



S.D. case could be heard by U.S. Supreme Court

Evan Hendershot

December 2, 2016

After years of litigation, two Miner County farmers could see their case reach the nation's highest court.

For eight years, Arlen and Cindy Foster have questioned the U.S. Natural Resource Conservation Service's (NRCS) wetland designation of 0.8 acres of their rural farmland — a designation made by the agency using a proxy site 33 miles away to determine whether the Foster's similar land would support wetland plants.

The case can be traced to 2008, when the Fosters asked the NRCS to reconsider a previous delineation deeming 0.8 acres of their farm as wetlands — land which, under the "Swampbuster" provisions of the Food Security Act of 1985, can limit eligibility to federal agriculture programs if converted to cropland. Because the acreage was disturbed, the NRCS used a proxy site to determine if the small area of land would support the growth of wetland plants.

Following several failed appeals, the Fosters have now petitioned to have their case against U.S. Secretary of Agriculture Tom Vilsack heard by the U.S. Supreme Court. The Fosters claim federal courts should not defer to agencies like the NRCS to use preselected proxy sites to make wetland determinations, coupled with the argument the Fosters due process rights protected by the Fifth Amendment of the U.S. Constitution may have been violated when the farmers weren't notified of the selection of the comparison site.

While Arlen Foster declined to comment on the case himself, the petition to have the case heard by the Supreme Court offers the Fosters reasoning for pursuing such a lengthy and rigorous appeals process.

"The wetland determination below limits how the Fosters can farm their land in the future, and forces them to choose between farming in the most productive way, and eligibility for United States Department of Agriculture programs, such as crop insurance," reads the petition submitted by Anthony L. Francois, of the Pacific Legal Foundation, the counsel of record for the Fosters.

On Wednesday, the deadline to file a response to the petition will come to pass, and the third-generation Miner County farmers could soon learn whether their case will be heard by the nation's highest court.

Using the Tetonka Reference site, located 33 miles away in Kingsbury County, the NRCS determined the land did qualify as wetlands, which served as the driving force behind the Fosters' initial 2011 appeal to the Department of Agriculture's National Appeals Division (NAD) because the proxy site was not "in the local area."

In a press release issued by the Pacific Legal Foundation in August, Arlen Foster said he is disappointed by the way federal officials handled the wetland determination on his land.

"It is just simply the nature of the bureaucracy to cut corners and disregard the rights when they do not have a personal stake in the results of their work," Foster said in the press release.

And Francois, the Fosters' attorney, called the wetland determination "bogus" and made through a method "that they rigged to produce the desired result of determining that the Fosters' property is federally protected wetland."

Before the Pacific Legal Foundation got involved, the Fosters lost their contestation with the National Appeals Division in 2012. In 2013, the Fosters filed suit in U.S. District Court against Vilsack, but Judge Karen Schreier ruled the Fosters failed to show arbitrary or capricious action by the NAD or NRCS in its wetland determination procedures.

The following year, the Fosters took their appeal to the U.S. Court of Appeals, contesting that wetland determinations should be subject to procedural due process protections — meaning the Fosters believe they should have received the right to a hearing and notification of the selection of the Tetonka site.

Like Schreier, the U.S. Court of Appeals ruled the agency's decision was "not arbitrary, capricious, or contrary to the law."

In September, three organizations offered their support for the Fosters' case to be heard by the Supreme Court, including the American Farm Bureau Federation, Cato Institute and the Center for Constitutional Jurisprudence.

The Center for Constitutional Jurisprudence asked the court if a civil service employee should have the power to bind the judicial branch of government to the understanding of an agency's rules, while the American Farm Bureau Federation made a more emotional pitch to the court.

With the uncertainties of farming, including weather, market and access to labor, the bureau argued there's no need to add another uncertainty to the mix.

"Then there are the uncertainties of environmental law, which increasingly requires farmers to ask the Government for permission to farm their own land," said the bureau.

On Thursday, Arlen Foster said he and his attorneys are still waiting for a response from the government regarding the petition.