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Alleged Impairment of Water Rights/Wetland Conservation Sites: Federal District Court Addresses Application of Sovereign Immunity to Natural Resource Conservation Service Oversight Activity

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A United States District Court (Eastern District, Washington) ("Court") addressed in an October 11th Order in the context of a Motion to Dismiss whether the doctrine of sovereign immunity applied to an oversight activity undertaken by the United States Department of Agriculture Natural Resources Conservation Service ("NRCS"). See *Round Lake Farms, LLC v. United States of America*, 2022 WL 6785732.

The question involved whether sovereign immunity was applicable to damages due to alleged impairment of senior water rights allegedly caused by a conservation planning program overseen by NRCS.

Round Lake Farms, LLC ("Round Lake Farms") is a producer and distributor of hay in Soap Lake, Washington. It uses Round Lake to irrigate approximately 840 acres of hay located directly south of the lake.

Round Lake Farms has a water rights certificate to use Round Lake water with priority dates between 1912 and 1976. The lake is described as natural and:

... at least 57 ft. deep, that is part of the Crab Creek Flow System and is connected to the creek through a shallow side channel.

Round Lake Farms relies on the Crab Creek Flow System to transport water from the upper Crab Creek and replenish Round Lake. The flow system combined with the water storage capacity of Round Lake is stated to have been a "reliable source of water for Plaintiff to exercise its water rights and sufficiently irrigate its hay crops."

Round Lake Farms filed a Complaint in the United States District Court against the NRCS. It alleged that pursuant to the Wetland Reserve Program ("WRP") the NRCS:

... provided permanent easements to eight entities, and provided permitting, funding, and design assistance for wetland projects, including construction activities such as dikes and ponds.

These activities are stated to have resulted in farmland on the upper Crab Creek becoming wetlands, retaining Crab Creek Flow System water and diminishing the spring freshet that is essential to annual

replenishment of Round Lake. As a result, Round Lake Farms stated it was unable to utilize its senior water rights. This is stated to have forced it to purchase emergency water from the East Columbia Basin Irrigation District and operate with a limited water supply which affected the 2020 and 2021 hayfields.

Round Lake Farms' Complaint asserted four claims:

1. Negligence (Alleging NRCS owed Round Lake Farms a legal duty to abide by the rules and procedures applicable to agency actions including Section 610.13 of the National Environmental Compliance Handbook which imposes a duty to comport with state requirements in carrying out the WRP.)
2. Trespass (NRCS effectively entered upon Round Lake Farms' land by changing the flow of the Crab Creek water system in a manner that directly encroached upon senior water rights.)
3. Public Nuisance (Alleging funding and approving the creation of dikes in furtherance of the projects that NRCS interfered with both Crab Creek and Round Lake in violation of Wash. Rev. Code 90.03.350 and Wash. Rev. Code 9.66.010.)
4. Private Nuisance (Alleging actions or omissions by employees of the United States constitute a public nuisance under the laws of the State of Washington.)

The NRCS moved to dismiss the Complaint arguing that the Court does not have subject matter jurisdiction because the United States has not waived its sovereign immunity to be sued for the claims brought by Round Lake Farms.

The NRCS in support of its Motion to Dismiss argued:

- No evidence exists that the NRCS WRP easements are impacting Round Lake Farms' water rights
- Documentation exists indicating that Round Lake has a history of insufficient water from Crab Creek to fill the lake annually that dates back to the early 1900s
- Washington Department of Ecology investigated the claim of water rights impairment and did not find conditions that could be elevated to regulation
- The WRP required a U.S. Corps of Engineers Nationwide Permit and the conditions were met
- The discretionary functions exception to the Federal Torts Claim Act applies which bars Round Lake Farms' claims
- NRCS did not violate any statute or regulation because the Washington Department of Ecology has not brought enforcement (and Round Lake Farms does not have a private right of action to enforce any violations)

The Court holds that the activities undertaken by NRCS pursuant to the WRP are the type of activities exempted from tort liability under the Federal Torts Claim Act.

The activities cited included the permitting, funding, and design assistance for wetland projects. It is further noted that the Federal Torts Claim Act only permits actions against the United States "in the same manner and to the same extent as a private individual under like circumstances." Round Lake Farms' claims are held to not meet the "private analog" requirement and therefore the Court dismisses the Complaint holding it does not have subject matter jurisdiction.

A copy of the Order can be downloaded [here](#).