

# WATERS OF THE UNITED STATES RULE AND FILLING THE SUPREME COURT VACANCY

Mr. GRASSLEY. Mr. President, I rise for the purpose of showing how one bureaucracy, the Corps of Engineers—and to some extent the EPA working with them—has already made farming very difficult and how, if the waters of the United States rule goes into effect, it can be much worse than even what I am going to be referring to.

Now, I am going to quote word for word a farmer's problem from the Iowa Farm Bureau's Spokesman dated January 27, 2016, and then I am going to make some comments on it.

For that reason, since I am told the next speaker is not going to come until 10:15, I ask unanimous consent to continue until that time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, before I start quoting, this is a story about a California farmer by the name of John Duarte, of Tehama County, CA. The title is "One farmer's ordeal may signal agencies' actions under WOTUS."

All John Duarte did was hire a guy to plow some grazing land so that he could raise wheat on 450 acres that his family had purchased in California's Tehama County, north of Sacramento. The land had been planted to wheat in the past. The wheat market was favorable and the farmer made sure to avoid some wet spots in the field, called vernal pools, which are considered wetlands.

But that plowing, which disturbed only the top few inches of soil, unleashed a firestorm from the U.S. Army Corps of Engineers, the Environmental Protection Agency, and other regulators against the California Farm Bureau member. The regulators' actions stopped Duarte from raising wheat, tried to force him to pay millions of dollars to restore the wetlands in perpetuity—although there was no evidence of damage—and sparked lawsuits and counter-lawsuits.

Duarte's experience could well turn out to be an example of how the agencies will treat farmers in Iowa and all over the country under the expansive Waters of the United States rule, according to Duarte, his attorneys and experts at the American Farm Bureau Federation.

"This really shows how these agency actions can play out on a specific family farm," Duarte said recently during a press conference at the American Farm Bureau Federation annual convention in Orlando. "We aren't concerned about it because John Duarte is having a bad time with the feds. We are concerned because this is a very serious threat to farming as we know it in America."

Although the EPA and other agencies continue to say to farmers that the WOTUS rule will not affect normal farming practices, such as plowing, Duarte's case shows that it will, said Tony Francois, an attorney with the Pacific Legal Foundation, which is representing Duarte.

"Anyone who is being told not to worry about the new WOTUS rule, they should be thinking about this case," Francois said. "The very thing they are telling you not to worry about is what they are suing Duarte over—just plowing."

Don Parish, [American Farm Bureau Federation] senior director of regulatory relations, said a big problem is the wide param-

eters that the agencies have placed in the WOTUS rule. He noted the rule is filled with vague language like adjacent waters and tributaries, which are difficult to clarify.

As broad as possible. "They want the Waters of the United States to be as broad as they can get it so it can be applied to every farm in the country," Parish said.

Iowa Farm Bureau Federation and other organizations have worked hard to stop the WOTUS rule, which was imposed last year but has been temporarily suspended by court rulings. The rule was designed to revise the definition of what is considered a "water of the United States" and is subject to Federal regulations under the Clean Water Act.

But instead of adding clarity, IFBF and others contend the rule has only added ambiguity, leaving farmers, like Duarte, facing the potential of delays, red tape and steep fines as they complete normal farm operations, such as fertilizing, applying crop protection chemicals or moving dirt to build conservation structures.

Another problem, Duarte said, is that the agencies are piling the WOTUS law with other laws, such as the Endangered Species Act, to dictate how farmers use their own land or to keep them from farming it at all.

"They aren't just trying to micromanage farmers. They're trying to stop farmers," Duarte said. "They're trying to turn our farmland into habitat preservation. They are simply trying to chase us off of our land."

Duarte, who operates a successful nursery that raises grapevines and rootstock for nut trees, was first contacted by the Corps of Engineers in late 2012. In early 2013, the Corps sent a cease-and-desist letter to Duarte, ordering suspension of farming operations based on alleged violations of the CWA.

The Corps did not notify the farmer of the allegations prior to issuing the letter or provide Duarte any opportunity to comment on the allegations.

The agency, Duarte said, wrongly accused him of deep ripping the soil and destroying the wetlands in the field. However, he had only had the field chisel plowed and was careful to avoid the depressions or vernal pools.

It's also important to note, Duarte said, that plowing is specifically allowed under the CWA. Congress specially added that provision to keep farmers from having to go through an onerous permitting process for doing fieldwork, he said.

Deciding to Fight.

That is a headline.

Instead of capitulating to the Corps, Duarte decided to fight the case in court.

His lawsuit was met by a countersuit from the U.S. Justice Department, seeking millions of dollars in penalties. The case is expected to go to trial in March.

Meaning March right around the corner.

The case, Duarte said, has raised some absurd charges by the agencies. At one point, the government experts claimed that the bottom of the plowed furrows were still wetlands, but the ridges of the furrow had been converted to upland, he said.

In another, an agency official claimed that Duarte had no right to work the land because it had not been continuously planted to wheat.

However, he said, the previous owner had stopped planting wheat because the prices were low.

"They said it was only exempt if it was part of an ongoing operation," Duarte said. "There is no law that says farmers have to keep growing crop if there is a glut and prices are in the tank. But by the Corps thinking, if you don't plant wheat when it is

unprofitable, you lose your right to ever grow it again."

Duarte also noted that when federal inspectors came out to his farm, they used a backhoe to dig deep pits in the wetlands. "If you do that, you can break through the impervious layer and damage the wetland, but it does not seem to be a problem if you are a government regulator."

To date, his family has spent some \$900,000 in legal fees.

Let me say something parenthetically here. If we had to spend \$900,000 in legal fees, the Grassleys might as well get out of farming. Now I want to go back to quoting, so I am going to start that paragraph over.

To date, his family has spent some \$900,000 in legal fees. That is separate from the work by the Pacific Legal Foundation, which represents the clients it takes for free and is supported by foundations.

It would have been easier, and cheaper, to comply with the wishes of federal agencies and given up use of the land. Many California farmers who found themselves in a similar situation have done just that, Duarte said.

Another two-word headline:

Banding together.

However, it's important to stand and fight the agencies' attempt to bend the CWA, Endangered Species Act and other laws to take control of private lands. And it's important for farmers to band together with Farm Bureau and other groups that oppose the WOTUS rule.

"We are not against the Clean Water Act or the Endangered Species Act as they were intended," Duarte said. "But this is not how those acts are supposed to be enforced. We are getting entangled in regulation, and the noose seems to be tighter every year."

I said that I would comment after I read that. For people who may be just listening, I just read an article that ran on the front page of the Iowa Farm Bureau Spokesman. The problems illustrated by this article are all occurring under current law with regard to farmers wanting to make a living by planting wheat in their fields. In the case of Mr. Duarte, government regulations from the EPA and the Corps of Engineers are making his life miserable with the threats of millions of dollars of fines.

As the article stated, regulators at one point tried to claim that "the bottom of the plowed furrows were still wetlands, but the ridges of the furrow had been converted to upland." That is ridiculous. The EPA is out of control.

You might remember the fugitive dust rule of a few years ago. I don't think now they are trying to push it, but the EPA was going to rule that you had—when you are a farming operation, you have to keep the dust within your property lines. So I tried to explain to the EPA Director: Do you know that only God determines when the wind blows? When you are a farmer and your soybeans are at 13 percent moisture, you have about 2 or 3 days to save the whole crop and get it harvested.

The farmer does not control the wind. The farmer does not control when the beans are dry, ready for harvest. When you combine soybeans, you

have dust. There is no way you can keep that dust within your boundaries. But as Washington is an island surrounded by reality, you can see the fugitive dust rule does not meet a commonsense test, and you can see that what they are trying to do to Duarte does not reach a commonsense test.

Again, referring to the newspaper article I just read, if the EPA and the Corps of Engineers are going around to farmers' fields making determinations about wetlands based on tillage practices under current law, imagine what they might do if this new waters of the United States rule goes into effect—now being held up by the courts.

Just think how you would feel if your family farm had survived for decades, overcoming droughts, overcoming flooding, overcoming price declines—and you can name 10 other things that a farmer has no control over—and then you have to put up with this nonsense. However, one day a government regulator could show up at your farm and hit you with excessive fines, and the next thing you know, your family farm is being auctioned off. That may sound absurd, but that is the reality of threats posed by the EPA. Mr. Duarte's case is the proof.

We have no shortage of assurances from the EPA Administrator that the plain language in the WOTUS rule will not be interpreted in a way that interferes with farmers. It is hard to take some assurances seriously when they are interpreting current law in such an aggressive way.

We have to stop the WOTUS rule so the bureaucrats don't become even more powerful. The WOTUS rule is too vague and allows way too much room for regulators to make their own interpretations about jurisdiction. So we should all continue to fight against the WOTUS rule and all other actions the EPA is taking that are ridiculous actions against farmers.

We have checks and balances in government. The Congress tried three times to stop the WOTUS rule. Senator BARRASSO tried to pass legislation taking away the authority or modifying the authority. That got about 57 votes but not 60 votes, so that could not move forward. The junior Senator from Iowa, my friend Senator ERNST, got a congressional veto through, a resolution of disapproval, with 52 votes. It went to the President. He vetoed it. So we did not override it that way. Then, of course, we tried an amendment on the appropriations bill, but we could not get that into the appropriations bill before Christmas. So we have tried three things. But thank God the courts have held up WOTUS through the Sixth Circuit Court of Appeals. So temporarily, at least, waters of the United States can't move ahead.

This brings back something that is very current right now: Why should we be concerned about who the next person on the Supreme Court is going to be? Because we have a President who said: I have a pen and a phone, and if Congress won't act, I will.

This sort of executive action by the EPA and the Corps of Engineers is kind of an example of the WOTUS rules, kind of an example of what we get out of this President. The President packed the DC Circuit Court of Appeals, which reviews these regulations, so they are going to have a friendly judge who says that whatever these bureaucrats do that may even be illegal or unconstitutional, they can get away with it.

Then, if that goes to the Supreme Court—we had an example just recently, about 1 week or so before Scalia died—a 5-to-4 ruling holding up some other ridiculous EPA rules.

Everybody wonders why everyone around here is saying they are concerned about who is going to be on the Supreme Court. It's because of these 5-to-4 decisions. We're concerned about the role of the Supreme Court in our constitutional system. The American people deserve to have their voices heard before the Court becomes drastically more liberal. I bet the Presiding Officer has people come to his town meetings, as I do, and say: Why don't you impeach those Justices, because they are making law, instead of interpreting law as the Constitution requires?" Well, you can't impeach a Justice for that. But this does raise something very basic: What is the role of the Supreme Court in our constitutional system? It hasn't been debated in Presidential elections for I don't know how long. There is a chance for this to be debated in the Presidential election and maybe lay out very clearly where Hillary Clinton or BERNIE SANDERS is coming from on one hand, or where our Republican nominee, whoever that is going to be, is coming from and what type of people they are going to put on the Court.

I have about 30 seconds, and I will be done.

We are presented with an opportunity, here. The American people have an opportunity to debate about the proper role for a Supreme Court Justice. The American people can decide whether they want another Justice who just decides cases based on what they feel in their "heart," and who buys into this notion of a "living Constitution," or whether they want a man or woman who believes the text means what it says on the Supreme Court.

I yield the floor.

The PRESIDING OFFICER (Mr. ROUNDS). The Senator from Pennsylvania.

#### STOPPING MEDICATION ABUSE AND PROTECTING SENIORS ACT

Mr. TOOMEY. Mr. President, I rise this morning to address a huge problem that is happening in every one of our States and in all of our communities and to talk about a bill that is meant to be helpful in this area. It is about the huge problem we have with opioid abuse, opioid addiction, including both prescription and heroin addiction and

abuse. This is an epidemic that is truly unbelievable in scale. It is affecting people of all ages, all ethnic groups, all demographics, all income classes, all geography. It is everywhere, and it is a huge problem. I have heard about it in every county I have visited in my State. In all 67 counties of Pennsylvania, I have heard about how big this problem is. In fact, more Pennsylvanians will die this year from heroin overdoses and the misuse of opioid painkillers than from the flu or homicides.

I wanted to learn more about this, so last fall I convened a hearing of the Senate Finance Subcommittee on Health Care, which I chair. Senator CASEY joined me in that hearing at Allegheny General Hospital in Pittsburgh, where we had this, to learn more to understand about the nature and scale of this huge opioid addiction problem and what we might do about it. I was surprised when I got to the room. It was a huge auditorium, and it was standing room only. The room was completely packed with people because this epidemic is affecting virtually every family. It affects almost all of us at some level and in some way. It is tearing families apart. It is taking the lives of people who are in the prime of their lives. It is a huge problem.

The hearing was very helpful in illuminating some aspects of the nature of the problem. We had medical professionals who are dealing with the treatment, and we had people who are suffering from addiction. A recovering addict who has put her life back together told a very compelling story about what she went through. We had people in law enforcement. So we had a lot of testimony with different perspectives.

One of the things I took away is that there are at least three categories of ways we can help try to deal with this huge scourge. One is the problem of the overprescription of narcotics, the overprescription of painkillers, opioids, which are chemically very similar to heroin. A lot of people begin their addiction with these prescriptions, and then when they can no longer obtain or afford the prescription opioids, they move on to nonprescription forms, such as heroin, and it usually goes downhill very dramatically from there. So reducing overprescription has to help. There are ways to deal with that. A second is to reduce the diversion of these opioids when they are being prescribed. My legislation really does focus on that. The third is, we need better treatment and we need better outreach. We need better ways of treating people. We need to treat the addiction, but also, many people find themselves addicted after they develop a mental health problem that is an underlying problem that contributes to the addiction. We have to do a better job identifying and helping people with mental health problems.