorari* was written and filed with the Supreme Court. Unfortunately, the Supreme Court only hears about 45 cases a year and at this time has declined to hear the Fosters' case.

Arlen and Cindy are equal partners in their farming operation. They met in church and their deep faith has given them the perseverance needed to continue their God-given right to uphold the basic principle of private property. Arlen believes there are basically two opposing worldviews. "Either you believe that man is a curse on the earth to be removed, or you believe that God created the world as a place to be lived in, to work out His purpose through history."

After the Supreme Court declined to hear their case, the Fosters asked NRCS for a review of the wetland status. The petition to the Court, amicus briefs, response and reply are available at [www.pacificlegal.org](http://www.pacificlegal.org) under the Aug. 10, 2016, press releases.

### Global Control

No one noticed when the United States, along with 169 other nations, signed the

treaty at the Convention on Wetlands that was held in Ramsar, Iran, in 1971. There are now 2,264 Ramsar wetlands' sites in the world. The United States boasts almost 40 wetlands of "international importance." This does not include the thousands of tiny wetland areas like on the Fosters' property. The government has spent millions of tax dollars



ABOVE: The Fosters' saga is never ending. Federal agents rule that eight-tenths of an acre of Arlen and Cindy's crop field (which has been farmed for more than 100 years) can't be worked because, after many contradictions, it was ruled "a dry wetland." OPPOSITE: Arlen and Fuzzy.

going after wetlands and other privately owned areas that make no major difference one way or another in the scope of things.

The United Nations' World Commission on Environment and Development, also known as the Brundtland Commission, released its report outlining sustainable development in 1987. This set the

groundwork for major global change regarding the use of property. In 1992, the Earth Summit known as Agenda 21 was held in Rio de Janeiro. Soon after, President Clinton formed the President's Council on Sustainable Development. Since 1992, major changes could be seen in unfair attacks on private property. Unknown

numbers of meetings, gatherings and conferences between global groups, government agencies, and NGOs have been held behind closed doors with the focus being control of your property. It appears to be a shell game where one treaty or congressional act establishing regulatory programs such as the Clean Water Act, Wetlands, Endangered Species Act, etc., takes hold of private property without people realizing what is happening until it is too late.

Arlen says, "Hope springs eternal that with a new administration we will be able to drain the bureaucratic swamp." ■

Joyce Morrison is a former writer and speaker on property rights issues. She is still involved with various organizations dealing with land issues.

## 30 Years and Counting

In 1977, 47-year-old Bob Brace of Waterford, Penn., bought 134 acres from his dad who had been a dairy farmer. Thirty acres was wetter than the cabbage he had intended to grow could tolerate, so, with the knowledge of the USDA, he installed more than five miles of ditches and drains. He hadn't even planted a crop there when he received notice of his violation of the Clean Water Act.

Brace's problems started when he allowed two state game commission officers on his property to trap beavers that had dammed a creek. After that visit, Brace received letters from the EPA, the U.S. Army Corps of Engineers, and the U.S. Fish & Wildlife Service informing him that he had drained regulated wetlands causing sedimentation in the creek and had damaged steelhead trout spawning waters. He was ordered to restore the wetlands or face fines of up to \$25,000. As previously stated, this

drainage had been done with the knowledge of the USDA.

A review of this case goes beyond ridiculous with years of agency contradictions and threats. One agency would authorize Brace and his sons to farm the land and another would threaten severe consequences if he did. Thirty years and a million dollars later, Bob Brace, at 77, is still battling the courts. On Jan. 11, 2017, the EPA filed two lawsuits against him. After failed mediation, his case will once again be heard by the U.S. District Court and a briefing schedule will be set.

Brace says: "I will do what you want, but I will not admit I am guilty when I'm not. You've been trying to make an example of me."

Out-of-control government agents are running roughshod over private-property owners. While food producers like Brace are still fighting for the use of their land, many of the agency officials who caused his problems are enjoying retirement with a government pension at the landowners' expense.

In 1987, Brace started the Pennsylvania Landowners Association (PLA) with the support of many individuals and likeminded groups. Their excellent website gives all the details of the Brace family's lengthy legal battles. The cases of many more landowners caught up in this nightmare over wetlands and the Clean Water Act can also be found at [www.palandowners.org](http://www.palandowners.org).

Keith Klinger, current board president, explains what issues the PLA stands for: "The obvious answer is private property rights. PLA works to influence regulations that affect those rights without just compensation as the Constitution calls for. Government programs such as Scenic Rivers, Rails to Trails, on-lot sewage regulations, government land acquisition, the Endangered Species Act, local zoning regulations, and any number of other government programs all directly affect private owners. PLA remains a voice speaking out when those government programs harm private owners."

—Joyce Morrison