2022-1994

United States Court of Appeals for the Federal Circuit

CITY OF FRESNO, ARVIN-EDISON WATER STORAGE DISTRICT, CHOWCHILLA WATER DISTRICT, DELANO-EARLIMART IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT, IVANHOE IRRIGATION DISTRICT, LINDMORE IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT, LOWER TULE RIVER IRRIGATION DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PORTERVILLE IRRIGATION DISTRICT, SAUCELITO IRRIGATION DISTRICT, SHAFTER-WASCO IRRIGATION DISTRICT, SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, STONE CORRAL IRRIGATION DISTRICT, TEA POT DOME WATER DISTRICT, TERRA BELLA IRRIGATION DISTRICT, TULARE IRRIGATION DISTRICT, LOREN BOOTH LLC, MATTHEW J. FISHER, JULIA K. FISHER, HRONIS INC., CLIFFORD R. LOEFFLER, MAUREEN LOEFFLER, DOUGLAS PHILLIPS, CARALEE PHILLIPS,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States Court of Federal Claims in No. 1:16-cv-01276-AOB, Armando O. Bonilla, Judge

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– v. –

UNITED STATES, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, SANTA CLARA VALLEY WATER DISTRICT, SAN LUIS WATER DISTRICT, WESTLANDS WATER DISTRICT, GRASSLAND WATER DISTRICT, JAMES IRRIGATION DISTRICT, BYRON BETHANY IRRIGATION DISTRICT, DEL PUERTO WATER DISTRICT, SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY, CENTRAL CALIFORNIA IRRIGATION DISTRICT, FIREBAUGH CANAL WATER DISTRICT, SAN LUIS CANAL COMPANY, COLUMBIA CANAL COMPANY,

Defendants-Appellees.

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In the Friant Contracts, the United States agreed "that it [would] not deliver to the [Exchange Contractors] waters of the San Joaquin River unless and until required by the terms of [the Exchange Contract]."[1] But in 2014, Reclamation delivered all available San Joaquin River supplies to the Exchange Contractors, leaving none for the Friant Contractors. Consequently, the pivotal issue to be determined in this appeal is whether the Exchange Contract *required* Reclamation to deliver to the Exchange Contractors all available waters of the San Joaquin River in 2014. If not, Reclamation breached the Friant Contracts.

The Friant Contractors did not argue in 2014, nor do they here, that the Government could have provided their full contractual allocation of 800,000 acre-feet of Class I water. Rather, their position is that over 100,000 acre-feet of water were delivered to the Exchange Contractors (largely from storage in Millerton Lake) that should have been delivered to the Friant Contractors.

The Government agrees in its Brief that this is the pivotal question in this case. But the Government fails to identify a term in the Exchange Contract that required Reclamation to deliver all waters of the San Joaquin River to the Exchange Contractors.[2] Because Reclamation delivered San Joaquin River water to

[1] Appx368.

[2] Generally, an exchange contract refers to an agreement where the holder of a water right agrees to allow another entity to exercise the right in exchange for a substitute water supply from a different source. The Exchange Contract referenced herein is the agreement between Reclamation and the Exchange Contractors

the Exchange Contractors in excess of what they were required to, Reclamation breached its contracts with the Friant Contractors.

In addition, for the first time in 2014, and contrary to almost seven decades of investments in their farming operations and crop development, Reclamation delivered all available San Joaquin River water to the Exchange Contractors, leaving the Friant landowners (who have no contract rights) with no Friant Division water to put to beneficial use on their land, contrary to California law and the federal Reclamation Act, and resulting in the unconstitutional taking of their property rights.

1. The Government Agreed Not to Deliver Waters of the San Joaquin River to the Exchange Contractors Unless and Until Required

Article 3(n) of the Friant Contracts prohibits Reclamation from delivering waters of the San Joaquin River to the Exchange Contractors, "unless and until *required* by the terms of"[3] the Exchange Contract. Article 4(b) is the only relevant Exchange Contract term requiring that "water *will be* delivered from the San Joaquin River."[4] Yet the Government insists this term was inapplicable in 2014.[5]

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allowing for Reclamation to divert the flows of the San Joaquin River that had historically been diverted by the Exchange Contractors, while the Exchange Contractors receive a substitute water supply from different sources.

[3] Appx368 (emphasis added).

[4] Appx316 (emphasis added).

[5] Appx587-589.

Other Exchange Contract terms cited by the Government to excuse its breach only mention that Reclamation "may" or "reserves the right" to make deliveries of San Joaquin River water to the Exchange Contractors "at the option" of Reclamation.[6] None of the terms relied upon by the Government *require* delivery of waters of the San Joaquin River to the Exchange Contractors.

2. Reclamation's Decision to Deliver All Available San Joaquin River Water as "Substitute Water" Was Not Required by the Terms of the Exchange Contract

The Government's construction of the Exchange Contract directly conflicts with the Exchange Contract's terms, basic rules of contract interpretation, and the purposes of the Exchange and Friant Contracts. The Court must adopt an interpretation that "gives effect to all [the] terms."[7] "Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language."[8] The Government's interpretation of the Exchange Contract inverts these rules, ignoring critical terms and preferring vague generalities cobbled together from unrelated or irrelevant articles over the specific provisions governing San Joaquin River water delivery.

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[6] Appx321.
[7] *Metric Constructors, Inc. v. National Aeronautics and Space Admin.*, 169 F.3d 747, 753 (Fed. Cir. 1999) (citation omitted).
[8] *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242, 1254 (Fed. Cir. 2003) (citing *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992); Restatement (Second) of Contracts § 203 (1981)).

3. The Government Misstates the Principal Purpose of the Exchange Contract and Development of the Friant Division

The Government's argument turns the entire Central Valley Project (CVP) plan on its head,[9] is contrary to the factual recitals in the Exchange and Friant Contracts,[10] and conflicts with findings in settled case law.[11]

This Court's predecessor has twice determined the purpose of the Exchange Contract—rulings binding on the Government as a party in those cases.[12] In *Wolfsen*, the Court of Claims described substitute water as water from the Sacramento River through the Delta-Mendota Canal:

> [T]he United States has been storing and diverting the waters of the San Joaquin River reserved for [the Exchange Contractors] in the purchase contract . . . in order to enable other parties [Friant Contractors] to use them within and without the watershed of the San Joaquin River and that the United States has been and is supplying [the Exchange Contractors], in lieu of such waters, with substitute water from the Sacramento River through the Delta-Mendota Canal.[13]

In *Gustine Land & Cattle Co.*, the Court of Claims reiterated that Sacramento River water constituted substitute water:

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[9] *See generally* Corrected Brief for Def.-Appellee United States (Jan. 26, 2023), ECF No. 64.
[10] *Id.*; Appx312-315; Appx349-353.
[11] *Wolfsen v. United States*, 162 F. Supp. 403 (Ct. Cl. 1958); *see also Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556 (1966).
[12] *Wolfsen v. United States*, 162 F. Supp. 403 (Ct. Cl. 1958); *see also Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556 (1966); *see also Kettle v. United States*, 104 Fed. Cl. 699, 710 n.8 (2012).
[13] *Wolfsen*, 162 F. Supp at 408-409 (emphasis added).

> Defendant's [United States] plan contemplated that compensation for the acquisition of the right to the use of water on croplands at or below Mendota Dam to approximately the mouth of the Merced River would be made by providing a substitute supply of water from the Sacramento River through the pumping system.[14]

Both *Wolfsen* and *Gustine* explained that San Joaquin River water is generally reserved for the Friant Division, and Sacramento River water is delivered to the Exchange Contractors as substitute water in exchange for the use of their San Joaquin River water rights. Both cases undermine the Government's position in this case.

4. Neither Article 3 nor 8 of the Exchange Contract Required Reclamation to Deliver All Available San Joaquin River Water to the Exchange Contractors

The Government asserts that Article 3 of the Exchange Contract required delivery of all water available in 2014 to the Exchange Contractors regardless of source—including all available San Joaquin River water.[15] But Article 3 identifies no source of water that Reclamation must deliver to the Exchange Contractors.[16] Article 3 does not require the United States to deliver water from the San Joaquin River or from storage in Millerton Lake. Article 3 also does not mention the San Joaquin River at all. Article 3 instead simply says that substitute water "means all

[14] *Gustine*, 174 Ct. Cl. at 578; *see also id.* at 668 ("The substitute waters of the Sacramento, first introduced into Mendota Pool in 1951. . .").
[15] Corrected Br. for Def-Appellee U.S., ECF No. 64 at 20-21, 23-25.
[16] Appx315 (defining "substitute water").

water delivered hereunder."[17] As the Government effectively concedes, under Article 3, water, regardless of source, only "became 'substitute water' once this water arrived at Mendota Pool for delivery to the Exchange Contractors."[18]

Significantly, the Government's interpretation ignores the key word in Article 3—"*substitute*." A proper contract construction, however, requires "substitute" to be interpreted harmoniously with *all* the terms of the Exchange Contract.[19] Contrary to the Government's contentions, this definition cannot be construed so broadly as to render other terms of the Exchange Contract, such as the exchange of waters under Article 4(a), a nullity.[20]

Article 3 does not require Reclamation to deliver San Joaquin River water from storage so it can *become* substitute water. Article 3 is not a mandate directing the United States to deliver all water to the Exchange Contractors from any source to meet the Exchange Contractors' annual maximum entitlement. Nothing in Article 3 *requires* Reclamation to deliver San Joaquin River water from Millerton Lake to Mendota Pool.[21]

An interpretive aid for Article 3 is found in Article 5(e), which provides that "whenever *sufficient water* is available from the San Joaquin River . . . to meet the

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[17] Appx315.
[18] Corrected Br. for Def-Appellee U.S., ECF No. 64, at 26 (citing Appx315).
[19] *See* Opening Brief for Appellants (Nov. 1, 2022), ECF No. 40 at 26-27 n.91.
[20] Appx315-317.
[21] *See generally* Appx315.

needs of the [Exchange Contractors] at Mendota Pool . . . Reclamation *reserves the right* to make all deliveries . . . at that point."[22] This subparagraph clarifies, as does the remainder of Article 5, that the United States is not required to deliver San Joaquin River water but may elect to do so. And, if that election is made, the water delivered will be counted by Reclamation towards its substitute water obligations to the Exchange Contractors. This construction avoids the inconsistency in the Government's interpretation, which would transform waters of the San Joaquin River reserved for "beneficial use by *others than* the [Exchange Contractors, that is, the Friant Contractors]" into "substitute water" for the Exchange Contractors.[23] Such a result would be entirely inconsistent with both the purpose of the Exchange Contract and the Government's performance of the agreements.[24]

Article 8, the second provision of the Exchange Contract on which the Government relies, "describes various quantities and flows that the United States must deliver, subject to prescribed maximums.[25] But Article 8 does not prescribe the source of this water; its sole purpose is to state annual and monthly maximum limits, and it does not refer to the San Joaquin River or any other water source.[26] Article 8 does not identify the San Joaquin River, storage, or any other water

[22] Appx321 (emphasis added).
[23] Appx315-316 (emphasis added).
[24] Appx314; Appx317.
[25] Appx326-329.
[26] Appx326-329.

source; it gives no support to the argument that Article 8, either alone or combined with Article 3, *requires* delivery of San Joaquin River water to the Exchange Contractors.[27]

Article 8 is also not a stand-alone, absolute water supply contract provision, as the Government asserts.[28] Instead, because it is exclusively limited to the delivery of substitute water, it is directly linked to Article 4, providing for the conditional permanent substitution of water supplies between the United States and the Exchange Contractors, which is the keystone to the "Contract for Exchange of Waters."[29]

5. The Government's Contract Construction Ignores and Nullifies Article 4 of the Exchange Contract

The second fatal flaw in the Government's position is that it effectively eliminates Articles 4(a), (b), and (c) of the Exchange Contract, which explicitly provide for the times, quantities, and conditions under which Reclamation must deliver waters of the San Joaquin River to the Exchange Contractors—and when the United States may use that water within the Friant Division for Friant Contractors.

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[27] Appx326-329.
[28] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 9, 21, 36-37.
[29] Appx315-316.

A. Article 4(a)

Article 4(a) authorizes the United States to exercise the Exchange Contractors' right to "reserved waters" of the San Joaquin River, conditioned on their receiving in exchange the delivery of substitute water from other sources:

> The United States may hereafter, either in whole or in part, store, divert, dispose of and otherwise use, within and without the watershed of the aforementioned San Joaquin River, the aforesaid *reserved waters* of said river for beneficial use by *others than* the [Exchange Contractors] so long as, *and only so long as, the United States does deliver to the* [Exchange Contractors] by means of the [CVP] Project or otherwise substitute water in conformity with this contract.[30]

This Court's predecessor interpreted this aspect of Exchange Contract: "The significance of the exchange lay in the fact that the water supply came from the Delta rather than from the San Joaquin River."[31] Similarly, in litigation involving these same parties and quoting Reclamation's long-term plan for the CVP, the Ninth Circuit found that the "Exchange Contractors 'exchanged' their senior rights to water in the San Joaquin River for a CVP water supply from the Delta."[32]

Defendants-Appellees fail to address the Article 4(a) paradox described in Plaintiffs-Appellants' Principal Brief: Since Article 4(a) grants Reclamation the use of all Exchange Contractor rights to use San Joaquin River water, so long as

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[30] Appx315-316 (emphasis added).
[31] *Gustine Land & Cattle*, 174 Ct. Cl. at 606.
[32] *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1102 (9th Cir. 2003).

they receive substitute water, and Reclamation insists it provided substitute water to the Exchange Contractors throughout 2014, under what provision was Reclamation obligated to deliver San Joaquin River water to the Exchange Contractors? Under Reclamation's own argument, because it was supplying substitute water to the Exchange Contractors from May 15, 2014, through September 23, 2014, Reclamation was obligated under both the Exchange Contract and Friant Contracts to deliver the reserved San Joaquin River water to the Friant Contractors. There is simply no way to interpret the Exchange Contract to prohibit Reclamation from delivering any San Joaquin River water to the Friant Contractors, as Reclamation argues, if it was delivering substitute water to the Exchange Contractors the entire time.

B. Article 4(b)

Article 4(b) directs what Reclamation is to do when it is unable "for any reason or for any cause" to deliver substitute water.[33] In that event, Reclamation must provide the San Joaquin River water (*not* substitute water) in much lesser quantities than those stated in Article 8. Those quantities are limited to the amount of the Exchange Contractors' reserved waters and any use of storage in Millerton Lake is strictly limited. Under Article 4(b), instead of receiving substitute water quantities up to the maximums stated in Article 8, the Exchange Contractors are

[33] Appx316.

entitled (after seven days) only to "the quantities and rates reserved," in the Purchase Contract (i.e., the reserved waters), with specific limits on receiving San Joaquin River water from Millerton Lake. The United States retains the balance of any available San Joaquin River water remaining for use by the Friant Contractors.[34]

The Government insists Article 4(b) only covers "failure of the Tracy Pumping Plant or Delta-Mendota physical facilities"[35] and therefore did not apply in 2014. But the contract says just the opposite: Article 4(b) applies when there is an interruption of substitute water "for any reason or for any cause."[36] If Article 4(b) were limited to facility failure, why does it not say so, as the Friant Contracts do?[37] And, why would the Exchange Contract provide limited San Joaquin River water as reserved in Schedule 1 when facility failure is depriving the Exchange Contractors of all Delta water, yet provide for unlimited San Joaquin River water when the Exchange Contractors are also receiving substitute water from the Delta?

The alternative argument by the Government, accepted by the trial court, is that Article 4(b) applies only when Reclamation cannot deliver "any" substitute

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[34] Appx316.
[35] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 46 (quoting Appx1864).
[36] Appx316.
[37] Appx373, art. 5(e) ("The Contractor shall indemnify the United States . . . except for any damage or claim arising out of . . . damage or claims resulting from a malfunction of facilities owned and/or operated by the United States or responsible operating entity.").

water from the Delta-Mendota Canal or other sources. First, there is no plain language limiting Article 4(b) to only when Reclamation cannot deliver "any" substitute water from the Delta-Mendota Canal or other sources. The Government's interpretation would require that this term be rewritten to insert "any" into the contract, confining it only to when Reclamation has zero substitute water. This Court's precedent prohibits such an interpretation.[38]

The Government's interpretation conflicts with Article 4(b), which provides that when a temporary interruption occurs and Reclamation is unable to deliver substitute water "from the Delta-Mendota Canal or other sources, water will be delivered from the San Joaquin River."[39] Article 4(b)'s language distinguishes water sourced from the Delta-Mendota Canal (i.e., Sacramento River, Delta water) and "other sources" from San Joaquin River water. However, the Government's interpretation would rewrite this term to provide that if it is unable to deliver substitute water from the Delta-Mendota Canal or other sources (i.e., San Joaquin River water), water will be delivered from the San Joaquin River. Such a nonsensical construction cannot be accepted.

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[38] *See, e.g.*, *Kiewit Infrastructure W. Co. v. United States*, 972 F.3d 1322, 1330 (Fed. Cir. 2020) (rejecting federal agency interpretation that would have required a modifier not found in plain language); *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1367 (Fed. Cir. 2000) (rejecting proffered interpretation "because it add[ed] an unnecessary interpretive gloss to the contract language").
[39] Appx316.

Even assuming, as the Government would have it, that Article 4(b) never went into effect in 2014, Reclamation would not have been required to deliver San Joaquin River water stored in Millerton Lake to the Exchange Contractors. Under those circumstances, Reclamation would have had the right to use the available San Joaquin River water for the Friant Division under Article 4(a) of the Exchange Contract, and Reclamation's refusal to do so breaches the Friant Contracts.

C. Article 4(c)

Article 4(c) applies when "the United States is *permanently unable* for any reason or for any cause to deliver to the [Exchange Contractors] substitute water in conformity with this contract."[40] When this condition exists, "the [Exchange Contractors] shall receive the said reserved waters of the San Joaquin River as specified in said Purchase Contract and the United States hereby agrees to release at all such times said reserved waters at Friant Dam."[41] In that instance, the Exchange Contractors would be entitled to use only the reserved waters; they would have no right to any San Joaquin River water stored in Millerton Lake.[42] But, under the Government's Interpretation of the Exchange Contract, Exchange Contractors received more San Joaquin River water and storage benefits from the

[40] Appx316-317 (emphasis added).
[41] Appx316-317.
[42] Appx316.

Government in 2014 than they would have been entitled to with a permanent interruption in the exchange.

6. Other Terms Allow, But Do Not Require, Reclamation to Deliver San Joaquin River Water to the Exchange Contractors

There are other provisions in the Exchange Contract that *allow* Reclamation to deliver San Joaquin River water to the Exchange Contractors, but no term *requires* that Reclamation deliver any water from the San Joaquin River.

In article 5, "Delivery of Substitute Water," the initial provision confirms that "[i]t is anticipated that most if not all the substitute water provided the [Exchange Contractors] . . . will be delivered to them via the aforementioned Delta-Mendota Canal."[43] Regarding the Exchange Contractors' delivery points, under Article 5(d), in certain instances water may be delivered into Mendota Pool or "at the option of the United States," the San Joaquin River. Article 5(e) says that when "sufficient water is available from the San Joaquin River . . . Reclamation reserves the right to make deliveries" at Mendota Pool.[44] Similarly, Article 9, addressing water quality, indicates that there can be times when San Joaquin River water is delivered to the Exchange Contractors with water quality being monitored.

Critically, not one of these terms requires Reclamation to provide any amount of San Joaquin River water to the Exchange Contractors.

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[43] Appx317; *see also* Appx314.
[44] Appx321.

7. The Government Fails to Reconcile Article 20

Defendants-Appellees fail to reconcile Article 20 of the Exchange Contract, which provides that the Exchange Contractors conferred upon the United States the right to "substitute water from the Delta and elsewhere *for water from* the San Joaquin River."[45] This provision cannot be squared with the Government's current position that the Exchange Contractors actually retained their right to continue using San Joaquin River water, notwithstanding their commitment to implement an exchange of waters with the United States.

Article 20 states:

> The rights hereby conferred by the [Exchange Contractors] on the United States to substitute water from the Delta and elsewhere *for water from the San Joaquin River*, and the right to impound or divert said San Joaquin River water, as provided herein, shall constitute easements and covenants running with and against the lands, water rights and canals, of the [Exchange Contractors] . . . .[46]

The Government strains to illustrate the meaning of the word "substitute," in the definition of "substitute water," with a colorful image of a diner who might order a meal of salad, chicken, and ice cream and ask to substitute beef for chicken.[47] But even under the Government's scenario, the diner would not expect to receive both the chicken and the beef.

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[45] Appx342 (emphasis added).
[46] Appx342 (emphasis added).
[47] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 31.

The term "substitute water" in the Exchange Contract cannot reasonably be read to support Defendants-Appellees' arguments that the Exchange Contractors are entitled to both a permanent supply of substitute water from the Delta and all other sources, and also the right to all reserved waters of the San Joaquin River which they were promised in exchange.

8. Reclamation's Interpretation and Reliance on Article 8 of the Exchange Contract is Misplaced

Even if Article 8 of the Exchange Contract applied in the manner the Government contends, it does not provide a defense to Reclamation's zero allocation of San Joaquin River water to the Friant Contractors in 2014.

The terms of Article 8 are straightforward. In a critical water year such as 2014, Reclamation is to deliver to the Exchange Contractors an annual substitute water supply "not to exceed 650,000 acre-feet."[48] That supply is to be delivered based on the prescribed "maximum monthly entitlements."[49] For example, in April and May, the "maximum" amounts to be delivered to the Exchange Contractors are not to exceed 81,000 acre-feet and 99,000 acre-feet per month, respectively.[50] Article 8 further prescribes that the total of all monthly deliveries during a critical

[48] Appx327.
[49] Appx327.
[50] Appx327.

year for "the period April through the following October shall not exceed 529,000 acre-feet."[51]

The undisputed facts regarding both the deliveries to the Exchange Contractors and the available San Joaquin River supply in 2014 make Reclamation's misinterpretation of the Exchange Contract and resulting breach of Article 3(n) of the Friant Contracts apparent. When Reclamation began releasing San Joaquin River water from Friant Dam to the Exchange Contractors in May of 2014, approximately 279,605 acre-feet of water was stored in Millerton Lake.[52]

Article 8, however, only requires the delivery of a maximum of 99,000 acre-feet of substitute water to the Exchange Contractors in May of a critical year,[53] an amount that clearly was available for release, particularly, as in 2014, the Exchange Contractors were already receiving deliveries of substitute water from the Sacramento River through the Delta-Mendota Canal. That amount was delivered (or capable of being delivered) to the Exchange Contractors in May of 2014 from the Delta-Mendota Canal, along with the unprecedented releases from Friant Dam. The United States was not only entitled under Article 4(a) of the Exchange Contract, but also required under Article 3(n) of the Friant Contracts, to

[51] Appx328 (emphasis added).
[52] Appx27.
[53] Appx327; *see also* Appx39.

allocate available supplies from the Friant Division facilities to the Friant Contractors.

Instead, Reclamation refused to allocate water from Millerton Lake to the Friant Contractors in May (and for the remainder of the 2014 irrigation season), erroneously concluding that the Exchange Contractors entire annual irrigation supply was required to be met. This is not what the Exchange Contract requires; nor is it consistent with the operation of the exchange of waters for decades before the 2014 debacle.[54] Historically, Reclamation had made deliveries to the Exchange Contractors monthly by sending substitute water in amounts and rates in conformity with the monthly maximum under Article 8, which concurrently enables Reclamation to deliver to the Friant Contractors monthly supplies of San Joaquin River water consistent with their contracted amounts and store the remainder of water in Millerton Lake for future delivery to the Friant Contractors.

That the water supply forecasts for 2014 indicated that Reclamation may not have been able to provide the entire annual maximum to the Exchange Contractors under Article 8 (or the reduced total under Article 4(b) that the Friant Contractors contend applies in such a shortage situation) did not authorize Reclamation to

[54] The Government admits that "Reclamation retained San Joaquin River water in storage in Millerton Reservoir in anticipation of . . . the possible need for releases to the Exchange Contractors in 2014." Appx1153.

unilaterally vitiate its contractual obligations to the Friant Contractors by issuing them a zero-water allocation.

If it were otherwise, the "exchange of waters" called for by the Exchange Contract could never be completed—the United States would need to provide substitute water in exchange for placing San Joaquin River water in storage but would also be required to reserve that same San Joaquin River water to serve as additional substitute supply for the Exchange Contractors. As the Friant Water Authority pointed out in its amicus brief, such an interpretation would impermissibly render the exchange illusory and void of consideration.[55]

The irrational and misleading hypotheticals posited by the Government regarding potential outcomes if Reclamation fell one acre-foot short in its monthly deliveries (with a similar variant by the Intervenors) undercuts their arguments if the actual facts are applied.[56] Rather than the bizarre scenarios dreamt up by counsel, it was Reclamation's apparent concern in 2014 that, by the end of the irrigation season, Reclamation would fall one (or more) acre-feet short of the annual maximum supply under Article 8. So, Reclamation withheld all allocations to the Friant Contractors, despite having the ability, particularly at the onset of the

[55] Friant Water Authority Amicus Curiae Brief in Support of Plaintiffs-Appellants and Reversal (Oct. 28, 2022), ECF No. 33-2 at 4, 10-11.; *see also Ace-Fed. Reps., Inc. v. Barram*, 226 F.3d 1329, 1331–32 (Fed. Cir. 2000) (invalidating federal interpretation that would render a key contractual term illusory).
[56] *See* Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 41-42.

irrigation season in April and May of 2014, to provide the requisite monthly supplies to the Exchange Contractors while concurrently allocating San Joaquin River water to the Friant Contractors in amounts greater than zero.[57] This fundamental misinterpretation of the Exchange Contract resulted in the over-delivery to the Exchange Contractors of Friant Division supplies in excess of 100,000 acre-feet in 2014.[58] Even under the Government's interpretation of Article 8, as adopted by the trial court, Reclamation breached its contractual obligations to the Friant Contractors.

9. The Government's Attempts to Defend the Deliveries of Water Stored in Millerton Lake to the Exchange Contractors are Unavailing

Article 4(b) specifically provides that "the United States shall in no event be required . . . to retain water in storage in Millerton Lake in anticipation of the possible future need for such releases."[59] Conceding, as it must, that the unambiguous language of Article 4(b) disclaims any obligation for Reclamation "to retain water in storage in Millerton Lake in anticipation of the possible future need for such releases,"[60] when Reclamation is unable "for any reason or for any cause"[61] to deliver substitute water in conformity with the Exchange Contract, the

[57] *See* Appx27-28.
[58] Appx610.
[59] Appx316.
[60] Appx316.
[61] Appx316.

Government simply falls back on its tired refrain that Reclamation "delivered substitute water to the Exchange Contractors pursuant to Article 8."[62] This argument fails.

The Government admits that "Reclamation retained San Joaquin River water in storage in Millerton Reservoir in anticipation of . . . the possible need for releases to the Exchange Contractors in 2014."[63] Had Reclamation delivered the available water in Millerton Lake to Friant Contractors before May 15, 2014 (as the Contractors had repeatedly requested), that water would not have still been in the reservoir and could not have been released to the Exchange Contractors through Friant Dam after that date. By retaining (instead of delivering to Friant Contractors) and later releasing the retained water, Reclamation delivered to the Exchange Contractors water that would not have been there but for the Government's retention.

Reclamation's right to "store" San Joaquin River water "for beneficial use by others than the [Exchange Contractors]"[64] requires that Reclamation has delivered substitute water to the Exchange Contractors. The San Joaquin River water that Reclamation has stored in Millerton Lake for the Friant Contractors is there because the "exchange of waters" has occurred. And that stored water, as

[62] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 48.
[63] Appx1153.
[64] Appx315-316.

Article 4(a) unambiguously provides, is for the *beneficial use* by "others than the [Exchange Contractors],"[65] specifically the Friant Contractors. Friant Contractors relied on that exchange when they entered into the Friant Contracts and invested hundreds of millions of dollars in the construction, maintenance, and operation of the Friant Division facilities (as to which the Exchange Contractors have admittedly paid nothing).[66]

The Government also glosses over the crucial difference between the natural flow water of the San Joaquin River before the Friant Division was constructed and the stored Friant Division water that only the Friant Contractors may receive—except under the limited circumstances prescribed under Article 4(b), which the Government insists did not apply in 2014.

The Government's final defense on the storage issue is an inaccurate, unsupported, and misleading statement that there is nothing "in either the Exchange Contract or the Friant Contracts that limited Reclamation's discretion to manage Central Valley Project reservoirs in 2014."[67] The Government cannot fall back on claims for amorphous CVP-wide flexibility. The water at issue here (the San Joaquin River water stored in or flowing through the Friant Division's Millerton Lake) had only two contractual destinations: Down the Friant-Kern

[65] Appx316.
[66] *See* Appx349-353.
[67] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 49.

Canal and Madera Canal for delivery to the Friant Contractors or down the San Joaquin river bed for delivery to the Exchange Contractors. As evidenced by the arguments offered by Defendants-Appellees, the over-delivery of water to the Exchange Contractors was based solely on Reclamation's misinterpretation of its obligations under the Exchange Contract.

10. The Government Has No Immunity from Its Breach Because Its Actions Exceeded the Scope of Its Legal Obligations

The Government must prove its affirmative defenses (which it calls "immunity"),[68] which it has failed to do.

The Government asserts, as an affirmative defense, that it had a legal obligation under the Exchange Contract to deliver all available San Joaquin River water to the Exchange Contractors and is therefore not liable for the breach. This is not an affirmative defense but merely an incorrect assertion that it did not breach Article 3(n) of the Friant Contracts.[69]

A. Drought Is Not a Defense Because There Was San Joaquin River Water Available in the Friant Division

While drought reduced the water supplies available in 2014, a substantial quantity of San Joaquin River water was available, stored, and released from Millerton Lake solely to benefit the Exchange Contractors.[70] Reclamation's

[68] *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009).
[69] *See* Appx368.
[70] Appx616-637.

delivery of San Joaquin River water to the Exchange Contractors when it was not required by the terms of the Exchange Contract breached the Friant Contracts, regardless of drought.

B. The Friant Contract Does Not Provide a "Reasonableness" Defense

Contrary to the Government's argument, a party that acts reasonably may still be liable for a breach. The covenant of good faith and fair dealing, implied in every contract, requires reasonable conduct by all parties so as not to unreasonably interfere with the object of the contract.[71] As this Court has stated, it may be entirely reasonable for a party to breach its contract, but "a reasonable breach is still a breach."[72]

The Government argues that the determinations of Reclamation's officials were not arbitrary, capricious, or unreasonable, and hence it must be immune from liability.[73] These determinations, however, did not meet the United States' legal obligations as Article 13 requires.[74] Instead, Reclamation acted beyond the scope

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[71] *See Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010) ("The duty of good faith and fair dealing is inherent in every contract. In essence, this duty requires a party to not interfere with another party's rights under the contract." (citations omitted)).
[72] *See Stockton E. Water Dist. v. United States*, 638 F.3d 781, 785 (Fed. Cir. 2011).
[73] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 52-53.
[74] Appx394 (Article 13 "If there is a Condition of Shortage because of errors in physical operations of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations, including but not limited to obligations pursuant to the

of its legal obligations to the Exchange Contractors, as the trial court clarified during oral argument—if Reclamation breached its legal obligations to Friant Contractors, it would be per se unreasonable—and not excused from liability.[75]

11. Defendants-Appellees Cannot Rely on Irrelevant, Unauthenticated Documents That Should Be Excluded From Evidence

The Government asks this Court to consider a memorandum by an unknown person in contradiction to the unambiguous, plain language in Article 4(b) of the Exchange Contract.[76] Friant Contractors objected to this document and two other similar memoranda,[77] as irrelevant and unauthenticated. This Court should ignore this memorandum.

12. The Reclamation Act Requires that Landowners in a Federal Reclamation Project Have Appurtenant Water Rights—Which Are Compensable Property Rights Under the Fifth Amendment

The trial court erred in dismissing Plaintiffs-Appellants taking claims, concluding they had no property interest in Friant Division water. That dismissal contradicts decades of Supreme Court precedent and fundamental principles of

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Settlement then, except as provided in subdivision (a) of Article 19 of this Contract, no liability shall accrue against the United States . . .).

[75] Appx832-833 ("I don't disagree with what you said with regard to if the Bureau of Reclamation delivered water that it was not required to [deliver] the Exchange Contractors under the Exchange Contract, then Plaintiffs can establish liability.").

[76] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 35.

[77] Appx2525-2530.

California water law. In a project under the Reclamation Act, like the Friant Division,

> [a]ppropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and . . . the water rights become the property of the landowners . . . The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for the operation and maintenance of the works.[78]

The Government cites *Barcellos and Wolfsen, Inc. v. Westlands Water District*,[79] for the proposition that "*Ickes* does not . . . require the government to continue to deliver water in contravention of the water delivery contract."[80] But that is not this case. Reclamation does not cite any provision of the Friant Contracts that would have been contravened by delivering water to Friant Contractors in 2014.

Here, Reclamation did breach the Friant Contracts. But in addition, and entirely independent of this breach, Reclamation also unconstitutionally took the individual Plaintiffs-Appellants' property rights. These individuals, unlike the Friant Contractors, have no contracts with Reclamation; their rights derive from California water rights law and federal reclamation law, which guarantees that

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[78] *Ickes v. Fox*, 300 U.S. 82, 95 (1937).
[79] *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731 (E.D. Cal. 1993).
[80] Corrected Br. for Def.-Appellee U.S., ECF No. 64 at 60 (quoting *Barcellos*, 849 F. Supp. at 731).

each landowner have permanent, appurtenant rights to water from the Friant Division, water they are entitled to beneficially use on their land.[81]

The Reclamation Act itself explicitly requires that "the right to the use of water acquired under the provisions of th[e] Act shall be appurtenant to the land irrigated."[82] The Supreme Court has repeatedly held that landowners (irrigators) in a Reclamation Act project have water rights appurtenant to their land that is recognized as property under the Fifth Amendment.[83] This follows California's law of water rights, which under Section 8 of the Reclamation Act is controlling if it does not directly contradict federal reclamation law.[84] The Defendant-Intervenors assert that this is not the law in California because the State Water Resources Control Board (SWRCB) "declined" to issue permits to water users and instead issued them to the United States.[85] This argument turns the SWRCB's decision on its head. In Decision-935 (D-935), the SWRCB reasoned:

> [W]hen any entity is an applicant for a water right for irrigation which has no intention to itself use the water, and when such use is made by

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[81] 43 U.S.C. § 372; *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 519 (Fed. Cir. 2011).
[82] 43 U.S.C. § 372.
[83] *See Ickes v. Fox*, 300 U.S. 82 (1937); *Nevada v. United States*, 463 U.S. 110 (1983); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *see also Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019).
[84] *See California v. United States*, 438 U.S. 645, 678 (1978) (state law directives cannot be "directly inconsistent" with the Reclamation Act); Appx1084 (issuing Reclamation permit on the San Joaquin River for purposes of supplying the Friant Division and stating the rights are appurtenant to the land irrigated).
[85] Brief for Def.-Intervenor-Appellees (Jan. 17, 2023), ECF No. 58 at 51.

> others, direct proof of such use must be made by the water users. Under such circumstances when the required use and proof thereof has been made, even though formal title to the use is held of record by the permittee or licensee, the right by use is vested in those by whom the use has been made, as a matter of law.[86]

The State Water Board saw no need to issue permits to the water users because it is a given under California law that the water rights vest in the water users. Issuing permits solely in the name of the United States, with that understanding, served only to avoid "administrative problems."[87]

Defendants-Appellees cite *Israel v. Morton*,[88] and other decisions citing *Israel* (none of which are binding authority in this Court) to cast doubt on the clear, and plainly correct analysis by the SWRCB in D-935. But *Israel* supports the Plaintiffs-Appellants' argument. The holding of *Israel* is straightforward: "If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such *vesting can only occur on terms fixed by the United States*."[89] The Reclamation Act itself fixed the terms of *that* vesting, under which Plaintiffs-Appellants have acquired a "permanent right" to their share of available Friant Division water.[90] The plaintiffs in *Israel* sought to circumvent clear provisions of federal reclamation law. Plaintiffs-Appellants, however, seek

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[86] Appx1075 (emphasis added).
[87] Appx1076-1077.
[88] *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977).
[89] *Id*. at 133 (emphasis added).
[90] 43 U.S.C. § 485h-1(4).

adherence to federal reclamation law, which authorized their right to irrigation water for beneficial use on their lands.

Other decisions cited by Defendants-Appellees are similarly inapposite. The SWRCB's D-1641 did not alter the conclusions of D-935, and the Government fails to point out that it was partially overturned by the California Court of Appeal because it failed to acknowledge the rights of landowners as "legal users" of project water.[91] *Del Puerto*,[92] like *Israel*,[93] involved plaintiffs trying to get more than they were entitled to under their contract and the Reclamation Act, and thus it has no applicability here.[94]

Instead, this Court should rely on the decisions of the United States Supreme Court, the Reclamation Act, and California's applicable water rights law as articulated in D-935, which together support the conclusion that the landowners have a property right in the available water to be delivered from the Friant Division.

Conclusion

Plaintiffs-Appellants ask this Court (1) to reverse this trial court's grant of summary judgment to the Government on the Friant Contractors' breach-of-

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[91] *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 804 (2006).
[92] *Del Puerto Water District v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224 (E.D. Cal. 2003).
[93] *Israel*, 549 F.2d 128.
[94] *Del Puerto Water District*, 271 F. Supp. 2d at 1244.

contract claim, (2) to reverse the trial court's dismissal of Plaintiffs-Appellants taking claims, and (3) to remand this case back to the trial court for further proceedings.

Respectfully submitted,

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

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