



Missing Links: A Real Strategy to Implement the NRS

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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





This was the era of my parents' Adams County farm





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





We all go through changes in life





Agriculture has changed too – as has the law





But the land and values remain





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, thoughts on some of the “unfulfilled legislative promises” we have made to protect natural resources.

Third, The flaws in the so-called Iowa Nutrient Reduction Strategy and the challenge of water quality issues going forward.

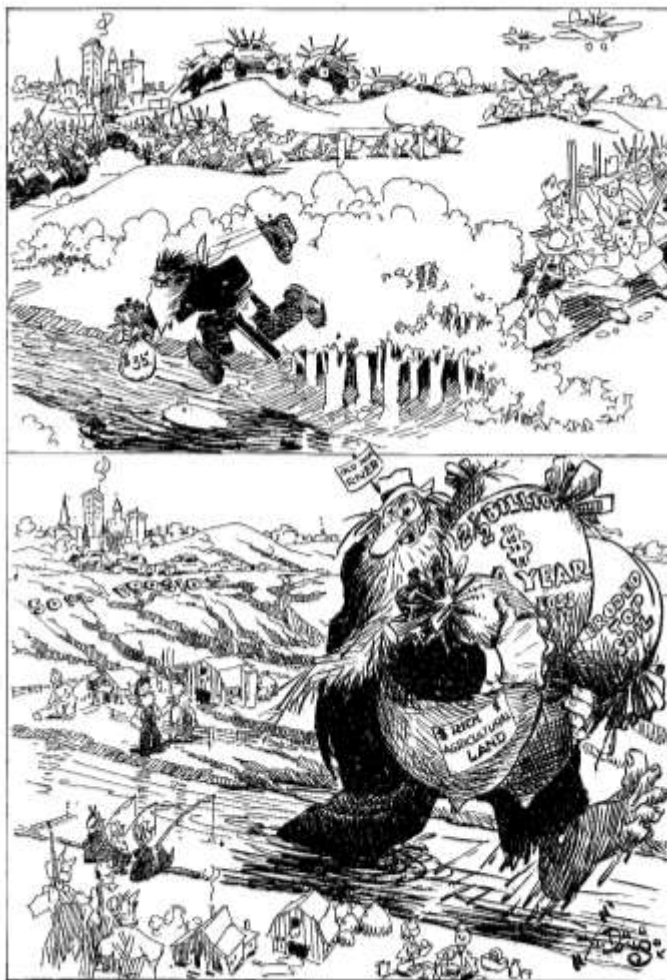


Iowa's Legacy of Leadership

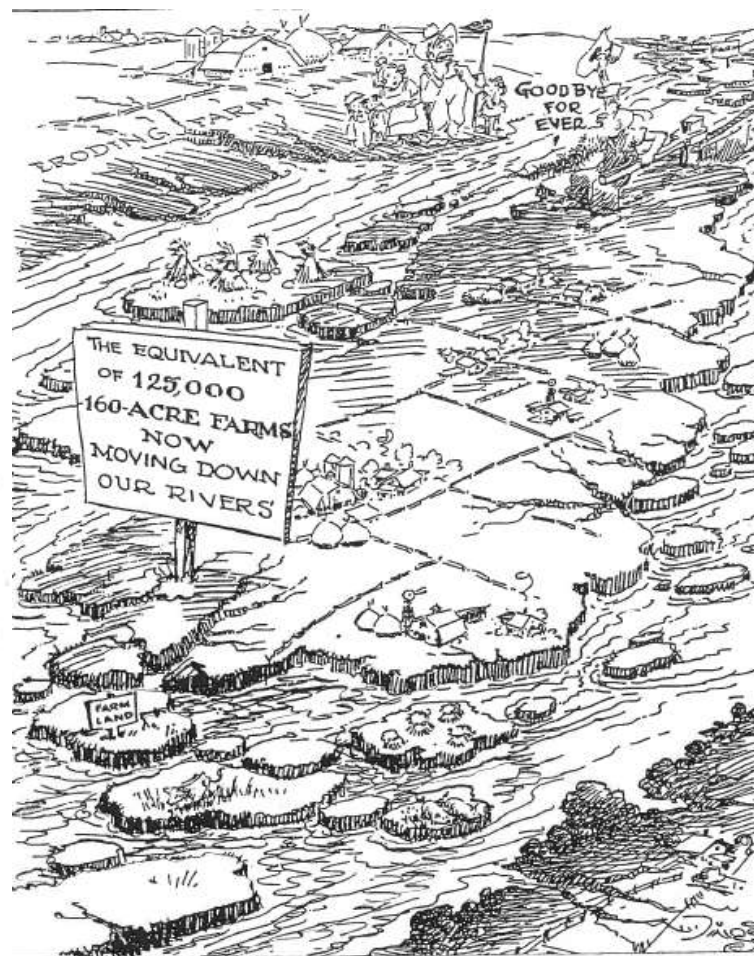
Individuals like Aldo Leopold, Henry Wallace, John Lacey and Ada Hayden. And of course Ding Darling, pictured here. More recent leaders include Paul Johnson who headed NRCS and Sen. Tom Harkin author of the Conservation Stewardship Program.



Ding Captured Our Challenges



Bank Robbers, Little And Big



WHAT THAT MUD IN OUR RIVERS ADDS UP TO EACH YEAR



Leaders in Ecological Insights: Ada Hayden and Aldo Leopold





Leopold on Our Obligations to the Land and Water

Leopold wrote about our relation to land – and how the idea of obligations is largely missing.

Our education “makes no mention of obligations to land over and above those dictated by self-interest.” He said “we have been too timid and too anxious for quick success, to tell the farmer the true magnitude of his obligations. Obligations have no meaning without conscience, and the problem we face is the extension of the social conscience from people to the land.”

This is the key log Leopold identified 70 years ago – and as we will see, it is in large part what is still missing in Iowa’s water quality efforts today.



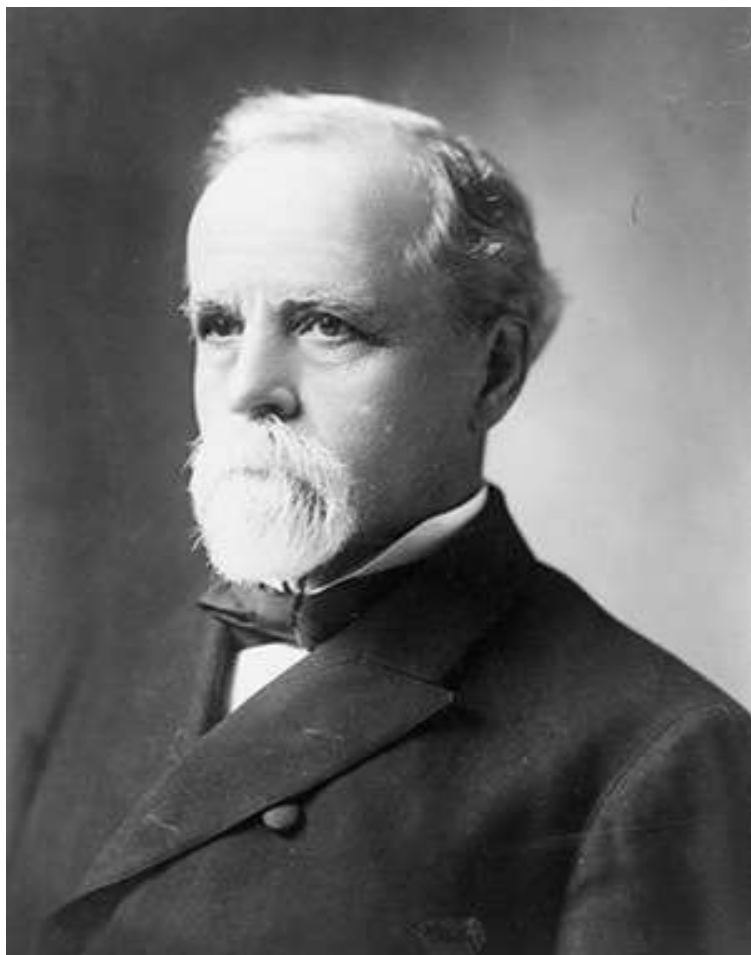
Leopold's Conclusion

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*





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.



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 conservation policies, it is necessary to recognize this duality as the intellectual and legal fulcrum to balance 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?





Some of the soil we love so much?





Soil Conservation programs are water quality protection

Iowa and the nation have rich soil conservation laws and policies. The efforts of USDA, IDALS, 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.



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





Tile outlets – are they point sources?





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

The following are examples of 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 § 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 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.



#5 – 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.

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



TOTAL REAP PROJECTS, 1989-2017

13,856

TOTAL REAP INVESTMENT, 1989-2017

\$318,237,602

COUNTY CONSERVATION IN IOWA MEANS...



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

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



Addressing Climate Change is a Key to Making Agriculture more Resilient



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



IWiLL: Will 2020 be the year?

Everyone here knows the long history and meaning of the Iowa Water Land and Legacy effort and 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 3/8 cent to fund the trust has loomed ever since – and today remains a key priority of the conservation 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.





What is Iowa's Agricultural Water Quality Policy?

Recent reports show Iowa has made little “progress” addressing water quality - raising the question: what is Iowa’s agricultural water quality policy? The answer is we really don’t have one – if by policy we mean: 1) a set of articulated standards of expected conduct; 2) an identifiable goal we are striving toward; 3) objective and measureable indicators of progress or compliance; and 4) widespread social recognition and acceptance of the value of the effort, and appreciation of the expected benefits.

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.



Hopes and Wishes – An endless Summer of Better Days to come

Here are examples of what Iowa law allows to take place on land:

- you can install as much tile as desired with no examination of any impact additional drainage will have on streams;
- you can farm next to the stream bank with no set back or buffers;
- you can apply as much fertilizer as can be afforded and apply vast amounts of manure to any acre;
- you can convert pasture and grasslands to crops and remove any timber, fence lines, or other habitat without restraint;
- you can let livestock have unlimited access to streams; and
- there is no farm level monitoring of the quality of water leaving the land (it is all for someone downstream to address)



Planting next to the river bank





Cows cooling off in the stream





Manure piled next to stream





Iowa's water quality policy for agriculture?

In a nutshell - no guidelines or standards; no goals or timelines for improvement; few identified priorities or strategies to address the sources of pollution; limited public funding; and no use of regulations, in favor of relying on a “voluntary” approach – and the Nutrient Reduction Strategy.

Is it any wonder Iowa water quality continues to deteriorate given this policy? We essentially have a policy designed to maximize crop production from every possible acre. We are driving with our foot on the accelerator of all out production of corn and beans and only periodically tap the brakes – or in a year like 2019, when nature and the changing climate taps them for us.

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





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: a Real Implementation Plan for the NRS.” I will conclude today with some critical observations about the NRS - which is now the law of the land in Iowa.



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 are met. It is not clear meeting the 45% reduction goal will have any identifiable impact on the water quality Iowans experience in their local streams and rivers. The reduction goal is related to the EPA's 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 critical gap in Iowa law is the lack of any legislative statement establishing a responsibility on the part of citizens, farmers, or landowners to act so as to not 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, any 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 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 exclusion of DNR water quality staff and farm group influence on the final report. Unfortunately, the NRS does not reflect a similar level of “scientific” inquiry and analysis of the possible strategies for achieving hoped for reductions. Instead, once “proposed” the NRS morphed into a political document, with the discussion focused on administration and costs – rather than how to do it.



5. Scenarios used to validate NRS have disappeared from discussions

If you read the NRS, the most important section discusses the scenarios used to identify farming practices needed to reduce nutrient losses so the state can meet EPA's goal. The NRS identified three scenarios to satisfy the goal, but drafters wrote: "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 where actions – such as installing wetlands, using buffer strips and planting cover crops may be required.

But once the scenarios were used to sanctify the NRS, discussion of them has largely disappeared. For example all 3 scenarios list moving nitrogen use to the MRTN rate as a goal.



6. Projected total costs are large but largely irrelevant

Putting a price tag on the “costs” of implementing the 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” are largely irrelevant because the state will not fund any scenario – 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 goal – is how do you know when you reach the objective? For the NRS the key issue is what is the baseline of nutrient loss – used to measure the needed 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 EPA uses it. Unfortunately, the selection is another example of how the goals of the NRS have little relation to the actual improvement of Iowa water quality. Why base a public policy of improving the water quality Iowans experience today, on actions from 25-40 years ago? The truth is we might be able to meet the goals of the NRS and still have polluted waters unsafe to use in Iowa.



8. Allowing private actors to degrade public waters with no restraint means the NRS is inherently immoral

A final concern relates to Iowa water law. First, all the waters in the state are declared to be “public water”[§ 455B.262(3)] Second, because Iowa law establishes no duty on individuals to protect surface 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 – the public – a classic example of a moral hazard. Most would agree it is immoral for one person to damage the property of another. A legal system that sanctions immoral behavior can itself be seen as immoral – at least for that issue.



It may be reasonable to assume people whose actions may degrade water – such as farmers who plant to the edge of streams do not see themselves as immoral but in reality that is what their behavior reflects – even if “legal.” One can argue, a goal of society should be to make the arguably legal, morally intolerable when it involves conduct injuring others. If for no other reason than to build our water quality policy on the basis of morality, Iowa law should be amended to reflect an obligation for individuals to protect the water of the state – property belonging to us all.

Moving forward Iowa needs to ground the NRS on recognizing both public rights and private obligations, especially if the public is expected to pay part of the costs to protect water.



Preliminary Ideas for an Iowa NRS 2.0

- Adding a Strategy to implement the NRS is a legitimate exercise with the goal of actually trying to improve Iowa's water quality, rather than giving the appearance of acting while really delaying an accounting.
- The state will make use of existing legal and institutional tools to implement the work, such as the county soil and water conservation districts, the watershed management authorities, soil loss limits, and the existence of drainage districts.
- The plan will use sound social science such as the appropriate role of regulation and education to achieve public goals, rather than being built on an anti-regulatory ideological bias.



- When the state provides additional funding, such as passing a sales tax increase, the public will expect to be in place a system with the capacity to use the money effectively, such as SWCDs using HUC 12 watershed plans and requiring monitoring of installed practices – this will require significant increases in staffing.
- To be effective, any plan needs identifiable goals, measurable indicators of progress, and methods to prioritize efforts.
- The plan will need to consider animal wastes and livestock production, in developing projects to address water quality.
- It is important to have broad and widespread participation by land owners and farmers – and public institutions, in all counties and watersheds.



- The plan will establish expected standards of water quality stewardship, both to increase the effectiveness of the efforts and to protect the economic interests of those farmers who voluntarily take action from the negative impact of free riders and those who do not.
- The plan will look to useful examples from neighboring states, such as the nutrient management plans required in Ohio, and use of buffer strips in Minnesota, to identify potential policies and programs to be used to protect water quality in Iowa.
- The plan will utilize the local HUC 12 watersheds as a primary vehicle to organize farmers and landowners, establish priorities, and to implement practices.



Take Advantage of USDA Conservation Programs







Take Responsibility for How Your Land is Farmed





Make Room for Nature





