MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT V. ROBERTSON: ABIDING BY THE FEDERAL COURSE OF INTERSTATE WATER ALLOCATION

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I. INTRODUCTION

Agricultural landowners ("landowners") in Arizona filed two separate actions in superior court to assert water rights from the Central Arizona Project ("CAP").[1] One of these claims was removed to the United States District Court and dismissed; the Ninth Circuit affirmed this judgment.[2] While the Ninth Circuit appeal was pending, plaintiffs proceeded with their remaining state court action on alternative theories, claiming they enjoyed rights to the CAP water either by contract or as third-party beneficiaries of a contract.[3] In large part, federal law dictates whatever contractual rights landowners possess.[4] At the same time, prior dismissal of their federal court suit left plaintiffs' third-party beneficiary theory adrift in the troublesome, murky waters of issue preclusion.[5]

From a legal standpoint, agricultural landowners in Arizona get their CAP water fourth-hand. The CAP was constructed under a 1972 contract between the United States Secretary of the Interior ("Secretary") and the Central Arizona Water Conservation District ("CAWCD"), a multicounty district created for the purposes of that contract.[6] The CAWCD subcontracts with two irrigation districts in Arizona for the delivery of CAP water to landowners; these districts are Arizona municipal corporations for which the landowners elect boards of directors.[7]

Obligations to repay the United States for the construction of the CAP have brought considerable financial difficulties upon the irrigation districts under

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1. Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson, 123 P.3d 1122, 1124 (Ariz. 2005).
2. *Id.*
3. *See id.* at 1126–27.
4. *See id.* at 1124–26.
5. *See id.* at 1128. This Case Note suggests that the court reaches the right result, but takes a needless detour into fishy authority. *See infra* Part IV.
6. *Id.* at 1125–26 (citing ARIZ. REV. STAT. § 48-3703 (2005)).
7. *Id.* at 1124, 1126 (citing ARIZ. REV. STAT. §§ 48-2901, -2922, -2978 (2005)).

the subcontracts.[8] In response, 2002 saw a proposed settlement whereby the districts would forego rights to CAP water in return for debt relief and the right to purchase CAP water through the year 2030.[9] A majority of the landowners in each district approved this arrangement.[10] In the face of opposition from about 200 approving district landowners, landowners disagreeing with the vote filed the above mentioned lawsuits against the CAWCD and the irrigation districts, asserting that the proposed settlement contravenes their vested rights in the CAP water.[11] The CAWCD removed its suit to the United States District Court, where it was dismissed.[12]

Subsequently, the state trial court granted partial summary judgment to the landowners in their suit against the irrigation districts, holding that the districts could not abrogate the landowners' rights in the water, which they enjoyed either by contract[13] or as third-party beneficiaries of the subcontracts between the districts, the CAWCD, and the Secretary.[14] The Arizona Supreme Court granted special action relief to the districts.[15] In its first decision authored by Justice Bales, the court unanimously reversed the trial court, holding that federal law confers no first-party contract rights on the landowners and that the District Court's ruling precludes examination of the third-party beneficiary theory on the merits.[16]

II. CAP WATER AND ITS STATUTORY SPRINGS

The court's analysis of plaintiffs' claims depended in part upon the statutory history of the CAP. Three federal statutes were relevant to the court's analysis: the Reclamation Act of 1902, the Boulder Canyon Project Act ("BCPA") of 1928, and the Colorado River Basin Project Act of 1968.[17] The first statute provides for the establishment of water reclamation projects in the western United States; the latter two usher in the construction of the Hoover Dam and the Central Arizona Project, respectively. Section 8 of the Reclamation Act requires the Secretary to comply with state law in "the control, appropriation, use, or distribution of water used in irrigation [while] carrying out the provisions of this Act."[18] The trial court relied on a separate section of the same act,[19] 43 U.S.C.

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8. *Id.* at 1124. For an incisive look at the CAP's financial problems, political challenges, and resultant underutilization, see generally Robert Jerome Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project*, 27 ARIZ. ST. L.J. 677 (1995).

9. *Robertson*, 123 P.3d at 1124.

10. *Id.*

11. *Id.*

12. *Id*.

13. *Id.* at 1127.

14. *Id.* at 1128.

15. In so doing, the court referred to the statewide importance of water law decisions and the districts' lack of an "'equally plain, speedy, and adequate remedy by appeal.'" *Id.* at 1124. (quoting ARIZ. R.P. SPEC. ACT. 1(a), 4(a)).

16. *Id.* at 1126–27, 1128.

17. *Id.* at 1124.

18. 43 U.S.C. § 383 (2000).

19. *Robertson*, 123 P.3d at 1127.

§ 372, dubbing water rights acquired under the act "appurtenant to the land irrigated."[20] The extent of such rights corresponds to the water's beneficial use.[21]

The *Robertson* court highlighted an apparent conflict between this language of appurtenance from the Reclamation Act and the language of the BCPA. Section 5 of the BCPA provides that only a contract with the Secretary can vest a person with rights to use water from the Boulder Canyon Project.[22] If the Secretary has exclusive control over the vesting of rights in the water, how can the Secretary simultaneously defer to state law concerning its "control, appropriation, use, or distribution," as required by the Reclamation Act? The answer lies in the United States Supreme Court's decision in *Arizona v. California*.[23] The *Robertson* court extracted the pertinent holdings of that case and its subsequent decree.[24] The BCPA is, in effect, Congress's "comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River."[25] The power of the Secretary to apportion such waters overrides that of the states.[26] And aside from water used for a federal reservation, no water would be delivered to users in Arizona, California or Nevada except under contract with the Secretary pursuant to federal law.[27] In sum, the BCPA allows the Secretary to contract in derogation of a state's inherent power over the use of the lower Colorado River.

The final legislative aquifer the *Robertson* court examined is the CAP Act. This Act, deliberately in keeping with the BCPA,[28] enables the Secretary to contract with state political subdivisions for the repayment of CAP construction costs and the distribution of CAP water.[29] The state subdivision thereby makes water available to users through subcontracts, over which the Secretary retains approval.[30] In this case, the state subdivision is the CAWCD, which entered into a "master contract" with the Secretary.[31] The "users" are the two irrigation districts who subcontracted with the CAWCD and the United States.[32] The landowners formed their own agreements with the districts on terms of delivery pursuant to which the districts would provide CAP water through their facilities, while the landowners would pay taxes and service fees and relinquish rights in certain irrigation wells to the districts.[33] Over the years, underutilization of CAP water and

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20. 43 U.S.C. § 372 (2000).
21. *Id.*
22. *Id.* § 617(d).
23. Arizona v. California (*Arizona I*), 373 U.S. 546 (1963).
24. *See Robertson*, 123 P.3d at 1125.
25. *Arizona I*, 373 U.S. at 565.
26. Arizona v. California (*Arizona II*), 376 U.S. 340, 342–43 (1964).
27. *Id.* at 343.
28. 43 U.S.C. § 1551(a) (2000) ("Nothing in this chapter shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of . . . the Boulder Canyon Project Act . . . .").
29. *Id.* § 1524(b)(1).
30. *Id.* By this same provision, the United States may require that it be made a party to the contract.
31. *Robertson*, 123 P.3d at 1125–26.
32. *Id.* at 1125.
33. *Id.* at 1126.

state political conditions left the districts awash in debt, which the proposed settlement promised to alleviate.[34] The *Robertson* court evaluated whether this settlement violated any vested rights of the plaintiffs by reducing their CAP water allocation.[35]

III. FIRST-PARTY CONTRACT RIGHTS OF THE LANDOWNERS

The *Robertson* court first treated the trial court's holding that the plaintiffs gained vested contractual rights to CAP water under the Reclamation Act.[36] This argument fails, according to the court, because the BCPA does not supplement the Reclamation Act—it displaces it. While the Reclamation Act provides that water rights under the Act are appurtenant to irrigated land (and therefore vested),[37] the U.S. Supreme Court expressly held in *Arizona v. California* that only a contract with the Secretary can precipitate rights in CAP water.[38] Subsequent holdings reaffirm this point.[39] Because the landowners are not parties to any contract with the Secretary, they have no vested contract rights in the water.[40]

This result conforms with the scheme of the water agreements, as well as the apparent wishes and understanding of the other landowners and the districts. While the parties expected the districts to deliver CAP water to landowners for irrigation,[41] the contract between the CAWCD and the Secretary did not guarantee delivery of water. Rather, delivery was subject to availability and the Secretary's discretion.[42] The court's holding also conforms to the Supreme Court's view of state deference to federal policies where the water interests of multiple states are at stake.[43]

Additional arguments by the landowners failed under the court's analysis. Interim financial agreements between the CAWCD and the districts vested no rights in the landowners because neither the Secretary nor the landowners were a party to these arrangements.[44] Some U.S. Supreme Court cases, *California v. United States* in particular,[45] hold that section 8 of the Reclamation Act does shield water rights vested under state law in other settings. For the *Robertson* court, *California v. United States* runs against the landowners[46] because it specifies that the Secretary has unique power under the BCPA given the multistate scope of the

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34. For an understanding of how the debt arose, see Glennon, *supra* note 8, at 682–88.
35. *Robertson*, 123 P.3d at 1124.
36. *Id.* at 1126–27.
37. 43 U.S.C. § 372.
38. *Arizona II*, 376 U.S. at 343.
39. *See, e.g.*, Bryant v. Yellen, 447 U.S. 352, 368–70 (1980); California v. United States, 438 U.S. 645, 674 (1978).
40. *Robertson*, 123 P.3d at 1127, 1128.
41. *Id.* at 1127.
42. *Id.* at 1126.
43. *See Arizona I*, 373 U.S. at 565.
44. *Robertson*, 123 P.3d at 1126, 1127.
45. 438 U.S. 645; *see also, e.g.*, Ickes v. Fox, 300 U.S. 82, 94–95 (1937).
46. *Robertson*, 123 P.3d at 1127.

project.[47] These straightforward principles underscore the federal need to dilute archaic local property doctrine with more flexible contract rights in interstate water allocation. Moreover, by upholding this federal scheme, the court allowed local landowners to exercise their political and economic will through their elected representatives in the districts.

IV. ISSUE PRECLUSION AND THIRD-PARTY CONTRACT RIGHTS OF LANDOWNERS

The trial court cited an additional basis for granting partial summary judgment: that the landowners were third-party beneficiaries of the subcontracts between the districts, the CAWCD, and the United States.[48] The Arizona Supreme Court reversed this holding because the federal district court had already decided the same issue in the landowners' suit against the CAWCD.[49] According to the court, the doctrine of defensive collateral estoppel barred relitigation of the issue at the state level.[50]

A. Federal Issue Preclusion

Under the American dual-court system, there are several scenarios in which courts must decide whether an issue is precluded: a federal court faces a prior federal judgment; a federal court faces a prior state judgment; a state court faces a prior state judgment; or a state court faces a prior federal judgment. The *Robertson* court faced the last situation, and the court took special guidance from the U.S. Supreme Court's statement: "[W]e have long held that States cannot give [federal] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."[51] As a result, federal law determines the preclusive effect of federal judgments in state court. It is worth noting that federal courts obey a converse principle: 28 U.S.C. § 1738 instructs them to give state court decisions the same full faith and credit that they would have in their native jurisdictions. Hence, state rules of issue preclusion decide whether a state decision has preclusive effect in federal court.[52]

The *Robertson* court began its analysis by looking to federal case law on the subject of issue preclusion. "Defensive" issue preclusion prevents a plaintiff from simply switching defendants to relitigate issues already settled in a prior case.[53] In *Allen v. McCurry*, the U.S. Supreme Court recognized this form of preclusion, setting out the three elements needed for it to apply: the issue must

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47. California v. United States, 438 U.S. 645, 674 (1978). Bryant v. Yellen, 447 U.S. 352, 370 (1980), more overtly affirms the point.

48. *Robertson*, 123 P.3d at 1126–27.

49. *Id.* at 1128.

50. *Id.* at 1128–29.

51. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001).

52. Thornton v. City of St. Helens, 425 F.3d 1158 (9th Cir. 2005) (citing Takahashi v. Bd. of Trustees, 783 F.2d 848, 850 (9th Cir. 1986); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)). The *Robertson* court also notes this point. 123 P.3d at 1128 (citing Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373, 380–81 (1985)).

53. *Robertson*, 123 P.3d at 1128.

previously have been litigated to a conclusion; the issue of fact or law must have been necessary to the prior judgment; and the party against whom preclusion is raised must have been a party (or privy to a party) to the first case.[54]

The *Robertson* court concluded that these three prongs were met.[55] In the first place, the ruling of a district court constituted a judgment under principles of federal issue preclusion, even if an appeal is pending.[56] Second, the landowners had already lost their case for third-party beneficiary status in the district court.[57] Third, the issue of third-party beneficiary status was essential to the ruling of the federal court, because without that status the landowners could not proceed with their suit.[58] Finally, the court gave little weight to the joinder of plaintiffs who were not plaintiffs in the federal suit,[59] because federal courts have frowned upon plaintiffs' attempts to add parties in the hope of avoiding preclusion.[60] The court pointed out that these new plaintiffs had their interests adequately represented at the federal court.[61]

B. Restatement *Exceptions to Issue Preclusion*

Section 29 of the *Restatement (Second) of Judgments* provides eight exceptions to the rule of issue preclusion, which would allow a plaintiff to contest an issue that another court has already resolved.[62] The landowners argued that five of these exceptions could apply in the instant case, and the Arizona Supreme Court humored them on the grounds that "federal courts have looked to the Restatement in determining the preclusive effect of federal judgments."[63] In support of this statement, the court cited *Montana v. United States*,[64] a 1979 case in which the U.S. Supreme Court consulted a tentative draft of the *Restatement* to find exceptions to issue preclusion.

First, the landowners contended that issue preclusion would be "incompatible with an applicable scheme of administering the remedies in the actions involved."[65] They cited the legislative creation of irrigation districts as such a scheme; the court countered that this exception only applies where a statute expressly limits a judicial determination to the action in which it is made.[66] The

54. 449 U.S. 90, 94–95 (1980).
55. *Robertson*, 123 P.3d at 1128.
56. Robi v. Five Platters, Inc., 838 F.2d 318, 327 (9th Cir. 1988).
57. *Robertson*, 123 P.3d at 1129 (affirming that a dismissal for failure to state a claim satisfies the requirement of a judgment on the merits (citing Federated Dep't Stores, Inc. v. Moitie 452 U.S. 394, 399 n.3 (1981)).
58. *Robertson*, 123 P.3d at 1129.
59. *Id.*
60. *See* Petit v. City of Chicago, 766 F. Supp. 607, 613 (N.D. Ill. 1991).
61. *Robertson*, 123 P.3d at 1129.
62. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).
63. *Robertson*, 123 P.3d at 1129.
64. 440 U.S. 147, 162–64 (1979).
65. RESTATEMENT (SECOND) OF JUDGMENTS § 29(1).
66. *Robertson*, 123 P.3d at 1129–30.

court went on to note that there is no sign that the legislature intended to make individual landowners into third-party beneficiaries of the districts' contracts.[67]

Second, the landowners asserted an exception applying when relationships between the parties to and only extant during the first proceeding might have driven its outcome.[68] The court dispensed with this argument as baseless.[69]

Third, the landowners argued that the district court should have determined their third-party beneficiary status under state rather than federal law, and therefore preclusion would "complicate determination of issues in the subsequent action or prejudice the interests of another party thereto."[70] The court held that this exception was inapposite and that, moreover, the district court correctly applied federal law to construe a contract entered into by the United States under a federal statute.[71]

The court considered the last two exceptions together: The first applies when preclusion would inappropriately foreclose reconsideration of a question of law,[72] and the second applies when a party can show "other compelling circumstances" such as plain error, the emergence of new evidence, or some other "good reason" to allow relitigation.[73] In support of this argument, the landowners reasserted the premises of their third-party beneficiary claim: that the irrigation districts were created for their benefit, and use of the CAP is ultimately conferred on the landowners.[74] The court held that the contracts between the districts and CAWCD guarantee no benefit to the landowners, adding in a footnote that for this reason it would agree with the Ninth Circuit's holding if it were to reach the merits:[75] The landowners failed to present the necessary "evidence of a clear intent to confer such status."[76]

The *Robertson* court discussed these *Restatement* exceptions at some length but cited only one federal case to support its application: *Montana v. United States* is supposed to show that "federal courts have looked to the Restatement in determining the preclusive effect of federal judgments."[77] Unlike *Robertson*, however, which involved a preclusive federal court judgment in state court,

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67. *Id.* at 1130.

68. *Id.*; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 29(5) (providing an exception if the issue "could reasonably have been resolved otherwise if those circumstances were absent").

69. *Robertson*, 123 P.3d at 1130.

70. RESTATEMENT (SECOND) OF JUDGMENTS § 29(6).

71. *Robertson*, 123 P.3d at 1130 (citing United States v. Seckinger, 397 U.S. 203, 209–10 (1970); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)). *Patterson* was cited by the Ninth Circuit in its decision on the merits. Smith v. Cent. Ariz. Water Conservation Dist., 418 F.3d 1028, 1034 (9th Cir. 2005).

72. RESTATEMENT (SECOND) OF JUDGMENTS § 29(7).

73. *Id.* § 29(8), § 29(8) cmt. j.

74. *Robertson*, 123 P.3d at 1130.

75. *Id.*

76. *Smith*, 418 F.3d at 1035–37.

77. *Robertson*, 123 P.3d at 1129.

Montana dealt with a preclusive *state* court judgment in *federal* court.[78] Moreover, Justice Rehnquist wrote a brief concurrence in *Montana* to point out that "references to . . . drafts or finally adopted versions of the Restatement of Judgments are not intended to bind the Court to the views expressed therein on issues not presented by the facts of this case."[79] It is true that the Ninth Circuit has looked to the *Restatement* in determining the preclusive effect of federal judgments.[80] However, Ninth Circuit decisions adverting to section 29 exceptions in the context of a prior federal judgment are very hard to come by. A Ninth Circuit bankruptcy appellate panel recently announced that federal courts generally follow the *Restatement*'s view of res judicata, but that panel erroneously cited federal cases wrestling with prior state court judgments under state preclusion law.[81] In sum, the *Robertson* court's citation of *Montana* to apply the *Restatement*'s exceptions to issue preclusion in the context of a prior federal judgment is attenuated.

Admittedly, the line between federal and state issue preclusion is easily blurred. The federal case from which the *Robertson* court pulled the essential elements of issue preclusion, in fact, balanced federal civil rights polices against the preclusive effect of a prior state judgment under state law.[82] The case is not a binding source of federal issue preclusion doctrine, but it invites confusion on the point. Regardless of whether a federal court would apply these uncontroversial elements[83] or the *Restatement* exceptions, judges and practitioners carry a special burden of precision as they characterize the persuasive authority of such slippery precedent.

Perhaps the Arizona Supreme Court saw *Robertson* as a chance to elucidate its own stance on the *Restatement* exceptions to issue preclusion, not having done so in the past. After all, if issue preclusion aims to relieve parties of costly litigation and conserve judicial resources,[84] it failed in this case. The trial

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78. 440 U.S. 147, 162–64 (1979). Subsequent U.S. Supreme Court cases applying 28 U.S.C. § 1738 to determine the preclusive effect of a prior state court judgment cite *Montana*, though not in regard to decisions of the same state court. *E.g.*, Haring v. Prosise, 462 U.S. 306, 313–14 (1983); Allen v. McCurry, 449 U.S. 90, 95 (1980). At the same time, the Ninth Circuit has referred to *Montana* in at least one case regarding a prior federal judgment. United States v. Weems, 49 F.3d 528, 533 (1995).

79. 440 U.S. at 164 (Rehnquist, J., concurring).

80. *See, e.g.*, Cal. Employment Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147, 1150 (9th Cir. 1996).

81. Alary Corp. v. Sims (*In re* Associated Vintage Group, Inc.), 283 B.R. 549, 554–55 (B.A.P. 9th Cir. 2002) (citing Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77–81 (1984) (prior state court judgment); Hiser v. Franklin, 94 F.3d 1287, 1290 (9th Cir. 1996) (prior state court judgment); *Del Mission Ltd.*, 98 F.3d at 1150 (prior federal court judgment)).

82. *Allen*, 449 U.S. at 96; *accord Migra*, 465 U.S. at 77–81. *But cf.* Kopp v. Fair Pol. Practices Com., 905 P.2d 1248, 1256 n.16 (1995) (holding—against dissent—that federal law governs preclusion but state law governs exceptions to preclusion by federal judgment).

83. *See* Segal v. Am. Tel. & Tel. Co., 606 F.2d 842, 845–46 (9th Cir. 1979) (applying similar elements to a prior federal judgment).

84. *Allen*, 449 U.S. at 94.

court heard the merits. Because Arizona courts follow the *Restatement* in the absence of contrary authority,[85] at least this opinion indicates how narrowly the court might delimit the *Restatement*'s exceptions in Arizona. It also succeeds as a rhetorical ploy. Message to plaintiffs: Even if we consider your edentulous argument, you lose.

V. CONCLUSION

The *Robertson* court followed well-laid precedent when it denied landowners contractual rights in CAP water. By allowing the districts to relinquish CAP water in exchange for debt relief, it also liberated the ebb and flow of politics and economics that gave rise to the CAP in the first place. That a dismissal in district court precluded the third-party beneficiary issue in state court is not surprising. That a federal court would adhere so closely to the *Restatement*'s exceptions in reaching that decision is less certain. Nonetheless, their examination offers guidance to Arizona judges and litigators in an esoteric area of law: As far as this bench is concerned, the *Restatement*'s cup of exceptions to issue preclusion does not runneth over.

85. Bank of Am. v. J. & S. Auto Repairs, 694 P.2d 246, 248 (Ariz. 1985).