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Orff v. United States, 358 F.3d 1137 (9th Cir. 2004)

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not clearly err in rejecting Friends' claim. Therefore, the Ninth Circuit affirmed the district court's ruling in part, reversed in part and remanded the case for further proceedings.

Arthur R. Kleven

Orff v. United States, 358 F.3d 1137 (9th Cir. 2004) (holding that farmers were not third-party beneficiaries to a contract between a water district and the federal government, where the water district received water from a water management project, and the farmers thus could not utilize a statutory waiver of sovereign immunity allowing suit for intended third-party beneficiaries or other parties to a contract).

The Westlands Water District ("Westlands") brought suit in California against the United States in the United States District Court for the Eastern District of California challenging a reduction in its allocation of Central Valley Project ("CVP") water as violating a 1963 contract. Landowners and water users (collectively "Farmers") and the Natural Resources Defense Council ("NRDC") intervened in the suit. In 1995, Westlands dismissed its complaint. The Farmers remained in the suit and filed an amended complaint. In 1998, the district court dismissed most of the Farmers' claims. The district court initially decided that the Farmers acted as a contracting entity and the government waived sovereign immunity. It then determined that it had jurisdiction to hear the remaining claims. It threw out three of the Farmers' claims and determined that the fourth claim raised a triable issue of fact. In 2000, pursuant to a motion for reconsideration, the district court altered its position on the sovereign immunity issue. It entered a judgment in favor of the federal government in 2000. The Farmers appealed to the United States Court of Appeals for the Ninth Circuit. NRDC and Westlands filed briefs as interveners in the appeal.

The CVP subsists as the nation's largest federal water management project. Westlands receives water from the CVP pursuant a 1963 contract with the United States. A previous case in 1986 ("*Barcellos I*") upheld the enforceability of the 1963 contract. In the early 1990s, the government listed the Sacramento River winter-run chinook salmon and delta smelt of the Sacramento-San Joaquin Delta as threatened species under the Endangered Species Act ("ESA"). The National Marine Fisheries Service found that the operation of the CVP jeopardized these species. The Bureau of Reclamation ("Bureau") reduced Westlands contractual supply of water by fifty percent. The Bureau acted under authority of the ESA and the Central Valley Project Improvement Act. The Farmers brought suit claiming that the reduction violated the 1963 contract.

The court first addressed the sovereign immunity issue. It asserted that it strictly interprets the extent of a waiver of sovereign immunity in favor of the government. Farmers argued that issue and claim preclusion barred the government's sovereign immunity defense.

Issue preclusion requires litigated issues be identical to a previous case. The court held that in *Barcellos I*, the district court rejected the sovereign immunity claim based on the *ultra vires* doctrine and the McCarran Amendment. In this case, the Farmers did not allege the government acted in an *ultra vires* manner. The court also determined that the McCarran amendment did not apply. Claim preclusion requires the cases arise out of the same cause of action. The court determined that the issue in this case differed from *Barcellos I* because it involved a reduction in water based on a listing under the ESA, which occurred after the *Barcellos I* decision. The court dismissed the Farmers' assertion that claim and issue preclusion barred the government's sovereign immunity defense.

The court then addressed whether a statutory waiver of sovereign immunity existed. It determined that the Farmers could proceed with their claims if a waiver of sovereign immunity under 43 U.S.C. Section 390uu applied to them. Under section 390uu, the government waives sovereign immunity in contract suits pursuant to federal reclamation law that confirms, decrees, adjudicates, or validates the contractual rights of a contracting entity and the United States. The Farmers claimed that their status as intended third-party beneficiaries of the 1963 contract made them contracting entities. The court held that an explicit reference to a third party in a contract was not dispositive of a party's status as an intended beneficiary. It interpreted a portion of the contract that referred to individual water users as not creating enforceable rights. Instead, the contract created enforceable rights with Westlands. The court conceded that various sections of the contract mentioning individual users showed that the contracting parties entered into the contract with the Farmers in mind. However, that was not sufficient to create intended third-party beneficiary status on the Farmers. The court also rejected the Farmers' argument that the existence of subsequent contracts referencing the 1963 contract failed to create third-party beneficiary status.

The Farmers then asserted that they sued the government as trust beneficiaries. The claim rested on a theory that Westlands served as a trustee for the Farmers and that Westlands failed to pursue a claim on their behalf. The court stated that a beneficiary of a trust generally may not sue on behalf of a trust unless a trustee will not pursue a cause of action that a trustee should bring against a third party on behalf of the trust beneficiary. In this exception, the beneficiary of the trust may bring an action joining the trustee and the third party. The beneficiary may sue the third parties who directly acted with the trustee in the breach of the trust. The Farmers did not seek judicial compulsion against Westlands, nor did they allege that the government directly participated in the breach of the trust. Thus, the court determined that the Farmers did not sue as trust beneficiaries.

The court concluded by vacating the district court's rulings on the merits. It declared that without a waiver of sovereign immunity, the court had no jurisdiction to decide any issues on the merits. The court noted that in some instances, the merits are intertwined with the

jurisdictional issues so much so that the resolution of the jurisdictional issue depends on the merits. However, in this case, it did not need to decide the merits to determine that it had no jurisdiction to hear the case.

Adriano Martinez

United States v. Appel, No. 02-57182, 2004 U.S. App. LEXIS 3006 (9th Cir. Feb. 2, 2004) (holding the Environmental Protection Agency did not err in utilizing the ordinary high water mark methodology to set jurisdictional boundaries of the Ventura River under the Clean Water Act).

John F. Appel challenged the United States Environmental Protection Agency's ("EPA") use of the ordinary high water mark ("OHWM") methodology to set jurisdictional boundaries of the Ventura River as it traversed Appel's property. The United States District Court for the Central District of California approved the OHWM method and Appel appealed to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit held that to determine a river's jurisdictional boundaries under the Clean Water Act, the EPA may use either (1) the ordinary high water mark, or (2) the limit of any wetlands. The EPA used the high water mark because Appel had bulldozed most of the area near the river on his property, rendering any wetlands indiscernible. The court reasoned that the CWA commands the government to eventually settle upon a single methodology. A court's task is to determine whether the method is supported by the evidence. Because that was what occurred in the initial case, the court found no error.

Appel argued that the district court relied on "flood flows" and he proffered an expert witness to prove that the ordinary flow of the river and not the peak flow or flood stage (so as to include overflow on the flood plain) determines the high water mark. The government also proffered an expert witness. The witness observed the physical features of the river through field study, aerial photographs, and soil samples to determine the location of the ordinary high water mark. The court held that the district court was not in error when it chose to credit the testimony of the government witness and conclude that "flood flows" were not used in the determination. Thus, the Ninth Circuit affirmed the district court's ruling.

Christina Valerio