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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCIS A. ORFF, ET AL., :

Petitioners :

v. : No. 03-1566

UNITED STATES, ET AL. :

- - - - -X

Washington, D.C.

Wednesday, February 23, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:

WILLIAM M. SMILAND, ESQ., Los Angeles, California; on
behalf of the Petitioners.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Respondent United States.

STUART L. SOMACH, ESQ., Sacramento, California; on behalf
of Respondent Westlands Water District.

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(10:04 a.m.)

JUSTICE STEVENS: We will now hear argument in
Orff against the United States.

Mr. Smiland.

ORAL ARGUMENT OF WILLIAM M. SMILAND

ON BEHALF OF THE PETITIONERS

MR. SMILAND: Justice Stevens, and may it please
the Court:

The relevant language of the 1963 contract, as
illuminated in the surrounding circumstances, was
confirmed in the express terms of the 1986 stipulated
judgment which commanded the district and the United
States to perform the contract.

In particular, the first sentence of paragraph
4.2, which is at joint appendix page 111, states -- and I
quote -- the district acknowledges that it entered into
the 1963 contract for the benefit of Areas 1A and 1B.
That's the premerger --

JUSTICE O'CONNOR: Mr. Smiland, do you mind
telling us why the petitioners never filed suit in the
Court of Federal Claims?

MR. SMILAND: Yes, Your Honor. There's a long
history of litigation here. It began with the first suit
in 1979. We were in the district court there. There were

1 administrative and constitutional and equitable issues as
2 well, and we were able in that initial case to combine all
3 those forms of relief in the district court. And then, of
4 course, we got this judgment that I began to read from.
5 And from then on, we had four or five other cases all in
6 the district court.

7 We do acknowledge that on the breach of
8 contract, there is concurrent jurisdiction under the
9 Tucker Act.

10 JUSTICE BREYER: Is it concurrent? I mean, the
11 -- the statute I'm reading, the one you brought is consent
12 is given to join the United States as a necessary party
13 defendant. Is that what happened here? They were joined
14 as a necessary party defendant?

15 MR. SMILAND: Well, we think so, Your Honor.

16 JUSTICE BREYER: They were? I -- I think that's
17 -- isn't that -- what rule of -- I thought there's a -- a
18 Rule of Federal Procedure. I can't remember what --
19 what's the --

20 MR. SMILAND: Rule 19(s)?

21 JUSTICE BREYER: Yes. Is that what they were
22 joined under?

23 MR. SMILAND: That -- that procedure was not
24 invoked here.

25 JUSTICE BREYER: No. Well, all right. Were

1 they -- there's technical phrase well known in the law to
2 be joined as a necessary party defendant. Given the
3 normal meaning in the law of that technical phrase, is
4 that what happened here?

5 MR. SMILAND: No. What happened -- what
6 happened --

7 JUSTICE BREYER: No, okay. If it did not
8 happen, then how could you possibly sue in that court
9 rather than the Court of Claims where the statute says you
10 can sue on any implied, as well as express, contract?

11 MR. SMILAND: Because the waiver of sovereign
12 immunity statute says in any suit.

13 JUSTICE BREYER: It doesn't mean in any suit in
14 sentence 2 of the kind referred to in sentence 1? Does it
15 mean any suit in the universe? Any suit in the world?
16 Any tort suit? I would have thought that sentence 2
17 refers to sentence 1.

18 MR. SMILAND: Well, it -- it does and that case
19 was litigated against the United States by my clients and
20 -- and we won in the Peck case. And we think that should
21 have ended the matter.

22 JUSTICE BREYER: But don't -- how can we, if we
23 have -- if -- if I read this -- this as meaning
24 technically what it says and it's a jurisdictional matter,
25 how could I do anything other than say, go to the Court of

1 Claims, you're in the wrong court?

2 MR. SMILAND: Any suit is also in the first
3 sentence, Your Honor.

4 JUSTICE BREYER: Yes. It says --

5 MR. SMILAND: And -- and --

6 JUSTICE BREYER: -- in any suit you can join the
7 United States as a necessary party.

8 MR. SMILAND: The -- the -- in the sue and be
9 sued cases, this Court construes that very broadly, and
10 this is the same root word and --

11 JUSTICE O'CONNOR: Well, but we don't give broad
12 construction to waivers of sovereign immunity.

13 MR. SMILAND: I --

14 JUSTICE O'CONNOR: Quite the reverse. And it
15 says to join the U.S. as a necessary party defendant in a
16 suit to adjudicate, confirm, validate, or decree the
17 contractual rights of a contracting entity in the United
18 States regarding any contract executed pursuant.

19 Now, I guess the farmers were not technically
20 the contracting entity.

21 MR. SMILAND: They were not the signing --

22 JUSTICE O'CONNOR: No.

23 MR. SMILAND: -- party.

24 JUSTICE O'CONNOR: So you've got more problems.

25 MR. SMILAND: Our -- our argument -- and again,

1 this has been resolved in the lower courts against the
2 Government. But our -- our view is that by the nature of
3 the intended beneficiary doctrine, the duty is owed to the
4 third party, as well as to the promisee, and it's
5 enforceable by the third party, as well as the promisee.

6 JUSTICE GINSBURG: If you -- if the lower courts
7 were of this view, why did the district court in this case
8 give you three opportunities to have your contract claim
9 transferred to the Claims Court?

10 MR. SMILAND: Once the determination was made
11 that we were not intended third party beneficiaries, that
12 was the law of the case, and had it been transferred to
13 the Claims Court, we -- we would have been bound by that
14 determination. We felt we had to bring to a final
15 resolution the -- the intended beneficiary issue before we
16 could proceed in the Claims Court either.

17 JUSTICE GINSBURG: But it does suggest that the
18 district court had at least some concern whether the case
19 -- your claim had been lodged in the right court.

20 MR. SMILAND: Yes, although again that -- that
21 court had been hearing these matters for many years in --
22 in numerous cases without this issue ever having come up.

23 JUSTICE BREYER: Well, but it's a -- see, I want
24 to know what I'm supposed to do. As I read the language,
25 you're out. As I understand the purpose of the statute,

1 it makes sense to me if you're out, and it doesn't make
2 sense to me if you're in. And maybe there's some lower
3 court precedent to the contrary, which I'd certainly read,
4 but is there any Supreme Court precedent to the contrary
5 that supports you?

6 MR. SMILAND: Just the -- the language of in any
7 suit definitely is --

8 JUSTICE BREYER: No, no. But that isn't the
9 limiting part. The limiting part is in any suit of a
10 certain kind.

11 MR. SMILAND: Yes.

12 JUSTICE BREYER: What they give consent to is
13 joinder as a necessary party. And that is not what
14 happened here.

15 MR. SMILAND: Only the -- the general principle
16 that language should be read in its ordinary meaning --

17 JUSTICE BREYER: It's ordinary meaning, you're
18 out because the ordinary meaning of joinder as a necessary
19 party is you weren't joined as a --

20 MR. SMILAND: There -- there at least is no
21 evidence that Congress had rule 19 in mind when it enacted
22 either the '52 statute or the '82 statute that we -- we
23 stand on.

24 JUSTICE KENNEDY: Well, it's something that I
25 hadn't concentrated on before now, but your position that,

1 well, if you're transferred to the Court -- to the Court
2 of Claims, that you bring with you all of the previous
3 rulings of the United States district court in California
4 and that those are somehow binding because of the law of
5 the case -- what is the authority for that? The -- the
6 court that's transferred has to accept all the rulings
7 that have been made previous to the transfer?

8 MR. SMILAND: I -- our understanding is if,
9 obviously --

10 JUSTICE KENNEDY: I mean, what's the authority
11 for that?

12 MR. SMILAND: I can't cite you authority, Your
13 Honor, but I -- we were very concerned about that. If
14 there was no waiver of sovereign immunity in the first
15 instance, then the lower court's ruling on intended third
16 party beneficiary I would think should be vacated.

17 JUSTICE SCALIA: Could I -- I -- I guess I'm not
18 following this. I don't know why, Mr. Smiland, you -- you
19 have not referred to the last sentence of -- of what you
20 assert was the waiver of sovereign immunity, which says
21 any suit pursuant to this section may be brought in any
22 United States district court in the State in which the
23 land involved is situated. Why isn't that what you're
24 relying on?

25 MR. SMILAND: It is and -- and when I was

1 talking about in any suit --

2 JUSTICE BREYER: How does that help you?

3 Because it says any suit pursuant to this section, and of
4 course, this section starts off by talking about addition
5 of a person as a necessary party. So how does the last
6 sentence help you?

7 JUSTICE SCALIA: I -- I --

8 MR. SMILAND: Well, it -- it -- if the words,
9 join necessary, limit any suit and the language that
10 Justice Scalia referred to, then -- then maybe we're in
11 trouble. But otherwise --

12 JUSTICE SCALIA: I -- I take that to mean that
13 when you sue one defendant and you also sue the United
14 States as a necessary party defendant, that suit -- any --
15 that would be a suit pursuant to this section. I -- I
16 don't know what other meaning that -- that sentence could
17 have. When you sue two parties, one of whom is the United
18 States, by reason of the fact that it's a necessary party
19 defendant, that suit is a suit pursuant this section and
20 it can be brought in any United States district court in
21 the State in which the land involved is situated. I -- I
22 don't know what -- what other suit that -- that sentence
23 could refer to.

24 JUSTICE BREYER: You -- you agree with that. I
25 -- you're caught in between us here, and I understand.

1 (Laughter.)

2 JUSTICE BREYER: And I guess we have to figure
3 out what is the right meaning of that initial phrase.

4 JUSTICE GINSBURG: Perhaps you can explain.
5 This was not your suit originally. You intervened.
6 Right? This was started out by the water district.

7 MR. SMILAND: The district sued the United
8 States. We intervened.

9 JUSTICE GINSBURG: And then after some, I think,
10 2 years --

11 MR. SMILAND: Yes.

12 JUSTICE GINSBURG: -- the water district bows
13 out. It has settled its case. It's a mystery what it
14 settled for. At least, I didn't see it in any of the
15 briefs. Why did the water district, having brought this
16 case, then say, we're satisfied, we're out?

17 MR. SMILAND: The record is very sparse, Your
18 Honor. There is the district's motion which says pretty
19 much what it said in its brief, that there was a -- a
20 thing called the principles between it and the United
21 States and various parties. And as a result of those
22 principles, which are not in the record, although they are
23 a matter of public record, the -- the district in its
24 discretion elected to dismiss the case. We opposed that.
25 We would have hoped the district would have kept going.

1 We lost that opposition. The district was dismissed, and
2 we were allowed to proceed on our own.

3 JUSTICE STEVENS: Mr. Smiland, can I ask this
4 question? If Justice Breyer is -- the thrust of his
5 question is right, I -- I think the district itself could
6 not have brought the suit under his reading of the
7 sovereign immunity. And I'm just wondering, has the
8 United States ever taken the position that the district
9 could not have initiated this litigation?

10 MR. SMILAND: Not to my knowledge, Your Honor.

11 JUSTICE SCALIA: Could -- could we hear your
12 argument on -- on the sovereign immunity point as opposed
13 to the venue point? What -- on what ground do you say the
14 United States has waived its -- its immunity from suit in
15 this case?

16 MR. SMILAND: There are two statutes.

17 JUSTICE GINSBURG: May -- may we just back up to
18 the question -- your answer to Justice Stevens? I thought
19 that this wasn't a suit initially on the part of the water
20 district for money damages. I thought they were seeking
21 declaratory relief against the United States.

22 MR. SMILAND: They pled both, Your Honor.
23 Although at that time the water still was available for
24 delivery, it hadn't flowed to the ocean. And the money
25 had not yet been collected and spent. So the focus

1 initially was on equitable relief to stop --

2 JUSTICE GINSBURG: Because one could -- one
3 could read the words, suit to adjudicate, confirm,
4 validate, or decree the contractual rights, as a suit for
5 declaratory relief but not encompassing damages.

6 MR. SMILAND: Both statutes we cite say that
7 judgments can be entered in the same manner, to the same
8 extent as a private individual under like circumstances,
9 language I believe from the Federal Tort Claims Act.
10 Again, both in the 491 F.Supp. decision under the McCarran
11 Act and in the Peck case, the district court held that
12 money damages were encompassed by that. So both statute
13 -- statutes on which we rely have language in it taken
14 from other sources of law, with which this Court is very
15 familiar and has opined on several times.

16 The -- the only unique parts of -- of either of
17 the two statutes that we stand on are -- are the rights.
18 One refers to administering a previously adjudicated right
19 to the use of water, and the other is the contract
20 language we've discussed.

21 JUSTICE SCALIA: Can you turn to sovereign
22 immunity now?

23 MR. SMILAND: Yes.

24 JUSTICE SCALIA: And -- and let me make -- make
25 it easy for you. Do you know of any case, other than

1 cases decided by this friendly district judge, in which a
2 suit has been allowed against the United States based on
3 nothing more than the status as a third party beneficiary
4 of a contract to which the United States has -- on which
5 the United States has agreed to be sued? Is -- is there
6 any such case?

7 MR. SMILAND: No.

8 JUSTICE SCALIA: And -- and you think it's clear
9 that -- as our sovereign immunity law requires, that such
10 a third party beneficiary can sue the United States?

11 MR. SMILAND: For example, in the U.S. v.
12 District Court case decided by this Court in 1971, under
13 the McCarran Act, that fact situation was not before you,
14 but the Court did say that the rights to which the statute
15 referred were all inclusive. It read it broadly.

16 JUSTICE SCALIA: I -- I don't understand that.
17 The rights were all inclusive.

18 As -- as I understand the law of third party
19 beneficiaries, it -- it used to be -- and -- and perhaps
20 at the time this statute was enacted still was -- quite --
21 quite restrictive. It's only in more recent -- I don't
22 agree with the Government's argument that -- that you have
23 to, in an ordinary contract, explicitly refer to the third
24 party beneficiary's rights. But when sovereign immunity
25 is at issue, it's -- it's a different question, it seems

1 to me.

2 MR. SMILAND: Well, we have explicit rights here
3 and -- and it would seem to me that if -- if -- and this
4 was certainly the legislative history behind section 221,
5 not -- not behind McCarran. But if -- if the same duty is
6 owed by the promisor to the third party that it owes to
7 the promisee, and if the third party has the same rights
8 of enforcement as it does under 304 of the Restatement
9 that the promisee would have, why should it be any
10 different? Why would Congress have intended to exclude
11 that? And it used the word contract.

12 JUSTICE SCALIA: Because -- because we have a
13 rule that says when Congress wants the United States to be
14 sued, it -- it must say so clearly.

15 MR. SMILAND: You also have the rule that the
16 word contract means the law of contract and not parts of
17 it.

18 JUSTICE STEVENS: But yes, isn't it arguable,
19 though, that in this case the Government probably thought
20 that it would be efficient to have the district represent
21 all the farmers for whatever their -- to the extent their
22 interests were shared with one another, rather than having
23 every individual have the same right to bring -- bring a
24 lawsuit?

25 MR. SMILAND: Efficient in -- in collecting land

1 assessments and water charges, but there's no evidence in
2 the -- either the language of the statute, I submit, or
3 the --

4 JUSTICE STEVENS: Except for the fact that the
5 district is the party to the contract, though.

6 MR. SMILAND: Nothing was said about litigation,
7 let alone intended third party beneficiary --

8 JUSTICE KENNEDY: Well, but the -- the whole
9 point of the district -- correct if I'm wrong. This is
10 your area. The whole point of the district was to make it
11 easier for the United States to know with whom it was
12 dealing to have an efficient system, and if you say, well,
13 that doesn't include lawsuits for damages, it seems to me
14 that destroys much of the purpose of the formation of the
15 district.

16 MR. SMILAND: There's a lot of legislative
17 history there, and it talks a great deal, as you say, Your
18 Honor, about efficiency and -- and the convenience. But
19 it's not talking at all about litigation, about remedies,
20 about rights once there's a breach.

21 JUSTICE SCALIA: But you haven't really achieved
22 very much efficiency if you simply get the United States
23 out of the business of collecting the payments and of
24 keeping track of the payments but leave the United States
25 subject to suit when the person who has authority to do --

1 do these things goofs. I mean, what -- what trouble has
2 the United States saved itself? It would still have to
3 ride herd over -- over the person with -- with whom it's
4 dealing.

5 MR. SMILAND: Well, it -- this is a transaction
6 between a water seller and many water buyers. Yes, in
7 1926 districts were put in the middle, but it's also true
8 in 1939 in -- in the section 9(e), Congress authorized the
9 particular type of contracts we have here, so-called water
10 service contracts, and it doesn't mention district. And
11 as a matter of fact, the Ninth Circuit has held that the
12 bureau had the discretion administratively to deal with
13 individuals.

14 So throughout the history of the reclamation
15 program, you -- you have the -- the core transaction is --
16 is a water sale from the Government to -- to farmers. And
17 that's was the case on day one in 1902 and it still is.

18 And I'd just like to remind the Court that
19 paragraph 3 of the stipulated judgment at page 110 of the
20 joint appendix is in our view dispositive here. This was
21 a -- an agreement by the United States and the district,
22 approved by a court after formal settlement notice was
23 dispatched to two formal classes, and it says, any
24 appropriate relief may be obtained against the Federal
25 parties by the filing of a new action for violation of any

1 contract arising independently of this judgment.

2 JUSTICE SCALIA: But the -- the Justice
3 Department has no authority to -- to consent to suit which
4 -- which Congress has not consented to. I don't see how
5 this strengthens your case.

6 MR. SMILAND: Again, if -- if this Court should
7 hold that neither of the two statutes on -- on which we
8 stand waive sovereign immunity, and --

9 JUSTICE SCALIA: And this alone wouldn't --
10 wouldn't remedy the --

11 MR. SMILAND: Then -- then --

12 JUSTICE SCALIA: -- the absence --

13 MR. SMILAND: -- the decision that we're not
14 intended beneficiaries should be vacated and we should
15 have a chance to go to the court -- Claims Court.

16 I'd like to reserve, Your Honor, 3 minutes, if I
17 may.

18 JUSTICE STEVENS: You may, indeed, Mr. Smiland.

19 Mr. Minear, I think you're up next.

20 ORAL ARGUMENT OF JEFFREY P. MINEAR

21 ON BEHALF OF RESPONDENT UNITED STATES

22 MR. MINEAR: Justice Stevens, and may it please
23 the Court:

24 Petitioners cannot maintain this suit for breach
25 of the Westlands contract because the Westlands contract

1 is itself subject to the rules of sovereign immunity. And
2 section 390uu authorizes only a limited waiver of
3 sovereign immunity. It does not authorize suits by
4 incidental beneficiaries for money damages.

5 For many of the points that have already been
6 raised by Justice Breyer, Justice Kennedy --

7 JUSTICE STEVENS: Mr. Minear, do you think it
8 does waive sovereign immunity for suits brought by the
9 district?

10 MR. MINEAR: In one circumstance, Your Honor.
11 This suit allows a district that has been sued by
12 individual water users to join the United States in the
13 ongoing suit and, in fact, remove the case to Federal
14 court if necessary, so there can be a determination of all
15 the rights in those --

16 JUSTICE STEVENS: Did this suit begin as a suit
17 by a water user against the district and then you were
18 joined later? Is that --

19 MR. MINEAR: No, it did not, but that did occur
20 in the Barcellos & Wolfson litigation that ran between
21 1978 and 1980.

22 JUSTICE STEVENS: Well, in this suit, did not
23 the district bring it against the United States?

24 MR. MINEAR: That's correct.

25 JUSTICE STEVENS: And was that a -- was that

1 jurisdiction proper at that time?

2 MR. MINEAR: That suit was brought under the
3 APA, and the district brought the suit on that basis.

4 JUSTICE STEVENS: But was it properly brought is
5 what I'm asking you.

6 MR. MINEAR: That suit was properly brought.

7 JUSTICE STEVENS: Okay.

8 MR. MINEAR: But it was not brought under 390uu.
9 Instead, there was an allegation that the United States
10 had acted unlawfully and the Westlands relied on the
11 Administrative Procedure Act.

12 JUSTICE SCALIA: And no money damages.

13 MR. MINEAR: And no money damages as well, and
14 that's what distinguishes this case.

15 JUSTICE BREYER: So that -- so your view -- I
16 mean, what -- what makes sense to me is that the section
17 means what it says, that consent is given to join the
18 United States. That means join them in an ongoing suit.
19 And it makes sense because what the United States wants is
20 anyone who sues them for money damages goes to the Court
21 of Claims. But of course, where you have an ongoing suit
22 between two other people, we'll make an exception because
23 there it's already in another district and we'll let you
24 bring the United States in as a necessary party. The
25 other exception is when you don't sue for money damages.

1 That's in section 702 of the APA.

2 Now, that to me makes a lot of sense and it's
3 consistent with the language. Is that your view or do you
4 have a different view?

5 MR. MINEAR: Yes, that is our view, and let me
6 supplement your comments in this regard. Section --

7 JUSTICE KENNEDY: May I -- may I -- has that
8 always been your view throughout?

9 (Laughter.)

10 MR. MINEAR: It has been our view under 390uu
11 when section 390uu has been -- has been raised.

12 JUSTICE KENNEDY: But throughout the litigation?

13 MR. MINEAR: Throughout this litigation? I
14 can't -- I can't be sure that we've maintained a
15 consistent position, but ultimately this is a question of
16 sovereign immunity. So the importance is that we get the
17 issue right here.

18 JUSTICE SCALIA: There has to be an ongoing
19 suit. You think this section does -- does not permit
20 somebody to initiate suit against one party and at the
21 same time against the United States as a necessary party.

22 MR. MINEAR: Your Honor, let me explain why
23 that's the case, and there was an answer --

24 JUSTICE SCALIA: Why what is the case?

25 MR. MINEAR: Why there's a necessity for an

1 ongoing suit.

2 JUSTICE SCALIA: You -- that is to say, there's
3 a suit between only two individuals and then the United
4 States is brought in.

5 MR. MINEAR: Your Honor, this -- this provision
6 was enacted in response to a specific problem that's
7 illustrated by the Barcellos & Wolfson litigation.
8 Individual farmers sued an irrigation district. The
9 irrigation district was concerned that it might be subject
10 to inconsistent liability to the farmers on the one hand
11 and the Federal Government on the other, and it sought to
12 join the United States. There was no mechanism in 1978
13 for that type of suit. Congress acted --

14 JUSTICE SCALIA: I understand that. That's one
15 situation that this provision could cover, but there are
16 other situations that this provision could -- could cover.
17 Let's say a farmer wants to bring suit against the
18 district, but it doesn't really know whether the fault is
19 with the district or whether the district was -- was
20 compelled to do what it did by the United States. So it
21 sues the district and just in case the United States was
22 -- was responsible, it joins the United States. Why
23 doesn't the language entirely permit that kind of a suit?

24 MR. MINEAR: The language could be construed to
25 allow that, but -- but waivers of sovereign immunity are

1 construed narrowly, and the language I think is more
2 properly construed, as Justice Breyer has suggested, to
3 allow joinder as a necessary party. And in fact, it was
4 enacted in specific reaction to that problem in the
5 Barcellos & Wolfson litigation where we did have ongoing
6 litigation and there was a sense by the irrigation
7 district they needed to join the United States so they
8 would not be subject to inconsistent suits.

9 So although I think that the language can bear
10 the -- the interpretation that you're suggesting, Justice
11 Scalia, nevertheless, I think the better interpretation is
12 the more narrow one that is --

13 JUSTICE SCALIA: Then -- then how do you explain
14 the last -- the last sentence of that provision, which is
15 any suit pursuant to this section? The only suit that the
16 section refers to is a suit in which the United States is
17 joined as a necessary party defendant. That's the subject
18 of the section.

19 MR. MINEAR: Yes, and --

20 JUSTICE SCALIA: And -- and the last sentence
21 says, any suit pursuant to this section may be brought in
22 any United States district court. And I read that to mean
23 if you want to sue the United States as a necessary party
24 initiating a suit, you can bring it in -- in any district
25 court in which the land involved is.

1 MR. MINEAR: Your Honor, we read that as
2 allowing removal in those circumstances when the United
3 States is joined later.

4 In any event, I have to say that with regard to
5 -- to this disagreement, it does -- it's not dispositive
6 or even affect the case here. The fact is that this
7 waiver of sovereign immunity under no circumstances would
8 allow this suit to go forward. Apart from the money
9 damages aspect, which itself is -- is -- would preclude
10 this type of suit, these parties are not intended
11 beneficiaries, and without being intended beneficiaries,
12 there's -- in no circumstances could they ever evoke these
13 provisions.

14 JUSTICE GINSBURG: Mr. Minear, when you say --
15 when you say not money damages, do you read the words that
16 I read to Mr. Smiland restrictively or do you think they
17 accommodate money damages, that is, suit to adjudicate,
18 confirm, validate, or decree the contractual rights of a
19 contracting entity?

20 MR. MINEAR: We think that under your cases,
21 such as *Pena v. Lane*, there needs to be a specific
22 reference to money damages. This simply is referencing
23 declaratory relief, and so we do not believe it would
24 allow an award of money damages. Rather, the party must
25 go to the Claims Court if they're seeking money damages.

1 And in fact, the waiver of sovereign immunity
2 there is somewhat broader. It does, as mentioned before,
3 allow implied or express contracts. So this suit is
4 simply in the wrong court.

5 But I would like to --

6 JUSTICE KENNEDY: So money damages -- waiver
7 always used the word money damages. When it says
8 adjudicate the rights under the contract, that doesn't
9 include money damages?

10 MR. MINEAR: No, I do not think in this context
11 it would. I think there needs to be something more
12 specific. We're really talking about declaring rights
13 here and not providing a specific remedy. And this Court
14 has always taken the view that the Claims Court
15 jurisdiction is the appropriate forum for deciding money
16 damages.

17 JUSTICE SCALIA: What about the second sentence?
18 The United States, when a party, shall be deemed to have
19 waived any right to plead that it is not amenable thereto
20 by reason of its sovereignty and shall be subject to
21 judgments, orders, and decrees of the court having
22 jurisdiction and may obtain review thereof in the same
23 manner and to the same extent? It's subject to the
24 judgments, orders, and decrees of the court to the same
25 extent as a private individual under like circumstances.

1 Why isn't that enough to -- to say that the court can --
2 can award damages?

3 MR. MINEAR: Your Honor, I think that simply
4 refers back to the previous sentence, which refers to
5 adjudicate, confirm, validate, or decree. Now, if you
6 interpret that to include money damages, then the second
7 sentence would follow, but I -- I think the two have to be
8 construed together. And in our view simply allowing a
9 party to adjudicate, confirm, validate, or decree in these
10 circumstances would not allow award of money damages.
11 Certainly I think Congress would be much clearer.

12 JUSTICE STEVENS: Yes, but if contractual rights
13 include a right to be paid for something, why wouldn't you
14 get a money judgment in a case like that? That first
15 sentence certainly covers the possibility of a contractual
16 right to be paid something.

17 MR. MINEAR: Your Honor, again, waivers of
18 sovereign immunity are construed narrowly. Now, let's --

19 JUSTICE STEVENS: That's pretty clear language.

20 MR. MINEAR: -- I have to say that the language
21 -- you're saying that the language -- yes, could it
22 conceivably be -- be interpreted in -- on -- that broadly.
23 But that's not --

24 JUSTICE STEVENS: Certainly if it were not a --
25 a United States and were a private individual, it would

1 include money damages.

2 MR. MINEAR: That might well be, but this is --

3 JUSTICE STEVENS: And -- and the next sentence,
4 as Justice Scalia points out, says the United States shall
5 be treated just like a private party.

6 MR. MINEAR: Yes. But Your Honor, ultimately I
7 think that we have to focus on that this is a waiver of
8 sovereign immunity. And -- and so far we have not touched
9 on the question of whether these parties --

10 JUSTICE STEVENS: Well, I think you've got a
11 very strong argument when you talk about an incidental
12 third party beneficiary not being a contracting party, but
13 now you're asking for a much broader holding than really
14 necessary to dispose of this case, it seems to me.

15 MR. MINEAR: Your Honor, I think I started with
16 that point, that an incidental beneficiary cannot invoke
17 this -- this provision. And I'd like to -- to continue
18 with that point because the party here is merely an
19 incidental beneficiary and not an intended beneficiary.
20 Under any of the -- the tests that have been applied for
21 third party beneficiaries, the party here would not
22 qualify as an intended beneficiary.

23 Most importantly, the contracting parties here,
24 the United States and Westlands, expressed no intent to
25 give this party enforcement rights.

1 What's more, the contract does not provide that
2 performance would be rendered to -- to the petitioners in
3 this case. The contract is quite clear that performance
4 is rendered to Westlands. This is a contract in which the
5 United States furnishes a specified amount of water to
6 Westlands and Westlands pays money for it. Westlands then
7 has a separate obligation with regard to the farmers.

8 JUSTICE SCALIA: Separate from -- where does
9 that -- that obligation come from?

10 MR. MINEAR: That arises from the regulations
11 that the Westlands Water District has enacted that
12 provides for the delivery of water from Westlands to the
13 individual farmers. The United States' obligation --

14 JUSTICE SCALIA: That's a State -- a State-
15 created obligation?

16 MR. MINEAR: That's right. That is -- and
17 Westlands has the -- has the option of either engaging in
18 contracts with the individual farmers or distributing the
19 water through regulation, and it has opted for
20 regulations.

21 Now, Westlands itself is a governmental unit.
22 It is comprised of the -- of the very farmers here, among
23 others, who have brought this suit. And it has the
24 authority to act in a representative capacity on behalf of
25 all its members. And that is why the United States enters

1 into contracts with irrigation districts precisely because
2 it allows them to reach accord and agreement and to
3 resolve their disputes. Now, the fact is that the United
4 States and Westlands agree on a great many things.
5 Sometimes they disagree, but when we disagree, we're able
6 to -- to speak to one another as two governments
7 representing constituencies and hammer out our
8 differences. And that would be impossible if these types
9 of third party beneficiary suits were allowed.

10 And I think that goes to the crux of what the
11 United States' real concern here is. When there are
12 contracts between one government and another, just as in
13 the context of treaties or compacts among the States, it's
14 vital that the two governmental units be able to deal with
15 one another as governments and to be assured that if they
16 can reach accord on behalf of their representatives -- on
17 behalf of the parties they represent, that that will
18 resolve the issue. If it were otherwise, this type of
19 distribution of water --

20 JUSTICE O'CONNOR: Well, you don't take the
21 position, do you, that Westlands could have agreed with
22 the United States that it wouldn't enforce its new laws
23 that deprived the farmers of water? You don't take that
24 position.

25 MR. MINEAR: But let's look at what would

1 happen, Your Honor, if that did happen. The individual
2 farmers would sue Westlands, claiming that Westlands was
3 not living up to its contract obligations. Westlands
4 would invoke 390uu and join the United States in that
5 suit. And the question of the legal rights would be
6 determined on that basis. So the mechanism that -- that
7 we've specified and the way that we interpret it deals
8 precisely with the problem that you've -- you've
9 addressed.

10 JUSTICE O'CONNOR: Yes, but you can't -- the --
11 presumably the Federal Government can't negotiate away the
12 Endangered Species Act or something. The fact is that new
13 laws were passed after these contracts were entered into
14 with Westlands. Isn't that right?

15 MR. MINEAR: That's correct. And again, I think
16 it's instructive to see what happened in this case. When
17 those laws were enacted, the United States reacted to
18 those. Westlands brought a suit under the APA challenging
19 the interpretation of the statutes. Westlands was
20 entitled to do that under the APA. The United States and
21 Westlands reached an accord, together with the
22 environmental intervenors in this group, that was
23 satisfactory to those parties. And it simply would be
24 very disruptive of the system if a minority of farmers in
25 the Westlands District could then bring a suit and upset

1 that agreement and that accord that had been reached.

2 Finally, I'd like to make a brief --

3 JUSTICE KENNEDY: Can the district get damages
4 from the Government?

5 MR. MINEAR: Technically yes, but their damages
6 are limited by the terms of the contract. Westlands could
7 sue the United States in Claims Court for a breach of the
8 contract, but the contract itself says that any damages
9 that are -- that the sole liability of the United States
10 in these circumstances would be an adjustment of the
11 account. In other words, there are not consequential
12 damages. Rather, if we do not provide Westlands with the
13 water that Westlands believes it's entitled to, then we
14 stand liable for an adjustment in the payments that
15 Westlands would make to us.

16 The suit that is being brought here is asking
17 for consequential damages, and we believe that the
18 contract here does not allow consequential damages. That,
19 of course, is a merits question that there's no need for
20 the Court to reach, but that is the way it would be
21 resolved in Claims Court in -- in our view.

22 I'd like to also raise the question of property
23 rights since that has -- has come up, that one of the
24 arguments that has been made by Westlands is that they're
25 entitled to status of a third party beneficiary because

1 they claim they have water rights in these circumstances.
2 The fact is that the United States, the State of
3 California, and Westlands, as well as the California Water
4 Resources Board and the first tier of California courts,
5 have all concluded they do not have the -- the water
6 rights that they claim. But in any event, our view is
7 that that issue is irrelevant to the inquiry here.

8 Rather, the question of third party beneficiary
9 status turns on the intent of the contracting parties.
10 Did they or did they not intend to give enforceable rights
11 to the third party? Here there's not a shred of evidence
12 that that was an intent -- there was an intent to create
13 enforceable rights in that third party.

14 Quite to the contrary. The only reference of
15 third parties, the farmers, in the contract here is
16 directed to limitations on what the district can do once
17 it receives its water. It doesn't create rights in them
18 -- the individual farmers. Quite to the contrary. What
19 it does it restricts the ability of the district in order
20 to protect the United States' interests, to make sure the
21 United States will be paid for the water that it
22 ultimately provides to the district.

23 The central point that I would like to leave you
24 with, though, here at the end is the importance of
25 protecting the relationship between the United States and

1 Westlands. But although we disagree on some matters, we
2 are able to reach accommodation and agreement, and when
3 we're able to do that, it's to the good of all concerned.
4 The contracts and the laws here are structured to allow
5 those types of agreements to be reached, and we think that
6 allowing third party beneficiary suits would be very
7 disruptive of that -- that operation.

8 JUSTICE STEVENS: Thank you, Mr. Minear.

9 Mr. Somach, will you tell us what the district's
10 views on this whole matter are?

11 ORAL ARGUMENT OF STUART L. SOMACH

12 ON BEHALF OF RESPONDENT WESTLANDS WATER DISTRICT

13 MR. SOMACH: Yes, Your Honor.

14 Justice Stevens, and may it please the Court:

15 Westlands Water District has argued in its brief
16 that petitioners are not intended third party
17 beneficiaries with enforceable rights under the 1963
18 contract. I want to make two points from the perspective
19 of the district why this must be so.

20 First, allowing a direct right of action by
21 petitioners is not practical or consistent with the
22 district's need and ability to function as a governmental
23 entity and to allocate all of the water that it receives
24 under contract to all of the landowners within the -- the
25 district. This is a scarce and valuable resource, and

1 these types of third party lawsuits jeopardize the
2 district's ability to be able to provide water pursuant to
3 California Water Code provisions to all of the landowners
4 within the district.

5 Second, the laws of the State of California and
6 reclamation law, working in harmony one with the other --

7 JUSTICE SCALIA: Excuse me. Could you expand on
8 the first point a little bit? I mean, you say you don't
9 want to be bothered with lawsuits. Is -- is that -- is
10 that all that it amounts to?

11 MR. SOMACH: No. I -- I think quite on the
12 contrary. You know, and unfortunately, the -- the history
13 of this contract and these -- these issues has been
14 anything other than the district avoiding litigation.

15 The -- the whole concept of a water district is
16 not to individualize or incrementalize the water and
17 interests in water in any one group of landowners or any
18 one landowner. The idea is that the rights of all of the
19 landowners to all of the water under the contract are to
20 be treated as a whole and allow the district to provide
21 protection to all of the landowners within the district as
22 a whole, the point there being that the water doesn't
23 belong to any one landowner or a group of landowners. It
24 belongs to the whole.

25 And in fact, the way the district operates, the

1 way it has to operate is in the context of the whole.
2 Bonds are issued. Encumbrances on lands are -- are
3 incurred, all based upon not individual rights to water
4 but rather broad rights of water throughout the district.
5 To allow a small group of landowners to decide how to
6 administer the contract, how to enforce the contract in
7 any one given situation leaves decisions that are critical
8 to all of the landowners solely in the hands of an
9 unaccountable small group of -- of landowners.

10 JUSTICE SCALIA: Can't -- can't such a suit be
11 brought in State court? I can't believe that this
12 district can do whatever it wants with the water.

13 MR. SOMACH: Oh, absolutely not. Yes, it --
14 yes, it can.

15 JUSTICE SCALIA: Really?

16 MR. SOMACH: No. What I meant to say was yes,
17 you are right.

18 JUSTICE SCALIA: Okay.

19 MR. SOMACH: And absolutely not. It can't do
20 just anything it wants to do. It is subject, as a
21 governmental entity, to all the strict requirements of
22 California water law and governmental law, for that
23 matter. If, for example, these petitioners decide for
24 whatever reason they don't like a decision of the -- of
25 the board -- and in fact, that is an example that exists

1 emanating out of the facts of this case. When the
2 district decided that it was better to settle the
3 litigation, these landowners first petitioned the -- the
4 governing of the -- of the district and sought to -- to
5 have them not proceed in that manner, the way any other
6 group of citizens or constituents with any other
7 governmental entity would have proceeded. The district
8 decided, however, that it was in the best interests of all
9 of the landowners within the district to settle the
10 litigation.

11 Now, at that point in time certainly, these
12 petitioners had the normal and ordinary rights that any --
13 any constituent within the district has to be able to
14 challenge a decision that has been made by the district.
15 That includes, for example, writ proceedings, to argue
16 that the decision of the board was arbitrary, capricious,
17 otherwise unlawful, and that it should -- should be
18 mandated to -- to proceed in some other fashion.

19 If the issue were damages, this district is
20 subject, like any other governmental entity within the
21 State of California, to the government Tort Claims Act if
22 -- if they're tortious type damages. And if we have
23 arguable impairment of property rights, this district is
24 subject to the California constitution, the United States
25 Constitution, and the government code provisions that

1 provide for litigation with respect to those broader types
2 of -- of damages.

3 And quite frankly, this is a governmental body
4 and it is very susceptible to the political process. It
5 is not an easy thing for -- for the district to be
6 standing up here and telling you that its landowners
7 aren't entitled to receive what they want. That's a very
8 difficult for the district to -- to do. But in dealing
9 with the rights of the entire district, it's an absolute
10 essential thing to do. If these landowners had exercised
11 their prerogatives under California law, they could have,
12 assuming they were the majority, controlled the decisions
13 of the board of directors in the way that any majority
14 constituency controls the director -- the -- the direction
15 and the decisions of a -- of a governing board.

16 You know, this -- this lawsuit is instructive in
17 -- in a number of ways in terms of these practical
18 concerns that we have in terms of how in the world are we
19 going to be able to administer a contract like this one.
20 How are we going to do all of the things that the Water
21 Code has told us that we have to do if, at any given time,
22 a landowner, a small group of landowners is able to go
23 into Federal district court and independently decide that
24 it wants to administer the contract that the district has
25 with the United States or to enforce terms of the contract

1 that it has with the United States in a manner that's
2 inconsistent or different than the way --

3 JUSTICE STEVENS: I don't really understand why
4 that's any greater burden than the fact they can sue you
5 in State court anyway. They -- they can always bring
6 litigation.

7 MR. SOMACH: Well, it -- it really requires the
8 district to, in a sense, race to the courthouse with the
9 -- with the petitioners in order to be there first in
10 order to have its views of the contract --

11 JUSTICE SCALIA: Well, the suit in State court,
12 I assume, would -- would only be -- the claim would be
13 that you were acting arbitrarily, and so long as your
14 interpretation of the contract was a reasonable one, the
15 suit would fail.

16 MR. SOMACH: Yes.

17 JUSTICE SCALIA: Whereas, this suit here -- it
18 doesn't matter how reasonable it is. If it's wrong, it's
19 wrong. I mean, it's quite a different --

20 MR. SOMACH: No. I think it is a different
21 situation, and I agree with what you -- what you have
22 said, Your Honor.

23 I do, however, want to -- to not avoid the
24 concern that may be expressed here, and -- and that is,
25 that -- that what it does is it -- it forces the district

1 into a situation of chasing its landowners, in essence,
2 around from one litigation forum to another in order to
3 ensure that its means of controlling and -- and
4 administering the contract is not jeopardized. The fact
5 that the landowners -- if the landowners can move forward
6 independently with litigation with respect to the
7 contract, what it really does is create in a sense a --
8 the contract becomes this very interesting moving target
9 where the district has its views about what the contract
10 is and how it should be administered, how it should be
11 enforced, and then it proceeds in one direction as, for
12 example, it did with the settlement in this litigation,
13 deciding that that was the best way to protect the
14 interests of the district.

15 Had these petitioners on the merits in a
16 hypothetical situation prevailed with a totally different
17 result, that would have substantially affected and
18 impacted the district's ability to be able to maintain the
19 obligations and the commitments that it made to the other
20 settling parties. That destabilizes the ability of the
21 district to actually act in other governmental forums, in
22 forums with the United States, with the State of
23 California, with other districts in the context of
24 attempting to say we control the contract, we enforce its
25 terms, and we can make commitments. And when we make

1 those commitments, we can abide by and we can live up to
2 those commitments in a way that -- that governments ought
3 to be able to do when they're -- when they're making those
4 types of commitments.

5 Having the landowners being able to come or --
6 and here, I want to make certain. When I use the word
7 landowners, I'm not saying that the landowners are not
8 beneficiaries of the contract. They certainly are.

9 JUSTICE KENNEDY: What about the provision in
10 the judgment at page 110 that was -- that was cited to us,
11 that -- that the parties may obtain other appropriate
12 relief by the filing of a new action?

13 MR. SOMACH: Yes. I -- I think that that --
14 that phrase is actually begun as a proviso, and I view it
15 as not limiting the ability of the area I`landowners in
16 the Barcellos & Wolfesen judgment that you're -- that
17 you're quoting from from being able to act in any other
18 way. It was a non-limiting provision. The -- the first
19 part of the -- the part that you read deals with what
20 their rights to enforce were. The second part was a
21 proviso that simply said notwithstanding this, whatever
22 else you're able to do, you may do.

23 Thank you for your time.

24 JUSTICE STEVENS: Thank you, Mr. Somach.

25 Mr. Smiland, you have 9 minutes remaining, but

1 you do not have to use it all.

2 REBUTTAL ARGUMENT OF WILLIAM M. SMILAND

3 ON BEHALF OF THE PETITIONERS

4 MR. SMILAND: Thank you, Your Honor.

5 What happened here is that the United States
6 sold half the water it was obligated to sell under the
7 contract. It doubled the price it was permitted to charge
8 on the other half. It was a massive harm to the farmers.
9 I'm sure you understand.

10 JUSTICE GINSBURG: Well, you say under the
11 contract. I thought there was a provision in the contract
12 that said that the United States will not be responsible
13 for under-deliveries, and I think it listed the drought
14 and the last thing was any other cause.

15 MR. SMILAND: Well, that's what we were about to
16 go to trial on, Your Honor. That's a merits issue. The
17 Ninth Circuit has abstained on whether there was a
18 mandatory statutory duty to cut off this water, and I urge
19 the Court not to -- to dive into that pool.

20 We're trying to get in the courthouse doors.

21 JUSTICE GINSBURG: But you were saying there's
22 -- there's a right under this contract to recover from the
23 United States for an under-delivery.

24 MR. SMILAND: We have massive cross summary
25 judgment motions on that issue and we were entitled to go

1 to trial on that -- on our claim of liability.

2 JUSTICE SOUTER: What --

3 JUSTICE SCALIA: If --

4 JUSTICE SOUTER: No, please.

5 JUSTICE SCALIA: No. I've asked a lot of
6 questions. Go on.

7 JUSTICE SOUTER: What do you make -- excuse me.
8 What do you make of the argument for reasonable
9 construction of the contract that in fact you just simply
10 cannot have a system that would promise the chaos that --
11 that you are promising?

12 MR. SMILAND: I -- I don't make much of it. The
13 parties here and -- and the parties in the West fully
14 understood for 20 years, after Allen Orchards, that the
15 farmers were intended third party beneficiaries. That's
16 -- we settled in 1986 with that understanding, and this
17 parade of horrors just has not come to pass.

18 JUSTICE SOUTER: Is -- is it correct, as Justice
19 Scalia suggested earlier, that so far as State litigation
20 is concerned, it would be limited simply to arbitrary,
21 unreasonable behavior?

22 MR. SMILAND: That's true. And even more
23 fundamentally, the United States breached the contract.
24 The district didn't do anything wrong. Why would we sue
25 the district when the United States cut off the water and

1 doubled the charge?

2 JUSTICE SCALIA: Well, I think it's arbitrary
3 not to -- not to -- for an agency, of which you're --
4 you're in some sense at least the beneficiary, not to
5 insist upon its contract rights, just as a shareholder can
6 insist that the -- that a corporation enforce its
7 contracts.

8 MR. SMILAND: We had a little mini-trial on that
9 in front of the -- in front of the district court, and --
10 and I made that argument, Your Honor, and the district
11 court rejected it.

12 JUSTICE SCALIA: No, he was wrong. That was --
13 (Laughter.)

14 MR. SMILAND: I agree.

15 JUSTICE BREYER: I guess the reason that you
16 would sue the district would be if you didn't have any
17 enforceable promise from the United States that they
18 didn't -- wouldn't do it.

19 MR. SMILAND: Well, we -- we --

20 JUSTICE BREYER: Now, you think you do. That's
21 the issue in the case.

22 MR. SMILAND: We had a stipulated judgment.

23 JUSTICE BREYER: And so therefore -- therefore,
24 I'm looking for where that promise is. And you started
25 out by citing a page, which wasn't a page of the contract.

1 It was a page of some kind of settlement, and that page
2 said that the district agrees that they entered into the
3 contract with helping the farmers in mind. I'm sure they
4 did. So what. I mean, I might buy a house with the idea
5 of helping of my child. I'm going to give it to him.
6 That doesn't mean he can enforce the contract.

7 MR. SMILAND: German Alliance, Your Honor.

8 JUSTICE BREYER: You mean my child can enforce a
9 contract I enter into with another -- I buy a house and I
10 say I intend to give it to my daughter.

11 MR. SMILAND: If the contract --

12 JUSTICE BREYER: And then she can enforce the
13 contract?

14 MR. SMILAND: If the contract says --

15 JUSTICE BREYER: Yes. If the contract says.
16 Now, that's why I was interested that you didn't cite
17 language in the contract.

18 MR. SMILAND: Oh, yes, we did, Your Honor.

19 JUSTICE BREYER: You -- well, I mean, you
20 started out by referring me to page 110 or 111 --

21 MR. SMILAND: That's true.

22 JUSTICE BREYER: -- which doesn't. Now, what is
23 the language in the contract --

24 MR. SMILAND: Articles --

25 JUSTICE BREYER: -- that helps you the most?

1 MR. SMILAND: -- 15 and 29(b) of the '63
2 contract and also the 1965 contract explicitly refers to
3 benefit, and probably most dramatically, the recordable
4 contracts that were signed actually with my clients and
5 the United States said that they were made in
6 consideration of the direct and indirect benefits that
7 those farmers would gain from the 1963 contract. Now,
8 paragraph 4.2 in the judgment, which came some years
9 later, reconfirmed that.

10 What was new and different about the judgment is
11 that for the first time it made explicit -- we think it
12 was implied earlier, but explicit that there was
13 enforceable rights in the farmers, and we've argued it
14 under your German Alliance test that's not required, but
15 if it was required, we bargained for, we got it. The --
16 the court approved that and the Congress approved that.
17 And I -- I -- personally I've looked at all of these cases
18 in recent months. It's very rare for an intended
19 beneficiary to have language like that.

20 In any case, as I was saying, my clients have
21 suffered massive losses. They've been litigating these
22 claims for 25 years. Everyone has assumed there was
23 waiver of sovereign landowner. Everyone assumed they're
24 intended beneficiaries. And we think we should have a
25 forum and a remedy and a right to our day in court.

1 JUSTICE STEVENS: Thank you, Mr. Smiland.

2 The case is taken under advisement.

3 (Whereupon, at 10:57 a.m., the case in the
4 above-entitled matter was submitted.)
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