



Harvesting the Law: Legal Duties to Steward Iowa's Water and Land

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Agricultural Law from Washington DC - farm bills and clean water -1975 to 2019





To plant genetic conservation on Svalbard in the Arctic



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This was the era of my parents' Adams County farm



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But we don't farm like my
parents did on our SW Iowa farm



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We all go through changes in life



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Agriculture has changed too – as has the law



But the land and values remain





Reflections on Retiring

Graduated 40 years ago from Iowa and helped start the Farm Division with Attorney General Miller

After 2 years at Arkansas School of Law returned to Drake to launch our Agricultural Law Center in 1983 as we sank into the Farm Crisis of the 1980s

From earliest years most work dealt with statutory interpretation and helping others understand laws

Taught Ag Law class for 35+ years but also Legislation for 25 – great respect and gratitude for those in the LSB now LSA – special appreciation for Doug



My undergrad degrees from Iowa State were in Forestry and Economics – so from earliest studies have had a special interest in our natural resources

- Iowa Natural Heritage Foundation board since 1991
- Spent 21 years on Leopold Center for Sustainable Agriculture Advisory board
- Drake has hosted a series of Sustaining Our Iowa Land (SOIL) conferences including the next on Nov. 4th – Searching for Solutions for Iowa's Water and Land



My goals for today

I want to talk about three main topics:

First, our state's legacy of leadership on land and water stewardship.

Second, some examples of legal duties of stewardship as reflected in Iowa law.

Third, thoughts on some of the "unfulfilled legislative promises" we have made and the challenge of water quality issues as we move forward.



Iowa's Legacy of Leadership

Individuals like Aldo Leopold, Henry Wallace, John Lacey and Ada Hayden. And of course Ding Darling, pictured here. More recent leaders include Paul Johnson who headed NRCS and Sen. Tom Harkin author of the Conservation Stewardship Program.





Ding Captured Our Challenges



Bank Robbers, Little And Big



WHAT SLAT MUD IN OUR RIVERS ADDS UP TO EACH YEAR

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Leaders in Ecological Insights: Ada Hayden and Aldo Leopold



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Leopold's Conclusion

An ethical obligation on the part of the private owner is the only visible remedy for these situations.

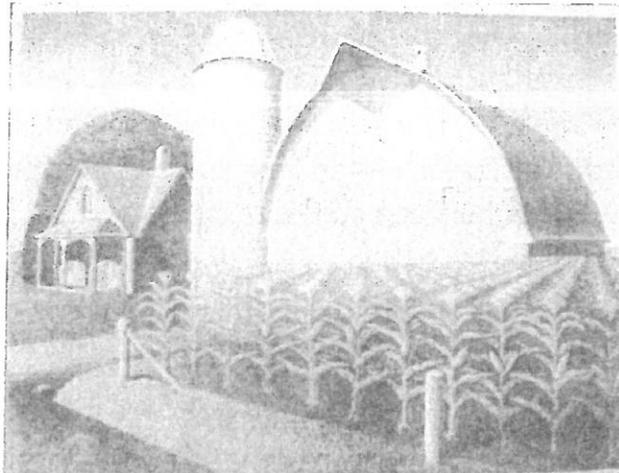


Political leaders in Conservation – John Lacey and Henry A. Wallace





Grant Wood - *Fertility*



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Understanding the dual dimensions of property rights

It is important to recognize under U.S. law, property ownership – and land tenure have two components:

First, is the private dimension - the rights of owners and those with legal claims, such as tenants, to possess and use land as they desire, and to sell and transfer it.

Second, is the public interest in how land is used and how landowners actions can help promote and protect shared public goals. This same duality applies to water resources which under Iowa law are public. It balances the private opportunities and rights of owners with public obligations and responsibilities.

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How Duality of Property Rights Relates to Land Tenure

The duality is readily apparent in agricultural land tenure. On the private side you can buy, sell and lease farmland; use mortgages and installment contracts to finance it; and organize your affairs and move farms between generations.

On the public side you have the duty to pay property taxes, to observe land use laws, and to comply with rules to protect soil and water resources.

To understand most agricultural policies, it is necessary to recognize this duality as the intellectual fulcrum for public and private interests.

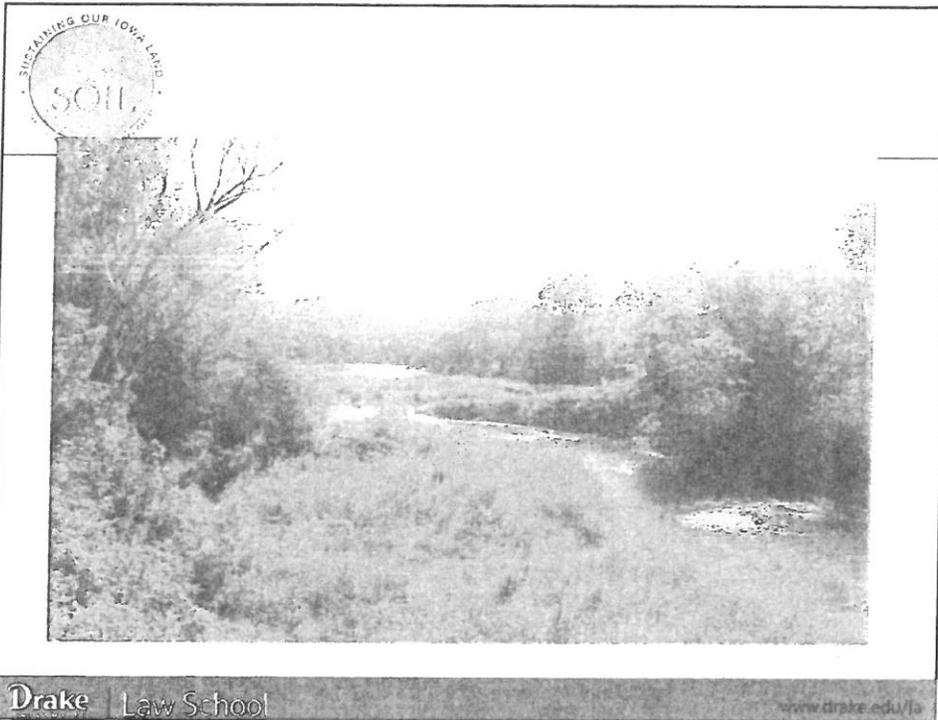


Henry Wallace on our Duty to the Soil

The social lesson of soil waste is no man has the right to destroy soil even if he does own it in fee simple. The soil requires a duty of man we have been slow to recognize.

Henry A. Wallace, Secretary of Agriculture, writing in the forward to Soils and Men, the 1938 Yearbook of Agriculture

One important question to consider is do we have a comparable duty to the water?





Examples of state laws and a duty of stewardship

First, in a 1943 case, *Benschoter v. Hakes*, the Iowa Supreme Court considered whether the legislature could require owners of farmland to give advance notice before terminating farm tenants. In ruling the law constitutional, the Court held:

It is quite apparent that during recent years the old concept of duties and responsibilities ... has undergone a change. Such persons, by controlling the food source of the nation, bear a certain responsibility to the general public. They possess a vital part of the national wealth, and legislation designed to stop waste and exploitation in the interest of the general public is within the sphere of the state's police power.

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§ 161A.43 of the Iowa Code

The Court's ruling found expression in the second precedent, § 161A.43 of the Iowa Code on soil conservation. It reads:

To conserve the fertility, general usefulness, and value of the soil and soil resources of this state, and to prevent the injurious effects of soil erosion, it is hereby made the duty of owners of real property in this state to establish and maintain soil and water conservation practices or erosion control practices, as required by the regulations of the commissioners of the respective soil conservation districts.



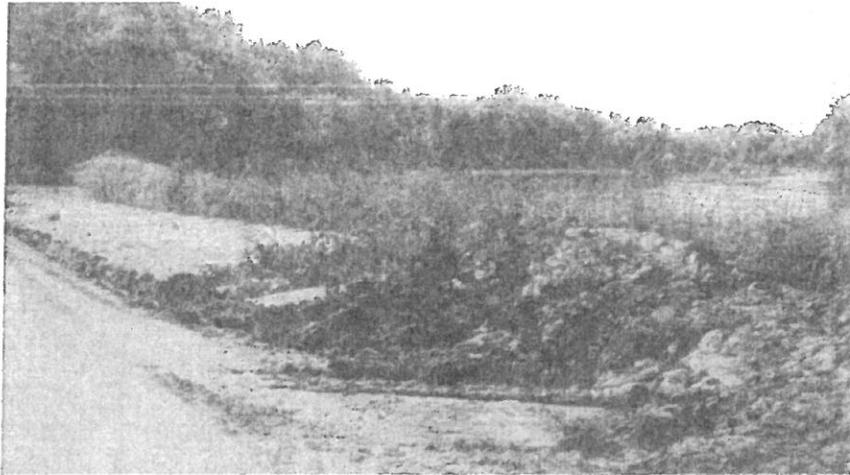
Woodbury County Soil Conservation District v. Ortner 1979

The third and perhaps most critical legal precedent is the 1979 Iowa Supreme Court ruling *Woodbury County Soil Conservation District v. Ortner*. In rejecting a claim soil loss limits are unconstitutional by requiring landowners to change how they farm or spend money on soil conservation, the Court ruled:

It should take no extended discussion to demonstrate agriculture is important to the welfare and prosperity of this state. It has been judicially recognized as our leading industry. The state has a vital interest in protecting its soil as the greatest of its natural resources, and it has the right to do so.



Some of the soil we love so much?



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Ethanol – the food or fuel issue may be resolved but what effect on land?



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Agriculture and Water Quality is largely unregulated, especially cropping practices

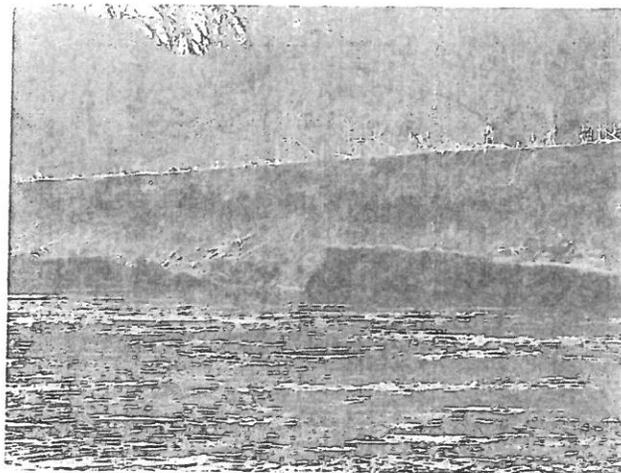
The impact agriculture has on water quality is one of the most important – and contentious issues facing the nation.

From a legal perspective, agriculture's impact on surface water quality is largely unregulated, under the federal Clean Water Act, under state law, and under most local regulations.

Consider these farming practices, which are unregulated: installing drain tile; land clearing; farming up to the bank of streams and rivers; deciding to install (or remove) grass waterways or buffer strips; allowing cattle unlimited access to streams; and the timing, amount and application method of fertilizers.

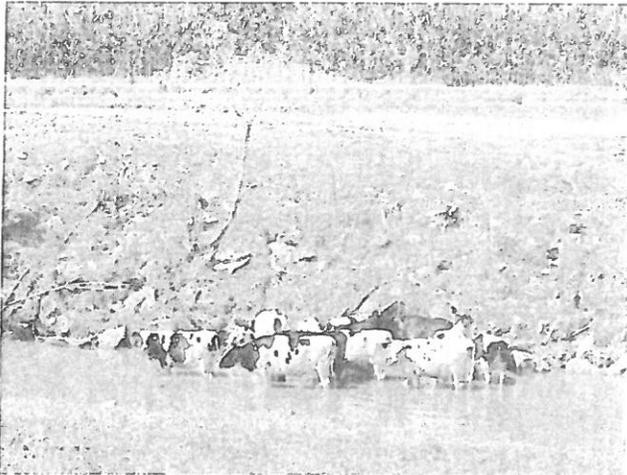


Planting next to the river bank





Cows cooling off in the stream

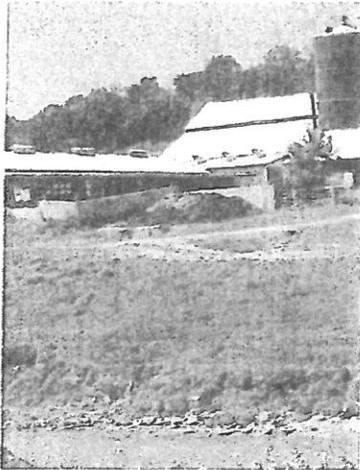


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Manure piled next to stream



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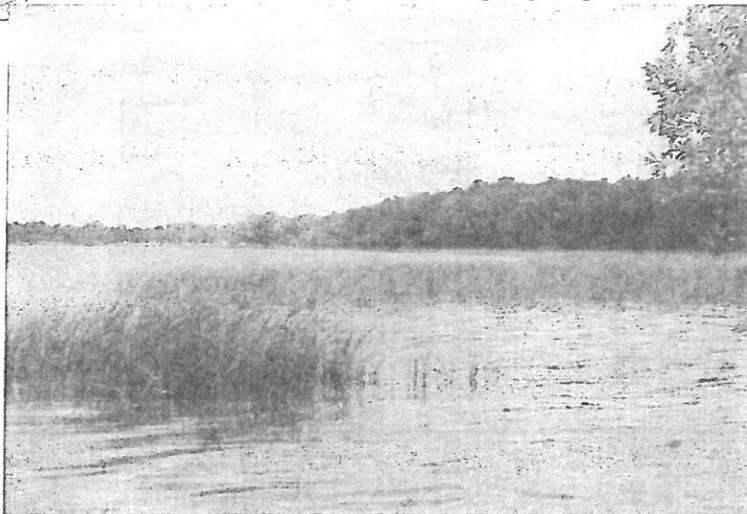
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Tile outlets – are they point sources?



Agriculture's potential impact on water can raise many challenging legal issues





Soil Conservation programs are water quality protection

Iowa and the nation have rich soil conservation laws and policies. The efforts of USDA and of the county soil and water conservation districts have made significant contributions in reducing soil losses and agriculture's impact on water quality.

But from a legal perspective, this history shows it is unlikely our efforts to protect water quality will ever be effective without a regulatory dimension to establish individual duties and to create goals and performance measures for farmers and landowners.



Unfinished Business or Empty Promises: Legislative Goal Setting to Protect Iowa's Natural Resources

The following are examples of current Iowa Code provisions relating to natural resource protection – all or most of which have never been fully achieved:

1. T by 2000 – the ambitious soil conservation planning requirement enacted in the 1970's and still found in various provisions such as § 161A.62. It would require soil conservation plans for all Iowa farms – some of the provisions were picked up in the 1985 Farm Bill Conservation Title.



#2 - 10% public land goal

One of the most interesting provisions is found in § 465.1(2)(b) which provides:

“In addition to other goals for the program, it is intended that a minimum of ten percent of the state’s land area be included under some form of public open space protection by the year 2000.” (found in Chapter 465A Open Space Lands)



#3 – I on Iowa – Buffer Strips

In Chapter 466 you find the language for a program enacted in 2000 titled “Initiative on Improving Our Watershed Attributes” or I on IOWA. The main goal was to develop a “comprehensive water quality program” through a range of initiatives. The law included several specific goals for action, including one on buffer strips found in § 466.4(2)(e) setting a five year goal of enrolling an additional “four hundred seven thousand five hundred acres.”
[407,500]



#4 Wetland Restoration Goal

Chapter 466 also included a specific section relating to the “conservation reserve enhancement program” known as CREP, in § 466.5. The 2000 enactment set a five year goal of establishing thirty-two thousand five hundred acres of CREP wetlands. It is unclear if this goal was met under the state program but during this same period NRCS helped restore thousands of acres of wetlands under the Wetland Reserve program (WRP). The state is still using the CREP program to install wetlands.



#5 Public Water Quality Education Campaign

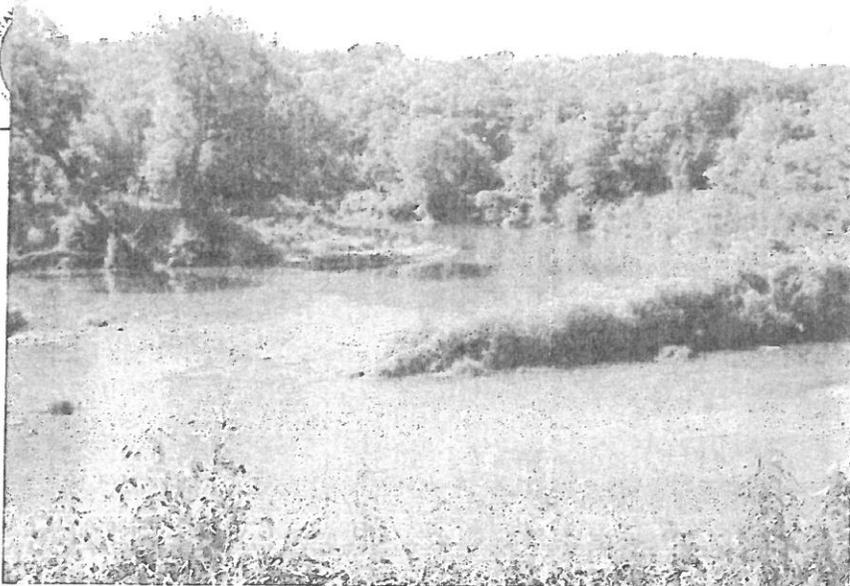
Chapter 466B is the key chapter on Iowa’s surface water protection, flood mitigation, and watershed management efforts – at least by the title. One interesting provision is § 466B.4 “Legislative findings and marketing campaign.” It provides the Water Resources Coordinating Council (WRCC – created in the Chapter) “shall develop a marketing campaign to educate Iowans about the need to take personal responsibility for the quality and quantity of water in their local watersheds.” The campaign was contingent on funding being available.



#6 – REAP – underfunded by \$250 million

The Resource Enhancement and Protection or REAP program, enacted in 1989 and found in § § 455A.15 et seq. is without doubt the most extensive and successful state initiative providing public funds for a wide range of natural resource initiatives – from acquiring park lands to local outdoor education. Thousands of projects in every corner of the state have been funded by REAP. REAP was authorized at \$20 million a year but only once in the 30 years of its existence has it received that amount. In recent years funding has been in the \$10-12 million range.

The total underfunding of REAP during this period now exceeds \$250 million – making one wonder what opportunities we lost by not making REAP funding higher priority.





Addressing Climate Change is a Key to Making Agriculture more Resilient



Joel Pett, Editorial Cartoon, Dec. 7, 2009, USA TODAY, available at <http://media>



Other Examples?

In the early 1980s Iowa enacted the agricultural land related provisions found in Chapter 352. These include a provision § 352.5 each county was to have enacted an ag land preservation plan by March 1985 based on county land use inventories to have been completed by 1984. Today it is not clear how many – if any – counties actually created such plans.

Under § 466B.5(1)(a) enacted in 2008 regional watershed assessments were to be completed within 5 years (1/5 of watersheds done each of 5 years).



IWiLL: will 2020 be the year?

Everyone around this table knows the long history and meaning of the Iowa Water Land and Legacy effort that lead to passage of the 2010 constitutional amendment [Art. VII, section 10] and the enactment of Chapter 461, the Natural Resources and Outdoor Recreation Act.

Debate over increasing the sales tax by 3/8 cent to fund the trust has been looming ever since – and a key priority of the conservation and sporting groups promoting it. The spending formula in Chap. 461 means the estimated \$200 million a year would fund a variety of natural resource initiatives from REAP to water quality. Our failure to pass the tax means the state has now passed on over \$1 billion in revenues to use for these important purposes





Water Quality and the Iowa Nutrient Reduction Strategy (NRS)

Over the last four years I have given many public talks on water quality issues in Iowa: “Sixteen Things to Understand about the Des Moines Waterworks Litigation”; “High Hopes Meet Hard Truths: Understanding Water Quality in Iowa”; and “Watershed Citizenship: How We Can Use HUC 12 Watersheds to Improve Our Water.”

Currently my work is on what I call “Missing Links: Adding a Real Implementation Plan to the NRS.” I will conclude today with some critical observations about the NRS - which is now the law of the land.



1. No identification of benefits to Iowans

The NRS is devoid of any description of what benefits will accrue to Iowa if the water quality improvement objectives of the NRS are met. It is not clear meeting the 45% reduction goal would have any identifiable impact on the water quality Iowans experience in their local streams and rivers. The reduction goal is related to the EPA effort to address nutrient losses from states into the Mississippi River impacting the hypoxia zone in the Gulf. This worthy goal should not be confused with identifying what type of clean water plan Iowans need for our water.



2. No statement of an obligation for citizens to protect surface water

One surprising gap in Iowa law is the lack of any statement establishing a responsibility on the part of citizens, farmers, or landowners to act so as not to pollute or degrade the waters of the state. This is in sharp contrast to the duty in Iowa Code

§ § 455E.5(4) on groundwater protection, “all persons in the state have the duty to conduct their activities so as to prevent the release of contaminants into groundwater.” Because there is no parallel duty for surface water, the goals and practices identified in the NRS are optional for farmers and landowners.



3. Lack of Recognition of the Role Regulations Play in Society

One consistent theme in the NRS is the idea there is no possible role for regulations – instead the state must rely only on voluntary action by citizens. This approach may be understandable politically, but it is illogical from a public policy perspective and will eventually prove unworkable. The “no regulation” mantra is an anti-government ideology that ignores the reality of how law works. Regulations are how we implement legislative and societal goals. Whether the issue is speed limits in school zones, caps on alcohol consumption and driving, or promoting child safety such as requiring kid seats in cars, key social objectives are promoted through uniform regulatory requirements. We do not make these programs voluntary and hope citizens will comply.



4. The NRS is both a scientific and political document

One important feature is the extensive scientific basis used to develop the possible scenarios. The involvement of scientists from Iowa State University, gives the NRS a solid footing in current farming practices and how potential changes can reduce nutrient loss. But the actual drafting of the NRS report happened behind closed doors, and was accompanied by serious political concerns, such as excluding DNR water quality staff and farm group influence on the final report. Unfortunately, the NRS does not reflect a similar level of inquiry and analysis of the possible strategies for achieving hoped for reductions. Instead, once it was “proposed” the NRS morphed into a political document, with the discussion focused on administration and costs.



5. Scenarios used to validate NRS have disappeared from discussions

If you read the NRS, the most important section is the discussion of the scenarios used to identify which combination of changes in farming practices could result in reducing nutrient losses so the state can meet the EPA’s goal. The NRS identified three scenarios that satisfy EPA’s goal. But the NRS drafters noted: “it is important to note these scenarios represent examples of practice combinations and are not recommendations of the science team.” The scenarios are important because they identify the changes in farming and the number of acres on which actions – such as installation of wetlands, use of buffer strips and cover crops may be required.

But once the scenarios were used to sanctify the NRS, discussion of them has largely disappeared.



6. Projected total costs are large but largely irrelevant

Putting a price tag on the “costs” of implementing the various NRS scenarios received much attention. The costs range from initial investments of \$1.2 billion to over \$4 billion, along with annual operating costs ranging from \$77 million to over \$1.2 billion. One effect is to show it will be expensive for Iowa to address water quality issues. But these large “costs” may largely be irrelevant because the state will not fund a scenario at one time – and more importantly the real costs will be born at the individual farm level as thousands of actors make decisions relating to water quality. What the NRS fails to provide is any real idea of what it might cost – or save – an individual farmer or land owner – or watershed – to protect the water.



7. Baseline period used to verify NRS actions is of dubious value

One important question with any public policy is the goal – how do you know when you have reached the objective. For the NRS the key issue is what is the baseline of nutrient loss – used to measure the projected 45% reduction?

This question was not answered until 2018 and passage of SF 512 on water quality. It establishes the time period as being from 1980-1995, see § 466B.3(3)(c). The choice was justified because it is the period EPA identified. Unfortunately, the selection is another example of how the goals of the NRS have little relation to the actual improvement of Iowa water quality. It seems questionable for a public policy goal of improving the water quality Iowans experience today, to go back 25-40 years to measure any improvements?



8. The NRS is inherently immoral because it allows private actors to degrade public waters with no restraint

A final concern relates to Iowa water law. First, all the waters in the state are declared to be “public waters.” Second, because Iowa law establishes no duty on individuals to protect water quality and because most farming practices are unregulated it means you can apparently act to pollute water with impunity. Third, this means under Iowa law, private actors are allowed to degrade the property of others – this is a classic example of a moral hazard. Most would agree it is immoral for one person to damage the property of another. As a result, a legal system that sanctions such immoral behavior can itself be seen as immoral – at least for that issue.



It may be reasonable to assume people whose actions can degrade the water – such as farmers who insist on farming to the edge of rivers and streams do not see themselves as immoral but in reality that is what their actions reflect. One can argue, a goal of society should be to make the arguably legal, morally unacceptable when it involves conduct that damages others. If for no other reason than to build our water quality policy on the basis of morality, Iowa should amend the law to reflect an obligation for individuals to protect the waters of the state – property of us all.



Take Advantage of USDA Conservation Programs



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QUOTE OF THE DAY



“It would be the ultimate Iowa joke if Iowa takes Minnesota’s sewage sludge ash.”

— Representative Paul Johnson, a Decorah Democrat, commenting on a dispute over whether Iowa should prevent sewage ash from being shipped into the state.

Environmental advocate bill vetoed by Branstad

By JONATHAN ROOS

Register Staff Writer

Saying that “cops and robbers” is a misguided approach to protecting the environment, Gov. Terry Branstad Friday vetoed a bill that would have created the new state post of environmental advocate.

Acting independently of other agencies, the office would have had broad powers to initiate or intervene in judicial and administrative actions pertaining to environmental issues.

Branstad charged in his veto message that the environmental advocate would duplicate the work performed by other state agencies and result in a new state bureaucracy.

He also said he was troubled by the philosophical approach reflected in the environmental watchdog position.

Supporters’ Ire

“It appears to be guided by an underlying assumption that litigation and lawsuits are the only way to effectively protect the environment. . . . Playing only ‘cops and robbers’ with polluters will allow us to stop only the few who we catch in the act. Instead we must work to prevent pollution in the first place.”

Supporters of the measure denounced Branstad’s veto.

Representative Paul Johnson, a Decorah Democrat, complained that Branstad didn’t understand the role of the environmental advocate.

“This office wasn’t designed to be a policeman at all. I wanted somebody who would speak for the land,” Johnson said.

Other Measures

Democrats in the Legislature have charged that Branstad is not the environmental governor he claims to be. They also have complained that the Environmental Protection Commission is more sensitive to business interests than to environmental concerns.

Other major bills received Branstad’s approval Friday.

Calling the measure a historic step, the governor signed a bill overhauling Iowa’s school finance formula, which distributes more than \$1 billion in state aid to school districts.

“I believe it will go down as one of the greatest achievements in the 1980s in the state of Iowa,” he said.

The revised formula will pump about \$35 million more a year into public schools than under the current formula.

Other changes in the formula will put school districts on a more equal financial footing by eliminating most “phantom students” from school budgets and by narrowing the gap between low- and high-spending districts.

The plan also calls for spending \$9 million to \$11 million more on programs to help children at risk of failing or of dropping out of school. It also sets aside \$8.5 million for rural and urban districts with high transportation costs and other special needs.

Another bill signed by Branstad establishes a multimillion-dollar plan to help finance the cleanup of leaky underground tanks.

The plan includes a state-administered fund to provide insurance against environmental damage, to pay cleanup costs and to make loans to help owners replace aging tanks.

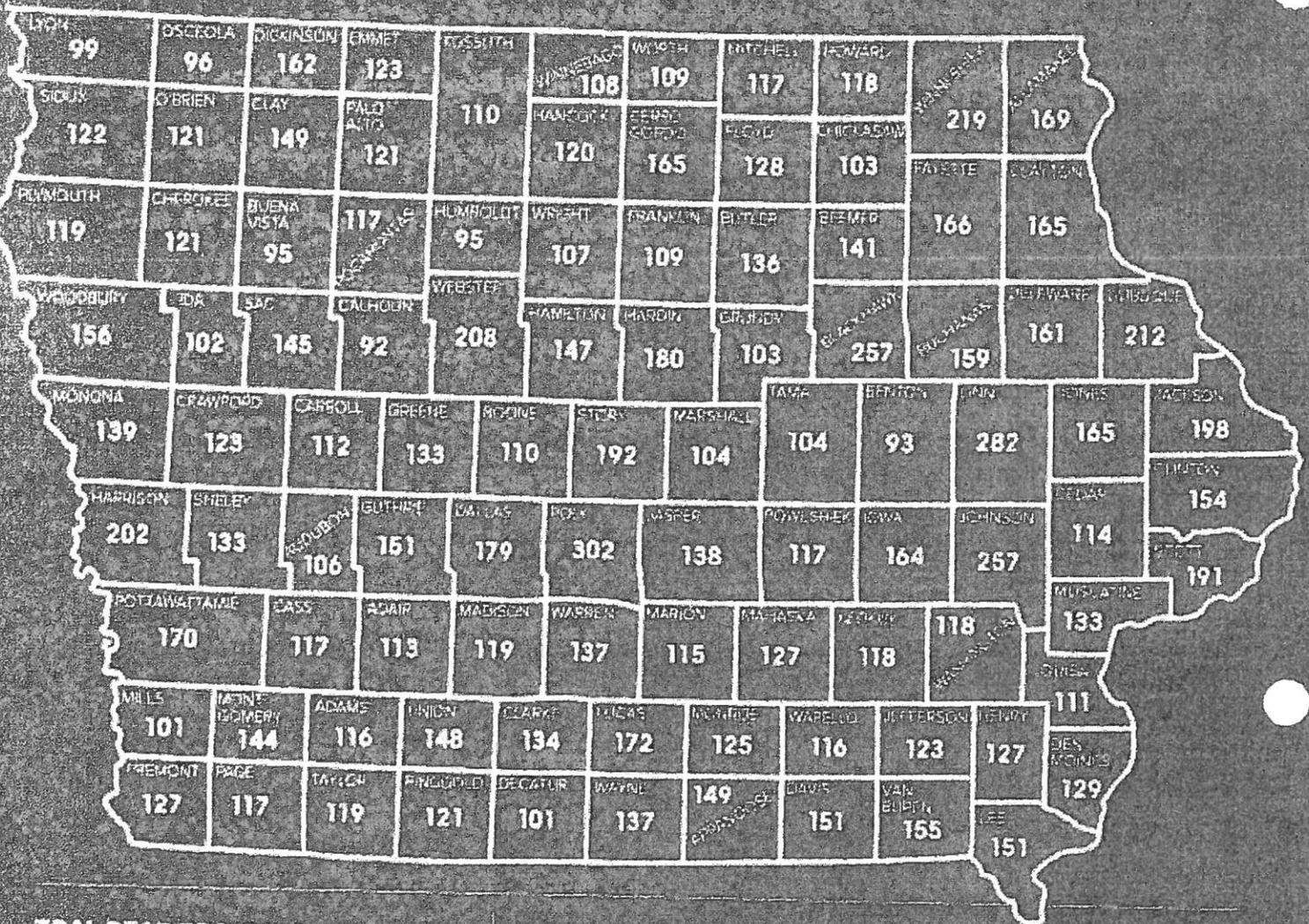
To help pay for the effort, the bill authorizes a fee on gasoline distributors equal to just less than a penny a gallon.

Branstad also signed a bill that increases the pay of legislators and other state employees. The legislation gives lawmakers a 9 percent salary increase, effective in 1991. The typical legislator’s annual salary would increase from \$16,600 to \$18,100.

NUMBER OF REAP PROJECTS BY COUNTY, 1989-2017

The project totals below include local projects accomplished through annual REAP fund allocations to each county and projects funded through competitive REAP and education grants to counties and cities.

Source: Iowa Department of Natural Resources



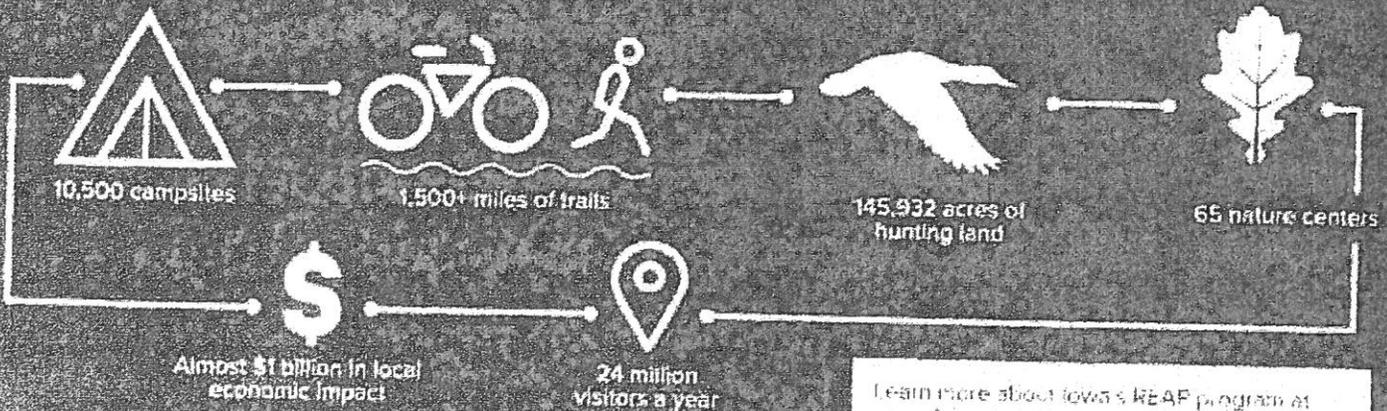
TOAL REAP PROJECTS, 1989-2017

13,856

TOAL REAP INVESTMENT, 1989-2017

\$318,237,602

COUNTY CONSERVATION IN IOWA MEANS...



Learn more about Iowa's REAP program at www.iowadnr.gov/conservation/reap.

Source: Iowa's County Conservation Board System, mycountyparks.com