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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ak-Chin Indian Community,
Plaintiff/Counterclaim Defendant,
v.
Central Arizona Water Conservation
District,
Defendant/Counterclaimant.
v.
United States of America, et al.,
Defendants.

CASE NO. 2:17-CV-00918-PHX-DGC

**DEFENDANT CENTRAL ARIZONA
WATER CONSERVATION
DISTRICT'S CROSS MOTION FOR
SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANT
UNITED STATES' MOTION FOR
SUMMARY JUDGMENT AND
PLAINTIFF AK-CHIN INDIAN
COMMUNITY'S MOTION FOR
SUMMARY JUDGMENT**

[ORAL ARGUMENT REQUESTED]

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Pursuant to this Court's August 25, 2017 Case Management Order filed as ECF document number 71, as subsequently amended by Order of July 3, 2018 extending summary judgment briefing deadlines, filed as ECF document number 105, and Rule 56 of the Federal Rules of Civil Procedure, Central Arizona Water Conservation District (CAWCD) hereby moves this Court for an order granting summary judgment on the grounds set forth in this Cross Motion for Summary Judgment and Opposition to Defendant United States' Motion for Summary Judgment and Plaintiff Ak-Chin Indian Community's Motion for Summary Judgment.

This motion is based upon the following points and authorities, the concurrently filed Declaration of Daniel Quinley in support, and CAWCD's Request for Judicial Notice, as well as all of the pleadings, files, and records in this proceeding, and all other matters of which the Court may take judicial notice, and any evidence that may be presented to or considered by the Court prior to its ruling, including any oral argument held by this Court, as requested by the parties.

I. INTRODUCTION

The instant dispute is unfortunate and has been wholly created by the United States' refusal to live up to its obligations to both the Ak-Chin Indian Community (Ak-Chin) and the Central Arizona Water Conservation District (CAWCD). While CAWCD is obligated to deliver water to Indian Central Arizona Project (CAP) contractors on behalf of the United States, that obligation is conditioned on the United States meeting its underlying obligation to provide water for CAWCD to deliver. In this case, the United States has failed to provide the water Ak-Chin asserts it is entitled to. The United States, by actually providing the subject water, could have resolved this dispute short of litigation, but it chose not to. Instead, it has argued that the obligation to provide water for delivery to Ak-Chin should be shifted to CAWCD, thus failing in its obligations to both Ak-Chin and to CAWCD.

///

At its core, this is a very focused dispute. Subsection 2(b) of the 1984 Ak-Chin Settlement Act (Section 2(b))¹ imposes upon the Secretary of the Interior (Secretary) the obligation to provide up to 10,000 acre-feet of water to Ak-Chin “in any year in which sufficient surface water is available” This obligation is unambiguously predicated on surface water being *available* for this purpose. 1984 Ak-Chin Settlement Act § 2(b). Both the United States and Ak-Chin ignore this important condition. If the United States had provided CAWCD an *available* supply of sufficient surface water to deliver to Ak-Chin, CAWCD would have delivered that water and the parties would not be before this Court.

The United States could have acquired a non-CAP water supply specifically for the purposes of Section 2(b). It has not. Instead, it has directed CAWCD to deliver to Ak-Chin CAP water that the United States has already contracted for or committed to other uses. The focused question presented in this case is whether there is sufficient surface water available to deliver to Ak-Chin pursuant to Section 2(b). That question can be answered as a matter of law by looking to the relevant contracts and statute governing the Central Arizona Project.

II. LEGAL STANDARD

Questions of statutory and contract interpretation are questions of law reviewed *de novo* by the court and are appropriate for resolution on summary judgment. *Allen v. Honeywell Ret. Earnings Plan*, 382 F. Supp. 2d 1139, 1149 (D. Ariz. 2004); *Wapato Heritage, LLC. v. United States*, No. CV-08-177-RHW, 2008 U.S. Dist. LEXIS 117185, at *14 (E.D. Wash. Nov. 21, 2008). Statutory and contractual interpretations must be ascertained from and consistent with the plain language of the documents. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999); *Tehama-Colusa Canal Auth. v. United States DOI*, 819 F. Supp. 2d 956, 987 (E.D. Cal. 2011) (citing *Mohave Valley Irrig. & Drainage Dist. v. Norton*, 244 F.3d 1164, 1165 (9th Cir. 2011)); *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005). Interpretations cannot

¹ Act of Oct. 19, 1984, Pub. L. No. 93-530, 98 Stat. 2698 (1984 Ak-Chin Settlement Act).

1 lead to unreasonable or impracticable results. *Hotels of the Marianas v. Gov't of Guam*,
 2 71 F.3d 1455, 1459 (9th Cir. 1995); *United States v. Westlands Water Dist.*,
 3 134 F. Supp. 2d 1111, 1134-35 (E.D. Cal. 2001).

4 When there are competing cross-motions for summary judgment, “the court must
 5 consider each party’s evidence, regardless under which motion the evidence is offered.”
 6 *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011). Each motion must be
 7 considered on its own merits and the court must determine whether genuine issues of
 8 material fact exist. *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.
 9 2001). Evidence from all motions are properly considered in determining the disposition
 10 of all motions. *Id.*; see also *Clark v. City of Tucson*, No. CV-14-02543-TUC-CKJ, 2018
 11 U.S. Dist. LEXIS 69547, at *6 (D. Ariz. Apr. 24, 2018). To the extent that a material
 12 factual dispute exists, summary judgment is not appropriate. See *Craten v. Foster Poultry*
 13 *Farms Inc.*, 305 F. Supp. 3d 1051, 1054-55 (D. Ariz. 2018).

14 III. BACKGROUND

15 A. Ak-Chin’s Settlement Rights and CAP Delivery Contract

16 In 1984, Congress enacted the 1984 Ak-Chin Settlement Act to implement a
 17 1983 Permanent and Interim Water Rights Settlement Agreement between Ak-Chin and
 18 the United States. 1984 Ak-Chin Settlement Act § 1; Daniel L. Quinley Declaration in
 19 Support of Defendant Central Arizona Water Conservation District’s Opposition to
 20 Defendant United States’ and Plaintiff Ak-Chin’s Motions for Summary Judgment
 21 (Quinley Decl.) ¶ 2; Ex. A. Subsection 2(a) of that Act gives Ak-Chin a permanent water
 22 supply of not less than 75,000 acre-feet of surface water, except as otherwise provided
 23 under subsections (b) and (c). 1984 Ak-Chin Settlement Act § 2(a); JSOF² ¶ 4.
 24 Subsection 2(c) reduces the Ak-Chin deliveries to 72,000 acre-feet per year in defined
 25 times of shortage. 1984 Ak-Chin Settlement Act § 2(a); JSOF ¶ 6.

26
 27
 28 ² Joint Stipulations of Fact for Motions on Summary Judgment, Dkt. 106, filed on July 13, 2018, by Ak-Chin (JSOF).

Section 2(b), which is the focus of this dispute, directs the Secretary to deliver up to 10,000 acre-feet in any year in which “sufficient surface water is available” for this purpose. 1984 Ak-Chin Settlement Act § 2(b); JSOF ¶ 7.

Subsection 2(f) provides that the requirements of subsections 2(a) and 2(c) shall be satisfied using first Colorado River water acquired from the Yuma Mesa Division of the Gila Project and, second, as much “as is necessary” of the 58,300 acre-feet of CAP water that the Secretary allocated and contracted to Ak-Chin in 1980.³ 1984 Ak-Chin Settlement Act § 2(f); JSOF ¶ 5. Subsection 2(f) does not identify a source for Section 2(b) water.

The 1984 Ak-Chin Settlement Act also provides for specific monetary damages if the United States fails to deliver Section 2(b) water, if such water is available. 1984 Ak-Chin Settlement Act §§ 2(h)-(i).

In 1985, the United States and Ak-Chin entered into a delivery contract. Contract Between the United States and the Ak-Chin Indian Community to Provide Permanent Water and Settle Interim Water Rights, dated Oct. 2, 1985 (1985 Ak-Chin Contract), Dkt. 102-5.⁴ This contract was to implement the 1984 Ak-Chin Settlement Act.

B. The San Carlos Apache Tribe Right to “Excess Ak-Chin Water”

Congress enacted the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, §§ 3701-11, 106 Stat. 4600, 4740-52 (1992 San Carlos Act), to settle San Carlos’s permanent water rights. JSOF ¶ 16. The Act reallocated, for the exclusive use of San Carlos, the portion of Ak-Chin’s 58,300 acre-feet CAP water allocation not required for delivery to the Ak-Chin Indian Reservation. 1992 San Carlos Act § 3704(a); JSOF ¶¶ 16-17.

³ Quinley Decl. ¶ 3, Ex. B (“Central Arizona Project Indian Water Delivery Contract Between the United States and the Ak-Chin Indian Community” dated December 11, 1980 (1980 Ak-Chin Contract)).

⁴ Dkt. refers to the ECF number assigned to filings in *Ak-Chin v. CAWCD, et al.*, United States District Court for the District of Arizona, Case No. 2:17-CV-00918-PHX-DGC.

1 The 1992 San Carlos Act directed the Secretary to amend the 1980 and
2 1985 Ak-Chin Contracts “as is necessary to satisfy the requirements of section 3704(a)[.]”
3 1992 San Carlos Act § 3706(a). The Secretary and Ak-Chin have never amended either
4 the 1980 Ak-Chin Contract or 1985 Ak-Chin Contract.

5 In 1999, the Secretary and San Carlos entered into the San Carlos Apache Tribe
6 Settlement Agreement (1999 San Carlos Agreement). Quinley Decl. ¶ 4, Ex. C-1. The
7 1999 San Carlos Agreement amends San Carlos’s CAP delivery contract⁵ and recognizes
8 San Carlos’s entitlement to the delivery of the remaining subsection 2(f)(2) water.
9 1999 San Carlos Agreement ¶¶ 4.2, 4.5, 9; 1980 San Carlos Contract ¶ 3.32; Quinley
10 Decl. ¶ 4, Ex. C-2. Specifically, the United States agreed that San Carlos could request
11 delivery of up to 33,300 acre-feet of the 58,300 acre-feet of CAP water otherwise
12 allocated to Ak-Chin. *Id.*

13 **C. CAWCD’s Contracts With the United States**

14 On June 15, 2000, the Operating Agreement Between the United States of America
15 and the Central Arizona Water Conservation District for Operation and Maintenance of
16 the Central Arizona Project, Dkt. 102-3 (2000 Operating Agreement) was executed by
17 CAWCD and the United States. *See* 2000 Operating Agreement ¶¶ 2.2, 2.3; JSOF
18 ¶¶ 12, 13. The 2000 Operating Agreement requires CAWCD to perform storage, delivery,
19 and reporting obligations of the United States under existing CAP water delivery
20 contracts. 2000 Operating Agreement ¶ 7.2.6; JSOF ¶ 15.

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27 ⁵ Quinley Decl. ¶ 4, Ex. C-2 (Amendment No. 2, “Central Arizona Project Indian Water
28 Delivery Contract Between the United States and the San Carlos Apache Tribe” dated
April 29, 1999.

1 In 1988, the United States and CAWCD amended CAWCD's contract for CAP
 2 water and for repayment of CAP construction costs.⁶ To end protracted litigation over
 3 provisions of this contract, the United States and CAWCD entered into the Stipulation for
 4 Judgment Between the United States and Central Arizona Water Conservation District in
 5 Nos. CIV 95-625 and CIV 95-1720 (D. Ariz.), Dkt. 102-5 (2007 Repayment Stipulation).
 6 Among other things, the 2007 Repayment Stipulation confirms CAWCD's exclusive right
 7 to sell or use "Excess Water," in its sole discretion, for any authorized CAP purposes.
 8 2007 Repayment Stipulation, ¶¶ 5(d)(2), (8); *see also* 1988 Repayment Contract ¶ 8.17(e).

9 IV. ARGUMENT

10 A. Section 2(b) Requires that Sufficient Surface Water Be Available for Delivery 11 to Ak-Chin

12 The plain and unambiguous language of Section 2(b) provides for the delivery of
 13 up to 10,000 acre-feet of water requested by Ak-Chin, "[i]n any year in which sufficient
 14 surface water *is available*." 1984 Ak-Chin Settlement Act § 2(b) (emphasis added). The
 15 United States and Ak-Chin contend that "sufficient surface water" means *any* surface
 16 water. Dkt. 107 at 10:15-17; Dkt. 108 at 5:23-26. This interpretation is contrary to the
 17 statutory scheme and Secretarial determinations regarding allocations of CAP water, as
 18 well as the plain meaning of the word "available." *See Cappaert v. United States*,
 19 426 U.S. 128, 137 (certain internal citations omitted) (citing *Arizona v. California*,
 20 373 U.S. 546, 599-601 (1963)) (the United States cannot simply declare water dedicated
 21 to other uses as available); *see also Westlands Water Dist. v. United States*,
 22 153 F. Supp. 2d 113, 1165 (E.D. Cal. 2001) (water available for apportionment by the
 23 United States does not include water that is used to satisfy other obligations of the United
 24 States).

25 ///

26
 27 ⁶ 1988 Contract Between the United States and the Central Arizona Water Conservation
 28 District for Delivery of Water and Repayment of Costs of the Central Arizona Project
 (1988 Repayment Contract), Dkt. 102-4.

1 The CAP water supply is only “available” to the specific CAP water users to whom
 2 the Secretary allocated water and who, in turn, contracted for such water.⁷ *See Maricopa-*
 3 *Stanfield Irrig. & Drainage Dist. v. United States*, 158 F.3d. 428, 431, 437 (9th Cir. 1998).
 4 In order to fulfill Ak-Chin’s Section 2(b) requests, the Secretary must identify an
 5 “available” surface water source. He may not simply declare each year that “sufficient
 6 surface water is available.” *See* Dkt. 107 at 8:3-5.

7 **B. The Secretary Does Not Have Discretion to Determine if Sufficient Surface**
 8 **Water Is Available**

9 Both the United States and Ak-Chin contend that the determination of whether
 10 “sufficient surface water is available” is a discretionary decision made by the United
 11 States. Dkt. 107 at 10:3-4; Dkt. 108 at 5:4-5. The plain language of the 1984 Ak-Chin
 12 Settlement Act and the 1985 Ak-Chin Contract does not provide the Secretary this
 13 asserted discretion. Congress explicitly limited the Secretary’s discretion to determining
 14 if there was sufficient canal capacity within CAP canals to deliver the Section 2(b) water.
 15 No such discretion was provided with respect to whether sufficient surface water was
 16 available. Instead, Section 2(b) confers upon the Secretary a mandatory obligation to
 17 deliver Section 2(b) water but only if sufficient surface water is *available*. The
 18 availability of sufficient surface water is a factual determination, based on the availability
 19 of water specifically allocated to Ak-Chin. The phrase “sufficient surface water” is
 20 modified and defined as water *available* for use by Ak-Chin; the phrase does not create a
 21 right to *any* surface water, as Ak-Chin contends. Dkt. 108 at 5:23-26.

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26 ⁷ The relevant Secretarial decisions regarding allocation: 41 Fed. Reg. 45883 (Oct. 18,
 27 1976); 45 Fed. Reg. 81265 (Dec. 10, 1980); 48 Fed. Reg. 12446 (Mar. 24, 1983); 57 Fed.
 28 Reg. 48388 (Oct. 23, 1992); 71 Fed. Reg. 50449 (Aug. 25, 2006); *see* Quinley Decl. ¶ 5,
 Exs. D-1 to D-5.

C. The United States has Not Provided Non-CAP Water

The United States has neither acquired nor provided to CAWCD any non-CAP water supply to satisfy the requirements of Section 2(b). The United States previously acquired non-CAP water to provide a firm source for Indian water rights settlements, including the 50,000 acre-feet of Colorado River water from the Yuma Mesa Division of the Gila Project as provided for in the 1984 Ak-Chin Settlement Act. This water is now part of the CAP water supply.⁸

D. The United States has Not Allocated CAP Water for Section 2(b) Deliveries

The United States and Ak-Chin contend that Section 2(b) requests can be fulfilled using any CAP water. Dkt. 107 at 12:21-23; Dkt. 108 at 5:2-3, 24-26. However, there is no support for this contention and there is no CAP water available for this purpose.

The Secretary reallocated the CAP water supply and confirmed existing allocations pursuant to the terms of the Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (Dec. 10, 2004) (AWSA) § 104(a)-(c). *See also* Quinley Decl. ¶¶ 5-7, Exs. D-1, D-2, E, and F; *see also* 48 Fed. Reg. 12446; 71 Fed. Reg. 50449. AWSA limits the total of all long-term CAP entitlements for federal purposes to 650,724 acre-feet. AWSA § 104(c); 71 Fed. Reg. at 50450-51. This federal CAP water supply is completely allocated and contracted to various Arizona tribes or reserved for future Indian water settlements.

Within the 650,724 acre-feet of federal CAP water, the Secretary designated two distinct supplies of water to meet Ak-Chin's long-term contractual entitlement: 47,500 acre-feet of former Yuma-Mesa water and 58,300 acre-feet allocated to the Ak-Chin as CAP Indian irrigation water. 1984 Ak-Chin Settlement Act § 2(f); *see also* 45 Fed. Reg. 81265 (allocating 58,300 acre-feet); 48 Fed. Reg. 12446 (firming

⁸ Project Water is the supply available to CAWCD each year to satisfy CAP water delivery contracts, and is defined to include the former Yuma-Mesa water. *See* 2007 Repayment Stipulation ¶ 5(a); 1988 Repayment Contract ¶ 5.27; 1984 Ak-Chin Settlement Act § 2(f)(1). The reallocated Yuma-Mesa water is now part of the CAP supply, but is not CAP water available for allocation to any CAP user except Ak-Chin.

1 58,300 acre-feet allocation for life of the CAP in light of the 1984 Ak-Chin Settlement
2 Act). These two water supplies, totaling 105,800 acre-feet, are designated to fulfill the
3 Secretary's water delivery obligations under subsections 2(a) and 2(c) of the
4 1984 Ak-Chin Settlement Act. 1984 Ak-Chin Settlement Act §2(f).

5 No specific water supply is identified to satisfy the Secretary's delivery obligation
6 under Section 2(b). 1984 Ak-Chin Settlement Act § 2(f). Prior to 1992, the 105,800 acre-
7 feet of water designated for Ak-Chin would have been sufficient to satisfy the Secretary's
8 delivery obligations under *both* subsections 2(a) and 2(c) *and* Section 2(b). Quinley Decl.
9 ¶¶ 2, 3, 5, 6, and 7, Exs. A, B, D-1, D-2, E, and F. In 1992, the United States reallocated
10 to San Carlos "Excess Ak-Chin Water" not required for delivery to the Ak-Chin under
11 subsection 2(f)(2). 1992 San Carlos Act § 3704(a). The United States has repeatedly
12 recognized that this reallocation amounts to approximately 33,300 acre-feet. Quinley
13 Decl. ¶ 8, Ex. G-1 to G-3; *see also* Dkt. 1-1 at 14-15. The United States and Ak-Chin did
14 not amend Ak-Chin's CAP delivery contracts to provide for the delivery of Section 2(b)
15 water from Ak-Chin's designated sources of CAP water, as was directed by the 1992 San
16 Carlos Act. *See* 1992 San Carlos Act § 3706(a). The actions of the United States,
17 including its failure to identify a source of Section 2(b) water prior to reallocating water to
18 San Carlos, leaves CAWCD in an untenable position because it is impossible to deliver
19 the same water to both Ak-Chin and San Carlos.⁹

20 **E. CAWCD Is Only Obligated to Deliver Water That Is Provided to It By the**
21 **United States**

22 The United States and Ak-Chin argue that CAWCD is obligated to deliver any
23 water ordered by the United States. *See* Dkt. 107 at 9:4-5; Dkt. 108 at 10:20-23. This is
24 simply incorrect. Under the 1988 Repayment Contract, the 1987 Operation and

25 _____
26 ⁹ To the extent San Carlos does not utilize all of the "Excess Ak-Chin water" it has been
27 allocated, such water may reasonably be determined to be "available sufficient surface
28 water" used to satisfy a request for Section 2(b) water by Ak-Chin, because such water is
part of the existing Ak-Chin CAP allocation. Once 136,645 acre-feet of water have been
ordered by Ak-Chin and San Carlos, sufficient surface water is not "available."

1 Maintenance Contract,¹⁰ and the 2000 Operating Agreement, CAWCD is only obligated to
 2 deliver water to the extent that water conforms to an entity's contract for CAP water.
 3 Dkt. 107 at 8:19-9:1; Dkt. 108 at 10:17-20; JSOF ¶¶ 12, 13, 14, 15, 20. The
 4 1988 Repayment Contract requires CAWCD to deliver only such Project Water "allocated
 5 by the Secretary" to tribes. 1988 Repayment Contract ¶ 8.17. The Secretary allocated
 6 58,300 acre-feet of CAP water to Ak-Chin. 48 Fed. Reg. 12446. The United States
 7 provides this allocation pursuant to the terms of the 1985 and 1980 Ak-Chin Contracts, as
 8 well as the 1992 San Carlos Act and 1999 San Carlos Agreement. *See* JSOF ¶¶ 4, 17;
 9 Quinley Decl. ¶¶ 3, 4, Exs. B, C-1, and C-2. CAWCD, in fact, delivers this water to Ak-
 10 Chin pursuant to these authorities and its contracts with the United States.

11 CAWCD also delivers non-CAP water for Indian uses, but only if the United States
 12 provides CAWCD with this water. 1988 Repayment Contract ¶ 8.17. CAWCD, for
 13 example, delivers the 47,500 acre-feet of Yuma-Mesa water reallocated to Ak-Chin, and
 14 will also deliver any other non-Project Water actually provided by the United States to
 15 CAWCD to fulfill water orders. *Id.* Under its contracts with the United States, CAWCD
 16 cannot deliver water in excess of specific allocations and does not have the authority to
 17 find or provide water necessary to fulfill the United States' delivery obligations.

18 **F. The Secretary Cannot Use "Excess Water" to Fulfill Section 2(b) Requests**
 19 **Because "Excess Water" Is Not "Available"**

20 In an attempt to circumvent the United States' failure to provide "available" surface
 21 water for Section 2(b) water, the United States and Ak-Chin allege that "Excess Water"
 22 otherwise given to CAWCD is "available" to fulfill Section 2(b) requests. Dkt. 107
 23 at 12:21-23; Dkt. 108 at 10:7-9.

24 ///

25 ///

26 _____
 27 ¹⁰ 1987 Contract Between the United States of America and the Central Arizona Water
 28 Conservation District for Operation and Maintenance of the Central Arizona Project
 (1987 OM&R Contract), Dkt. 102-2.

1 Allocated water that is not used, resold, or exchanged pursuant to long-term
2 contracts or subcontracts for Project Water service is “Excess Water” within the meaning
3 of the 2007 Repayment Stipulation. 2007 Repayment Stipulation ¶ 5(d).¹¹ The
4 2007 Repayment Stipulation guarantees CAWCD “the exclusive right in its discretion to
5 sell or use all Excess Water for any authorized purpose of the CAP.” 2007 Repayment
6 Stipulation ¶ 5(d)(2); JSOF ¶ 23. “Excess Water” is not “available” for delivery under
7 Section 2(b) because it is contracted to, and being used by, CAWCD.¹²

8 The United States alternatively argues that Section 2(b) of the 1984 Ak-Chin
9 Settlement Act vests Ak-Chin with an entitlement to any uncontracted or unused water in
10 the CAP system simply because Section 2(b) is a provision of a long-term contract.
11 Dkt. 107 at 14:3-8. In the first instance this interpretation would convert Ak-Chin’s
12 conditional right to 10,000 acre-feet of water into an unconditional right. There is simply
13 no cannon of statutory or contractual construction that would sanction this type of
14 semantic magic.

15 In any event, in order to have an entitlement to CAP water, an entity, including Ak-
16 Chin, must have *both* an allocation *and* a contract for such water. *Maricopa-Stanfield*
17 *Irrig. & Drainage Dist.*, 158 F.3d at 436-37. That situation does not exist here. The
18 United States has not allocated any water, beyond 105,800 acre-feet, to Ak-Chin.

19 In contrast, CAWCD has a specific contractual right to the exclusive use of Excess
20 Water. The United States and Ak-Chin cite to nothing that gives Ak-Chin the right to
21 water to which CAWCD has an exclusive contractual right. Neither the 1984 Ak-Chin
22 Settlement Act nor the 1985 Ak-Chin Contract contain language remotely similar to

23 _____
24 ¹¹ For example, the City of Phoenix has a CAP municipal and industrial (M&I) water
25 delivery subcontract entitlement of 122,204 acre-feet. If the City ordered 112,204 acre-
26 feet under that subcontract in a given year, then 10,000 acre-feet would become Excess
27 Water in that year.

28 ¹² In recent years, CAWCD’s use of Excess Water has included conservation in Lake Mead
to protect against Colorado River shortage as provided in a 2014 memorandum of
understanding between CAWCD, the United States, and other Colorado River entities.
Quinley Decl. ¶ 9, Ex. H.

paragraph 5(d) of the 2007 Repayment Stipulation, which explicitly grants CAWCD rights to Excess Water. The United States’ strained interpretation of the term “long-term contract” cannot be utilized to reallocate unused CAP water to Ak-Chin. Absent an actual allocation or reallocation of CAP water to the benefit of Ak-Chin, no right to that water can be implied or imputed. *See Maricopa-Stanfield Irrig. & Drainage Dist.*, 158 F.3d at 431; 41 Fed. Reg. 45883; 48 Fed Reg. 12446.

G. Ak-Chin Does Not Have Standing

Ak-Chin alleges that CAWCD’s failure to deliver Section 2(b) water is a breach of CAWCD’s contracts with the United States. Dkt. 108 at 10:11-23. A necessary predicate for Ak-Chin to sustain this claim and to obtain relief requires Ak-Chin to demonstrate that it is an intended third-party beneficiary of CAWCD’s Operating Agreement. *See* Dkt. 1 at 50, Ak-Chin Response to Interrogatory No. 6; *GECCMC 2005-C1 Plummer St. Office Ltd. P’ship v. JP Morgan Chase Bank, Nat. Ass’n*, 671 F.3d 1027, 1032 (9th Cir. 2012). As a matter of law, Ak-Chin is not an intended third-party beneficiary.

Federal common law governs the determination of whether Ak-Chin is an intended third-party beneficiary. *GECCMC*, 671 F.3d at 1032. The Ninth Circuit takes a distinctly narrow approach to determining if a plaintiff is an intended third-party beneficiary. “A party can enforce a third-party contract only if it reflects ‘an express or implied intention of the parties to the contract to benefit the third party.’ ” *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (quoting *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)). “Parties that benefit [from contracts with the United States] are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.” *Id.* In order to enforce CAWCD’s contracts with the United States, Ak-Chin must demonstrate “an intention . . . to grant [Ak-Chin] enforceable rights.” *Id.* The Ninth Circuit does not recognize intended third-party beneficiary status even when a master reclamation contract is entered into with a third-party in mind and operates for the benefit of that third-party, even if that third-party has separate contracts with the United States. *Orff v. United States*, 358 F.3d 1137, 1146-48

(9th Cir. 2004). Reclamation contracts do not confer intended third-party beneficiary status absent express language. *Id.*

Neither the 1988 Repayment Contract, nor any of the CAWCD-United States operating agreements confer intended third-party beneficiary status. *Smith*, 418 F.3d at 1036-37. The 1987 OM&R Contract, the governing document of the 2000 Operating Agreement, explicitly states that “[n]othing in this contract, express or implied, is intended to confer any rights or remedies under or by this contract on any persons other than the parties to it[.]” 1987 OM&R Contract ¶ 14. There is no clear language and certainly no clear implied intent, in any relevant agreement between the CAWCD and the United States that Ak-Chin is entitled to enforceable rights against CAWCD. Indeed, the contrary is true.

The situation presented to the Court is analogous to the situation presented in *Klamath*. In *Klamath*, irrigators attempted to claim third-party beneficiary status based on two provisions in a contract to which they were not a direct party. *Klamath Water Users*, 204 F.3d at 1211. The court found that the provisions did not provide enforceable rights to third-party beneficiaries. *Id.* at 1211-12.

Ak-Chin and CAWCD have distinct and separate contracts with the United States. The 1980 Ak-Chin Contract for CAP water and the 1985 Ak-Chin Contract are not subcontracts of CAWCD’s 1988 Repayment Contract – both are entirely separate. The 1988 Repayment Contract does not require CAWCD to find a source for Ak-Chin water or vest Ak-Chin with a water right outside of its CAP allocations and settlement rights. *See Smith*, 418 F.3d at 1036. The 2000 Operating Agreement requires CAWCD to operate the project works for the benefit of every party that receives CAP water in a manner consistent with all other obligations to CAP users. If the United States or CAWCD intended to confer intended third-party beneficiary status on Ak-Chin, there would be explicit language granting such status. *See* 1987 O&M Contract ¶ 14; *see, e.g.*, Arizona Water Settlements Agreement ¶ 12.1 (expressly vesting Maricopa-Stanfield Irrigation & Drainage District, Central Arizona Irrigation and Drainage District, and

1 Mohave County Water Authority to specific third-party beneficiary rights), Quinley Decl.
 2 ¶ 7, Ex. F.

3 Under *Klamath, Orff*, and *Smith*, Ak-Chin is not an intended third-party
 4 beneficiary, because (1) Ak-Chin's contracts are distinctly separate from CAWCD's
 5 1988 Repayment Contract; (2) Indian CAP water deliveries are distinct from other CAP
 6 deliveries under the 1988 Repayment Contract; and (3) such a result "would open the door
 7 to all users receiving a benefit from [CAP] achieving similar status[.]" *Klamath Water*
 8 *Users*, 204 F.3d at 1212.

9 **H. Ak-Chin Is Not Entitled to Injunctive Relief**

10 Injunctive relief is appropriate where a party will suffer irreparable harm, the
 11 balance of equities tips in the movant's favor, and the injunction is in the public interest.
 12 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2014). Irreparable harm is defined as
 13 harm for which there is no legal remedy. *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d
 14 1053, 1060 (9th Cir. 2014). If the harm to the moving party is merely monetary, it will
 15 not be enough to establish irreparable harm. Monetary harm is not irreparable because it
 16 is "easily calculable and fully satisfied through subsequent money damages."

17 *Hoffmann-La Roche, Inc. v. Promega Corp.*, No. C-93-1748-VRW, 1994 U.S. Dist.
 18 LEXIS 10174, at *22 (N.D. Cal. June 13, 1994).

19 Ak-Chin alleges that a failure of CAWCD to provide Section 2(b) water is
 20 irreparable harm. Dkt. 108 at 11:7-13:12. However, both the 1984 Ak-Chin Settlement
 21 Act and 1985 Ak-Chin Contract recognize that the damages to Ak-Chin for failure to
 22 provide, not only Section 2(b) water, but also any permanent water, are monetary in
 23 nature, and easily calculated by (1) the cost of replacement water up to 75,000 acre-feet
 24 and (2) as "measured by the agricultural water service operation, maintenance and
 25 replacement costs for [CAP] water in effect during that year, plus 20 per centum[.]"
 26 1984 Ak-Chin Settlement Act § 2(i); 1985 Ak-Chin Contract ¶ 9(c). Having agreed to a
 27 damage remedy for failure to deliver Section 2(b) water, Ak-Chin cannot here claim
 28 irreparable injury for failure to deliver the same water.

I. Ak-Chin Failed to Mitigate the Harm It Alleges

The doctrine of avoidable consequences requires a plaintiff to “reasonably . . . stave off avoidable harm” and is properly applied to breaches of federal statute.

Genschorck v. Suttell & Hammer, P.S., No. 12-CV-0615-TOR, 2013 U.S. Dist. LEXIS 165826, at *10 (E.D. Wash. Nov. 21, 2013). Where a party fails to take reasonable steps to avoid injury, relief is precluded. *Aero Med, Inc. v. White Mt. Cmty. Hosp., Inc.*, No. CV-11-8031-PHX-GMS, 2012 U.S. Dist. LEXIS 132135, at *18 (D. Ariz. Sept. 17, 2012).

Ak-Chin unreasonably seeks to impose on CAWCD an obligation to find a source for conditional Section 2(b) water 25 years after Congress required amendment of Ak-Chin’s CAP contracts to conform to the reallocation of Excess Ak-Chin Water to San Carlos.¹³ Additionally, Ak-Chin seeks to impose this obligation nearly 20 years after the amendment of the 1984 Ak-Chin Settlement Act and 1985 Ak-Chin Contract to allow long-term leasing of up to 10,000 acre-feet when United States Congress hearings explicitly recognized “available” water would be increasingly “unavailable.” Quinley Decl. ¶ 11, Exs. I-1 and I-2.

In the time between when Ak-Chin first became aware of the reallocation of “Excess Ak-Chin Water” and when Ak-Chin filed suit, Ak-Chin amended the 1984 Ak-Chin Settlement Agreement and 1985 Ak-Chin Contract, entered into long-term leases, and failed to take action to find a firm source for Section 2(b) requests. These actions demonstrate the necessary “failure to take reasonable steps to avoid harm.”

J. Laches Does Not Bar CAWCD’s Counterclaim

Ak-Chin alleges that “CAWCD has unreasonably delayed in litigating its claims and doing so now will result in expectations-based prejudice to Ak-Chin.” Dkt. 108 at 16:17-18. Ak-Chin asserts that “each year since 2003, Ak-Chin has requested

¹³ This Court addressed the interaction between Ak-Chin’s and San Carlos’s rights to “Excess Ak-Chin Water” in *Maricopa*. The Court noted that the 1992 San Carlos Act contained a 2-year statute of limitations for entities to contest the 1992 San Carlos Act. *Maricopa-Stanfield*, 158 F.3d. at 428.

1 and received § 2(b) water.” Dkt. 108 at 16:21. With the exception of 2015 and 2017,
 2 however. Ak-Chin’s Section 2(b) water request was fulfilled from the Yuma-Mesa water
 3 and Ak-Chin’s CAP allocation. Quinley Decl. ¶ 8, Ex. G-1 to G-3; *see also* Dkt. 1-1;
 4 Dkt. 109-1. In 2015,¹⁴ the United States and CAWCD agreed to fulfill Ak-Chin’s request
 5 for Section 2(b) water as a one-time accommodation in order to enter into discussions to
 6 determine how best to resolve the parties’ disagreement over where Section 2(b) water
 7 should come from. *Id.* This resolution did not occur, and Ak-Chin initiated suit in 2017.
 8 Dkt. 1. CAWCD again stipulated to provide water beyond Ak-Chin’s contractual
 9 entitlement while this litigation is pending. Dkts. 62, 98. A year between the failure of
 10 negotiations with the United States, following the 2015 water order and Ak-Chin’s
 11 initiation of the instant litigation does not constitute unreasonable delay.

12 Ak-Chin has not and will not incur expectations-based prejudice. With the
 13 exception of 2015 and 2017, Ak-Chin has only received water from its CAP Allocation.
 14 There has been no expectation that it would receive water from a source that has not
 15 specifically been allocated to Ak-Chin. Additionally, as an admitted conditional right,
 16 Section 2(b) is subject to the existence of “*available* surface water.” *See* Dkt. 108 at 8:21.
 17 There can be no expectation in always receiving a conditional water delivery.

18 **K. Ak-Chin Has Waived Sovereign Immunity**

19 Ak-Chin’s contention that it has not waived sovereign immunity to CAWCD’s
 20 counterclaims is unavailing. Dkt. 108 at 16:1-14. The authority Ak-Chin relies on,
 21 *Quinault Indian Nation v. Pearson*, 868 F.3d 1093 (9th Cir. 2017), is inapplicable. In
 22 *Quinault*, out-of-court events lead the plaintiff to move for voluntary dismissal of their
 23 claim against the defendants and dismissal of the defendants’ myriad counterclaims that
 24 did not mirror the plaintiff’s own claims. *Id.* at 1096. Here, Ak-Chin does not seek
 25 dismissal of its suit and CAWCD’s counterclaims, but rather it seeks adjudication of these
 26 claims. Ak-Chin’s reliance on *Quinault* is tantamount to arguing that sovereign immunity

27
 28 ¹⁴ 2015 was the first year there was insufficient water available from Ak-Chin’s CAP
 allocation to provide Section 2(b) water.

1 can prevent the Court from adjudicating the issues presented, unless it does so in favor of
2 Ak-Chin.

3 *Quinault* is further distinguishable from the current litigation between Ak-Chin and
4 CAWCD. Ak-Chin seeks a declaration of its water rights and injunctive relief. Those
5 claims set the bounds of Ak-Chin's case, and by filing suit, it has consented to the court's
6 adjudication of those claims. Unlike the counterclaims in *Quinault*, CAWCD's response
7 is fully within the bounds of Ak-Chin's claims – it is a mirror image. Ak-Chin seeks a
8 declaration of its rights to the Section 2(b) water and that CAWCD is obligated to deliver
9 that water out of the CAP. CAWCD seeks a declaration that it is not obligated to deliver
10 the Section 2(b) water to Ak-Chin, unless the United States provides CAWCD with an
11 “available” surface water supply for delivery to Ak-Chin. CAWCD does not seek relief
12 distinct from the relief sought by Ak-Chin. “Having placed a question before the court, a
13 sovereign acknowledges the court's authority to resolve that question, whether in favor of
14 the sovereign or in favor of a counterclaimant seeking the opposite resolution.” *Tohono*
15 *O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1204 (D. Ariz. 2016). CAWCD seeks
16 only the opposite resolution of the question raised by Ak-Chin.

17 V. CONCLUSION

18 For the foregoing reasons, this Court should deny summary judgment to the United
19 States and Ak-Chin, and grant summary judgment to CAWCD.

20 Respectfully submitted,

21 SOMACH SIMMONS & DUNN

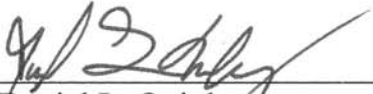
22
23 DATED: August 10, 2018

24 By: 

25 Stuart L. Somach
26 Robert B. Hoffman
27 Daniel L. Quinley
28 Attorneys for Defendant/Counterclaimant
Central Arizona Water Conservation District

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I directed the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants:



Daniel L. Quinley
Somach Simmons & Dunn

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