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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, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	3:73-CV-00127-MDD-WGC **UNITED STATES OF AMERICA AND THE WALKER RIVER PAUITE TRIBE'S JOINT REPLY IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**

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I. Introduction

Plaintiffs' Motion for Judgment on the Pleadings sought judgment against five of Principal Defendants' ("Defendants") twenty-four affirmative defenses: (1) laches; (2) estoppel/waiver; (3) no reserved right to groundwater; (4) the United States is without authority to reserve water rights after Nevada's statehood; and (5) claim and issue preclusion.[1] In the MJOP, Plaintiffs established that these affirmative defenses are unavailable to Defendants as a matter of law. Plaintiffs demonstrated (1) that equitable defenses such as laches and estoppel/waiver are not available against Plaintiffs' water right claims; (2) claim and issue preclusion do not apply; (3) *Winters* Rights attach to groundwater claims; and 4) that the United States had the authority/power to reserve *Winters* Rights in Nevada both before and after statehood.

Defendants filed their Response,[2] but failed to refute that judgment should enter against them on these five affirmative defenses. Indeed, Defendants have strategically abandoned their pled affirmative defenses, choosing instead to address defenses Plaintiffs did not challenge and present non-responsive exhibits to bolster their arguments. On substance, Defendants concede Plaintiffs' arguments regarding claim and issue preclusion, federal reserved rights to groundwater, and the United States' power to reserve water after Nevada's statehood. And rather than refute Plaintiffs' arguments that laches, estoppel, and waiver do not apply against Plaintiffs' water right, Defendants ask the Court to ignore longstanding precedent and manufacture a new

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[1] *Joint Motion for Judgment on the Pleadings* (ECF No. 2606) at 1 and Exhibit 1 (ECF No. 2606-1) ("MJOP").

[2] *Principal Defendants' Opposition to Plaintiffs' Motion for Judgment on the Pleadings* (ECF No. 2619) ("Response").

exception based on the procedural posture of this case. Finally, Defendants offer an expansive view of finality and repose, casting it as an umbrella legal doctrine under which any "principle" of issue and claim preclusion and equitable defenses may find shelter.

Below, Plaintiffs first explain the procedural infirmities presented by Defendants attaching fourteen exhibits to their Response. Next, Plaintiffs will address Defendants' Response associated with the affirmative defenses at issue in this MJOP to reaffirm that Plaintiffs have established, and Defendants have failed to refute, that judgment should enter against each. Finally, Plaintiffs are obliged to deconstruct Defendants' significant mischaracterizations regarding the availability and scope of finality and repose as articulated in *Arizona II*.[3] The Court should reject these arguments as well.

II. The exhibits Defendants attach to their Response are non-responsive material.

Through its MJOP, Plaintiffs seek judgment as a matter of law that five affirmative defenses are unavailable and/or contrary to law.[4] While this Court must accept the allegations in Defendants' pleadings as true,[5] it "is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."[6] Nor is the Court

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[3] *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). As discussed in more detail in Section IV *infra*, *Arizona II* discusses the application of "finality and repose" to decree modifications under the Court's continuing jurisdiction. *Id.* at 619. The case held that only issues already litigated were subject to finality. *Id.* at 626–27. As such, unlitigated claims for additional water rights fell properly within the Court's continuing jurisdiction and were not precluded by the doctrine. *Id.*

[4] *See Carl v. Angelone*, 883 F. Supp. 1433, 1439 (D. Nev. 1995) ("The defendant bears the burden of proof and chooses how to plead [affirmative defenses].").

[5] *Hal Roach Studios, Inc. v. Richard Feiner, Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

[6] *Prothro v. Prime Healthcare Servs.-Reno, LLC*, No. 3:13-CV-108-RCJ-WGC, 2013 WL 5671353, at *3 (D. Nev. Oct. 16, 2013).

required to consider materials, such as Defendants' exhibits, that go beyond the face of the pleadings.[7]

When, as here, affirmative defenses are the subject of a motion for judgment on the pleadings, courts separately analyze the merits of each defense as pled.[8] A true affirmative defense is one that precludes a plaintiff's recovery even if all elements of its claim are proven.[9] "A defense which demonstrates that plaintiff has not met its burden of proof," on the other hand, "is not an affirmative defense."[10] A moving party is entitled to judgment on the pleadings when it "clearly establishes *on the face of the pleadings* that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law."[11] Thus, to resolve the MJOP, this Court must determine the merits of Defendants' five affirmative defenses, on the face of the pleadings, "notwithstanding the plaintiff's *prima facie* case."[12]

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[7] *Howard v. Nevada*, No. 2:11-CV-01698-RFB, 2014 WL 4829021, at *3 (D. Nev. Sept. 30, 2014).

[8] *See e.g.*, *Reed v. AMCO Ins. Co.*, No. 3:09-CV-0328-LRH-RAM, 2012 WL 556265, at *2–3 (D. Nev. Feb. 21, 2012) (analyzing the merits of several affirmative defenses based on the face of the pleadings).

[9] *F.T.C. v. Johnson*, No. 2:10-CV-02203-MMD, 2013 WL 2460359, at *9 (D. Nev. June 6, 2013) ("[A] defendant may raise an affirmative defense that serves as an excuse or justification notwithstanding the existence of the claim's required elements.") (citing *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010)); *Barnes*, 718 F. Supp. 2d at 1173; *Sherwin-Williams Co. v. Courtesy Oldsmobile- Cadillac, Inc.*, No. 1:15-CV-01137 MJS HC, 2016 WL 615335, at *2 (E.D. Cal. Feb. 16, 2016).

[10] *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

[11] *Hal Roach Studios, Inc.*, 896 F.2d at 1550 (emphasis added).

[12] *F.T.C.*, 2013 WL 2460359, at *9 (quoting *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F.Supp.2d 1283, 1291 (S.D. Fla. 2007)). Defendants acknowledged that several so-called affirmative defenses in their pleadings are not true affirmative defenses and should be read as more detailed denials. *Defendants' Memorandum Concerning Discovery and Motion Schedule*

If a court considers matters outside the pleadings, pursuant to Fed. R. Civ. P. 12(d), it must first convert such pleadings into motions for summary judgment.[13] Courts apply a two-step inquiry into whether to apply Fed. R. Civ. P. 12(d).[14] First, courts decide "whether the extraneous material is considered 'matters outside the pleadings.'"[15] When presented with material outside the pleadings, courts must then decide whether to exclude the material or convert the motion based on Fed. R. Civ. P. 12.[16] "The central question is whether the proffered materials and additional procedures required by Rule 56 will facilitate disposition of the action or whether the court can base its decision upon the face of the pleadings."[17]

Defendants' fourteen exhibits go well beyond the pleadings.[18] The exhibits are either filings from the litigation initiated in 1924 (Exhibits 7 and 12-14) or correspondence from that

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and Procedure, ECF No. 2603 at 6. Pursuant to Fed. R. Civ. P. 12(f)(1), this Court may strike such insufficient defenses on its own.

[13] *F.T.C.*, 2013 WL 2460359, at *9 (citing *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir.1996)).

[14] *Dreamdealers USA, LLC v. Lee Poh Sun*, No. 2:13-CV-1605 JCM VCF, 2014 WL 3919856, at *2–3 (D. Nev. Aug. 12, 2014).

[15] *Id.*

[16] *Id.*

[17] *Id.* (quoting *Collins v. Palczewski*, 841 F. Supp. 333, 335 (D. Nev. 1993) (Reed, J.)).

[18] The exhibits are comprised of various correspondence between 1932 and 1940 of United States representatives as well as with WRID trial counsel. Response, Exhibits 1-6 and 8-11. In addition, the exhibits include the 1926 Amended Complaint (Exhibit 12), a 1936 WRID memorandum (Exhibit 7), the 1940 Order (Exhibit 13), and excerpts of the 1936 Decree as amended (Exhibit 14).

era (Exhibits 1-6 and 8-11).[19] Defendants seek to use them to aid their claim and issue preclusion defense,[20] which they also argue is subsumed within the separate over-arching finality and repose affirmative defense.[21]

The Court should exclude or disregard Defendants' exhibits from consideration because, as demonstrated in Plaintiffs' MJOP and as conceded in Defendants' Response, claim preclusion is not available to Defendants as a matter of law, regardless of whether they could succeed on the elements of such a defense.[22] Indeed as the non-moving party, the allegations in Defendants'

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[19] "Briefs, oral arguments in connection with the motion, exhibits attached to the pleading, matters of which the court may take judicial notice, and 'items of unquestioned authenticity that are referred to in the challenged pleading and are 'central' or 'integral' to the pleader's claim for relief' do not require conversion." "By contrast, affidavits and declarations, among other things, do require conversion." *Dreamdealers USA, LLC*, 2014 WL 3919856, at *2–3.

[20] Defendants' reliance on matters outside the pleadings is limited to their discussion of the construction of Weber Reservoir, Response at 9-12, 20–23, although the legal arguments regarding claim preclusion are discussed throughout their brief. Defendants argue, based in part on these matters outside the pleadings and in part on their own impressions, that the United States could have brought claims for Weber Reservoir, but strategically decided against it, before April 14, 1936. *Id.* Plaintiffs do not concede Defendants' arguments regarding the merits of their claim preclusion affirmative defense.

[21] In their amended answers (identified in Exhibit 1 to the MJOP), Defendants plead the identical (or nearly identical) affirmative defense: "'General principles of finality and repose' that apply to water right decrees, *Arizona v. California*, 460 U.S. 605, 619 (1983), preclude Paragraph XIV of the Decree from being construed as authorizing the modification of the Decree to recognize additional reserved water rights for the Tribe that were not recognized and established in the Decree." *See e.g., Walker River Irrigation District's Answer to Second Amended Counterclaim of the Walker River Paiute Tribe*, (ECF No. 2523) at 6 (third affirmative defense) ("Sample WRID Answer"). Because each Defendant filed separate, nearly identical answers, Plaintiffs' utilize WRID's Answer here as an example.

[22] MJOP at 26; Response at 4, 17, 21; *see* Section III(A) *infra*.

pleadings are taken as true and the Court must assume that Defendants can prove their properly pled affirmative defenses when resolving motions for judgment on the pleadings.[23]

Thus, this Court may properly resolve Plaintiffs' MJOP based solely on the face of the pleadings and need not consider Defendants' extraneous materials that purport to demonstrate the merits of their defenses. To the extent that the exhibits could be construed as relating to Defendants' separate finality and repose affirmative defense, they remain irrelevant because finality and repose are not currently before the Court as a result of the instant MJOP. The Court should conclude that the Defendants' exhibits include materials outside the pleadings, that they are not relevant to resolving the MJOP, and that they should be excluded from consideration for the reasons stated above.[24]

III. Defendants' affirmative defenses are inapplicable as a matter of law.

Defendants devote little of their Response to refuting the clear Supreme Court and Ninth Circuit precedent holding that the affirmative defenses at issue do not apply as a matter of law. Instead, they make remarkable concessions. Defendants concede that claim and issue preclusion do not apply; that the federal reserved water rights doctrine applies to groundwater; and that the United States has the power, even after Nevada became a state, to reserve water for use on its

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[23] *Hal Roach Studios, Inc.*, 896 F.2d at 1550.

[24] In the event the Court construes Defendants' Response as a motion for summary judgment based on the exhibits attached, Plaintiffs request that the Court set an appropriate briefing schedule to address any motion identified by the Court. *Swedberg v. Marotzke*, 339 F.3d 1139, 1146 (9th Cir. 2003) (stating that an analogous Rule 12(b)(6) motion to dismiss "supported by extraneous materials cannot be regarded as one for summary judgment until the district court acts to convert the motion by indicating, preferably by an explicit ruling, that it will not exclude those materials from its consideration.").

lands. The bulk of Defendants' arguments on these defenses goes to why or how the Court might nonetheless properly consider concepts or principles from the identified affirmative defenses.[25] In the context of groundwater and statehood, Defendants also attempt to overcome the concessions they made earlier in their Response by arguing for alternative affirmative defenses.

Elsewhere, Defendants ask the Court to ignore longstanding precedent rejecting the application of equitable defenses when the United States or an Indian tribe asserts or protects its federal reserved water rights. Defendants claim that this case law is irrelevant where the United States asserts such rights through a modification provision in an existing decree. No such exception exists.

For the reasons articulated below, judgment should enter against Defendants' affirmative defenses as requested.

A. Defendants concede that claim and issue preclusion are inapplicable.

As stated in the MJOP, law of the case denies Defendants the ability to raise claim and issue preclusion against Plaintiffs' counterclaims.[26] In *Walker IV*, the Ninth Circuit ruled that, because the counterclaims do not constitute a new action, "traditional claim and issue preclusion do not apply."[27]

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[25] The bulk of Defendants' Response addresses the relevancy of "principles" of their defenses to finality and repose, a separate defense not raised in Plaintiffs' MJOP. These arguments will be addressed in Section IV, whereas this section will address only the defenses at issue in the MJOP as they stand on their own.

[26] MJOP at 27.

[27] *United States v. Walker River Irrigation District*, 890 F.3d 1161, at 1172–73 (9th Cir. 2018) ("*Walker IV*") *citing Arizona II*, 460 U.S. 605, 619 (1983) ("*[R]es judicata* and collateral estoppel do not apply ... [where] a party moves the rendering court in the same proceeding to correct or modify its judgment.").

Defendants agree. Throughout their Response, they concede: "traditional claim preclusion, i.e., *res judicata* and collateral estoppel, don't apply;"[28] "the technical rules of preclusion are not strictly applicable;"[29] and "[t]he Ninth Circuit held in *Walker IV* that *res judicata* does not bar Claimants' claims for additional reserved rights."[30] Based on these concessions alone, the Court should enter judgment as requested against the affirmative defenses of claim and issue preclusion.[31]

B. Defendants concede that the *Winters* Doctrine applies to groundwater.

Plaintiffs' MJOP addresses Defendants' eleventh affirmative defense that "the implied reservation of water rights doctrine does not apply to groundwater."[32] Plaintiffs demonstrated in their MJOP that this bald and sweeping contradiction to Ninth Circuit case law must be rejected.[33] In response, Defendants do not attempt to counter Plaintiffs' arguments. Instead,

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[28] Response at 14, 17.

[29] *Id*. at 17.

[30] *Id.* at 21.

[31] Defendants use much of their Response urging the Court to embrace their alternative argument that claim and issue preclusion are nevertheless applicable under principles of finality and repose discussed in *Arizona II*. For the reasons discussed in Section IV *infra*, the Court should reject this argument as well. Ultimately, if the principles of these defenses are in fact relevant or informative to finality and repose, nothing prevents the Court from addressing them when it analyzes finality. Considering, Defendants derive no benefit from reframing their defenses in the alternative as "principles" rather than elemental doctrines. The benefit comes only through Defendants' unfounded conclusion that the doctrine of finality and repose is an umbrella over *res judicata* that allows it in as a stand-alone defense. As stated above, this contradicts the law of the case.

[32] Sample WRID Answer (eleventh affirmative defense).

[33] Even before *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), federal courts in California, Montana, New Mexico, and Washington

Defendants assert that this affirmative defense is related to their twelfth affirmative defense: that a reserved right to groundwater cannot apply where a tribe's surface water right is sufficient.[34] But these two affirmative defenses are separately pled and must stand, or fail, on their own. In fact, Defendants preface their twelfth affirmative defense with the phrase, "[i]f the implied reservation of water rights doctrine *applies* to groundwater …"[35] Thus, the "related" twelfth affirmative defense Defendants address in their Response contradicts, and is premised on a *rejection* of, the eleventh affirmative defense that was the subject of the MJOP. By pivoting to their twelfth affirmative defense, Defendants effectively concede, as they must, that federal reserved water rights apply to groundwater as a matter of law. For this reason alone, the Court should grant Plaintiffs' MJOP and enter judgment against Defendants' eleventh affirmative defense.

(as well as the Court of Claims and the Indian Claims Commission) had already found that the *Winters* doctrine may extend to groundwater. *See Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) ("The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well"); *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) (citing *Cappaert v. United States*, 426 U.S. 128, 142-43 (1976) ("[*Winters* rights] extend to groundwater as well as surface water")), *aff'd in part, rev'd in part on other grounds*, 647 F.2d 42 (9th Cir. 1981); *Cf. State of New Mexico ex. rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (citing *Cappaert*, 426 U.S. at 142-43: "Pueblo water rights appurtenant to their lands are the surface waters of the stream systems and the ground water physically interrelated to the surface water as an integral part of the hydrologic cycle"); *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699 (1986) ("Ground water under the Gila River reservation impliedly was reserved for the Indians"); *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm. 326, 341 (1976).

[34] *See e.g.*, Sample WRID Answer (twelfth affirmative defense).

[35] *Id.*

While Defendants' concession is grounds to enter judgment, Defendants' assertion under their "related" twelfth defense—*i.e.*, that groundwater rights exist only where surface water rights are insufficient— misinterprets clear Ninth Circuit precedent and should be rejected as well. In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the Ninth Circuit addressed two distinct questions: (1) whether a federal reserved right exists to groundwater generally under the *Winters* doctrine; and (2) whether the Agua Caliente Reservation has such a right.[36] The court held, without qualification, that "the *Winters* doctrine applies to groundwater."[37] Its primary reasoning was that *Winters* applies to *all* waters of a reservation, whether above ground or below.[38] The court recognized that the reserved right to groundwater was based on the need for water to fulfill the purposes of the reservation. And although groundwater is the primary source of water for the Agua Caliente Reservation, the court made no suggestion that access to that water was dependent upon a demonstration of need that exceeded the minimally available surface water. In fact, the court acknowledged that a prior state proceeding already recognized surface water rights for the Agua Caliente Reservation, and it clarified that, despite these rights, "some amount" of groundwater was reserved.[39] *Agua Caliente*, therefore, undermines Defendants' assertion that groundwater rights are limited by

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[36] *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1271.

[37] *Id.* at 1272.

[38] *Id.*

[39] The court did not opine as to the amount of Agua Caliente's reserved groundwater right, which was to be quantified in a later phase of the proceeding. *Id.* at 1273.

available surface water. Ultimately, questions concerning the quantity of groundwater to which the Tribe might be entitled to involve facts and law that this Court will have to parse further.

Defendants have failed to dispute controlling authority that the reserved rights doctrine applies to groundwater. Therefore, Plaintiffs are entitled to judgment as a matter of law on Defendants' eleventh affirmative defense, as pled. In addition, the Court should reject as unfounded Defendants' alternative argument under their twelfth defense that groundwater rights exist only where surface water rights are insufficient.

C. Defendants concede that the United States has the power to reserve water rights after 1864 when Nevada became a state.

Defendants asserted as their thirteenth affirmative defense that the United States has no power, since Nevada statehood (October 31, 1864) to reserve water for the benefit and use of federal land.[40] Plaintiffs' MJOP established that no basis exists for this affirmative defense and that Defendants' assertion was contrary to unambiguous, long-standing Supreme Court precedent.[41] Over the course of one hundred years, the Supreme Court has consistently found that the United States has the power to reserve water rights necessary to serve federal lands. These rights exist regardless of, and are not subject to, state law.[42] As most recently and succinctly stated in *United States v. District Court, County of Eagle, Colorado*: "As we said

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[40] *See* MJOP Exhibit 1; Sample WRID Answer (thirteenth affirmative defense). Tellingly, Defendant Nevada Department of Wildlife (NDOW) did not assert this affirmative defense. *See e.g. Nevada Department of Wildlife's Answer to Second Amended Counterclaim* (ECF No 2547).

[41] MJOP at 23–25.

[42] *See e.g. United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899); *United States v. District Ct., Cty of Eagle*, 401 U.S. 520, 522–23 (1971) (*Eagle County*).

[previously], *the Federal Government had the authority both before and after a State is admitted into the Union* 'to reserve waters for the use and benefit of federally reserved lands.' The federally reserved lands include any federal enclave."[43] In Response, Defendants *agree* with Plaintiffs and refute their own affirmative defense, stating: "[Plaintiffs] 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."[44] The MJOP regarding this affirmative defense should be granted based on Defendants' concession alone.

In apparent recognition that their thirteenth affirmative defense has no basis, Defendants use a now-familiar tactic of turning to a different affirmative defense. Defendants now raise their fourteenth affirmative defense, that the 1936 Act that authorized the withdrawal of additional lands for the Reservation "implies … that Congress did not intend to exercise its power (implied or otherwise) to reserve water with respect to the lands to be added."[45] In essence, Defendants contend that, through the 1936 Act authorizing the Secretary of the Interior to increase the Reservation by 171,000 acres, Congress implicitly rejected an implied reservation of water for the addition to the Reservation under the *Winters* Doctrine. But the Court must reject this alternative argument as well.

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[43] 401 U.S. at 522–23 (emphasis added) (citations omitted). *See also Arizona v. California*, 373 U.S. 546, 597–98 (1963) (rejecting State of Arizona's contention that the federal government had no power to reserve water rights for Indian tribes after statehood) ("*Arizona I*").

[44] Response at 56.

[45] *See, e.g.*, Sample WRID Answer (fourteenth affirmative defense). Of course, this defense further refutes Defendants' original defense, because arguing that the United States did not exercise its power to reserve water for federal land in this instance plainly acknowledges that such underlying power exists.

The entire basis for Defendants' unusual, reverse implication argument is a *proviso* of the 1936 Act, stating that the withdrawal of land "shall not affect any valid right initiated prior to the approval hereof." Defendants combine that *proviso* with a purported "historic background of Congressional deference to state water law," to conclude that Congress did not intend to reserve water for the added lands. Further, Defendants argue that through the *proviso* protecting "valid existing rights," Congress deferred to the State of Nevada to regulate water within a federal reservation.

Defendants' logic is tortured and they offer no direct or express authority for their argument. Moreover, Defendants' argument flips the *Winters* Doctrine on its head, suggesting a negative implication that neither the courts nor Congress has ever recognized and directly contradicting the positive implication that water rights are implicitly reserved to support the purposes of a federal reservation.[46] Accordingly, the Court should reject this argument. But even if the Court were to consider the two conceptual bases Defendants allege support their theory, analysis reveals their argument to be without merit.

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[46] Congress is fully capable of indicating when it does not wish a federal reservation to have water rights and has done so many times. *See e.g.*, Colorado Wilderness Act of 1993, Pub. L. No. 103–77, 107 Stat. 756 § (8)(b)(2)(B) (1993) ("Nothing in this Act shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States in the State of Colorado existing before the date of enactment of this Act . . ."); An Act to Provide for the designation and conservation of certain lands in the states of Arizona and Idaho, and for other purposes, Pub. L. No. 100-696, 102 Stat. 4571 § 304 (1988) ("Nothing in this title, nor any action taken pursuant thereto, shall constitute either an expressed or implied reservation of water or water right for any purpose"). In addition, through legislation enacting various Indian water rights settlements, Congress has expressly indicated that federal water rights are not reserved for after-acquired lands. *See, e.g.*, Arizona Water Rights Settlement Act, 118 Stat. 3478, 3523 § 210(b) (2004) ("After-acquired trust land shall not include federally reserved rights to surface water or groundwater.").

First, the identified *proviso* in the 1936 Act, that the land withdrawal authorized by the act shall "not affect any valid right," is an unremarkable and plain statutory statement that *existing* property rights, including water rights, in lands subject to the Act would not be disturbed. This concept fits perfectly with the fundamental principle that *Winters* Rights are reserved from "then unappropriated" waters.[47] As asserted in the Amended Counterclaims and specified in the Detailed Statement,[48] the water rights Plaintiffs assert for the lands withdrawn through the 1936 Act will have a priority date "as of the date land was restored or added to the Reservation," i.e. September 25, 1936 or June 19, 1972. Thus, the *Winters* Rights associated with lands added under the 1936 Act and to which Plaintiffs are entitled do not and cannot affect any valid pre-existing water rights. Moreover, the 1936 proviso says nothing about post-1936 rights in water or land.

Second, Defendants' argument that general Congressional deference to state water law can defeat *Winters* rights does not withstand even minimal scrutiny. To the contrary, the Supreme Court has expressly held that the *Winters* Doctrine "is a doctrine built on implication and *is an exception* to Congress' explicit deference to state water law in other [statutory] areas."[49] Defendants' discussion of *California v. United States*, the Desert Land Act of 1877, the

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[47] *Cappaert*, 426 U.S. at 137 (emphasis added).

[48] *United States' Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe* (ECF No. 2476); *Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe* (ECF No. 2477-1); *Second Amended Counterclaim of the Walker River Paiute Tribe* (ECF No. 2479).

[49] *United States v. New Mexico*, 438 U.S. 696, 715 (1978) (emphasis added); *see also id.* at 702 (holding for federal reserved water rights–as distinct from water rights for secondary uses–that "it is reasonable to conclude, *even in the face of Congress' express deference to state water law in other areas*, that the United States intended to reserve the necessary water") (emphasis added); *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1269 (similarly rejecting that *New*

Reclamation Act of 1902, and Nevada water statutes are, frankly, *non sequitur*.[50] *Winters* Rights are not subject to a generalized deference to state water law, whether in Nevada or anywhere else. They are an exception to such deference expressed through *other* federal statutes that are not at issue here.

Through their numerous remaining affirmative defenses, Defendants will likely argue, among other things, that no water right was impliedly reserved. But Plaintiffs' MJOP does not address all affirmative defenses. On the thirteenth affirmative defense, which the MJOP did challenge, Defendants have failed to dispute the controlling Supreme Court authority that the United States has the power, even after Nevada's statehood in 1864, to reserve water for use on its lands. Plaintiffs are entitled to judgment as a matter of law at this time. As to Defendants' fourteenth affirmative defense, the Court should reject as unfounded Defendants' argument that the United States impliedly did not exercise that power when it withdrew additional lands for the Reservation through the 1936 Act.

D. Defendants fail to show that equitable defenses apply and instead ask the Court for an unprecedented change in the law.

The MJOP details decades of Supreme Court and Ninth Circuit case law holding that equitable defenses are not available when the United States or an Indian tribe seeks a formal determination of *Winters* rights.[51] At their core, water rights reserved for Indian tribes arise by

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Mexico stood for the proposition that Congress deferred to state water laws in the context of federal reserved water rights).

[50] *See* Response at 57–58.

[51] MJOP at 7–17.

operation of federal law. Once these federal property rights are created, only Congress may abrogate them.[52] Delay or inaction by federal agents is insufficient to do so.[53] Defendants cite no case law to the contrary.[54] Instead, they ask this Court to simply ignore long-standing precedent and recognize an exception based on the procedural posture of this case—that Plaintiffs' claims are made through this Court's retained jurisdiction to modify the Decree.[55] Defendants' arguments are unsupported and in fact contradict Supreme Court and Ninth Circuit precedent.

Faced with Supreme Court case law establishing that equitable defenses are unavailable against the United States when it acts in its sovereign capacity, Defendants attempt to distinguish the cases to avert the Court's express prohibition on equitable defenses.[56] They first assert that *United States v. California* did not reject the application of equitable defenses, but merely ruled

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[52] MJOP at 6–7. As described in Plaintiffs' MJOP: "In *Heckman v. United States*, the Supreme Court clarified that the United States had standing to protect Indian property interests based on either its government interests, 'fulfillment of which the national honor has been committed,' or its underlying federal property interests." MJOP at 7, *citing* 224 U.S. 413, 437–38 (1984).

[53] *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2016); *Solenex LLC v. Bernhardt*, No. 18-5343, 2020 WL 3244004, at *6 (D.C. Cir. June 16, 2020) ("In other words, delay itself does not render agency action unlawful.").

[54] Response at 44–54.

[55] *Id.* at 48–54. Defendants attempt to distinguish *Winters*, *Arizona I*, and *Cappaert* on this ground. *See, e.g.*, *Id.* at 49–50. As Plaintiffs demonstrated in the MJOP, the Supreme Court has repeatedly and squarely rejected equitable considerations in conjunction with recognizing *Winters* Rights. An exception that such considerations nevertheless apply when *Winters* Rights are asserted in the context of modifying an existing decree is of Defendants' own making. They cite no precedent holding such an exception, and their arguments about *Winters*, *Arizona I*, and *Cappaert* are based on the very unfounded premise Defendants ask this Court to accept: that the procedural posture of this case somehow upends the Supreme Court's longstanding *Winters* analysis. As discussed in Section IV, *infra*, Defendants' purported exception is based on their incorrect, expansive reading of *Arizona II*.

[56] *Id.* at 46.

that the elements of the doctrines had not been met.[57] In *California*, however, the Court found no waiver *even if* the equitable defenses were available.[58] The case nevertheless stands for the rule that "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."[59] Defendants further assert that *Summerlin* found only that a statute of limitations was inapplicable, insisting that the Court did not rule on equities generally.[60] But there the Court rejected the application of both a statute of limitations *and laches* defense, citing to *United States v. Thompson* that held "No laches can be imputed to the government, and against it no time runs so as to bar its rights."[61]

Defendants next lean on *Heckler v. Community Health Services* for the notion that the Court was "hesitant" to say there were no situations where equitable defenses could apply, despite holding that "it is well settled that the Government may not be estopped on the same terms as other litigants."[62] As detailed in the MJOP, the courts have readily and consistently rejected equitable defenses raised against the United States under a variety of procedural postures. To note just a few: *United States v. Tacoma* declined to apply equitable defenses in a suit by the United States to void condemnation proceedings by the City of Tacoma nearly a

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[57] *Id.*

[58] 332 U.S. 19, 39–40 (1947).

[59] *Id.*

[60] *United States v. Summerlin*, 310 U.S. 414, 416 (1940).

[61] *Id.* at 416 (quoting *United States v. Thompson*, 98 U.S. 486, 488 (1878)).

[62] 467 U.S. 51 (1984).

century after the proceedings concluded;[63] *United States v. Ahtanum Irrigation District* declined to apply equitable defenses to a quiet title action for the Yakima Nation's water rights to Ahtanum Creek, and provided rights in addition to those finalized in a 1908 agreement between the tribe and settlers;[64] and *Board of Commissioners of Jackson County v. United States* declined to apply equitable defenses to a suit to recover back taxes from the County on fee simple reservation land, addressing for the first time defenses between the United States and a local government.[65] The courts have applied the law in these cases unwaveringly. Equitable defenses do not apply against the United States, regardless of procedural posture.

Finally, the Ninth Circuit has expressly held that equitable defenses do not apply against the United States in its role as trustee even under extraordinary procedural circumstances.[66] In *United States v. Washington*, the United States brought an action against the State to quantify various tribes' shell-fishing rights 135 years after treaties were signed and nearly two decades after adjudicating anadromous fishing rights in an earlier phase of the proceeding.[67] Recognizing that equitable defenses could not apply, the defendants argued that "this was an extraordinary case. . . . [and] extraordinary facts called for new law"[68]–precisely the argument Defendants proffer here. The court reasoned that "even though the equities weighed in [defendants'] favor . .

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[63] 332 F.3d 574 (9th Cir. 2003).

[64] 236 F.2d 321 (9th Cir. 1956).

[65] 308 U.S. 343 (1939).

[66] 157 F.3d 630, 640-42 (9th Cir. 1998).

[67] *Id.*

[68] *Id.* at 649.

. . the law does not support their claim." Ignoring the procedural posture of the case, the court declined to apply equitable defenses because of the unique role of the United States as tribal trustee.[69]

Defendants' argument that well-settled case law simply cannot apply given the procedural posture of this case ignores the underlying reason equitable defenses do not apply to the United States or Indian tribes seeking *Winters* rights—the United States cannot, through inaction, abrogate its sovereign property rights or those it asserts as trustee on behalf of Indian tribes.[70] Defendants' attempt to alter this well-established precedent in favor of an exemption for so-called never-before-seen procedural circumstances is unavailing. Judgment should enter against Defendants' affirmative defenses asserting laches, estoppel and waiver.

IV. Defendants fundamentally mischaracterize finality under *Arizona II*, and their affirmative defenses cannot stand under an all-encompassing umbrella of finality and repose.

As discussed above, Defendants concede that their affirmative defenses based on claim preclusion, issue preclusion, laches, estoppel, and waiver cannot stand on their own. Recognizing these defenses do not "technically" apply as a matter of law, Defendants contend that the Court should nevertheless consider them because their "principles" "inform" and are "embedded in" the concept of finality and repose introduced by the Supreme Court in *Arizona II*.[71] In other

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[69] *Id.*

[70] *Washington*, 853 F.3d at 967.

[71] *See e.g.* Sample WRID Answer (second affirmative defense); Response at 21 ("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*[.]"); *id.* at 38 ("[E]ven 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

words, Defendants argue that where the court has rejected the application of a defense, the defense can nonetheless be resurrected and applied because its underlying "principles" are relevant to finality. Defendants' theory would allow them to pursue any defense that resembles reliance or equity, thereby requiring this Court to engage in equitable balancing in determining whether *Winters* Rights exist. But to survive the MJOP, Defendants' affirmative defenses must stand on their own.[72] Finality and repose is not a vehicle through which Defendants can import affirmative defenses that Plaintiffs have demonstrated do not apply in this case.

Defendants' affirmative defense specifically addressing finality and repose is not strictly before the Court–because the MJOP did not address it. Notwithstanding that, Defendants assert that under *Arizona II* any claims for additional reserved water rights brought pursuant to the Court's continuing jurisdiction are subject to finality and repose and, inherently, *res judicata* and

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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.").

[72] The party raising an affirmative defense has the obligation to demonstrate that its requirements are met. *See generally* Restatement (Second) of Judgments §§17-24, 39 (1982); *Shapely v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir.1985) (holding that the United States had the burden of proving the elements of res judicata were met because it raised the defense); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050-51 (9th Cir. 2008) ("the burden is on the party seeking to rely upon issue preclusion to prove each of the elements have been met."); *Cedar Creek Oil & Gas Co. v. Fidelity Gas Co.*, 249 F.2d 277, 281 (9th Cir. 1957) (holding that the party asserting equitable estoppel has the burden of demonstrating each of its five elements); *Flores v. First Hawaiian Bank*, 642 Fed. Appx. 696, 698 (9th Cir. 2016) ("a party claiming a laches defense bears the burden to show" its elements); *Amercon, Inc. v. Insurance Co. of North America*, 51 F.3d 279, 279 (9th Cir. 1995) (holding that the party asserting waiver bears the burden of establishing the other party's intent to relinquish a known right).

equitable defenses.[73] Consequently, they contend that these principles preclude all of Plaintiffs' claims, particularly where water rights arose prior to the 1936 Decree.[74] This Court must reject this theory now.

Defendants' framing fundamentally mischaracterizes *Arizona II*'s finality analysis. Only claims previously litigated are subject to finality and repose.[75] And a court may still reopen an already litigated issue, overriding finality, if unforeseen or changed circumstances exist and equities weigh in favor of doing so.[76] Thus, under *Arizona II*, the modification of a decree for additional reserved rights is appropriate where: (1) an issue has not already been litigated; or (2) the court decides that a finalized right should nonetheless be relitigated. Principles of claim and

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[73] Response at 16–18. Defendants recognize a narrow exception to the doctrine of finality for changed or unforeseen circumstances not previously litigated. *Id.* at 32–33. This exception, and Defendants' incorrect interpretation of it, will be discussed in Section IV(B).

[74] *Id.* at 18. Defendants also attempt to import *Nevada v. United States* in order to force the application of *res judicata* here. Response at 21–22; *Id*. at 32 (citing *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521 (Nev. 2011) (relying on *Nevada* to deny additional claims sought under the Orr Ditch Decree)). *Nevada* applied *res judicata* to deny additional water right claims related to the Orr Ditch Decree, which fully adjudicated water rights for the Pyramid Lake Reservation. *Nevada v. United States*, 463 U.S. 110, 134–35 (1983) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)). *Walker IV*, however, explicitly held that *Nevada* does not apply here, recognizing that *Nevada* "is distinguishable on both form and substance." *Walker IV*, 890 F.3d 1161, 1169, 1172 n.13 (9th Cir. 2018). The court noted that "unlike the Tribe and the United States here, the plaintiffs in *Nevada* were required to bring their claims in a new action because they had no avenue to modify the underlying decree." *Id.* Through the modification provision in Paragraph XIV of the 1936 Decree, Plaintiffs' claims here are now properly before this Court as part of this ongoing action, and *res judicata* does not apply. *Id.* at 1172.

[75] *Arizona II*, 460 U.S. at 622–23.

[76] *Id.* at 626.

issue preclusion merely inform *why* an already litigated issue should be final; and equities are relevant only in the court's decision to override finality and reopen a previously-litigated issue.[77]

Thus, the Court should reject Defendants' alternative finality and repose argument and incorrect interpretation of *Arizona II*, grant the MJOP, and enter complete judgment against Defendants' affirmative defenses based on claim preclusion, issue preclusion, laches, estoppel, and waiver.

A. Finality does not bar a decree modification for additional, unlitigated claims.

In *Arizona II*, the United States and five Colorado River tribes sought two types of water right claims: 1) a relitigation of irrigation water rights tied to irrigable acreage previously subject to litigation in *Arizona I*; and 2) a calculation, in the first instance, of irrigation water rights tied to irrigable acreage not subject to litigation in *Arizona I*. The Court held that only the former was subject to and precluded by finality because it had been previously litigated. The latter, in contrast, was a proper modification of the decree under the Court's continuing jurisdiction. Each circumstance is analyzed below.

i. The Court in *Arizona II* applied finality only to water rights previously litigated in *Arizona I*.

In the *Arizona II* litigation, the United States and tribes sought first to recalculate the reserved irrigation water right based on irrigable acres omitted from evidence otherwise

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[77] *Id.* at 626–27. Put another way, *Arizona II* requires the court to answer two questions before modifying a decree. First, has the issue already been litigated such that it is subject to principles of finality and repose? If not, the addition of rights is not subject to finality and may be addressed under the courts continuing jurisdiction. Second, even if the issue has already been litigated, are there changed or unforeseen circumstances that should allow for the previously litigated matter to be reopened on balance of the equities?

presented on irrigable acres during the *Arizona I* litigation.[78] The irrigable acreage calculations–as litigated, determined by the Special Master in the 1950s, and confirmed by the Court in *Arizona I*–were embodied in the 1964 Decree establishing the *Winters* Rights of the tribes. The United States and tribes argued that relitigation of the irrigable acreage was appropriate under the modification clause of the 1964 Decree.[79] The Court was tasked with determining the scope of its modification jurisdiction and, as a result, whether the United States and tribes could relitigate the calculations in *Arizona I* to include additional irrigable acres and, in turn, additional *Winters* Rights.[80]

Drawing on principles of claim preclusion, which itself was not applicable because the claims were brought in the same case, the Court observed that "a fundamental precept of common-law adjudication is that an issue *once determined* by a court of competent jurisdiction is conclusive," precluding parties from contesting matters that they already "fully and fairly litigated."[81] It reasoned that the aforementioned principles advised against "recalculating the amount of practicably irrigable acres,"[82] a "retrial of factual issues,"[83] or "reconsider[ing]

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[78] *Arizona II*, 460 U.S. at 612, 614.

[79] *Id.* at 611, 612.

[80] *Id.* at 615–19. While the Court noted that principles of res judicata were relevant in its analysis, applying the doctrine in addition to finality, as Defendants request, undermines the reason why the Court utilized finality at all–as a unique doctrine for the circumstances presented by continuing jurisdiction.

[81] *Id*. at 621 (emphasis added).

[82] *Id*. at 620.

[83] *Id*. at 621.

whether initial factual determinations were correctly made"[84] because they ran counter to the "strong interests in finality in this case."[85]

With these considerations in mind, the Court concluded that the calculation of irrigable acreage had been squarely before the Court and thoroughly litigated in *Arizona I* and, thus, was subject to finality and repose.[86] The Court's decision rested on the established record, which demonstrated that the parties and the *Arizona I* Special Master understood and intended the calculation of irrigable acreage to be final for the reservation lands existing at the time.[87] The United States and tribes could not reopen that calculation and present additional evidence of irrigable acreage that had been omitted the first time. Simply put, they could not attempt to *retry* the same issue.

But the Court did not, as Defendants contend, impose finality as a blanket preclusion to all modifications of the 1964 Decree as to additional water rights. And it certainly did not erect a time bar as to claims that arose prior to, and could have been adjudicated under, the 1964 Decree. The only additional water right claims the Court precluded were the water right claims previously and actually litigated.

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[84] *Id*.

[85] *Id*. at 620. Throughout *Arizona II*, the Court used all of the following terms and phrases in discussing the additional acreage claims at issue in the case: relitigate, relitigated, relitigation, fully and fairly litigated, retrial, recalculating, reopen, reopened, reopening, redetermined, prior determination, factual determinations, adversarially determined, and settled issues. There can be little doubt about what the Court considered precluded under the principles of finality and repose.

[86] *Id.* at 622–23.

[87] *Id.*

ii. The Court modified the decree to include waters rights not litigated in *Arizona I*.

In addition to seeking water rights for irrigable acres on the omitted lands, the United States and tribes sought water rights for additional irrigable acreage on lands not yet adjudicated–*i.e.*, land for which the boundary of an Indian reservation was in dispute at the time of *Arizona I* or land added to a reservation by Congressional act after *Arizona I*.[88] For the latter category,[89] the Court did not hesitate to recognize these additional water rights.[90] Without *any* discussion of finality and repose or *any* consideration of changed or unforeseen circumstances, the Court recognized additional water rights. [91] The Court affirmed the Special Master's decision to modify the 1964 Decree to include additional water rights on both the Cocopah Indian Reservation, which had been expanded by judicial decree and Congressional act to include approximately 1,161 additional irrigable acres, and the Fort Mojave Indian Reservation, which had been expanded by judicial decree to include approximately 500 additional irrigable acres.[92]

iii. In *Arizona III*, the Court upheld its jurisdiction to modify the decree to include additional, previously unlitigated rights, including rights that "could have" been raised in *Arizona I*.

The Court's opinion in the third phase of the *Arizona v. California* adjudication further upheld the Court's jurisdiction to modify the 1964 Decree to include additional, previously

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[88] *Id*. at 628–41.

[89] The Court retained jurisdiction to revisit irrigable acreage on lands in the first category whenever the relevant boundary disputes were finally resolved. *Id.* at 640–42.

[90] *Id.* at 633, 640–42.

[91] *Id.*

[92] *Id*.

unlitigated *Winters* rights.[93] In *Arizona III*, the United States and the Quechan Tribe sought additional water rights to seventy-two square miles of land not litigated in the initial decree.[94] Just like Defendants today, the defendants in *Arizona III* argued that finality precluded any addition of rights because the Quechan Tribe "could have" raised their claim in the first adjudication.[95]

The Court did not reach the merits of defendants' arguments; rather it denied the defense as untimely.[96] Nonetheless, the Court's treatment of the issue underscores the Court's view regarding preclusion under finality and repose: "While the State parties contend that the [issue] could have been decided in *Arizona I*," the Court reasoned, "this Court plainly has not 'previously decided the issue presented.'"[97] The Court's refusal to apply finality and repose in *Arizona III* to an issue that could have been litigated but was not is consistent with its treatment of the irrigable acreage in *Arizona II–i.e.*, precluding only claims that had already been fully and fairly litigated.[98] In addition, the Court emphasized that it "must be cautious about raising a preclusion bar" so as not to erode a tribe's ability to bring before a court unlitigated claims for

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[93] *Arizona v. California*, 530 U.S. 392, 412–13 (2000) ("*Arizona III*").

[94] *Id.* at 402.

[95] *Id.* at 406–07.

[96] *Id.* at 409.

[97] *Id.* at 412–13.

[98] *Id.* at 412.

water rights,[99] highlighting that the necessary counterpart of finality is the preservation of a tribe's ability to pursue its unresolved rights, a consideration Defendants consistently neglect.

Contrary to Defendants' arguments, the principles of finality and repose espoused in *Arizona II* do not apply to or preclude modifications of decrees in order to adjudicate claims that have not been previously litigated.

In the litigation leading up to the 1936 Decree in this case, the claim litigated was a single one regarding the Walker River Indian Reservation: the direct flow surface water right from the Walker River to irrigate Reservation lands existing in 1924.[100] The court awarded the Tribe a right to a flow of 26.25 cfs for 180 days to irrigate the 2,100 acres that were then under irrigation.[101] Under *Arizona II*, principles of finality and repose plainly preclude the United States or the Tribe from simply reopening the Decree to relitigate the water right previously litigated in the 1920s/1930s. In contrast, Plaintiffs' claims for additional water rights that are before this Court now–Weber Reservoir storage, groundwater, and rights associated with lands added to the Reservation[102]–were not previously litigated by this Court and no party can

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[99] *Id.* at 413. This holding was irrespective of the "changed and unforeseen circumstances" of the decree, which the court also found inapplicable to the issue raised. *Id.* at 408.

[100] *United States v. Walker River Irrigation District*, 104 F.2d 334, 340 (9th Cir. 1939) ("*Walker III*").

[101] *Id*.

[102] MJOP at 3–4. More specifically, these rights are (1) a storage water right associated with Weber Reservoir arising well after initiation of the 1924 litigation; (2) a groundwater right associated with lands added to the Reservation by Executive and Congressional action in 1918, 1928, 1936, and 1972, with the Tribe also claiming surface water rights to serve the 1928, 1936, and 1972 land additions to the Reservation; and (3) a groundwater right underlying all lands within the exterior boundaries of the Reservation, some of which have been held in trust by the United States for the Tribe since 1859.

legitimately contend that they have been. Instead, Defendants incorrectly assert that Plaintiffs are precluded from bringing additional water right claims that "could have" been litigated previously. Defendants' assertion that Plaintiffs' claims are inherently precluded by a sweeping application of *Arizona II* is unmoored from the more specific principles of finality and repose articulated therein and should be rejected.

B. An already litigated issue may be reopened and modified where there are changed or unforeseen circumstances and equities weigh in favor of doing so.

Despite Defendants' generally incorrect and overbroad interpretation of finality, they do correctly note that *Arizona II* recognized an exception to the application of finality and repose where changed circumstances exist.[103] However, Defendants fail to recognize that this exception applies only where the court modifies a decree despite having found the issue already litigated and subject to finality.[104] Moreover, they fail to recognize that the court only considers equities when deciding whether to modify a decree based on changed circumstances, after it has conducted its initial finality analysis. [105] Unlike *Arizona II*'s application of principles of claim and issue preclusion under circumstances in which traditional claim and issue preclusion did not apply, nothing in the facts, reasoning, or holding of *Arizona II* suggests that principles of laches,

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[103] Response at 32–33.

[104] *Id.* at 33. This exception would then apply to the direct flow surface water right from the Walker River to irrigate Reservation lands existing in 1924.

[105] *Id.* at 38 ("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.").

estoppel, or waiver are relevant to a finality and repose analysis. Defendants' expansive view of finality and repose as an umbrella, covering equitable defenses that are otherwise barred, lacks support and should be rejected.

Defendants argue that the only modification to which finality does not apply is an addition of rights due to changed or unforeseen circumstances.[106] Defendants cite *Arizona II* for the proposition that, "Article IX [describing the Court's continuing jurisdiction]. . . should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated."[107] However, their argument removes this quote from its context in the Court's analysis discussed *supra*. This qualification applies only after the court "subjects" an argument to finality and repose, asking whether it has already been litigated and determining that it has.[108] Conversely, claims for additional rights not yet litigated are not subject to that defense and the qualification is irrelevant. Defendants' interpretation erases entirely the Court's initial finality analysis, impermissibly expanding the doctrine to apply to all decree modifications.

Ultimately, *Arizona II* did not analyze this exception because no changed or unforeseen circumstances demanded that the Court reopen the previously litigated irrigable acreage calculation.[109] However, the Court recognized that, had it reached that analysis, then and only

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[106] *Id.*

[107] *Id.*

[108] *See Arizona II*, 460 U.S. at 622–24.

[109] *Id.* at 626. "Because we have determined that the principles of *res judicata* advise against reopening the calculation of the amount of practicably irrigable acreage, and that Article IX does not demand that we do so . . ."

then would it consider equities.[110] The Court explained that the magnitude of a proposed modification was only relevant once the court "established that the underlying legal issue [was] one which should be *redetermined*," and equities were relevant when determining whether "*changed circumstances*" justified reopening a claim.[111] Moreover, the Court ultimately declined to consider the defendants' equity arguments altogether, even though some detrimental reliance existed, because finality stood regardless of equitable considerations.[112]

Defendants' argument that equities are a foundational part of the Court's initial finality analysis turns *Arizona II* on its head.[113] Finality is not "informed" by equitable defenses; it is overridden by equitable considerations where there are changed or unforeseen circumstances. And equities are not *always* relevant; they are *only* relevant when those circumstances are present. Thus, Defendants' arguments that principles of equity inform finality, that a court can only modify a decree under changed or unforeseen circumstances, and that equity bars all of Plaintiffs' claims are without merit.[114] This Court should find as much.

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[110] *Id.*

[111] *Id.*

[112] *Id.* Opponents also vastly overstate the role of reliance. Reliance is not an affirmative defense in itself.

[113] Response at 36–39.

[114] Defendants additionally assert that Plaintiffs' counterclaims are nothing more than requests for post-judgment relief analogous to claims under Fed. R. Civ. P 60(b)(6), which they assert consider finality as well as equities. Response at 42. This argument misreads the rule with the same misconceptions as their discussion of *Arizona II*. Even in situations in which a party seeks to formally modify a judgment pursuant to Rule 60(b)(6) (i.e., even when there is a prior judgment that directly addressed a matter and from which a party subsequently seeks a judicial modification), a generalized interest in finality cannot prohibit Rule 60 relief. That is because the "whole purpose" of the rule "is to make an exception to finality." *Buck v. Davis*, 137 S. Ct. 759, 779 (2017) ("[M]ere finality of judgment is not sufficient to thwart Rule 60(b)(6) relief" since

C. *Walker IV* upholds the conclusions of *Arizona II*.

The Ninth Circuit in *Walker IV* held that this Court has continuing jurisdiction under Paragraph XIV of the Decree to: (1) "permit the adjudication of yet-unlitigated rights;" and (2) subject counterclaims to "finality and repose, absent changed circumstances or unforeseen issues not previously litigated."[115] In addition, the court held that Plaintiffs' claims did not constitute a new action, fell under the court's continuing jurisdiction, and as such, claim and issue preclusion did not apply.[116] Both conclusions cite *Arizona II* to expressly allow the assertion of "additional rights." [117] The court did not qualify what "could have" been raised prior to the decree or reject *Arizona III*'s holding that such considerations are irrelevant.[118] Defendants' arguments to the contrary extrapolate far beyond the text of the case.

In a last-ditch effort to preclude Plaintiffs' claims, Defendants contend that *Walker IV* "obviously meant" that Paragraphs XI and XII of the 1936 Decree preclude litigating additional

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otherwise "no such motions would ever be granted."); *Ritter v. Smith*, 811 F.2d 1398, 1401-02 (11th Cir. 1987). And in such cases, detrimental reliance cannot be relevant unless a party "has made a showing of special hardship by reason for their reliance on the original judgment." *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 868-69 (1988).

[115] *Walker IV*, 890 F.3d at 1169, 1172–73. Paragraph XIV of the Decree states: "The Court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user…The Court shall hereafter make such regulations as to notice and form or substance of any applications for change or modification of this decree, or for change of place or manner of use of water as it may deem necessary."

[116] *Id*. at 1172.

[117] *Id.* at 1171, 73.

[118] *Id.*

rights that arose *prior* to 1936.[119] In their view, *Walker IV* "left open defenses sounding in *res judicata* that are based on Paragraphs XI and XII of the [1936] Decree."[120] However, *Walker IV* addressed and rejected a similar, though slightly broader, argument that Paragraphs XI and XII precluded litigating additional rights entirely.[121] The court read Paragraphs XI and XII in concert with Paragraph XIV, finding that they only precluded "relitigation" of claims that "were litigated in the original case."[122] For claims not yet litigated, the court retained continuing jurisdiction to modify the decree.[123] Thus, the court held that Paragraphs XI and XII "[do] not bear on the scope of the district court's continuing jurisdiction" under Paragraph XIV, and that the sections were not in tension as Defendants then suggested.[124]

Defendants now attempt to confine their argument to claims that arose prior to 1936.[125] However, citing *Arizona II*, without further explanation or attempt to address the facts of the case, *Walker IV* places no time-based restrictions on its holding, and it certainly did not hold that principles of finality and repose preclude yet-unlitigated claims simply because they could have

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[119] Response at 24.

[120] Response at 25.

[121] *Walker IV*, 890 F.3d at 1171–72. *See, e.g.*, *Brief of Appellee Lyon County* at 10, *Walker IV*, 890 F.3d 1161 (9th Cir. 2018), No. 15-16478 ("Paragraph XI prohibits the parties, including the United States and the Tribe, from asserting additional water rights in the Walker River "except" for the rights adjudicated in the Decree. The manifest purpose of Paragraph XI is to provide for finality and repose of the rights adjudicated in the Decree.").

[122] *Walker IV*, 890 F.3d at 1171–72.

[123] *Id.*

[124] *Id.* at 1171.

[125] Response at 23.

been litigated prior to the original Decree.[126] Defendants' final preclusion argument must fail as well.

This Court has yet to apply *Arizona II* to the facts of this case or analyze what has or has not been litigated. Those issues that have not been previously litigated fall properly within its continuing jurisdiction to modify the Decree. Defendants' attempts to bar Plaintiffs' counterclaims through finality and repose are both incorrect and premature. Thus, the Court should reject their attempt to do so in its entirety.

V. Conclusion

For the reasons articulated in the paragraphs above, Plaintiffs are entitled to judgment on the pleadings at this time as to the affirmative defenses of: (1) laches; (2) estoppel/waiver; (3) no reserved right to groundwater; (4) the United States is without authority to reserve water rights after Nevada's statehood; and (5) claim and issue preclusion. This Court should enter such judgment against Defendants.

Dated: July 2, 2020

Respectfully submitted,

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By /s/ Andrew "Guss" Guarino
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[126] *Walker IV*, 890 F.3d at 1171-72.

Certificate of Service

It is hereby certified that on July 2, 2020 service of the foregoing was made through the court's electronic filing and notice system (CM/ECF) to all of the registered participants.

Further, pursuant to the *Superseding Order Regarding Service and Filing in Subproceeding C-125-B on and by All Parties* (Doc. 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 United States 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/ Andrew "Guss" Guarino
Andrew "Guss" Guarino