

PART 524 - DRAINAGE

United States Department of Agriculture



Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013

SUBJECT: CPA – Guidance for Implementing the 8th Circuit Court of Appeals Decision in *Barthel v. the United States Department of Agriculture (USDA)* **Date:** Nov 22, 2004

TO: State Conservationists **File Code:** 180

Changes in land use may increase water on agricultural land within the watershed. The regulations at 7 CFR § 12.33(a) state "if, after December 23, 1985, changes due to human activity occurred in the watershed and resulted in an increase in the water regime on a person's land, the person may be allowed to adjust the existing drainage system to accommodate the increased water regime," provided the person furnishes the Natural Resources Conservation Service (NRCS) with appropriate documentation of the increased water regime, its causes and the planned changes in the drainage system.

The 8th Circuit Court of Appeals in *Keith Barthel and Dorothy Barthel, v. USDA*, clarified that NRCS must allow adjustments of the existing drainage system sufficient to return the land to the farming use and condition that existed on December 23, 1985. This may allow the landowner to improve the capacity of existing drainage ditches or drain tiles to accommodate an increase in water coming from upslope in the watershed.

In cases where an increased water regime is documented, NRCS will consult aerial photographs and crop history records to determine the farming use and the scope and effect of the drainage system in the area on December 23, 1985, and will authorize maintenance to achieve that water regime and use. The *Barthel* decision states that a landowner may improve drainage sufficiently to achieve the water regime and farming use that existed on December 23, 1985, which reflect the operation and maintenance of the site prior to that date. However, he is not authorized to significantly improve the drainage or manipulation so that wetland characteristics on areas identified as wetland or farmed wetland are further degraded in a significant way.

/s/ by Jose J. Acevedo on (November 22, 2004) / rg

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