

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 01-16482

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D.C. Docket No. 00-00935-CV-PAS

<p><b>FILED</b> U.S. COURT OF APPEALS ELEVENTH CIRCUIT JULY 19, 2002 THOMAS K. KAHN CLERK</p>
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FRIENDS OF THE EVERGLADES,

Plaintiff-Appellant,

versus

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, BEVERLY H. BANISTER,  
Acting Director, Water Management Division,  
Region 4, Environmental Protection Agency,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Florida

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(July 19, 2002)

Before CARNES, HILL, and KRAVITCH, Circuit Judges.

PER CURIAM:

The Friends of the Everglades (“Friends”), a Florida environmental conservation organization, brought this action against the United States Environmental Protection Agency (“EPA”), challenging the agency’s 1999 determination that the Everglades Forever Act, FLA. STAT. ANN. § 373.4592, a 1994 law governing environmental cleanup of the Everglades, was consistent with the requirements of the Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1387 (“the Clean Water Act”). The district court, Judge Seitz, concluded that the EPA did not act arbitrarily, capriciously, or otherwise abuse its discretion when it approved Florida’s water quality standard, as revised by the Everglades Forever Act, and accordingly issued an order granting the EPA’s motion for summary judgment. Friends now appeals the district court’s grant of summary judgment in favor of the EPA.

I.

We review de novo the district court’s grant of summary judgment, viewing the evidence in a light most favorable to the non-moving party. Preserve Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996). Even in the context of summary judgment, however, an agency action is entitled to great deference. Where a case, such as

this one, is brought pursuant to § 706 of the Administrative Procedures Act, a reviewing court may hold unlawful and set aside agency action, findings, and conclusions only if they are found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Id. (referencing 5 U.S.C. § 706(2)).

## II.

Friends of the Everglades has failed to show that the EPA's decision to approve the changes to Florida's water quality standard meets that standard of wrongfulness. Although Friends contends that there are several unresolved disputes of fact in the record which preclude a grant of summary judgment, the factual disputes it refers to are either about irrelevant matters, or there is sufficient evidence supporting the EPA's finding on the matters to prevent its determination from being arbitrary and capricious.

Likewise, we disagree with Friends' contention that the EPA acted arbitrarily by determining that a state water quality standard can incorporate a reasonable compliance schedule for meeting the standard. The district court properly deferred to the agency's determination that the Clean Water Act does not prohibit approval of a water quality standard that contains a compliance schedule.

Finally, contrary to Friends' assertions, neither the doctrine of collateral estoppel nor law of the case doctrine foreclosed the district court from granting summary judgment in favor of the EPA. Friends contends that an earlier opinion, issued by Judge Davis, held that the EPA was arbitrary and capricious in determining that the Everglades Forever Act was a reasonable compliance schedule, and that the EPA therefore was collaterally estopped from concluding to the contrary. But Friends, although originally a party to the case before Judge Davis, withdrew prior to final judgment and was dismissed by the court from the case. As such, it was not a party bound by Judge Davis' opinion for purposes of collateral estoppel. See, e.g., Mid-Continent Cas. Co. v. Everett, 340 F.2d 65, 69-70 (10<sup>th</sup> Cir. 1965) (stating that "where a party is put out of a case by a dismissal, the judgment thereafter rendered is not conclusive upon him"). That means that it cannot enforce the holding against the EPA. Although, under the doctrine of nonmutual offensive collateral estoppel, a nonparty to a prior lawsuit may make "offensive"<sup>1</sup> use of collateral estoppel against a private party to the prior suit, that doctrine does not apply against the United States government. United States v.

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<sup>1</sup>A plaintiff makes offensive use of collateral estoppel by trying to foreclose a defendant from relitigating an issue the defendant previously litigated unsuccessfully in another action against the same or different party. United States v. Mendoza, 464 U.S. 154, 159, 104 S. Ct. 568, 571-572 n.4 (1984).

Mendoza, 464 U.S. 154, 160-61, 104 S. Ct. 568, 571-72 (1984); see Sun Towers, Inc. v. Heckler, 725 F.2d 315, 322-323 & n.8 (5<sup>th</sup> Cir. 1984) (suggesting that the reasoning the Mendoza Court enunciated for prohibiting the assertion of nonmutual collateral estoppel against the Government applies to all issues). Therefore, Friends cannot collaterally estop the EPA – an agency of the federal government – from determining that the Everglades Forever Act is a reasonable compliance schedule permitted by the Clean Water Act.

Likewise, the law of the case doctrine is of no help to Friends. Under that doctrine, “both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.” Ellard v. Alabama Bd. of Pardons and Paroles, 928 F.2d 378, 381 (11<sup>th</sup> Cir. 1991). The doctrine only binds the district court and this Court to findings of fact and conclusions of law made by this Court in a prior appeal in the same case. Friends is unable to point to any Eleventh Circuit decision suggesting that Judge Seitz was bound, under the law of the case, to follow Judge Davis’ prior findings or conclusions. In its supplemental memorandum, Friends points to decisions in the Seventh, Eighth and Tenth Circuits, all of which extend the law of the case doctrine to require an administrative agency, on remand from a court, to conform its further proceedings in the case to the determinations set forth

in the remanding court's decision. We find those decisions of other circuits – which are not binding upon us, anyway – to be distinguishable from the situation at hand. None of them, for example, involved application of the findings or legal conclusions from one case to another one. There is no support in law or logic for extending the law of the case doctrine across case lines.

**III.**

**AFFIRMED.**

A True Copy - Attested:  
Clerk, U.S. Court of Appeals  
Eleventh Circuit  
By: D. Samuel  
Deputy Clerk  
Atlanta, Georgia