

1 JOHN C. CRUDEN
2 Assistant Attorney General
3 Environment and Natural Resources Division
4 United States Department of Justice

5 F. PATRICK BARRY, Senior Trial Attorney
6 patrick.barry@usdoj.gov

7 DARON T. CARREIRO, Trial Attorney
8 daron.carreiro@usdoj.gov

9 YOSEF M. NEGOSE, Trial Attorney
10 yosef.negose@usdoj.gov

11 Indian Resources Section
12 Environment and Natural Resources Division
13 United States Department of Justice

14 P.O. Box 7611
15 Ben Franklin Station
16 Washington, DC 20044
17 Phone: (202) 305-0269
18 Facsimile: (202) 305-0725

19 Attorneys for Plaintiff-Intervenor
20 UNITED STATES OF AMERICA

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

23 AGUA CALIENTE BAND OF
24 CAHUILLA INDIANS,

25 Plaintiff,

26 and

27 UNITED STATES OF AMERICA,

28 Plaintiff-Intervenor,

CASE NO.
5:13-cv-00883-JGB-SP

**UNITED STATES' NOTICE OF
MOTION; MOTION FOR
PARTIAL SUMMARY
JUDGMENT; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

1 v.
2 COACHELLA VALLEY WATER
3 DISTRICT, et al.,
4
5 Defendants.
6

BEFORE: Judge Jesus G. Bernal
DATE: December 14, 2015
DEPT: Courtroom 1
TIME: 9:00 a.m.

7
8 **NOTICE OF MOTION AND MOTION**

9 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

10 PLEASE TAKE NOTICE that on December 14, 2015, at 9:00 am, or as soon
11 thereafter as the matter may be heard, in the Courtroom of the Honorable Jesus G.
12 Bernal, at the United States District Court for the Central District of California,
13 located at 3470 Twelfth Street, Riverside, California 92501—and pursuant to Rule
14 56 of the Federal Rules of Civil Procedure and this Court’s July 8, 2015 scheduling
15 Order, approving a stipulated briefing schedule (Doc. 126)—the United States of
16 America (“United States”) intends to move, and hereby does move for summary
17 judgment on the purely legal question of whether, as a matter of law, Defendants’
18 equitable defenses are applicable to the United States’ federally reserved water
19 rights claims under *Winters v. U.S.*, 207 U.S. 564 (1908).
20
21
22
23

24 This motion is based on the attached Memorandum of Points and Authorities
25 in support of the motion, the attached Proposed Order, all other pleadings and
26 papers on file in this case, and upon such other and further arguments, documents,
27
28

1 and grounds as may be advanced in the future. The United States also joins the
2 motion for summary judgment being filed today by the Tribe.
3

4 Dated: September 18, 2015

Respectfully submitted,

6 JOHN C. CRUDEN
7 Assistant Attorney General
8 Environment & Natural
9 Resources Division
10 United States Department of Justice

11 /s/ F. Patrick Barry

12 F. PATRICK BARRY, Trial Attorney
13 DARON CARREIRO, Trial Attorney
14 YOSEF M. NEGOSE, Trial Attorney
15 Indian Resources Section
16 Environment & Natural
17 Resources Division
18 United States Department of Justice
19 P.O. Box 7611
20 Ben Franklin Station
21 Washington, DC 20044
22 Phone: (202) 305-0269
23 Facsimile: (202) 305-0725
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STANDARD	2
ARGUMENT	2
A. The Federal Reserved Water Rights of the United States are not subject to a Balance of the Equities	5
B. The Doctrine of Unclean Hands Does not Limit the Federal Reserved Water Rights of the United States	8
C. The Federal Reserved Water Rights of the United States are not subject to Laches	9
CONCLUSION	13

TABLE OF AUTHORITIES

Federal Cases

<i>Agua Caliente Band of Cahuilla Indians v. CVWD</i> , Case No. 13-cv-883, 2015 WL 1600065 (C.D. Cal. Mar. 20, 2015).....	1, 7
<i>Arizona v. California</i> , 373 U.S. 546 (1963).....	4, 11
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976)	7
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).....	12
<i>Colville Confederated Tribes v. Walton</i> , 460 F. Supp. 1320 (E.D. Wash. 1978)....	10
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42 (9th Cir. 1981)	5, 10, 11
<i>Colville Confederated Tribes v. Walton</i> , 752 F.2d 397 (9th Cir. 1985)	3, 5
<i>Costello v. United States</i> , 365 U.S. 265 (1961)	12
<i>Cramer v. United States</i> , 261 U.S. 219 (1923)	9
<i>Ellenburg v. Brockway, Inc.</i> , 763 F.2d 1091 (9th Cir.1985)	8
<i>Heckman v. United States</i> , 224 U.S. 413 (1912)	3
<i>Hood ex rel. Mississippi v. City of Memphis</i> , 533 F. Supp. 2d 646(N.D. Miss. 2008)	12
<i>Johnson v. Yellow Cab Transit Co.</i> , 321 U.S. 383 (1944).....	8
<i>Kingman Reef Atoll Investments, L.L.C. v. United States</i> , 541 F.3d 1189 (9th Cir. 2008)	2
<i>Lipscomb v. United States</i> , 906 F.2d 545 (11th Cir. 1990)	3
<i>M'Culloch v. Maryland</i> , 17 U.S. 316 (1819)	10
<i>Oregon v. United States</i> , 467 U.S. 1252 (1984)	11
<i>Pan-Am. Petroleum & Transp. Co. v. United States</i> , 273 U.S. 456 (1927)	9
<i>Republic Molding Corp. v. B.W. Photo Utils.</i> , 319 F.2d 347 (9th Cir.1963)	8
<i>South Carolina v. North Carolina</i> , 552 U.S. 804 (2007)	12
<i>State of Nev. ex rel Shamberger v. United States</i> , 165 F. Supp. 600 (D. Nev. 1958)	10
<i>United States v. Adair</i> , 478 F. Supp. 336 (D. Or. 1979).....	11
<i>United States v. Ahtanum Irr. Dist.</i> , 236 F.2d 321 (9th Cir. 1956)	10
<i>United States v. Anderson</i> , 736 F.2d 1358 (9th Cir. 1984).....	4
<i>United States v. Beebe</i> , 127 U.S. 338 (1888).....	10
<i>United States v. California</i> , 332 U.S. 19 (1947).....	2, 10
<i>United States v. City of Tacoma, Wash.</i> , 332 F.3d 574 (9th Cir. 2003)	3

1	<i>United States v. Minnesota</i> , 270 U.S. 181 (1926)	9
2	<i>United States v. Preston</i> , 352 F.2d 352 (9th Cir. 1965).....	4
3	<i>United States v. Walker River Irr. Dist.</i> , 104 F.2d 334 (9th Cir. 1939).....	6, 11
4	<i>Winters v. United States</i> , 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).. <i>passim</i>	

Federal Statutes

6	25 U.S.C. § 177	3
---	-----------------------	---

Federal Rules

8	Fed. R. Civ. P. 56	2
9	Fed. R. Civ. P. 12(b)(6)	1

Constitutional Material

11	U.S. Const. art. IV, § 3, cl. 2	2, 9
12	U.S. Const., art. VI, cl. 2	10

State Cases

15	<i>In re Hallett Creek Stream Sys.</i> , 44 Cal. 3d 448 (1988)	4
----	--	---

State Codes

17	Cal. Water Code § 10720.3(d)	4, 8, 12
----	------------------------------------	----------

Other Authorities

20	Joseph M. Feller, <i>The Adjudication That Ate Arizona Water Law</i> , 49 Ariz. L. Rev.	
21	405, 406-408 (2007)	13

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On July 2, 2015, the Agua Caliente Band of Cahuilla Indians (Tribe), United States of America (United States), Desert Water Agency (DWA) and Coachella Valley Water District (CVWD) filed a stipulation (Doc. 125) proposing a briefing schedule regarding the limited issue of whether, as a matter of law, CVWD's and DWA's (Defendants') equitable defenses—namely, the defenses of laches, balance of the equities, and unclean hands¹—bar the United States' and Tribe's claims requesting that the Court declare, quantify and decree the scope of federally reserved waters. Pursuant to the Court's July 8, 2015 scheduling Order approving this stipulated briefing schedule (Doc. 126), the United States hereby submits this memorandum of points and authorities explaining why these equitable defenses do not apply to the United States' claims; may not divest the United States of its

¹ With respect to "laches", DWA contends that the United States "has failed to state a claim upon which relief can be granted," because the United States has never previously attempted to establish its dominion over water beneath its land, and because Defendants' state-based rights "would be jeopardized by recognition" of such dominion. (Doc. 72 at 8). CVWD contends similarly, (Doc. 73 at 14-15), but highlights expenditures made, and contracts entered in reliance on California law. With respect to "unclean hands", DWA alleges that the "United States' Complaint must be dismissed under Rule 12(b) (6) of the FRCP" because "the Tribe and Allottees have obtained their water supplies by purchasing such supplies from DWA and CVWD." (Doc. 72 at 8). CVWD contends similarly, (Doc. 73 at 15-16), but—in apparent reliance on the groundwater/surface water distinction that this Court has already rejected as failing "as a matter of law and logic" *Agua Caliente Band of Cahuilla Indians v. CVWD*, Case No. 13-cv-883, 2015 WL 1600065, at *6 (C.D. Cal. Mar. 20, 2015)—CVWD further faults the United States for purportedly failing to protect "surface water supplies". Finally, with respect to "balance of the equities", DWA contends that "the United States is not entitled to injunctive or declaratory relief", in light of DWA's "rights" and "require[ments]" under California law, and the United States' "right under California law, as an overlying landowner of the Coachella Valley." (Doc. 72 at 9). CVWD contends similarly. In fact, with the exception of one or two minor edits, CVWD's Fourteenth Affirmative Defense appears to be a direct copy of DWA's Ninth Affirmative Defense. (*Compare* Doc. 72 at 9 with Doc. 73 at 16-17).

1 sovereign interest in the waters at issue in this case; and must fail as a matter of
2 law.

3 **STANDARD**

4 Summary judgment is proper if the movant shows “there is no genuine
5 dispute as to any material fact and the movant is entitled to judgment as a matter of
6 law.” Fed. R. Civ. P. 56. Here, the parties have stipulated that discovery is not
7 necessary for the Court to resolve the purely legal question of whether the
8 Defendants’ equitable defenses are applicable to The United States’ and Tribe’s
9 *Winters* claims (*see* Docs. Nos. 125 and 126). For the reasons set forth below, the
10 United States is entitled to judgment as a matter of law with respect to this
11 question.
12

13 **ARGUMENT**

14 This suit is brought by the United States, and asserts the United States’
15 sovereign interest in water rights held for the benefit of the Tribe. The United
16 States, unlike a private party, is not to be deprived of its sovereign title by “court
17 rules designed particularly for private disputes....” *United States v. California*, 332
18 U.S. 19, 40 (1947). The sovereign property of the United States, unlike the
19 property of private parties, is subject to the Property Clause of the United States
20 Constitution. This Clause vests Congress alone with the power to dispose of such
21 property, U.S. Const. art. IV, § 3, cl. 2, and federal “officers who,” unlike
22 Congress, “have no authority at all to dispose of [such] property[,] cannot by their
23 conduct cause the Government to lose its valuable rights by their acquiescence,
24 laches, or failure to act.” *California*, 332 U.S. at 40.

25 In light of the foregoing, “it is well established that the United States does
26 not abandon its claims to property by inaction.” *Kingman Reef Atoll Investments*,
27 *L.L.C. v. United States*, 541 F.3d 1189, 1199 (9th Cir. 2008). The United States
28

cannot lose its sovereign title “by means of adverse possession.” *Lipscomb v. United States*, 906 F.2d 545, 546 n. 2 (11th Cir. 1990); *see also* 25 U.S.C. § 177 (prohibiting the “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians... unless the same be made by treaty or convention entered into pursuant to the Constitution”). And, when acting in its sovereign role as trustee for Indian tribes—*see Heckman v. United States*, 224 U.S. 413, 437 (1912) (describing “the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians” as “distinctly an interest of the United States...” to the “fulfilment of which the national honor has been committed”)—the United States is not subject to equitable defenses. *See, e.g., United States v. City of Tacoma, Wash.*, 332 F.3d 574, 581-82 (9th Cir. 2003) (“Here, there can be no argument that equitable estoppel bars the United States’ action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense”).

The above principles apply with particular force to the case at bar, the purpose of which is to delimit the United States’ property interest in the waters of the Agua Caliente Reservation, which are held by the United States for the benefit of the Tribe, and are necessary to effectuate the reservation’s purpose as an enduring tribal homeland. *See Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (“Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users.”); *Id.* at 404-05 (“In Walton II, we specifically addressed the potential inequity of ‘open-ended water rights,’ but said quantification, not limitation, was the answer.”). At issue is whether Defendants’ equitable defenses could, as a matter of law, diminish or alter this sovereign interest: a present-perfected right under the doctrine of *Winters v. United States*, 207 U.S. 564, 576 (1908). Courts have long held that these rights

1 arise as soon as a reservation for Indians has been established. *Arizona v.*
 2 *California*, 373 U.S. 546, 600 (1963) (“the United States did reserve the water
 3 rights for the Indians effective as of the time the Indian Reservations were
 4 created”); *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (“These
 5 tribal reserved *Winters* rights vest on the date of the creation of the Indian
 6 reservation”); *United States v. Preston*, 352 F.2d 352, 357 (9th Cir. 1965) (reserved
 7 water rights arise “as soon as a reservation for Indians has been established”).
 8 Courts have long held that these rights are “present perfected rights,” *Arizona*, 373
 9 U.S. at 600—intended to “continue[] through years,” *Winters*, 207 U.S. at 577—to
 10 sufficient water “to satisfy the future as well as the present needs of the Indian
 11 Reservations,” *Arizona*, 373 U.S. at 600. California’s highest court has long been
 12 cognizant of their existence, has described them as “sovereign”, and has
 13 characterized them as enmeshed with the powers and prerogatives of the federal
 14 government. *See, e.g., In re Hallett Creek Stream Sys.*, 44 Cal. 3d 448, 459-60
 15 (1988) (describing the differences between private and government ownership of
 16 land, and recognizing that “the Supreme Court has held the states may not deprive
 17 the federal government of water sufficient to accomplish the primary purposes of a
 18 federal reservation”). *See also* Cal. Water Code § 10720.3 (“[F]ederally reserved
 19 rights to groundwater shall be respected in full.... This subdivision is declaratory of
 20 existing law.”). Cal. Water Code § 10720.3(d).

22 These present perfected federal rights are longstanding and resilient fixtures
 23 of federal water law; yet—as the Ninth Circuit has noted—until they are
 24 quantified, their extent cannot be fully known, and state-created water rights in
 25 their vicinity cannot be relied upon by property owners. *Walton*, 647 F.2d at 48
 26 (“We recognize that open-ended water rights are a growing source of conflict and
 27 uncertainty in the West. Until their extent is determined, state-created water rights
 28

1 cannot be relied on by property owners”). For the reasons set forth more fully
 2 below, neither assertion of competing interests, nor unsubstantiated allegations of
 3 fraud or deceit, nor mere passage of time may limit or prevent determination of
 4 these present perfected rights’ scope and extent. Defendants’ equitable defenses
 5 must fail as a matter of law.

6 **A. The Federal Reserved Water Rights of the United States are not**
 7 **subject to a Balance of the Equities**

8 “An implied reservation of water for an Indian reservation will be found
 9 where it is necessary to fulfill the purposes of the reservation,” *Walton*, 647 F.2d at
 10 46, and where so implied “arise[s] without regard to equities that may favor
 11 competing water users.” *Walton*, 752 F.2d at 405. For instance, in *Winters v.*
 12 *United States*, 207 U.S. 564 (1908), the Supreme Court held that reserved water
 13 rights were implicit in the 1888 establishment of the Fort Belknap Reservation.
 14

15 The Court reached this conclusion notwithstanding contentions that

16 if the claim of the United States and the Indians [were to] be maintained, the
 17 lands of the defendants and the other settlers [would] be rendered valueless,
 18 the said communities [would] be broken up, and the purpose and object of the
 19 government in opening said lands for settlement [would] be wholly defeated.

20 *Id.* at 570. Indeed, the defendant settlers in *Winters* alleged, at length, that the
 21 waters at issue were indispensable to them; that their lands would be ruined; that it
 22 would be necessary to abandon their homes; and that they would be greatly and
 23 irreparably damaged if the Court were to rule in favor of the United States. 207
 24 U.S. at 570. But the Court rejected these arguments and ruled in favor of the
 25 United States, holding that “[t]he power of the Government to reserve the waters
 26 and exempt them from appropriation under the state laws is not denied, and could
 27 not be.” *Id.* at 577.
 28

1 The Court further noted that prior to *Winters*, and prior to establishment of the
2 Fort Belknap reservation:

3 The Indians had command of the lands and the waters,—command of all their
4 beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’
5 or turned to agriculture and the arts of civilization.

6 *Id.* at 576. The Court then asked:

7 Did they give up all this? Did they reduce the area of their occupation and
8 give up the waters which made it valuable or adequate?

9 *Id.* The Court concluded:

10 [I]t would be extreme to believe that.... Congress destroyed the reservation
11 and took from the Indians the consideration of their grant, leaving them a
12 barren waste,—took from them the means of continuing their old habits, yet
13 did not leave them the power to change to new ones.

14 *Id.* at 577. Though flatly rejected, the homesteaders’ factual contentions in *Winters*,
15 and their request to have the court consider and balance the equities, have often re-
16 appeared (and have been rejected) in subsequent cases. At various times over the
17 course of the last century, off-reservation water users have repurposed these
18 contentions as arguments that federal law’s protection of Native American water
19 resources is somehow unjust, is detrimental to non-Native American interests, or—
20 as in the case *sub judice*—is inequitable. These arguments are ill-founded and have
21 received short shrift from the Courts.

22 For instance, in *United States v. Walker River Irrigation District*, 104 F.2d
23 334 (9th Cir. 1939), settlers sought to defeat a reserved water right claim, citing the
24 “heavy expense of reclaiming ... lands and ... the conduct of the Government in
25 permitting and encouraging settlement.” *Id.* at 339. The Ninth Circuit dismissed
26 these contentions as “unavailing[]”, and under the rule laid down in *Winters*, held
27
28

1 that water was reserved for the Walker River Paiute Tribe. *Id.* at 339-40. The Court
 2 further observed that the settlers who took up lands in the valleys at issue were
 3 “not justified in closing their eyes to the obvious necessities of the Indians already
 4 occupying the reservation below.” *Id.* at 339.

5 With respect to the case at bar, “[t]he Agua Caliente have lived in the
 6 Coachella valley since before American or European settlers arrived in what is
 7 now southern California, and the Tribe has used both surface water and
 8 groundwater resources there for cultural, domestic and agricultural subsistence
 9 purposes.” *Agua Caliente Band of Cahuilla Indians v. CVWD*, Case No. 13-cv-
 10 883, 2015 WL 1600065, at *1 (C.D. Cal. Mar. 20, 2015). And, to be sure,
 11 Defendants, like the settlers in *Walker River*, are not—nor were they ever—
 12 justified in interfering with necessary waters appurtenant to the Tribe’s homeland.
 13 But the reservation of water at issue in this case—as in others—does not hinge on
 14 the presence or absence of Defendants’ justification for such interference.
 15

16 As this Court has already observed,
 17 [t]he case law specifically holds that the *Winters* doctrine does not entail a
 18 ‘balancing test’ of competing interests to determine the existence or scope of
 19 reserved rights.

20 *Id.* at *8 (citations omitted). “[B]alancing the equities is not the test”. *Cappaert v.*
 21 *United States*, 426 U.S. 128, 139, n. 4 (1976). Defendants would have the Court
 22 depart from this well settled rule. Yet, Defendants, unlike the homesteaders in
 23 *Winters*—for whom no exception was made; and unlike the settlers in *Walker*
 24 *River*—for whom no exception was made; are statutory creatures, whose authority
 25 is governed by California law, which, itself, (1) acknowledges the supremacy of
 26 federal reserved rights to groundwater; (2) acquiesces in their priority; and (3)
 27 explicitly confirmed as much earlier this year. *See* Cal. Water Code § 10720.3(d)
 28

1 (“[F]ederally reserved rights to groundwater shall be respected in full.”).
 2 Defendants’ “balance of the equities” defenses to federally reserved water rights
 3 (see Doc. 72 at 9 and Doc. 73 at 16-17) must fail as a matter of law.

4 **B. The Doctrine of Unclean Hands Does not Limit the Federal Reserved**
 5 **Water Rights of the United States**

6 The doctrine of unclean hands requires that a plaintiff shall have acted fairly
 7 and without fraud or deceit as to the controversy in issue. *Ellenburg v. Brockway,*
 8 *Inc.*, 763 F.2d 1091, 1097 (9th Cir.1985). The doctrine does not mean that courts
 9 must always permit a defendant wrongdoer to retain the profits of his wrongdoing
 10 merely because the plaintiff himself is possibly guilty of transgressing the law.
 11 *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Rather, determining
 12 whether the doctrine of unclean hands precludes relief requires balancing the
 13 alleged wrongdoing of the plaintiff against that of the defendant, and “weigh[ing]
 14 the substance of the right asserted by the plaintiff against the transgression which,
 15 it is contended, serves to foreclose that right.” *Republic Molding Corp. v. B.W.*
 16 *Photo Utils.*, 319 F.2d 347, 350 (9th Cir.1963).

17 Calling once more for the type of equitable balancing that Courts decline to
 18 apply to claims under the *Winters* doctrine, the Defendants contend that the Tribe,
 19 (by purchasing water from Defendants, see Doc. 72 at 8); and the United States (by
 20 purportedly failing to protect surface water supplies, see Doc. 73 at 16), have
 21 engaged in the type of conduct that—as a matter of equity—should enable
 22 Defendants to continue to degrade and diminish the waters beneath a federal
 23 reservation with impunity. No court has so held. And the Supreme Court has
 24 specifically concluded that equitable principles “will not be applied to frustrate the
 25 purpose of [the United States’] laws or to thwart public policy.” *Pan-Am.*
 26 *Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 506 (1927).
 27
 28

Moreover, DWA's Eighth and CVWD's Thirteenth Affirmative Defenses allege no fraud, no deceit, and no wrongdoing warranting diminishment of federal sovereignty over waters federally held in trust for the Tribe. And even if Defendants could cite an unlawful action by the government or one of its agents amounting to "fraud" or "deceit," it is doubtful that equity would bar the United States' claims in this matter—see *Cramer v. United States*, 261 U.S. 219, 234 (1923) (Government not estopped by unlawful "act[s] or declaration[s] of its officers or agents")—thereby diminishing the United States' sovereign interest in the waters at issue in this case. See U.S. Const. art. IV, § 3, cl. 2 (The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States).² Defendants' unclean hands defenses must fail as a matter of law.

C. The Federal Reserved Water Rights of the United States are not subject to Laches

Again, the instant suit is in the sovereign interest of the United States, because it arises out of the United States' trust relationship with the Tribe, and is intended to remove unlawful obstacles to the use and enjoyment of a federal enclave.³ Consequently, Defendants' assertion of laches contradicts Supreme Court pronouncements establishing "past all controversy or doubt" that "the United States are not ... barred by any laches of their officers, however gross, in a suit

² As noted above, case law specifically rejects the application of equitable balancing tests to determination of the existence and scope of *Winters* rights.

³ See *United States v. Minnesota*, 270 U.S. 181 (1926). In *Minnesota*, the United States filed suit alleging that land patents issued to the State of Minnesota violated the United States' treaty with the Chippewa Tribe. The Supreme Court held that the United States' interests in the suit arose "out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194 (citations omitted).

1 brought by them as a sovereign Government” *United States v. Beebe*, 127 U.S.
 2 338, 344 (1888); *see also California*, 332 U.S. at 39-40 (“officers who have no
 3 authority at all to dispose of Government property cannot by their conduct cause
 4 the Government to lose its valuable rights by their acquiescence, laches, or failure
 5 to act.”).

6 The Courts have specifically ruled that laches does not apply to water right
 7 claims under the *Winters* doctrine. *See, e.g., Colville Confederated Tribes v.*
 8 *Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) (reserved water rights are not
 9 lost by laches, estoppel or adverse possession) *aff’d in part, rev’d in part on other*
 10 *grounds*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981); *United*
 11 *States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (“No defense of
 12 laches or estoppel is available to the defendants here for the Government as trustee
 13 for the Indian Tribe, is not subject to those defenses”), *cert. denied*, 352 U.S. 988
 14 (1957).
 15

16 Moreover, as a practical matter—by suggesting that federal sovereignty over
 17 the waters necessary to effectuate the purposes of federal lands⁴ is a function of the
 18 speed with which actions are brought to delimit the scope of such sovereignty—
 19 application of the doctrine of laches in this case would run counter to the holdings
 20

21 ⁴ With respect to the fulfilment of the purposes of federal lands, the Supremacy Clause mandates
 22 that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in
 23 every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the
 24 Contrary notwithstanding.” U.S. Const., Art. VI, Cl. 2. *See M’Culloch v. Maryland*, 17 U.S. 316,
 25 427 (1819) (“It is of the very essence of supremacy, to remove all obstacles to its action within its
 26 own sphere, and so to modify every power vested in subordinate governments, as to exempt its
 27 own operations from their own influence.”). *See also State of Nev. ex rel Shamberger v. United*
 28 *States*, 165 F. Supp. 600, 605 (D. Nev. 1958) (addressing federal supremacy with respect to use of
 groundwater beneath federal lands) (“Since the earliest reaches of American Constitutional
 history, the courts have stressed the supremacy of the Federal government in matters coming
 within the restricted scope of its delegated functions. During the period of our judicial history
 decision after decision has emphasized the paramount power of the national government within its
 prescribed area.”).

1 of most, if not all, *Winters* right cases that have been decided in the doctrine's
2 history.

3 The Supreme Court's decision in *Arizona v. California*, 373 U.S. 546
4 (1963); 376 U.S. 340, 344-45 (1964) (decree), for example, addressed the water
5 rights of five Indian tribes to more than 900,000 acre-feet of water from the Lower
6 Basin Colorado River, notwithstanding a 100-year gap between the establishment
7 of at least one of the reservations at issue in that case and the Court's decision.⁵
8 Similarly, the Ninth Circuit's 1981 *Walton* decision addressed *Winters* rights for an
9 Indian Reservation established in 1872. *Walton*, 647 F.2d at 44. The Ninth
10 Circuit's 1983 *Adair* decision addressed the effect of an 1864 treaty. *Adair*, 723
11 F.2d at 1409.⁶ In *Walker River*, discussed above, the Ninth Circuit addressed
12 *Winters* rights for Indians whose lands were set aside in 1859 (65 years prior to the
13 United States' complaint in that matter), at a time when the Indians were, as the
14 Court put it, "at war with the whites." 104 F.2d 336, 339-40. As discussed above,
15 *Winters* rights for Indians vest upon establishment of Indian reservations; and
16 Courts have repeatedly honored this aspect of these present perfected rights, by
17 confirming them without regard to when claims to define their scope and extent are
18 initiated.
19

20
21
22 ⁵ One of the reservations at issue in *Arizona* was the Colorado River Reservation, which had been
23 created by Congress in 1865. *Arizona*, 373 U.S. at 596. The Supreme Court's 1964 Decree
24 confirmed that by creating the reservation, Congress had reserved enough water to irrigate all of
the practicably irrigable acreage on the reservation, which was quantified at more than 700,000
acre-feet of water. *Id.* at 600; 376 U.S. at 344-45.

25 ⁶ The State of Oregon in that matter acknowledged—and indeed, *complained*—that were the Court
26 to declare the "Indian water rights" asserted, the Court would be prevented from considering the
27 equities of doing so. *United States v. Adair*, 478 F. Supp. 336, 344 (D. Or. 1979) *aff'd as modified*,
723 F.2d 1394 (9th Cir. 1983) *cert. denied sub nom Oregon v. United States*, 467 U.S. 1252 (1984).
28 The Court nevertheless explained that declaration of such rights under federal law was appropriate.
Adair, 478 F. Supp. at 345 ("I believe it is appropriate to declare those rights now.")

1 Defendants' laches defenses must fail for another reason too. Laches
 2 requires proof of prejudice to the party asserting the defense. *See Costello v.*
 3 *United States*, 365 U.S. 265, 282 (1961). And here, Defendants—creatures of
 4 California law—cannot be prejudiced by compliance with what California (1) has
 5 long acknowledged; and (2) has formally recognized, this year, by statute:

6 In an adjudication of rights to the use of groundwater.... federally reserved
 7 water rights to groundwater shall be respected in full. In case of conflict
 8 between federal and state law in that adjudication or management, federal law
 9 shall prevail.... This subdivision is declaratory of existing law.

10 Cal. Water Code § 10720.3(d) (West). Moreover, when viewed against the
 11 backdrop of DWA's commitment, throughout this litigation, to faulting the Tribe
 12 for not pumping groundwater under state law (*see, e.g.*, Doc 84-1 at 15-19 & 21-
 13 22), DWA's apparent qualms with the Tribe doing the same thing (pumping
 14 groundwater)—under the federal law that California recognizes, rather than the
 15 'state law' that Defendants fancy—further undercuts any argument that Defendants
 16 could be unduly prejudiced by the "existing law" of the state whence comes their
 17 authority. DWA's Seventh, and CVWD's Twelfth Affirmative Defenses, pled in
 18 Defendants' Answers to the United States' Complaint-in-Intervention (See Docs.
 19 72 & 73) are contrary to law, and must fail.⁷

21
 22 ⁷ There is a broader point to be made here. For better or worse, water conflicts among sovereigns
 23 are often slow to arise. *See, e.g., South Carolina v. North Carolina*, 552 U.S. 804 (2007) (Granting
 24 South Carolina leave to file a complaint against North Carolina in a suit seeking apportionment of
 25 the Catawba River, notwithstanding the province of Carolina's seventeenth-century origins, and
 26 colonial-era division into what are now two states); *Colorado v. New Mexico*, 459 U.S. 176, 183-
 27 84 (1982) (addressing apportionment of the Vermejo River, 106 years after Colorado became a
 28 state, and 70 years after New Mexico became a state). *See also Hood ex rel. Mississippi v. City of*
Memphis, 533 F. Supp. 2d 646, 648 (N.D. Miss. 2008) (acknowledging that the Sparta Aquifer—
 which underlies Mississippi, Tennessee and several other states in the South—had not been
 apportioned, and dismissing suit on account of the Supreme Court's original and exclusive
 jurisdiction over such inter-state apportionment) *aff'd*, 570 F.3d 625, 630 (5th Cir. 2009) ("The

CONCLUSION

The United States is a sovereign. It has a well-settled, present perfected interest in the waters necessary to effectuate the purposes of its lands. This interest is governed by the Property Clause of the United States Constitution. Equity is no bar to its assertion. For these reasons, the United States respectfully requests that the Court hold, as a matter of law, that Defendants' equitable defenses are inapplicable to the United States' *Winters* claims.

Dated: September 18, 2015

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural
Resources Division
United States Department of Justice

fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance.”), *cert. denied, Mississippi v. City of Memphis*, 130 S. Ct. 1319 (2010). Additionally, water disputes can take a long time to get going—even after they start. *See, e.g.,* Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. 405, 406-408 (2007) (discussing Arizona's intrastate Gila Adjudication) (“The Adjudication is the largest and longest judicial proceeding in the history of Arizona, and is among the most complex judicial proceedings in the history of the United States.... Although the Adjudication has yet to result in a final judgment, it has already spawned one extensive revision of Arizona's water code, nine decisions of the Arizona Supreme Court (one of which overturned much of the code revision), and one decision of the United States Supreme Court.”). In light of the foregoing, to hold that laches can bar sovereign claims in water disputes would hinder the ability of states, the federal government (all three branches) and tribes to pursue just allocation of the nation's waters through settlement and litigation. It would freeze states, tribes and the United States in time—depriving them of the legal tools necessary to further delimit the water resources essential to their futures and subject to their respective domains. Defendants' contrary position on this issue is untenable, unsound and unsupported by law. For the reasons stated in the body of this memorandum of points and authorities, it should be rejected.

/s/ F. Patrick Barry

F. PATRICK BARRY, Trial Attorney
DARON CARREIRO, Trial Attorney
YOSEF M. NEGOSE, Trial Attorney
Indian Resources Section
Environment & Natural
Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-0269
Facsimile: (202) 305-0725

CERTIFICATE OF SERVICE

I hereby certify that on the September 18, 2015, a true and correct copy of the foregoing was served on all counsel of record via the Court's Electronic Case Filing System.

/s/ Yosef Mulugeta Negose

1 JOHN C. CRUDEN
2 Assistant Attorney General
3 Environment and Natural Resources Division
4 United States Department of Justice

5 F. PATRICK BARRY, Senior Trial Attorney
6 patrick.barry@usdoj.gov

7 DARON T. CARREIRO, Trial Attorney
8 daron.carreiro@usdoj.gov

9 YOSEF M. NEGOSE, Trial Attorney
10 yosef.negose@usdoj.gov

11 Indian Resources Section
12 Environment and Natural Resources Division
13 United States Department of Justice
14 P.O. Box 7611

15 Ben Franklin Station
16 Washington, DC 20044

17 Phone: (202) 305-0269
18 Facsimile: (202) 305-0725

19 Attorneys for Plaintiff-Intervenor
20 UNITED STATES OF AMERICA

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

23 AGUA CALIENTE BAND OF
24 CAHUILLA INDIANS,

25 Plaintiff,

26 and

27 UNITED STATES OF AMERICA,

28 Plaintiff-Intervenor,

v.

COACHELLA VALLEY WATER
DISTRICT, et al.,

CASE NO.

5:13-cv-00883-JGB-SP

[PROPOSED] ORDER
GRANTING UNITED STATES'
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Defendants.

This matter came before the Court upon the United States' Motion for Partial Summary Judgment. Having read and considered all briefs and other matters presented to the Court, and upon any hearing in this matter, the Court finds that where federal reserved water rights are properly implied, they arise without regard to equities that may favor competing water users. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985). Therefore, IT IS HEREBY ORDERED that:

1. The Desert Water Agency's Seventh, Eighth and Ninth affirmative defenses (Doc. 72 at 8-9), which allege competing equities as defenses to Plaintiffs' reserved right claims; and

2. The Coachella Valley Water District's Twelfth, Thirteenth and Fourteenth affirmative defenses (Doc. 73 at 14-15-9), which allege competing equities as defenses to Plaintiffs' reserved right claims,

do not bar the United States' federally reserved water rights claims under *Winters v. U.S.*, 207 U.S. 564 (1908).

IT IS SO ORDERED.

Dated this ____ day of _____, 2015

The Honorable Jesus G. Bernal
United States District Judge