

1 UNITED STATES DEPARTMENT OF JUSTICE
Chad A. Readler, Acting Assistant Attorney General
Civil Division
2 Ruth A. Harvey, Director
3 J. Taylor McConkie, Assistant Director
Marc S. Sacks (GA Bar No. 621931)
4 Kevin P. VanLandingham (NY Reg. No. 4741799)
Trial Attorneys
5 P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875
6 Telephone: (202) 307-1104
7 Email: marcus.s.sacks@usdoj.gov
kevin.p.vanlandingham@usdoj.gov

8 Jeffrey D. Wood, Acting Assistant Attorney General
9 Environment and Natural Resources Division
Bradley S. Bridgewater (OK Bar No. 10741)
10 Trial Attorney
South Terrace, Suite 370, 999 18th Street
11 Denver, CO 80202
12 Telephone: (303) 844-1359
Email: bradley.s.bridgewater@usdoj.gov

13 Attorneys for the United States
14

15 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

16 Ak-Chin Indian Community,
17 Plaintiff/Counterclaim Defendant,

18 v.

19 Central Arizona Water Conservation
20 District,

21 Defendant/Counterclaimant/
Cross-defendant

22 v.

23 United States of America, *et al.*,

24 Defendant/Crossclaimant.
25

CV-17-00918-PHX-DGC

**UNITED STATES' MOTION FOR
SUMMARY JUDGMENT**

[ORAL ARGUMENT REQUESTED]

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	2
A. The Colorado River and the Central Arizona Project	2
B. Contracts between the United States and CAWCD	3
C. The Ak-Chin Indian Community’s water rights	5
ARGUMENT	7
I. CAWCD must deliver the Section 2(b) water when ordered by the United States	7
II. No statute limits the Secretary’s authority to order the Section 2(b) water	9
A. Congress has not limited the Secretary’s authority to determine whether “sufficient surface water” is available for the Section 2(b) water	10
B. The Secretary’s authority to order the Section 2(b) water is not limited by the San Carlos Act	10
III. The 2007 Stipulation does not abrogate CAWCD’s obligation to deliver the Section 2(b) water	13
IV. Because the contract is clear, the plain language controls	14
CONCLUSION	15

INTRODUCTION

As granted by Congress and recognized by the United States Supreme Court, the Secretary of the U.S. Department of the Interior has broad authority to manage, apportion and allocate Colorado River water. Congress approved the settlement of Ak-Chin's water rights in 1984, statutorily empowering the Secretary to provide Ak-Chin a permanent annual water supply of 75,000 acre-feet ("AF") and an additional conditional right to 10,000 AF of water when the Secretary determines there is sufficient surface water available. In Arizona, where the United States built the Central Arizona Project ("CAP") to convey Arizona-apportioned Colorado River water to central Arizona, the United States contracted with the Central Arizona Water Conservation District ("CAWCD") to operate the CAP. Under contracts between the United States and CAWCD, CAWCD is the United States' operating agency tasked with delivering CAP water, including Ak-Chin's congressionally recognized water, upon the United States' order.

For years, however, CAWCD has repeatedly threatened (although it ultimately capitulated) to reject the Secretary's Section 2(b) water orders for delivery of the 10,000 AF to Ak-Chin, orders made after the Secretary's determination that sufficient surface water was available. Hampered by the uncertainty created by CAWCD's threats of non-delivery, Ak-Chin brought suit against CAWCD. The United States filed a crossclaim against CAWCD to enforce CAWCD's contractual obligation to deliver the 10,000 AF to Ak-Chin when ordered by the United States, and to prohibit CAWCD from usurping the Secretary's authority to determine water availability and from obstructing the Secretary's ability to perform his obligations pursuant to a congressionally approved water settlement and the resulting federal water delivery contract.

Specifically, the United States seeks a declaration that: (a) CAWCD must deliver up to an additional 10,000 AF of water to Ak-Chin, as authorized by Section 2(b) of the Ak-Chin Water Rights Settlement Act of 1984 (“Section 2(b) water”) and set out in the 1985 water rights contract between the United States and Ak-Chin (“1985 Contract”), in any year the Secretary determines that there is sufficient surface water available and that there is sufficient capacity available in the main project works of the CAP; (b) that CAWCD’s obligation to deliver Section 2(b) water is not limited to water available from the 136,645 AF comprising the sum of the permanent water allocations to Ak-Chin and the San Carlos Apache Tribe; and (c) that the definition of “Excess Water,” as that term is used in the 2007 Stipulation for Judgment between the United States and CAWCD, does not include Section 2(b) water because such water is used pursuant to the long-term 1985 contract.

BACKGROUND

A. The Colorado River and the Central Arizona Project

Under the 1928 Boulder Canyon Project Act, 45 Stat. 1057, the Secretary has authority to “construct, operate, and maintain a dam and other works in order to . . . store and distribute [Colorado River] waters for reclamation and other beneficial uses.” *Arizona v. California*, 373 U.S. 546, 560 (1963) (concluding that Congress had apportioned 2,800,000 AF of mainstem Colorado River water to Arizona); *see also Maricopa-Stanfield Irr. & Drainage Dist. v. United States*, 158 F.3d 428, 431 (9th Cir. 1998) (“Th[e] Act . . . gave the Secretary . . . broad administrative authority over the water, including the power to apportion water within the states”). The Supreme Court recognized that the Secretary has broad authority over water allocation and water delivery contracts:

1 Congress intended the Secretary of the Interior . . . both to carry out the
 2 allocation of the waters of the main Colorado River among the Lower Basin
 3 States [including Arizona] and to decide which users within each State
 4 would get water. The general authority to makes [sic] contracts normally
 5 includes the power to choose with whom and upon what terms the contracts
 6 will be made. When Congress in an Act grants authority to contract, that
 7 authority is no less than the general authority, unless Congress has placed
 8 some limit.

9 *Arizona*, 373 U.S. at 580.

10 The 1968 Colorado River Basin Project Act “authorized the Secretary . . . to build,
 11 operate, and maintain the [CAP], which allocates Arizona’s share of Colorado River
 12 water after other users with perfected rights take their water.” *Maricopa-Stanfield*, 158
 13 F.3d at 431; *see also* Joint Stipulations of Fact for Motions on Summary Judgment
 14 (“JSOF”), Dkt. 106, ¶ 2. “The Act also permitted the Secretary to contract for the
 15 repayment of CAP construction costs with a single political subdivision in Arizona.”
 16 *Maricopa-Stanfield*, 158 F.3d at 431. “In 1971, Arizona created this subdivision: the
 17 [CAWCD].” *Id.* As the Ninth Circuit recognized, “the Secretary was left to devise and
 18 implement a system for determining how and to whom CAP water would be sold . . . and
 19 settled upon an allocation-contract mechanism for distributing CAP water.” *Id.*

20 **B. Contracts between the United States and CAWCD**

21 The United States and CAWCD have entered into numerous agreements relating
 22 to CAWCD’s operation of the CAP (including the repayment of construction costs). The
 23 plain language of those agreements, read together, contractually obligates CAWCD to
 24 deliver the Section 2(b) water when ordered by the United States.

25 In the December 1988 Repayment Contract, the United States agreed to construct
 the CAP, and CAWCD agreed to repay certain of the construction costs.¹ Dkt. 102-4;

¹ The 1988 Repayment Contract superseded and replaced the original 1972 contract for construction of the CAP.

1 JSOF, ¶ 20. The contract expressly preserved the United States’ rights with respect to
2 Indian water deliveries. For instance, Paragraph 8.7(a) of the 1988 Repayment Contract
3 states: “The Secretary reserves the right to determine that quantity of Colorado River
4 water to be released each year . . . for use by the [CAP] pursuant to applicable law, which
5 shall include the quantity of water which may be allocated by the Secretary for use on
6 Indian lands.”

7 In Paragraph 8.17 of the 1988 Repayment Contract, entitled “Rights Reserved to
8 the United States to Have Water Carried by Project Facilities,” CAWCD acknowledged
9 its obligation to make the CAP available for transporting water for Indian uses as directed
10 by the Secretary:

11 As a condition to the construction of project facilities and the delivery of
12 water hereunder, [CAWCD] agrees that all project facilities will be
13 available for the diversion, transportation, and carriage of water for Indian
14 and non-Indian uses pursuant to arrangements or contracts therefor entered
15 into on their behalf with the Secretary.

16 This paragraph of the 1988 Repayment Contract also stipulates that if operation,
17 maintenance and repair of project facilities is transferred to the “Operating Agency”
18 (CAWCD), “such transfer shall be subject to the condition that the Operating Agency
19 shall divert, transport, and carry such water for such uses pursuant to the provisions of the
20 aforesaid arrangements or contracts” entered into by the Secretary. 1988 Repayment
21 Contract, ¶ 8.17

22 As contemplated by the 1988 Repayment Contract, the United States entered into
23 the June 15, 2000 Operating Agreement governing CAWCD’s operation of the CAP.
24 Dkt. 102-3; JSOF, ¶¶ 13-15. In the Operating Agreement, CAWCD agreed, with respect
25 to “Project Waters delivered through” the CAP, to “perform storage, delivery and

reporting obligations of the United States under existing CAP delivery contracts.”

Operating Agreement at ¶ 7.2.6; JSOF, ¶ 14.

Finally, beginning in 1995, United States and CAWCD litigated multiple issues relating to the CAP in consolidated cases in the District of Arizona. Subsequent settlement negotiations resulted in a May 3, 2000 Stipulation and Order for Judgment entered by the Court, which set out the terms by which the United States and CAWCD resolved all pending claims. JSOF, ¶ 21. The parties revised the stipulation twice, first in 2003, primarily to extend deadlines for satisfaction of conditions subsequent, and then again to conclusively resolve the litigation in a final Stipulation for Judgment on September 27, 2007 (Dkt. 102-5). JSOF, ¶ 21. The 2007 Stipulation remains in effect today.

C. The Ak-Chin Indian Community’s water rights

Congress has required that the Secretary provide water to Ak-Chin. JSOF, ¶ 3. In 1978, the United States first settled with Ak-Chin regarding its water rights. Pub. L. No. 95-328, 92 Stat. 409 (1978). In 1984, after renegotiation, Congress passed the Ak-Chin Water Rights Settlement Act of 1984 (1984 Act), Pub. L. No. 98-530, 98 Stat. 2698 (1984), amended by Pub. L. No. 102-497, 106 Stat. 3258 (1992). The 1984 Act generally entitles Ak-Chin to 75,000 AF of water each year.² 1984 Act, § 2(a); JSOF, ¶ 4. The 1984 Act identifies two sources of water (totaling 108,300 AF) that the Secretary may utilize to satisfy the 75,000 AF. 1984 Act, § 2(f); JSOF, ¶ 5. The 1984 Act also provides Ak-Chin with the conditional right to an additional 10,000 AF:

In any year in which sufficient surface water is available, the Secretary shall deliver such additional quantity of water as is requested by the

² The statute permits the Secretary to deliver as little as 72,000 AF in a year of water “shortage.” 1984 Act, § 2(c); JSOF, ¶ 6.

Community not to exceed ten thousand acre-feet. The Secretary shall be required to carry out the obligation referred to in this subsection only if he determines that there is sufficient capacity available in the main project works of the [CAP] to deliver such additional quantity.

1984 Act, § 2(b); JSOF, ¶ 7. Unlike for the permanent supply of 75,000 AF, the 1984 Act does not identify a specific source of water for the conditional right to 10,000 AF, only requiring the Secretary to determine if there is “sufficient surface water available.”

On October 2, 1985, “pursuant to” the legislation, the United States and Ak-Chin entered into a water rights contract “to provide permanent water.” Dkt. 102-1; JSOF, ¶ 8. Sections 3(a)-(c) of the 1985 Contract repeat verbatim the language of Sections 2(a)–(c) of the 1984 Act describing Ak-Chin’s water rights. *Id.* The contract has no term or end date, and remains in effect.

In the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575 §§ 3701-11, 106 Stat. 4600, 4742-52 (“1992 San Carlos Act”), Congress reallocated to San Carlos a portion of the Section 2(f) water (108,300 AF) “which is not required for delivery to the Ak-Chin Indian Reservation under that [1984] Act.” P.L. 102-575, Section 3704(a); JSOF, ¶¶ 16-17. Congress also reallocated or designated a total of 30,835 AF of water to San Carlos from three other sources. P.L. 102-575, Sections 3704(c) (14,655 AF), 3704(d) (3,480 AF) and 3704(e) (12,700 AF). The San Carlos Act did not alter Ak-Chin’s annual right to 75,000 AF of water or its conditional right to 10,000 AF of water. P.L. 102-575, Sections 3704(h) (“[n]othing in this title shall be construed to repeal, modify, amend, change or affect the Secretary’s obligations to the Ak-Chin Indian Community pursuant to the” 1984 Act); JSOF, ¶ 19

ARGUMENT

I. CAWCD must deliver the Section 2(b) water when ordered by the United States

As an initial matter, there is no dispute that CAWCD operates the CAP and CAWCD *agrees* that it is generally obligated by contract to deliver water, including water for Ak-Chin, as ordered by the United States. JSOF, ¶ 2, 15. CAWCD concedes that it “delivers water on behalf of the United States, in accordance with the Operating Agreement.” Dkt. 34-1 at 11 (¶ 2) (citing 2000 Operating Agreement, at ¶¶ 7.2.6, 7.3.3.). Moreover, CAWCD concedes that Ak-Chin “is entitled to delivery of an amount of water each year, pursuant to codified settlement agreements and contracts with the United States.” Dkt. 34-1 at 2 (¶ 2). CAWCD further concedes that:

The United States, through the Secretary of the Interior, has entered into numerous agreements with Arizona Indian tribes to provide CAP water to them, and although not a party to the contracts, the Operating Agreement obligates CAWCD, upon direction of the United States, to distribute the CAP water allocated in these agreements.

Id. at 11 (¶ 3).

“Federal law governs the interpretation of contracts where the United States is a party.” *Roosevelt Irrigation District v. United States*, 2017 WL 4364108, at *5 (D. Ariz. 2017) (citing *Mohave Valley Irrigation & Drainage Dist. v. Norton*, 244 F.3d 1164, 1165 (9th Cir. 2001)). “As such, federal law has traditionally governed the interpretation of reclamation contracts.” *Id.* (citing *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)).

The Court has previously held that the 1988 Repayment Contract “is a government contract and federal law governs its interpretation.” *Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1127 (D. Ariz. 1998) (citing *United States v.*

1 *Seckinger*, 397 U.S. 203, 209-10 (1970)).³ “A written contract must be read as a whole
 2 and every part interpreted with reference to the whole, with preference given to
 3 reasonable interpretations.” *Roosevelt Irrigation District*, 2017 WL 4364108, at *6
 4 (quoting *Klamath Water Users’ Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999);
 5 *see id.* (“Courts should consider ‘the plain language of the contract’ first, giving contract
 6 terms ‘their ordinary meaning.’”) (quoting *Klamath*, 204 F.3d at 1210).

7 The contracts entered into between the United States and CAWCD plainly
 8 obligate CAWCD to deliver Ak-Chin’s Section 2(b) water, and because there are no
 9 contractual ambiguities, this Court should apply the plain language. In the 1988
 10 Repayment Contract, CAWCD agreed that the Secretary “determine[s] that quantity of
 11 Colorado River water . . . for use by the [CAP]” including “the quantity of water which
 12 may be allocated by the Secretary for use on Indian lands.” 1988 Repayment Contract,
 13 Dkt. 102-4, at ¶ 8.7(a).

14 In the same contract, CAWCD agreed that the CAP “will be available for . . .
 15 transportation . . . of water for Indian . . . uses pursuant to . . . contracts therefor entered
 16 into on their behalf with the Secretary.” *Id.* at ¶ 8.17. The 1988 Repayment Contract
 17 also mandates that CAWCD, as CAP operator, “shall divert, transport, and carry [Indian]
 18 water . . . pursuant to the provisions of the aforesaid . . . contracts” entered into by the
 19 Secretary. *Id.* And the 2000 Operating Agreement repeats CAWCD’s agreement to
 20 “perform . . . delivery . . . obligations of the United States under existing CAP delivery
 21

22 ³ The 1988 Repayment Contract has no choice of law provision, but all references are to
 23 federal law. *See, e.g.*, ¶ 9.10(c) (“All rights of action for breach of this contract are
 24 reserved to the United States as provided by Federal law.”). The 2000 Operating
 25 Agreement and the 2007 Stipulation also do not expressly address choice of law but,
 again, nothing in those documents suggests that anything other than federal law could
 apply to their interpretation.

contracts.” Operating Agreement at ¶ 7.2.6; JSOF, ¶ 15. Nothing in the 1988 Repayment Contract or the 2000 Operating Agreement gives CAWCD the authority to refuse to deliver water ordered by the Secretary.

Read together, these contracts demonstrate that CAWCD’s obligation to deliver the Section 2(b) water is clear and unambiguous. *See Roosevelt Irrigation District v. United States*, 2017 WL 4364108, at *6 (D. Ariz. 2017) (“A contract is ambiguous ‘if reasonable people could find its terms susceptible to more than one interpretation.’”) (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005)). Thus, this Court should apply the plain language and declare that CAWCD must deliver the Section 2(b) water, as authorized by the 1984 Act and set out in the 1985 Contract, in any year the Secretary determines that there is sufficient surface water available and that there is sufficient capacity available in the main project works of the CAP.

II. No statute limits the Secretary’s authority to order the Section 2(b) water

The 1984 Act has not been amended or repealed and remains current law. There is also no dispute that after the 1984 Act, Congress has never addressed, much less limited, Ak-Chin’s conditional right to Section 2(b) water when the Secretary determines there is sufficient surface water available to provide it. CAWCD nonetheless apparently argues that Ak-Chin’s water rights (and thus CAWCD’s obligation to deliver the Section 2(b) water) have been limited by the 1992 San Carlos Act, Pub. L. No. 102-575 §§ 3701-11, 106 Stat. 4600, 4742-52. However, nothing in the 1992 San Carlos Act alters Ak-Chin’s water rights or limits CAWCD’s contractual obligation to deliver the Section 2(b) water to Ak-Chin.

A. Congress has not limited the Secretary’s authority to determine whether “sufficient surface water” is available for the Section 2(b) water

In the 1984 Act, Congress made the 10,000 AF of Section 2(b) water conditional upon the Secretary’s determination that “sufficient surface water is available.” 1984 Act, ¶ 2(b); JSOF, ¶ 7. No subsequent statute has addressed the Section 2(b) water or otherwise limited the definition of “sufficient surface water.” CAWCD’s demand that this Court now do what Congress has never done is contrary to the rule of construction providing that legislative ambiguities are to be resolved in favor of tribal interests. *E.g.*, *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be ‘construed generously.’”). Ambiguities or “any doubtful expressions in [those documents] should be resolved in the Indians’ favor.” *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (agreements with Indians “to be interpreted liberally in favor of the Indians” and “any ambiguities are to be resolved in their favor”); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[the] canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

B. The Secretary’s authority to order the Section 2(b) water is not limited by the San Carlos Act

The 1992 San Carlos Act approved the settlement of San Carlos’s water rights. JSOF, ¶ 16. Ignoring that the San Carlos Act does not alter Ak-Chin’s annual right to 75,000 AF of water or its conditional right to 10,000 AF of water, CAWCD nonetheless asserts that the United States may only obtain delivery of the Section 2(b) water from

1 “the specific combined water allocations totaling 136,645 acre-feet to the Ak-Chin and
2 San Carlos.” Dkt. 103 at 6-7 (¶ 32). CAWCD misreads the law.

3 As discussed above, the 1984 Act provided Ak-Chin with 75,000 AF of water
4 from two specific sources (totaling 108,300 AF). 1984 Act, ¶¶ 2(a), 2(f); JSOF, ¶¶ 4-5.
5 The 1984 Act did not limit the source of the conditional 10,000 AF of water, leaving it to
6 the Secretary’s discretion to determine whether there is sufficient surface water available.
7 1984 Act, ¶ 2(b); JSOF, ¶ 7. In the San Carlos Act, Congress reallocated to San Carlos a
8 portion of the Section 2(f) water (108,300 AF) “which is not required for delivery to the
9 Ak-Chin Indian Reservation under that [1984] Act.” P.L. 102-575, Section 3704(a).
10 JSOF, ¶ 17. In effect, CAWCD is contending that the Ak-Chin Section 2(b) water can
11 only be sourced from (1) the 108,300 AF supply identified in Section 2(f) of the 1984 Act
12 (part of which was reallocated to San Carlos by the 1992 San Carlos Act), or (2) the
13 additional approximate 30,000 AF of water Congress provided to San Carlos in the 1992
14 San Carlos Act. P.L. 102-575, Section 3704(c)-(e).

15 CAWCD’s argument ignores that the plain language of the 1984 Act *does not*
16 require that the Section 2(b) water must be sourced out of the Section 2(f) water allocated
17 to Ak-Chin in the 1984 Act (and later reallocated, in part, to San Carlos). While the 1984
18 Act specifically provides water sources for the Section 2(a) 75,000 AF of water, 1984
19 Act, ¶ 2(f), Congress provided no specific source for the conditional Section 2(b) water,
20 which, by the plain language of that provision, may be sourced by the Secretary’s from
21 available “surface water,” 1984 Act, ¶ 2(b). JSOF, ¶¶ 4-5, 7. Congress did not limit that
22 provision in the 1992 San Carlos Act or any subsequent legislation. In fact, Section
23 3710(h) of the San Carlos Act provides that “[n]othing in this title shall be construed to
24
25

1 repeal, modify, amend, change or affect the Secretary’s obligations to the Ak-Chin Indian
 2 Community pursuant to the” 1984 Act. JSOF, ¶ 18.

3 Because Congress in the 1984 Act did not limit the source of the Section 2(b)
 4 water to the specific 108,300 AF of water allocated to Ak-Chin for its permanent supply,
 5 1984 Act, ¶¶ 2(a), 2(f), there is no basis for asserting that Congress, in the 1992 San
 6 Carlos Act, by reallocating the excess of that amount to San Carlos, reversed course and,
 7 for the first time, intended that amount to be a *limitation* on the Section 2(b) water. The
 8 Supreme Court has held that treaty rights can be abrogated only by a subsequent act when
 9 Congress clearly expresses intent to abrogate after a careful consideration of the conflict
 10 with extant rights. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202; *United*
 11 *States v. Dion*, 476 U.S. 734, 739-40 (1986) (requiring “clear evidence” Congress
 12 considered the conflict and chose to resolve it by abrogating the treaty); *United States v.*
 13 *Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate tribal
 14 property rights must be “plain and unambiguous”). Though anti-abrogation is most
 15 commonly raised in the context of treaty rights, courts apply the canons to all manner of
 16 positive law affecting tribes. *See, e.g., Choate v. Trapp*, 224 U.S. 665, 671 (1912)
 17 (equating a statute concerning tribal property with a treaty); *Cnty. of Oneida v. Oneida*
 18 *Indian Nation*, 470 U.S. 226, 247-48 (1985) (explaining Supreme Court has “applied
 19 similar canons of construction” as rule against abrogating treaty rights “in nontreaty
 20 matters”).

21 Thus, CAWCD’s obligation to deliver Section 2(b) water is not limited to water
 22 available from the 136,645 AF comprising the sum of the permanent water allocations to
 23 Ak-Chin and San Carlos.

III. The 2007 Stipulation does not abrogate CAWCD's obligation to deliver the Section 2(b) water

As described above, the plain language of the contracts between the United States and CAWCD obligate CAWCD, as operator of the CAP, to deliver Indian water, including the Section 2(b) water, when ordered by the Secretary to fulfill the United States statutory and contractual obligations to Indian tribes. Nonetheless, CAWCD apparently argues that the United States is prohibited from ordering delivery of the Section 2(b) water from a source other than the combined 136,645 acre-feet provided by Congress to the Ak-Chin and San Carlos because any other water is "Excess Water" pursuant to the 2007 Stipulation. Dkt. 103 at 6 (¶ 28). However, CAWCD's proffered interpretation of the 2007 Stipulation is contrary to its plain language.

The 2000 Operating Agreement obligates CAWCD to "[m]ake deliveries of Project Waters." Operating Agreement, Dkt., 102-3, at ¶ 7.2.4; JSOF, ¶ 15. The Agreement defines "Project Waters" as including "all Project Water as defined in Paragraph 5 of the . . . Stipulation."⁴ Operating Agreement at ¶ 4.2.4. Based upon that definition of "Project Water," the 2007 Stipulation defines "Excess Water" as "all Project Water that is in excess of the amounts used, resold, or exchanged pursuant to long-term contracts and subcontracts for Project Water service." 2007 Stip., Dkt. 102-5, at ¶ 5(d)(1); JSOF, ¶ 23. CAWCD has "the exclusive right in its discretion to sell or use all Excess Water for any authorized purpose of the CAP." 2007 Stip. at ¶ 5(d)(2); JSOF, ¶ 23. The Stipulation defines "long-term contract" as "one having a term that extends to 2043 or beyond." 2007 Stip. at ¶ 4(a) n.1. Thus, based on the plain language of the 2007

⁴ The 2000 Operating Agreement referenced the 2000 Stipulation, which has been superseded by the 2007 Stipulation. The relevant provisions of the Stipulation discussed here are unchanged in the 2000 and 2007 versions.

1 Stipulation, Project water that is used pursuant to a contract that extends to 2043 or
2 beyond is unambiguously *excluded* from the definition of “Excess Water.”

3 Here, the 1985 Ak-Chin contract, which restates the Secretary’s obligation to
4 provide water to Ak-Chin found in the 1984 Act, including the Section 2(b) water, has *no*
5 *expiration date* and, thus, is unquestionably a long-term contract. Therefore, the
6 definition of “Excess Water,” as that term is used in the 2007 Stipulation, does not
7 include Section 2(b) water because such water is “used” pursuant to the long-term 1985
8 Contract. This Court should reject CAWCD’s “Excess Water” argument as contrary to
9 the plain language of the 2007 Stipulation.

10 Significantly, the Stipulation also states:

11 Except as provided herein, the 1988 Contract remains in full force and
12 effect Nothing in this Judgment is intended to affect the rights of long-
13 term contractors and subcontractors of Project Water service or any
14 Colorado River water right holders. . . . Nothing in this Judgment may be
used in any way to control the CAP water allocation process or affect its
interpretation.

15 2007 Stip. at ¶ 11; JSOF, ¶ 22.⁵ Thus, the broad delivery obligation contained in the
16 1988 Repayment Contract remains valid and the definition of “Excess Water,” as that
17 term is used in the 2007 Stipulation, does not include Section 2(b) water because such
18 water is used pursuant to the long-term 1985 Contract.

19 **IV. Because the contract is clear, the plain language controls**

20 As described above, Ak-Chin’s water rights are defined by federal statute and
21 contract with the Secretary. The multiple contracts entered into between the United

22
23 ⁵ This provision also states that, “Notwithstanding the foregoing, to the extent that the
24 1988 Contract is inconsistent with the provisions of this Judgment, the provisions of this
25 Judgment shall govern.” 2007 Stip. at ¶ 11. However, there is no “inconsistency”
involving the two documents as regards the Section 2(b) water (which is not mentioned
or alluded to in either contract).

1 States and CAWCD plainly obligate CAWCD to deliver Ak-Chin's Section 2(b) water.
 2 Because there are no ambiguities involved, this Court should apply the plain language,
 3 interpreting the contracts as a matter of law, and need not examine extrinsic evidence.

4 "The Court's role in interpreting a contract is to effectuate the mutual intent of the
 5 contracting parties. A court should first look to the four corners of the contract to
 6 ascertain the intent of the contracting parties. If the contract's language is clear and
 7 unambiguous on its face, the intent of the parties is most readily ascertained from simply
 8 reading the contract." *CAWCD v. United States*, 32 F. Supp. 2d at 1127. "Federal
 9 common law follows the traditional approach for the parol evidence rule: 'A contract
 10 must be discerned within its four corners, extrinsic evidence being relevant only to
 11 resolve ambiguity in the contract.'" *Arizona v. Tohono O'odham Nation*, 818 F.3d 549,
 12 560-61 (9th Cir. 2016) (citing *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir.
 13 2005)).

14 Notably, CAWCD appears to agree that there are no contractual ambiguities in
 15 this case. CAWCD's dismissed third-party complaint and crossclaim against the United
 16 States, while asserting that the plain language of the parties' contracts does not obligate
 17 CAWCD to deliver Section 2(b) water, did not allege that any of the relevant contractual
 18 documents contain ambiguous terms. *See* Dkt. 34-1, 65.

19 CONCLUSION

20 For the foregoing reasons, this Court should grant summary judgment to the
 21 United States and declare:

- 22 (1) CAWCD is obligated to deliver up to an additional 10,000 acre-feet of
 23 water, as authorized by Section 2(b) of the 1984 Act in any year the
 24
 25

Secretary determines that there is sufficient surface water available and sufficient capacity available in the main project works of the CAP.

- (2) CAWCD's obligation to deliver water described in Section 2(b) of the 1984 Act is not limited to water available from the 136,645 acre-feet comprising the sum of the permanent allocations to Ak-Chin and San Carlos.
- (3) The definition of "Excess Water," as that term is used in the 2007 Stipulation, does not include water described in Section 2(b) of the 1984 Act.

1 Dated: July 13, 2018

Respectfully submitted,

2 CHAD A. READLER
Acting Assistant Attorney General

3 RUTH A. HARVEY
4 Director

5 J. TAYLOR McCONKIE
6 Assistant Director

7 /s/ Marc S. Sacks
8 MARC S. SACKS (GA Bar No. 621931)
9 KEVIN P. VANLANDINGHAM
(NY Reg. No. 4741799)
Trial Attorneys
10 U.S. Department of Justice, Civil Division
P.O. Box 875, Ben Franklin Station
11 Washington, D.C. 20044-0875
Telephone: (202) 307-1134
12 Facsimile: (202) 514-9163
13 E-mail: kevin.p.vanlandingham@usdoj.gov

14 JEFFREY D. WOOD
Acting Assistant Attorney General

15
16 BRADLEY S. BRIDGEWATER
(OK Bar No. 10741)
Trial Attorney
17 U.S. Department of Justice, Environment and
Natural Resources Division
999 18th Street
18 South Terrace, Suite 370
19 Denver, CO 80202
20 Telephone: (303) 844-1359
21 Email: bradley.s.bridgewater@usdoj.gov

Of Counsel:

19 LISA C. LANCE
20 ANDREW ENGEL
Office of the Solicitor
21 U.S. Department of the Interior

22 ATTORNEYS FOR THE UNITED STATES
23 OF AMERICA
24
25

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 2018, I electronically filed the foregoing UNITED STATES' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks
MARC S. SACKS
Commercial Litigation Branch
Civil Division
United States Department of Justice