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20 **UNITED STATES DISTRICT COURT**
21 **DISTRICT OF ARIZONA**

22 Ak-Chin Indian Community,

23 Plaintiff,

24 v.

25 Central Arizona Water Conservation
26 District,

27 Defendant.
28

Case No.: CV-17-00918-PHX-DGC

**AK-CHIN INDIAN COMMUNITY'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

[ORAL ARGUMENT REQUESTED]

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1 The Ak-Chin Indian Community filed this suit to confirm and protect its federally
2 reserved water rights that are disputed by defendant Central Arizona Water Conservation
3 District (CAWCD). Pursuant to its congressionally approved water settlement act, Pub. L.
4 98-530, 98 Stat. 2698 (1984) (the 1984 Act), and its permanent federal water delivery
5 contract, Doc. 102-1 (the 1985 Contract), Ak-Chin has a permanent right to at least 75,000
6 acre-feet (AF)¹ of water from the Central Arizona Project (CAP) annually.² *See* 1984 Act
7 § 2(a); 1985 Contract ¶ 3(a). Another provision of the 1984 Act (and the corresponding
8 provision of the 1985 Contract) entitles Ak-Chin to receive up to 10,000 AF of additional
9 water “[i]n any year in which sufficient surface water is available” and the Secretary of the
10 Interior “determines that there is sufficient capacity available in the main project works of
11 the Central Arizona Project to delivery such additional quantity.” 1984 Act § 2(b); 1985
12 Contract ¶ 3(b). The 1984 Act and 1985 Contract impose no limitation on Ak-Chin’s right
13 to receive the 10,000 AF of additional water (the § 2(b) water) or its potential sources
14 beyond those stated in the text of § 2(b) of the 1984 Act. If sufficient surface water and
15 CAP canal capacity are available, “the Secretary shall deliver” § 2(b) water requested by
16 Ak-Chin. *Id.*

17 CAWCD, as the party legally responsible for fulfilling the United States’ CAP water
18 delivery obligations, has a duty to deliver the § 2(b) water to Ak-Chin when the Secretary
19 determines that sufficient “surface water” and canal capacity are available. Based on its
20 interpretation of § 2(b) and other, subsequent statutory provisions and agreements,
21 however, CAWCD asserts that it is not bound by the Secretary’s determinations and
22 threatens to limit or discontinue future deliveries of § 2(b) water to Ak-Chin. CAWCD’s
23 refusal to provide water that Ak-Chin is entitled by law to receive and relies upon to meet
24 the needs of its tribal members and enterprises would result in irreparable harm for which
25 Ak-Chin would have no adequate remedy at law. Accordingly, Ak-Chin seeks and is

26
27 ¹ One acre-foot is approximately 326,000 gallons of water.

28 ² This entitlement is reduced to 72,000 AF in years of a declared water shortage on the Colorado River, *see* 1984 Act § 2(c), but that provision is not at issue in this litigation.

entitled to (1) the declaration of its water rights and CAWCD's delivery obligations and (2) an injunction directing CAWCD to comply with those obligations.

FACTUAL AND LEGAL BACKGROUND

Much of the relevant statutory and legal background is set forth in the parties' stipulated facts, filed separately. Additional facts are set forth in the declarations of Ak-Chin Councilmember Delia Carlyle, Ak-Chin Farms Manager Steve Coester, and Ak-Chin Southern Dunes Golf Course Superintendent Daniel Payson, also filed herewith. The following briefly summarizes the dispute and provides additional context.

In 1978, Ak-Chin became the first federally recognized Indian tribe to obtain a congressionally approved settlement of its federal water rights. The 1978 Ak-Chin Settlement Act (the 1978 Act), Pub. L. 95-328, 92 Stat. 409 (1978), entitled Ak-Chin to receive 85,000 AF of water each year, with the permanent source of that water to be secured within 25 years of the act's passage. *See id.* § 3. At the United States' request, which resulted from its inability to fulfill its obligations under the 1978 Act, Ak-Chin subsequently agreed to modify its settlement. *See* 1. Under the 1984 Act, Ak-Chin is entitled to the permanent annual receipt of 75,000 AF of water from two specific allocations of Arizona's Colorado River entitlement,³ *see id.* §§ 2(a) & (f), plus up to 10,000 AF of additional water "[i]n any year in which sufficient surface water is available" and the Secretary of the Interior "determines that there is sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity." *Id.* § 2(b). The 1985 Contract between Ak-Chin and the United States, which provides for the delivery of Ak-Chin's statutory water rights, repeats the relevant terms of the 1984 Act.

³ The State of Arizona is entitled to 2.8 million AF of Colorado River water each year. *See Arizona v. California*, 373 U.S. 546 (1963). Of that amount, 1.415 million AF is available for "entitlements under long-term contracts ... for the delivery of Central Arizona Project water." Arizona Water Settlements Act (AWSA), Pub. L. 108-451, 118 Stat. 3478, 3490 (2004). The remainder of Arizona's Colorado River water is allocated to other entities within the state, although any water not used by those entities within their respective allocations is available for diversion into the CAP. *See* CAWCD Resp. to Ak-Chin Int. No. 2, attached hereto as Ex. 1.

1 1985 Contract ¶¶ 3-4. The 1984 Act and 1985 Contract do not impose any limitations on
 2 the potential sources of § 2(b) water other than requiring that it be “surface water.” The
 3 1985 Contract requires the Secretary “to deliver annually a permanent surface water
 4 supply” to Ak-Chin; it is unlimited as to term. *Id.* ¶ 3.

5 Pursuant to an Operating Agreement associated with the United States’ transfer of
 6 control of the CAP to CAWCD, CAWCD has a mandatory duty to fulfill the United States’
 7 water delivery obligations. *See* Operating Agreement, Doc. 102-3, §§ 7.2.4 & 7.2.6. This
 8 includes the delivery of water to Ak-Chin pursuant to the 1984 Act and the 1985 Contract.
 9 Nothing in the Operating Agreement limits Ak-Chin’s water rights or grants CAWCD the
 10 authority to refuse water orders submitted by the United States on Ak-Chin’s behalf.

11 Following litigation over their respective rights and obligations vis-à-vis the CAP,
 12 the United States and CAWCD executed a stipulation on September 27, 2007. *See*
 13 Repayment Stipulation, Doc. 102-5. The Repayment Stipulation gave CAWCD “the
 14 exclusive right in its discretion to sell or use all Excess Water for any authorized purpose
 15 of the CAP,” with “Excess Water” defined as “all Project Water that is in excess of the
 16 amounts used, resold, or exchanged pursuant to long-term contracts and sub-contracts for
 17 Project Water service.” *Id.* ¶ 5(d). A “long-term contract” is defined, in relevant part, as
 18 “one having a term that extends to 2043 or beyond.” *Id.* ¶ 4(a) n.1. The Repayment
 19 Stipulation explicitly disclaimed any effect on the rights of long-term contractors of CAP
 20 Project Water services or right holders in Colorado River water and stated that it could not
 21 “be used in any way to control the CAP water allocation process or affect its interpretation.”
 22 *Id.* ¶ 11.

23 In every year since 2003, Ak-Chin has requested and received § 2(b) water. *See*
 24 Carlyle Dec. ¶ 5. Ak-Chin’s water budgets indicate that it will continue to request § 2(b)
 25 water for the foreseeable future. *Id.* ¶ 6. While CAWCD has delivered § 2(b) water to Ak-
 26 Chin as directed by the Secretary in prior years, it has disputed its obligation to do so and
 27 has indicated that it will not satisfy orders for § 2(b) water in the future as it has in the past.
 28 Doc 1-1 at 63-64; *see generally* Doc. 1-1. CAWCD contends, *inter alia*, that any water that

1 might otherwise be available to fill Ak-Chin's requests for § 2(b) water is now Excess
2 Water and that the Secretary cannot require CAWCD to deliver Excess Water to Ak-Chin.

3 Ak-Chin would suffer substantial and irreparable harm if CAWCD failed to deliver
4 water that the Community is entitled to receive under the 1984 Act and 1985 Contract. For
5 example, as described in detail in Ak-Chin's declarations, delivery of less than Ak-Chin's
6 full entitlement of Colorado River water would require Ak-Chin Farms, the Community's
7 wholly owned commercial farming operation that is a key source of revenues to fund Ak-
8 Chin's tribal governmental services, to reduce its operations, necessitating the lay-off of
9 experienced, well-trained employees and limiting the Farms' ability to provide crops to
10 customers with whom it has established business relationships. Coester Dec. ¶¶ 20-25;
11 Carlyle Dec. ¶ 4. It would also reduce the quality of the water delivered to Ak-Chin for
12 irrigation at Ak-Chin Farms and the Ak-Chin Southern Dunes Golf Course. *See* Coester
13 Dec. ¶¶ 26-31. Irrigation with lower quality water would adversely affect the soil, reduce
14 crop quality and yield at Ak-Chin Farms, and damage course conditions at Ak-Chin
15 Southern Dunes, harming the goodwill and business reputation of both enterprises. *Id.* ¶¶
16 31-34; Payson Dec. ¶¶ 6-12.

17 It would be difficult to overstate the significance of these injuries to the Community,
18 particularly with respect to Ak-Chin Farms. Ak-Chin founded Ak-Chin Farms in 1962 to
19 combat widespread poverty in the Community. Carlyle Dec. ¶ 4. The Farms played a
20 critical role in what has been called "the amazing story of [Ak-Chin's] growth from federal
21 dependency to self-sufficiency," and today Ak-Chin Farms is the Community's largest
22 non-gaming revenue source, funding Community governmental programs for elder
23 assistance, member housing, and education. *Id.* The declaratory and injunctive relief
24 requested in Ak-Chin's Complaint is necessary to avoid irreparable harm to these culturally
25 and economically valuable Community enterprises and to ensure that the Community
26 continues to enjoy the benefit of its hard won statutory and contractual water rights.

ARGUMENT

Under the express terms of the 1984 Act and the 1985 Contract, § 2(b) water can come from any otherwise unused source of surface water within the CAP system. CAWCD is obligated to deliver § 2(b) water whenever Ak-Chin requests it and the Secretary determines that sufficient surface water and CAP canal capacity are available. CAWCD's erroneous arguments that (1) its contractual Excess Water rights trump Ak-Chin's statutory and long-term contractual rights to § 2(b) water; (2) § 2(b) water can come only from two specific CAP allocations; and (3) CAWCD is not required to satisfy a request for § 2(b) water from any other sources regardless of the Secretary's determination that sufficient water and canal capacity are available are wholly without merit. Likewise, CAWCD's affirmative defenses and counterclaims lack merit. Ak-Chin is entitled to summary judgment on its claims for declaratory and injunctive relief and on CAWCD's claims.

I. The only limitation of the source of § 2(b) water is that it must be “surface water.”

A. The plain language of the 1984 Act provides that § 2(b) water may be drawn from available “surface water.”

The “[s]tarting point in discerning congressional intent ... is the existing statutory text,” and “when the statute’s language is plain, the sole function of the courts ... is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotes. & cits. omitted). The plain language of the 1984 Act imposes only one restriction on the source of § 2(b) water: it must be “surface water.” Accordingly, the 1984 Act allows the Secretary to look to any source of surface water in determining whether sufficient water is available to fulfill Ak-Chin's request for § 2(b) water. This broad term signals a congressional intent to make the largest possible pool of water—*i.e.*, any surface water that can be brought into the CAP that isn't needed to satisfy an existing entitlement—available to satisfy Ak-Chin's statutory and contractual water rights.

Even if the language of the 1984 Act were ambiguous, which it is not, federal law mandates that “statutes are to be construed liberally in favor of the Indians, with ambiguous

provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see generally Cohen’s Handbook of Federal Indian Law* § 2.02 (2012 ed.). This and other “canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.” *Montana*, 471 U.S. at 766 (internal quot. & punctuation omitted). Any ambiguity regarding the sources of water available to satisfy Ak-Chin’s rights under § 2(b) must be resolved in Ak-Chin’s favor.

The broad language of § 2(b) starkly contrasts with other provisions, including one within the 1984 Act, that limit the sources of water available to satisfy particular water rights. *See, e.g.*, 1984 Act § 2(f) (identifying two allocations that are available to fulfill Ak-Chin’s rights under §§ 2(a) & (c)). Such provisions demonstrate that Congress knows how to limit the sources of a water right to particular allocations where it intends to do so. Its decision not to impose any such restriction on the potential sources of § 2(b) water must be understood as a conscious choice to maximize the availability of § 2(b) water to Ak-Chin. CAWCD’s *ex post facto* attempts to limit the sources of water available to fill Ak-Chin’s rights under § 2(b) of the 1984 Act and ¶ 3(b) of the 1985 Contract, and thereby to increase the amount of water available for CAWCD’s discretionary use as Excess Water, contravene this congressional choice, disregard the Indian canons, and should be rejected.

B. CAWCD’s efforts to limit the sources of § 2(b) water are unavailing.

Because the plain language of the 1984 Act imposes no restrictions on the source of § 2(b) water beyond requiring it to be surface water, CAWCD attempts to import additional limitations from elsewhere. First, it argues that the Repayment Stipulation converts all water in the CAP system that is not used by the entity to which it is initially allocated into Excess Water, making it unavailable to fulfill Ak-Chin’s § 2(b) rights. Second, it argues that subsequent federal statutes—namely, the San Carlos Apache Tribe (San Carlos) Water Rights Settlement (the San Carlos Act), Pub. L. 102-575, 106 Stat. 4740 (1992), and the Arizona Water Settlements Act, Pub. L. 108-451, 118 Stat. 3478 (2004)—cap the total amount of water that can be supplied to Ak-Chin and San Carlos in any given year and limit the potential sources of that water. Both arguments are incorrect.

1 1. *Section § 2(b) water is not Excess Water controlled by CAWCD.*

2 CAWCD asserts that it cannot be required to fulfill an order for § 2(b) water out of
3 “Excess Water,” as that term is defined in the Repayment Stipulation. This argument relies
4 on an incorrect premise. While CAWCD does control the disposition of Excess Water,
5 water requested by Ak-Chin and determined to be available by the Secretary pursuant to §
6 2(b) of the 1984 Act and ¶ 3(b) of the 1985 Contract is not Excess Water at all.

7 The Repayment Stipulation explicitly excludes from the definition of Excess Water
8 any water used, “resold, or exchanged pursuant to long-term contracts and sub-contracts
9 for Project Water service,” with “long-term contracts” defined to include those contracts
10 “having a term that extends to 2043 or beyond.” Repayment Stipulation ¶¶ 4(a) n.1 & 5(d).
11 The 1985 Contract, which provides for the delivery of Ak-Chin’s § 2(b) water, is a
12 permanent contract, so it necessarily extends beyond 2043 and is a long-term contract. *See*
13 1985 Contract ¶ 3. Water provided pursuant to it is, by definition, not Excess Water.

14 2. *Other statutes do not limit Ak-Chin’s rights to § 2(b) water.*

15 CAWCD next contends that the 1984 Act and the later enacted San Carlos Act
16 identify a pool of 136,645 AF of water for Ak-Chin and San Carlos and that the combined
17 federal CAP water orders for those two tribes cannot exceed that amount. *See* Doc. 33 ¶¶
18 22-24 & 48. This argument implies that Ak-Chin is not entitled to receive § 2(b) water if
19 the provision of that water would result in Ak-Chin and San Carlos receiving more than
20 136,645 total AF of water from the CAP in a given year.

21 Contra CAWCD’s claims, nothing in the San Carlos Act indicates that the total
22 combined water orders on behalf of Ak-Chin and San Carlos cannot exceed 136,645 AF.
23 The 1984 Act and San Carlos Act do identify 136,645 AF of specific allocations that are
24 available to the two tribes, including the two allocations, totaling 108,300 AF, that § 2(f)
25 of the 1984 Act identifies as the source of the 75,000 AF of water that Ak-Chin receives
26 under § 2(a) of the 1984 Act. *See* 1984 Act § 2(f)(1)-(2); San Carlos Act § 3704. And the
27 San Carlos Act does entitle San Carlos to “all of the water referred to in [§ 2(f)(2)] of the
28 [1984 Act] which is not required for delivery to the Ak-Chin Indian Reservation under that

1 Act.” San Carlos Act § 3704(a). But the two acts do not bar Ak-Chin or San Carlos from
 2 accessing additional water beyond the specific allocations identified therein—*i.e.*, neither
 3 prevents the United States from directing the delivery of other “surface water” to Ak-Chin
 4 under § 2(b) of the 1984 Act. In fact, the San Carlos Act explicitly disclaims any
 5 modification of the Secretary’s obligations to Ak-Chin under the 1984 Act. *See* San Carlos
 6 Act § 3710(h)-(i).⁴ Any reading of the San Carlos Act that would limit or restrict Ak-Chin’s
 7 ability to receive § 2(b) water is thus inconsistent with the San Carlos Act’s express text.

8 The AWSA likewise imposes no limitation on Ak-Chin’s § 2(b) rights. CAWCD
 9 erroneously attempts to infer a limitation from the provision of the AWSA providing that
 10 “[t]he total amount of entitlements under long-term contracts ... for the delivery of [CAP]
 11 water in the State shall not exceed 1,415,000 [AF], of which” 650,724 AF shall be under
 12 contract to Arizona Indian tribes or available to the Secretary for allocation to such tribes.
 13 AWSA § 104(c)(1)(A). CAWCD contends in its Counterclaim that this 650,724 AF of
 14 water referred to in the AWSA is fully allocated or reserved for future Indian water rights
 15 settlements, implying that it is unavailable to provide § 2(b) water. *See* Doc. 33, ¶ 21.
 16 CAWCD also appears to believe that the 650,724 AF figure set forth in the AWSA operates
 17 as a hard cap on the amount of water that can be provided to Arizona Indian tribes pursuant
 18 to long-term contracts. This is incorrect. The provision that CAWCD cites applies only to
 19 “*entitlements* under long-term contracts.” AWSA § 104(c)(1)(A) (emphasis added). Ak-
 20 Chin’s § 2(b) water right is not an “entitlement,” however, because it is not a guaranteed
 21 right. It is instead a conditional right to receive surface water, subject to secretarial
 22 determinations regarding the availability of sufficient surface water and canal capacity.
 23 Because Ak-Chin’s right under § 2(b) is conditional and relies, in effect, on entitlement
 24 holders not using their full allocations of water, recognition of that right is in no way

25
 26 ⁴ Section 3710 (h) of the San Carlos Act provides that “[n]othing in this title shall be
 27 construed to repeal, modify, amend, change or affect the Secretary’s obligations to the Ak-
 28 Chin Indian Community pursuant to the” 1984 Act. Section 3710(i) states that “[n]othing
 in this title shall be construed to quantify or otherwise affect the water rights, claims, or
 entitlements to water of any Arizona tribe, band or community, other than” San Carlos.

1 inconsistent with the AWSA's limitation on the amount of water that can be made subject
2 to entitlements under long-term contracts.

3 That Ak-Chin's right is a conditional right to receive unused portions of other
4 allocations rather than being tied to a specific allocation is also significant with regard to
5 AWSA's savings clause. The AWSA explicitly states that "[e]xcept for provisions relating
6 to the allocation of Central Arizona Project water and the Reclamation Reform Act of 1982,
7 nothing in this title affects ... any rights to use Colorado River water existing on the date
8 of enactment of this Act." AWSA § 108 (internal citation omitted). Section 2(b) of the
9 1984 Act and ¶ 3(b) of the 1985 Contract establish a "right[] to use Colorado River water"
10 that existed on the date of the AWSA's enactment that is independent of any AWSA
11 provision relating to the allocation of CAP water. The AWSA thus explicitly disclaims any
12 effect on Ak-Chin's right to receive § 2(b) water. And again, as noted above, to the extent
13 that the Court determines that any of these statutes are ambiguous, the Indian canons
14 require that any ambiguity be resolved in favor of Ak-Chin, not CAWCD. *See supra* § I.A.

15 In addition to its misplaced reliance on the San Carlos Act and the AWSA,
16 CAWCD's argument that the potential sources of § 2(b) water are limited to particular
17 allocations suffers from a more fundamental flaw. Under CAWCD's theory, the lack of an
18 identified source of water in § 2(b) necessarily means that § 2(b) water can be satisfied, if
19 at all, only from the allocations identified in § 2(a).⁵ This is an irrational reading of the
20 1984 Act. Had Congress intended to limit the potential sources of § 2(b) water to the
21 allocations identified to satisfy Ak-Chin's rights under § 2(a), it could have done so quite
22 easily. It did not. Instead, it said in § 2(f) that "[t]he water supply referred to in subsections
23 (a) and (c) shall consist of the aggregate supply of" two particular allocations of CAP water.

24
25 ⁵ To the extent that CAWCD asserts that Congress's decision to not identify a specific
26 source of the § 2(b) water means that no water is available to satisfy Ak-Chin's rights under
27 that provision, its interpretation violates the Indian canons of construction and seeks to
28 render § 2(b) a nullity. The Ninth Circuit has "consistently ... reject[ed] interpretations that
would render a statutory provision surplusage or a nullity," and this Court should do the
same. *In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000).

1 *Id.* Congress pointedly did not limit the potential sources of § 2(b) water to the two
 2 allocations identified in § 2(f), no doubt because such a limitation would have been
 3 inconsistent with § 2(b)'s own declaration that the water it describes could come from any
 4 available source of surface water. Congress's decision not to limit the potential sources of
 5 § 2(b) water to particular allocations serves to maximize the pool of water available to
 6 fulfill Ak-Chin's § 2(b) rights, not to restrict it.

7 Ak-Chin is entitled to a declaration that its requests for § 2(b) water can be filled
 8 from any otherwise unused source of surface water, as provided by the 1984 Act and the
 9 1985 Contract, and that the putative limitations that CAWCD seeks to impose on Ak-
 10 Chin's statutory and contractual water rights are invalid.

11 **II. CAWCD must deliver water requested by Ak-Chin and ordered by the U.S.**

12 The 1984 Act provides no room for discretion with respect to the provision of § 2(b)
 13 water to Ak-Chin. Where sufficient surface water and canal capacity are available to
 14 provide § 2(b) water, the Secretary "shall deliver" such water. 1984 Act § 2(b). Similarly,
 15 the Operating Agreement and other documents that charge CAWCD with fulfilling the
 16 United States' delivery obligations vest CAWCD with no discretion. The Operating
 17 Agreement, for example, provides that CAWCD "shall perform the following activities,"
 18 including delivering CAP water and "perform[ing] the storage, delivery and reporting
 19 obligations of the United States under existing CAP delivery contracts" such as the 1985
 20 Contract. Doc. 16-1, §§ 7.2.4 & 7.2.6. CAWCD can point to no statute or other authority
 21 that authorizes it to refuse delivery of § 2(b) water to Ak-Chin when the Community
 22 requests such water and the Secretary determines that sufficient water and canal capacity
 23 are available, and Ak-Chin is entitled to a declaration of this fact.

24 **III. Ak-Chin is entitled to an injunction requiring CAWCD to comply with its** 25 **statutory and contractual obligations to deliver water to Ak-Chin.**

26 In addition to a declaration of its rights and CAWCD's obligations, Ak-Chin is
 27 entitled to a permanent injunction requiring CAWCD to deliver § 2(b) water to Ak-Chin
 28 in any year when Ak-Chin requests such water and the Secretary determines that sufficient

1 surface water and canal capacity are available to deliver it. Injunctive relief is appropriate
 2 where the plaintiff (1) is likely to suffer an irreparable injury; (2) remedies available at law,
 3 such as monetary damages, are inadequate to compensate for that injury; (3) the balance of
 4 hardships between the plaintiff and defendant favors the entry of injunctive relief; and (4)
 5 injunctive relief would serve the public interest. *See, e.g., Cal. ex rel. Lockyer v. U.S.D.A.*,
 6 575 F.3d 999, 1019 (9th Cir. 2009). All of these requirements are satisfied here.

7 The declarations of Councilmember Carlyle, Mr. Coester, and Mr. Payson show that
 8 if CAWCD delivers less than Ak-Chin's full entitlement of water, the resulting shortage
 9 will result in substantial business injuries to both Ak-Chin Farms and the Ak-Chin Southern
 10 Dunes Golf Course. These harms include, *inter alia*, damage to existing business
 11 reputation, relationships, and good will, loss of skilled employees, and harm to employee
 12 morale. Coester Dec. ¶¶ 14-25; Payson Dec. ¶¶ 10-13. A failure to deliver water to Ak-
 13 Chin Farms, for example, would force the Farms to fallow acreage or forego double-
 14 cropping, either of which would require the lay-off of well-trained, experienced employees.
 15 Coester Dec. ¶¶ 14-25. Additionally, any reduction of the amount of Colorado River water
 16 in the Santa Rosa Canal, which delivers water to Ak-Chin Farms and Ak-Chin Southern
 17 Dunes, results in the remaining water in the canal having higher salinity and concentrations
 18 of nitrates and other impurities. *Id.* ¶¶ 26-30; Payson Dec. ¶ 6. Increasing the salinity of
 19 water necessary for irrigation leads to harmful increases in soil salinity, which by itself is
 20 an irreparable harm. *See, e.g., League of Wilderness Defenders/Blue Mountains*
 21 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (“[E]nvironmental
 22 injury, by its nature, can seldom be adequately remedied by money damages and is often
 23 permanent or at least of long duration, i.e., irreparable.” (internal quot. omitted)).

24 Here, increasing soil salinity would reduce crop yields and quality at Ak-Chin
 25 Farms, harming its reputation as a source of high quality crops, and would make the golf
 26 course landscaping susceptible to blight and require more frequent aeration of the greens,
 27 causing aesthetic harm that reduces the course's appeal and damages its reputation as a
 28 premier golfing destination. Coester Dec. ¶¶ 30-34; Payson Dec. ¶¶ 10-12. Such injuries

are impossible to quantify, and thus are irreparable as a matter of law. *See, e.g., My Space, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007) (“Harm to business goodwill and reputation is unquantifiable and considered irreparable.” (citing *Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“Intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.”))). For the same reason, legal remedies such as money damages could not adequately compensate Ak-Chin for these injuries. *See, e.g., Countrywide Home Loans, Inc. v. Am.’s Wholesale Lender, Inc.*, 2013 WL 12131378 at *6 (C.D. Cal. Dec. 13, 2013); *Kingston Tech. Corp. v. Jiaxin Tech.*, 2010 WL 11595923 at *3 (C.D. Cal. Oct. 14, 2010).

Additionally, as discussed in detail in Ak-Chin’s Motion for Preliminary Injunction (Doc. 52 at 11-14), Ak-Chin is a sovereign tribal government with a sovereign interest in its water rights under the 1984 Act and 1985 Contract—rights which were provided by the United States as a direct replacement for Ak-Chin’s groundwater underlying its Reservation that the United States had wrongly allowed third parties to deplete. *See* Doc. 52 at 12-13; 1978 Act § 1(b). Federal courts have repeatedly affirmed that (1) control of tribal resources implicates tribal sovereign interests, *see, e.g., Montana v. E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998) (recognizing that tribal regulation of water resources “is in accord with powers inherent in Indian tribal sovereignty”) (internal quot. omitted); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (“Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources ... [and] an important sovereign power.”); and (2) injury to tribal sovereignty is inherently unquantifiable, irreparable, and incapable of adequate compensation through legal remedies such as monetary relief. *See, e.g., Poarch Band of Creek Indians v. Hildreth*, 656 Fed. App’x 934, 944 (11th Cir. 2016); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001).

The balance of equities and the public interest also favor injunctive relief for Ak-Chin. As set forth above, federal law entitles Ak-Chin to receive § 2(b) water when the

Secretary determines that sufficient surface water and canal capacity are available. 1984 Act § 2(b). By establishing that federal law entitles it to receive the water in question, Ak-Chin has necessarily established that the balance of the equities and the public interest support the entry of injunctive relief. *See, e.g., Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (“It is clear that it would not be equitable or in the public’s interest to allow [a party] to violate the requirements of federal law” (internal quotation omitted)); *Small v. Avanti Health Sys., Inc.*, 661 F.3d 1180, 1197 (9th Cir. 2011) (“[T]he public interest favors applying federal law correctly.”); *N.D. v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010) (“[I]t is obvious that compliance with the law is in the public interest”). Because neither the public interest nor any equitable considerations support allowing CAWCD to act contrary to federal law, the Court should enter a permanent injunction requiring CAWCD to comply with its water delivery obligations.

IV. CAWCD’s affirmative defenses lack merit.

A. Ak-Chin has standing to litigate its claims.

CAWCD wrongly asserts that Ak-Chin lacks standing to litigate its claims. Doc. 33 at 9. Standing is “a threshold determination of the propriety of judicial intervention.” *Inter-Tribal Council of Nev., Inc. v. Hodel*, 856 F.2d 1344, 1349 (9th Cir. 1988). “In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Standing comprises three elements. First, the plaintiff must face an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. The injury “may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Warth*, 422 U.S. at 500 (internal quot. omitted). Absent a statute conferring standing, a plaintiff must allege “some threatened or actual injury resulting from the putatively illegal action” before a federal court may assume jurisdiction. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). Second, the plaintiff’s injury must be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Lujan v. Defenders of*

1 *Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations omitted). Third, it must be likely,
 2 and not merely speculative, that the injury will be redressed by a favorable decision. *Id.*

3 Here, Ak-Chin faces concrete and particularized harm—described in detail above
 4 and in Ak-Chin’s declarations—as a result of CAWCD’s refusal to deliver § 2(b) water
 5 that Ak-Chin is entitled to receive. CAWCD’s threatened action also would invade Ak-
 6 Chin’s legal interests under both the 1984 Act and the 1985 Contract. This injury is
 7 imminent, as CAWCD has repudiated its obligation to deliver § 2(b) water to Ak-Chin and
 8 agreed to do so only during the pendency of this litigation as an “accommodation.” *See*
 9 Doc. 1-1 at 63-64; Doc. 98. And any injury to Ak-Chin as a result of CAWCD’s refusal to
 10 deliver water that Ak-Chin is entitled to receive is obviously and directly traceable to
 11 CAWCD’s conduct and redressable via the declaratory and injunctive relief requested
 12 herein. Accordingly, Ak-Chin has standing.

13 B. Ak-Chin’s claims are not barred by laches.

14 CAWCD also asserts that Ak-Chin’s claims are barred by laches. Doc. 33 at 9.
 15 Laches is an equitable defense that prevents a plaintiff, “who with full knowledge of the
 16 facts, acquiesces in a transaction and sleeps upon his rights.” *Evergreen Safety Council v.*
 17 *RSA Network Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012). A party asserting laches must
 18 establish: (1) lack of diligence by the plaintiff, and (2) prejudice to the defendant. *Grand*
 19 *Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979, 987 (9th Cir. 2004).

20 An assessment of diligence considers both the extent of delay and of the
 21 circumstances surrounding it, with delay measured from the time when the plaintiff knew
 22 or should have known of the potential claim until it brought suit. *In re Beaty*, 306 F.3d 914,
 23 927 (9th Cir. 2002); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001). Delay
 24 alone, however, cannot establish laches; it must be accompanied by prejudice. *See Galliher*
 25 *v. Cadwell*, 145 U.S. 368, 373 (1892); *Danjaq*, 263 F.3d at 955. Prejudice in this context
 26 may be evidentiary or expectations-based. *Id.* Evidentiary prejudice encompasses lost,
 27 stale, or degraded evidence, including witnesses who have died or whose memories have
 28 faded. *Id.* Expectations-based prejudice exists where the defendant took actions or suffered

consequences that it would not have, had plaintiff brought suit promptly. *Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1119 (9th Cir. 2018); *Russell v. Price*, 612 F.2d 1123, 1126 (9th Cir. 1979). Establishing undue prejudice requires that the defendant show “at least some reliance on the absence of a lawsuit.” *Eat Right Foods*, 880 F.3d at 1119 (internal quot. omitted). CAWCD can establish neither undue delay nor prejudice.

There can be no serious assertion of lack of diligence by Ak-Chin. Ak-Chin filed this lawsuit on March 28, 2017, shortly after CAWCD notified the Community that it did not plan to continue delivering § 2(b) water as it had done in the past. *See* Complaint, Doc. 1 ¶¶ 36-40; Doc. 1-1 pp. 63-64 (stating that CAWCD would make a “one-time accommodation” by delivering § 2(b) water in 2017 but “will not be able to make a similar accommodation in future years”). Prior to that time, any claim by Ak-Chin was unripe because CAWCD had always agreed to deliver the § 2(b) water. Certainly Ak-Chin did not unreasonably delay filing suit, so the doctrine of laches does not apply.

Moreover, CAWCD has not suffered prejudice from any putative delay. It can point to no evidence that has been lost or actions that it has taken as a result of alleged delay by Ak-Chin. As discussed below, if anyone has developed reasonable expectations that face potential harm as a result of delay in this litigation, it is Ak-Chin, not CAWCD. The Community’s claims are not barred by laches.⁶

V. Ak-Chin is entitled to summary judgment on its affirmative defenses.

In addition to being entitled to summary judgment on its own claims—and concomitantly on the merits of CAWCD’s counterclaims to the extent they raise the same issues—Ak-Chin is entitled to summary judgment on CAWCD’s counterclaims based on the affirmative defenses of tribal sovereign immunity and laches.

⁶ Several of CAWCD’s remaining ostensible affirmative defenses are not true affirmative defenses in that they simply deny or seek to negate elements of Ak-Chin’s claims. All of them lack sufficient factual context to provide fair notice of the basis for the alleged defense. None of them prevent the entry of summary judgment in favor of Ak-Chin.

1 A. Ak-Chin’s tribal sovereign immunity bars CAWCD’s counterclaims.

2 Federally recognized Indian tribes such as Ak-Chin possess sovereign immunity
 3 from suit unless that immunity is clearly and voluntarily waived by the tribe or abrogated
 4 by Congress. *See, e.g., Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1096-97 (9th
 5 Cir. 2017) (citing, *inter alia*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030
 6 (2014)). CAWCD erroneously asserts that Ak-Chin waived its sovereign immunity by
 7 filing suit. *See* Doc. 33 ¶ 34. The Ninth Circuit has recently rejected such arguments. *See*
 8 *Quinault*, 868 F.3d 1093. The mere filing of a lawsuit does not waive tribal immunity from
 9 counterclaims, even compulsory ones. *See id.* at 1097 (citing *Okla. Tax Comm’n v. Citizen*
 10 *Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). While “a tribe’s participation
 11 in a lawsuit can effect a waiver for limited purposes” in “rare instances,” the Ninth Circuit
 12 “demand[s] clarity that the tribe gave up its immunity.” *Quinault*, 868 F.3d at 1097-98
 13 (internal quot. & cits. omitted). Because there is no indication here that Ak-Chin intended
 14 to waive immunity from CAWCD’s counterclaims, those claims are barred.

15 B. Laches bars CAWCD’s counterclaims.

16 The laches argument that CAWCD erroneously asserts as a bar to Ak-Chin’s claims
 17 actually applies to CAWCD’s counterclaims, as CAWCD has unreasonably delayed in
 18 litigating its claims and doing so now will result in expectations-based prejudice to Ak-
 19 Chin. CAWCD has known that the United States disagrees with CAWCD’s cramped
 20 interpretation of Ak-Chin’s right to receive § 2(b) water since at least 2003. *See* Doc. 1-1
 21 at 3-7. Yet each year since 2003, Ak-Chin has requested and received § 2(b) water. Carlyle
 22 Dec. ¶ 5. Over the course of more than a decade, Ak-Chin has come to expect and rely on
 23 the availability of § 2(b) water, at least in normal years on the Colorado River, and it has
 24 entered into water leases with third parties and future planning of its own water use is based
 25 on this reasonable expectation. Carlyle Dec. ¶¶ 6-8; Coester Dec. ¶¶ 11-15. Had CAWCD
 26 promptly filed suit to vindicate its position—and had it succeeded in that suit—Ak-Chin
 27 would not have come to rely on receiving the § 2(b) water and could have avoided long-
 28 term leases or investments based on its reasonable expectation of receiving that water in

1 the future. CAWCD chose not to do that, and the doctrine of laches now bars it from doing
2 so.

3 **CONCLUSION**

4 The plain language of the 1984 Act and the 1985 Contract establish Ak-Chin's right
5 to receive § 2(b) water in any year where the Community requests it and the Secretary
6 determines that sufficient "surface water" and canal capacity are available. That statute and
7 contract remain valid, and they control the outcome of this case. The Court should grant
8 summary judgment to Ak-Chin, declare its right to receive § 2(b) water and CAWCD's
9 obligation to deliver it, and enjoin CAWCD from refusing to perform its obligation. It
10 should also grant summary judgment to Ak-Chin on all of CAWCD's counterclaims.

11
12 Respectfully submitted this 13th day of July, 2018.

13
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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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