

SOMACH SIMMONS & DUNN
A Professional Corporation

SOMACH SIMMONS & DUNN
A Professional Corporation
STUART L. SOMACH (CA SBN 090959)
ROBERT B. HOFFMAN (AZ SBN 4415)
DANIEL L. QUINLEY (CA SBN 312579)
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
Email: ssomach@somachlaw.com
bhoffman@somachlaw.com
dquinley@somachlaw.com

JAY M. JOHNSON (AZ SBN 015122)
CENTRAL ARIZONA WATER
CONSERVATION DISTRICT
23636 N 7th Street
Phoenix, AZ 85024
Telephone: (623) 869-2333
Facsimile: (623) 869-2412
Email: jjohnson@cap-az.com

Attorneys for Defendant/Counterclaimant
CENTRAL ARIZONA WATER
CONSERVATION DISTRICT

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.,
Defendant/Crossclaimant.

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

**DEFENDANT CENTRAL
ARIZONA WATER
CONSERVATION DISTRICT'S
REPLY TO CROSSCLAIMANT
UNITED STATES' OPPOSITION &
REPLY BRIEFS**

I. INTRODUCTION

The United States and Ak-Chin assert first that Section 2(b) water¹ is “long-term contract” water but is, nonetheless, not subject to the supply limitations on “long-term contract water” found in the Arizona Water Settlements Act, Pub. L. No. 108-451, 181 Stat. 3478 (Dec. 10, 2004) (AWSA); *see also* Stipulation for Judgment Between the United States and Central Arizona Water Conservation District in Nos. CIV 95-625 and CIV 95-1720 (D. Ariz.), Dkt.² 102-5 (2007 Repayment Stipulation) ¶ 2(7). Yet, if Section 2(b) water is “long-term contract” water it must be subject to the limitations found in AWSA. ASWA limits the total quantity of CAP water under long-term contracts for federal purposes to 650,274 acre feet, all of which as been allocated or reserved. The 10,000 acre-feet of Section 2(b) water is not part of that reserved or allocated CAP water. Therefore, to be “available” it must either come from a source other than CAP water or from CAP water that has been allocated or reallocated to others, but that has not been used, resold, or exchanged. The latter, however, ignores the 2007 Repayment Stipulation which provides that this water is not “available” because it is Excess Water granted to CAWCD.³

The United States could have avoided the current dispute if, as it was required to do under Section 3706(a) of the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, tit. XXXVII, 106 Stat. 4740, §§ 3701-3711(1992 San Carlos Act), it had amended Ak-Chin’s contracts to specifically provide for how, after the reallocation of up-to 33,300 acre-feet of unused Ak-Chin water to the San Carlos Apache Tribe, Section 2(b) water was to be identified and provided to Ak-Chin. The United States, however, failed and refused to do this. The United States also could have excluded

¹ “Section 2(b) water” as defined under Subsection 2(b) of the Act of Oct. 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698 (1984 Ak-Chin Settlement Act).

² 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.

³ “Excess Water” is allocated water that is not used, resold, or exchanged pursuant to long-term contracts or subcontracts for Project Water Service under paragraph 5, at 11, lines 13-14 of the 2007 Repayment Stipulation

Section 2(b) water from the clear definition of “Excess Water” that was negotiated into the 2007 Repayment Stipulation. It did not do this either. Instead, the United States now attempts to torture the provisions of the 2007 Repayment Stipulation by making the unsupported assertion that Excess Water is determined after providing Section 2(b) water to Ak-Chin.

II. ARGUMENT

A. Section 2(b) Does Not Grant Ak-Chin a Right to CAP Water Outside the Framework of Long-Term Contracts

1. Ak-Chin Entered Long-Term Contracts for a Limited Pool of CAP Water, Consistent With its Allocation

The United States contends that CAWCD invented the allocation requirement as it applies to the Section 2(b) water and argues that because the Section 2(b) right is found in a contract that extends beyond the year 2043, a “long-term contract” as defined in AWSA, it has a priority over CAWCD’s right to Excess Water. This narrow view of the issues presented ignores the operative statutory and contractual mandates that govern how CAP water can be used, including the Section 2(b) water that the United States contends it can order CAWCD to deliver to Ak-Chin.

Long-term contracts for the delivery of CAP water do not exist in a vacuum. Long-term contracts are those contracts entered into by the United States, based upon the allocation requirement for CAP water provided for first in the decree in *Arizona v. California*, 376 U.S. 340, 341-43 (1964) (*Arizona Decree*), which enjoined the United States from delivering Colorado River water except as required pursuant to valid contracts and subsequently, in CAP-authorizing legislation. *See, e.g.* Colorado River Basin Project Act, Pub. L. No. 90-537, tit. I, § 102, 82 Stat. 885 (1968), as amended and codified at 43 U.S.C. §§ 1501-1556 (authorizing the Secretary of the Interior⁴ to allocate Arizona’s remaining Colorado River entitlement); 48 Fed. Reg. 12446 (Mar. 24, 1983) (setting specific allocations for CAP users).

⁴ The Secretary of the Interior shall hereinafter be referred to as “Secretary”.

ASWA confirmed existing CAP water allocations and limited the total of all long-term CAP entitlements for federal purposes (including for Indian Tribes) to 650,724 acre-feet. This limitation emanates from the 2007 Repayment Stipulation which is cross-referenced in the AWSA.⁵ The Repayment Stipulation also grants CAWCD the right to unused allocations of CAP water regardless of whether the source of that unused water is from Federal or non-federal allocations of CAP water.

Ak-Chin contracted for the delivery of its CAP allocation in 1980 and 1985. *See* Dkt. 113-2, (“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)); Dkt. 102-5 (“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 Contract)). These two contracts are “long-term contracts” within the meanings of AWSA and the 2007 Repayment Stipulation because they extend beyond the year 2043. The delivery of water pursuant to those contracts, including the delivery of Section 2(b) water, is thereby subject to the CAP allocation limitation of 650,724 acre-feet for federal purposes.

Ak-Chin’s 1985 Contract implements the terms of the Ak-Chin Water Rights Settlement Act of 1984⁶ (1984 Ak-Chin Settlement Act). The 1985 Contract gives Ak-Chin a permanent water supply of 75,000 acre-feet and allows Ak-Chin to request up to 10,000 acre-feet of water (also referenced in ¶ 3(b) of the 1985 Contract as “Permanent Water”), to be delivered by the United States if “sufficient surface water is available.” 1985 Contract ¶¶ 3(a)-(b).⁷ The 1985 Contract then specifies the “Source of Permanent Water,” as being from the 50,000 acre-feet of water from the Yuma Mesa Division of the Gila Project and Ak-Chin’s CAP allocation of 58,300 acre-feet. These supplies provide

⁵ Indeed, the definition of “long term contracts” used in the AWSA is the definition of long-term water used in the 2007 Repayment Stipulation at Section 2 (7).

⁶ Act of Oct. 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698.

⁷ Paragraph 3(c) deals with minimum water deliveries in dry years.

1 Ak-Chin with 108,300 acre-feet of “sufficient available surface water.”

2 1985 Contract ¶ 4(a).

3 The 1985 Contract was constructed to be consistent with the legal limitations
4 imposed by relevant statutory requirements, including the allocation requirement. Further,
5 nothing inherent in the 1985 Contract conflicts with the AWSA or the 2007 Repayment
6 Stipulation, including the grant of Excess Water to CAWCD. The United States, however,
7 complicated Ak-Chin’s ability to obtain its Section 2(b) water supply from due to the
8 manner in which the United States implemented the 1992 San Carlos Act, which allowed
9 up to 33,300 acre-feet (the balance of Ak-Chin’s allocation after fulfilling a water order of
10 75,000 acre-feet) of Ak-Chin’s water not required for delivery, to be supplied to the San
11 Carlos Apache Tribe. Ak-Chin’s CAP allocation therefore must meet the water supply
12 demands of both Ak-Chin and the San Carlos Apache Tribe from the same source of
13 allocated water, with no clear delineation of priority between these competing users.

14 The United States and Ak-Chin argue that, notwithstanding this anomaly, CAWCD
15 is required to deliver 10,000 acre feet of Section 2(b) water to Ak-Chin even if the total
16 delivery request from both Ak-Chin and the San Carlos Apache Tribe exceed the
17 108,300 acre-feet of CAP water allocated the two tribes. The entirety of this 108,300 acre
18 feet “Source of Permanent Water” is included within the CAP water supply of
19 650,724 acre-feet for federal purposes, but the remainder of that supply is allocated to
20 various Arizona tribes or reserved for future Indian water settlements, and is unavailable
21 for use by either the Ak-Chin or the San Carlos. *See* AWSA § 104(c). Notably, the
22 allocated CAP supply does not include an additional 10,000 acre-feet to source the
23 Section 2(b) water.

24 The United States and Ak-Chin attempt to sidestep this limitation by arguing that
25 Ak-Chin’s Section 2(b) right may be fulfilled by “leftover” federally reserved water.
26 However, the description by the United States and Ak-Chin that the water at issue is
27 “leftover,” is itself an admission that such water is water other than that which has been
28 allocated to Ak-Chin through its long-term contracts. *See* Dkt. 115 at 5:11-16; Dkt. 116

1 at 1:1-8. It follows, therefore, that this “leftover” water cannot be long-term contract
2 water.

3 The very contracts that the United States and Ak-Chin point to in asserting
4 CAWCD’s obligations are contrary to their arguments. Those contracts limit Ak-Chin’s
5 permanent entitlement to quantities that have been allocated to it and convey to CAWCD
6 all water that has been allocated or subsequently reallocated by the Secretary, but is not
7 used by the entity to which it was allocated. The allocation requirement is the means to
8 distinguish CAP water, which belongs to others, from CAP water that belongs to
9 CAWCD. Section 2(b) provides Ak-Chin with a conditional right to up to 10,000 acre-
10 feet of surface water when sufficient water is available. This conditional right does not, as
11 the United States contends, mean that a conditional allocated right attaches to any CAP
12 water.⁸

13 **2. Unused Indian Pool CAP Water is Excess Water**

14 The United States asserts that, if there is any water in the 650,724 acre-feet
15 remaining in the Indian pool, after all other tribal water orders are made, such water is
16 “available” as a source of Section 2(b) water. *See* Dkt. 115 at 9:1-3. This assertion is
17 contrary to the express language of the 2007 Repayment Stipulation that provides that
18 unused Indian pool water (which is nothing other than allocated or reallocated CAP water
19 that has not been used, resold, or exchanged) is Excess Water belonging to CAWCD.

20 The United States, in its Navajo Nation example, conflates the meaning of Excess
21 Water with the meaning of “available water”. Dkt. 115 at 9. Water allocated for the
22 expected future water rights settlements for the Navajo, if not used by the Navajo, is not
23 “available.” It is Excess Water until it is used by the Navajo or permanently allocated, or
24 reallocated and used by another Indian Tribe. That result is not “absurd” but is rather a
25 result of the contractual relationship between the United States and CAWCD, the very

26 _____
27 ⁸ Allocated water has a priority attached to it by virtue of the allocation such as
28 “Municipal and Industrial” (“M&I”), “Indian” or “Non Indian Ag”. Since the
Section 2(b) water has not been allocated, it carries no priority and does not fit within the
priority system.

contractual relationship that the United States and Ak-Chin contend compels CAWCD to deliver Section 2(b) water to Ak-Chin.

B. The Plain Meaning of the Word “Available” Cannot Reasonably be in Dispute

The United States spends pages redefining “available,” but the definition of “available” cannot really be in dispute. *See* Dkt. 115 at 10-13. If CAP water allocated or reallocated to CAP contractors or subcontractors (Indian or non-Indian) is not used, resold, or exchanged pursuant to a long-term contract, then it is Excess Water. If it is Excess Water, then it belongs to CAWCD. If it is Excess Water that belongs to CAWCD it cannot be “available” to provide to Ak-Chin by any accepted definition of the word “available.”

The United States relies on *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133 (E.D. Cal. 2001), for the proposition that Congressional failure to designate a water supply means that such water may come from any source. Dkt. 115 at 11:20-12:10. This case merely holds that the United States can find a non-designated water source, obtain legal right to that water, and then substitute such water for the water originally anticipated by statute or contract. *Westlands Water Dist.*, 154 F. Supp. 2d at 1159-60. *Westlands Water District* does not sanction the United States taking water from others so that it may substitute that taken water for the water anticipated by the original contract. *Westlands Water District* merely supports the broad proposition that water is generally fungible.

C. The United States Did Not Properly Address Section 2(b) Requirements as it Could Have/Should Have in Reallocating Ak-Chin Water to San Carlos

United States is sensitive about its actions or inactions relative to the reallocation of Ak-Chin CAP water to the San Carlos Apache. Section 2(b) existed at the time the reallocation was made, and the United States had an opportunity at the time it implemented the 1992 San Carlos Act to clarify the United States intentions with respect to providing water to Ak-Chin. The premise of the reallocation was that the reallocated water was not needed by Ak-Chin. In light of the requirement to amend the 1985 Contract provided for in Section 3706(a) of the 1992 San Carlos Act, it is logical to

conclude that if the United States had met its statutory mandate, the Section 2(b) issue would have been properly addressed. Moreover, the issue was apparent at the time of the negotiation of the 2007 Repayment Stipulation but the United States again failed to address this issue. If the United States had clearly excepted Section 2(b) from the definition of Excess Water, and such water was somehow outside the federal limitation of the 650,724 acre-feet allocation, there would be no current dispute. However, the United States failed to do so. Its arguments now are merely an attempt to rewrite, *ex post facto*, a limitation on CAWCD's entitlement to Excess Water that does not currently exist in the 2007 Repayment Stipulation.

D. The Allocation of CAP Water to Ak-Chin is Merely One Way in Which Section 2(b) Water Can Be Secured for Ak-Chin

The United States and Ak-Chin claim that CAWCD asserts that the only water that Ak-Chin is entitled to is water that has been allocated to Ak-Chin. *See e.g.*, Dkt. 115, at 5-8 and Dkt. 116, at 2-7. CAWCD, however, only asserts that in order for a directive from the United States to CAWCD to provide Ak-Chin with Section 2(b) to be valid is if the United States provides that water to CAWCD for delivery to Ak-Chin.

CAWCD's position is not that Ak-Chin must have a CAP allocation to Section 2(b) water before CAWCD will deliver it, but rather that either it must have an allocation to cover the Section 2(b) water *or* the United States must provide non-CAP water for that purpose. CAWCD's position is not theoretical but is based upon the relevant statutes and agreements that govern the relationships between the parties.

There is no dispute that the United States has not provided non-CAP water to CAWCD to deliver to Ak-Chin. There is likewise no dispute that CAWCD has delivered water that has been allocated to Ak-Chin, to Ak-Chin. Doing so is consistent with the relevant statutory and contractual obligations in play. However, there is no statute or contract that provides a priority to Ak-Chin for water that has not been allocated to it, and, water that has been allocated but is unused by those to whom it was allocated, is defined as Excess Water, which has been granted to CAWCD for its use at its sole discretion.

1 CAWCD is under no legal obligation to deliver this water to Ak-Chin as Section 2(b)
2 water.

3 The United States contends, “the Ninth Circuit did not hold that “available” water
4 must be limited to “allocation-contract” water. Dkt. 115 at 6:1-2. However, the Ninth
5 Circuit explicitly recognized such a limitation. In *Maricopa-Stanfield Irrigation &*
6 *Drainage District v. United States*, 158 F.3d 428 (9th Cir. 1998), the court recognized that
7 CAP allocations to end users, including the operative 1983 allocation of 58,300 acre-feet
8 of CAP water to Ak-Chin, is “the *maximum* amount of CAP water” available to CAP
9 users. *Maricopa-Stanfield Irrigation & Drainage Dist.*, 158 F.3d at 431, n.5 (emphasis in
10 the original). Within these limits, “how much CAP water users *actually* received was
11 limited only by their demand.” *Id.* (emphasis in the original). The court further noted
12 that, “[u]sers who wanted to receive the CAP water allotted to them were required to
13 contract for it.” *Id.*

14 The United States concedes that CAWCD has not claimed any entitlement to water
15 allocated to Ak-Chin but finds fault in CAWCD’s assertion that CAP water that has not
16 been allocated or reallocated, or is not being used by an entity with an allocation or
17 reallocation of CAP water, belongs to Ak-Chin in the form of Excess Water. *See* Dkt. 115
18 at 6:6-12. Again, the United States’ assertion begs the very question at issue by assuming
19 that Excess Water is “available” water. CAWCD claims no priority over “available”
20 water but contends that Excess Water is not “available.” While Section 2(b) does not
21 limit the sources from which the United States can find “available” water, there is nothing
22 in Section 2(b) to suggest that Congress intended the United States to provide Section 2(b)
23 water by taking it away from another entity with whom the United States has properly
24 contracted.

25 **E. CAWCD is Under No Obligation to Provide Excess Water to Ak-Chin**

26 The United States isolates and relies upon a single provision of the 1988 Contract
27 for its argument that CAWCD has an absolute obligation to deliver “Excess Water” to
28

1 Ak-Chin as Section 2(b) water. Paragraph 8.17 of the 1988 Repayment Contract⁹ makes
 2 CAP facilities available for the diversion, transportation, and carriage of water for Indian
 3 and non-Indian uses pursuant to arrangements or contracts therefor entered into on their
 4 behalf with the Secretary and that, if there is an agreement for Operation and Maintenance
 5 (O&M), that CAWCD will divert, transport and carry such water for such uses pursuant to
 6 the provisions of the those arrangements and contracts. CAWCD has indicated that it has
 7 met, and will continue to meet, its obligations under this contractual provision. This
 8 obligation is conditioned upon the United States identifying and providing the water to be
 9 diverted, transported, and carried by CAP facilities. The totality of the contracts and
 10 arrangements made by the Secretary, including the 1988 Repayment Contract, the 2007
 11 Repayment Stipulation as well the 1985 Contract, contain no authority for CAWCD to
 12 deliver water in excess of specific allocations or reallocations of water. Moreover, while it
 13 could deliver non-CAP water to Ak-Chin if the United States provided such water, it does
 14 not have the obligation, nor does it have the authority, to find or provide non-CAP water
 15 to fulfill the United States' delivery obligations.

16 There is nothing within the relevant contracts or within CAWCD's argument that is
 17 inconsistent with the relevant statutes. Indeed, the proper interpretation of the relevant
 18 statutes and contracts is to give meaning to all provisions. *See Klamath Water Users'*
 19 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) ("A written contract
 20 must be read as a whole and every party interpreted with reference to the whole, with
 21 preference given to reasonable interpretations.") CAWCD's interpretation accomplishes
 22 just that. It provides a means for Ak-Chin to obtain their Section 2(b) water and for
 23 CAWCD's Excess Water entitlement to be honored. The United States' interpretations
 24 only meet Ak-Chin's goal, and does so at the expense of CAWCD's rights, and by
 25 ignoring the provisions of contracts that grant those rights.

26
 27 ⁹ "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,"
 dated December 1, 1988 (1988 Repayment Contract).

III. CONCLUSION

Based upon the forgoing, as well as its opening brief in support of its motion, CAWCD respectfully requests that its Cross Motion for Summary Judgment be granted, and that the Motions for Summary Judgment filed by the Ak-Chin Indian Community and the United States, be Denied.

Respectfully submitted,
SOMACH SIMMONS & DUNN

DATED: September 27, 2018

By: s/ Stuart L. Somach
Stuart L. Somach
Robert B. Hoffman
Daniel L. Quinley
Attorneys for Defendant/Counterclaimant
Central Arizona Water Conservation District

SOMACH SIMMONS & DUNN
A Professional Corporation

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018, I electronically transmitted the foregoing document to 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:

s/ Daniel L. Quinley

Daniel L. Quinley
Somach Simmons & Dunn

SOMACH SIMMONS & DUNN
A Professional Corporation