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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	CASE NO: 3:73-CV-00127-MMD-WGC **PRINCIPAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**

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7	April 22, 1936 Memorandum of Walker River Irrigation District and other Defendants in Answer to Brief on Exceptions to the Master's Findings, Conclusions and Proposed Decree	034-043
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12	March 19, 1926 United States' Amended Bill of Complaint, *United States of America v. Walker River Irrigation District, et al.*	057-065

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I. INTRODUCTION.

A. The Motion and the Affirmative Defenses at Issue.

The United States and the Walker River Paiute Tribe ("Tribe") (collectively, the "Claimants") seek judgment on the pleadings (the "MJOP") (ECF 2606) with respect to certain affirmative defenses asserted in the Principal Defendants' answers.[1] They contend that those affirmative defenses fail as a matter of law and therefore each of them should be dismissed. MJOP (ECF 2606) at 3. The MJOP describes those defenses as "(1) laches; (2) estoppel/waiver; (3) no reserved right to groundwater; (4) the United States is without power to reserve water rights after Nevada's statehood; and (5) claim and issue preclusion." *Id.* While the Principal Defendants have alleged laches, waiver and estoppel as affirmative defenses (the "Delay Defenses"), these Delay Defenses are far more complicated than Claimants' suggest because they are based on the unique post-judgment posture of these proceedings. Specifically, the Delay Defenses are asserted properly because they apply to the Claimants' request for relief from this Court's prior final Decree. The other affirmative defenses at issue are also far more complex than Claimants describe them.[2]

First, there are related defenses concerning finality. One asserts that *res judicata* bars claims for water for lands that were part of the Reservation before the Walker River Decree (the "Decree") was entered. *See, e.g.*, ECF 2522 at 8; 10. Another asserts that the claims are barred

[1] The "Principal Defendants" are the Walker River Irrigation District, Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Peri & Peri, LLC, and Frade Ranches, Inc., Lyon County and Centennial Livestock, the California State Agencies (State Water Resources Control Board, Department of Fish and Wildlife, and Department of Parks and Recreation), the Nevada Department of Wildlife, the Schroeder Group, and Mono County.

[2] In this Opposition, for examples of the relevant affirmative defenses, the Principal Defendants refer to the Answers of the District (ECF 2524), Lyon County (ECF 2522), and Peri & Sons (ECF 2544). The California State Agencies did not assert every affirmative defense addressed in this Joint Opposition, and therefore only join in the arguments applicable to those they did assert.

by the doctrines of claim preclusion, issue preclusion, and/or other principles of finality as set forth in *Nevada v. United States*, 463 U.S. 110 (1983), and *Arizona v. California*, 460 U.S. 605 (1983). *See, e.g.*, ECF 2524 at 5; ECF 2522 at 9; ECF 2544 at 4. Another states that general principles of finality and repose that apply to water rights decrees, *Arizona v. California*, 460 U.S. 605, 619 (1983) preclude the Decree here from being construed as authorizing its modification to recognize additional reserved water rights for the Tribe that were not recognized and established in the Decree. ECF 2524 at 5; ECF 2522 at 9-10; ECF 2544 at 4. These are the "Finality and Repose Defenses."

The defense directed at the implied reservation of groundwater is specific to the circumstances of this case, and it is covered by two related defenses. Those defenses assert that a federal reservation has a single claim for an implied reserved right and does not have an implied reservation claim for surface water and a separate one for groundwater. *See, e.g.*, ECF 2524 at 7; ECF 2522 at 10; ECF 2544 at 5. Finally, when construed in the light most favorable to the Principal Defendants, as it must, the defense that the United States could not reserve water after Nevada's statehood asserts that when Congress authorized the addition of lands to the Walker River Indian Reservation (the "Reservation") in 1936, it intended to defer to Nevada law with respect to obtaining water rights for those lands. Accordingly, the affirmative defenses at issue are far more complex and fact-intensive than Claimants suggest and they do not fail as a matter of law on the pleadings. They must be developed factually in light of the procedural posture of the Claimants' claims and then resolved on the merits.

In order to place the affirmative defenses at issue in the MJOP in context, it is necessary to provide some background information concerning the claims being made by the Claimants, the Reservation and its history, and the prior litigation brought by the United States with respect to water rights for the Reservation. The information concerning the claims is taken from the United

States' Detailed Statement of Water Right Claims (ECF 2476) filed May 3, 2019 and which was joined in by the Tribe (ECF2480). Much of the information concerning the history of the Reservation is taken from this Court's decision in *United States v. Walker River Irrigation District*, 11 F.Supp 158 (D.Nev. 1935), and from decisions of the United States Court of Claims involving the Tribe's claim for damages from the United States' alleged failure to honor its obligation to provide an irrigation system sufficient to irrigate 10,000 acres of land on the Reservation. *See, Northern Paiute Nation v. United States*, 8 Cl. Ct. 470 (1985).

B. The Claims Being Made Here.

Through their Second Amended Counterclaims, the Claimants are seeking implied reserved water rights for lands which were withdrawn for or added to the Reservation in 1918, 1924/1928, 1936 and 1972. With respect to the lands withdrawn in 1918 and 1924/1928, they seek rights to springs and groundwater to water livestock with unspecified priority dates. *See*, Detailed Statement at 9-10; Claim Summary at 13.

The Claimants' implied reserved groundwater rights claims seek a priority date of September 25, 1936 for the lands added in 1936 to water livestock and also to irrigate 1,500 acres of those added lands. *See*, Detailed Statement at 8; Claim Summary at 13. They also claim an implied reserved water right from the Walker River for Weber Reservoir for irrigation purposes to irrigate 2,100 acres presently recognized by the Decree as having an 1859 water right from the Walker River, and to irrigate another 3,856 acres of land. Detailed Statement at 14-15; Claim Summary at 13. The United States claims a priority date of April 15, 1936 and the Tribe claims a priority date of June 16, 1933 for this right. *Id*.; ECF2480 at 2. With the exception of the 2,100 acres recognized in the Decree, it is not clear at this point how much of this land, if any, was added to the Reservation, and if so, when and/or for what purpose.

The Claimants also seek an implied reserved water right to groundwater for domestic, commercial, municipal and industrial purposes with an 1859 priority. In addition, they claim a similar right with the same priority to irrigate another 1,238 acres of land on the Reservation. Detailed Statement at 10-11; Claim Summary at 13.

In the 1924 Water Litigation, the United States unsuccessfully sought a water right to irrigate 10,000 acres. If the Claimants are successful here, the Decree would be modified so that the land on the Reservation with an implied reserved water right from groundwater for irrigation would include 1,238 acres with an 1859 priority, and 1,500 acres with a 1936 priority. The total land to be irrigated from all sources would be 8,694 acres, approaching the 10,000 acres the United States previously sought unsuccessfully in the early 1900s. *See* pp. 6-7 below.

C. History of the Reservation.

The Reservation was set aside in 1859, and was confirmed by Executive Order in 1874. 11 F.Supp at 161-62. It originally encompassed approximately 320,000 acres of which Walker Lake was a part. *Northern Paiute Nation*, 8 Cl. Ct at 472. The land on the Reservation was not sufficient to sustain the Tribe in its former lifestyle. The Tribe had to begin farming, and an irrigation system of some sort was necessary for that farming. *Id.*

While the United States investigated how to provide such an irrigation system, a movement began to reduce the size of the Reservation, apparently to allow access to what was perceived to be valuable minerals located on a portion of the Reservation. In June of 1900, Frank Conser, Superintendent of Indian Schools, recommended to the Commissioner of Indian Affairs that the mineral lands on the Reservation be sold, and the proceeds utilized for construction of a storage reservoir, irrigating ditches, purchase of cattle and farm implements, etc. His recommendation would have reduced the Reservation to about 75,000 acres, including all irrigable land and common pasture land suitable for grazing cattle. He found potentially 8,000-12,000 acres of

irrigable land. He recommended that the land be surveyed into 20-acre parcels and allotted to the members of the Tribe. *Id.* at 473. He also stated that without an adequate irrigation system, including a reservoir, the allotment efforts would be a useless expenditure of money. 8 Cl. Ct. at 472-73. These recommendations eventually resulted in the passage of the Act of May 27, 1902, 32 Stat. 245, 260-61; the Joint Resolution of June 19, 1902, 32 Stat. 744; and the Act of June 21, 1906, 34 Stat. 325, 358. *Id.*

The Act of 1902 directed the Secretary to allot the land on the Reservation susceptible of irrigation by present ditches or extensions thereof into 20 acre parcels for each head of a family residing on the Reservation. The remainder of the arable land was to be allotted to such Indians on the Reservation as the Secretary may designate, not exceeding 20 acres each. It further provided that heads of families on the Reservation would receive $300 each when a majority had accepted the allotments and consented to the relinquishment of the right to occupy other land on the Reservation, including land that could not be irrigated from existing ditches and extensions thereof, and to land that was not necessary for dwellings, school buildings or habitations of members of the Tribe. In addition, when the allotments were made and the consent obtained, the President was to open the relinquished land to settlement for disposal under existing laws. *Id.* at 474.

The Joint Resolution of June 19, 1902 provided that before the Indians gave up their land in excess of the needed irrigable land, they were entitled to grazing land. It required the Secretary to select from the lands to be opened to disposition, non-irrigable grazing lands at one or more places to be used in common by the Indians for the grazing of livestock. The June 21, 1906 Act provided that, in addition to the allotted irrigable land and non-irrigable grazing land, the Secretary was to select and set apart for the use in common of the Indians a tract of timberland to meet the reasonable requirements of the Indians for fuel and improvements. *Id.* at 474-75.

The Indians agreed on July 20, 1906, and ceded 268,000 acres to the United States. These lands were opened for entry by Presidential Proclamation dated October 29, 1906. 8 Cl. Ct. at 475. The Indians were left with 51,000 acres, 10,000 acres for irrigation and allotment, and 280 acres for the agency, a school and church. Pursuant to the Act of June 19, 1902, 37,400 acres were set aside as common grazing land, and 3,300 acres of timber land were retained under the Act of June 21, 1906. *Id.*

In 1905, the Acting Commissioner of Indian Affairs had directed James R. Meskimons to study the irrigation issues on the Reservation. He was told that about 10,000 acres would have to be irrigated. He provided a report in 1906 which included his recommendation that a reservoir be constructed to provide water sufficient to irrigate the 10,000 acres. 8 Cl. Ct. at 476. The Claims Court concluded that the Act of May 27, 1902 and the Agreement of July 20, 1906 obligated the United States to provide the Tribe with an irrigation system sufficient to irrigate 10,000 acres, and that the United States had breached that obligation. *Id.* at 477-78.

D. The 1924 Water Litigation.

In 1924, the United States turned its attention to obtaining recognition of a water right for the Reservation. It filed this action, and filed an Amended Complaint in 1926. The United States alleged that, as a result of establishing the Reservation, it reserved and set aside sufficient water to irrigate approximately 11,000 acres of land from the Walker River with a priority date of 1859. *United States v. Walker River Irrig. Dist.*, 11 F.Supp. 158 ,159 (D.Nev. 1935). It based its claim on the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). *Id.* at 163. A Special Master was appointed to take testimony and evidence and to report to the Court with recommendations and a proposed decree. Testimony was taken from March 22, 1928 and continuing thereafter from time to time to December 30, 1932. 11 F.Supp. at 162.

The Special Master made his report on or about December 24, 1932. He found that there was no necessity for the cultivation of more than 2,100 acres on the Reservation, and that a flow of 26.25 cubic feet per second during the irrigation season of 180 days was necessary for the proper irrigation of that land. The Special Master recommended a priority date of November 29, 1859. *Walker River Irrigation District*, 11 F.Supp. at 162. The United States objected to the Master's recommendations, asserting that it was entitled to a water right for 10,000 acres of land, and a corresponding amount of water, to wit 150 cubic feet per second during the irrigation season from March 15 to September 15 of each year, with an 1859 priority date. *Id.* at 163. The District Court rejected that argument, and determined that the rights of the United States and its use of the waters of the Walker River and its tributaries for purposes of irrigation, like the rights of all other diverters in the Walker River Basin, were to be "adjudged, measured and administered in accordance with the laws of appropriation as established by the State of Nevada." 11 F.Supp at 167.

On appeal, the Ninth Circuit reversed the District Court and found there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. *U.S. v. Walker River Irrigation District*, 104 F.2d 334, 339-40 (9th Cir. 1939). The Ninth Circuit, however, rejected the United States' claim for 150 cubic feet per second with an 1859 priority to irrigate 10,000 acres, and instead adopted the Report of the Master granting an 1859 water right for the purpose of irrigating 2,100 acres with 26.25 cubic feet per second during the irrigation season. *Id.* at 340. The Decree, as amended, also provides for "whatever flow of said stream is reasonably necessary for domestic and stockwatering purposes, to the extent now used by the [United States] during the non-irrigation season . . . ." Exh. 13 at 067.

E. Land Withdrawn for or Added to the Reservation.

1. 1918 and 1924/1928 Lands.

In 1918, before the water litigation was filed, President Woodrow Wilson issued Executive Order No. 2820 setting aside 34,000 acres as a "grazing reservation" for Indians of the Walker River Reservation. *See*, Detailed Statement, ECF 2476 at 7.

By Executive Order No. 4041 of June 27, 1924, President Coolidge withdrew approximately 69,000 acres of land for the use and benefit of the Indians of the Reservation. The withdrawal was subject to enactment by Congress of an act permanently withdrawing the lands and providing that the temporary withdrawal did not affect existing legal rights. Pursuant to the Act of March 3, 1928, 45 Stat. 160, Congress confirmed that withdrawal with the provision that it was not to affect any existing legal right. Detailed Statement at 12. This withdrawal occurred during the water litigation and while testimony and evidence were taken.

2. Lands Added Under the 1936 Act of Congress.

In 1936, Congress authorized the Secretary of the Interior to set aside a maximum of 171,200 acres of public lands as an addition to the Reservation. *See,* Act of June 22, 1936, 49 Stat. 1806. The Act provided that the addition was not to affect valid legal rights. Existing stock drive ways used by others were also to be maintained. The Act also reserved title to all minerals in the United States, and made them subject to all forms of mineral entry or claim under the Public Land Mining Laws. The Act also required a payment of $.05 per acre to the Tribe for any land lost by use or occupancy as a result of mineral entry or mining.

The Senate Report for the 1936 legislation included a letter from the then Secretary of the Interior, Harold L. Ickes. The letter stated that, with the exception of about "1,440 acres of woodland," the remainder of the lands, about "169,700 acres . . . surround [the Indians] grazing reserve, is desirable as an addition for grazing purposes. The lands are being utilized almost exclusively by Indians. Their character and location make them valueless to any other group. The range value of the land is so low, it takes from 150 to 200 acres per head per year." Senate Report

No. 1750 to Accompany S. 3805, April 7, 1936. In 1972, the Secretary exercised the authority under the 1936 Act to add 2,900 acres to the Reservation. Detailed Statement at 7, n. 17.

3. All of the Lands Were Withdrawn or Added for Grazing Purposes, Not for Irrigation.

The 1918 withdrawal was expressly for grazing, as was the 1924/1928 withdrawal. The 1936 addition was also for grazing. The Senate Report and Secretary Ickes letter make that fact clear as to the 1936 lands. That these lands were withdrawn or added to the Reservation for grazing purposes, and not for irrigation, is confirmed in part by the United States. In its Detailed Statement (ECF 2476), the United States recognizes those facts, with the exception that it contends 1,500 acres from the 1936 addition are irrigable. However, the manner in which the 1936 lands were added to the Reservation, with a provision that existing rights not be affected, and with the reservation of all minerals, as well as requiring a payment of $.05 per acre for any land lost to the Tribe by the use and occupancy as a result of mineral entry or mining, prove they were not intended for irrigation purposes. Therefore, there could be no implied reservation of water for irrigation. Moreover, the Principal Defendants expect to be able to show that these lands are not practically irrigable based upon their location and contour, and as suggested by the Ickes letter.

F. Construction of Weber Reservoir.

Consistent with the obligations under the 1906 Agreement to provide an irrigation system for the Reservation, Congress authorized a study to determine to what extent the water supply for the Reservation could be augmented by the construction of a reservoir, and to determine if there were feasible sites. *See, U.S. v. Walker River Irrigation District*, 11 F.Supp. 164. That report, which became known as the "Blomgren Report," was issued in 1927, and was transmitted to the Commissioner of Indian Affairs by the Supervising Engineer. The Report evaluated several sites on the Reservation -- Weber, Parker and Rio Vista. Ultimately, the Report recommended that

water rights on the river system be adjudicated, a Water Commissioner be appointed to administer the river system, a reservoir be constructed on the Reservation at the Rio Vista site, and the irrigation system be extended to cover the entire irrigable area of the Reservation. *See*, 11 F.Supp. at 164-65.

A series of letters produced by the Tribe in its Initial Disclosures indicate that while the litigation initiated in 1924 was ongoing, the United States continued to consider the need for storage on the Reservation. At some point in 1932, the United States apparently became aware of what the Special Master would recommend in a proposed decree. Although the information was not completely accurate as to the Special Master's final recommendations, it was very close to what was recommended in December of 1932. *See,* Exh. 1 at 001-002.

A report was submitted to the Director of Irrigation at the U.S. Indian Service in Washington, D.C. The report was entitled "Water Available Under Special Master's Recommended Decree and Its Utilization." *Id.* at 002-020. The report concluded that if the United States received what it was seeking in the litigation, a first priority right of 150 cfs for 10,000 acres, it would be unnecessary to construct water storage on the Reservation. However, it concluded that if the decree as recommended by the Special Master was confirmed by the Court, a small reservoir would be required. It said that "it is the conclusion of many engineers who have studied the Walker River Reservation water supply problem that a small reservoir should now be constructed at the Weber site." *See,* Exh. 1 at 020.

Consistent with that recommendation, and as stated in the Detailed Statement (ECF 2476), the Indian Service received $137,000 in federal appropriations from the National Industrial Recovery Act and the Public Works Administration in 1933. Construction of Weber Reservoir began in 1933, and impoundment began soon thereafter. Construction was completed by 1937 with the installation of spill gates. *See*, Detailed Statement at 4-5.

As the reservoir was constructed and became visible, the then defendants in the adjudication became aware of its existence, and apparently suggested opening the case for purposes of making the Court aware of its construction. In September of 1934, the attorney for the District wrote the attorney for the United States concerning reopening the case to establish the fact that the reservoir had been constructed, including a stipulation proposing that the Court take that into account in deciding the case. Exh. 6 at 028-033.

The United States resisted that request, apparently out of concern that the information would jeopardize its claim for 150 cubic feet per second with an 1859 priority for 10,000 acres of land to be irrigated. *See, e.g.,* Exh. 2 at 021-022; Exh. 3 at 023-024. Moreover, by letter dated February 28, 1934 the Assistant Secretary of the Interior wrote to the Attorney General of the United States, and said:

> It is manifest from the foregoing that there was and now is no intention of this department to abandon or jeopardize its claim to water rights as set out in the Amended Bill of Complaint in this case. The only purpose of constructing a small reservoir is to provide regulation of the available flow of the river, which regulation is necessary to properly utilize the water rights of the Reservation.

Exh. 4 at 025-026. The United States accordingly made a calculated, strategic decision to sit on any claim it may have had for Weber Reservoir, adding complexity and defenses to these proceedings. The District Court became aware of the construction of the reservoir in 1935. The United States filed a brief in support of its Exceptions to the Master's Report, stating that the reservoir recommended in the Blomgren Report had not been built. The District responded, stating that a reservoir had in fact been built, although not the one recommended. Exh. 7 at 039-041.

Only after the Ninth Circuit rejected the United States' claim for 150 cfs with an 1859 priority date to irrigate 10,000 acres of land, did the United States change its position on the purpose of Weber Reservoir. As discussions began in 1940 to amend the Decree to conform to the mandate of the Ninth Circuit's decision, the United States began to consider the need for a

right to store water in Weber Reservoir, rather than to simply use it to regulate flow. It was then the United States evaluated a priority date for such a right. A series of correspondence shows that initially the United States proposed a storage right with a priority of July 1, 1933. Exh. 8 at 044-045. However, the Special Assistant to the Attorney General stated that a priority earlier than April 14, 1936, the date of entry of the Decree, could not be established. Exh. 10 at 049-050. Ultimately, the Department of Interior agreed to a "priority for storage of water as of April 15, 1936." Exh. 9 at 047-048; Exh. 11 at 054-055.

G. Claims Being Made by the Claimants and Their Relationship to Affirmative Defenses.

As indicated above at 3-4, the Claimants now seek recognition of the right to store and use water in Weber Reservoir, a groundwater right associated with lands withdrawn for the benefit of or added to the Reservation by executive and congressional action, surface water rights to serve some of those additions, and a groundwater right underlying all lands within the exterior boundaries of the Reservation, including some in the original Reservation in 1859. The Delay Defenses of laches and estoppel/waiver relate to the fact that it appears that the United States intentionally made no claim for Weber Reservoir either because it was intended as a regulating reservoir for the right it was asserting, and/or because the United States believed it would jeopardize the claim it was making. It also appears that claims for the 1918 and 1924/1928 lands could have been, but were not, made. Instead, the United States waited until 1992 to bring these claims.

The Finality and Repose Defenses relate to the claim for Weber Reservoir and any claim for groundwater for the Reservation as it existed during the water adjudication in 1924, which lands were part of the original action. The defense of no reserved right to groundwater for the original Reservation relates to the fact that a reservation has only one claim for a reserved right.

That claim was asserted in the 1924 water litigation, was quantified, and is satisfied by surface water. It also relates to the fact that surface water springs have been providing water for livestock on the grazing lands, and well sites which have been identified may not be in existence. Thus, the Tribe's water requirements for grazing livestock have been met with adequate stock water from surface springs. Finally, the defense related to Nevada's statehood raises the issue of whether the United States could effectively reserve water for land added in 1936 consistent with the express and implied provisions in the 1936 Act of Congress authorizing the addition of those lands to the Reservation.

II. THE LEGAL STANDARD APPLICABLE TO THE MOTION.

In the context of a motion for judgment on the pleadings seeking to dismiss defenses, the Court must accept the allegations of the opposing party as true. The allegations of the moving party which have been denied are taken as false. *Austad v. United States*, 386 F.2d 147, 149 (9th Cir. 1967). The allegations of the opposing party are to be construed in the light most favorable to that party. *General Conference Corp. of Seventh Day Adventists v. Seventh Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989). The moving party is not entitled to judgment on the pleadings, or in this case, to have defenses dismissed, when, if proved, the defenses would defeat recovery in whole or in part. *Id.*, 887 F.2d at 230.

As is apparent from the background information above, and which includes some, but not all, of the facts on which the Principal Defendants will rely to support these defenses, and by the argument concerning the applicable law which follows, these defenses and the law which supports them may, in fact, defeat some or all of the recovery the Claimants seek here. At this stage of these proceedings, it would be premature and error to dismiss these affirmative defenses. At this point, the Court need not decide that the Principal Defendants will prevail on these defenses. The

Court need only determine that they are viable and not subject to dismissal as a matter of law. The Principal Defendants should be allowed to undertake discovery and present evidence on them.

III. THE MOTION FOR JUDGMENT ON THE PLEADINGS, IN SEEKING DISMISSAL OF THE PRINCIPAL DEFENDANTS' AFFIRMATIVE DEFENSES BASED ON CLAIM PRECLUSION, SHOULD BE DENIED.

A. The Ninth Circuit Did Not Decide Whether Principles of Finality and Repose Preclude the Claimants' Assertion of Additional Reserved Rights Claims, and Therefore the Claimants' Motion, in Seeking Dismissal of the Finality and Repose Defenses Informed by Claim Preclusion, Should Be Denied.

In their MJOP, the Claimants argue that the Ninth Circuit, in remanding the issues raised in their counterclaims to this Court, held that *res judicata* and collateral estoppel do not bar their claims, that the Ninth Circuit's decision is the law of the case, and therefore the Principal Defendants' affirmative defenses based on claim preclusion should be dismissed. *See, United States v. Walker River Irr. Dist., et al.,* 890 F.3d 1161, 1172 (9th Cir. 2018) ("*Walker IV*"); ECF 2606 at 26-27. In *Walker IV*, the Ninth Circuit stated that Paragraph XIV of the Walker River Decree provides that the district court "retains jurisdiction" for purposes of "correcting or modifying" the Decree; that the word "modifying" authorizes the district court to recognize additional reserved rights not adjudicated in the Decree; and therefore "*traditional* claim preclusion and issue preclusion do not apply." *Walker IV*, 890 F.3d at 1172-1173 (emphasis added).

Citing the Supreme Court's decision in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), however, the Ninth Circuit also held that—even though "traditional" claim preclusion, *i.e., res judicata* and collateral estoppel, does not apply—the principle that "[i]nstead" applies is that the Claimants' claims for additional reserved rights are "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Walker IV*, 890 F.3d at 1173 (quoting *Arizona II,* 460 U.S. at 619; internal quote marks

omitted). The Ninth Circuit did not, however, apply these principles of finality and repose to determine whether they preclude the Claimants from asserting their claims for additional reserved rights. Instead, the Ninth Circuit left the issue open for this Court to decide. Moreover, the Ninth Circuit did not find that the claims here were "new claims not litigated in the original decree proceedings" as the Claimants contend. *See*, ECF 2606 at 26-27. It had no record before it, only the allegations in the pleadings. In fact, one of the issues on appeal was Judge Jones' *sua sponte* dismissal of claims on *res judicata* grounds without a record. Therefore, the issue of whether principles of finality and repose as described in *Arizona II* preclude the Claimants' claims for additional reserved rights is raised in the Principal Defendants' affirmative defenses, and is properly before this Court.

The Supreme Court in *Arizona II* also held that "principles" of *res judicata* "inform" the "general principles of finality and repose." *Arizona II*, 460 U.S. at 619. The Ninth Circuit also did not address or decide whether the principles of *res judicata*, to the extent they "inform" the "general principles of finality and repose," preclude the Claimants' assertion of additional reserved rights claims. Instead, it said "on remand, the district court should subject [any potential] *res judicata* decision to the rigors of the adversarial process." *Walker IV*, 890 F.3d at 1122. Thus, the principles of *res judicata*, to the extent they "inform" the principles of finality and repose, are also properly raised in the Principal Defendants' affirmative defenses.[3]

[3] As we argue later, the Claimants' claims for additional reserved rights are also precluded by Paragraphs XI and XII of the Walker River Decree, which provides that the Decree "shall be deemed to determine all of the rights of the parties" in the Walker River as of April 14, 1936 (Paragraph XII), and that the Decree "forever enjoins and restrains" the parties from asserting additional rights beyond those adjudicated in the Decree (Paragraph XI). *See,* pages 23-27, *infra*.

Since the Ninth Circuit did not apply the foregoing principles, the MJOP should be denied to the extent it seeks dismissal of the Principal Defendants' affirmative defenses based on claim preclusion.

B. Principles of Finality and Repose Preclude the Assertion of Claims for Additional Reserved Water Rights That Arose Prior To and Could Have Been Adjudicated in the Walker River Decree.

We now explain in more detail why principles of finality and repose preclude the Claimants' assertion of some or all of the claims for additional reserved rights in the Walker River, and why the MJOP should be denied to the extent it seeks dismissal of the affirmative defenses based on those principles.

In *Arizona II*, the Supreme Court held that the United States' claims for additional reserved water rights beyond those previously adjudicated in water rights decrees may be barred by "general principles of finality and repose" that apply to water decrees, even though the claims may not be barred by *res judicata*. *Arizona II*, 460 U.S. at 619. Earlier, in *Arizona I*, the Supreme Court had issued a decision and decree—the Colorado River Decree—that adjudicated water rights in the Colorado River, including the United States' reserved rights for the Colorado River Indian tribes. *Arizona v. California*, 373 U.S. 546 (1963) (decision); *Arizona v. California*, 376 U.S. 340 (1964) (decree) (collectively "*Arizona I*"). In *Arizona II*, the United States brought an action to modify the decree to include additional reserved rights for the Indian tribes that the United States claimed had been "omitted" from the decree.

The Supreme Court in *Arizona II* held, first, that the United States' claims for additional reserved rights were not barred by "traditional" claim and issue preclusion, specifically *res judicata* and collateral estoppel. *Arizona II,* 460 U.S. at 617-619. The Court reasoned that Article IX of the Colorado River Decree reserved jurisdiction for purposes of "modification" of the decree, and thus an action to modify the decree to include additional reserved water rights is the "same

proceeding" in which the decree was issued; therefore, "res judicata and collateral estoppel do not apply." *Id*. at 619.

The Supreme Court in *Arizona II* also held, however, that—even though *res judicata* and collateral estoppel do not apply—the reserved jurisdiction clause of the Colorado River Decree "must be given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Arizona II*, 460 U.S. at 619. The Court stated that "while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision." *Id*. Based on these "general principles of finality and repose," the Court held that the United States was precluded from asserting claims for additional reserved rights for the Colorado River Indian Tribes. *Id*. at 621-622.

The Supreme Court explained more fully why principles of finality and repose required a "narrower reading" of the reserved jurisdiction clause and precluded the United States from asserting claims for additional reserved rights, stating:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. In no context is this more true than with respect to rights in real property. . . . . *Certainty of rights is particularly important with respect to water rights in the Western United States.* The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. The doctrine of prior appropriation, the prevailing law of the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Arizona II, 460 U.S. at 619-620 (citations and internal quote marks omitted; emphasis added). The Court added:

> In the arid parts of the West, claims for water use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. If there is no surplus water in the Colorado River,

> any increase in federal reserved water rights will require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.

Id. at 620-621 (citing and partially quoting *United States v. New Mexico*, 438 U.S. 696, 699, 705 (1978); internal quote marks omitted).

Thus, while *Arizona II* held that "traditional" claim preclusion in the form of *res judicata* did not apply because of the reserved jurisdiction clause of the Colorado River Decree, *Arizona II* also held that "general principles of finality and repose" required a "narrower reading" of the reserved jurisdiction clause, and that these principles of finality and repose precluded the United States from asserting claims for additional reserved rights. *Arizona II*, 460 U.S. at 619-620. These principles of finality and repose, the Court stated, are based on the need for "finality" and "certainty" of water rights adjudicated in water rights decrees in the arid western states. *Id.*

The principles of finality and repose described in *Arizona II* vitiate the Claimants' claims for additional reserved water rights here, especially to the extent that the claims arose prior to the Walker River Decree and could have been adjudicated in the Decree. Just as *Arizona II* held that principles of finality and repose precluded the United States from asserting claims for additional reserved rights for the Colorado River Indian Tribes beyond the rights adjudicated in the Colorado River Decree, these same principles of finality and repose preclude the Claimants here from asserting claims for additional reserved rights for the Tribe beyond the rights adjudicated in the Walker River Decree. Just as *Arizona II* held that principles of finality and repose required a "narrower reading" of the reserved jurisdiction clause of the Colorado River Decree, notwithstanding that the clause authorized "modification" of the decree, these same principles of finality and repose require a narrower reading of the reserved jurisdiction clause of the Walker River Decree, which, like the Colorado River Decree, authorizes "modifying" the Decree. Under this "narrower reading," the reserved jurisdiction clause of the Walker River Decree cannot

properly be construed as authorizing the Claimants to assert claims for additional reserved rights beyond those adjudicated in the Decree, at least to the extent that the claims arose prior to and could have been adjudicated in the Decree. This is how the Supreme Court in *Arizona II* construed the reserved jurisdiction clause of the Colorado River Decree, and the virtually-identical reserved jurisdiction clause of the Walker River Decree should be construed the same way.

The principles of finality and repose apply with particular force in the case of a water rights decree, such as the Walker River Decree, that comprehensively adjudicates water rights of federal and non-federal users in an entire river or stream system. Indeed, the Ninth Circuit has cited the Walker River Decree as an example of a "comprehensive adjudication" of water rights. *United States v. Truckee-Carson Irr. Dist.,* 649 F.2d 1286, 1302 (9th Cir. 1981). As the Supreme Court has said, although a quiet title action is normally an *in personam* action, a quiet title action that results in a general adjudication of water rights in a river or stream system is more in the nature of an *in rem* action, because the adjudication resolves numerous competing claims in a particular *res*, namely a body of water. *Nevada v. United States*, 463 U.S. 110, 143-144 (1983). The Walker River Decree, in the nature of an *in rem* proceeding, comprehensively adjudicated water rights in the Walker River, so that the water users would be able to rely on and exercise their adjudicated rights in conducting their present and future operations and enterprises. The Decree adjudicated the Claimants' entire reserved rights claims, at least to the extent the claims arose prior to the Decree and could have been adjudicated in the Decree.

In initiating the Walker River adjudication, the United States clearly indicated its intention to seek adjudication of the United States' *entire* reserved right for the Tribe in the Walker River, and not just a portion of its reserved right. The United States' complaint alleged that "there is *no other source of supply of water* for the irrigation of said lands" of the reservation than the water in which the United States sought a reserved right. *United States of America v. Walker River Irr.*

Dist., et al., Amended Bill of Complaint, at 5 (D. Nev. March 19, 1926) (hereinafter "Amended Bill of Complaint") (emphasis added) (Exh. 12). In representing that there is "no other source of supply of water" for the Tribe's needs than that sought by the United States in the adjudication, the United States made clear that the water it sought was the entire water encompassed in the United States' reserved right for the Tribe.

Finally, the conclusion that the Claimants are precluded from asserting claims for additional reserved rights is supported by sound public policy. Since water rights adjudicated in water rights decrees are considered to be "final" and "certain," *Arizona II*, 460 U.S. at 619, the United States should not be permitted to seek piecemeal adjudication of its rights, by seeking adjudication of some rights in the initial general adjudication and adjudication of other rights in a subsequent litigation brought many years later. Such piecemeal adjudication would defeat the reasonable expectations of water users who have reasonably relied on and exercised their adjudicated rights for many decades. If the United States were allowed to seek piecemeal adjudication of its claims, the adjudicated rights of the water users would be uncertain and inconclusive rather than final and certain, even though *Arizona II* held that "final[ity]" and "certain[ty]" of adjudicated rights is the very purpose of water rights decrees. *Arizona II*, 460 U.S. at 619-620.

In sum, the principles of finality and repose that apply to the Walker River Decree preclude some or all of the Claimants' assertion of claims for additional reserved rights, at least claims that arose prior to and could have been adjudicated in the Decree. Therefore, the MJOP, in seeking dismissal of the affirmative defenses based on finality and repose informed by claim preclusion principles, should be denied.

C. The Principles of *Res Judicata* Are Relevant Because They Inform the Principles of Finality and Repose.

There is no question that general principles of finality and repose govern this Court's consideration of the Claimants' claims going forward. *See Walker River IV*, 890 F.3d at 1173. And, there is equally no question that the principles of *res judicata* guide and inform the general principles of finality and repose. The Principal Defendants have, therefore, properly included *res judicata* in their affirmative defenses because that defense is relevant going forward.

Under *res judicata*, a party is barred not only from relitigating causes of action or claims that were finally adjudicated in a prior action between the parties, but also from litigating those that *could have been* adjudicated in the prior action. *Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *Cromwell v. County of Sac*., 94 U.S. 351, 352 (1876).[4] Although the Ninth Circuit held in *Walker IV* that *res judicata* does not bar the Claimants' claims for additional reserved rights, 890 F.3d at 1172-1173, the Supreme Court in *Arizona II* held that the "principles" of *res judicata* "inform" the "general principles of finality and repose." *Arizona II*, 460 U.S. at 619. Thus, regardless of whether *res judicata* technically applies here, the *principles* of *res judicata* are relevant and properly alleged because they "inform" the principles of finality and repose that do directly apply. The affirmative defenses based on *res judicata* can properly be read as including the *principles* of *res judicata*, and thus the MJOP should be denied even as applied to the Principal Defendants' affirmative defenses based on *res judicata*.

The principles of *res judicata* apply with particular force where, as here, a court has issued a water rights decree that comprehensively adjudicates water rights in a river system, including the United States' reserved rights, and the United States initiates a separate action many decades later claiming additional reserved rights. In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court held that the Orr Ditch Decree comprehensively adjudicated water rights in the Truckee

[4] Under collateral estoppel, a party is barred from relitigating *issues* that were finally adjudicated in a prior action between the parties. *Nevada*, 463 U.S. at 130 n. 11.

River in Nevada, including the United States' reserved water rights for the Pyramid Lake Indian Tribe, and that the United States was barred by *res judicata* from subsequently asserting additional reserved rights claims for the tribe. *Nevada*, 463 U.S. at 129-145. Specifically, the Supreme Court held that the Orr Ditch Decree adjudicated "the full 'implied-reservation-of-water' rights that were due the Pyramid Lake Indian Reservation," and thus there was no basis for the United States' claims for additional reserved rights for the reservation. *Id.* at 133. The Supreme Court described the importance of finality and certainty of water rights adjudicated in water rights decrees, stating:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. . . . Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.

Id. at 129 n. 10 (citations and internal quotation marks omitted). These policies were so strong and important that the *Nevada* Supreme Court held that subsequent appropriators on the Truckee River who had not been parties to or in privity with parties to the Orr Ditch litigation were nonetheless protected by *res judicata* principles. 463 U.S. at 143-144.

Just as the Orr Ditch Decree comprehensively adjudicated water rights in the Truckee River, including "the *full* 'implied-reservation-of-water' rights" for the Pyramid Lake reservation, *Nevada*, 463 U.S. at 133 (emphasis added), the Walker River Decree comprehensively adjudicated water rights in the Walker River, including the United States' *full* reserved right for the Tribe. *See United States v. Truckee-Carson Irr. Dist.,* 649 F.2d 1286, 1302 (9th Cir. 1981) (Walker River Decree provided "comprehensive adjudication" of water rights in Walker River).

Thus, the principles of *res judicata* that "inform" the principles of finality and repose, *Arizona II*, 460 U.S. at 619, preclude the Claimants' assertion of claims for additional reserved rights in the Walker River, at least to the extent the claimed rights arose prior to the Walker River Decree and could have been adjudicated in the Decree. The MJOP should be denied in seeking dismissal of the affirmative defenses based on claim preclusion in the form of *res judicata*.

D. Paragraphs XII and XI of the Walker River Decree Preclude Claims for Additional Reserved Rights That Arose Prior to the Decree and Could Have Been, But Were Not, Adjudicated in the Decree.

Apart from principles of finality and repose, Paragraphs XII and XI of the Walker River Decree independently preclude the assertion of claims for additional reserved rights that arose prior the Decree and could have been adjudicated in the Decree. Paragraph XII provides that the Decree "shall be deemed to determine all of the rights of the parties" in the Walker River and its tributaries "as of the 14th day of April, 1936." *Walker IV*, 890 F.3d at 1166.[5] Paragraph XI provides that the parties are "forever enjoined and restrained" from claiming water rights in the Walker River "except the rights set up and specified in this decree . . . ." *Id.* Since these provisions provide, respectively, that the Decree determines "all of the rights of the parties" as of April 14, 1936, and that the parties are "forever enjoined and restrained" from claiming additional such rights, these provisions plainly preclude the Claimants' assertion of claims for additional reserved rights that arose prior to April 14, 1936 and were not adjudicated in the Decree.

In *Walker IV*, the Ninth Court, addressing the claim preclusion issue, primarily focused on Paragraph XIV of the Walker River Decree, which reserved jurisdiction for the district court for purposes of "modifying" the Decree; the Ninth Circuit held that the word "modifying" includes

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[5] Paragraph XII of the original Decree did not include the reference to the date of April 14, 1936, but the reference was added to Paragraph XII later, when the Decree was modified in 1940. *Walker IV*, 890 F.3d at 1167.

"additional reserved rights," and therefore that the district court has jurisdiction to address the claims for additional reserved rights. *Walker IV*, 890 F.3d at 1169-1171. In a short following passage, the Ninth Circuit also stated that Paragraphs XI and XII simply "reiterate standard preclusion principles, i.e., that no party may relitigate a claim to water rights in the Walker Basin . . . that was litigated in the original case as of April 14, 1936." *Id*. at 1171-1172. The Claimants argue that this short passage indicates that the Ninth Circuit found that "this Court has jurisdiction to consider the Amended Counterclaims because the water rights asserted in them were never litigated," and that the Claimants may assert claims for additional reserved rights that were *not* adjudicated in the Decree, even though the claims arose prior to the Decree and could have been adjudicated in the Decree. MJOP, at 27 (ECF 2606). The Ninth Circuit did not hold and could not have upheld any finding about what was or was not litigated in the 1924 litigation. There was no record before it because of the District Court's *sua sponte* ruling on *res judicata.*

On the contrary, the Ninth Circuit in this short passage obviously meant that Paragraphs XII and XI bar claims for reserved rights that arose prior to the Walker River Decree and could have been adjudicated in the Decree, and did not mean that the provisions bar only claims that were actually litigated. This interpretation of the Ninth Circuit's decision is supported by several indicia. First, the Ninth Circuit expressly stated in the short passage that Paragraphs XI and XII provide that a party may not "relitigate" a claim that was "litigated" in the original case, *Walker IV*, 890 F.3d at 1171-1172, but pointedly did not state, conversely, that a party may *litigate* in the first instance a claim that was *not litigated* in the original case because it had not yet arisen; thus, the Ninth Circuit did not suggest that a party may assert a claim that arose prior to the Decree and could have been, but was not, adjudicated in the Decree. Second, the Ninth Circuit stated that Paragraphs XI and XII "reiterate standard preclusion principles," and the standard preclusion principles of *res judicata* preclude a party from litigating not only claims that were *actually*

litigated in a prior action between the parties but also claims that *could have been* litigated. *Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *Cromwell v. County of Sac*., 94 U.S. 351, 352 (1876). Third, the Ninth Circuit stated that Paragraph XI cannot be construed as precluding the Claimants from asserting a claim for a reserved right "in any court, even if the basis for such claim . . . arose *after* the 1936 Decree was entered," *Walker IV*, 890 F.3d at 1171 (emphasis added), thus indicating that the Ninth Circuit's preclusion focus was on claims that arose *after* the Decree and not claims that arose *before* the Decree. The Ninth Circuit therefore left open defenses sounding in *res judicata* that are based on Paragraphs XI and XII of the Decree.

Most importantly, the Claimants' interpretation of the Ninth Circuit's decision is inconsistent with the plain language of Paragraphs XI and XII and would render the provisions a nullity. The plain language of Paragraph XII is that that the Decree determines "*all* of the rights of the parties" as of April 14, 1936 (emphasis added), and the plain language of Paragraph XI is that the parties are "forever enjoined and restrained" from asserting additional such rights, that is, water rights in existence as of April 14, 1936. Neither provision suggests that it is limited to water rights actually adjudicated in the Decree, and does not apply to water rights that existed as of April 14, 1936 and were *not* adjudicated in the Decree. Thus, the provisions according to their plain language preclude water rights claims that arose prior to April 14, 1936 and were not adjudicated in the Decree. If, as the Claimants contend, the provisions were construed as applicable only to water rights that were litigated, the provisions would have no practical force or effect, because a party obviously does not have the right under *res judicata* or other principles to seek litigation of claims that have already been litigated. Thus, the Ninth Circuit logically meant that Paragraphs XII and XI do not bar claims that arose *subsequently* to the Decree and could not have been

adjudicated in the Decree, but did not mean that Paragraphs XI and XII do not bar claims that arose *prior* to the Decree and could have been adjudicated in the Decree.[6]

This conclusion is also consistent with the United States' apparent contemporaneous understanding of the preclusive effect of Paragraph XII during the Walker River litigation. As was explained above at pages 9-12, prior to the 1940 amendment to the Decree, the United States decided on a priority date for the reserved rights it claims here—for Weber Reservoir—*not* as the date that the claimed right *arose*, which was prior to the Decree, but instead as the date immediately *after* April 14, 1936, when the claimed right would no longer be subject to preclusion under Paragraph XII—and, more importantly, the United States apparently decided on a priority date as the date immediately after April 14, 1936 in order to avoid the preclusive effect of Paragraph XII. The fact that the United States contemporaneously understood that unadjudicated claims arising prior to April 14, 1936 would be subject to preclusion under Paragraph XII further demonstrates that Paragraph XII precludes such claims.

In any event, regardless of how Paragraphs XI and XII are construed, the Ninth Circuit in *Walker IV* stated that the claims are "subject to the general principles of finality and repose" under *Arizona II*, but did not apply these principles to determine whether they preclude the claims. *Walker IV*, 890 F.3d at 1173. These principles of finality and repose preclude the Claimants from

[6] Nor can it be argued that the Ninth Circuit's ruling that Paragraph XIV of the Walker River Decree reserves jurisdiction for the district court to litigate unlitigated claims for additional reserved rights, *Walker IV*, at 1169-1171, means that Paragraphs XI and XII do not bar litigation of unlitigated claims that arose prior to April 14, 1936 and could have been adjudicated in the Decree. Paragraph XIV establishes the district court's *jurisdiction* to modify the Decree to include additional rights, and Paragraphs XI and XII establish the *scope* of the claims that can be litigated. The Ninth Circuit recognized the distinction between the district court's jurisdiction and the scope of Paragraphs XI and XII, stating that Paragraph XIV addresses "the district court's continuing jurisdiction" and Paragraph XI "purports to limit claims." *Id*. at 1171. If Paragraph XIV were construed as authorizing the district court to hear claims that are precluded by Paragraphs XI and XII, these provisions would be in obvious conflict, in that Paragraph XIV would allow what Paragraphs XI and XII disallow.

asserting their claims here, as argued above. *See,* pages 15-22, *supra.* Thus, the Claimants' claims for additional reserved rights that arose prior to the Decree are precluded under principles of finality and repose, regardless of whether they are also precluded under Paragraphs XI and XII, and therefore the Court should not dismiss the finality and repose defenses.

E. Principles of Finality and Repose and Paragraphs XI and XII of the Walker River Decree Preclude the Assertion of Specific Reserved Rights for Weber Reservoir, Withdrawn Lands, Lands Added to the Tribe's Reservation, and Groundwater.

The Claimants have asserted claims for additional reserved rights that fall into three categories—for (1) Weber Reservoir, (2) lands added and restored to the Tribe's reservation, and (3) groundwater. United States' Amended Counterclaim (ECF 2477-1) at 4-6; Tribe's Second Amended Counterclaim (ECF 2479) at 3-7; United States' Detailed Statement (ECF 2476) at 4, joined by Tribe (ECF 2480).

As we now argue, the claim preclusion principles described above—the principles of finality and repose and Paragraphs XI and XII of the Walker River Decree—preclude the Claimants from asserting most of their claimed reserved rights that fall into these three categories, because most of the claims arose prior to the Decree and could have been adjudicated in the Decree. The Decree comprehensively adjudicated water rights in the Walker River, and was intended to provide finality and certainty of the rights that were adjudicated. To allow the Claimants to assert claims for additional reserved rights at this late date, more than eighty years after the claimed rights were adjudicated, would be to unsettle water rights that were adjudicated long ago and were intended to be final and certain.

1. Weber Reservoir.

In the Detailed Statement (ECF 2476), which the Tribe has joined (ECF 2480), the United States asserts that its reserved right for Weber Reservoir "*arose* when the Executive . . . secured

congressionally authorized funds for the construction of Weber Reservoir in September, 1933." Detailed Statement (ECF 2476) at 5 (emphasis added).[7] Thus, the Claimants acknowledge that their claimed reserved right for Weber Reservoir "arose" before the Decree was entered; the claimed right "arose" in September 1933, nearly three years before the Decree was entered in April 1936. Thus, their claimed right could have been adjudicated in the Decree. Indeed, the United States acknowledges that it "*could assert* a priority for Weber Reservoir consistent with that date," *i.e.,* September 1933, but states that the United States instead "asserts a priority date for Weber Reservoir storage of April 15, 1936." Detailed Statement (ECF 2476) at 5 (emphasis added). Since the Claimants' claimed Weber Reservoir reserved right arose prior to the Decree and could have been adjudicated in the Decree, principles of finality and repose preclude them from asserting their claimed right now, more than eighty years after the Decree was issued.

As discussed, Paragraph XII of the Decree provides that it determines "*all* of the rights of the parties" in the Walker River and its tributaries "as of the 14th day of April, 1936" (emphasis added), and thus precludes any water rights claims of the parties that arose prior to and existed on that date. *See,* page 25, *supra* (emphasis added). The United States, on the other hand, claims that the priority date of its reserved right for Weber Reservoir is April 15, 1936, Detailed Statement (ECF 2476) at 5—which, conveniently, is one day *after* the date when Paragraph XII provided that the Decree no longer has preclusive effect. In other words, the United States has established the priority date of its claimed reserved right for Weber Reservoir not as the date that the right arose in 1933—which was nearly three years *prior* to the Decree—but instead as the day immediately

[7] The United States and the Tribe also assert in their counterclaims that Weber Reservoir was "completed," or "practically completed," in 1935. Tribe's Second Amended Counterclaim (ECF 2479) at 5 ("completed"); United States' Amended Counterclaim (ECF 2477-1) at 4 ("practically completed"). Thus, the reservoir was "completed" or "practically completed" before the Walker River Decree was issued in April 1936.

after the date that the Decree ceased to have preclusive effect. This might suggest, of course, that the United States has established the priority date of the right in order to avoid the preclusive effect of Paragraph XII. Indeed, the historical record demonstrates that the United States was fully aware of the preclusive effect of Paragraph XII, and purposefully set April 15, 1936 as the priority date of its claimed Weber Reservoir reserved right in order to avoid the preclusive effect of Paragraph XII. *See*, pp. 9-12, *supra*. Thus, the United States fully understood that its claimed reserved right for the reservoir would be subject to preclusion under Paragraph XII if the priority date were the date that the claimed right allegedly arose, *i.e.*, July 1933, which further demonstrates that Paragraph XII precludes the Claimants' assertion of their claimed reserved right for Weber Reservoir.

In any event, regardless of what date the United States asserts as the priority of its claimed reserved right for Weber Reservoir, principles of finality and repose preclude the Claimants from asserting the claimed right. First, as set forth in greater detail above, it was the position of the United States at the time that Weber Reservoir was constructed "to provide regulation of the available flow of the river, which regulation is necessary to properly utilize the water rights of the Reservation," *i.e.*, the 150 cfs, the United States was seeking. *See*, p. 11, *supra*. It was not built for storage. Moreover, to the extent that it was so built, the claimed right for Weber Reservoir arose nearly three years prior to the Decree, and could have been adjudicated in the Decree. The Decree was intended to determine water rights in the Walker River once and for all, in order that the water users would be able to reasonably rely on and exercise their adjudicated rights. To allow the Claimants to assert their claim for a reserved right in Weber Reservoir now—more than eighty years after the Decree was entered—would be to deprive the adjudicated rights of the finality and repose that is the very purpose the Decree. *See, Arizona II*, 460 U.S. at 619.

2. Withdrawn and Added Lands.

The Claimants argue that they have additional reserved water rights in the Walker River for lands that were withdrawn for or added to the Tribe's Reservation by various congressional statutes, executive orders, and regulations. The lands were withdrawn for or added to the Reservation, they assert, by executive orders issued on March 15, 1918, and June 27, 1924; by a congressional statute enacted on March 3, 1928; and by regulations adopted by the Secretary of the Interior on September 25, 1936, and June 19, 1972, pursuant to authority granted by a congressional statute enacted on June 22, 1936. Detailed Statement (ECF 2476) at 7; United States' Amended Counterclaim (ECF 2477-1) at 5; Tribe's Second Amended Counterclaim (ECF 2479) at 4.

The first three federal actions mentioned above—the executive orders issued in 1918 and 1924 and the congressional statute enacted in 1928—were taken long before the Decree was entered on April 15, 1936. Thus, the Claimants' reserved rights claims based on these federal actions arose prior to the Decree, and could have been adjudicated in the Decree. Under principles of finality and repose as described in *Arizona II*, and under Paragraphs XI and XII of the Decree, which provide, respectively, that the Decree determines "all of the rights of the parties" as of April 14, 1936, and that the parties are "forever enjoined and restrained" for claiming additional such rights, these claims are precluded.

3. Groundwater.

The Claimants assert that they have a reserved right for groundwater underlying the Tribe's Reservation, which arose when the Tribe's Reservation was created on November 29, 1859. Detailed Statement (ECF 2476), at 10-12.

On the contrary, the Decree adjudicated, and was intended to adjudicate, the United States' *full* reserved right for the Walker River Tribe, which would include any reserved right in groundwater. Thus, principles of finality and repose, as well as Paragraphs XI and XII of the

Decree, preclude the Claimants from belatedly asserting their claim for a reserved right in groundwater now, more than eighty years after the Decree was issued. Nothing in the Decree, or in the United States' complaint that initiated the Walker River litigation, suggested that the United States possessed not one but two reserved rights—one for surface water and the other for groundwater—and that the United States was only asserting a reserved right for the former and not the latter. On the contrary, the United States' complaint alleged that "there is *no other source of supply of water* for the irrigation of said lands" of the reservation than the water in which the United States sought a reserved right. Amended Bill of Complaint (emphasis added) (Exh. 12 at 061). Since the United States represented that there is "no other source of supply of water" for the Tribe's needs than that sought by the United States in the adjudication, the United States made clear that the water it sought comprised the United States' *entire* reserved right for the Tribe. Thus, principles of finality and repose preclude the Claimants from now asserting a separate and distinct claim for a reserved right in groundwater.

This conclusion is supported by the Supreme Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983), which held that the Orr Ditch Decree comprehensively adjudicated water rights in the Truckee River, including the United States' *entire* reserved right for the Pyramid Lake Indian Tribe. *Nevada*, 463 U.S. at 129-145. As the Court held, the Orr Ditch Decree adjudicated "the full 'implied-reservation-of-water' rights that were due the Pyramid Lake Indian Reservation," and therefore the United States was precluded from asserting additional reserved rights for the reservation. *Id.* at 133. Similarly here, the Decree adjudicated the "full" implied reserved water right that was due the Walker River Reservation, and the Claimants are precluded from asserting additional claims for reserved rights for the reservation, including any claimed reserved right in groundwater.

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This conclusion is also supported by the Nevada Supreme Court's decision in *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145 (Nev. 2011), which, following the U.S. Supreme Court's decision in *Nevada*, held that the Pyramid Lake Indian Tribe was precluded from asserting a reserved right claim in the groundwater of the Truckee River basin. The Nevada Supreme Court held that—since the Orr Ditch Decree "represented 'the full implied-reservation-of-water' rights" of the Pyramid Lake Reservation, as the Supreme Court had held in *Nevada*—"the Tribe cannot assert a federally implied water right to the Dodge Flat groundwater." *Ricci*, 126 Nev. at 524 (citing and quoting *Nevada*, 463 U.S. at 133). Thus, *Ricci* held that the Orr Ditch Decree adjudicated the Pyramid Lake Tribe's full reserved right in the Truckee River and precluded the Tribe's assertion of a separate reserved right in groundwater. Similarly here, the Decree adjudicated the Claimants' full reserved right in the Walker River and precludes them from asserting a separate reserved right in groundwater.

The Claimants assert that their reserved right in groundwater arose when the Tribe's reservation was created in November 29, 1859, and that the priority of the right is based on that date. Detailed Statement at 11 (ECF 2476). Thus, they had ample opportunity to assert any claim for a reserved right in groundwater during the Walker River litigation, and to have the claim adjudicated in the Decree. Since they did not include groundwater in their claim for reserved rights in the Walker River litigation, when they had an opportunity to do so, they cannot assert their claim now, more than eighty years after the Decree was issued.

F. The Limited Exceptions to Principles of Finality and Repose Do Not Apply to the Claimants' Claims for Reserved Rights That Arose Prior to and Could Have Been Adjudicated in the Walker River Decree.

As noted earlier, the Supreme Court in *Arizona II* and the Ninth Circuit in *Walker IV* held that principles of finality and repose that apply to water rights decrees are subject to two exceptions, namely that these principles do not apply in the case of "changed circumstances or

unforeseen issues not previously litigated." *Arizona II*, 460 U.S. at 619; *Walker IV*, 890 F.3d at 1173. These exceptions should be construed narrowly rather than broadly, because of the need for finality and certainty of water rights in the arid and semi-arid western states. *See Arizona II*, 460 U.S. at 619-620.[8]

The limited exceptions to principles of finality and repose do not apply to the Claimants' claims for additional reserved rights that arose prior to and could have been adjudicated in the Decree. The circumstances surrounding such claims are the same as when the Decree was issued in 1936, and have not "changed" since then. Any unlitigated issues concerning such claims were foreseeable and not "unforeseen" when the Decree was issued. Since the exceptions to principles of finality and repose do not apply to the claims for reserved rights, the principles themselves fully apply, and they preclude the Claimants' claims for additional reserved rights that could have been, but were not, adjudicated in the Walker River Decree many years ago.

G. Conclusion.

In *Arizona II*, the Supreme Court held that principles of finality and repose, which are informed by principles of *res judicata*, apply to water rights adjudicated in water rights decrees. These principles preclude the Claimants from asserting claims for additional reserved rights in the Walker River that arose prior to the Decree and could have been adjudicated in the Decree. These

[8] The Supreme Court in *Arizona II* indicated that these two exceptions are to be narrowly construed, and are limited to emergencies and other fundamentally changed circumstances that could not have been reasonably foreseen when the decree was issued. The Court cited two of its own decisions where it had applied the exceptions, *Wisconsin v. Illinois*, 352 U.S. 983 (1957), and *New Jersey v. New York*, 283 U.S. 336 (1931). *Arizona II*, 460 U.S. at 624 n. 16. The Court stated that *Wisconsin* involved temporary modification of a decree because of an "emergency in navigation caused by low water in the Mississippi River," and that *New Jersey* involved a decree that was amended by consent of the parties to take account of "changed conditions concerning the discharge of sewage." *Id.* The Court stated that these decisions demonstrated the need for "flexibility" in reserved jurisdiction clauses of water rights decrees to address "changing conditions and questions which could not be disposed of at the time of an initial decree." *Id.* at 624.

claims for additional reserved rights are also precluded by Paragraphs XI and XII of the Decree, which provide, respectively, that the Decree determined "all of the rights of the parties" as of April 14, 1936, and that the parties are "forever enjoined and restrained" from claiming any additional such rights. These various principles are intended to ensure that water rights adjudicated in water rights decrees, including the Decree, are final and certain, and are not subject to claims for additional water rights that are raised many years and even decades after the decrees are issued. Therefore, the MJOP, which seeks dismissal of the Principal Defendants' claims based on principles of finality and repose as informed by claim preclusion, should be denied. It is clear that these defenses may, in fact, defeat some or all of the recovery the Claimants seek here.

IV. THIS COURT MUST CONSIDER THE PRINCIPAL DEFENDANTS' EQUITABLE AFFIRMATIVE DEFENSES.

A. Introduction.

The Claimants assert that a legal wall prohibits any and all equitable defenses, equitable considerations, and a trial on the equities of their second-round of belated reserved water right claims. *See*, MJOP (ECF 2606) at pp. 6-7. They make this assertion despite the fact that the Claimants admittedly seek, not to establish reserved water rights or the Walker River decree in the first instance, but to modify the longstanding judicial decree that has been in place and relied upon in the river basin for nearly 100 years. *See*, MJOP at p. 1 ("Plaintiffs seek recognition of additional water rights not addressed by the 1936 Decree pursuant to this Court's authority to modify the Decree."). In doing so, the Claimants ignore the procedural posture of this case that, as the Ninth Circuit has already found, requires this Court to entertain equitable defenses and considerations. *See, United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1173 (9th Cir. 2018) ("because we have concluded that the counterclaims are not a new action … the counterclaims are 'subject to general principles of finality and repose'") (quoting *Arizona v. California*, 460 U.S. 605, 619

(1983)). Indeed, the Claimants are asking this Court to exercise its equitable power to modify the 1936 Decree only to now claim on remand from the Ninth Circuit that equitable considerations and defenses do not apply to them. The Claimants cannot have it both ways.

Specifically, this is not a new case where the Claimants are asserting federal reserved water rights under the *Winters* doctrine for the first time. *See id.* at 1169 ("We conclude that the district court was correct that it retained jurisdiction to modify water rights under the decree, but erred in concluding the counterclaims constituted a 'new action.'"). Instead, the Claimants are asking this Court to exercise its equitable power to modify its existing judgment – the 1936 Decree – to recognize additional reserved water rights in their favor. *See*, MJOP at p. 1. Because of this unique procedural posture (modification of an existing judicial decree), equitable considerations, such as waiver, estoppel and laches, apply, notwithstanding the Claimants' misplaced and disjointed arguments to the contrary. *See, e.g., Arizona v. California*, 460 U.S. 605, 619 (1983) ("Detrimental reliance is certainly relevant in ***a balancing of the equities when determining whether changed circumstances justify modification of a decree***.") (emphasis added). This Court should, therefore, deny the MJOP as it relates to the Principal Defendants' equitable affirmative defenses.

1. The Principal Defendants Have Properly Asserted Equitable, Affirmative Defenses.

This lawsuit began in 1924; however, the Claimants did not make the water right claims at issue now until the early 1990s – more than fifty years after this Court entered the 1936 Decree and retained jurisdiction to modify it in certain circumstances. Relatively recently, on May 3, 2019, the Claimants filed their amended counterclaims for the additional water rights they seek, *see* ECF 2477-1 (*Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe*); ECF 2479 (*Second Amended Counterclaim of the Walker River Paiute Tribe*), along with a detailed statement those claims. *See,*

e.g., The United States' Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe (ECF 2476); *The Walker River Paiute Tribe's Joinder in the United States' Detailed Statement of Water Right Claims* (ECF 2480). Although the Claimants' pending water right claims are styled as counterclaims, they are in reality nothing more than a post-judgment request for this Court to exercise its equitable power to modify the 1936 Decree. *See*, *Motion* at p. 1; *see also Walker River Irrigation Dist.*, 890 F.3d at 1169-72. However, pursuant to this Court's *Stipulated Scheduling Order and Discovery Plan* dated March 7, 2019 (ECF 2437), the Principal Defendants were obligated to answer the Claimants' amended counterclaims as though they were counterclaims. The Principal Defendants accordingly did so and, as required by Fed. R. Civ. P. 8(c), asserted affirmative defenses and equitable considerations that are applicable in these post-judgment proceedings. The Claimants now argue they are entitled to judgment on all of these affirmative defenses as a matter of law because equitable considerations do not apply to their reserved water right claims. *See*, MJOP at p. 1. They are wrong.

In *Arizona II*, the Supreme Court was required to address challenges to a final report from a special master that concluded that certain Indian tribes (at the behest of the United States) were entitled to additional water rights over and above those water rights previously awarded in a 1964 judicial decree governing the Colorado River. *See id.* at 613. The Court defined the issue as follows: "whether the determination of practicably irrigable acreage within recognized reservation boundaries should be reopened to consider claims for 'omitted' lands for which water rights could have been sought in the litigation preceding the 1964 adjudication and decree." *Id.* at 615. While the Court found it had the power to modify the 1964 decree under the terms of that decree, it nevertheless determined that the Court's power to modify the decree was limited by general principles of finality and repose, which precluded re-litigation of the irrigable-acreage question. *See id.* at 619-26. The Court accordingly sustained the states' challenges to the special master's

report on that issue, effectively denying the United States' reserved water right claims. *See id.* at 628.

In reaching this conclusion, the Court emphasized the equitable considerations that come into play when a party seeks to modify an existing (and longstanding) water right decree and such a request is, as here, subject to principles of finality and repose. The Court also made clear that such equitable considerations apply with equal force to the United States acting on behalf of Indian tribes. For example, the Court stressed the importance of the ability of all parties to rely on judicial decrees because there is a need for certainty in the holding and use of water rights, especially in the arid West. *See id.* at 620-21. The Court also noted litigation concerning water rights must provide necessary assurances to private interests of the amount of water they can anticipate to receive. And, while the Court was not required to reach the issue of detrimental reliance, it explained the "bitterly contested question" of detrimental reliance on the decree in that case "***is certainly relevant in a balancing of the equities when determining whether changed circumstances justify the modification of a decree***." *Id.* at 626 (emphasis added). In fact, the Court explained further that the finality of a water rights decree must be respected broadly, not just when equities weigh against its modification. *See id.* Thus, the Court made clear in *Arizona II* that when a party (even the federal government on behalf of Indian tribes) seeks to modify an existing judicial decree governing water rights, such a request is (1) subject to principles of finality and repose, (2) necessarily requires a balancing of equities, and (3) may be denied (even if based on federal, reserved rights) when the equities preclude the requested modification.[9]

[9] The Court in *Arizona v. California*, 460 U.S. 650, 627 n.19 (1983), even went so far as to reject the dissent's argument that the "balance of hardships" weighed in favor of the Indian tribes. Accordingly, the Court repeatedly embraced the application of equitable considerations, including a balancing of hardships, detrimental reliance, and delay, in cases where a party seeks to modify a water rights decree.

Here, the Claimants' request to modify the 1936 Decree to recognize additional water rights in their favor requires, like the modification sought in *Arizona II*, a balancing of the equities. In fact, a balancing of equities is required more so in this case than in *Arizona II* because many of the Claimants' current claims could have been raised ***before*** the 1936 Decree was finalized. Accordingly, consistent with the Court's opinion in *Arizona II*, the Principal Defendants have asserted affirmative defenses in response to the Claimants' amended counterclaims because (i) the Principal Defendants are entitled to present their equitable defenses as this Court evaluates whether it should or should not exercise its equitable power to modify the 1936 Decree and recognize additional reserved water rights in favor of the Tribe that could have been asserted long ago, and (ii) the failure to assert such defenses in a required responsive pleading can result in a waiver of those defenses. *See, e.g.*, 2 Moore's Federal Practice – Civil § 8.08[3] (failure to raise affirmative defense in responsive pleading may result in wavier of the defense). The Principal Defendants have not, therefore, asserted affirmative defenses improperly but have proactively raised the equitable issues this Court must consider to timely frame those issues, conduct discovery on them, and further avoid any future argument that those equitable issues have somehow been waived.

Moreover, even if laches, waiver, and estoppel do not apply in the most technical sense to the Claimants' claims, they, like *res judicata*, at a minimum inform the principles of finality and repose that do limit and preclude the Claimants' claims. Consequently, to assert principles of finality and repose as a defense in the most complete sense, the Principal Defendants must assert waiver, estoppel and laches as defenses that are embedded in the principles of finality and repose.

Underscoring this conclusion is the Ninth Circuit's decision in this case that remanded these post-judgment proceedings back to this Court. The Ninth Circuit analogized these proceedings to those in *Arizona II*, explaining "[b]ecause the Supreme Court in *Arizona II* relied on a reference to modification of the *Arizona I* decree to conclude that it retained jurisdiction to

hear a suit asserting claims for additional rights, we conclude the 1936 Decree may properly be read as also retaining jurisdiction in the Nevada district court to litigate additional rights in the Walker River Basin." *Walker River Irrigation District*, 890 F.3d at 1171. Thus, just as the Supreme Court made clear in *Arizona II* that equitable considerations were appropriate in determining whether the decree should be modified in that case, the Ninth Circuit has made clear that the same equitable considerations apply now. This Court must, therefore, entertain the Principal Defendants' affirmative defenses of laches, estoppel and waiver, to determine whether the 1936 Decree should be modified to recognize any additional federal reserved water rights the Claimants seek to establish.

In fact, the Ninth Circuit made clear that "[o]n remand, the district court should 'subject [any potential] *res judicata* decision to the rigors of the adversarial process.'" *Walker River Irrigation District*, 890 F.3d at 1172. The court then stated that because the counterclaims were not a new action, traditional rules concerning issue and claim preclusion do not apply. *See id.* "Instead, the counterclaims are 'subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" *Id.* at 1173 (quoting *Arizona II*, 460 U.S. at 619). To subject the counterclaims to the rigors of the adversarial process on *res judicata* issues, as the Ninth Circuit has instructed, with due consideration to finality, the presence or absence of changed circumstances, and/or the foreseeability of issues not previously litigated, this Court must evaluate the merits of the affirmative defenses the Principal Defendants have lodged. Changed circumstances, finality, and foreseeability all implicate the legal doctrines of estoppel, waiver and laches.

For example, the Claimants ask this Court to recognize their purported right to store water in Weber Reservoir – a reservoir that was built starting in 1933 and completed in 1937 before the Ninth Circuit's 1939 decision in *Walker River I*. *See*, Detailed Statement (ECF 2476) at pp. 4-6.

"The United States and Tribe seek a storage right to the capacity of the reservoir (approximately 13,000 acre-feet ("af")) throughout the year and the right to carry stored water over to following years." *Id.* at p. 6. Guardedly, the United States prefaces their explanation of this alleged storage right with the following statement: "For decades prior to the construction of Weber Reservoir, the United States Indian Service . . . contemplated the construction of a reservoir on the Reservation to increase the water supply to the Tribe." *Id.* at p. 4. The historical record, however, reveals something very different and concrete, supporting the Principal Defendants' Delay Defenses.

As early as June 19, 1900, the United States recognized that a dam or reservoir on the Reservation would be needed to meet the irrigation needs of the Tribe. *See, Northern Paiute Nation*, 8 Cl. Ct. at 472. In fact, analysis showed in 1905 that sufficient natural flow, surface water rights could likely not be established in favor of the Tribe, and therefore a reservoir and/or groundwater wells would be needed for the Reservation. *See id.* at p. 476. Nonetheless, by no later than 1906, the United States contractually obligated itself to provide the Tribe with an irrigation system that would serve 10,000 acres at the Reservation. *See id.* at pp. 476-478. The United States thereafter initiated this lawsuit in 1924, seeking a surface water right for the Tribe totaling 150 cfs with an 1859 priority for 11,000 acres. At that time, the United States knew that it might not win on that claim, but made the strategic decision to sit on (and not raise) any claim for a storage water right, believing that such an alternative theory might jeopardize its request for 150 cfs. *See* pp. 10-11 above. In addition, the Assistant Secretary of the Interior observed at that time that any reservoir would be used only to regulate the available flow of the Walker River. Thus, the United States proceeded with known litigation risks in this precise case, resulting in the 1936 Decree that granted the Tribe its 1859 right to 26.25 cfs for 180 days for 2,100 acres (rather than 150 cfs for 11,000 acres). The Decree, of course, did not recognize a storage right at Weber Reservoir or any groundwater rights for the Tribe (assuming *arguendo* those could have been

established) because neither the Tribe nor the United States sought those rights for apparent strategic reasons. Now, nearly 100 years have passed since the 1936 Decree was issued with the Claimants sitting on their alleged rights and needs, and the Claimants want this Court to grant them equitable relief from the 1936 Decree while simultaneously precluding the Principal Defendants from developing through discovery the complete factual record on issues related to laches, waiver and estoppel. The Claimants cannot do this, and this Court should not dismiss any affirmative defenses before discovery occurs given the factual and procedural complexity this case entails.[10]

The Ninth Circuit's decision in *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047 (9th Cir. 1993), provides further guidance on this issue and similarly instructs that these affirmative defenses are properly plead and should not be struck. In *Alpine*, a water right holder sought to modify the 1980 Alpine decree that comprehensively adjudicated water rights on the Carson River. Modification of the decree was sought pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, which allows a party to seek relief from a final judgment for any reason that justifies relief. *See*, Fed. R. Civ. P. 60(b)(6). The district court granted the requested relief, and the Ninth Circuit reversed on appeal. The Court of Appeals noted that relief under Rule 60(b)(6) is relief to be used "sparingly as an ***equitable remedy to prevent manifest injustice***." *Id.* at 1049 (emphasis added). The court then held that such relief was not available to the movant in that case because there was no showing of injury nor any showing that circumstances beyond the moving party's control prevented timely action to protect its interests and seek modification of the decree. *See id.* The court finally explained "there is no reason for holding litigants in complex

[10] It is indeed apparent that the MJOP is designed not so much to dismiss certain defenses, but to narrow the scope of discovery at this early juncture and preclude development of the factual record this Court needs to evaluate the Claimants' claims on the merits. The Claimants do not want a full factual record because, as shown above, even cursory developments of the historical and procedural background of the Reservation and this lawsuit begin to defeat the Claimants' belated request for additional water rights.

water rights litigation to any lesser standard than litigants in other proceedings. ***Participants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments***." *Id.* at 1050 (emphasis added) (citing *Nevada v. United States*, 463 U.S. 110, 128-30 (1983)).

While the Claimants' claims for additional federal reserved water rights are couched as counterclaims, they are not, as the Ninth Circuit has already held, a new action or stand-alone, independent claims for relief. Rather, they are, as the Claimants admit and the Ninth Circuit has held, a request to modify this Court's existing judgment – the 1936 Decree. Accordingly, the Claimants' current federal water right claims, though couched as counterclaims, are a request for relief from the 1936 Decree analogous to (if not properly characterized as) a motion for relief pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. This post-judgment relief, as the Ninth Circuit explained in *Alpine Land & Reservoir Co.*, is an equitable remedy subject to equitable considerations, including, but not limited to, whether the Claimants justifiably or inexcusably sat on their claims for over fifty years after the 1936 Decree was entered and whether the Principal Defendants justifiably relied on the finality of the 1936 Decree. Accordingly, the Principal Defendants have properly alleged laches, waiver and estoppel as affirmative defenses because the Claimants are seeking to undo the 1936 Decree based on this Court's equitable power to modify that decree. The Claimants are not, as a result, entitled to the dismissal of the equitable defenses they invited and now require this Court's consideration on remand from the Ninth Circuit.

Indeed, a motion for relief from a judgment pursuant to Rule 60(b)(6) must be made within a reasonable time. *See*, Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within ***a reasonable time***—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.") (emphasis added). "What constitutes a reasonable time 'depends on the facts of each case.' Major considerations … are whether the [non-

moving party] was prejudiced by the delay and whether the [moving party] had a good reason for failing to take action sooner." *In re Pac. Far E. Lines, Inc.,* 889 F.2d 242, 249 (9th Cir. 1989); *see also, Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014) ("Considerations of ***repose and finality*** become stronger the longer a decision has been settled."). The law governing Rule 60 motions accordingly makes clear by analogy (if not directly) that the Principal Defendants' equitable defenses are proper and cannot be dismissed on the pleadings. The Claimants, as noted above, are seeking relief from an existing decree analogous to the Rule 60(b)(6) motion that was filed in *Alpine Land & Reservoir Co.* And, the Ninth Circuit has already determined that their requested relief is subject to the principles of finality and repose under *Arizona v. California*, which require a balancing of the equities. Accordingly, the Claimants cannot insulate themselves from equitable defenses and considerations because they invoked the equitable powers of this Court to modify the 1936 Decree more than fifty years after that decree was entered.

As even the Restatement (Second) of Judgments states: "relief from a judgment will be denied if: (1) The person seeking relief failed to exercise reasonable diligence in discovering the ground for relief, or after such discovery was unreasonably dilatory in seeking relief; or (2) The application for relief is barred by lapse of time; or (3) Granting the relief will inequitably disturb an interest of reliance on the judgment." Restatement (Second) of Judgments § 74. The Restatement characterizes these considerations "***as ones of affirmative defense against an application for relief***." *See id.* at Cmt. b. (emphasis added) ("The matters referred to in this Section are usually treated as ones of affirmative defense against an application for relief."). The Claimants fail in the MJOP to address the procedural posture of their claims, ignore what principles of finality and repose actually entail, and disregard how their "counterclaims" must, in light of the Ninth Circuit's decision remanding these proceedings back to this Court, be evaluated under the same standards that govern relief from existing judgments. Thus, the Claimants have not, as they

suggest, constructed a legal wall that precludes equitable defenses; they have, instead, sent an engraved invitation to assert (and ultimately prove) that the Claimants' claims (in addition to being factually and legally deficient) are barred by the doctrines of laches, waiver and estoppel. And, more importantly, the Claimants have expressly asked this Court to make these determinations by invoking its equitable powers.

2. The Claimants Have Acknowledged That Equitable Defenses May Bar Their Claims.

After Judge Jones dismissed the Claimants' counterclaims for additional water rights because he found the claims constituted a new action that was barred, the Claimants appealed, arguing "a court charged with ongoing administration of a decree has broad authority to alter or modify the decree **in light of changed circumstances and consistent with principles of equity**." Opening Brief of the United States at p. 34 (emphasis added) (citing Fed. R. Civ. P. 60(b)(5). In this regard, the Tribe emphasized to the Ninth Circuit that **equitable exceptions** "can sometimes overcome continuing application of *res judicata* and preclusion principles." Opening Brief of Walker River Paiute Tribe at p. 37 (citing Fed. R. Civ. P. 60(b)(5) and *Bellevue Manor Assocs. V. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999) ("Rule 60(b)(5) … creates an exception to the doctrine of claim preclusion and provides parties with standards under which they may attack judgments already deemed final.")). The United States similarly emphasized "[t]he prospective effect of a judgment or decree is open to modification **where deemed equitable under Rule 60(b)**." Opening Brief of the United States at p. 34 (emphasis added) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992)). Accordingly, when it suited their needs to obtain a reversal of Judge Jones, the Claimants emphasized that their current counterclaims were equitable in nature analogous to a motion made pursuant to Rule 60(b) to modify an existing judgment. And they argued they could use equitable considerations to overcome finality. The

Ninth Circuit must have found one of these arguments persuasive because, as noted above, it reversed Judge Jones and held that the counterclaims were not a new action but rather a request to modify the 1936 Decree subject to general principles of finality and repose under *Arizona II*.

Now that the Claimants have secured the reversal of Judge Jones' decision dismissing their claims, they do an about-face, arguing to this Court on remand that a broad trial on the equities of their claims would be improper. *See*, MJOP (ECF 2606) at pp. 6-7. This about-face is plainly improper. *See, e.g., Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996) ("Judicial estoppel … precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."). But, more importantly, it demonstrates, through the Claimants' own admissions, that the Claimants have invoked this Court's equitable power in an attempt to modify the 1936 Decree, requiring this Court to allow the Principal Defendants to assert and develop equitable defenses based on waiver, estoppel and laches. In fact, it appears the Claimants want a one-sided contest where they can present any equities that may support their claims for more water rights without regard to finality, while they simultaneously claim the Principal Defendants are precluded from developing any equitable defenses in response, including those defenses embodied in the principles of finality and repose. This is nonsense, and further demonstrates that the Claimants' motion should be denied.

Furthermore, the Claimants also argued to the Ninth Circuit, in seeking reversal of Judge Jones, that Judge Jones erred in relying on the doctrine of laches because laches is a waivable, affirmative defense that was not asserted prior to his ruling. *See*, Opening Brief of the United States at pp. 55-56; Opening Brief of the Walker River Paiute Tribe at pp. 36-38. Thus, in securing reversal of Judge Jones and remand to this Court, the Claimants suggested not only that their claims were equitable and analogous to a Rule 60(b) motion, but also subject to equitable defenses at the appropriate time. And, they made clear that if those defenses were not raised in responsive

pleadings, they would be considered waived. Now that the Principal Defendants have raised equitable defenses that apply directly to the Claimants' claims (or indirectly through general principals of finality and repost), the Claimants cry foul. The Claimants cannot, however, cry foul because this Court must consider the equities associated with the Claimants' reserved water right claims, and these equities necessarily include the defenses of waiver, estoppel and laches.

B. Equitable Defenses Can Be Asserted Against the United States.

Citing *United States v. California*, 332 U.S. 19 (1947), and *United States v. Summerlin*, 310 U.S. 414 (1940), the Claimants argue the "Supreme Court has long held that equitable defenses do not apply to the United States when acting in its sovereign capacity." Motion at p. 7. They accordingly argue that the Principal Defendants' equitable defenses are not available as a matter of law. The Claimants are again wrong.

Neither *United States v. California*, 332 U.S. 19 (1947), nor *United States v. Summerlin*, 310 U.S. 414 (1940), stand for the broad proposition for which they are cited in the MJOP. In *Summerlin*, the Court determined that a claim by the United States was not and could not be barred by a state statute of limitation. *See Summerlin*, 310 U.S. at 417. And, in *United States v. California*, the Court did not flatly reject equitable defenses; it found there was no waiver on the part of the United States even if the defense was available. *See California*, 332 U.S. at 39 ("Assuming that Government agents could by conduct, short of a congressional surrender of title or interest, preclude the Government from asserting its legal rights, we cannot say it has done so here."). Accordingly, neither *United States v. California*, 332 U.S. 19 (1947), nor *United States v. Summerlin*, 310 U.S. 414 (1940), flatly prohibit equitable defenses against the United States.

Underscoring this conclusion is the Supreme Court's more recent decision in *Heckler v. Community Health Services*, 467 U.S. 51 (1984). In that case, "[t]he question presented [was] whether the Government is estopped from recovering [medicare] funds because respondent relied

on the express authorization of a responsible Government agent in making the expenditures." *Id.* at 53. While the Court answered this question in the negative, it did so not because estoppel was unavailable as defense but because the record did not support the estoppel argument. *See id.* at 61. More importantly, the Court did not hold that equitable defenses, like estoppel, were unavailable as a matter of law. Instead, it left that question open, explaining that circumstances might establish equitable defenses against the United States in other cases. The Court explained:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant … to say that there are ***no cases*** in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Id. at 60-61 (emphasis in original). Thus, rather than adopting a blanket prohibition against equitable defenses being asserted against the United States, the Supreme Court has stated that equitable defenses can be successful in a particular case to foster decency, honor, and reliability in the citizenry's dealings with its government.

This citizenry previously dealt with the Claimants' reserved federal water right claims when the 1936 Decree was litigated and ultimately finalized, recognizing reserved federal water rights in favor of the Tribe with the earliest priority. Now, nearly one hundred years later the citizenry must again deal with a new round of federal reserved water right claims because the Claimants are still dissatisfied and want the 1936 Decree modified. This is, accordingly, the precise case under *Heckler* where equitable defenses can be asserted and may ultimately prevail. Indeed, the Claimants have failed to cite a single case where the United States sought to modify

an existing judgment or water rights decree and the court disregarded the equities involved or equitable defenses that might apply. Accordingly, the Claimants base their entire argument on case law that is procedurally distinguishable from the facts and circumstances of this case.

Furthermore, the Claimants fail to explain how their claims are on the one hand "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated," *Walker River Irrigation District*, 890 at 1173, but on other hand immune from equitable defenses like laches, waiver and estoppel. The Claimants fail to provide such an explanation because none exists. The Principal Defendants have properly plead the defenses of laches, waiver and estoppel because those defenses are all necessarily implicated in determining, through the rigors of the adversarial process the Ninth Circuit has directed this Court to conduct, whether the Claimants' belated water right claims can overcome finality and repose principles. Therefore, there is no blanket prohibition against these affirmative defenses as the Claimants self-servingly suggest by ignoring applicable law, decisions in this particular case, and the procedural posture of these proceedings.

C. *Winters* and Its Progeny Do Not Preclude the Principal Defendants' Defenses.

Citing *Winters v. United States*, 207 U.S. 564 (1908), *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), and *Cappaert v. United States*, 426 U.S. 128 (1976), the Claimants assert that reserved water rights cannot be denied or limited based on equitable considerations. *See,* MJOP at pp. 9-10. This assertion misstates the law.

First and foremost, in *Arizona II*, which the Claimants do not discuss, the Supreme Court specifically overturned an award of additional reserved water rights to Indian tribes that were based on a new calculation of practicably irrigable acres. The Court overturned the award of these additional reserved water rights because principles of finality and repose, as well as other equitable considerations, precluded re-litigation of the irrigable-acreage question. *See, Arizona II*, 460 U.S.

at 625-26. The Court explained: "It would be counter to interests of all parties to this case to open what may become Pandora's box, upsetting the certainty of all aspects of the decree." *Id.* at 625. Thus, in the one case most analogous to this one and the one case most relied upon by the Ninth Circuit in remanding these proceedings to this Court, the Supreme Court actually denied *Winters* rights based on the legal and equitable considerations that applied there and undoubtedly apply here. Accordingly, it is inaccurate for the Claimants to represent to this Court that the *Winters* rights the Claimants seek cannot be denied or limited based on the Principal Defendants' Delay Defenses.

Furthermore, in *Winters*, the Court did not reject equitable considerations out of hand. Instead, the Court found that the agreement between the Indian tribe in that case and the United States, creating the Fort Belknap Reservation, controlled. *See, Winters*, 207 U.S. at 576-77. And, the Court found that the agreement required recognition of water rights in favor of the tribe because such rights were necessarily reserved when the reservation was created. The principal argument against the tribe was that it was not the intention of the government to reserve any of the waters of the Milk River to fulfill the purpose of the reservation, as the tribe had access to springs and several streams on the Reservation. *Id.* at 570. The Court rejected this argument as contrary to the agreement that established the reservation. *Winters* does not, therefore, stand for the absolute, unwavering proposition that equitable defenses are unavailable when, as here, the United States seeks to modify an established adjudication of water rights.

Similarly, *Arizona I* does not support the Claimants' contention that equitable defenses are unavailable in response to their quest to modify the 1936 Decree. In *Arizona I*, the State of Arizona argued that the doctrine of equitable apportionment should be used to divide Colorado River water between the State of Arizona and Indian reservations. *See, Arizona I*, 373 U.S. at 597. The Court rejected this argument not because it was an equitable defense but because the "doctrine of

equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties. An Indian Reservation is not a State." *Id.* In addition, the Court explained that "even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations." *Id.* Thus, the Supreme Court's refusal to apply equitable apportionment in *Arizona I* had nothing to do with the availability of equitable defenses in this case.

Finally, *Cappaert* involved an initial proceeding by the United States to establish a reserved water right for Devil's Hole National Monument. The State of Nevada did not raise any affirmative defenses; instead, it argued that the reserved water rights involved a balancing of competing interests. The Court explained, however, that "whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139. The Court did not have occasion to determine (and did not determine) whether equitable defenses would apply in a case such as this one where the United States seeks to modify an existing decree that already determined the extent of reserved federal water rights. Accordingly, *Cappaert* is inapposite and does support the Claimants' motion.

D. Ninth Circuit Case Law Does Not Preclude the Principal Defendants' Defenses.

1. The Ninth Circuit Did Not Previously Reject the Principal Defendants' Defenses.

Citing *United States v. Walker River Irrigation District*, 104 F.2d 334 (1939) (*Walker River III*), the Claimants argue that "[t]he Ninth Circuit already rejected equitable defenses in this case. The law-of-the-case doctrine dictates that this Court is precluded from reconsidering the issue."

Motion at p. 13. Tellingly absent from the Claimants' motion, however, is any explanation as to how the Ninth Circuit, in 1939, rejected defenses that were not made until 2019, and were only made then in response to claims filed in the 1990s – fifty-plus years after *Walker River III* was decided. The Claimants offer no explanation as it relates to this timeline because the Ninth Circuit has not rejected the Principal Defendants' affirmative defenses.

In *Walker River III*, water right users pointed "to the heavy expense of reclaiming their land and to the conduct of the Government in permitting and encouraging settlement. … They urge on these grounds that the Government is estopped to question the priority of their appropriations." *See, Walker River III*, 104 F.2d at 339. The Ninth Circuit found the argument unavailing, noting that "[t]he settlors who took up lands in the valley of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below." *Id.* This finding is a far cry from a determination that "the settlors" could not thereafter never rely on the finality of the 1936 Decree and assert equitable defenses nearly one hundred years later, when, unbeknownst to the court in *Walker River III*, the Claimants would seek to modify the Decree to establish more reserved water rights that could have been sought even before *Walker III* was decided.

In fact, *Walker River III* suggests that the Claimants must actually overcome the Principal Defendants' affirmative defenses. The court in *Walker River III* established the principle that water right users cannot blindly ignore others only to then assert (based on that willful blindness) that the equities weigh in their favor. Yet, that is precisely what the Claimants do now. They want modification of the decree without regard to the impact it may have on any other water right users and blindly ignore what those water rights users have done since the 1936 Decree was finalized. And, they want this Court to follow them down this blind path without so much as considering certain affirmative defenses, the Claimants' inaction, and the Principal Defendants' reliance on the

finality of the 1936 Decree. This Court cannot follow the Claimants down this path even under *Walker River III*.

Moreover, the parties now have *Walker River IV*, where the Ninth Circuit held that the Claimants' water right claims are subject to principles of finality and repose under *Arizona II*. This holding from 2018 makes clear, as discussed at length above, that these affirmative defenses are not only proper but also necessary to subject the Claimants' claims to the rigors of the adversarial process. Thus, the Ninth Circuit has not precluded these equitable defenses; it has embraced them and directed this Court to entertain them.

2. Ninth Circuit Precedent Does Not Preclude the Principal Defendants' Defenses.

The Claimants finally argue that additional case law in the Ninth Circuit precludes the Principal Defendants' affirmative defenses. *See*, MJOP at pp. 13-16. Yet, again, however, the myriad of cases the Claimants cite do not involve what the Claimants seek here – post-judgment modification of an existing judicial decree. Nor do those cases involve claims that were subject to the principles of finality and repose and the equitable considerations those principles entail. Accordingly, the Claimants have cited once more inapposite and distinguishable authority that does not apply to these proceedings.

For instance, in *United States v. Washington*, 853 F.3d 946 (2017), Indian tribes had entered into various treaties, pursuant to which the tribes were guaranteed certain fishing rights in exchange for forfeited lands. *See id.* at 953-54. For over a hundred years, there was conflict between the State of Washington and the tribes over those fishing rights, prompting the United States to file suit to resolve the conflict. Washington asserted waiver as a defense, and the Ninth Circuit found the defense unavailable because "[t]he United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights." *Id.* at 967. In

contrast to the United States in *Washington*, the Claimants are not seeking to enforce treaty rights in this case. They are, instead, seeking equitable relief from an existing judgment to obtain new reserved water rights that are not recognized in the 1936 Decree.

The Claimants also cite *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (1956), *United States v. City of Tacoma*, 332 F.3d 574 (2003), and *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (1985), to argue the Principal Defendants' affirmative defenses fail. But, these cases, like *United States v. Washington*, are easily distinguishable from the proceedings before this Court. First, none of the cases involve a post-judgment request to modify an existing water rights decree to recognize additional reserved water rights. Second, none of the cases involve a situation where the United States sought federal reserved water rights, obtained them, and then filed for more rights over 50 years later. In fact, in *Walton*, all of the parties derived their water rights of equal priority from reserved water rights, requiring proportional reduction in their rights if sufficient water was unavailable to serve them. Accordingly, none of the cases the Claimants cite in the MJOP stand for the proposition that equitable defenses are unavailable when the United States or an Indian tribe seeks to modify an existing water rights decree and the claims are, as clearly the case is now, subject to principles of finality and repose.

Stated differently, if the United States, on behalf of the Tribe, was currently seeking to enforce the 1936 Decree as it is written (e.g., 26.25 cfs for 180 days) after years of failing to do so, cases like *United States v. Washington*, 853 F.3d 946 (2017), might preclude equitable defenses such as laches, waiver and estoppel. But, that is not what the United States and the Tribe are attempting to do. They are, instead, seeking judicial recognition of additional reserved water rights by way of modification of the Decree by asking this Court to exercise its equitable power to modify the 1936 Decree. Given this ask, the Claimants claims are subject equitable considerations, and

the Principal Defendants' affirmative defenses are proper. The Claimants' Motion as it relates to the Principal Defendants' equitable defenses of laches, waiver and estoppel should be denied.

V. THE IMPLIED RESERVED WATER RIGHTS DOCTRINE DOES NOT PROVIDE A FEDERAL RESERVATION WITH A RIGHT TO GROUNDWATER AND AN ENTIRELY SEPARATE RIGHT TO SURFACE WATER.

The Principal Defendants have asserted two related affirmative defenses concerning the implied reservation of water rights doctrine and groundwater. Those related defenses are based upon the principle that there is a single claim for an implied reserved water right for any federal reservation, not two entirely separate claims, one for surface water and one for groundwater, each of which may be brought independent of the other decades apart, as is the case here. *See, e.g.*, ECF 2524, Eleventh and Twelfth Affirmative Defenses.

This principle is consistent with the factors used to determine if two actions involve the same claim. The Ninth Circuit considers four factors: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. The last of those criteria is the most important. *See, Friend for Animals v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992); *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002). It is clear that when the United States seeks an implied reserved water right for a reservation, the transactional nucleus of facts, *i.e.*, the fact, date, purpose of reservation and the quantity of water needed to satisfy that purpose will be the same regardless of the source of the water, surface or ground water.

These defenses need to be placed in the context of claims being made by the Claimants. Leaving aside the claim for an implied reserved right to irrigate 1,500 acres of the 1936 added lands, which is not consistent with the primary purpose of the addition of those lands to the

Reservation, the Claimants also seek implied reserved rights to groundwater for watering grazing livestock when it may be that existing surface supplies are adequate. They also seek a groundwater right for the original Reservation with an 1859 priority for domestic, commercial, municipal and industrial use and for irrigation. *See, supra* at 3-4.

The Claimants place principal reliance on *Agua Caliente Band of Cahuilla Indians vs. Cochella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017). That case does not hold that a federal reservation has separate implied reserved water rights, one for surface water and one for groundwater, which may be asserted in separate actions brought decades apart. It recognizes that when lands are reserved, water is only reserved to the extent necessary to accomplish the purpose of the reservation. 849 F.3d at 1268. It also recognizes that in many locations throughout the West, groundwater is the only viable water source. The court noted that surface water in the Cochella Valley is minimal or entirely lacking for most of the year. *Id.* at 1271. In such a situation, a reservation without an adequate source of surface water must be able to access groundwater.

The *Agua Caliente* court refers to and relies on the Arizona Supreme Court's decision in *In Re: General Adjudication of All Rights to Use of Water in the Gila River*, 989 P.2d 739 (Az. 1999). There, the Arizona court also recognized that some reservations lack perennial streams, and depend for present or future survival substantially or entirely upon pumping of underground water. *See, Gila River*, 989 P.2d at 746. It noted that the significant question for the purpose of the reserved rights doctrine is not whether water runs above or below the ground, but whether it is necessary to accomplish the purpose of reservation. *Id.* at 747.

Here, with respect to the Reservation as it existed throughout the 1924 action, the Claimants seeks a second bite at the apple. The implied reserved water right for the Reservation as it existed at that time was quantified by the Decree, and there was not then, nor could there be now, any assertion that there was or is inadequate surface water to satisfy it. It has been satisfied

by surface water since the Decree was entered over 80 years ago. Having failed to obtain a surface water right at that time to irrigate 10,000 acres, the Claimants now assert entitlement to irrigate another 1,238 acres with groundwater. They also seek an additional 641 acre feet of groundwater for domestic, commercial, municipal and industrial use and for stockwater, even though the existing Decree provides for a right to irrigate 2,100 acres of land with an 1859 priority and 26.25 cubic feet per second of water and also provides for water reasonably necessary for domestic and stock watering uses during the non-irrigation season.

Although additional information is needed, and it cannot be determined at this time, it may also be that water claimed to have been reserved from groundwater to water livestock on the added grazing lands is, and has been, satisfied by surface flows. Thus, again, a separate implied reserved right to groundwater from future well sites is not necessary.

In short, it is and will be the position of the Principal Defendants that, under the facts and circumstances of this case, there is no separate reserved right to groundwater for the original Reservation, and that potentially there is no separate reserved right to groundwater for the grazing lands withdrawn for or added to the Reservation after the Decree was entered. Those defenses are not invalid as a matter of law and should not be struck from their answers.

VI. IN AUTHORIZING THE ADDITION OF LANDS TO THE RESERVATION IN 1936, CONGRESS PRESERVED THE RIGHT OF THE STATE OF NEVADA TO REGULATE THE USE AND APPROPRIATION OF WATER ON SUCH LANDS.

The Claimants are correct that, even after Nevada became a state, the United States continued to have the power to reserve water for its property under the Property Clause. *See, e.g., Arizona v. California*, 373 U.S. 546, 597-598 (1963); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). However, the cases on which they rely are not determinative of the issue here. The statute which authorized the addition of lands to the

Reservation in 1936 implies, if it does not do so directly, that Congress did not intend to exercise its power (implied or otherwise) to reserve water with respect to the lands to be added.

The defense asserting that the United States had no power to reserve water after Nevada became a State is viable with respect to the lands added to the Reservation in 1936 and 1972 pursuant to the 1936 Act, 49 Stat. 1806, and the related Executive Orders. In the 1936 Act, Congress allowed the described lands to be set aside as an addition to the Reservation, with the proviso that the addition not affect any valid rights initiated prior to the Act becoming law. *See*, 49 Stat. at 1806-1807. Until those lands were added to the Reservation, they were part of the public domain and open to entry under the land laws of the United States. More importantly, in Section 2 of the Act, Congress reserved title to all minerals in said lands, made the lands "subject to all forms of mineral entry or claims under the public land mining laws." It also recognized that "mineral patents" could be granted. Id.

The Act authorizing the admission of Nevada into the Union provided that it should be "admitted . . . on equal footing with the original states, in all respects whatsoever." 13 U.S. Stat. at Large p. 30, Sec. 1. With the exception of certain lands granted to Nevada for schools and other purposes, the bulk of the public lands within Nevada were in effect reserved to the United States. However, the Act was silent as to water. Legal commentators in the late 19th and early 20th centuries concluded that in such a situation, under the equal-footing doctrine, the Western States acquired exclusive sovereignty over their unappropriated waters. *See, e.g., California v. United States*, 438 U.S. 645, 654-655 (1978).

In *California v. United States*, 438 U.S. 645 (1978), the Supreme Court traced the history of the relationship between the United States and the Western States concerning water law. Noting the relationship was "long and involved," it recognized that "through it runs a consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653-654. As an

example, the Court specifically referenced the Mining Act of 1866. 438 U.S. at 656. It noted that that Act was not a "grant of water rights under federal law," but rather a recognition of the law with respect to the use of water which had grown up as a matter of custom in the States and territories. *Id.*

It also referenced the Desert Land Act of 1877 and its interpretation by the Court in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). There, the Supreme Court decided, that as a result of that Act, if not before, there was "a severance of all waters upon the public domain, and not theretofore appropriated, from the land itself." 295 U.S. at 158. The non-navigable waters thereby severed "were reserved for the use of the public under the laws of the states and territories." 295 U.S. at 162; *see also, California*, 438 U.S. at 658.

Against that historic background of Congressional deference to state water law, the *California* court interpreted Section 8 of the Reclamation Act of 1902 as requiring the United States, in connection with reclamation projects, to comply with state water law in all respects not directly inconsistent with Congressional directives. *California*, 438 U.S. at 678. Although not framed nearly as clearly and directly as Section 8 of the Reclamation Act, the relevant Congressional provisions in the 1936 Act at issue here should be similarly construed.

In enacting its comprehensive water law in 1913, the Nevada legislature declared "the water of all sources of supply within the boundaries of the State above or beneath the surface of the ground belongs to the public." N.R.S. 533.025. It also provided that any person who wishes to appropriate those public waters must first apply to the State Engineer for a permit to do so. N.R.S. 533.325. The valid rights referenced in the 1936 Act include those of the State of Nevada to regulate the use of water within the State as set forth in its 1913 Water Law. As a result of the provisions in the 1936 Act protecting valid rights and authorizing entry under the mining laws of the United States, Congress intended that the right to use and appropriate water on the lands added

1 to the Reservation under the authority of the 1936 Act were subject to the laws of the State of
2 Nevada and could not be impliedly reserved by the United States. The affirmative defense at issue
3 should be construed accordingly, and as so construed is not subject to being dismissed under the
4 MJOP.
5
6 **VII. CONCLUSION.**
7 When the affirmative defenses at issue are construed in the light most favorable to the
8 Principal Defendants, as they must be, they may defeat the Claimants' claims in whole or in part.
9 Therefore, the MJOP must be denied. To the extent that the Court determines that any of those
10 defenses, as plead, are deficient, or not entirely consistent with the facts and law set forth herein,
11 the Court may and should grant the Principal Defendants leave to amend their answers to correct
12 those deficiencies.
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14 Dated: May 19, 2020.
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DECLARATION OF GORDON H. DePAOLI

Under penalty of perjury of the laws of the State of Nevada, GORDON H. DePAOLI states:

1. I caused Exhibits 1 through 14 to be assembled.

2. An Index to the Exhibits is set forth on pages vii and vii herein following the Table of Authorities.

3. Exhibits 1 through 11 are taken from the Walker River Paiute Tribe's Initial Disclosures Document No. A97.

4. Exhibit 12 is taken from the United States Excerpts of the Record in *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161 (9th Cir. 2018).

5. Exhibits 13 and 14 are taken from this Court's file in *United States v. Walker River Irrig. Dist.*, In Equity No. C-125 (D.Nev. 1936).

6. All exhibits are true and correct copies of the original documents from which they are taken.

DATED this 19th day of May, 2020.

/ s / Gordon H. DePaoli
Gordon H. DePaoli

CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 19th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

Further, pursuant to the *Superseding Order Regarding Service and Filing in Subproceeding C-125-B on and by All Parties* (ECF 2100) at 10 ¶ 20, the foregoing does not affect the rights of others and does not raise significant issues of law or fact. Therefore, the Walker River Irrigation District has taken no step to serve notice of this document via the postcard notice procedures described in paragraph 17.c of the *Superseding Order*.

/ s / Gordon H. DePaoli
Gordon H. DePaoli