

DOCUMENT RESUME

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Review of Complaints Concerning the Soil Conservation Service's Involvement in the Patton Group Drainage Project. B-114833; CED-77-10; CED-77-9. December 3, 1976. Released March 7, 1977. 3 pp. + enclosure (11 pp.).

Report to Rep. Andrew Jacobs, Jr.; Sen. Birch Bayh; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Land Use Planning and Control: Land Policy and the Environment (2302).

Contact: Community and Economic Development Div.

Budget Function: Natural Resources, Environment, and Energy: Conservation and Land Management (302).

Organization Concerned: Soil Conservation Service.

Congressional Relevance: Rep. Andrew Jacobs, Jr.; Sen. Birch Bayh.

An examination was performed of the Patton group drainage project in response to allegations by Mr. Harold Wood that it caused damage to his farm crops. The project, designed by the Soil Conservation Service, drains runoff from three farms, causing it to reach Mr. Wood's farm--including a creek running through it. Mr. Wood claimed that he was not advised of the project until after it was constructed, and that it changed natural drainage, causing water to flow onto his land. Findings/Conclusions: According to Service officials, they were not required to contact Mr. Wood before construction. Because of conflicting reports, and lack of clear evidence, it was not ascertained if the project had changed runoff patterns or caused damages as claimed. However, it was concluded that the complainant should have been informed of the project and its impact, and the Service should have ascertained that an adequate drainage ditch would extend to the creek. Recommendations: Agency official should emphasize timely notification to property owners affected by projects. (HTW)



Same as 737

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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DEC 3 1976

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The Honorable Birch Bayh
United States Senate

RELEASED
3/7/77

Dear Senator Bayh:

In response to your letter of June 9, 1976, and subsequent discussions with your office, we reviewed allegations made by your constituent, Mr. Harold Wood, that the Department of Agriculture's Soil Conservation Service acted improperly in providing technical assistance for the Patton group drainage project, which purportedly has caused damage to crops on his farm.

The Service planned, designed, and approved the project which drains the runoff from three farms westward to a 30-inch culvert under a county road. The runoff continues to flow westward through an older drainage ditch on another farm before reaching the complainant's farm and a creek that cuts through his farm.

Mr. Wood claims that he was not advised of the project until after it was constructed. He also claims that the project changed the natural drainage of the three farms in violation of Illinois drainage laws, causing water from these farms to flow onto his land when it had not done so in the past. He contends that the culvert is a new outlet for these farms and that the natural drainage used to flow north through another waterway.

To ascertain the facts in this matter, we reviewed correspondence furnished by your office and the complainant; Service correspondence, regulations, and instructions; the Department's Office of Investigation's report on the project which included legal advice from the Department's Office of the General Counsel; and Illinois farm drainage laws. We also reviewed plat books, engineering plans and drawings, maps, and aerial photographs of the project area.

We visited the project site and, on different occasions, observed the area in and around the project with the complainant, other landowners, and Service employees. We interviewed the complainant, other farm owners and operators in

the project area, Service officials, State and local officials, Office of Investigation and Office of the General Counsel officials, and a University of Illinois instructor on Illinois drainage laws.

Service officials said that they had not contacted the complainant before the project was constructed because they were not required to and did not believe it was necessary at the time. We found no evidence that the Service or others had deliberately avoided such notification to force the complainant to accept the completed project.

We also could not find hard evidence conclusively showing whether the project changed the direction of the natural drainage in the area. Oral information was conflicting and the strongest documentary evidence we could find pointing to drainage flow direction before the project was constructed consisted of highway engineering drawings which indicated only that drainage in the area of the county road flowed west through the culvert.

Also, we could not ascertain whether, or to what extent, the complainant's farm received rain runoff prior to the project. Because of this, and because the creek on his land at times floods the area he claims is being damaged by the project runoff, we could not determine whether the complainant's cropland has been damaged as a result of the project. The complainant believes the project has caused slight damage to date but is more concerned about future damages that might occur.

On the basis of our examination we believe that:

- The Service should have required the project participants to inform the complainant or his tenant about the proposed project and the possible impact it could have on his land.
- The Service should have ascertained, in connection with providing technical advice and assistance to the project, that an adequate drainage ditch to handle the runoff from the project farms extended across the complainant's farm to the creek.
- To avoid similar situations in the future, the Service should emphasize to its field offices the need to be particularly careful that timely notification be given to property owners who may be affected by projects in which the Service is involved.

Service headquarters officials agreed with us. They said that they were in the process of clarifying the Service's overall policies concerning field office responsibilities when providing technical assistance. They agreed to include a requirement that field offices make certain that property owners who plan to participate in Service-assisted projects have notified other property owners or operators in the area who may be affected by the proposed project. They also said that they would advise Service field offices to encourage all property owners who might be affected by or benefit from a proposed project to participate in the project.

Many of the Federal, State, and local officials, property owners, and others we talked to concluded that the most logical and reasonable alternative to the present situation would be to construct a drainage ditch across the complainant's property to the creek. The complainant, however, said that he would not accept such an arrangement. Service officials told us that, if an acceptable arrangement cannot be worked out with the complainant, his ultimate recourse might be to pursue the matter through the courts.

Further details regarding the foregoing matters are included in the enclosed summary of observations.

Sincerely yours,


DEPUTY Comptroller General
of the United States

Enclosure

SUMMARY OF OBSERVATIONSBACKGROUND OF PROJECT CONTROVERSY

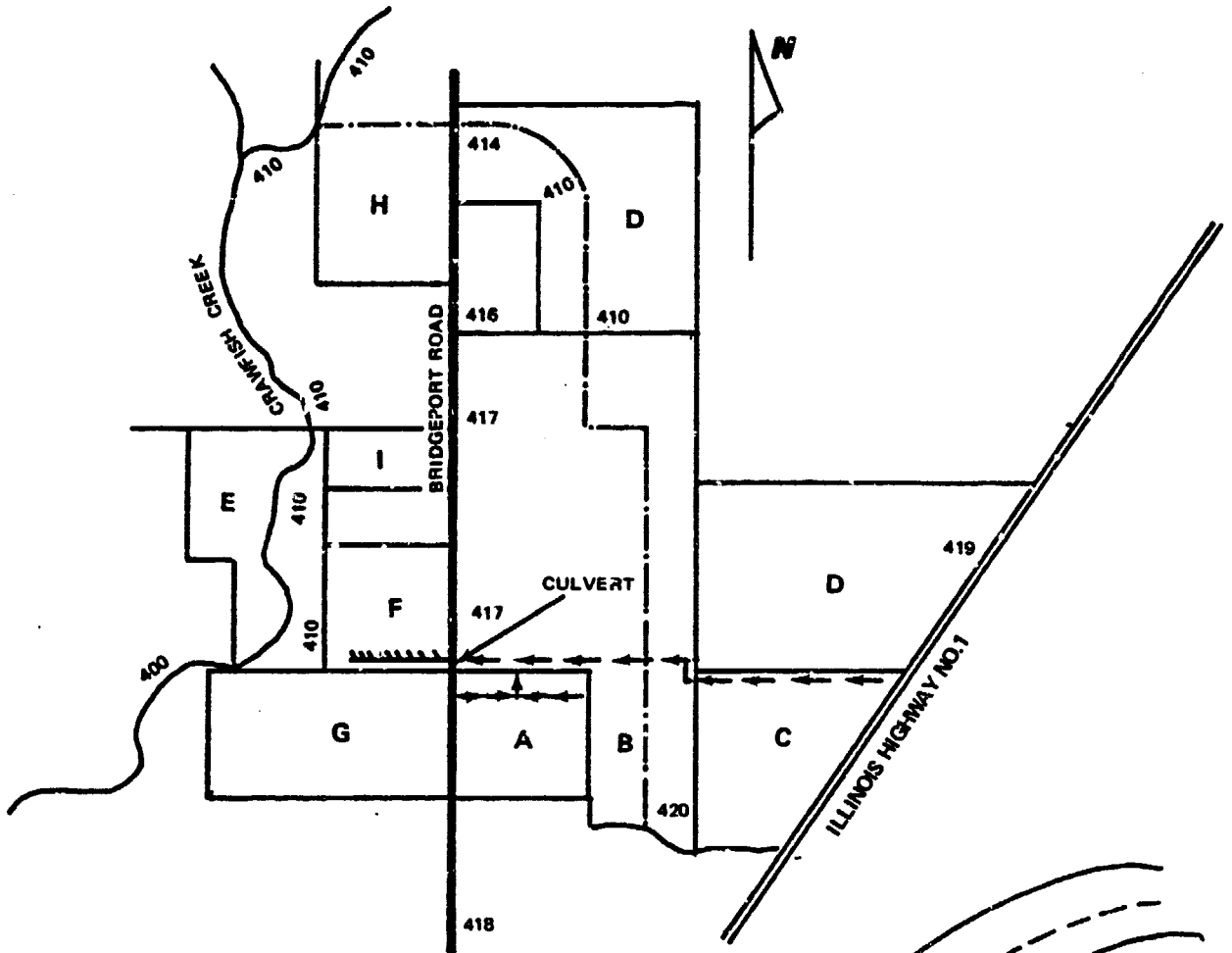
We prepared the diagram on page 2 to show the relationship of (1) the complainant's property (farm E) to the other farms in and around the project site and (2) the old and new drainage ditches. Three landowners in the vicinity of the complainant's property (farms A, B, and C) formed the Patton group drainage project in May 1975. The project, an earthen ditch for channeling their drainage, was completed during the same month. The Department of Agriculture's Soil Conservation Service (SCS) provided the technical assistance and the owners of farms A and C paid for the construction cost. The owner of farm B cooperated by allowing the ditch to cross his farm but did not share in the project cost.

The water from the project was to drain through the culvert under Bridgeport Road into an existing ditch on another property (farm F). From there the drainage flows onto the complainant's farm and into Crawfish Creek. In early June 1975, during SCS's final construction check, SCS officials learned that the existing ditch across farm F did not extend to the creek but instead plained into the land near the complainant's property line. The complainant's tenant farmer wrote the complainant and asked permission to extend the ditch across his property to the creek at the tenant farmer's and at a project participant's expense. The complainant would not give permission. Instead, he registered a complaint with SCS stating that the project was illegally draining water onto his property.

In an effort to arrive at a solution, SCS requested technical advice from its Midwest Technical Service Center in Lincoln, Nebraska, and legal advice from the Department's Office of the General Counsel. The two organizations concluded that the project participants were within their rights to construct the drainage ditch and that SCS had followed proper engineering and technical procedures in carrying out its responsibilities. The Department's Office of Investigation also made a lengthy investigation to determine the facts and circumstances of the project. The investigation did not resolve the question of whether the natural drainage direction changed but indicated there was little damage, if any, to the complainant's property or crops as a result of the project.

SCS officials also sent the complainant tort forms to file for any damages he believed he may have incurred as a result of the project and offered assistance in preparing the forms. The complainant said, however, that he only wanted

DIAGRAM SHOWING PROJECT AREA AT TIME OF CONSTRUCTION



the water off his land. SCS officials said they would do no further work in the case unless new evidence was provided indicating that the project infringed on the complainant's rights.

INCONCLUSIVE EVIDENCE TO DETERMINE
WHETHER DRAINAGE DIRECTION CHANGED

The basic issue of the controversy seems to be whether the project changed the direction of the natural drainage in the area. We could not determine this, however, because documentary evidence did not conclusively indicate the direction(s) the area drained before the project was constructed. An SCS official stated that the construction erased any channel which may have existed along the path of the project before the project was undertaken.

The following documents were available to analyze.

- Department of the Interior Geological Survey maps with 10-foot contour lines.
- Engineering drawings prepared by SCS before and after construction.
- County engineering drawings prepared in 1943 and 1966 for use in improving Bridgeport Road.
- A contour map SCS had prepared of farm A before the project was constructed.

The SCS State conservation engineer said that Department of the Interior Geological Survey maps did not include sufficient information for him to determine whether the natural drainage had been changed. The SCS area engineer said that he also could not determine from these maps and from inspection of the project whether the drainage direction had changed. Neither of these engineers had been involved in planning the project.

Engineering drawings that SCS had prepared before construction showed that the ground elevation did not vary more than about 1-1/2 feet along the 4,500-foot path of the planned construction. This would indicate that the ground was almost flat from one end of the area where the new drainage ditch was installed to the other.

Engineering drawings prepared by the Wabash County superintendent of roads in 1943 showed arrows pointing west through and beyond the culvert under Bridgeport Road. The super-

intendent told us this indicated that water flowed west through the culvert and beyond at that time. Engineering drawings prepared to improve Bridgeport Road in 1966 showed arrows pointing in the same direction. The drawings also showed that the 30-inch culvert, which replaced a smaller culvert, was to be placed under the road with the west end .4 of a foot lower than the east end. These drawings are the strongest evidence that the drainage in the area of Bridgeport Road flowed east to west before the project was constructed.

SCS's contour map of farm A was prepared to identify the low spots before the project was constructed. This map showed that, although the farm was almost flat, the elevation in the northwest quarter of the farm was about 1-1/2 feet lower than the elevation in the southeast quarter.

All of these maps and drawings must be interpreted and, consequently, may be interpreted differently by different individuals. Because the area is so flat, interpretation may be more of a guess than a conclusive determination. To further complicate the problem, we were told that water in the area may run in different directions at times, depending on the amount of rainfall. We were told that, in some cases where the land is flat, even the courts are unable to determine the direction of natural drainage.

Comments and written statements by the complainant, other landowners, former landowners, tenants, and others were divided on whether the project changed the direction of the drainage. Some parties said the natural drainage always flowed west and others said it used to flow north.

As to the area's current drainage pattern, the Department's Office of Investigation reported that an SCS water management engineer from the Midwest Technical Service Center said that he could not determine from maps and drawings how the water in the project area would divide during periods of heavy runoff. He also said that extensive topographic surveys or observations after heavy rains would have to be made to make such a determination. The SCS State conservation engineer believes that a topographical survey of about 2-1/2 square miles would be needed to determine the area's present natural drainage. He told us that such a survey had not been made because the Department's Office of the General Counsel and Office of Investigation and SCS State officials had determined that the culvert under Bridgeport Road was, in their opinion, a legal outlet for the natural drainage from the farms in the Patton group drainage project. SCS headquarters officials told us that a topographical survey would determine how the water drains now but would not in-

dicade how the water drained before the project was constructed.

The Department's Office of the General Counsel made the following statements in its August 21, 1975, opinion on whether the project violated Illinois farm drainage laws.

"Illinois follows the Civil Law Rule which requires the servient lands to accept all water naturally flowing from dominant lands. However, the owner of dominant lands does not have an unlimited right to alter water drainage and particularly no right to bring water from other watersheds into the drainage. The dominant owner may, however, improve his land by constructing channels to collect water and direct it into the drainage even though it may increase the flow over the servient land. These rights of the dominant owner are based on the principle that such drainage is ordained by nature."

* * * * *

"* * * We should make it clear that artificial drains which divert water from its natural course, created and maintained for a period of 20 years, with acquiescence of the parties, are established and treated as natural drains under Illinois law."

* * * * *

"It appears to us that the evidence indicates that there may have been a natural drain generally following the present drain. If a natural drain did not exist the evidence indicates that an artificial drain has been maintained on this location in excess of 20 years. The Wabash County Highway Department maps and records dating back to 1943 indicate a 15 inch culvert under the Bridgeport Road with the water running from east to west. State Highway Department records indicate road resurfacing and installation of a 30 inch culvert. These records are most persuasive. They were made at a time when there was no controversy and therefore no reason to fabricate them. It is our opinion, that, if the present drainage has continued in excess of 20 years, as the evidence indicates, the dominant landowners were within their rights in cleaning out the drain and Mr. Wood has a legal obligation to accept the flow from this drain across his property to the outlet on the Crawfish Creek."

The Chief of the Bureau of Soil and Water Conservation for the Illinois Department of Agriculture, in a January 22, 1976, letter to the complainant, said that the only way to settle the question of whether the natural drainage had been changed was through the courts. He told us that he believed the drainage outlet was legal.

COMPLAINANT NOT NOTIFIED OF
PROJECT UNTIL IT WAS COMPLETED

The complainant contends that the drainage project was constructed before he was notified in order to force an outlet through his land to Crawfish Creek. SCS officials said that they had not contacted the complainant because they were not required to and did not believe it was necessary at that time. We found no evidence that SCS or others had deliberately avoided such notification to force the complainant to accept the completed project.

After SCS and the three farm owners who were to participate in the project had formulated their plans for the drainage ditch, local SCS officials advised the county superintendent of roads about the project and the owner of farm A advised the owner of farm F. However, none of the parties notified the complainant or his tenant of the planned project.

Before the new drainage ditch was constructed, a local SCS official checked the culvert under Bridgeport Road and walked about 1,000 feet west along the existing drainage ditch on farm F to determine whether it was adequate to contain the runoff from the farms that would be participating in the project. The official told us that he assumed that the drainage ditch on farm F continued all the way to Crawfish Creek but did not talk to the complainant (or his tenant) or walk across his property to insure that it did. SCS technicians said they did not believe they had to trace the existing drainage ditch any further than they did on farm F to determine that it was adequate to handle the expected runoff.

The drainage ditch on farm F ends or planes into the ground near the complainant's property line (about 800 feet from the creek). SCS officials said that they did not know this until the owner of farm F told them on June 4, 1975-- after the project was completed. At that time, SCS officials notified the complainant's tenant farmer who notified the complainant.

SCS State officials told us that they had no written instructions requiring local SCS officials to contact all land-

owners who might be affected by small drainage projects for which SCS furnishes technical assistance. They said that local SCS officials are supposed to use their judgment in determining who should be notified and, at the time the plans for the Patton group drainage project were being formulated, SCS local officials believed it was sufficient to contact the county superintendent of roads and the owner of farm F next to the project. The Department's Office of Investigation's report said that the SCS State conservationist believed that SCS officials and others had made a "human error" by not advising the complainant about the project before it was constructed. According to the report, the State conservationist and other SCS officials have apologized to the complainant's wife about this oversight.

The SCS State conservationist told us that, since the problem over the drainage ditch developed, he had emphasized to his area conservationists the need for local SCS employees to exercise good judgment in notifying property owners who might be affected by projects in which SCS is involved. He said that he had not issued any written instructions to require local SCS officials to provide such notification, however, because of the difficulty they may have in determining who should be contacted under different circumstances on different projects.

We believe that SCS should have required the project participants to inform the complainant or his tenant about the project before construction began. We also believe that SCS should have made sure that the existing drainage ditch across farm F, which was to handle the runoff from the project farms, continued across the complainant's property all the way to Crawfish Creek. We further believe that SCS should emphasize to all of its field offices the need to give affected property owners timely notification of proposed projects in which it is involved.

SCS headquarters officials agreed with us. They said that they were in the process of clarifying SCS's overall policies concerning field office responsibilities when providing technical assistance. They agreed to include a requirement that field offices make certain that property owners who plan to participate in SCS-assisted projects have notified other property owners or operators in the area who may be affected by the proposed project. They also said that they would advise SCS field offices to encourage all property owners who might be affected by or benefit from a proposed project to participate in the project.

COMPLAINANT'S PROPERTY DAMAGED
BY CREEK FLOODING

We were unable to firmly establish whether the complainant sustained damage to his cropland as a result of the runoff from the Patton group drainage project. His cropland had been damaged, however, by the flooding of Crawfish Creek.

The complainant believes that the project has caused slight damage to his cropland to date; he is more concerned about future damages that might occur if the owner of farm F cleans out his ditch and there is a heavy rainfall, or if other farmers should tie into the drainage project and increase the runoff. SCS State and local officials said that the project was completed and there were no plans to add any additional farms to the drainage system.

The SCS area engineer visited the project site on June 17, 1975, and reported that drainage from the project spreads out into a wooded area on the complainant's property before entering Crawfish Creek. He said that a small amount of water can and does enter some of the complainant's cropland to the north before draining into the creek. He pointed out, however, that the area showed evidence of frequent flooding due to backwater from the creek and said that a heavy rainfall over the general area would cause the creek to rise and flood the same portion of the complainant's property that the complainant claims has been damaged or threatened by the project's runoff.

The tenant who operated the complainant's farm when the project was constructed said that the area in question usually flooded several times a year from the creek. He said he had not been able to get a decent crop since he began farming the property in 1970. Before then the cropland was in the soil bank. The current operator of the complainant's farm said the corn in the area had to be replanted this year due to the creek flooding. He does not plan to farm the property next year.

EFFORTS AND CONSIDERATIONS IN
TRYING TO RESOLVE COMPLAINTS

SCS actions

SCS had taken a number of steps to try to satisfy the complainant before our review started. After local SCS officials learned on June 4, 1975, that the existing drainage ditch on farm F did not extend to Crawfish Creek, they contacted the tenant who operated the complainant's farm and the tenant notified the complainant. SCS recommended that

an outlet channel be constructed through the complainant's property to the creek. In a June 5, 1975, letter to the complainant, the tenant operator asked permission to dig a ditch across the property without cost to the complainant. The tenant operator also owned farm D which adjoined farm C on the east side of the county road. He and the owner of farm C planned to share the cost of the ditch across the complainant's property. This arrangement did not satisfy the complainant and he initiated a complaint with SCS. He also contacted Department of Agriculture headquarters personnel who asked the Department's Office of Investigation to review the facts and contentions involved in the controversy.

According to the Office of Investigation report, the SCS State conservationist

- had his technical staff review the project;
- encouraged a meeting of all interested parties on July 22, 1975, to discuss the problem, alternatives, and solutions;
- requested an opinion from the Department's Office of the General Counsel on the project's legality;
- offered technical assistance to the complainant to resolve the problem;
- sent the complainant forms to file a tort claim for any damage; and
- agreed to have SCS's Midwest Technical Service Center review the engineering procedures used in the project.

Taking the results of these actions into account, the State conservationist concluded that the project should not be redesigned.

The Chief of the Illinois Bureau of Soil and Water Conservation attempted to assist the complainant by visiting the project site and attending the July 22, 1975, meeting of all interested parties. The meeting did not provide a solution. In a January 22, 1976, letter to the complainant, the State bureau chief stated:

"* * * Investigations have been made from every apparent angle but have developed no solutions to the problem. It appears to me that the decision regarding the proper flow of drainage water now will be required from the courts to make the determination as to whether the Illinois Drainage Laws were violated. This again will take time and the court decision, of course, at this time is unknown.

"I am suggesting that you go to the Wabash County Soil and Water Conservation District and request assistance through the Soil Conservation Service in solving a water related problem on your farm. * * * This may be a distasteful approach for you, however, I believe it is a necessary one that you should take rather than immediately entering into a court case."

Alternative drainage routes

The complainant told us that he would not accept a ditch on his property even if it were designed to SCS or to his own standards. He also said he would not accept the results of a complete SCS topographic survey of the area around the project. He wants the drainage water off his land and diverted another way to Crawfish Creek. Although SCS has not surveyed the area to determine whether an alternative drainage route might be feasible to bypass the complainant's property, SCS officials, project participants, the county superintendent of roads, and others in the vicinity of the project indicated there could be major problems in routing the water another way to the creek.

SCS State officials told us they had not developed any specific data on the feasibility of another route because the current drainage outlet under Bridgeport Road is a legal outlet. The water management engineer from the SCS Midwest Technical Service Center identified two possible outlets for the drainage other than the present one west of the county road. One was north through farm B, and the other was north along the county road one-half mile and then west along another county road to the creek. However, SCS State officials said that these alternatives would require acquisition of additional rights of way, flowage easements, and substantial construction cost on other properties. They also said other landowners in the area would fight this all the way and make it necessary to obtain injunctions to cross their properties.

The county road superintendent told us that the use of the county road ditches as an alternate route would not be acceptable to him because it would cause additional maintenance problems. He said it would be ridiculous to run water down the road ditches when it is already running west through the culvert under the county road.

We asked the owner of farm B about taking the water north through the old existing waterway on his property. He said he was not interested in having the water channeled through his property and was still having problems getting other portions of his land to drain north through the old waterway.

We asked residents on farm G south of the complainant's property about the possibility of sharing a ditch on the property line with the complainant or having one constructed on their property to the creek. They said they would not be interested since they would not benefit from the ditch.

We asked the owner of farm A about taking the water south between his property and the county road. He said he did not understand why he should agree to such an arrangement since the drainage outlet running west under the county road is considered a legal outlet.

On the basis of our discussions, there appear to be major obstacles to rerouting the drainage from the project.

Most feasible solution to problem

Although the complainant has adamantly stated that he does not want a drainage ditch constructed across his land to the creek, the consensus of the Federal, State, and local officials; property owners; and others we talked to (including the five people whose names the complainant had furnished) was that such a ditch would be the most logical and reasonable solution to the problem.

State and local SCS officials estimated that it would cost about \$4,000 to \$5,000 to construct either a ditch or a berm embankment across the complainant's property to the creek. These are rough estimates because the land had not been surveyed. They said the ditch could be routed to follow along the property line through a wooded area to avoid taking any cropland. It would be designed to SCS standards and would include either a drop structure or pipe into the creek to prevent erosion.

It is unclear how the construction would be financed. The complainant's former tenant, who also owns farm D, was willing to share in the cost when the controversy first arose but told us that he was no longer willing to do so. The owner of farm C, who also operates farm A, said he was still willing to share in the cost of such a ditch. The owner of farm A said that he had never offered to share the cost of a ditch on the complainant's land and was not willing to do it now either. We did not ask the owner of farm B because he did not share in the cost of the drainage ditch that was constructed across his land.

SCS officials told us that, if the complainant continues to demand that the drainage be rerouted through other properties to bypass his property, his ultimate recourse might be to pursue the matter through the courts.