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CASENOTE

THE EFFECT OF WETLAND RESTORATION AGREEMENTS UNDER THE SWAMPBUSTER ACT

*Branstad v. Veneman*¹

I. INTRODUCTION

The Swampbuster Act uses disincentives, rather than regulations, to protect wetlands on agricultural lands. Seventy-seven million acres of wetlands are subject to the provisions of the Swampbuster Act.² This note focuses on the effects of wetland restoration agreements and the administrative processes for certifying wetlands.

II. FACTS AND HOLDING

Monroe and Edward Branstad, farmers in Winnebago County, Iowa, sought judicial review of agency actions of the United States Department of Agriculture (USDA) concerning violations of the Swampbuster Act.³ The Branstads purchased two adjacent tracts of land in 1995 (Tracts #2024 and #1475) and produced corn and soybeans on the tracts.⁴ The prior owners of the tracts did not maintain the single tile drainage system that had been installed on both tracts in the early 1900s.⁵ In addition, the previous owners did not contest the “wetlands” determinations the USDA had made on the tracts in 1987 and 1991.⁶ The term “wetlands” refers to land that has a predominance of hydric soils, is saturated by water in such a manner as to support hydrophytic vegetation typically adapted for life in saturated soil conditions and under normal circumstances does not support a prevalence of such vegetation.⁷

¹ 212 F. Supp. 2d 976 (N.D. Iowa 2002).

² David J. Salmons, *The New Congress: Legislative Initiatives for Agriculture and Wetlands*, SF92 ALI-ABA 169, 171 (May 31, 2001).

³ *Branstad*, 212 F. Supp. 2d at 978; See 16 U.S.C. §§ 3821-24 (2000), *Erodible Land and Wetland Conservation and Reserve Program*. The purpose of the Swampbuster Act is to preserve wetlands. The Act denies eligibility for several federal farm-assistance programs if wetlands are converted to agricultural use.

⁴ *Branstad*, 212 F. Supp. 2d at 979.

⁵ *Id.* The major objective of a subsurface drainage system is to remove excess water from the plant root zone of soil affected by a high water table. Subsurface drains lower the water table so that the whole field can be cultivated, planted, and harvested when conditions are right. Although subsurface drainage systems do not require extensive maintenance, the maintenance that is required is extremely important. See C. Drablos & S. Melvin, *Planning a Subsurface Drainage System*, 1-5, NCH-33 (Iowa State University 1991).

⁶ *Branstad*, 212 F. Supp. 2d at 979. Determinations of wetlands were made by departments of the USDA through the use of off-site based information such as soil surveys. The Swampbuster Act was amended in 1990 to allow for on-site wetland determination whenever the owner or operator requested. The 1987 determination of Tract #2024 as wetland was voided and the redetermination fell between the amendment in 1990 and an amendment in 1991 which explained when delineations became final and certified. It is not clear if the 1991 wetland determination of Tract #2024 became final and certified. *Id.*

⁷ 16 U.S.C. § 3801(a)(18).

In September of 1996, the Branstads sought permission from the USDA to repair the tile drainage system on Tract #2024.⁸ The Branstads submitted “detailed information about the existing drainage system and their plans to repair it, which indicated that Tract # 1475 was also involved or would be affected.”⁹ The USDA replied to the Branstads’ request in a letter dated September 16, 1996, which stated that the areas identified for drainage repair would not affect any classified wetlands if the Branstads only made repairs to original size and depth of the tile system.¹⁰ The letter told the Branstads to proceed with the project as planned.¹¹

The Branstads repaired the tile system in 1997 with smaller plastic tile that did not exceed the size or depth of the original tile system’s drainage field.¹² After completion, the USDA examined the repaired tile system, but it decided not to require any changes or initiate any agency action against the Branstads.¹³ In September of 1998, a neighbor filed a “whistleblower” complaint with the USDA, stating that the repairs resulted in the drainage of wetlands on Tract #2024.¹⁴ In February or March of 2000, a neighbor filed a whistleblower complaint regarding a wetlands violation on Tract #1475.¹⁵ After both of these complaints, the USDA, the National Resources Conservation Service (NRCS), and the Farm Services Agency (FSA) determined that wetlands violations had occurred.¹⁶

On October 26, 1999, the NRCS issued a determination that the Branstads had converted 18.4 acres of wetland on Tract # 2024 by repairing the drainage tile system.¹⁷ The District Conservationist warned the Branstads that this would probably cause the loss of their eligibility for USDA program benefits for 1997-2000.¹⁸ The Branstads appealed the determination by the NRCS to the FSA on November 2, 1999.¹⁹ The FSA advised the NRCS to review its decision later that month.²⁰ On February 7, 2000, the FSA notified the Branstads by a letter, which stated that the NRCS had been correct in its prior determination that the Branstads had converted the wetlands.²¹ The FSA letter stated that the Branstads were ineligible for farm program benefits paid in 1998 and 1999 totaling over \$400,000, and the FSA demanded the Branstads repay the farm program benefits by March 8, 2000.²²

⁸ *Branstad*, 212 F. Supp. 2d at 979; See 7 C.F.R. § 12.1 (2002). The USDA, through its agencies and instrumentalities, determines when a person who has planted an agricultural commodity on a converted wetland is ineligible for benefits. Two divisions of the USDA are responsible for administering conservation programs: the Farm Service Agency and the Natural Resources Conservation Service.

⁹ *Branstad*, 212 F. Supp. 2d at 979.

¹⁰ *Id.* Replacing the tile with larger tile, or placing the tile deeper, would affect the land by draining more water.

¹¹ *Id.*

¹² *Id.* at 980.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Any person who produces an agricultural commodity on converted wetland is deemed to have violated the Swampbuster Act. Land is converted wetland if it is drained for the purpose of making the production of an agricultural commodity possible. See 16 U.S.C. § 3821(a) and (c).

¹⁷ *Branstad*, 212 F. Supp. 2d at 981.

¹⁸ *Id.* A person who violates the Swampbuster Act is ineligible for the following benefits: marketing assistance loans, price supports or payments under the Agricultural Market Transition Act or any other act, farm credit programs loans made under the Consolidated Farm and Rural Development Act or any other provision of law administered by the FSA if the Secretary determines that the proceeds will be used for a purpose that contributes to the conversion of wetlands, and payments made under the Agricultural Credit Act of 1978. See 7 C.F.R. § 12.4(d)(1-5).

¹⁹ *Branstad*, 212 F. Supp. 2d at 981.

²⁰ *Id.*

²¹ *Id.* at 982.

²² *Id.*

The Branstads entered into agreements to restore the wetlands on each tract.²³ On February 25, 2000, they entered into a “Wetland Restoration Agreement: Good Faith Restoration” for Tract #2024.²⁴ This agreement stated that the specified restoration conditions had to be created and maintained by the Branstads in order for them to continue receiving farm program benefits and that “[a]ll restoration practices will be accomplished and applied by June 1, 2000.”²⁵ The Branstads entered into a similar agreement for Tract #1475 with a restoration deadline of December 1, 2000.²⁶ The Branstads never completed restoration of either tract.²⁷

When the Branstads entered the restoration agreement for Tract # 2024, they also appealed the FSA determination to the USDA National Appeals Division (NAD) and received an administrative evidentiary hearing.²⁸ The Hearing Officer held that the NRCS’s wetlands determinations—pertaining to Tract #2024 in 1987 and 1991—were in error and that the NRCS’s decision that the Branstads converted the wetlands was erroneous.²⁹

However, in May of 2000, the FSA requested a director review of the Hearing Officer’s decision.³⁰ On July 17, 2000, the Acting Director issued a “Director Review Determination” stating that, because the Branstads entered into the good faith restoration agreement, there was no adverse decision left to hear, and the Branstads’ appeal of the converted wetlands determination was moot, assuming that the Branstads admitted to conversion of wetlands by entering into the agreement.³¹ The Acting Director further concluded that the wetland determinations in 1987 and 1991 were made in accordance with the regulations at that time and were not appealed by the landowner at that time.³² Therefore, the wetland determinations were final and not subject to appeal.³³ The Branstads filed a complaint for judicial review of the proceedings regarding Tract #2024 on September 11, 2000.³⁴

On November 2, 2000, the FSA notified the Branstads of their determination that wetlands had been converted on Tract #1475.³⁵ The FSA also said that they had thirty days to appeal, and the Branstads mailed their request for appeal December 2, 2000.³⁶ The NAD did not receive the Branstads first request for appeal, but they did receive a second request for appeal postmarked January 12, 2001.³⁷ The NAD denied the second request for appeal as untimely and stated that the Branstads could request review of its determination if there were extenuating circumstances.³⁸ The Branstads’ attorney sent a letter to the NAD asserting that the fact that the Postal Service had lost the first appeal request was an extenuating circumstance; the Appeals Division

²³ *Id.* at 981.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 982.

²⁹ *Id.* This decision would have allowed the Branstads to keep farm program benefits received, and they would no longer need to restore the wetlands. *Id.*

³⁰ *Id.*

³¹ *Id.* at 982-83.

³² *Id.* at 983

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 983-84. The second request for appeal was sent because counsel for the Branstads had not received acknowledgment of the first filing. It is presumed the first mailing was lost in the U.S. mail system. *Id.* at 984.

³⁸ *Id.*

replied that the circumstances raised did not establish good cause to relieve the Branstads.³⁹ The Branstads filed an action for judicial review of the agency determination regarding Tract #1475 on March 19, 2001.⁴⁰

In reviewing the agency determination, the United States District Court for the Northern District of Iowa held that the USDA's decision regarding the mootness of the Branstad's appeal was arbitrary and capricious,⁴¹ and that wetland determinations made before the Branstads purchased the land could be administratively appealed.⁴² The court further held that the USDA's finding that the Branstads' appeal was untimely was arbitrary and capricious.⁴³ Therefore, the court vacated the prior decision and remanded it to the USDA.⁴⁴

III. LEGAL BACKGROUND

Wetlands and similar areas were perceived as impediments to agriculture until the last several decades, and were frequently eliminated.⁴⁵ At one time there was an estimated 221 million acres of wetlands in the United States; in 1997, that number had fallen to approximately 105.5 million acres.⁴⁶ In the early 1970s, the perspective on wetlands shifted as it became clear that wetlands had important societal and ecological value.⁴⁷ Conservationists had become concerned that the environmental problems caused by agricultural practices were not being addressed by traditional programs.⁴⁸ In 1985, Congress enacted the "Swampbuster" provisions of the Food Security Act.⁴⁹ The Swampbuster Act aims to decrease the conversion of wetlands.⁵⁰

In order to be classified as a wetland, the land must: have a predominance of hydric soils,⁵¹ be saturated by water at a "frequency and duration sufficient to support . . . hydrophytic vegetation typically adapted for live in saturated soil conditions,"⁵² and under normal conditions does not support a prevalence of such hydrophytic vegetation.⁵³

During enactment of the Swampbuster Act, Congress stated that its purpose was to "discourage the draining and cultivation of wetland that is unsuitable for agricultural production in its natural state."⁵⁴ To promote this purpose, any person who produces an agricultural commodity on converted wetland is in violation

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 991.

⁴² *Id.* at 998-99.

⁴³ *Id.* at 1003.

⁴⁴ *Id.* at 1007.

⁴⁵ Mark A. Chertok, *Federal Regulation of Wetlands*, SF97 ALI-ABA 1149, 1151 (2001).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 Harv. Envtl. L. Rev. 201, 220 (1997).

⁴⁹ *Branstad*, 212 F. Supp. 2d at 986.

⁵⁰ *Gunn v. USDA*, 118 F.3d 1233, 1235 (8th Cir. 1997).

⁵¹ 16 U.S.C. § 3801(a)(18)(A). Hydric soil means that the soil, "in its undrained condition, is saturated, flooded or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation." 16 U.S.C. § 3801(a)(10). "Hydrophytic vegetation means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content."

16 U.S.C. § 3801(a)(11).

⁵² 16 U.S.C. § 3801(a)(18)(B).

⁵³ 16 U.S.C. § 3801(a)(18)(C).

⁵⁴ McBeth, *supra* n. 48, at 221.

of the Swampbuster Act and is “ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.”⁵⁵ A wetland is deemed converted if it has been “drained, dredged, filled, leveled, or otherwise manipulated for the purpose or to have the effect of making the production of an agricultural commodity possible if such production would not have been possible but for such action,”⁵⁶ and before the conversion, the “land was neither highly erodible land nor highly erodible cropland.”⁵⁷

Two departments of the USDA determine whether a wetland exists. The NRCS determines whether wetland criteria have been met,⁵⁸ and this decision is appealable within the NRCS.⁵⁹ When the wetland determination is final, the Farm Services Agency (FSA) decides whether the farmer is eligible to receive loans and payments.⁶⁰ The FSA’s decision is also appealable within the agency and through the National Appeals Division.⁶¹ A final determination of the USDA is reviewable and enforceable by United States District Courts.⁶² The USDA’s decision must be upheld unless it is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”⁶³

When a violation of the Swampbuster Act is suspected, the NRCS examines any modifications made that alter the soil and compares current and prior conditions.⁶⁴ If a violation has occurred, the landowner is referred to the FSA.⁶⁵ The FSA determines whether to deny benefits.⁶⁶

Throughout the history of the Swampbuster Act, there have been some important changes in how wetlands were designated. In 1987, determinations of wetlands could be made off-site using tools such as soil surveys and aerial photographs.⁶⁷ The statute was amended in 1990, requiring on-site determination of wetlands, whenever requested, prior to the designation of the land as wetlands.⁶⁸ The statute also allowed the opportunity to appeal certification prior to the certification becoming final and allowed for on-site inspection prior to rendering a decision on any such appeal.⁶⁹ In 1996, the statute was amended again, and now provides that final certification remains “valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.”⁷⁰ In the case of an appeal, there must be an on-site inspection of the subject land on a farm.⁷¹

⁵⁵ 16 U.S.C. § 3821(a)(2).

⁵⁶ 16 U.S.C. § 3801(a)(6)(A)(i).

⁵⁷ 16 U.S.C. § 3801 (a)(6)(A)(ii).

⁵⁸ 7 C.F.R. § 12.6(c)(5).

⁵⁹ 7 C.F.R. § 12.6(c)(9).

⁶⁰ 7 C.F.R. § 12.6 (b)(2).

⁶¹ 7 C.F.R. § 12.12.

⁶² 7 C.F.R. § 11.13(a).

⁶³ 5 U.S.C. § 706. “An arbitrary and capricious decision exists where an agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Von Eye v. U.S.*, 92 F.3d 681, 685 (8th Cir. 1996).

⁶⁴ Jeffrey Zinn & Claudia Copeland, *Agricultural Wetlands, Current Programs and Legislative Proposals*, Congressional Research Service (May 1, 1996) (available at <1996 WL 9714524> or <<http://www.ncseonline.org/NLE/CRS/abstract.cfm?NLEid=16042>>).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Branstad*, 212 F. Supp. 2d at 994.

⁶⁸ 16 U.S.C. § 3822(a)(1) (1991).

⁶⁹ 16 U.S.C. § 3822(a)(2).

⁷⁰ 16 U.S.C. § 3822(a)(4) (2000).

⁷¹ 16 U.S.C. § 3822(a)(5).

IV. INSTANT DECISION

The Branstads filed a separate action for judicial review of the agency determination for each tract of land. The two actions were never formally consolidated, but the court found that a consolidated ruling was appropriate in light of substantial factual and legal overlap between the two cases.

A. Tract #2024

In the instant case the court began by stating it could overturn a final agency determination on judicial review only if it is “arbitrary and capricious, an abuse of discretion, or otherwise contrary to law.”⁷² Regarding Tract #2024, the final agency determination was that, as a result of the good faith restoration agreement, there was no adverse decision to appeal, thereby making the issue moot, and furthermore the 1987 and 1991 wetland determinations were final and unappealable.⁷³

The court found that the Acting Director’s conclusion that the Wetland Restoration Agreement mooted the dispute between the parties was arbitrary and capricious in light of the fact that the FSA and NRCS agreed that signing the agreement did not moot the Branstads’ appeal.⁷⁴ In fact, the agency never contested the Branstads’ right to appeal.⁷⁵

The court also found that there was no concession that the Branstads converted wetlands, as the agreement recognized the tract was previously labeled as wetland but lacked any concession that the wetlands designations were correct.⁷⁶ The court said the Acting Director failed to consider whether the agency had agreed to allow the administrative appeal to continue, which ran counter to the evidence that the agency agreed to allow the appeal to continue and the actual language of the restoration agreement did not include concessions.⁷⁷ The court found that the case involving Tract #2024 must be remanded to the agency for Director Review considering the merits of the agency’s wetlands and conversion determinations, because the Branstads’ appeal was not moot.⁷⁸

In regard to the unappealability of prior wetland determinations, the court found that when the first wetland determination was made in 1987, it could be from off-site evidence such as soil surveys.⁷⁹ However, in November of 1990, the controlling statute had been amended.⁸⁰ The new wetland determination for Tract #2024 (made in 1991) rendered the 1987 wetland determination void.⁸¹ The redetermination of wetlands on Tract # 2024 fell between the amendment to the statute in 1990 and the amendment of applicable regulations in 1991 explaining when such delineations became final and certified. Therefore it is not clear if the determination of Tract #2024 as wetland ever became final and certified.⁸²

⁷² *Branstad*, 212 F. Supp. 2d at 989. *See also* 5 U.S.C. § 706.

⁷³ *Branstad*, 212 F. Supp. 2d at 990.

⁷⁴ *Id.* at 991.

⁷⁵ *Id.*

⁷⁶ *Id.* at 992.

⁷⁷ *Id.*

⁷⁸ *Id.* at 993.

⁷⁹ *Id.* at 994.

⁸⁰ *Id.*; 16 U.S.C. § 3822(a) (“The secretary shall make a reasonable effort to make on-site wetland determination whenever requested by an owner or operator, prior to such delineation ... In the case of an appeal, the Secretary shall review and certify the accuracy of the mapping of all lands subject to the appeal mapped prior to November 28, 1990, for the purpose of wetland delineations.”).

⁸¹ *Branstad*, 212 F. Supp. 2d at 994.

⁸² *Id.* at 995.

The statute was amended again in 1996 to state that a final certification is only valid and in effect as long as the area is devoted to agricultural use or until the person affected by certification requests review of the certification.⁸³ The court held that the statute must be read to mean that any person subsequently affected by an existing wetland determination may invalidate the existing certification by requesting review of the certification by the Secretary.⁸⁴ The court found the Acting Director's determination that the 1987 wetland determination was unappealable was plainly contrary to evidence that the determination was superseded in 1991.⁸⁵ Further, the court found that the Acting Director's determination that the 1991 wetland determination was unappealable was plainly contrary to law, even assuming that the determination was certified and final because that determination was valid only until the person affected by it requested review of certification by the Secretary.⁸⁶ The Director Review Determination as to Tract #2024 was vacated and remanded for agency action in conformity with the court's judgment.⁸⁷

B. Tract #1475

The court's review of agency determinations regarding Tract # 1475 focused on the question of whether the agency improperly denied the Branstads' request for administrative appeal. The court found that the agency considered factors that were not at issue when telling the Branstads that it would consider their untimely appeal if extenuating circumstances existed, because the National Appeals Division only considered factors in the agency's rules for timely appeals.⁸⁸ The court determined that the agency failed to consider an important aspect of the problem: whether or not there were "extenuating circumstances for the Branstads' failure to comply with the letter of the rules for timely appeals."⁸⁹ The court observed that the agency seemed to have "secret reasons" for its action, and therefore its determination was arbitrary.⁹⁰ The court stated that "no judicial or quasi-judicial body that is allowed to keep secret its reasons for making a decision involving the claims or contentions of a citizen can satisfy the American conception of justice."⁹¹ The court further found that the NAD acted "arbitrarily and capriciously and abused its discretion in finding that no extenuating circumstances or good cause had been shown for failure to file an untimely request."⁹² Therefore, the court vacated the decision denying the Branstads' request for untimely administrative appeal and directed the NAD to consider the Branstads' appeal on the merit.⁹³

V. COMMENT

In the instant decision, the court was correct in its decision that the Branstad's administrative appeal was not moot as a result of entering into a restoration agreement regarding tract # 2024.⁹⁴ The agreement did not embody any concessions mooting the appeal; the Branstads did not concede that they converted wetlands.⁹⁵ To

⁸³ *Id.*: 16 U.S.C. § 3822(a)(3)(B)(4) (1996).

⁸⁴ *Branstad*, 212 F. Supp. 2d at 996.

⁸⁵ *Id.* at 997.

⁸⁶ *Id.*; See 16 U.S.C. § 3822(a)(4).

⁸⁷ *Branstad*, 212 F. Supp. 2d at 999.

⁸⁸ *Id.* at 1001.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1002.

⁹¹ *Id.* at 1003.

⁹² *Id.* at 1005.

⁹³ *Id.* at 1006.

⁹⁴ *Id.* at 993.

⁹⁵ *Id.* at 992.

say that the restoration agreement made the administrative appeal moot would be contrary to the statute providing a good faith exemption.⁹⁶

This is the first time any court has examined the effects of a restoration agreement made between the agency and the owners or producers as a result of Swampbuster violations. The restoration agreement in this case provided the producer with an opportunity to regain benefits he would otherwise lose; it did not resolve underlying issues such as whether the agency's wetland determinations are correct.⁹⁷ To say otherwise would limit the ability of owners and producers of land in their ability to appeal agency decisions. When faced with losing future governmental benefits and repaying past benefits of approximately \$400,000, the court was not surprised that the Branstads entered into the restoration agreement.⁹⁸ The letter from the agency stating the Branstads were ineligible for farm program benefits gave the Branstads one month to repay the money.⁹⁹ Other farmers in the same position would probably respond as the Branstads did when faced with the chance to qualify for the reinstatement of benefits.

The court was also correct in analyzing the changes to the statutes and regulations and the impact of those changes on the wetland determinations for tract # 2024. The agency was incorrect in interpreting the statute to say that the person affected by the determination must be the person who owned the property at the time of the determination.¹⁰⁰ The court noted that in light of the plain language of the statute, any person subsequently affected by an existing wetland determination may invalidate it by requesting review of the certification by the Secretary.¹⁰¹ Clearly, the Branstads were affected by existing wetland determination on their property.

The agency also failed to consider whether the conversion was commenced before December of 1985 and whether the wetland characteristics determined after that date were a result of lack of maintenance.¹⁰² Since the tile had been in place since the early 1900s,¹⁰³ it is entirely possible that the wetlands were converted before 1985 or that wetland characteristics returned after that date because of the lack of maintenance on the tile drainage system. By saying that wetland determinations are not appealable, the agency failed to recognize the absence of statutory language which supports a conclusion that determinations of the agency are unappealable.

The ultimate question in the case may be whether the Branstad's repair of the existing tile drainage system exceeded the amount of repair necessary to return to the water and farming regime as it existed prior to December 23, 1985.¹⁰⁴ The court vacated the wetland determinations and directed the agency to consider on remand "those factors which Congress intended it to consider,"¹⁰⁵ such as whether there was a conversion prior to the statute taking effect. The tile drainage system had been on the property since the early 1900s, and the land was used for farming crops in the 1930s and 1950s. This suggests that the drainage system made the soil less hydrated than it was before the system was installed, therefore making agricultural commodity production possible.

⁹⁶ See 16 U.S.C. § 3822(h) (2000).

⁹⁷ *Branstad*, 212 F. Supp. 2d at 992.

⁹⁸ *Id.* at 982.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 997; See also 16 USC § 3822(a)(4).

¹⁰¹ *Branstad*, 212 F. Supp. 2d at 997.

¹⁰² *Id.* at 998; See also 16 USC §3822(b)(1)(G) ("No person shall become ineligible under Section 3821 of this title for program loans or payments . . . [a]s a result of the production of an agricultural commodity on . . . [a] converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of the lack of maintenance of drainage, dikes, levees or similar structures.").

¹⁰³ *Branstad*, 212 F. Supp. 2d at 979.

¹⁰⁴ *Id.* at 988.

¹⁰⁵ *Id.* at 998-99.

The court did not discuss the effect the agency's approval of the project before the Branstads started repairs on the tiles. The letter from the agency said "the areas identified for drainage repair will not effect any classified wetlands if the repair is made only to the original size and depth of tile."¹⁰⁶ The agency inspected the repaired system without requiring any changes, and there was no evidence in the agency record that the repairs exceed the scope and effect of the tile drainage system that was originally installed in the land.¹⁰⁷ The fact that the agency later determined there was a conversion of wetlands suggests that perhaps their prior off-site designations of the tracts as wetlands were incorrect.

VI. CONCLUSION

This appears to be the only case in which a court has decided the effect of landowners entering into a wetland restoration agreement with the USDA. The court was correct in determining entering the agreement does not render further appeals moot. This is important because entering a wetland restoration agreement seems like a logical alternative for owners and operators of land faced with wetlands violations. The court was also consistent with prior cases in holding that the agency could not act arbitrarily and capriciously when making decisions.

Laurie J. Wiedenhoff

¹⁰⁶ *Id.* at 979.

¹⁰⁷ *Id.* at 980.