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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GLENN-COLUSA IRRIGATION
DISTRICT,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS; ASSISTANT SECRETARY
OF THE ARMY FOR CIVIL WORKS JO-
ELLEN DARCY, in her official
capacity; LIEUTENANT GENERAL
TODD SEMONITE, in his official
capacity; and COLONEL DAVID RAY,
in his official capacity,

Defendants.

No. 2:17-cv-120 WBS CKD

MEMORANDUM & ORDER RE:
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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Plaintiff Glenn-Colusa Irrigation District brought this
action against defendants the United States Army Corps of
Engineers ("USACE"), Assistant Secretary of the Army for Civil
Works Jo-Ellen Darcy, Lieutenant General Todd Semonite, and
Colonel David Ray, alleging that the USACE breached a

1 construction contract by failing to construct an irrigation
2 facility according to the contract's specifications. (Compl.
3 (Docket No. 1).) Before the court is defendants' Motion for
4 Partial Summary Judgment. (Docket No. 44.)

5 I. Background

6 Plaintiff is a state government entity and an
7 irrigation district that provides water to farms in Glenn and
8 Colusa counties. (Decl. of Thaddeus Bettner ("Bettner Decl.") ¶
9 4 (Docket No. 45-2).) Plaintiff diverts water from the
10 Sacramento River at a pump station near Hamilton City and then
11 conveys that water through a canal to approximately 1,500
12 landowners. (Id. ¶ 5.) The USACE is a subdivision of the United
13 States Army that builds and maintains infrastructure in the
14 United States. (See US Army Corps of Engineers,
15 <http://www.usace.army.mil/About> (last visited July 10, 2019).)
16 The individual defendants are Army personnel who oversee USACE
17 operations. (See Compl. ¶¶ 18-20 (Docket No. 1).)

18 In 1991, the United States brought an Endangered
19 Species Act action against plaintiff in this court. (Pl.'s App.
20 Ex. 2 (Docket No. 46-2).) The government alleged that plaintiff
21 unlawfully took endangered Chinook salmon with defective fish
22 screens at its Hamilton City pump station. (See id. at 1.)
23 After Judge Levi permanently enjoined plaintiff from pumping
24 water during the salmon's migration season, the parties developed
25 a long-term solution and created the Hamilton Fish Screen
26 Project. (Id.) As part of that project, the parties entered
27 into a Project Cooperation Agreement ("PCA") and agreed to co-
28 fund the construction of an irrigation gradient facility designed

1 to improve the performance of a fish screen plaintiff implemented
2 at the pump station. (Pl.'s App. Ex. 4 (Docket No. 46-4).)

3 The gradient facility is an in-channel permanent rock
4 structure located near plaintiff's intake channel off the
5 Sacramento River. (Bettner Decl. ¶ 9.) The facility regulates
6 the water surface levels at the pumping station and was
7 engineered to improve performance of the newly-implemented fish
8 screen. (Bettner Decl. ¶ 11.) The facility was designed to help
9 plaintiff meet demand and also ensure compliance with the pumping
10 restrictions imposed due to the prior litigation. (Pl.'s App.
11 Ex. 3 at 15 (Docket No. 46-3).) Congress authorized the
12 construction of the gradient facility in Section 102 of the
13 Energy and Water Development Appropriations Act of 1990, Pub. L.
14 No. 101-101, 103 Stat. 641, 649. This authorization directed the
15 Secretary of the Army, acting through the Chief of Engineers, to
16 complete engineering and design and proceed with construction of
17 the gradient facility.

18 The PCA sets forth the obligations of the parties with
19 respect to the construction of the gradient facility. (Pl.'s
20 App. Ex. 4.) As a non-federal sponsor, the PCA required
21 plaintiff to contribute a minimum of 25% of total project costs
22 for the facility. (Id. at 5.) Additionally, USACE received
23 funds for the project from Congress on the condition that it
24 expeditiously construct the project, applying the procedures
25 traditionally applied to federal projects pursuant to federal
26 law. (Id. at 4.) The PCA specified that "performance of all
27 work on the Project . . . shall be exclusively within the control
28 of the Government." (Id.)

1 Part of the PCA, and the focus of defendants' motion,
2 references bank stabilization work near River Mile 208 ("RM
3 208"). (Id. at 1.) RM 208 is located about two miles upstream
4 from the gradient facility. (Pl.'s App. Ex. 5 at 50:22-25
5 (Docket No. 46-5).) The PCA refers to RM 208 and notes that
6 congressional authorization for the construction of the gradient
7 facility was modified by Section 305 of the Water Resources
8 Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 269, 299.
9 (Pl.'s App. Ex. 4 at 1.) Citing Section 305, the PCA states that
10 the government may "carry out bank stabilization work in the
11 riverbed gradient facility, particularly, in the vicinity of
12 River Mile 208, if the Assistant Secretary of the Army (Civil
13 Works) determines that such work is necessary to protect the
14 overall integrity of the project, on the condition that
15 additional environmental review of the project is conducted,
16 which work, if approved may be reflected in an amendment to this
17 Agreement." (Id.)

18 In 2001, the parties executed a Schedule and Cost
19 Change Request to complete engineering reports and environmental
20 assessments "to evaluate alternatives for the RM 208 bank
21 stabilization feature of the gradient facility project." (Pl.'s
22 App. Ex. 8 (Docket No. 46-8).) In the years after, the USACE
23 contracted with outside parties to complete the referenced
24 engineering and environmental work. (See Pl.'s App. Exs. 9-15
25 (Docket Nos. 46-9 to 46-17).) Ultimately, plaintiff admits that
26 the Assistant Secretary of the Army made no determination that
27 bank stabilization work was necessary to protect the overall
28 integrity of the gradient facility project and the parties did

1 not execute an amendment to the PCA to include such work at RM
2 208. (Decl. of Benjamin Hall ("Hall Decl.") Ex. A at 6 (Docket
3 No. 44-3).)

4 After the parties were unable to resolve the issues
5 they had with the project, plaintiff brought an action against
6 the government in the Court of Federal Claims, alleging that the
7 United States breached the PCA by failing to construct the
8 gradient facility according to the PCA's specifications. See
9 Glenn-Colusa Irrigation Dist. v. United States, 129 Fed. Cl. 593
10 (2016). The Court of Federal Claims dismissed that action for
11 lack of jurisdiction. Id. at 599.

12 In January 2017, plaintiff filed this action, alleging
13 causes of action against defendants for: (1) breach of contract,
14 (2) breach of the implied covenant of good faith and fair
15 dealing, (3) breach of implied warranty, (4) declaratory
16 judgment, and (5) violation of the Administrative Procedure Act.
17 (Compl. ¶¶ 20-26.)¹ Plaintiff alleges, as one of its categories
18 of project defects, that USACE failed to construct improvements
19 at RM 208. (Id. ¶¶ 84-89.) Defendants now seek summary judgment
20 as to all claims arising out of the alleged failure to conduct
21 bank stabilization efforts near RM 208.²

23 ¹ This court previously denied defendant's motion to
24 dismiss certain claims on the grounds that they were barred by
25 the applicable statute of limitations. See Glenn-Colusa
Irrigation Dist. v. U.S. Army Corps of Eng'rs, No. 2:17-cv-0120
WBS GGH, 2017 WL 2779012 (E.D. Cal. June 27, 2017).

26 ² The complaint does not clearly outline what claims
27 pertain to the alleged defects at RM 208. Accordingly, the court
28 assumes that plaintiff alleges all of its claims as to this
alleged defect.

1 II. Legal Standard

2 Summary judgment is proper “if the movant shows that
3 there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law.” Fed. R. Civ.
5 P. 56(a). A material fact is one that could affect the outcome
6 of the suit, and a genuine issue is one that could permit a
7 reasonable jury to enter a verdict in the non-moving party’s
8 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
9 (1986).

10 The party moving for summary judgment bears the initial
11 burden of establishing the absence of a genuine issue of material
12 fact and can satisfy this burden by presenting evidence that
13 negates an essential element of the non-moving party’s case.
14 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

15 Alternatively, the movant can demonstrate that the non-moving
16 party cannot provide evidence to support an essential element
17 upon which it will bear the burden of proof at trial. Id. Any
18 inferences drawn from the underlying facts must, however, be
19 viewed in the light most favorable to the party opposing the
20 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
21 U.S. 574, 587 (1986).

22 III. Discussion

23 Federal law governs contract interpretation where the
24 United States is a party. Mohave Valley Irrigation & Drainage
25 Dist. v. Norton, 244 F.3d 1164, 1165 (9th Cir. 2001). The
26 content of federal law is derived from general federal common
27 law. United States Postal Serv. v. Ester, 836 F.3d 1189, 1195
28 (9th Cir. 2016). In interpreting and applying federal common

1 law, courts should be "guided by general principles of contract
2 law and by the Restatement." First Interstate Bank of Idaho v.
3 Small Bus. Admin., 868 F.2d 340, 343 (9th Cir. 1989) (alteration
4 in original). Another source of traditional common law
5 principles is "the content of the forum state's law." Glenn-
6 Colusa, 2017 WL 2779012, at *3 (citations and quotations
7 omitted).

8 The interpretation of a contract is a mixed question of
9 law and fact. Tehama-Colusa Canal Auth. v. U.S. Dep't of the
10 Interior, 721 F.3d 1086, 1093 (9th Cir. 2013). However, "the
11 determination of whether contract language is ambiguous is a
12 question of law." Klamath Water Users Protective Ass'n v.
13 Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999). Contract
14 interpretation starts with the language of the written agreement.
15 Id. The contract "must be read as a whole and every part
16 interpreted with reference to the whole, with preference given to
17 reasonable interpretations." Id. If the provisions of a
18 contract are clear and unambiguous, they must be given their
19 ordinary meaning. Tehama-Colusa, 721 F.3d at 1093.

20 A. Breach of Contract Claim

21 A breach of contract claim requires (1) the existence
22 of a valid contract, (2) an obligation under the contract, (3) a
23 breach of that duty, and (4) damages caused by the breach. See
24 CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (5th
25 Dist. 2008); San Carlos Irrigation & Drainage Dist. v. United
26 States, 877 F.2d 957, 959 (Fed. Cir. 1989). Plaintiff argues
27 that defendants did not perform their contractual obligation to
28 carryout bank stabilization work at RM 208. Plaintiff insists

1 that such an obligation exists because evidence demonstrates that
2 RM 208 is integral to the gradient facility project.

3 Here, the express terms of the PCA, the contract at
4 issue in this case, define the obligations of the parties and the
5 scope of the gradient facility project. Article II-A of the PCA
6 requires that the government "expeditiously construct the
7 project," applying the procedures traditionally applied to
8 federal projects. (See Pl.'s App. Ex. 4 at 4.) And Article I-A
9 of the agreement states that:

10 The term "Project" shall mean the Riverbed Gradient
11 Facility Project for the Sacramento River at the GCID
12 Intake, California, which shall be operated in an
13 integrated fashion with the Hamilton City Pumping
14 Plant Fish Screen Improvement Project. The Riverbed
15 Gradient Facility is designed with the general
16 characteristics of a natural riffle and consists of
17 three sheet pile cutoff walls and rock riprap
18 revetment along the channel bed and banks as generally
19 described in the Limited Reevaluation Report titled,
20 "Gradient Facility Limited Reevaluation Report,
21 Riverbed Gradient Facility for the Sacramento River at
22 the GCID Intake, California," dated, March 1998 and
23 approved by Director of Civil Works, on 21 April 1998.

24 (See id. at 2.) Nothing within the quoted language mentions RM
25 208. Likewise, plaintiff agrees that the project, as defined in
26 the PCA, does not include bank stabilization at RM 208. (See
27 Hall Decl. Ex. A at 5.) Moreover, the operative part of the
28 contract does not obligate defendants to take any action related
to RM 208.

29 In fact, the PCA contains only a single reference to RM
30 208, which is in the contract's recitals. (See Pl.'s App. Ex. 4
31 at 1; see also Hall Decl. Ex. A at 6 (plaintiff admitting that a
32 recital to the PCA contains the relevant reference to RM 208).)
33 Recitals in a contract "are merely explanations of the

1 circumstances surrounding the execution of the contract.” See
2 Mozdzierz v. Accenture, LLP, No. 06-cv-3877, 2010 WL 4273323, at
3 *6 (E.D. Pa. Oct. 29, 2010) (citation omitted). Recitals are
4 generally given limited effect and do not form any part of the
5 real agreement. See Emeryville Redevelopment v. Harcross
6 Pigments, Inc., 101 Cal. App. 4th 1083, 1101 (1st Dist. 2002);
7 see also Grynberg v. F.E.R.C., 71 F.3d 413, 416 (D.C. Cir. 1995)
8 (“[I]t is standard contract law that a Whereas clause, while
9 sometimes useful as an aid to interpretation, cannot create any
10 right beyond those arising from the operative terms of the
11 document.”). Their relevance is confined to giving meaning to
12 certain parts of a contract that may otherwise be ambiguous. See
13 Hunt v. United Bank & Tr. Co., 210 Cal. 108, 115 (1930).
14 Ultimately, if the operative part of a contract is clear, that
15 meaning controls. See Powertech Tech., Inc. v. Tessera, Inc.,
16 No. 10-cv-945 CW, 2013 WL 12324116, at *10 (N.D. Cal. Apr. 15,
17 2013) (citing 17A Am. Jur. 2d Contracts § 383).

18 The operative part of the agreement is clear in this
19 case. Plaintiff cannot point to any portion of the PCA that is
20 otherwise ambiguous and that would be clarified by the reference
21 to RM 208 in the recitals. The agreement explicitly sets forth
22 the obligations of each party and provides a definition of the
23 scope of the project. Regardless, the court cannot ascertain any
24 relevant promise made on the part government in this recital.
25 The recital merely notes that “the Government may carry out bank
26 stabilization work . . . if the Assistant Secretary of the Army
27 (Civil Works) determines that such work is necessary to protect
28 the overall integrity of the project.” (Pl.’s App. Ex. 4 at 1

1 (emphasis added).) The recital merely restates defendants'
2 authority under the Water Resources Development Act of 1999 and
3 emphasizes that performing such work remains within the Assistant
4 Secretary's discretion, outside of the promises made in the
5 operative portion of the agreement.

6 In hopes of creating a factual dispute, plaintiff makes
7 two arguments in support of its contention that defendants had
8 contractual obligations related to RM 208. First, plaintiff
9 argues that defendants would not have performed all the
10 previously-mentioned engineering and environmental work if it had
11 no obligation to do so. Second, plaintiff provides evidence that
12 USACE used funds earmarked for this project and provided by
13 plaintiff pursuant to its cost-sharing obligation under the PCA
14 for work on RM 208. (See Pl.'s App. Exs. 16 & 17 (Docket Nos.
15 46-18 & 46-19).)

16 Plaintiff's argument that the government would not have
17 performed the work if it did not have an obligation to do so is a
18 non-sequitur. The evidence merely shows that the government
19 inquired into the appropriateness of bank stabilization work at
20 RM 208. Indeed, before defendants could undertake such work,
21 under Section 305 of the Water Resources Development Act of 1999,
22 the Assistant Secretary had to first determine that such work is
23 necessary to the overall project and conduct environmental
24 review. In the absence of language from the PCA that supports
25 the existence of an obligation, the court cannot conclude that
26 the authorization for the engineering and environmental work was
27 anything but an exercise of the Assistant Secretary's
28 discretionary authority under this statute.

1 Plaintiff's second argument, that the USACE used funds
2 meant for the project, relies on letters sent to plaintiff from
3 government officials. The cited evidence shows that the
4 government asked for required cash contributions under the PCA to
5 fund contracts for RM 208 engineering design reports and
6 environmental documentation. (See id.) The letters mention
7 plaintiff's cash contribution share of 25% (see id.), which is
8 the exact share specified in the PCA (see Pl.'s App. Ex. 4 at 5).
9 However, this evidence is not enough to establish that RM 208 was
10 the subject of any contractual obligations. Generally, extrinsic
11 evidence like these letters "is inadmissible to contradict a
12 clear contract term." Pierce Cty. Hotel Emps. & Rest. Emps.
13 Health Tr. v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1327
14 (9th Cir. 1987). While California law states that extrinsic
15 evidence may be used to prove a meaning of a term that is
16 otherwise unambiguous on its face, the offered evidence should
17 "prove a meaning to which the language of the instrument is
18 reasonably susceptible." Pac. Gas & Elec. Co. v. G. W. Thomas
19 Drayage & Rigging Co., 69 Cal. 2d 33, 37 (1968).

20 Here, the meaning of the term "project" in the PCA
21 cannot reasonably be construed to include work at RM 208. The
22 scope of the project is defined in terms of the gradient facility
23 structure. (See Pl.'s App. Ex. 4 at 2.) Similarly, the PCA
24 enumerates in detail "total project costs," yet it makes no
25 mention of costs for bank stabilization work. (See id. at 3.)
26 Instead, the type of costs listed relate to the construction of
27 the actual facility, not work upstream. (See id.) Further,
28 plaintiff cannot argue that the parties could not have

1 anticipated including references to bank stabilization work in
2 these definitions. As explained previously, the PCA refers to RM
3 208 in its recitals without identifying any legal rights and
4 obligations related to that work.

5 Although plaintiff made cost contributions related to
6 RM 208, its remedy at the time would have been to contest its
7 obligation to contribute funds. Plaintiff cannot use its then-
8 acquiescence to expand the scope of the contract beyond what the
9 plain language of the agreement supports. See Pace v. Honolulu
10 Disposal Serv., Inc., 227 F.3d 1150, 1158 n.10 (9th Cir. 2000)
11 (courts cannot “admit[] parol evidence that is wholly
12 inconsistent with the terms of [the agreement]”).

13 Even if these letters establish that RM 208 is included
14 in the scope of the project, nothing in the PCA required
15 defendants to perform bank stabilization work at RM 208. The
16 only mention of RM 208 in the agreement is language emphasizing
17 the Assistant Secretary’s discretion under the relevant statute
18 to authorize such work. (See Pl.’s App. Ex. 4 at 1.)³
19 Consistent with this statutory authority, defendants simply
20 explored the necessity of any work at RM 208. Because the
21 agreement did not place any limits on the Assistant Secretary’s
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23 ³ The PCA also states that such work “if approved may be
24 reflected in an amendment to this Agreement.” (Id.) If the PCA
25 already required defendants to conduct bank stabilization work at
26 RM 208, any further amendment would be unnecessary, and this
27 language would be superfluous. Such a reading is inconsistent
28 with basic principles of contract interpretation. See
Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc., 971 F.2d
272, 278-79 (9th Cir. 1992) (“It is well settled that a contract
should be interpreted so as to give meaning to each of its
provisions.”).

1 discretion, the court cannot independently determine whether the
2 exercise of that discretion was reasonable. See United States v.
3 Basin Elec. Power Co-op., 248 F.3d 781, 797 (8th Cir. 2001)
4 (“[W]here a contract gives broad discretion . . . to one of the
5 parties,” it is inappropriate to “rewrite the bargained-for-terms
6 of the contract by limiting the [] party’s discretion.”).
7 Therefore, as a matter of law, the Assistant Secretary’s
8 discretionary decision not to authorize bank stabilization work
9 at RM 208 is not a breach of the PCA.

10 Accordingly, the court must dismiss plaintiff’s breach
11 of contract claim with respect to RM 208.

12 B. Plaintiff’s Remaining Claims Related to RM 208


13 Plaintiff cannot use any implied covenants, such as the
14 implied covenant of good faith and fair dealing, to create an
15 obligation related to RM 208. As explained previously, the
16 project as defined by the agreement did not include RM 208 and,
17 even if it did, the PCA did not otherwise require defendants to
18 complete bank stabilization work there. The implied duty of good
19 faith and fair dealing, the only implied covenant mentioned in
20 plaintiff’s opposition, “cannot expand a party’s contractual
21 duties beyond those in the express contract or create duties
22 inconsistent with the contract’s provisions.” Precision Pine &
23 Timber, Inc. v. United States, 596 F.3d 817, 831 (Fed. Cir.
24 2010); see also Racine & Laramie, Ltd. v. Dep’t of Parks &
25 Recreation, 11 Cal. App. 4th 1026, 1032 (4th Dist. 1992) (“[T]he
26 implied covenant is limited to assuring compliance with the
27 express terms of the contract, and cannot be extended to create
28 obligations not contemplated in the contract.”). For the reasons

1 given previously, construing an implied covenant to require
2 certain actions on the part of defendants related to RM 208 runs
3 counter to the very terms of the PCA.

4 Lastly, plaintiff fails to defend in its opposition any
5 claims it may have related to RM 208 for breach of implied
6 warranty and violations of the Administrative Procedure Act. The
7 court cannot identify any independent legal support for these
8 claims. Accordingly, because plaintiff has no claim with respect
9 to RM 208, the court must also dismiss the related request for
10 declaratory relief under the Declaratory Judgment Act, 28 U.S.C.
11 § 2201. In order to be entitled to relief under the Declaratory
12 Judgment Act, the party must have a viable underlying claim. See
13 City of W. Sacramento v. R & L Bus. Mgmt., No. 2:18-cv-900 WBS
14 EFB, 2019 WL 2249630, at *4 (E.D. Cal. May 23, 2019) (citations
15 omitted).

16 IT IS THEREFORE ORDERED that defendants' Motion for
17 Partial Summary Judgment (Docket No. 44) be, and the same hereby
18 is, GRANTED.

19 Dated: July 18, 2019


20 **WILLIAM B. SHUBB**
21 **UNITED STATES DISTRICT JUDGE**

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