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## Orff v. United States, 125 S. Ct. 2606 (2005)

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large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.” Alaska alleged that the Court should consider the four islands in the Alexander Archipelago connected to each other and the mainland creating juridical bays to the north and south.

The Court assumed, *arguendo*, that they should consider the islands connected as part of a peninsula, but found the waters to the north and south of that peninsula still did not meet the criteria of a juridical bay. Neither the waters on the north, nor the waters on the south formed the requisite well-marked indentations. The Court found these hypothetical bays would not be evident to the eye of a mariner, therefore rejecting Alaska’s juridical bay theory.

Alaska’s second claim was to the submerged lands beneath Glacier Bay within Glacier Bay National Park (formerly Glacier Bay National Monument) (“Park”). These lands are undisputedly part of an inland bay. Alaska would have title to these lands unless the United States could rebut the strong presumption that title to these lands passed to Alaska at statehood. The United States could defeat a future state’s presumed title by setting submerged lands aside as part of a federal reservation. To prevail, the United States must have clearly intended to include submerged lands within the reservation and must have expressed its intent.

The Court found that the United States clearly intended to include the submerged lands under the waters of Glacier Bay when it created the Park in the 1930s. The purposes of the Park’s creation included conservation and scientific study of the glaciers and the wildlife within Glacier Bay, which included studying the submerged lands. The Court also found that the United States expressed its intent through the Alaska Statehood Act (“ASA”). After considering the context within which Congress enacted the ASA, the text of the ASA, and a prior case on the ASA, the Court concluded that the ASA did express the intent of the United States to retain the submerged lands under Glacier Bay when it granted Alaska statehood. The Court held the United States successfully rebutted Alaska’s presumptive title.

The Court concluded by rejecting Alaska’s claims to the submerged lands under Alexander Archipelago and Glacier Bay and directed the parties to prepare and submit to the Special Master a decree for the Court’s consideration.

*Julie M. Schmidt*

**Orff v. United States, 125 S. Ct. 2606 (2005)** (holding that Section 390uu of the Reclamation Reform Act does not waive sovereign immunity from suits directly against the United States, but constitutes a limited waiver to join the United States as a necessary party defendant to

permit a complete adjudication of rights under a reclamation contract).

Francis A. Orff, individual farmers, and farming entities in California ("Farmers") purchased water from the Westlands Water District ("District"). The District received water from the United States Bureau of Reclamation ("Bureau") under a 1963 contract between the District and the Bureau, which specified annual quantities of water that the United States would furnish to the District. The District then supplied water to the farmers. In 1992, the enactment of the Central Valley Project Improvement Act required the Bureau to meet all obligations under the Federal Endangered Species Act ("ESA") and to annually dedicate certain amounts of water to implement fish, wildlife, and habitat restoration. The Bureau concluded that pumps used to deliver water south of the Sacramento-San Joaquin Delta could harm the Sacramento River winter-run Chinook salmon and the delta smelt, both of which were listed as threatened species under the ESA. Therefore, during the 1993 and 1994 water year, the Bureau reduced the contractual delivery of water to the District by 50 percent.

The Farmers brought suit in the United States District Court for the Eastern District of California, alleging that the United States breached its contract with the District by reducing the allocation of water. The district court ruled for the government, and the farmers appealed. The United States Court of Appeals for the Ninth Circuit affirmed. The Farmers appealed to the Supreme Court, maintaining that that they were third-party beneficiaries entitled to enforce the contract and that the United States waived its sovereign immunity in section 390uu of the Reclamation Reform Act.

In affirming the court of appeal's decision, the United States Supreme Court identified two reasons why the lower court properly interpreted section 390uu as not waiving the government's sovereign immunity from suits directly against the United States. First, applying the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign, the Court found terms of art contained in the language of section 390uu, supporting interpreting section 390uu as permitting the traditional requirements of joinder under Fed.R.Civ.P. 19(a). Second, contrasting the language of section 390uu with the broader language of the Tucker Act, which contains express terms waiving immunity from suits against the United States alone, the Court concluded that the proper construction of section 390uu was a limited waiver sovereign immunity, allowing parties to join the United States as a necessary party defendant.

Thus, the Court affirmed the court of appeals decision, holding that the language of section 390uu grants consent to join the United States in an action between other parties when the action requires construction of a reclamation contract and joinder of the United States is

necessary, but it does not permit a plaintiff to sue the United States alone.

*Charles P. Kersch, Jr.*

## UNITED STATES CIRCUIT COURTS

### SEVENTH CIRCUIT

**Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005)** (holding: (1) NRDC failed to show causal connection between compliance with the EPA's General Permit and violation of the Clean Water Act; (2) EPA's General Permit did not violate the Clean Water Act requirement for public notice and public hearing; (3) the EPA complied with the Endangered Species Act when issuing the General Permit; and (4) a stay of judgment on whether Clean Water Act permit requirements affected oil and gas companies).

The Clean Water Act ("CWA") requires that the Environmental Protection Agency ("EPA") or authorized states issue permits to dischargers of pollutants. The EPA created a General Permit ("GP") for storm water discharges from both large and small construction sites. This GP only applied in jurisdictions where the EPA had not authorized the state or Indian Tribe to administer its own permitting program. Operators of large and small construction sites who desired to discharge storm water under this GP had to submit a Notice of Intent ("NOI") to the EPA. Next, they had to create, maintain, and implement a Storm Water Pollution Prevention Plan ("SWPPP"). Finally, they had to implement best management practices to ensure compliance with water quality standards.

The National Resources Defense Council ("NRDC") and several organizations filed petitions for review of the EPA's Final Action creating the GP in the U.S. Court of Appeals for the 7th Circuit. The NRDC alleged the GP violated the CWA by allowing discharge of pollutants without ensuring the discharge satisfied the standards set by the CWA. The NRDC also alleged the GP failed to provide a public hearing for complaints and that it violated the Endangered Species Act ("ESA"). Several organizations representing business interests in the oil and gas industry (collectively "Oil and Gas") challenged a regulation contained in the EPA GP, which required permit authorization for oil and gas companies and conflicted with a prior statute passed by Congress that granted the oil and gas companies some immunity from EPA regulation.

The NRDC represented members in potentially affected areas, but it failed to show a link between pollution from local construction activities and its members' reduced aesthetic and recreational enjoyment of