No. 03-1566

In The
Supreme Court of the United States

FRANCIS A. ORFF, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT WESTLANDS WATER DISTRICT

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QUESTION PRESENTED

Respondent Westlands Water District addresses the following question presented by this case:

Whether the court below correctly determined that the Petitioner landowners within Westlands Water District are not intended third-party beneficiaries of Westlands' 1963 water service contract with the United States, and that the United States has not waived its sovereign immunity pursuant to 43 U.S.C. § 390uu against the landowners' claims that the United States breached the 1963 contract.

CORPORATE DISCLOSURE STATEMENT

Respondent Westlands Water District has no parent corporation or a nonwholly owned subsidiary.

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MISCELLANEOUS

STATEMENT OF THE CASE

This case involves assertions by various landowners within Westlands Water District ("Westlands") that they are intended/direct beneficiaries to a 1963 Water Service Contract ("1963 Contract") between Westlands and the United States. The landowners, who are Petitioners, assert that this third-party status is sufficient to defeat the United States' assertions of sovereign immunity in its breach of contract and declaratory relief action against the United States. The Petitioners seek damages from the United States due to the United States' failure to meet its contractual water delivery commitments to Westlands. The Petitioners depend upon this water to sustain their farming activities, and therefore assert that the United States' failure to deliver this water to Westlands harmed them.

The backdrop against which this dispute has played out is the massive Central Valley Project ("CVP"). The CVP is the largest federal water management project in the United States. *Westlands Water District v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003); *see generally Dugan v. Rank*, 372 U.S. 609, 612 (1963);[1] *Ivanhoe Irrigation District*

[1] The grand design of the Project was to conserve and put to maximum beneficial use the waters of the Central Valley of California, . . . comprising a third of the State's territory, and the bowl of which starts in the northern part of the State and, averaging more than 100 miles in width, extends southward some 450 miles. The northern portion of the bowl is the Sacramento Valley, containing the Sacramento River, and the southern portion is the San Joaquin Valley, containing the San Joaquin River. The Sacramento River rises in the extreme north, runs southerly to the City of Sacramento and then on into San Francisco Bay and the Pacific Ocean. The San Joaquin River rises in the Sierra Nevada northeast

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v. McCracken, 357 U.S. 275, 279-84 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 726-31 (1950). Although initially planned and envisioned by the State of California, the United States took over and began developing the CVP in 1935 pursuant to the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (June 17, 1902), as amended by Pub. L. No. 66-212, 41 Stat. 605 (May 20, 1920). *See Westlands Water District v. United States*, 337 F.3d at 1095. As summarized by the Ninth Circuit,

> The CVP's purpose is to "improv[e] navigation, regulat[e] the flow of the San Joaquin River and the Sacramento River, control[ ] floods, provid[e] for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy." Act of August 26, 1937, Pub. L. No. 75-392, 50 Stat. 844, 850. To accomplish the project's purposes, CVP's construction includes a series of many dams, reservoirs, hydro-power generating stations, canals, electrical transmission lines, and other infrastructure. *Gerlach Live Stock, Co.*, 339 U.S. at 733.

> of Fresno, runs westerly to Mendota and then northwesterly to the Sacramento-San Joaquin Delta where it joins the Sacramento River. The Sacramento River, because of heavier rainfall in its watershed, has surplus water, but its valley has little available tillable soil, while the San Joaquin is in the contrary situation. An imaginative engineering feat has transported some of the Sacramento surplus to the San Joaquin scarcity and permitted the waters of the latter river to be diverted to new areas for irrigation and other needs.

Dugan v. Rank, 372 U.S. at 612.

Westlands Water District v. United States, 337 F.3d at 1095-96; *see also California v. Sierra Club*, 451 U.S. 287, 291 (1981) ("[T]he Central Valley Project[ ] is designed in part to provide a constant source of water for irrigation to the Central Valley of California.").

The United States Bureau of Reclamation (hereinafter either "Bureau" or "Reclamation"), a division of the Department of the Interior, operates the CVP, including diverting and storing water from various sources and delivering it to contract holders for beneficial use. *Westlands Water District v. United States*, 337 F.3d at 1096. The California State Water Resources Control Board ("SWRCB") grants the permits for water appropriation for the CVP. *Id*. at 1096.

Westlands is a local governmental entity formed under and governed by Division 13 of the California Water Code, known as the "California Water District Law." Cal. Water Code § 34000 *et seq*. Westlands purchases water from the Bureau pursuant to the 1963 Contract, a CVP water service contract. *See* Joint Appendix ("J.A.") 30-61. In particular,

> Westlands is a California water district located within Fresno and King[s] Counties. In 1963, Westlands entered into a contract with the Bureau for water from the San Luis Unit of the CVP, which diverts water from the Sacramento-San Joaquin River Delta via the Delta-Mendota Canal. Westlands is the largest contractor for water from the San Luis Unit [citation omitted] with a contractual entitlement to purchase 900,000 acre feet of water annually. . . .

Westlands Water District v. United States, 337 F.3d at 1097. As recognized by the court below, "[t]he validity and

enforceability of the 1963 contract was upheld in 1986 pursuant to a Stipulated Judgment in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist*., (E.D. Cal.) (No. CV 79-106-EDP) ("*Barcellos*"), which resolved litigation that arose out of the government's assertion in 1978 that the 1963 contract was invalid. The *Barcellos* judgment required the government to perform the 1963 contract." Pet. App. 3a.

Petitioners are landowners within Westlands who have received water from the Bureau since the late 1960's and early 1970's. 1 E.R. 141; *see also* 1 E.R. 37[2] ("The . . . [Petitioner landowners] own and operate in the aggregate approximately 60,000 acres of farmland located in . . . [an area] of the District."); *O'Neill v. United States*, 50 F.3d 677, 680 (9th Cir. 1995) (discussing historical delivery of water to landowners within an area of Westlands).

A. Proceedings in This Case

The present case "is another in a long line of cases involving the Central Valley Project. . . . " Pet. App. 2a.[3] Westlands commenced this litigation in 1993 by filing its complaint for damages and injunctive relief against the Bureau and other defendants. 1 E.R. 1. Various parties

[2] Westlands filed two volumes of Excerpt of Record with the 9th Circuit. Citations from those two volumes will hereinafter be referenced as "1 E.R." or "2 E.R."

[3] *See, e.g., Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853 (9th Cir. 2004); *Westlands Water District v. United States*, 100 F.3d 94 (9th Cir. 1996); *O'Neill v. United States*, 50 F.3d 677; *Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994); *Westlands Water District v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993); *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814 (9th Cir. 1990); *Westlands Water District v. United States*, 700 F.2d 561 (9th Cir. 1983).

intervened in the litigation, including the Petitioners, who were allowed to intervene as plaintiffs. 1 E.R. 21; s*ee generally Westlands Water District v. United States*, 850 F.Supp. 1388, 1393-99 (E.D. Cal. 1994). The litigation, itself, was predicated upon the impacts of the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600 (Oct. 30, 1992) (hereinafter "CVPIA") and related actions. These circumstances affected Westlands and its landowners through the reallocation of water from intended uses within Westlands to general environmental purposes, and through the substantial increase in the per-acre-foot cost of CVP contract water.

Subsequent to the filing of this case, the United States, the State of California, and various "stakeholders," including Westlands, entered into negotiations to address the broad water supply and environmental issues emanating from the enactment of the CVPIA and related issues. These circumstances had, among other things, given rise to the litigation. On December 15, 1994, Principles for Agreement on San Francisco Bay-Delta Water Quality Standards Between the State of California and the Federal Government were entered into. This Agreement, coupled with other related developments that addressed some of the most significant issues that had prompted Westlands to initiate the original underlying lawsuit, resulted in Westlands filing a motion seeking dismissal of its action without prejudice. 1 E.R. 138-39. The district court granted Westlands' motion to dismiss and designated the Petitioner landowners as "Plaintiffs" in future proceedings. 1 E.R. 29. The Petitioners then filed a Second Amended Complaint including allegations that the United States violated their statutory and contractual rights in failing and refusing to deliver water to them. 1 E.R. 49.

The Petitioners ultimately sought damages based on federal reclamation law, trust law, state water rights law and contract law.[4] 1 E.R. 197-98.

In response, the United States argued that the Petitioner landowners lacked standing to assert such rights since they did not have a contractual relationship with the United States. 1 E.R. 198. By an opinion issued in June 1998 (1 E.R. 186), the district court initially rejected this argument and ruled that the Petitioners could assert contractual rights as third-party beneficiaries to Westlands' 1963 Contract. 1 E.R. 203. Based on its determination of the Petitioners' status, the district court found that it had subject matter jurisdiction, and proceeded to rule on the state appropriative water rights and trust claims. 1 E.R. 203, 204, 231 & 233. Those claims, the district court held, were dependent on the 1963 Contract and could not be asserted independently from that contract. 1 E.R. 223 & 233. The district court also dismissed for lack of subject matter jurisdiction all claims not arising under the 1963 Contract. 1 E.R. 217.[5]

After the district court issued its June 1998 Opinion and Order, the Ninth Circuit Court of Appeals issued its opinion in *Klamath Water Users Protective Assoc. v. Patterson,* 204 F.3d 1206 (9th Cir. 1999), *cert. denied*, 531 U.S.

[4] The Petitioner landowners also asserted claims for rescission of the 1963 Contract based on the United States' alleged breach of contract and claims arising from surcharges imposed under section 3407 of the CVPIA. 1 E.R. 198.

[5] Upon Westlands' special appearance, the district court granted Westlands' motion to modify the June 5, 1998 Opinion and Order. 1 E.R. 306. Accordingly, the district court struck from its June 1998 Opinion and Order the sentence: "Any judgment will bind Westlands and Westlands' members, including Plaintiffs." 1 E.R. 306.

812 (2000) ("*Klamath*"). In *Klamath*, the Ninth Circuit held that irrigators in the United States' Klamath Project are not intended third-party beneficiaries of a contract between a dam operator and the Bureau of Reclamation. *Id*. at 1211. The *Klamath* decision prompted the United States to seek reconsideration of the district court's ruling according the Petitioners the status of third-party beneficiaries under the 1963 Contract. Pet. App. 26a-27a.

The district court reconsidered its earlier determination of the Petitioners' status in light of the *Klamath* decision, reversed its earlier finding, and ruled that the Petitioners were not intended third-party beneficiaries of the 1963 Contract. Pet. App. 45a. The district court concluded that, therefore, the Petitioners lacked standing to bring their contract claims before the court. Pet. App. 34a. Accordingly, it dismissed the Petitioners' contractual claims for lack of subject matter jurisdiction. Pet. App. 46a.[6]

On August 11, 2000, the district court entered its Final Judgment in the underlying case, ruling that the Petitioners were not intended third-party beneficiaries of

[6] The court did provide the Petitioners 10 days in which to notify the court whether they wished their money damages claims transferred to the Court of Claims. Pet. App. 46a. Upon the Petitioners' request to vacate the April 12, 2000 memorandum opinion, the court declined the request to vacate, but did give the Petitioners five days in which to notify the court whether they wished the case transferred to the Court of Claims. 2 E.R. 352. The Petitioners did not so notify the court, and the district court's Final Judgment concluded: "Since April 2000, Plaintiffs have been given three opportunities to have the case transferred to the Court of Claims. Each time, they have objected by purporting to impose unilateral conditions on any transfer. The re-argument and objections by Plaintiffs are OVERRULED." Pet. App. 22a.

the 1963 Contract and that the district court lacked subject matter jurisdiction. Pet. App. 21a-22a. Notwithstanding the dismissal and determination that the district court lacked subject matter jurisdiction on the contractual claims, the district court ultimately entered Final Judgment in favor of the United States on the merits of the Petitioners' water rights and trust claims. Pet. App. 21a-22a. The Petitioners appealed and Westlands intervened out of concern that its rights could be affected. Pet. App. 5a.

In the decision now before the Court, the Ninth Circuit upheld the district court's conclusion that *Klamath* compelled dismissal of the Petitioners' action. The Ninth Circuit confirmed its prior articulation of a rule that in dealing with the question of intended third-party beneficiary status with respect to Reclamation contracts, a clear intent to provide such status must be evidenced within the language of the contract. In this regard, the Ninth Circuit refused to look at the history and circumstances surrounding the contract. Pet. App. 17a. In addition, due to the district court's lack of jurisdiction, the Ninth Circuit concluded that it must "vacate as nullities the district court's rulings on the merits of the appropriative water rights, trust, and surcharge claims." Pet. App. 18a. Given the lack of subject matter jurisdiction, the Ninth Circuit expressly noted: "we have had no need to explore the merits of those claims." Pet. App. 19a.

B. Historical Background: The California Water Rights System and Federal Reclamation Law

The Bureau is like any other applicant for water and water rights in California and can only obtain rights to

divert and deliver water within Reclamation projects through the application of relevant provisions of state law. *California v. United States*, 438 U.S. 645, 652, 653 n.7, 678 (1978). California's water right system is a hybrid system, recognizing both riparian[7] and appropriative[8] water rights. *People v. Shirokow*, 26 Cal.3d 301, 307 (1980). It bears emphasis that both types of water right are usufructuary in nature, which is a right to the *use* of the water as opposed to the *corpus* of the water. *Kidd v. Laird*, 15 Cal. 161, 180 (1860); *State of California v. Superior Court of Riverside County*, 78 Cal.App.4th 1019, 1032 (2000).[9] Specifically, Cal. Water Code § 102 provides that "[a]ll water within the State is the property of the people of the State, but the right to the *use* of the water may be acquired by appropriation in the manner provided by law." (Emphasis added.)

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[7] Upon statehood, California adopted the common law of England, thereby incorporating the riparian doctrine. *United States v. State Water Resources Control Board*, 182 Cal.App.3d, 82, 101 (1986). The riparian doctrine confers upon the owner of land, adjacent to a water course, the right to divert the water flowing in that watercourse for use on riparian lands. *Id*. All riparians share in common ownership in the water course and, in times of shortage, must reduce usage proportionately. *Id*. With limited exception, appropriative rights are subordinate to riparian rights such that in times of shortage, riparians are entitled to fulfill their needs before appropriators are entitled to any water. *Id*. at 101-102, citing *Meridian, Ltd. v. San Francisco*, 13 Cal.2d 424, 445-47 (1939).

[8] *Colorado v. New Mexico*, 459 U.S. 176, 179 n.3 (1982) ("Under the prior appropriation doctrine, recognized in most of the western states, water rights are acquired by diverting water and applying it for a beneficial purpose.")

[9] *See also United States v. Gerlach Live Stock Co*., 339 U.S. at 745 (in discussing the development of the riparian rights doctrine, this Court noted that "the law followed the principle of equality which requires that the corpus of flowing water become no one's property. . . . ")

For the operation of the CVP, the United States, by and through the Bureau, obtained only permits for appropriative water rights. In California, there are two distinct categories of appropriative water rights: pre-1914 rights and rights obtained through a permit procedure. Pre-1914 appropriative water rights are those appropriative water rights initiated prior to California's Water Commission Act of 1913.[10] Prior to 1914, one could acquire appropriative water rights either by diverting and putting water to beneficial use[11] or by posting notice, taking water from the source, and applying it to some beneficial use. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. The right obtained was a right appurtenant to the

[10] In 1913, the California Legislature enacted the Water Commission Act. Stats. 1913, ch. 586. The Water Commission Act was codified in 1943 as Division 2 of the California Water Code. Today, and since 1914, any person or entity seeking an appropriative water right is required to file an application to appropriate water with the SWRCB. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102.

[11] In order for a "use" of water to be appropriative, it must be "beneficial." The "beneficial use," not just "use," is always the measure of an appropriative water right. Beneficial uses include domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, and mining and power purposes, among others. Cal. Water Code § 1257; Cal. Code Regs. tit. 23, §§ 659-672. In California, since 1928, a beneficial use must also be "reasonable" in order for it to support an appropriative right. The California constitution provides that the right to water is "limited to such water as shall be reasonably required for the beneficial uses to be served. . . . " Cal. Const. art. X, § 2. The rule enunciated in this constitutional provision applies to riparian and appropriative rights alike. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 106, citing *Peabody v. City of Vallejo*, 2 Cal.2d 351, 383 (1935).

lands identified in the notice as being within the place of use.[12]

Subsequent to 1914, one could no longer obtain a water right through mere notice and use but, rather, one needed to instead file an application for the appropriation of water with the State of California. This new statutory scheme provided the exclusive method for acquiring appropriative water rights in California. Cal. Water Code § 1225; *Crane v. Stevinson*, 5 Cal.2d 387, 398 (1936); *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. Under this statutory scheme, one who seeks to appropriate water files an application with the SWRCB seeking a permit to authorize the construction of the works necessary for the diversion of the water and the taking and use of water sought therein. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. Once the SWRCB issues the permit, the permit holder has the right to take and use water in accordance with the permit. Cal. Water Code § 1381; *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102.

Upon compliance with the permit terms, the SWRCB issues a license, which is the "final document" in the process, confirming the appropriative right acquired.

[12] Indeed, the very concept that appropriative water rights are real property in California stems from the proposition that appropriative water rights are incidental and appurtenant to land. *See Inyo Consolidated Water Co. v. Jess*, 161 Cal. 516, 520 (1911); *Palmer v. Railroad Commission*, 167 Cal. 163, 173 (1914). That appropriative water rights are appurtenant to land distinguishes them from property rights that are held "in gross." Rights held in gross are generally those that are "neither appendant nor appurtenant to land," but instead "annexed to a man's person." Black's Law Dictionary 782 (6th ed. 1994).

United States v. State Water Resources Control Board, 182 Cal.App.3d at 102. The actual water right, however, is perfected only by actual use on the lands identified within the permit as the place of use, and within a reasonable time of the granting of the permit, assuming the exercise of due diligence. Cal. Water Code §§ 1396, 1397. The date of priority relates back to the date that the application was accepted by the State. Cal. Water Code §§ 1450, 1455. The right obtained through the statutory process remains a right appurtenant to the lands comprising the place of use identified in the permit/license.[13] While an appropriative right, unlike a riparian right, can be separated from the land to which it was initially attached, this can be done only pursuant to the process set forth within the California Water Code. Cal. Water Code § 1702 (before a change can be approved the SWRCB must find "that the change will not operate to the injury of any legal user of the water involved.").

The appropriative right becomes appurtenant to the land on which the water is used. *Wright v. Best*, 19 Cal.2d 368 (1942); *Inyo Consolidated Water Co. v. Jess*, 161 Cal. at 520; *Tulare Irr. Dist v. Lindsay-Strathmore Irr. Dist*, 3 Cal.2d 489, 546-47 (1935); *Joerger v. Pacific Gas & Electric Co*., 207 Cal. 8, 25-26 (1929); *Senior v. Anderson*, 138 Cal. 716, 723 (1903). The appurtenancy requirement means that the measure of the water right itself relates directly to actual beneficial use on specified lands for specified

[13] An application to appropriate water requires the identification of, among other things, a "place of use" of the water sought to be diverted. Cal. Water Code § 1260(f). Where the holder of an appropriative water right seeks to change the place of use of the water diverted, the holder must file a petition with the SWRCB requesting the change. Cal. Water Code § 1701.

purposes. "An appropriator's right is limited to such quantity . . . as he may put to a useful purpose upon his land within a reasonable time, by use of reasonable diligence. . . . " *Felsenthal v. Warring*, 40 Cal.App. 119, 133 (1919). *See also Smith v. Hawkins*, 120 Cal. 86, 87 (1898); *Crane v. Stevinson*, 5 Cal.2d 387; *California Water Service Co. v. Edward Sidebotham & Sons, Inc.*, 224 Cal.App.2d 715, 727 (1964). A permit is not an appropriative water right. Indeed, an appropriation is incomplete and there is no vested "water right" unless and until waters have been put to beneficial use. *Madera Irr. Dist. v. All Persons*, 47 Cal.2d 681, 688-91 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); Hutchins, *The California Law of Water Rights* 100 (1956). The permit bestows a privilege; beneficial use gives rise to a right.

The law in most of the Reclamation States, regarding the appurtenant nature of water rights, is similar to the law in California. At its heart is a requirement that a right to use water be perfected through actual use for specified purposes on specified lands.[14] The right acquired is a real

[14] *See, e.g.*, Or. Rev. Stat. § 540.510(l) ("all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used. . . . "); Nev. Rev. Stat. § 533.040(l) (" . . . any water used in this state for beneficial purposes shall be deemed to remain appurtenant to the place of use."); N.M. Stat. § 72-1-2 (" . . . all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water . . . "); Ariz. Rev. Stat. § 45-141(B) (" . . . [a]n appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant . . . "); Idaho Code § 42-101 (" . . . such [water] right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ");

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property right and is incidental and appurtenant to these specified lands. *Fudicar v. East Riverside Irr. Dist.*, 109 Cal. 29, 36-37 (1895); *San Francisco v. County of Alameda*, 5 Cal.2d 243, 247 (1936); *Locke v. Yorba Irr. Co.*, 35 Cal.2d 205, 211 (1950).

Congress chose to adopt this rule of Western water law for Reclamation projects. Section 8 of the 1902 Reclamation Act, definitively interpreted by this Court in *California v. United States*, 438 U.S. 645, provides as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof, [*Provided, T]hat the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right*.

Pub. L. No. 57-161, 32 Stat. 388, 390 § 8 (June 17, 1902) (codified as amended at 43 U.S.C. §§ 372, 383) (emphasis

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Wash. Rev. Code § 90.03.240 ("Upon the final determination of the rights to the diversion of water it shall be the duty of the department to issue to each person entitled to the diversion of water by such determination, a certificate under his official seal, setting forth . . . the land to which said water right is appurtenant . . . ").

added). Reclamation law, therefore, just like State law, requires that a right to water be limited to beneficial use on appurtenant lands.

These fundamental concepts of Western and Reclamation water law drove the early contracting for water under the Reclamation Act of 1902. In those early situations, a farmer/landowner would "enter" onto lands with the intent of either homesteading or otherwise perfecting a grant of land. Assuming compliance with all of the provisions within the underlying statutory provisions associated with the grant or patent, the patent would issue. *See, e.g.*, Act of August 9, 1912, ch. 278, 37 Stat. 265; Act of February 15, 1917, ch. 71, 39 Stat. 920. In those situations the grant would include a right to Reclamation project water, which would be appurtenant to lands to which it had been previously applied for beneficial use. *See, e.g.*, Act of August 9, 1912, ch. 278, 37 Stat. 265. That right was usually perfected through a contract between the farmer/landowner and the United States. *See, e.g.,* Act of August 9, 1912, ch. 278, 37 Stat. 265; Act of February 15, 1917, ch. 71, 39 Stat. 920. To the extent a district or association was involved, prior to 1926, its role was generally limited to the operation of facilities and the collection of fees to pay for operation and maintenance of these facilities. The perfection of the water right, in many of these cases, predated the formation of the district or association or otherwise proceeded under laws that may be different from those at issue in this case. In those situations the landowner might hold a more direct interest in the underlying vested right to water, with a district's interest dependent

on state law considerations and other relevant circumstances.[15]

Since 1926, by statute, a contract between Reclamation and an irrigation district organized under state law has been a prerequisite to delivery of water by any new Reclamation project. 43 U.S.C. § 423e. This change in the law resulted from a financial crisis that faced a number of Reclamation projects in the early 1920's. A 1924 "fact finder's report" commissioned by Congress described the nature of the difficulties facing early Reclamation projects. *See* S. Doc. No. 68-92 (1924) ("Report"). Among the problems noted were: underestimates of construction costs, inadequate consideration of whether the crops produced could support the costs of construction, farmers' inexperience with irrigation, locating projects based on politics instead of feasibility, unrealistic payment schedules, failure to calibrate repayment with the relative productivity of soils in different areas, and a depression in the farm economy. Report at xi-xiv. The Report proposed reforms to address these problems.

One such reform was an increased role for local irrigation districts or water users' associations. Report at

[15] The water rights associated with some of the districts which have filed as *amicus curiae* on behalf of Petitioners, including those on the Klamath Project, may well have developed in the manner outlined above. The rights of individual landowners and farmers in these situations were dealt with in *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); and *Nevada v. United States*, 463 U.S. 110 (1983). Those cases did not deal with the rights of the landowners vis-à-vis their respective water districts. As with the water rights and parties involved here, the relationship between water rights, districts and landowners involves consideration of provisions of state law and historical circumstances that are not necessarily uniform in all situations.

103-108. The Report's authors believed that local control would encourage a sense of local responsibility, as well as increase efficiency. Thus, the Report observed:

> Not a few of the ills which have beset the Federal irrigation projects may be traced to the feeling that they are essentially governmental ventures for which the farmer has little or no responsibility, and that in any event the Government will protect the farmer from serious consequences, even of his own neglect. The management of all projects should be turned over to water users' associations just as soon as two-thirds of the units under the project, or division of a project, have been covered by water contracts with the Federal Government.

Report at 106. The Report discussed the differences between an irrigation district and a water users' association, but found that both forms could be useful in addressing the problems of Reclamation projects. Report at 107. It noted as the key difference that "all the lands belonging to the district are jointly liable for the project debts," and that generally a district may impose a tax to collect project costs from all lands in the district. *Id*.

The Report included proposed legislation which, among other things, provided "[t]hat hereafter no moneys shall be expended for construction on account of any new project or any new division of a project until an appropriate repayment contract, in a form approved by the Secretary, shall have been properly executed by a district or districts organized under State law, embracing the lands irrigable thereunder. . . . " Report at 205.

On December 5, 1924, Congress adopted the Second Deficiency Act, 1924 ("Fact Finders' Act"), ch. 4, 43 Stat.

672, 702 (codified at 43 U.S.C. § 500), providing, *inter alia*, that as a condition of receiving various benefits of that legislation including debt relief, a water users' association or irrigation district must assume responsibility for the "care, operation and maintenance of all or any part of the project works . . . " and that "thereafter the United States, in its relation to [the] project, shall deal with a water users' association or irrigation district. . . . " 43 U.S.C. § 500.

In 1926, Congress enacted further reforms in the Omnibus Adjustment Act, Pub. L. No. 69-284, 44 Stat. 636 (May 26, 1926) ("1926 Act"), aimed at the "rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis." 44 Stat. 650, 43 U.S.C. § 423f. In particular, section 46 of that Act required that Reclamation's future dealings concerning deliveries of water would be through contracts with irrigation districts organized under State law:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, . . .

1926 Act, 44 Stat. 636, 649; Act of July 11, 1956, 70 Stat. 524 (codified at 43 U.S.C. § 423e).[16]

This irrigation district contracting requirement addressed the concerns articulated in the "Fact Finder's Report" in two ways. First, it placed distance between the federal government and the individual farmer, and thereby diminished the adverse consequences of federal "paternalism." Report at 6; 43 U.S.C. § 500. Second, the district contract requirement enhanced the prospects for repayment of Reclamation funds used for costs of construction. An irrigation district (or a water district) may collect the costs as a tax on the lands benefited. Liability is joint, so repayment does not depend on the success of each farmer. Report at 107. Instead, the repayment risk is spread over many farmers by means of "a 'firm' contract . . . with a responsible irrigation district or other local public or semi-public organization." *United States v. 277.97 Acres of Land*, 112 F.Supp. 159, 164 (S.D. Cal. 1953). Requiring landowners to deal with the United States through a district as the contracting entity thus was perceived to place and maintain the projects "upon a sound operative and business basis." *Id*. at 163.

The United States obtains its right to divert water for Reclamation projects pursuant to state law and the use of water must comport with state law unless state law is

[16] Another section of the Act, codified at 43 U.S.C. § 423d, provided for a transition for contracts already in effect, by requiring, as a condition precedent to the execution of amendments to existing contracts, the execution of a repayment contract by a water users' association or irrigation district.

inconsistent with congressional directives.[17] *California v. United States*, 438 U.S. 645. Since, under state law, water is appropriated for specific use on specific lands and the right to water is appurtenant to those lands for those uses, the United States cannot, without a change in its basic water rights, modify either the place or purpose of use of water.

While the United States acquires and may be identified as having nominal interest in the water rights for many Reclamation projects, such water rights would not exist without the actions of the districts (such as Westlands) and their landowners, taken in reliance on the dependability of the project supply. A water right cannot be acquired and perfected merely by building dams and canals. More is required: the physical act of putting water to beneficial use.[18] Thus, the water rights for the CVP could not have been perfected if the water districts and irrigation districts had not delivered the water pursuant to California law, and had that water not been put to beneficial use. As a consequence, the water acquired by the

[17] The decision of the Ninth Circuit in *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977), finding that the United States "owned" Reclamation water rights was premised on the mistaken concept that the United States did not have to comply with state law in obtaining and maintaining water rights for Reclamation projects. Since *Israel*, however, this Court in *California v. United States*, 438 U.S. at 678-79, has determined that the United States must comply with state water law unless that law, as applied, is inconsistent with congressional directives. Thus, *Israel* cannot be read to justify the United States ignoring the interests of others in the use of the water.

[18] Indeed, prior to 1913 in California, the act of putting water to beneficial use was *all* that was required for a valid appropriation of water. *Tulare Water Co. v. State Water Commission*, 187 Cal. 533, 536 (1921); *Utt v. Frey*, 106 Cal. 392, 395 (1895); *DeNecochea v. Curtis*, 80 Cal. 397 (1889).

United States for Reclamation projects becomes appurtenant to lands within a district that is within the place of use for which it was appropriated.

Here, the underlying water rights permits for the Central Valley Project were granted by the State of California in accordance with SWRCB Water Rights Decisions 893, 990 and 1020.[19] These decisions specify that the water rights issued by the relevant permits were granted for the benefit of the public water agencies (including Westlands) for irrigation within the districts. Moreover, these decisions indicate that the right granted is a permanent right (subject to certain terms and conditions) to the use of all water appropriated and beneficially used under the permits issued, and that the right is appurtenant to the land to which the water is applied. SWRCB D 893 provides:

> The right to divert and store water and apply said water to beneficial use . . . is granted to the United States as Trustee for the benefit of the public agencies of the State together with the landowners and water users within such public agencies as shall be supplied with the water appropriated. . . . [S]uch public agencies, on behalf of their landowners and water users, shall

[19] SWRCB Decision D 893 (March 18, 1958); SWRCB Decision D 990 (February 9, 1961); SWRCB Decision D 1020 (June 30, 1961). SWRCB D 1020 resulted from Application 15764, which was originally filed by Westlands and assigned to Reclamation. 1 E.R. 140. The assignment was made after Reclamation guaranteed to Westlands that "[a] permanent water supply for [Westlands] will, of course, be assured and made available pursuant to a long term contract, renewable in accordance with the current provisions of Reclamation Law." Letter from Reclamation to Jack W. Rodner, Manager of Westlands (September 28, 1960); *see also* 1 E.R. 229.

> . . . have the permanent right to the use of all water appropriated and beneficially used . . . which right . . . shall be appurtenant to the land to which said water shall be applied. . . .

SWRCB D 893, ¶¶ 15, 16 at 72-73.[20]

This statement of rights arising under California law is consistent with federal law, including the Reclamation Act of 1902, which provides that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.[21]

[20] *See also* SWRCB D 990, ¶ 29; SWRCB D 1020, ¶¶ 13(a) & (b) at 23.

[21] The significant property interests held by Westlands for the ultimate benefit of its landowners in the water at issue are confirmed by this Court's prior decisions. For example, in *Nevada v. United States*, 463 U.S. 110, 124-26 (1983), this Court, citing from numerous prior Court decisions, emphasized as follows:

> . . . [I]t long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by expressed provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.
>
> * * *
>
> . . . The Government's "ownership" of the water rights was at most nominal; the *beneficial interest* in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Id. (emphasis added).

SUMMARY OF ARGUMENT

It is not possible to set forth a "one-size-fits-all" rule which will determine the intended third-party beneficiary status of landowners under all contracts between water districts and the Bureau of Reclamation. The analysis of intended third-party beneficiary status under the 1963 Contract depends upon the specific contract language at issue and on the facts, history and circumstances surrounding the transaction.

Petitioners argue that the court below erred in the manner in which it analyzed their status under the 1963 Contract between Westlands and the United States. Westlands agrees that the court below did err in focusing solely on the specific language of the 1963 Contract in an effort to determine if it evidenced a clear intent to confer intended third-party beneficiary status on Petitioners. But it nonetheless reached the correct result. Had the court looked at the surrounding facts, history and circumstances of the 1963 Contract, the correct conclusion that it reached would have rested on a much stronger footing than does its current opinion.

In this regard, the court below should have looked at the general history of Reclamation law, including provisions of Reclamation law that specifically provide that Reclamation contracts shall be with districts, such as Westlands, or water user associations and not with individual farmers and landowners. A determination that a landowner/farmer has intended third-party beneficiary status would significantly undermine the statutory objective of requiring Reclamation to contract with districts rather than with individuals.

California law is also relevant to this inquiry and should have been considered. That law, while recognizing the fundamental requirement that a right to water is created by actual beneficial use, nonetheless does not vest any ownership interest in the right to water that emanates from the 1963 Contract with individual landowners or farmers. Applicable California law leaves it to Westlands to allocate this water to individual landowners and farmers. Westlands' water rights are held for the benefit of all of the lands within the districts and cannot be reduced to the individual "ownership" of any one landowner or group of landowners, including the Petitioners.

California law also precludes individual landowners, including Petitioners, from collaterally attacking governmental decisions made by Westlands through their assertion of intended third-party beneficiary status. If Petitioners feel that Westlands is not properly acting to protect the district's 1963 Contract rights, then they are free to directly challenge district decisions in various ways expressly provided for in the California Code of Civil Procedure and California Government Code.

For these reasons, the court's decision that the 1963 Contract did not confer intended third-party beneficiary status on Petitioners should be affirmed.

Even if that conclusion were incorrect, because Petitioners are not the "contracting entity," as that term is used in 43 U.S.C. § 390uu, the court below should have also concluded that the provisions of that statute do not waive sovereign immunity. The inapplicability of the waiver of sovereign immunity to suits by intended

third-party beneficiaries provides an entirely independent basis to dismiss the action.

ARGUMENT

THE COURT BELOW PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CASE FOR LACK OF SUBJECT MATTER JURISDICTION

A. The Court Below Correctly Ruled that Petitioners Are Not Intended Third-Party Beneficiaries of the 1963 Contract[22]

The Ninth Circuit reached the correct result even as it ignored substantial surrounding history and circumstances that confirm that Petitioners are not intended beneficiaries with enforceable rights under the 1963 Contract. Accordingly, the decision below should be affirmed.

[22] Westlands is, of course, concerned about the rights and interests of its landowners, including those of Petitioners. In this context, it well understands the real injury that has been caused by enactment of the CVPIA and other similar actions by the United States. These actions have caused both the reduction in water supply made available to Westlands for allocation to its landowners, as well as the increase in per-acre-foot cost for the water that is ultimately provided by Westlands to its landowners. Nonetheless, the fact that injury has been caused does not, itself, create intended third-party beneficiary status in these Petitioners.

1. The Determination of Intended Third-Party Beneficiary Status Under a Government Contract Depends on a Finding, Based on the Contract and Its Surrounding Circumstances, of an Intent of the Parties to Directly Benefit and Thus Allow Direct Enforcement of the Contract by the Third Party

Federal common law governs the analysis of whether Petitioners are third-party beneficiaries under the 1963 Contract. *Boyle v. United Technologies Corporation*, 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."). While privity of contract is generally required to maintain a breach of contract action, there are exceptions.

This Court has long recognized that a beneficiary of a promise between two persons may have the right to file suit to enforce the promise. *National Bank v. Grand Lodge*, 98 U.S. 123, 124 (1878). The Court directly addressed the propriety of a third-party beneficiary action in *German Alliance Insurance Company v. Home Water Supply Company*, 226 U.S. 220 (1912) ("*German Alliance*"). In *German Alliance*, a municipality entered into a contract with a water company to provide, among other things, water to extinguish fires. *Id*. at 222. A property owner attempted to sue the water company for breach of contract when fire damaged his property and the water supply was inadequate to extinguish the fire. *Id*. at 222. While recognizing differing standards applied by state courts, this Court stated a fundamental requirement that "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which

he is not a party, he must, at least, show that it was intended for his direct benefit." *Id*. at 230. This Court ultimately rejected the propriety of the landowner's third-party action since potentially opening the door to a multitude of third-party actions, under the facts presented, "could not have been in contemplation of the parties." *Id*. at 231.

In subsequent years, the Court has addressed possible third-party actions infrequently. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) ("[u]ntil relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it."); *Kansas v. Colorado*, 514 U.S. 673, 683 n.3 (1995) (Court declined to express an opinion as to whether Kansas was a third-party beneficiary under the subject agreement); *Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) (limits on contractual third-party beneficiary actions circumscribe the availability of damages in contract actions); *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364, 370 (1984) (no apparent dispute as to third-party beneficiary status); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 29 (1977) (choice of law issue in determining whether individual third-party beneficiaries had standing to sue County); *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 18 n.15 (1977) (declining to address whether bondholders were third-party beneficiaries).

Lower federal courts, the Restatement of Contracts and commentators have had more occasions to address the ability of a third party to sue on a contract. Where contracts involving the United States Government have been involved, such cases have often arisen in the United States Court of Federal Claims and have been addressed by the

Court of Appeals for the Federal Circuit. Recently, the Federal Circuit articulated the proper standard as follows:

> In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.

Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

This standard is consistent with the approach of the Restatement of Contracts, which provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> >
> > (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981).

The Restatement further divides potential contractual beneficiaries into two classes: intended beneficiaries and incidental beneficiaries. "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty" but "[a]n incidental beneficiary acquires

by virtue of the promise no right against the promisor or the promisee." *See* Restatement (Second) of Contracts §§ 304, 315. Under § 302(1), it is an essential prerequisite to intended beneficiary status that "recognition of [an enforceable] right to performance in the beneficiary" will "effectuate the intention of the parties." *Id*., § 302(1).

In addition to examining the contract language for evidence of the parties' express or implied intent to directly benefit the third party, federal common law requires an evaluation of the circumstances surrounding the transaction. For example, in *Schneider Moving & Storage Company v. Robbins,* 466 U.S. at 370-71, in counseling against "mechanical application" of rules of construction in a case involving a third-party beneficiary, this Court sought to determine the parties' intent through the examination of contractual language and the circumstances under which it was executed.

Likewise, the Federal Circuit has observed:

> [w]hen the intent to benefit the third party is not expressly stated in the contract, evidence thereof may be adduced. For determination of contractual and beneficial intent when, as here, the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose. *See, e.g., Rendleman v. Bowen*, 860 F.2d 1537, 1541-42 (9th Cir. 1988) (when the contract terms are mandated by Congress, statutory intent is highly relevant to contractual interpretation); *American Hosp. Ass'n v. Schweiker*, 721 F.2d 170, 183 (7th Cir. 1983) (legislative intent is relevant when the contract implements a statute); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 602 (1985) (the court considers statute, regulations, and

> policy, in determining whether the plaintiffs are third party beneficiaries).

Roedler v. Department of Energy, 255 F.3d 1347, 1352 (Fed. Cir. 2001); *see also North Star Steel Co. v. United States*, 58 Fed. Cl. 720 (2003) (in finding third-party beneficiary status the court examined circumstances concerning contract formation, execution, contractual language and subsequent actions taken by the parties to implement its terms).

Contrary to these authorities, the Ninth Circuit has adopted a quite narrow view of what can properly be considered in assessing intended third-party beneficiary status. For example, in *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003), that court stated that:

> A party can enforce a third-party contract only if it reflects "an express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999). . . . When a contract is with a governmental entity, a more stringent test applies: "Parties that benefit . . . are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id*. The contract must establish not only an intent to confer a benefit, but also "an intention . . . to grant [the third party] enforceable rights." *Id*.

Kremen v. Cohen, 337 F.3d at 1029.

The court of appeals below relied upon *Klamath* and ultimately concluded the farmers were not intended third-party beneficiaries of the 1963 Contract because "the 1963 contract does not 'illustrate[ ] an intention of [Westlands] or the United States to grant [the farmers] enforceable

rights.'" Pet. App. 14a (bracketed phrases in original). The court of appeals explained that in determining third-party beneficiary status under governmental contracts, parties that benefit "are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*." Pet. App. 10a (citing *Klamath*, 204 F.3d 1206, italics in original). The court of appeals referred in several places to this standard, concluding that "the farmers in our case fail to satisfy the 'clear intent' standard" (Pet. App. 11a), and that the law in the Ninth Circuit "requires an examination of the precise language of the contract for a 'clear intent' to rebut the presumption that the farmers are merely incidental beneficiaries." Pet. App. 15a n.5.

The court of appeals also confined its inquiry narrowly to two express provisions of the 1963 Contract, article 15 and article 11. Pet. App. 11a-14a. Based upon these provisions, the court of appeals determined that Petitioners lacked intended third-party beneficiary status. Pet. App. 14a. The court concluded "Article 15 and Article 11(b) merely show that the 1963 contract operates to the farmers' benefit and was entered into with the farmer 'in mind.' That by itself is not enough under *Klamath* to confer intended third-party beneficiary status on farmers." Pet. App. 14a. This approach is consistent with the analysis in *Klamath* which noted: "[t]he plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries." *Klamath Water Users Protective Association v. Patterson*, 204 F.3d at 1211. Thus, in both cases, the Ninth Circuit simply relied upon the four corners of the contract in declining to find an intended third-party beneficiary.

The proper approach in such circumstances was addressed at some length by then Circuit Judge Kennedy in a concurring opinion in *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205 (9th Cir. 1979), where the court found that plaintiff was not an intended beneficiary. He emphasized that:

> The majority fails to consider substantial extrinsic evidence, offered by plaintiff in the district court proceedings and discussed at great[ ] length below, which would aid in interpreting the intent of the parties. Its reason is that the words of the contract are unambiguous. This approach to contractual interpretation has been rejected by this circuit and it is out of line with better-reasoned contract law cases. It results in the exclusion of evidence clearly probative of the parties' understanding of their obligations. Examination of the circumstances which gave rise to the agreement, and of subsequent acts and communications which bear on the parties' intent at the time of contracting, are relevant to show the intended meaning of a provision in a contract.

Id. at 1210-11.

The Restatement similarly supports a broad review in order to determine the parties' intent. The Reporter's Note to § 302 expressly states: "[a] court in determining the parties' intention [concerning third-party beneficiary status] should consider the circumstances surrounding the transaction as well as the actual language of the contract." Restatement (Second) of Contracts § 302 cmt. a. An analysis of the underlying facts, circumstances and contractual background information may ultimately allow for third-party beneficiary status in situations where a limited review of the contractual text would not. Westlands thus

submits that the Ninth Circuit took an unduly narrow view of what it should consider in determining whether Petitioners are intended beneficiaries with rights to sue under the 1963 Contract. The court's task would have been a great deal easier and its conclusion more compelling if it had looked beyond the specific words of the 1963 Contract and especially of the two provisions on which it focused, and considered several highly relevant surrounding circumstances. These include (1) the history of Reclamation law and Congress' decision in 1926 to deal with local governmental entities; (2) the legal ownership rights to water delivered under the 1963 Contract; and (3) the governmental powers and purposes of Westlands.

2. Congress's Insistence in 1926 on Dealing Only with Local Governmental Districts and Westlands' Status as a Governmental Entity with Primary Responsibility for Management and Distribution of the Water Delivered Under the 1963 Contract, Together Strongly Support the Conclusion that Petitioners Have No Right to Sue Under the 1963 Contract

The evolution of reclamation law, and the critical legislative decision in 1926 to require that all contracts for use of reclamation water be through districts, is recounted at some length above. *See supra* 14-19. That legislative decision evidenced a concern for the financial integrity of the reclamation projects, to be advanced by the identification of a local governmental entity – the water district, with powers to secure funding from its members – from whom the United States could expect to receive satisfaction on the terms of the contract, and to

whom the United States would owe its contractual obligations.

It is within this statutory framework that the 1963 Contract was executed. While it rested with the parties to that Contract to prescribe the precise rights those receiving water under the Contract would have, it would be surprising and somewhat incongruous with the underlying legislative scheme if individual farmers (or *an* individual farmer) within Westlands were, in fact, accorded the contractual right to second-guess litigation and other decisions of Westlands, and pursue their distinct and individual interests by separate litigation against the United States. Such a right would undermine the policy objectives behind the 1926 legislation by severely impairing the ability of Westlands to speak and be accountable for the contractual interests of the District as a whole. Apart from this legislative scheme and the words of the 1963 Contract that were examined by the court below, other critical facts make clear that the parties to the 1963 Contract intended no such result.

Westlands was formed and exists pursuant to the general California Water District Law (Cal. Water Code § 34000 *et seq*.) and special legislation enacted as the Westlands Water District Merger Law (Cal. Water Code § 37800 *et seq*.). Specific provisions of this statutory scheme establish and govern Westlands' interest in and control over the water that is acquired and delivered by Westlands. In this regard, Cal. Water Code § 35602 provides as follows: "There is given, dedicated and set apart for the uses and purposes of each district all water and

water rights belonging to the State *within the district*." (Emphasis added.)[23]

Once CVP water is delivered to Westlands under the 1963 Contract, such water is clearly "within the district," and is therefore "dedicated . . . for the uses and purposes of the district." In addition, once a water supply is secured by Westlands (*e.g.*, water served under the 1963 Contract), the Water Code specifically directs how such water is to be apportioned and allocated to landowners affording Westlands a great deal of discretion regarding which landowners will receive what amount of water. *See* Cal. Water Code §§ 35420-35429. Cal. Water Code § 35423 empowers Westlands to withhold water deliveries to landowners that fail to abide by Westlands' rules and regulations governing the sale, distribution and use of water within the district. Cal. Water Code § 35408 also grants to Westlands the right, among others, to "compromise" rights related to the ownership or use of waters or water rights within Westlands used or useful for any purpose of the district or a benefit to any land. Intended third-party beneficiary status for landowners to themselves claim and assert an ownership interest in district water would be in conflict with this district power. Finally, in this regard, Cal. Water Code § 35428 also provides that "[*n*]*o right in any water* or water right owned by the

[23] *See also Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 740 (1973) ("*Salyer*") (Douglas, J., dissenting) (noting that "[t]he Water Code of California states that 'all waters and water rights' of the State 'within the district are given, dedicated, and set apart for the uses and purposes of the district.' ").

District shall be acquired by use permitted under this article." (Emphasis added.)[24]

Petitioners assert that they own the right to water secured by contract and, in that context, can enforce the right as an intended third-party beneficiary to the 1963 Contract even if they choose to do so in a manner different than Westlands. As noted, Petitioners are precluded from asserting this right through relevant provisions of the California Water Code which provides that, as between Westlands and its landowners, it is Westlands that "owns" the relevant water rights. Cal. Water Code § 35428. Only in this way can Westlands preserve and protect the collective rights of *all* district landowners in the water secured in the 1963 Contract, not just from the actions of the United States, but also from the individual actions of potentially dissenting landowners within Westlands including, for example, the Petitioners. To proceed in any other way would be to reduce Westlands' collective right to mere individual rights, thereby making the role of the district irrelevant, negating the ability of the district to administer its affairs and carry out its purposes. While Petitioners are correct that in the context of Reclamation law the United States does not "own" the water rights in question, they are incorrect in not recognizing that those rights are for Westlands, not Petitioners, to enforce.

Perhaps to circumvent these obvious state law limitations on their asserted ownership of water rights within California water districts, Petitioners assert that irrigation districts hold water in "trust" for landowners within

[24] Importantly, Petitioners wholly ignore and fail to even cite to this provision in their brief on the merits. *See* Pet. Br. xiii.

districts, and that the beneficial ownership of water is with the landowner. Pet. Br. 45 n.53. Westlands, however, is not an irrigation district, but rather is a "California Water District" and thus governed by the above-referenced provisions. But even if it were an irrigation district, while water rights acquired by irrigation districts for use in the district are held in trust for the district's purposes and uses, this does not mean that a private ownership in water rests with landowners within an irrigation district. Cal. Water Code §§ 22437, 20529 ("'[p]roperty' . . . embraces all real and personal property, including water, water rights. . . . "). Indeed, just as with a California Water District, the Irrigation District Law provides that "[n]o right to any water or water right owned by the district shall be acquired by use permitted under this article." Cal. Water Code § 22262.[25]

Further, the decision of the court below is strongly supported by the fact that Westlands is a fully-functioning governmental entity. Westlands was formed and exists pursuant to the general California Water District Law, as codified in Division 13 of the Cal. Water Code § 34000 *et seq*., and special legislation enacted as the Westlands

[25] The purpose of an irrigation district is to obtain and distribute water for improvement, by irrigation, of lands within the district. *Jenison v. Redfield*, 149 Cal. 500, 503 (1906); *Hall v. Superior Court of Imperial County*, 198 Cal. 373 (1926). The water user "is entitled to have distributed to him for that purpose such proportion as his assessment [by the irrigation district] entitled him to." *Jenison v. Redfield*, 149 Cal. at 504. The irrigation district, as trustee, "must administer [the trust] consistently with and not in violation of the rights of their beneficiaries." *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal.2d 597, 624 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). Thus, the water users hold only an equitable interest, subject to the trust, in the water rights of the irrigation district. *Jenison v. Redfield*, 149 Cal. at 503-504; *Hall v. Superior Court of Imperial County*, 198 Cal. 373.

Water District Merger Law. Cal. Water Code § 37800 *et seq*. This special legislation accomplished, among other things, the merger of the West Plains Water Storage District into Westlands, and designated Westlands as the surviving district. Cal. Water Code §§ 37820-37822. The statutes also expressly state that Westlands, as the surviving district, is a public agency of the state. Cal. Water Code § 37823. These provisions, moreover, confirm that Westlands "succeeds to all properties, rights, and contracts of the two districts . . . " and that, except as expressly provided therein, Westlands shall in all respects be operated, managed, and governed in accordance with the law for California water districts generally. Cal. Water Code § 37826.

As a California water district, Westlands maintains numerous broad powers and authorities that are traditionally governmental, including the power of eminent domain (Cal. Water Code § 35600), the power to enter into contracts for water (Cal. Water Code § 35403), the power to enter upon any land for the purposes of the district (Cal. Water Code § 35404), the power to buy, hold and sell property (Cal. Water Code §§ 35405, 35604), and the power to issue general obligation bonds (Cal. Water Code §§ 35950, 36150). Westlands also carries the traditional limitations on claims for money or damages against governmental agencies. Cal. Water Code § 35752. Finally, Westlands' powers include the authority to undertake all acts necessary or proper to effectuate its purposes and to carry out fully the provisions of the California Water District Act. Cal. Water Code § 35400.

Westlands also has the specific power to contract with other entities or public agencies, including with the United States for water under the Reclamation Act of 1902 and all

acts amendatory thereof or supplementary thereto. *See* Cal. Water Code §§ 35850-35855 and 35875-35886. Cal. Water Code § 35876(b) specifically empowers California water districts to contract with the United States for a water supply. Any such contracts with other parties, including the Bureau, are subject to a challenge by a legal action to determine their validity. Cal. Water Code § 35855. In addition, proposed contracts between water districts and the United States, for any purpose other than obtaining a water supply, may be challenged through a vote of all landowners in an election within the district. Cal. Water Code §§ 35881-35886.

Petitioners assert that Westlands is not really a government, but rather a "surrogate" or "middleman" with no right to own water itself. Pet. Br. 44-46. Petitioners apparently advance this theory in order to avoid application of the general rule that members of the public are not the intended beneficiaries of a contract with a governmental entity. *See* Restatement (Second) of Contracts § 313. In seeking to avoid the operation of this general rule, Petitioners rely upon inapposite authority or selectively quote from this Court's precedents to allege that Westlands is not a "real" government.[26] *See* Pet. Br. 44, *citing Salyer*

[26] Petitioners also lean heavily on language in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), for the proposition that a water district is the landowners' surrogate and that landowners may, therefore, sue directly for the enforcement of contracts related to their water supplies. In that case, the court found that the farmers had a direct property interest in the water rights at issue and, in fact, the farmers in that case had originally contracted directly with the United States prior to the formation of their district. *Id*. at 1576. The *H.F. Allen Orchards* court, however, made no categorical holding that all irrigators using water from a Reclamation project are intended beneficiaries of water service contracts. In fact, that case did not involve a Reclamation

(Continued on following page)

Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719; *Ball v. James*, 451 U.S. 355 (1981) ("*Ball*").

Salyer and *Ball*, however, involved challenges to the apportionment of voting rights, where such apportionment was based upon the value of individual land holdings (*Salyer*, 410 U.S. at 720) or upon the number of acres owned (*Ball*, 451 U.S. at 357). Both cases involved landowners' assertions that the voting rights apportionment violated the "one person, one vote" rule, and effectuated a denial of equal protection under the law for certain landowners and residents. This Court, in both cases, held in favor of the districts. *Salyer*, 410 U.S. at 733-34; *Ball*, 451 U.S. at 371. In each case, this Court expressed an institutional respect for the purpose and mission of the districts being challenged. *Salyer*, 410 U.S. at 721-23; *Ball*, 451 U.S. at 357-58. These cases, therefore, actually undercut Petitioners' claim that Westlands is not a true government.

Moreover, in the *Salyer* case, Justice Douglas, joined by Justices Brennan and Marshall, recognized that various types of water districts in California are essentially governmental in nature:

> Such state agencies are considered exclusively governmental, and their property is held only for governmental purpose, not in the proprietary sense. They are a public entity, just as any other political subdivision. That is made explicit in various ways. The Water Code of California

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contract at all. *Id*. Rather, it involved a consent decree and subsequent alleged implied contracts, and the court made no general pronouncements about the relationship between irrigators and the federal government.

> states that all waters and water rights of the State within the district are given, dedicated, and set apart for the uses and purposes of the district. Directors of the district are public officers of the state. The district possesses the power of eminent domain. Its works may not be taxed. It carries a governmental immunity against suit. A district has powers that relate to irrigation, storage of water, drainage, flood control, and generation of hydroelectric energy.

Salyer, 410 U.S. at 740 (Douglas, J., dissenting) (internal quotations and citations omitted). Nothing within the majority opinion was inconsistent with this statement. Accordingly, it is quite clear that water districts, such as Westlands, are real governmental bodies and not mere pass-through entities that are formed exclusively to contract in landowners' names.

A further demonstration of this is the fact that landowners within Westlands are afforded specific rights and remedies under state law to contest the governmental decisions that are made by Westlands. In this regard, landowners may avail themselves of the validation proceedings pursuant to Cal. Code Civ. Proc. § 860 *et seq*. Under these provisions, any interested person may bring an action to determine the validity of any matter, which under state law is authorized to be determined pursuant to those provisions. *Id*. at §§ 860, 863. As noted above, the water service contracts between Westlands and Reclamation, including the 1963 Contract, are subject to validation proceedings. Cal. Water Code § 35855. In fact, the 1963 Contract itself contains a provision that required a confirming validation proceeding. *See* Pet. App. 56-57.

Landowners within Westlands may also avail themselves of the special writ proceedings allowed under California law to challenge certain decisions or actions by Westlands with regard to its performance of its governmental functions. *See* Cal. Code Civ. Proc. § 1063 *et seq*. For example, Cal. Code Civ. Proc. § 1085(a) provides that a "writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. . . . "

The foregoing procedures and proceedings would be meaningless and, in effect, would be nullified if Petitioners or other landowners had a general right to collaterally attack Westlands' contracting decisions through the assertion of intended beneficiary status. Under those circumstances, a small group of dissenting landowners, or even a single dissenter, might otherwise completely obstruct Westlands' ability to make and administer contracts in accordance with the law. This would also conflict with Westlands' general duty and obligation to implement decisions that take into account the best interests of the District as a whole.

In the instant case, Westlands chose to dismiss its lawsuit in the underlying litigation for substantial reasons that relate to multiple actions regarding Westlands' water supplies in other arenas. If a dissenting minority of its landowners could, through the assertion of intended third-party beneficiary status, assert a legal position different from Westlands with respect to rights under the 1963 Contract, Westlands' authority to secure and provide water supplies for its constituents as a whole would be seriously undermined. Accordingly, the surrounding circumstances of Westlands' governmental powers and

purposes weigh heavily against any finding of intended beneficiary status.

B. Even Assuming *Arguendo* That Petitioners Were Intended Third-Party Beneficiaries Under the 1963 Contract, the Waiver of Sovereign Immunity Under 43 U.S.C. § 390uu does Not Extend to Petitioners' Claims Because They Are Not the "Contracting Entity"

In the proceedings below, the entire discussion of third-party beneficiary status was in the context of whether the trial court had jurisdiction over the Petitioners' claims against the United States. Pet. App. 5a-17a. The Petitioners claimed that the court had jurisdiction as a result of the waiver of sovereign immunity found in 43 U.S.C. § 390uu.[27] The Petitioners and even the Ninth Circuit assumed that if the landowners were intended third-party beneficiaries of the 1963 Contract, then the waiver of sovereign immunity in § 390uu extended to them. This assumption, however, ignores the plain language of § 390uu and legislative authority that waivers of sovereign immunity by the United States must be strictly and narrowly construed. *E.g., United States v. Nordic Village, Inc*., 503 U.S. 30, 33-34 (1992).

Generally, the United States, as a sovereign, is immune from suit except where it has consented to being sued. *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Within the context of federal Reclamation law, however,

[27] Notably, in the operative complaint below, the Petitioners pled jurisdiction and waiver of sovereign immunity only under § 390uu. Pet. App. 8a.

the Reclamation Reform Act, 43 U.S.C. § 390uu, offers a limited express waiver of sovereign immunity for suits regarding contracts executed pursuant to Reclamation law:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of *a contracting entity* and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in the United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu; Pet. App. 47a (emphasis added). The plain and unambiguous language of this statute, therefore, relates to a waiver of sovereign immunity in suits involving the rights of an entity which contracts with the United States. Conversely, it does not waive the United States' sovereign immunity for suits involving contractual rights asserted by a third party, even if the third party is an intended contract beneficiary.

Where statutory language is unambiguous, that language must ordinarily be regarded as conclusive. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988). The only published federal court decision that has reviewed the scope of the waiver in § 390uu found that

§ 390uu is clear and unambiguous, and that, by contrast, the relevant legislative history is unclear and ambiguous.[28] *See Wyoming v. United States*, 933 F.Supp. at 1034-40 (third party district is not a "contracting entity" within the meaning of 43 U.S.C. § 390uu, and not entitled to sue as beneficiary of a contract between another district and the United States).[29] Moreover, this Court has said that "[w]aivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed" and "the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged . . . beyond what the language requires. . . . " *United States v. Nordic Village*, 503 U.S. at 33 (internal quotes and citations omitted).

[28] Westlands is mindful of the aspects of the legislative history cited by Petitioners. *See* Pet. Br. 12 n.24. This history is not sufficient, however, to override the clear and unambiguous language of the statute. *See Wyoming v. United States*, 933 F.Supp. 1030, 1039 (D.Wyo. 1996).

[29] In its June 5, 1998 Memorandum Opinion and Order (subsequently superseded), the district court below initially found that the waiver of § 390uu extended to petitioners. Pet. App. 26a; 1 E.R. 199-205. Citing *Indian Towing v. United States*, 350 U.S. 61, 69 (1955), the district court relied on the principle that a court should not interpret a waiver so narrowly as to "import" total immunity into a waiver. 1 E.R. 201. Limiting the waiver of § 390uu to "contracting entities," however, does not "totally" gut the waiver. Westlands and other districts with contracts with the United States are clearly "contracting entities" and within the scope of the waiver. Moreover, the broad interpretation of § 390uu urged by the Petitioners might lead to the explosion of litigation envisioned in the *Wyoming* case. *Wyoming v. United States*, 933 F.Supp. at 1039-40. Finally, the cases relied on by the district court were Court of Claims cases interpreting generally the Tucker Act, 28 U.S.C. § 1491, or other jurisdictional act and not § 390uu. In each of these cases, except *Hebah v. United States,* 428 F.2d 1334 (Ct. Cl. 1970), the third party to the contract was found not to have a claim. In *Hebah*, the Indian treaty in question was found to have conferred individual rights and the Court allowed the claim to proceed. *Id*. at 1340.

Accordingly, the express language of the waiver of sovereign immunity at issue here must be read to preclude suit against the United States by third parties, even if they are intended third-party beneficiaries as alleged by the Petitioners herein.

In this regard, it is again worth noting that the 1926 Omnibus Adjustment Act limited Reclamation contracting to only the United States and districts or water user associations. Congress was, of course, aware of this provision when it enacted the Reclamation Reform Act and provided for the waiver of sovereign immunity under § 390uu. That waiver tracks the contracting process provided for in the 1926 Act.

A lack of intended third-party beneficiary status and a strict construction of § 390uu does not necessarily leave district landowners, such as Petitioners, without a possible forum to resolve claims for monetary damages against the United States related to the Bureau's reduced deliveries. As emphasized by both the court of appeals and district court below, it is possible that such claims are maintainable in the Court of Federal Claims. Pet. App. 17a, 38a-45a. Water users such as Petitioners have been held to have a Fifth Amendment takings claim cognizable in the Court of Federal Claims for the same types of government activities challenged by Petitioners herein. *Tulare Lake Basin Water Storage District v. United States,* 49 Fed. Cl. 313. In *Tulare,* the court based its grant of summary judgment on the finding that the water users owned a usufructuary right to the water they were receiving from the state, but which had been taken when the United States restricted the times and amounts of diversions in favor of the winter-run chinook salmon and delta smelt. The court's decision did not depend on or even discuss

whether the water users were third-party beneficiaries of the contracts involved.[30]

CONCLUSION

For these reasons, Respondent Westlands respectfully requests that, based upon the foregoing, the decision of the court below be affirmed.

Respectfully submitted,

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[30] In addition, it was recently reported that the United States declined to appeal the Court of Federal Claims' *Tulare Lake* decision, and instead, announced that the United States has agreed to a settlement wherein it will pay $16.7 million to the water user plaintiffs. Bettina Boxall, L.A. Times, *U.S. to Pay $16 Million in Water Rights Case*, Dec. 22, 2004, at Part B, Page 1.