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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ak-Chin Indian Community,

Plaintiff/Counterclaim Defendant,

v.

Central Arizona Water Conservation District,

Defendant/Counterclaimant/ Crossclaimant

v.

United States of America, *et al.*,

Defendant/Crossclaim Defendants.

CV-17-00918-PHX-DGC

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS CAWCD'S CROSSCLAIM

Crossclaim Defendants, the United States of America; United States Department of the Interior; Ryan Zinke, Secretary of the Interior; United States Bureau of Reclamation ("BOR"); Alan Mikkelsen, Acting Commissioner of the BOR; Terry Fulp, Regional Director, Lower Colorado Region, BOR; and Leslie Meyers, Phoenix Area Office Manager, Lower Colorado Region, BOR (together, the "United States"), respectfully submit this reply in support of their motion to dismiss ("U.S. Mot."), Dkt. 76, the Crossclaim of Central Arizona Water Conservation District ("CAWCD"), Dkt. 65, for lack of subject matter jurisdiction because the United States has not waived its sovereign immunity and for failure to state a claim for relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. CAWCD's opposition ("CAWCD Opp."), Dkt. 80, fails to counter the legal principles supporting the United States' motion.[1] Thus, the Crossclaim should be dismissed.

I. Section 390uu Does Not Waive the United States' Sovereign Immunity for CAWCD's Crossclaim

While there is no dispute that 43 U.S.C. § 390uu contains a waiver of sovereign immunity that allowed the Court to join the United States as defendant in this case,

[1] CAWCD's Opposition confusingly begins by noting three bases for subject matter jurisdiction. CAWCD Opp. at 3. But to establish jurisdiction, CAWCD must establish both a source of subject matter jurisdiction and a waiver of sovereign immunity. *See* U.S. Mot. at 2 ("The Court does not have jurisdiction over a suit without such a waiver of sovereign immunity.") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The issue here is whether Congress waived sovereign immunity. The only potential waivers advanced by CAWCD are under 43 U.S.C. § 390uu and the APA, *see* Crossclaim ¶¶ 13, 14; CAWCD Opp. at 3, neither of which waive immunity over the claims asserted in the Crossclaim.

CAWCD identifies no authority holding, or even suggesting, that the limited statutory waiver also permits CAWCD to bring a *separate claim* against the United States. Section 390uu does not waive sovereign immunity for CAWCD's Crossclaim.

Without legal support, CAWCD asserts: "The United States cannot be a party for some purposes (such as responding to Ak-Chin's claims and potentially making its own claims), but not for others (being subject to CAWCD's claims)." CAWCD Opp. at 5. CAWCD is wrong. As detailed in our motion, it is blackletter law that the United States may only be sued when it waives sovereign immunity. Section 390uu explicitly waives sovereign immunity for joinder. But that statute does not waive sovereign immunity for any other claims against the United States. *See Orff v. United States*, 545 U.S. 596, 602-04 (2005).

CAWCD also incorrectly argues that because the United States is a "coparty" under Fed. R. Civ. 13(g), no waiver of sovereign immunity is needed in order to assert a crossclaim against the United States. *See* CAWCD Opp. at 6. "A cross-claim under the federal rules is considered a separate pleading which can be made outside the context of a responsive pleading . . . ." *Grondal v. United States*, No. CV–09–0018–JLQ, 2012 WL 523667, at *5 (E.D. Wash. Feb. 16, 2012). Even when the United States is a coparty, there must be a waiver of sovereign immunity for crossclaims against the United States.[2] For example, in *Friends of Dereef Park v. National Park Service*, a non-profit sued the National Park Service ("NPS") and the Secretary of the Interior challenging an NPS

[2] To the extent CAWCD argues that Rule 13(g) acts as a waiver of sovereign immunity, there is no legal support for that argument.

decision in an "administrative record" case. No. 2:13-cv-03453-DCN, 2015 WL 12807782, at *1-2 (D.S.C. Apr. 13, 2015). The court joined a private party, Gathering at Morris Square LLC ("GMS"), as a defendant pursuant to Fed. R. Civ. P. 21. *Id.* at *2. Through a motion to amend its answer, GMS attempted to assert crossclaims against the federal defendants under the Quiet Title Act, 28 U.S.C. § 2409a, and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. 2015 WL 12807782, at * 4. But the court denied the motion to amend, holding there was no waiver of sovereign immunity for GMS's proposed crossclaims. *Id.* at *6-8. That the federal defendants were "coparties" was irrelevant, as it is not relevant here.

Similarly, in *Hines v. United States*, 658 F. Supp. 2d 139 (D.D.C. 2009), the plaintiff brought a crossclaim against the United States. After explaining that the Federal Rules prohibit such a claim (the United States was the defendant), the court noted that "even if the plaintiff had complied with the Federal Rules of Civil Procedure, the claims raised in his crossclaim would not succeed" because Congress had not waived sovereign immunity, and "absent a waiver of sovereign immunity, a claim must be dismissed for lack of subject matter jurisdiction." *Id*. at 148 (quoting *Eliason v. United States*, 551 F. Supp. 2d 63, 64 n. 1 (D.D.C. 2008)).

Numerous other cases illustrate that waivers of sovereign immunity must be determined on a claim-by-claim basis. *See, e.g.*, *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389-90 (1998) (implying that 11th Amendment sovereign immunity is assessed claim-by-claim); *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1172 (9th Cir. 2010) (explaining that sovereign immunity under Foreign Sovereign Immunities

Act must be assessed claim-by-claim); *Grondal*, 2012 WL 523667, at *10 (dismissing cross-claims due to the Native American tribe's sovereign immunity and noting "[e]ach claims' legal basis and type of relief must be analyzed separately as to the issue of sovereign immunity"); *Lee v. Walters*, No. 95-274, 2002 U.S. Dist. LEXIS 2272, at *37 (D. Or. Jan. 30, 2002) (qualified immunity analysis to proceed claim-by-claim); *see also United States v. Barron Collier*, No. 14-00161, 2014 WL 12672641, *7–8 (D. Ariz. Sept. 15, 2014) (sustaining United States' contract claim but dismissing defendants' contract counterclaim because no waiver of immunity allowed it to be brought in district court).

CAWCD's reliance upon *Terry v. Newell*, No. CV-12-02659-PHX-DGC, 2014 U.S. Dist. LEXIS 92408 (D. Ariz. July 8, 2014), is misplaced. Properly understood, *Terry* supports the United States' position that a specific waiver of sovereign immunity is required for each crossclaim against the United States. There, the family of a slain United States Border Patrol agent sued individual federal defendants and a private party (Lone Wolf), the alleged source of the weapons used to kill the agent. *Id.* at *2. The United States substituted itself for the individual federal defendants, after which Lone Wolf sought to amend its answer to add crossclaims against the United States. *Id.* at *3. The court first addressed Lone Wolf's request to amend its answer to add a *Bivens* claim against the United States. *Id.* at *5-8. The court rejected the motion to amend, holding that the United States was "protected by sovereign immunity from the *Bivens* claim asserted in the proposed new crossclaim." *Id.* at *8. Again, that the United States was already a coparty was irrelevant to the court's analysis, which examined whether a stand-alone waiver of sovereignty immunity permitted the crossclaim to go forward.

CAWCD, tellingly (and misleadingly), ignores *Terry*'s holding that sovereign immunity precluded the *Bivens* crossclaim, instead pointing this Court to *Terry*'s consideration of Lone Wolf's proposed state-law tort counterclaims against the United States. CAWCD Opp. at 6. For those claims, the Court quickly identified a sovereign immunity waiver in the Federal Tort Claims Act ("FTCA"). 2014 U.S. Dist. LEXIS 92408, at *8. Thus, the question before the court was whether Lone Wolf had "first exhaust[ed] available administrative remedies" and whether the FTCA's exception for crossclaims applied. *Id.* It was only in that context that the court considered whether the United States and Lone Wolf were "coparties," a question of interpreting Rule 13 generally. The court only considered whether the United States was a coparty *after* holding that it had waived sovereign immunity in the FTCA.

Here, of course, CAWCD identifies no valid stand-alone waiver of sovereign immunity for its Crossclaim. Its contention that section 390uu contains such a waiver is belied by the plain language of the statute. *See* U.S. Mot. at 4-5. Whether the United States and CAWCD are "coparties" is not a question the Court need address. Moreover, it does not matter that CAWCD has not brought, as it asserts, a "direct suit" against the United States. Nor does it matter that, in suits not involving the United States, crossclaims may utilize "ancillary jurisdiction" or that CAWCD's "Crossclaim is [allegedly] inextricably linked with the main claim in this litigation" *See* CAWCD Opp. at 5-6. CAWCD's Crossclaim is a "claim" against the United States, and this Court has

no jurisdiction to adjudicate that claim unless Congress has waived sovereign immunity. Congress has not.[3]

II. CAWCD Does Not Bring a Valid APA Claim

The APA does not waive sovereign immunity over contract-based claims because the Tucker Act impliedly forbids equitable relief. *See Gabriel v. Gen. Servs. Admin.*, 547 Fed. Appx. 829, 830-31 (9th Cir. 2013). U.S. Mot. at 8-13. Here, CAWCD concedes that its claims are sourced in contract: "This matter is a contractual dispute arising under contracts entered into pursuant to federal Reclamation laws." Crossclaim, ¶ 41; *see also id*. at ¶ 14. As shown in the United States' Motion to Dismiss, the United States' right to schedule water for delivery to Ak-Chin (and other recipients) and CAWCD's obligation to deliver water in response to that schedule are created by the contractual agreements between the United States and CAWCD. U.S. Mot. at 12.[4]

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[3] CAWCD argues, without citation to legislative history, that Congress "must have intended" that section 390uu permit its Crossclaim. CAWCD Opp. at 10 n.5. However, "[a]s is oft said, the plain language of the statute is usually the best indication of the drafters' intent." *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006). In section 390uu, Congress *could have* waived sovereign immunity for any claim against the United States related to a contract executed pursuant to Federal reclamation law. It did not. Instead, it narrowly permitted "join[der of] the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." 43 U.S.C. § 390uu. This Court need look no further than Congress's unambiguous language to determine congressional intent.

[4] In asserting that the United States waived sovereign immunity under section 390uu, CAWCD asks the Court to recognize that CAWCD brings "suit to adjudicate the rights of a contracting entity regarding agreements entered pursuant to federal Reclamation law." Crossclaim, ¶ 40. This Court should not allow CAWCD to make one argument in support

While CAWCD's Opposition argues now that certain statutes are relevant to its claims, *see* CAWCD Opp. at 9, those statutes do not give rise to CAWCD's claimed right to Excess Water, which arises from a contract. Section 5(d)(1) of the 2007 Stipulation for Judgment defines "Excess Water." Dkt. 65-1, Crossclaim Ex. 3 at 11 (PDF page 49); *see* Crossclaim ¶ 32 ("water that is not used under a [Central Arizona Project ("CAP")] Indian contract or a CAP non-Indian subcontract is 'Excess Water,' as that term is defined in § 5(d)(1) of the 2007 CAP Repayment Stipulation"), ¶ 33 (citing 2007 Stipulation), ¶ 52-53 (discussing Excess Water as found in parties' contracts). The 2007 Stipulation for Judgment is indisputably a contract. "An agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract law." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). In *Miami Tribe of Oklahoma v. United States*, the Miami Tribe brought a suit seeking to compel enforcement of a stipulation to settle prior litigation. 316 F. Supp. 2d 1035, 1036 (D. Kan. 2004). The court held that, although the action was styled as an APA suit, "[c]ourts have consistently held that settlement agreements are contracts for enforcement purposes," and therefore the action was one for breach of contract, the only available remedy was monetary damages, and the Tucker Act forbade the relief the Tribe sought under the APA. *Id.* at 1040-41. The Court should reach the same conclusions here.

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of a sovereign immunity waiver under section 390uu, and then make the opposite assertion in attempting to shoehorn its claim into the APA (in an effort to take advantage of the waiver of sovereign immunity therein).

Moreover, CAWCD does not assert, because it cannot, that its claims are "independent" of its contracts with the United States. Thus, this Court's analysis in *San Carlos Irr. & Drainage Dist. v. United States*, No. 05-937, 2005 WL 3434704 (D. Ariz. Dec. 14, 2005) (Campbell, J.) is on point. *See* U.S. Mot. at 13-14. CAWCD misunderstands the import of that case. *See* CAWCD Opp. at 11. In *San Carlos Irrigation*, this Court held that the Tucker Act precluded the plaintiff's claims because those claims did "not exist independent of th[e] contract," even though they were also referred to in federal regulations. *Id.*, at *3. Just as in *San Carlos Irrigation*, the source of CAWCD's purported right to "Excess Water" does "not exist independent of" its contracts with the United States. Because CAWCD's claims are "contractually based, the Court lacks jurisdiction." *See id.* at *2.

Even if this Court were to agree that CAWCD raises arguments based upon statute, a party has a "right of review" under the APA only if that party is "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). In other words, "a plaintiff challenging a statutory provision under the [APA] must show that the injury he or she has suffered falls within the 'zone of interests' that the statute was designed to protect." *Douglas County v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)). CAWCD's alleged injury is not within the "zone of interests" of the statutes it purportedly relies upon.

CAWCD's Opposition relies primarily upon the 1984 Ak-Chin Water Rights Settlement Act, Pub. L. No. 98-530, 98 Stat. 2698. CAWCD Opp. at 8. But that statute

merely establishes Ak-Chin's water rights and obligates the United States to provide water to Ak-Chin. The statute grants no rights to, or places no obligations upon, CAWCD. CAWCD is only referenced in the statute in Section 7, in which Congress conditionally authorized an appropriation of $1 million into a fund "for voluntary acquisition or conservation of water from sources within the State of Arizona for use in central Arizona in years when water supplies are reduced" if CAWCD first contributes at least $1 million. 98 Stat. 2702. CAWCD's Crossclaim is unrelated to that fund.

CAWCD's Opposition also relies upon the Arizona Water Settlements Act (AWSA), Pub. L. No. 108-451, 118 Stat. 3478, and the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600. But, again, these two statutes did not provide CAWCD with any alleged right to "Excess Water." CAWCD Opp. at 9. The AWSA reallocated "Central Arizona Project water among interested persons, including Federal and State interests . . . ." Section 102(2), 118 Stat. 3487. The AWSA does not address CAWCD's purported right to "Excess Water" and it does not make individual allocations or alter allocations involving Ak-Chin's water rights. The San Carlos settlement, 106 Stat. 4740-52, which also reallocated water rights, discusses payments to CAWCD, but also does not address CAWCD's alleged right to "Excess Water." The three Settlement Acts grant congressional approval to settlements that primarily delineated the water due to tribal entities and provided protection for those

rights.[5] Thus, CAWCD's alleged "Excess Water" injury does not fall within the "zone of interests" of the three statutes it relies upon.

III. The Court Should Dismiss CAWCD's APA Claim Because the Tucker Act Provides an Adequate Alternative Remedy

As an entirely separate and additional basis for dismissal, the Court should dismiss CAWCD's APA crossclaim because "an adequate remedy for its claims is . . . available elsewhere," via a contract suit for damages.[6] *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). While conceding that it may likely sell the alleged "Excess Water," CAWCD now asserts – as it omitted to do in the Crossclaim and without support – that it may "store Excess Water in a given instance." CAWCD Opp. at 13. Storage, assuming the stored water even qualifies as "Excess Water," only serves to delay a monetary benefit. And "[w]ater rights, like money, are fungible." *In re Nunes*, 1997 WL 1038143, at *9 (Bankr. E.D. Cal. 1997); *see Texas v. New Mexico*, 107 S. Ct. 2279 (1987) (recognizing that New Mexico, which failed to deliver water to Texas, may pay money damages for the shortfall).

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[5] CAWCD fails to acknowledge that the 2007 Stipulation for Judgment explicitly states that "[n]othing in this Judgment is intended to affect the rights of long-term contractors . . . or any Colorado River water right holders. . . . Nothing in this Judgment may be used in any way to control the CAP water allocation process or affect its interpretation." Dkt. 65-1, Ex. 3 at 25 (PDF page 63).

[6] In other words, even if the Court determined that money damages would not resolve CAWCD's claims, the APA claim must still be dismissed because CAWCD's claim is sourced in contract and its alleged injury (loss of "Excess Water") is outside the zone of interest of its alleged statutory claim.

No matter how CAWCD describes its claim, CAWCD wants nothing more than additional "Excess Water." That water, like almost every resource, has a price, meaning that CAWCD has an adequate remedy in a suit for money damages. Thus, the Court has an additional basis to dismiss CAWCD's APA crossclaim.[7]

IV. Conclusion

For the reasons stated herein, the United States requests that the Court dismiss CAWCD's Crossclaim.

[7] Even if this Court were to conclude that section 390uu theoretically waived sovereign immunity for a CAWCD crossclaim against the United States, that waiver would be meaningless if the Court dismisses CAWCD's APA claim (Count II). Without Count II, CAWCD asserts only, in Count I, a claim based upon 28 U.S.C. § 2201 (the Declaratory Judgment Act (DJA)). But, the purpose of the DJA is to provide an *additional* remedy once jurisdiction is found to exist on another ground. *Benson v. State Bd. of Parole and Prob.*, 384 F.2d 238, 239 (9th Cir. 1967); *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). "The [DJA] does not itself confer federal subject matter jurisdiction, but rather there must be an independent basis for such jurisdiction." *Knapp v. Depuy Synthes Sales Inc.*, 983 F. Supp. 2d 1171, 1176 (E.D. Cal. 2013) (citing *Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 280 (9th Cir. 1988)); *see also Skelly Oil Co. v. Phillips Petrol. Co.,* 339 U.S. 667, 671-72 (1950) (the DJA merely creates a remedy and is not an independent basis for jurisdiction); *Heydon v. MediaOne of Se. Mich., Inc.,* 327 F.3d 466, 470 (6th Cir. 2003) ("before invoking the Act, the court must have jurisdiction already."). Thus, if CAWCD cannot establish jurisdiction under the APA, the Court must dismiss Count II for lack of subject matter jurisdiction regardless of whether section 390uu waives sovereign immunity. CAWCD's contention that this Court also has subject matter jurisdiction under 28 U.S.C. § 1331 and section 390uu are without merit.

Dated: October 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 20, 2017, I electronically filed the foregoing UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS CAWCD'S CROSSCLAIM with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks
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