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Can the Farmers Sue Uncle Sam When the Bureau of Reclamation Reduces Deliveries to the Water District?

by Robert H. Abrams

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This case is a very small part of a major saga that has played out in the governance of the Central Valley Project, the largest of all federal reclamation projects. The catalyst for this particular lawsuit is the reduction of contractual water deliveries by the Bureau of Reclamation to the Westlands Water District in order to protect endangered fish species. Here, farmers whose water supplies have been reduced seek a remedy directly against the Bureau of Reclamation and are being met by the defense of sovereign immunity.

ISSUES

Are farmers who have received water from an irrigation district "intended" third-party beneficiaries of that water district's service and repayment contracts with the United States Bureau of Reclamation and, therefore, within the scope of a waiver of sovereign immunity that would otherwise bar

a suit by the farmers against the Bureau of Reclamation?

FACTS

The story of this case has roots stretching back more than a century, to Senator Newlands's vision of federal irrigation projects assisting farmers in reclaiming the arid lands of the West for agriculture. That vision took shape with passage of the Reclamation Act of 1902, launching massive federal construction of dams, reservoirs, and irrigation works that have indeed changed the face of the West. The costs of the federal construction and operation of waterworks were to be repaid (although considerably less than fully) pursuant to long-term contracts. In the earliest stages of the Reclamation Act, the contracts ran directly from the Bureau of Reclamation (Bureau) to the water users. The now-dominant and nearly exclusive model employs water districts, which are quasi-governmental agencies, as interme-

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ORFF ET AL. V. UNITED STATES
OF AMERICA
DOCKET NO. 03-1566

ARGUMENT DATE:
FEBRUARY 23, 2005
FROM: THE NINTH CIRCUIT

Case at a Glance

Farmers in the Westlands Water District lost water when the United States Bureau of Reclamation reduced deliveries to Westlands to meet obligations imposed by the Endangered Species Act. The farmers, claiming that the Bureau breached its obligations, here seek to sue the Bureau directly as "intended" third-party beneficiaries of the Bureau's contract with Westlands.





diaries. The Bureau contracts with the districts, and the districts contract with the water users.

This case involves the Westlands Water District (Westlands) in California that is part of the federal Central Valley Project (CVP), the largest and most extensive of all the reclamation projects. The particular water contract that is at the root of this case was entered into by Westlands and the Bureau in 1963, when the Bureau was in the process of constructing the San Luis Unit of the CVP. The Westlands contract specifies that Westlands shall pay for water delivered and sets quantities of water to be delivered, but the contract language expressly releases the federal government for liability for under-delivery caused by "errors in operation, drought, or any other causes."

For 15 years, there were no major controversies. In 1978, however, the Solicitor of Interior issued an opinion that effectively required the Bureau to deny delivery of water unless the Westlands contract was revised to include repayment of additional construction costs for delivery facilities. The legal wrangling that ensued was instrumental in influencing Congress to include a limited waiver of its sovereign immunity as part of the Reclamation Reform Act of 1982. That law (now codified at 43 U.S.C. § 390uu) waived immunity in a suit "to adjudicate, confirm, validate, or decree contractual rights of a contracting entity and the United States" regarding a reclamation contract.

The current dispute arose in the wake of the Central Valley Project Improvement Act (CVPIA), which was passed in 1992 in an effort to balance competing demands for CVP water, including the demands of fish and wildlife as well as irrigation. Pursuant to that statute and

the Endangered Species Act, the Bureau limited water districts south of the Sacramento-San Joaquin Delta, including Westlands, to 50 percent of the maximum contractual supplies. Westlands, joined by other affected water districts, sued the Bureau. Orff and other Westlands contractors intervened in the litigation. Through an aggressive series of negotiations led by the State of California and the federal government (frequently dubbed the "CalFed process"), by 1995 the dispute between the districts and the Bureau was settled, leaving only the current petitioners as plaintiffs in the suit against the Bureau in United States District Court. The crux of the remaining claim was that the United States was liable to the water users for money damages as a result of the breach of the Westlands contract and that the waiver of immunity contained in § 390uu included the water users as "intended" third-party beneficiaries of the Westlands contract. Eventually the district court ruled in favor of the United States in all regards, finding for it on both the merits and on the issue of immunity. The court of appeals affirmed the immunity ruling, and, as a result, vacated the rulings on the merits as unnecessary advisory opinions in light of the immunity ruling. 358 F.3d 1137 (2004).

CASE ANALYSIS

The legal issue that is before the Court is a narrow one related to the scope of the waiver of sovereign immunity worked by the Reclamation Reform Act. For such decisions, the starting point, and often the ending point as well, is the statutory language. In this context the courts that have considered the issue have created a dichotomy between "intended" beneficiaries and "incidental" beneficiaries, with the former held to be within the scope of the waiver and the latter

excluded. Perhaps importantly, the Tucker Act, another federal statute waiving portions of the United States' sovereign immunity, has been held to allow monetary claims, such as those of petitioners, to be heard, but in the U.S. Court of Federal Claims, and not in district court. Indeed, in the instant case, the district court urged petitioners to do just that.

SIGNIFICANCE

Particularly if this case is affirmed, it is unlikely to have great significance. Users of federal reclamation project water in the vast majority of projects (e.g., projects where the Bureau's contract is with the water district), will be remitted to their remedies against the district under state law, and any actions by the water users against the Bureau will be available only in the Court of Federal Claims. These remedies are not insubstantial. State law governs the relations of water districts, which are quasi-governmental creatures of state law and their constituents, and monetary claims are still open against the United States. Moreover, the water districts are expressly allowed to sue the Bureau, and in that manner vindicate the interests of the water-using collective.

What is left intact by affirmance would be not only the immunity of the federal government vis-à-vis the water users, but also the ability of the water districts to resolve their differences with the Bureau without the interference of potentially fractious or self-interested claims of individual water users. That recognition establishes the significance of a reversal in this case. If the water users are able to sue the Bureau, or intervene in suits by the water districts against the Bureau, the districts will lose their ability to speak authoritatively for the collective that is accorded them under state law, and the Bureau will lose the



availability of a single interlocutor with whom to work to resolve differences.

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