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Family Farm ALLIANCE SM

MEMORANDUM

TO: **SLDMWA BOARD OF DIRECTORS**

FROM: DAN KEPPEN, EXECUTIVE DIRECTOR

SUBJECT: EXECUTIVE DIRECTOR'S REPORT

DATE: FEBRUARY 7, 2022

This memo is intended to keep you apprised as to what is happening behind the scenes on policy issues the Family Farm Alliance is engaged in. In the past month, much of our efforts have focused on engaging in Biden Administration rulemaking efforts, monitoring federal agency implementation of the *Infrastructure Investment and Jobs Act,* preparing for our 2022 annual conference, public outreach and speaking engagements. These issues and other matters important to our members are further discussed in this memo.

BIDEN ADMINISTRATION DEVELOPMENTS

1. Recent Appointments

On January 12, the Senate Committee on Environment and Public Works (EPW) advanced for Senate consideration President Biden's nomination of Martha Williams to be Director of the United States Fish and Wildlife Service (by a vote of 16-4). Full Senate consideration is the next step. Ms. Williams returns to Department of the Interior having served as Deputy Solicitor for Parks and Wildlife between 2011 and 2013, providing counsel to the National Park Service and the Fish and Wildlife Service. She was an Assistant Law Professor at the University of Montana, where she co-directed the university's Land Use and Natural Resources Clinic. She also served as the Director of the Montana Department of Fish, Wildlife and Parks from 2017 to 2020. In December, Alliance President Patrick O'Toole, our lobbyist Mark Limbaugh, and I participated in a very constructive call with Ms. Williams, her two deputies, and three regional directors.

Senator Ben Ray Luján suffered a stroke two weeks ago, sidelining him for the foreseeable future and jeopardizing the Senate's majority lineup to confirm some nominees. Democrats received some good news last week, though, as Senator Luján's office told reporters that the New Mexico

109

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Anthea Hansen

From: Family Farm Alliance Communications <media@familyfarmalliance.com>
Sent: Tuesday, January 25, 2022 12:48 PM
To: Anthea Hansen
Subject: Breaking WOTUS News

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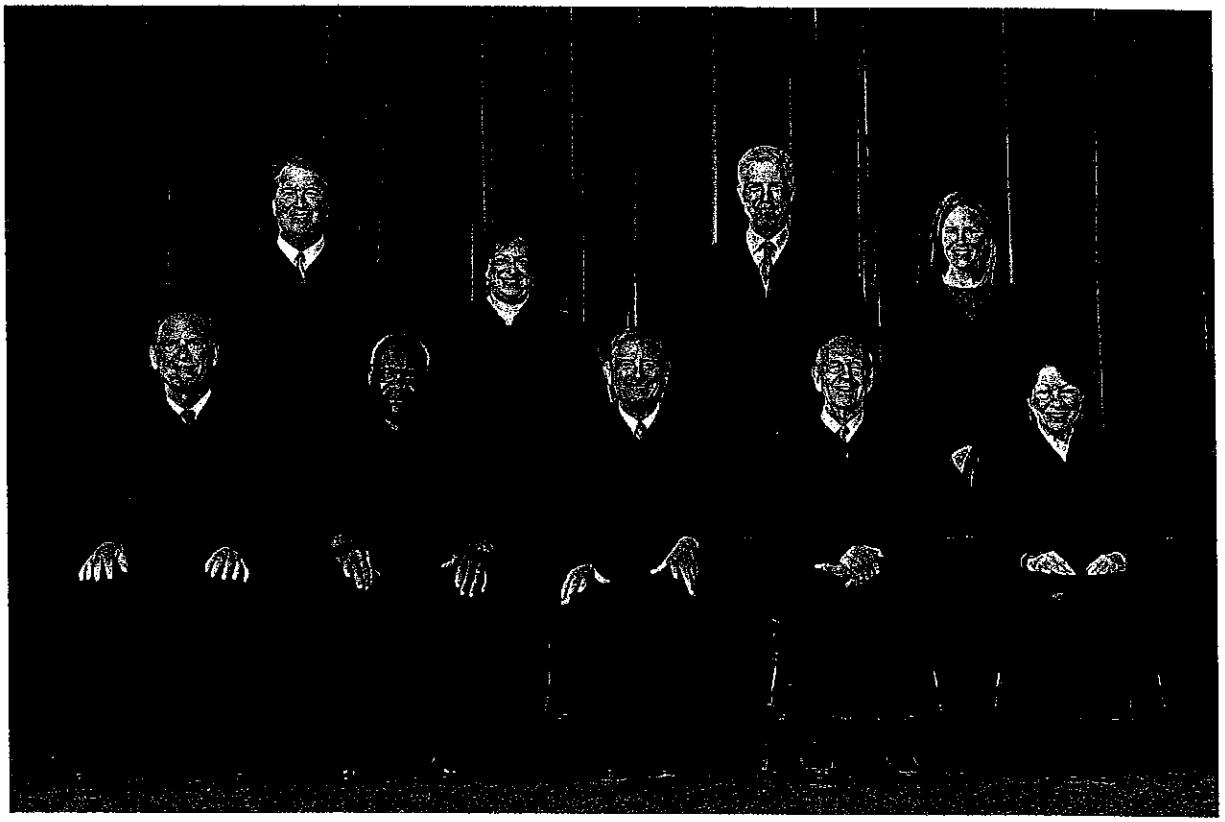
PROTECTING WATER FOR WESTERN IRRIGATED AGRICULTURE

Supreme Court Takes Up Clean Water Act Case

Justice Scalia's WOTUS Test Could Narrow

EPA Jurisdiction Over Navigable Waters



178

Potentially game-changing news for Western farmers and ranchers hit the headlines yesterday when the U.S. Supreme Court announced that the justices will revisit and potentially limit the scope of Clean Water Act (CWA) precedent. The case to be taken up by the Supreme Court centers on a conflict between an Idaho couple, Chantell and Michael Sackett, and the Environmental Protection Agency (EPA). The Sacketts attempted to build a home on land the EPA claims to be federally protected wetlands under the CWA.

As reported in *E&E News*, the Supreme Court in 2012 sided with the Sacketts in their battle for judicial review of an EPA order that stopped them from building a house on their land and threatened fines of more than $30,000 a day. In a short order yesterday, the justices agreed to consider whether the 9th U.S. Circuit Court of Appeals erred when it affirmed that the federal government has permitting authority over the couple's property in northern Idaho.

"The Sacketts' ordeal is emblematic of all that has gone wrong with the implementation of the Clean Water Act," said Damien Schiff, a senior attorney at Pacific Legal Foundation, which represents the Sacketts, in a news release. "The Sacketts' lot lacks a surface water connection to any stream, creek, lake, or other water body, and it shouldn't be subject to federal regulation and permitting."

The interpretation of what qualifies as "waters of the U.S." (WOTUS) under the CWA is the focus of this case.

Justice Anthony Kennedy provided the key vote in the 4-1-4 decision in *Rapanos v. United States* in 2006, where he disagreed with his colleagues on how to determine in which cases the federal government can exercise its CWA authority. In the years since *Rapanos*, federal courts have generally favored Justice Kennedy's "significant nexus" test, which takes a broad view of federal jurisdiction, over Justice Antonin Scalia's narrower definition requiring a wetland to have a continuous surface connection to a regulated water.

Former Justice Kennedy's test had served as the basis for the Obama administration's

179

Clean Water Rule, which the Trump administration later replaced with the Navigable Waters Protection Rule. The Trump rule relied heavily on former Justice Scalia's CWA interpretation. It was struck down by a federal court in Arizona last year, giving the Biden administration a chance to write a brand-new rule.

Yesterday's decision to grant *cert* could provide a fresh perspective of what the language in the CWA really means, one expert told E&E News yesterday.

"They very well could address this whole issue fresh, what we call *de novo*, look at it in light of what the language of the statute really means," said Larry Liebesman, a senior adviser at Dawson & Associates, a consulting firm that specializes in permitting. "With a 6-3 majority conservative, there's a fair chance they may come out with a ruling that's a lot closer to the Scalia interpretation."

Two House Republicans, including Reps. Sam Graves (R-Mo.) and David Rouzer (R-N.C.) called on the Biden EPA to halt the rulemakings until the Supreme Court rules, according to yesterday's article in Bloomberg.

"Given this significant development, the Biden administration should immediately cease its efforts to issue a new WOTUS definition rule that will greatly broaden the federal government's jurisdiction over privately owned land," Reps. Graves and Rouzer said in a joint statement.

In 2019, the Family Farm Alliance submitted extensive formal comments to the EPA and U.S. Army Corps of Engineers in support of the approach to base a new WOTUS rule on former Justice Scalia's plurality decision in the 2006 case *Rapanos v. United States.*

"[T]he plurality's ruling in *Rapanos*, led by Justice Scalia, including important parts of Justice Kennedy's opinion, as the basis for much of the proposed rule, would provide much needed clarity to the definition of WOTUS," the Alliance letter stated.

With *cert* granted in the Sackett case, the Supreme Court could take action in October

180

that removes the need for the Biden Administration to write a brand-new rule for what constitutes WOTUS under the CWA.

The Family Farm Alliance will continue to cover this important new development closely, while also continuing to advocate for irrigated agriculture with the Biden Administration as they proceed with current rulemaking.

We will continue to keep you informed on this and other developments impacting Western irrigated agriculture.

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181