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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-Intervernor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	3:73-cv-00127-MMD-WGC **UNITED STATES' AND THE WALKER RIVER PAIUTE TRIBE'S REPLY IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR PARTIAL SUMMMARY JUDGMENT**

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Exhibit 17 - *Washington Dept. of Ecology v. Acquavella, et. al.*, Order Responding to United States' Motion for Clarification dated April 17, 1985

The United States and the Walker River Paiute Tribe ("Plaintiffs") hereby reply in support of their Joint Motion for Partial Summary Judgment ("MSJ") on Defendants' Third, Seventh, Twelfth, and Fourteenth Affirmative Defenses. As demonstrated in Plaintiffs' opening MSJ and this Reply, these defenses rest solely on assertions that are incorrect as a matter of law and summary judgment should be granted for Plaintiffs.

I. Introduction

In this action, the United States and Walker River Paiute Tribe seek recognition of water rights reserved under federal law, including a storage right in Weber Reservoir and a right to groundwater beneath the Reservation.[1] The Reservoir provides a long-standing, important component of the United States' commitment to develop irrigation for the Tribe and was built around the time the decree was entered (at the urging of some opponents who appear today). *See infra* Section III(b)(i); Plaintiffs' Exhibit 9. In response to the Plaintiffs' Amended Counterclaims, Defendants raised numerous challenges they characterize as affirmative defenses. *See, e.g., Walker River Irrigation District's Answer to Second Amended Counterclaim of the Walker River Paiute Tribe* (Aug. 1, 2019) (ECF No. 2523) ("Sample WRID Answer").

Previously, Plaintiffs sought and the Court entered judgment on five asserted affirmative defenses. *Joint Motion for Judgment on the Pleadings* (Feb. 20, 2020) (ECF No. 2606) ("MJP"); *Order* at 10–11 (July 20, 2020) (ECF No. 2626) ("MJP Order"). But in responding to Plaintiffs'

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[1] Plaintiffs' water right claims are thoroughly detailed in *The United States' Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe* at 13 (May 3, 2019) (ECF No. 2476) ("Detailed Statement"); *Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe* at 4–6 (May 3, 2019) ("U.S. Amended Counterclaim") (ECF No. 2477); *Second Amended Counterclaim of the Walker River Paiute Tribe* at 6–7 (May 3, 2019) ("Tribe Amended Counterclaim") (ECF No. 2479).

MJP, Defendants repeatedly articulated theories under affirmative defenses other than those challenged. *See Joint Reply in Support of Plaintiffs' Joint Motion for Judgment on the Pleadings* at 10–17, 21–24 (July 2, 2020) (ECF No. 2622) ("MJP Reply"). Although Plaintiffs addressed these additional defenses in their MJP Reply, the Court declined to rule on them because they had not been raised in the MJP. *See* MJP Order 4, 10–11.

Plaintiffs' MSJ now seeks judgment on four of Defendants' remaining affirmative defenses, three of which Defendants previously relied on to defend against the MJP. Because these affirmative defenses rest solely on assertions that are incorrect as a matter of law, they are the proper subject for summary judgment.

Third Affirmative Defense. First, Plaintiffs' MSJ demonstrated that Defendants' Third Affirmative Defense of finality and repose does not bar Plaintiffs' claims because, under the controlling standards articulated in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), the principle of finality and repose prohibits only the relitigation of determined claims. MSJ at 20–25 (Oct. 15, 2020) (ECF 2638). Claims that were not litigated are not barred. *Id.* Plaintiffs established four undisputed material facts to show that the water right claims they pursue today have not been litigated before:

A) The only claim litigated in the first phase of this case (*Walker I*, 11 F. Supp. 158 (D. Nev. 1935), from 1924-1935) was a surface water right to irrigate 10,000 acres of Reservation lands within the Reservation's permanent boundaries, as they existed in 1924, from the direct, uninterrupted, natural flows of the Walker River;

B) the district court record in *Walker I* and stipulations by the parties following trial show a reserved right for storage in Weber Reservoir has not been litigated;

C) the district court record in *Walker I* and this Court's 1994 Order, *Order* (July 8, 1994) (ECF No. 30), show that groundwater rights for the Reservation have not been litigated; and

D) the district court record in *Walker I* shows that reserved water rights for lands added to the Reservation in 1928, 1936, and 1972 have not been litigated.

MSJ at 26–30.

Defendants spend the bulk of their Response arguing the merits of their finality and repose defense. *Principal Defendants' Opposition to the United States and Walker River Paiute Tribe's Joint Motion for Summary Judgment* at 36–72 (Jan. 13, 2021) (ECF No. 2649) ("Response"). Defendants argue that what Plaintiffs actually litigated previously is beside the point and that Plaintiffs are barred from *ever* litigating all claims they had the theoretical *opportunity* to bring in 1924. Response at 40–58. Defendants' argument mischaracterizes the controlling case on finality and repose, *Arizona II*, and ignores that, throughout the opinion, the Court's defining criteria for the application of finality and repose focused on what had been litigated. Defendants then assert, in the alternative, that the United States *actually litigated* the water right claims at issue. Response at 58–66. But as explained below, Defendants' argument is wholly unsupported by the record in *Walker I*. Ultimately, this argument merely repackages their unfounded assertion that, having had the *opportunity* to litigate the claims, the United States did litigate its claims.

Seventh and Twelfth Affirmative Defenses. Next, Plaintiffs' MSJ established that Defendants' Seventh Affirmative Defense (that reserved rights for added lands exist only if the Reservation's previously decreed rights for surface water are insufficient to meet the added lands' purposes) and their Twelfth Affirmative Defense (that reserved groundwater rights exist only if surface water is insufficient) are unsupported as a matter of law. MSJ at 33–40. Plaintiffs detailed the controlling Supreme Court and Ninth Circuit precedent establishing that reserved water rights, or *Winters* rights, [2] arise by implication under federal law if the purposes for which

[2] *See Winters v. United States*, 207 U.S. 564 (1906).

land was reserved merely require water. That is, the existence of such rights is not dependent on whether other sources of water may be available to serve those purposes. Because these affirmative defenses are contrary to established law, Plaintiffs were not required to establish any issue of undisputed material fact.

As to their Seventh Affirmative Defense, Defendants argued that water rights are not impliedly reserved for lands added to an existing reservation if the existing reservation has decreed rights sufficient to meet the needs of those lands. Response at 72–74. However, Defendants failed to cite case law supporting this statement and merely made conclusory references to the reserved rights doctrine. Defendants' argument is not only incorrect but illogical because the Reservation's decreed 1859 surface right for irrigation did not and could not take into account additional water uses on lands yet to be added to the Reservation.

As to their Twelfth Affirmative Defense, that reserved rights to groundwater exist only if surface water is insufficient, Defendants rely primarily on arguments supporting their Third Affirmative Defense of finality and repose. Response at 66–72. Defendants' Response is akin to their past reliance on one affirmative defense to justify another. *See, e.g.*, MJP Reply at 10–17, 21–24; MJP Order at 3, 10. Such a response constitutes a concession of the issue, rather than an argument in support of the affirmative defense. Defendants not only fail to rebut Plaintiffs' Motion, they offer no supporting authority for this defense. As a result, Plaintiffs are entitled to judgment as a matter of law.

Fourteenth Affirmative Defense. Finally, Plaintiffs' MSJ established that the Fourteenth Affirmative Defense (that the 1936 Act authorizing the expansion of the Reservation did not impliedly reserve water rights) is unsupported as a matter of law. MSJ at 40–43. Plaintiffs detailed the controlling Supreme Court and Ninth Circuit precedent establishing that *Winters*

rights arise by implication under federal law and are drawn from unappropriated waters; they are not created in deference to state water law as contended. As to their Fourteenth Affirmative Defense, Defendants candidly concede that it is inadequate as a matter of law. Response at 8 ("the Act of June 22, 1936 does not preclude additional federal reserved rights."). As such, Plaintiffs are entitled to summary judgment without need for further argument.

In sum, Defendants fail to refute that judgment should enter on all four defenses and Plaintiffs are entitled to summary judgment as a matter of law.

II. No dispute over material facts prevents entry of summary judgment against Defendants.

Plaintiffs' argument concerning the finality and repose affirmative defense required the establishment of undisputed material facts. Under the rules articulated in *Arizona II*, a decree may be modified under a court's continuing jurisdiction where claimed rights have not yet been litigated. Thus, in the MSJ, Plaintiffs established four undisputed material facts to show that the claims asserted by Plaintiffs today were *not* previously litigated in this action.

Despite their unsupported, conclusory assertion to the contrary, Defendants do not dispute Plaintiffs' material facts and fail to establish a genuine disputed issue of material fact. Defendants begin their Response with a thirty-six-page Preface, Introduction, and Statement of Facts that present a litany of factual circumstances supported by sixty-five exhibits. Many of these overlap with what Plaintiffs have previously established and are based on documents disclosed through discovery to Defendants by Plaintiffs. Nevertheless, at the end of their presentation of factual circumstances, Defendants finish by re-stating Plaintiffs' four material facts, discussed above, and conclusorily state: "it is clear that those conclusions cannot be made at all." Response at 36. But in their discussion of what was litigated in *Walker I*, Defendants refer

back to only six of their eighty-eight "material" facts. Response at 47, 64, 68. At the same time, Defendants centrally engage their Statement of Facts to support their argument that Plaintiffs' claims "could have been" litigated, despite this premises' incorrect legal foundation. *Id.* at 38, 74, 75. Most importantly, Defendants point to no single outstanding material fact in dispute that prevents this Court from ruling on the MSJ. In fact, no material fact is in dispute.

III. Defendants' interpretation and application of finality and repose is unsupported by *Arizona II* and the record of this case.

Plaintiffs' MSJ demonstrated that Defendants' Third Affirmative Defense of finality and repose is inapplicable to Plaintiffs' claims because the controlling standards articulated in *Arizona II* prohibit only the relitigation of claims. MSJ at 20–25, 30–33. Claims that have not been previously litigated, such as Plaintiffs' claims here, are not prohibited. *Id.* at 20–33.

In response, Defendants take issue with Plaintiffs' interpretation of *Arizona II* and argue that what Plaintiffs litigated previously is beside the point because finality and repose bars every conceivable claim that could have been litigated. Response at 40–58. It follows, Defendants assert, that Plaintiffs are barred from ever litigating any reserved rights claims that they did not bring in 1924. *Id.* They argue that, because it was theoretically possible in the 1920s to assert a claim to store water in a reservoir whose construction was not authorized until the 1930s and a claim to groundwater for which there was no infrastructure or practical use, Plaintiffs were required to bring those claims in the original litigation and cannot today. As discussed below, Defendants' analysis is fundamentally flawed.

Defendants mischaracterize *Arizona II* by highlighting and taking out of context the Court's only use of the phrase "could have." Response at 41–43. Defendants also inappropriately apply *res judicata* to force the preclusion of all conceivable claims that they argue "could have

been" litigated before the entry of the 1936 Decree. *Id.* at 44–46. Then, arguing in the alternative, with no support from the record, Defendants assert that Plaintiffs' claims are barred because *Walker I* litigated the "totality of the Reservation's reserved water right" once and for all.[3] *Id.* at 58–66.

As established by Plaintiffs' MSJ and discussed *infra* Section III(b), the initial litigation of this case leading to *Walker I* addressed a single claim for uninterrupted surface water from the Walker River.[4] The unquestionable focus of that litigation was on Defendants' interference with surface water delivered to the Reservation that prevented the Tribe from irrigating 10,000 acres of allotted trust land or even the approximately 2,000 acres the Tribe tried to irrigate at that time. App. R. at 10–13, 16–17. Thus, Plaintiffs are entitled to summary judgment dismissing Defendants' Third Affirmative Defense as a matter of law.

a. Defendants' argument that finality and repose bars claims that "could have" been litigated finds no support in case law and misapplies *res judicata*.

Defendants first argue that Plaintiffs' claims are barred because finality and repose apply not only to claims that were fully and fairly litigated, but also to any claims that "could have" been litigated when the case was initiated. Response at 41–58. But to make this argument, Defendants misread *Arizona II* and *Arizona III* and then improperly deploy every aspect of *res judicata* under the guise of "guiding principles." Because Defendants' assertions regarding

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[3] Defendants make exceptions for claims for lands added in 1936 and 1972 under both of their theories. Thus, they challenge only groundwater rights for the 1859, 1918, and 1928 lands and storage rights in Weber Reservoir. Response at 6–8.

[4] *United States v. Walker River Irrigation Dist.* ("*Walker I*"), 11 F. Supp. 158, 162 (D. Nev. 1935) (No.8779) ("App. R."). This case was initiated in 1924 when the United States filed its Complaint. *Id.* at 159. The United States subsequently filed an Amended Complaint in 1926, which Plaintiffs will refer to here as the controlling complaint from *Walker I*. App. R. at 7–19.

Supreme Court case law are erroneous and because the Supreme Court, the Ninth Circuit, and this Court have all held *res judicata* is inapplicable here, Defendants' argument fails.

i. Defendants mischaracterize *Arizona II* and misapply *res judicata*.

Defendants' argument that finality and repose barred all claims that "could have" been litigated rests on a single phrase from *Arizona II*, that "water rights [for the "omitted lands"] ***could have been sought*** in the litigation preceding the 1964 Decree." Response at 42 (emphasis added by Defendants). Defendants then make the conclusory leap that *Arizona II* barred considering the irrigability of the omitted lands solely because finality bars any claim for reserved water rights that "could have been raised" but were not. *Id.* at 43. As discussed below, Defendants' argument strips the phrase "could have" of its context and ignores the Court's entire subsequent analysis of finality and repose to the facts and issues involved in the case.[5]

In *Arizona I,* the Court quantified water rights for five Indian reservations based upon irrigable acreage. *See Arizona II*, 460 U.S. at 609–10. In *Arizona II*, the United States and Tribes subsequently sought additional water rights for irrigable lands, within the uncontested boundaries

[5] Defendants attempt the same out of context reading of a single phrase, "should have," from the United States' opening appellate brief in *Walker IV*, *United States v. Walker River Irrigation District*, 890 F.3d 1161(9th Cir. 2018), to allege that the United States admitted the claims should have been raised in the 1926 Amended Complaint. Response at 51 (referencing *Opening Brief for the United States,* 2016 WL 3438101, No. 15-16478, at *39 (June 15, 2016) (9th Cir. 2018) ("the district court should have determined whether litigation leading to the Decree addressed, or should have addressed, the same claims.")). In context, the phrase refers merely to the United States' view that this Court should rule on the standard to be applied, and makes no statement as to what that standard is. The United States' brief is consistent with what Plaintiffs argue here today. *See id*. at *43 ("In light of its interpretation of the retained-jurisdiction clause as authority to adjudicate new water-right claims, the district court's conclusion that the Decree on its face 'prevents the United States (like all parties) from claiming any additional rights beyond those adjudicated therein' is patently unreasonable.").

of the reservations, that had not been included in the original irrigable land calculation. *Id*. at 617. Termed the "omitted lands," the lands were characterized as such not because they were entirely omitted from the *Arizona I* litigation, but because they had not been designated irrigable for the purposes of the original irrigable acreage calculation. *Id.*

The Court defined the issue as "reopening" the determination of irrigable land that was litigated before the Special Master twenty years earlier:

> We turn now to the first major question in the case: 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 Decree. The Special Master agreed with the United States and the Tribes that it is not too late in the day to modify the 1964 adjudication and Decree, notwithstanding his own finding that "[t]he claim in the original case ... embraced the totality of water rights for the Reservation lands." Tuttle Report at 31. We disagree with the Special Master and sustain the exceptions filed by the States and private agencies to his conclusion. In our opinion, the prior determination of Indian water rights in the 1964 Decree *precludes relitigation of the irrigable acreage issue*.

Id. at 615-16 (emphasis added).[6] From there, the Court engaged in a ten-page discussion of the Court's continuing jurisdiction to modify the decree, never again using the phrase "could have"

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[6] Later in their Response, Defendants cite to this passage to state that *Arizona II* applied finality and repose to a determination of the "totality of water Rights for the reservation." Response at 41, 58. As can be seen in context discussed *infra* Section III(b), this reference quotes the Special Master's description of the claim at issue that the Court rejected and which included not only the omitted reservation lands but also the boundary lands that the Supreme Court addressed separately. *Arizona II*, 460 U.S. at 615–17, 629. The Court stated that the narrow focus of its finality analysis was the relitigation of "the irrigable acreage issue" and merely barred a retrial of how many acres of the lands specifically litigated in *Arizona I* could be irrigated. *Arizona II*, 460 U.S. at 616–17, 628.

or even alluding to mere opportunity to litigate as a relevant consideration in its analysis.[7] *Id.* at 615–26.

The Court understood what "could have" been previously litigated in connection with the irrigable acres within the Tribes' reservations that had *specifically been* litigated. *Arizona II*, 460 U.S. at 620–25. The Court was concerned about expending additional judicial resources on a matter that had in fact been before the Court in *Arizona I* and for which that Court had already conducted a "full, adversary proceeding." *Arizona II*, 460 U.S. at 610, 622–23. The Court's decision did not turn on the United States' mere opportunity (and failure) to assert any claim, but on the fact that the United States, when called upon to present the amount of irrigable acreage within the boundaries of the reservations in *Arizona I*, failed to include the omitted lands as a component of its calculation. Thus, the *Arizona II* Court found that the issue of irrigable acreage for those lands constituted the very question that "was fully and fairly litigated in 1963" and prohibited the United States and Tribes from reopening the case to incorporate additional evidence on the matter previously litigated. 460 U.S. at 622–23, 628.

Based on their erroneous interpretation of "could have," Defendants attempt to import the doctrine of *res judicata* as articulated in *Nevada v. United States* because principles of *res judicata* "informed" finality and repose. Response at 44–46, 49, 57. In *Nevada*, the Court applied *res judicata* to prohibit an attempt to add water rights to those established in an earlier decree that did not remain open for modification. *Nevada v. United States*, 463 U.S. 110, 133–34

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[7] To the contrary, the Court's analysis is replete with references that demonstrate the Court's concern: precluding "relitigating," "reopening," and "recalculating" the irrigable acreage issue. *Arizona II*, 460 U.S. at 616, 621 n.12, 622 n.13, 625, 626, 627, 638 (discussion "relitigating" the issue); *id.* at 615, 617, 623, 625, 626 (discussing "reopening" the issue); *id.* at 620, 625 n.18 (discussing "recalculating" the issue).

(1983). Preclusion there, the Court ruled, applied not only to water right claims that had been litigated, but also to "any other admissible matter that might have been offered," thus including all claims that could have been litigated. *Nevada*, 463 U.S. at 129–30. But *Nevada* has no relevance here or in *Arizona II* where specific modification clauses exist in a decree and where *res judicata* does not apply.[8] *Arizona II*, 460 U.S. at 619; *United States v. Walker River Irrigation District*, 890 F.3d 1161, 1172–73 (9th Cir. 2018) ("*Walker IV*").

In *Walker IV*, the Ninth Circuit explicitly held that *Nevada* does not apply here, recognizing that *Nevada* "is distinguishable on both form and substance."[9] 890 F.3d at 1172, 1172 n.13. 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*. at 1172 n.13. Accordingly, the Court concluded that "traditional claim preclusion and issue preclusion *do not apply*" in this case. *Id.* at 1172–73 (emphasis added). This Court recognized that *Walker IV* was "quite clear" on this point when it granted Plaintiffs judgment as a matter of law as to Defendants' affirmative defense based on *res judicata*. MJP Order at 9. Under Defendants' reading, no distinction exists between applying a principle of *res judicata* and applying every aspect of the doctrine itself, nor is there a

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[8] As Defendants note, *Arizona II* was issued *before Nevada* and therefore reliance on *Nevada* to interpret *Arizona II* is from the onset a dubious proposition. Response at 44. And, neither *Arizona II* nor the controlling concepts from *Arizona II* were cited or used in *Nevada*, further undermining Defendants' ongoing reliance on *Nevada*. *See Nevada*, 463 U.S. at 129–34.

[9] In *Arizona II*, the Court did not even consider the application of *res judicata*, but rather, in determining which doctrine to apply, the Court centered on the choice between the law of the case doctrine and finality and repose. *Arizona II*, 460 U.S. at 618-619. And, because of the unique, ongoing nature of the Court's jurisdiction, finality and repose was more appropriate than the law of the case doctrine. *Id.* at 619.

discernable difference between *Arizona II* and *Nevada*, rendering the distinctions drawn in *Walker IV* meaningless.[10] As a result, Defendants' continued attempts to argue *res judicata* are without basis and contradict the law of the case.[11]

The proper reading of *Arizona II* is that matters specifically placed at issue and subjected to the rigors of an adversarial judicial proceeding should not be relitigated. In fact, the Court explicitly stated that the driving principle informing finality and repose is that "an issue *once determined* by a competent court is conclusive." *Arizona II*, 460 U.S. at 619 (emphasis added) (citations omitted). The Court, after describing this principle, concluded that "*recalculating* the amount of *irrigable acreage* runs directly counter to the strong interests in finality in this case." *Id.* at 620 (emphasis added). This reading comports with *Walker IV*, in which the Ninth Circuit found that this Court had retained jurisdiction over "yet-unlitigated" claims. 890 F.3d at 1169. Thus, a fair reading of *Arizona II* reveals that finality and repose is informed by principles of *res*

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[10] Defendants assert that that *Arizona II* held that principles of finality and repose require such a "narrow" reading of the "reserved jurisdiction clause." Response at 42, 45–46. This argument too misreads the Court's reasoning. *Arizona II* did not hold that finality and repose requires a "narrow" reading of the modification clause. Rather, it determined that the reserved jurisdiction clause should be given a narrower reading than the law of the case doctrine provides, and thus, should be read using "general principles" of finality and repose. *Arizona II*, 460 U.S. at 618–19.

[11] Defendants also ask the Court to reject Plaintiffs' water right claims for "policy reasons." Response at 47. Defendants state, for example, that Plaintiffs "have offered no explanation for why they did not present those 'claims' … or why they waited several decades before asserting them . . . more than eighty years after the decree was issued." Response at 45. Defendants next assert that "Plaintiffs should not be permitted to seek . . . additional rights in the next century, after water users whose rights were adjudicated have long exercised and relied on their rights[.]" Response at 47. But Defendants' "policy reasons" evoke the equitable defense of laches. Laches, the defense that a party who sleeps on its rights to the prejudice of another party loses those rights, is a legal doctrine, not a policy preference. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). This Court has already ruled that laches and other equitable defenses are inapplicable here. MJP Order at 5-8.

judicata only in so much as it prohibits the relitigation of claims that have in fact already been litigated.[12]

ii. Defendants mischaracterize *Arizona III*.

In their MSJ, Plaintiffs' identified *Arizona III* as reaffirming that finality and repose prohibits relitigation of those claims actually litigated. MSJ 21–25. In *Arizona III*, the Court relied on the fact that the claims at issue there "were not litigated" previously to consequently reject the application of finality and repose. *Arizona v. California*, 530 U.S. 392, 412–13 (2000) ("*Arizona III*") ("This Court plainly has not "previously decided the issue presented. Therefore[,] we do not face the prospect of redoing a matter once decided.").

In response, Defendants assert that *Arizona III* somehow supports *their* expansive reading of finality and repose to preclude claims that were not previously litigated but "could have" been. Response at 55–57. But the only language Defendants cite in support of their view is the Court's

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[12] Plaintiffs do not address Defendants' various arguments concerning claims arising between 1926 and 1936 because it is irrelevant whether the claims could have been raised after 1926. Contrary to Defendants' insistence, even assuming for the sake of argument that *res judicata* has application here, preclusion does not apply to claims that were not mature at the time the first action was filed. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017). Defendants ignore this precedent and draw their own lines for when Plaintiffs' claims could have been raised. For water rights for the 1928 lands, Defendants' line is any time before testimony was taken. Response at 73. And because the 1928 lands were added to the Reservation nineteen days before testimony was taken, *id.* at 22, Defendants assert that claims for these lands could have been brought and are precluded. *Id.* at 73. As for Weber Reservoir, Defendants' contend that a storage right was "ripe for assertion right up to 1932," *id.* at 74, even though evidence had closed and the Special Master had submitted his report, *id.* at 26, both of which occurred well before Weber Reservoir was authorized, funds were appropriated, or construction had begun. *Id.* at 27-28. Perhaps in the alternative, Defendants' line for Weber Reservoir is 1934, when the United States declined Defendants' request to stipulate to seek leave of the Court to reopen evidence, *id.* at 74. All of these manufactured demarcations for claims assertion are not only inconsistent, but also incorrect.

statement that *res judicata* is "an affirmative defense ordinarily lost if not timely raised." *Id.* at 57. Defendants conclude, based on this phrase, that finality and repose was applied against the *Arizona III defendants* because they "could have" raised a *res judicata* defense. *Id*. But Defendants misunderstand the case—*Arizona III* did not apply finality and repose to defendants there, but merely found their *res judicata* defense untimely. *Arizona III*, 530 U.S. at 410, 422. Defendants ignore what the *Arizona III* Court had to say about finality and repose and focus instead on the fact that the preclusion defense was raised *sua sponte.* Response at 56. Revealingly, Defendants pivot immediately away from *Arizona III* and again back to *Nevada* to assert that all aspects of *res judicata* found in *Nevada* should be incorporated into the *Arizona II* finality and repose analysis. *Id.* at 57. These acts and omissions are fatal to Defendants' attempt to distinguish or rely on *Arizona III*.

In sum, Defendants' assertion that finality and repose bars all claims that "could have" been litigated rests on distorting both *Arizona II* and *Arizona III* to attempt to improperly apply the doctrine of *res judicata*. These arguments contravene binding precedent and fail.

b. Defendants fail to show that Plaintiffs previously litigated the rights at issue.

Defendants' Response next alleges, in the alternative, that Plaintiffs' claims here *were* litigated in *Walker I* because the United States purportedly litigated every aspect of the Reservation's reserved water rights in the 1920s and 1930s. Response at 61–62. Defendants fail to square this argument with their prior concession to the contrary: "[t]he Decree, of course, did not recognize a storage right at Weber Reservoir or any groundwater rights for the Tribe [] because neither the Tribe nor the United States sought those rights for apparent strategic reasons." *Principal Defendants' Opposition to Plaintiffs' Motion for Judgment on the Pleadings* at 40–41 (May 19, 2020) (ECF No. 2619); *see also* Response at 38. In any event, Defendants

base their argument on the technical application of *res judicata* and on an unsupported and incorrect framing of the United States' 1926 Amended Complaint.

Defendants initially attempt to define the United States' 1926 claim using the elements courts typically consider in a *res judicata* analysis, with a particular focus on the "transactional nucleus of operative fact." Response at 60–61. They assert that the United States' 1926 claim implicitly must have included rights to groundwater and Weber Reservoir because the present claims and the previously litigated surface water right have the "same origin," that is, the executive action establishing the Reservation.[13] Response at 61–62. But in their attempt to apply *res judicata*, Defendants fail to consider record evidence or the expectations of the parties and the Court in *Walker I*. Ultimately, Defendants' argument that Plaintiffs litigated the Reservation's "entire" reserved water rights in 1926 finds no support in the record and cannot be propped up by their overly-broad characterization of the "transactional nucleus of fact." Response at 60–61.

In an action in which the court retains continuing jurisdiction, the record of the case determines which claims have or have not been litigated. *See Arizona II,* 460 U.S. at 622–23 (finding claims for omitted lands barred because "the record demonstrates that it was the

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[13] Defendants assert that the shared "origin" of Plaintiffs' claims includes the claims' priority date and location. Response at 61–62. Defendants ignore the nature of the claims Plaintiffs assert today. As stated in the United States Amended Counterclaim and Detailed Statement, Plaintiffs seek a storage water right for Weber Reservoir arising in 1933 from the combined acts of the Executive and Legislative branches of the federal government. Plaintiffs do not assert a water right for Weber Reservoir based upon the establishment of the Reservation in 1859. Moreover, Plaintiffs' groundwater claims arise not only in 1859 but also under varying priority dates based on a series of distinct executive orders and acts of Congress reserving portions of the Reservation long after 1859. *See generally* Detailed Statement. Thus, Defendants' contention that Plaintiffs' water right claims all derive from a common basis stemming back to the Reservation's initial 1859 establishment is without basis.

understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final"); *see also Sidney v. Zah*, 718 F.2d 1453, 1458 (9th Cir. 1983) (finding a claim precluded because "the record reflects that both the Hopi Tribe in its presentation of the matter, and the court in its disposition, sought to resolve [the claims] in one proceeding"). It is the context of the record, not "the mechanistic application of a simple test," that determines the identity of claims. *See Abramson v. University of Hawai'i*, 594 F.2d 202, 206 (9th Cir. 1979). And even under a *res judicata* analysis, courts consider whether the record shows that the claims treatment as a unit conforms to the parties' expectations. *Central Garden & Pet Co., Inc., v. Scotts Co.*, 85 Fed. Appx. 633, 634 (9th Cir. 2004) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)).

As discussed below, the record clearly demonstrates that, from 1926 to 1936, the United States litigated a single claim for a right to the uninterrupted natural flow of the Walker River, specifically to enjoin upstream water users from interfering with the Tribe's ability to irrigate. The United States did not allege and had no reason to litigate either water rights that did not yet exist or rights to water for which no party was interfering. Thus, Plaintiffs' claims here have not yet been litigated and are not barred by finality and repose.

i. Defendants' argument that Plaintiffs litigated their entire water right is not supported by the record.

Defendants' only reference to the record purporting to support their view that *Walker I* litigated the entirety of the Reservation's reserved water rights is a single sentence from the United States' 1926 Amended Complaint indicating there was "no other source of water" available for the Reservation other than the surface water of the Walker River. Response at 47, 70. But this solitary sentence and the more narrow phrase within provides no basis on which to

impute the United States' intent to waive storage or groundwater rights unrelated to the narrow claim presented. To the contrary, this sentence underscores that the United States sought solely to protect the Tribe's ability to irrigate against named upstream users that had been "obstructing, impeding, and preventing" the "natural flow of the river . . . in, down, along, and upon the natural channels . . . to and upon the Reservation" because the Walker River was in fact what the Tribe relied on to irrigate at the time. App. R. at 10–13, 16–17. In litigation, both plaintiff and defendant witnesses testified about how many acres might be irrigated from the uninterrupted, natural flows of the river.[14] United States witness's testimony, App. R. at 338–39, 932, 951; Defendants' witness's testimony, App. R. 793, 813. Nothing in the 1926 Amended Complaint supports Defendants' position that the United States sought to litigate the "totality" of the Reservation's reserved rights, and the United States made no claim associated with the application of stored water or groundwater and no request for a general stream adjudication of all the reserved rights in the Basin.[15]

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[14] Nor could any party have envisioned groundwater as a significant source of water for irrigation at that time: no *Winters* rights to groundwater had been claimed on any reservation and none of the parties to the 1936 Decree had ever asserted groundwater rights. *See* 1936 Decree, App. R. at 524–38. In Nevada, groundwater was not comprehensively governed, let alone subject to a comprehensive adjudication of rights, until 1939. Nevada Groundwater Act, Statutes of Nevada 1939, Chapter 178 The Underground Waters Act, ch. 178, 1939 Nev. Stat. 274 (codified as amended at Nev. Rev. Stat. ch. 534 (2000)).

[15] *See Dugan v. Rank*, 372 U.S. 609, 618 (1963) (distinguishing between a general stream adjudication and private suits to determine water rights solely between named parties). Further, no general stream adjudication statute has ever existed under federal law. And though Nevada's general stream adjudication statute has existed for more than a century, *see* NRS 533.090, et seq., the United States' 1926 Amended Complaint did not place any reliance on or make any reference to the state's statutory scheme. Despite this context, Defendants assert that "the Ninth Circuit has held that the Walker River Decree was an example of a 'comprehensive adjudication' of water rights." Response at 46 (*citing United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1302 (9th Cir. 1981)). Although the *Truckee-Carson* court called the proceedings leading to the 1936 Decree a "comprehensive adjudication," examination of that case reveals that this

Defendants' own actions as well as those of the Court in *Walker I* acknowledge the limited scope of the United States' claim even more unambiguously. Over the consistent objection of the United States, Defendants raised the issue of storage and argued that, although 10,000 irrigable acres might exist on the Reservation, such irrigation was impossible using only the surface water of the river. *See, e.g.,* App. R. at 793, 812; Plaintiffs' Exhibit 15 at Bates No. US0031336–US0031338; Plaintiffs' Exhibit 16 at Bates No. US0029987–US0029990. Instead, Defendants argued that irrigation of more than 2,000 acres would be possible only with surface water *and* storage, *id.*, and *guaranteed* 30,000 acre-feet of water per year to fill a reservoir if built. *Id*. at 819. The Court agreed with Defendants, providing the Tribe enough water to irrigate approximately 2,000 acres with the recognition that the creation of a reservoir could increase present supply to support future, additional irrigation. *Walker I*, 11 F. Supp. at 165. And Defendants ultimately *agreed* to preserve the issue of storage, separate from natural flow, through the stipulated amendment of Article XII.[16] *See* Plaintiffs' Exhibits 10–13.

Lacking support in the record, Defendants make the unsupported assumption that storage must have been considered as part of the original claim because a reservoir could have regulated a right for 150 cfs to irrigate 10,000 acres. Response at 65. What's more, they assume that by claiming a surface water right before canals and head gates were constructed, the United States

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statement was dicta, made without basis and concerned a matter not before the court. Such unconsidered dicta provides no actual or persuasive support for Defendants' assertion here.

[16] Defendants may not today assert that the Tribe is not entitled to a storage water right after they previously convinced this Court and the Ninth Circuit that the Tribe was entitled to enough direct flow to irrigate only 2,100 acres (not 10,000) *because* the remaining 8,000 acres could be irrigated using storage water. *See New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001) (a party may not assert one position in an action, succeed on that position, and later take the opposite position to the prejudice of the other party).

demonstrated its ability to assert storage or groundwater rights before constructing necessary infrastructure.[17] Response at 65. But it is unmistakable from the record that throughout the course of litigation the United States believed it could irrigate 10,000 acres with surface water alone. App. R. at 338–39, 932, 951. No amount of after-the-fact hypotheticizing by Defendants about how the United States might have used its reserved water negates what the United States claimed, placed in the record, and litigated. Nor did the United States waive its right to later claim a groundwater or storage right simply because its 150 cfs surface water claim "could have" obviated the need for groundwater or storage. Ultimately, Defendants provide no evidence – and none exists – to show that the United States considered whether 150 cfs of water could come, either wholly or partially, from either groundwater or storage water. This is despite ample opportunity for the United States' witnesses to assert as much in testimony specifically addressing how the Tribe would irrigate 10,000 acres of the Reservation.[18]

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[17] Despite Defendants' lengthy statement of facts and circumstances, Defendants' references to or reliance on facts throughout their Response is almost devoid of citations or references to show from where they are drawing their purported facts and conclusions, and it is frequently impossible to discern which documents or record evidence, if any, Defendants consider supportive of their assertions.

[18] Defendants' Statement of Facts notes the *only* statement in the record stating that the reservoir could store the water right if the government so chose. Response at 23, Statement of Fact 39. Defendants solicited this statement in cross-examination. Notably, the Special Master did not see the materiality of discussing the reservoir in regard to the Tribe's surface water claims. *See* Defendants' Exhibit 30.

Defendants further assert that the United States "considered and rejected" the use of groundwater as evidence that the United States litigated the Reservation's entire right and assumed it would not include groundwater. Response at 13, 68. Though Defendants' statement is without citation, this statement might refer to a 1906 letter from the Chief Engineer of the U.S. Indian Irrigation Service describing a policy decision to not explore groundwater options at that time because it would be uneconomical. *See* Response at 18, Statement of Fact 9, Exhibit 10; Plaintiffs' Exhibit 3. This letter did not reject future use of groundwater and it did not purport to state the United

Defendants further distort a key piece of evidence in order to present their assumptions as undisputed material facts. Principally, Defendants assert that the parties stipulated to include the phrase "as of the 14th day of April, 1936" in Article XII of the Decree only to preserve a claim for Weber Reservoir *under state law*. Response at 64–65 (citing Statement of Facts No. 77–81 and related exhibits). No document cited by Defendants supports this assertion. Nor is this assertion logical given that, throughout the litigation leading to *Walker I*, the United States opposed any application of state law to the Reservation's reserved water rights. App. R. at 480, 482–83. Defendants make this assertion to attempt to explain away what is in fact undisputed: the parties agreed to stipulate that Article XII of the Decree would not bar post-Decree recognition of a right for Weber Reservoir that had not yet been litigated and fell properly within the Court's modification jurisdiction. MSJ at 13; Plaintiffs' Exhibits 10–13.[19]

In the end, Defendants' argument that the United States litigated the Reservation's "entire" reserved water rights in *Walker I* has no basis in the record, rests on sweeping,

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States' litigation position or any position for that matter in relation to future litigation of water rights nearly two decades later.

[19] Without explanation, Defendants' conclude that any use of Plaintiffs' Exhibit 10 for evidence of what WRID's attorney, Mr. Kearney, "may or may not have said" is hearsay without any exception. Response at 64, n.15. Defendants' objection is incorrect. Any statement by Mr. Kearney, a representative of WRID, offered by Plaintiffs against Defendants is not hearsay. Fed. R. Evid. 801(d)(2). And even if statements by Mr. Kearney are in Exhibit 10 and considered to be hearsay, such statements would not be excluded by the rule against hearsay. Fed. R. Evid. 803(16); *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076, 1081 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1295 (2020) ("The district court erred in excluding the Kelsey report as hearsay. It is plainly admissible as an ancient document, Fed. R. Evid. 803(16), which may contain multiple levels of hearsay."); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 6935 (3rd ed. 2020) ("[E]xclusion of statements in qualifying ancient documents on the grounds that the author lacked firsthand knowledge, or (relatedly) that the document contains hearsay-within-hearsay should be rare."). At bottom, Defendants have no basis to dispute what Mr. Kearney agreed to.

unsupported assumptions, and is made in disregard of the contents of the 1926 Amended Complaint.

ii. Defendants' argument that Plaintiffs litigated their entire water right ignores the expectations of the parties and the Court.

Defendants overbroad conception of the United States' 1926 Amended Complaint ignores both the parties' and the Court's expectation of how the claim was pled and litigated in the context of the law at that time. In 1926, when the United States filed its Amended Complaint, the construction of claims was governed by a much narrower conception of *res judicata* than applied today:

> Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue. That being the guiding principle, the phrase 'cause of action' came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata." *Williamson v. Columbia Gas & Elec. Corp*., 186 F.2d 464, 469–470 (3d Cir. 1950). . . "In recent years the courts have defined the term 'claim' for *res judicata* purposes in an expansive manner." *James v. Gerber Products Co*., 587 F.2d 324, 328 n.5 (6th Cir. 1978). "The scope of preclusion has necessarily expanded with the definition of 'claim' or 'cause of action.'" *Manego v. Orleans Bd. of Trade,* 598 F. Supp. 231, 234 (D. Mass. 1984), citing WRIGHT, MILLER & COOPER, *judgment aff'd*, 773 F.2d 1 (1st Cir. 1985).

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 4407 n. 29 (3rd ed. 2020).

This was particularly true for reserved water rights claims, where the pleading of distinct rights was not only permissible but common: the United States was not required to bring all possible claims when first suing to protect reserved water rights. *See e.g.*, *Conrad Inv. Co. v. United States*, 161 F. 829, 835 (9th Cir. 1908) (holding that adjudications of reserved rights for Indians need not be "once and for all," but may allow subsequent adjudications to cover additional rights "should the conditions on the reservation at any time require such

modification");[20] *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956) ("[i]t is plain from our decision in the *Conrad Investment* case, *supra*, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."). [21]

With this understanding, the parties and the Court in 1926 were under the expectation that the United States' asserted its claim with particularity, rather than encompassing all of the Reservation's possible reserved rights claims. This understanding is reflected in the record and explains the utility of the modification clause permitting later claims for yet-unlitigated rights. And similar to the language in *Conrad* and *Ahtanum*, the *Walker I* court expressly considered storage to be a *future* solution should the Tribe's needs increase over time. *See Walker I*, 11 F. Supp. at 164–65 (recognizing that no reservoir had yet been constructed on the Reservation and reasoning that a *future reservoir* would "undoubtedly greatly *increase* the present supply" of 26.25 cfs) (emphasis added). Thus, contrary to Defendants' contentions, the United States' reliance on the *Winters* doctrine as the legal basis for the Reservation's surface water right did

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[20] Well aware of this precedent, the Special Master in this case cited to the District Court proceeding in *Conrad*. Special Master Report, App. R. at 265.

[21] In the seminal *Winters* litigation, the United States and relevant parties focused solely on upstream diversions on the Milk River that negatively impacted the existing Indian irrigation project on the Fort Belknap Reservation. *Winters*, 207 U.S. 564 (1906). No one can credibly claim–nor have they tried–that the United States and the Assiniboine and Gros Ventre Tribes of the Fort Belknap Reservation should be forever barred from asserting and confirming the full extent of their reserved rights now because of the *Winters* litigation over a century ago. Indeed, those Tribes and the State of Montana recently entered into a compact to define the full scope of the Reservation's reserved water rights. Fort Belknap Compact, Mont. Code Ann. § 85-20-1001 (2019). Federal legislation to authorize the compact has been introduced several times, but has not yet passed Congress.

not contort the 1926 Amended Complaint into an action to declare all rights of the Reservation under that doctrine.

Accordingly, the United States did not litigate all of the Reservation's *Winters* rights once and for all in *Walker I*. The record, the expectation of the parties, and the Court's ruling all show that the United States narrowly claimed a right to protect a single source of water on the Reservation as it existed in 1926 from interference by Defendants. And so, Plaintiffs do not seek a "relitigation" of a right already determined, but a declaration and quantification of rights to new sources and for new lands for the first time.[22] Defendants' interpretation of what was litigated in this case is wholly unsupported by the record and the context of this case and should be rejected.

Finally, to refute this argument on a broader scale, Defendants make the unsupported statement that there is "no basis in law or in fact for seriatim actions each separately determining a quantity of water from surface and groundwater sources[.]" Response at 62 (citing no authority). This is incorrect both in the context of this case and under the law, and would effectively prevent a downstream party from ever protecting rights at immediate risk of illegal appropriation until it could research and assert all possible claims. Even when the United States does not initiate litigation but is required under the McCarran Amendment, 43 U.S.C. § 666, to participate in state court *general* stream adjudications, such proceeding may address surface water and groundwater separately. *See e.g.*, *United States v. State of Oregon Water Resources Dept.*, 44 F.3d 758, 768–70 (9th Cir. 1994) (holding that a state court proceeding adjudicating

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[22] And while some water will be used on the same lands for which the Tribe litigated its surface water rights, the law allows for such rights to distinct sources to be quantified in addition to surface water rights so long as they have not yet been litigated.

surface water, but not addressing groundwater or precluding future litigation of groundwater, was comprehensive for purposes of the McCarran Amendment and required the United States' participation); *see also*, *Washington Dept. of Ecology v. Acquavella, et. al.*, No. 77-2-01484-5 at 2 (Wash. Super. Ct. Jan. 8, 1986) (describing state court adjudication of the Yakima River Basin, to which the United States was joined under the McCarran Amendment, as limited to surface water and noting that the United States was not barred from asserting federal reserved rights to groundwater in a subsequent proceeding).[23] In such proceedings, where the United States asserts *Winters* claims, it does so only regarding the source of water being adjudicated. Consequently, Defendants' uncited assertion is plainly contrary to the law, as well.

In sum, Defendants' arguments that Plaintiffs' claims are barred by finality and repose because they "could have" been litigated or, in the alternative, were litigated under the United States' 1926 Amended Complaint lack any basis in case law or the record. Plaintiffs' three water right claims today have not been litigated, and it is irrelevant whether they "could have" been litigated in 1926. As such, Plaintiffs are entitled to summary judgment dismissing Defendants' Third Affirmative Defense of finality and repose.

IV. Defendants misconstrue the law concerning the existence of a surface water right to the added lands.

Plaintiffs' MSJ demonstrated that Defendants' Seventh Affirmative Defense – that water was not reserved for lands added to the Reservation unless Plaintiffs can show that water granted in the 1936 Decree is insufficient to meet the purposes of those lands – is plainly incorrect as a

[23] Though this opinion is public record, it is provided here as Plaintiffs' Exhibit 17 for the convenience of the Court and the Parties.

matter of law. MSJ at 40–43. In response, Defendants argue that, where land is reserved and added to an existing Reservation, "it is relevant and appropriate [for the Court] to consider the sufficiency of the Reservation's already existing water right when considering whether additional water has been reserved." Response at 72–73. Defendants argue, as they also do in support of their Twelfth Affirmative Defense, discussed below, that a reservation of land does not bring with it a reservation of water if the lands could be served by water already available. Response at 70, 72–73. But as the Ninth Circuit has found, the only inquiry the Court must undertake to determine whether water is reserved for a reservation is whether the purpose of the reserved lands anticipated water use. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269–70 (9th Cir. 2017) (rejecting defendant water agencies' similar argument that "*New Mexico* stands for the proposition that water is impliedly reserved only if other sources of water then available cannot meet the reservation's water demands," and finding that "*New Mexico* did not . . . eliminate the threshold issue–that a reserved right exists if the purposes underlying a reservation envision access to water").

Defendants provide little explanation in support of this affirmative defense and cite no authority to support it beyond conclusory restatements of *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978), that the *Winters* doctrine "reserves only the amount of water necessary to fulfill the purposes of the reservation, and no more."[24] Response at 73. To be sure, *Cappaert* and *New Mexico* both state this broad

[24] Defendants retreat in part from their reliance on *New Mexico*, saying they "are not contending that the primary/secondary distinction applies here." Response at 73. This is surprising, given that their Seventh Affirmative Defense appears to be premised on that very distinction. Sample WRID Answer at 6–7 ("A federal reserved water right exists only if 'necessary' to fulfill the *primary* purposes–as opposed to the *secondary* purposes–of the federal reserved lands, *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978)[.]") (emphasis in original). In any event,

proposition. 426 U.S. at 141; 438 U.S. at 700. But neither case addresses *Winters* rights in a situation where lands are added to a reservation, and neither considered the sufficiency of an existing right to fulfill the purpose of a later reservation. *See Cappaert,* 426 U.S. at 142–43, 147 (holding that United States had *Winters* rights to protect rare fish species for which national monument was reserved); *New Mexico*, 438 U.S. at 698–702, 715 (articulating a distinction between the primary purposes and secondary uses of national forests and quantifying reserved rights of a national forest *after* an earlier action determined that water was reserved under the *Winters* doctrine).

Defendants clarify that this defense relates to Plaintiffs' claims for lands added to the Reservation in 1918 and 1928, not those for lands added in 1936 and thereafter. Response at 7. Accordingly, Defendants' argument appears to be that, in determining whether water is necessary for lands added in 1918 and 1928, the Court must consider the sufficiency of the water reserved in 1859 and recognized in the Walker River Decree. Thus, Defendants would have this Court reconsider the sufficiency of the Tribe's previously decreed right to determine whether it

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Plaintiffs explained in their MSJ that *New Mexico's* primary purpose/secondary use distinction does not directly apply in the context of Indian reservations, whose purposes are entitled to broader interpretation than those of other federal reservations, such as national forests. MSJ at 37. Despite the suggestion in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), that the primary purpose/secondary use distinction may provide "useful guidelines," multiple state supreme courts have since *Adair* concluded that the *New Mexico* distinction should not apply to Indian reservations, instead favoring broad homeland or multiple purposes for such reservations. *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 448 P.3d 322, 355–59, 363–66 (Idaho 2019); *In re General Adjudication of All rights to Use Water in Gila River system and Source*, 35 P.3d 68, 76–78 (Ariz. 2001); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 766–68 (Mont. 1985).

could also serve additional needs that were not the subject of the Decree.[25] Yet, Defendants make no claim that the 1859 right to 26.25 cfs (established by 1940) was based on anything other than the then-believed irrigation needs of approximately 2,100 acres. And, at the same time, they suggest that a water right that arose in 1859 and was specifically decreed for one purpose can be stretched to meet the additional needs of future, unforeseeable purposes. This is not only legally incorrect but illogical, and neither *New Mexico* nor any other decision suggests that the Court should engage in such a parsimonious undertaking to diminish the right. As discussed above, in determining whether water was reserved for added lands, the proper inquiry for this Court is whether the purposes of the reservation envisioned water use; if so, water is reserved. For these reasons, Plaintiffs are entitled to summary judgment dismissing Defendants' Seventh Affirmative Defense because it fails as a matter of law.

V. Defendants misstate the law concerning the existence of a reserved right to groundwater.

In their MSJ, Plaintiffs demonstrated that Defendants' Twelfth Affirmative Defense – that the *Winters* doctrine applies to groundwater only where there is insufficient surface water – is incorrect as a matter of law. MSJ at 38–39. Defendants cite no authority to support this defense in their answers, and given an opportunity to provide such support in the Response, they

[25] As detailed previously, for the 1918 and 1928 lands, Plaintiffs claim no more than the right to sufficient surface water and groundwater found on or under those lands to provide water for stock consumption. Detailed Statement at 9–12. In contrast, the 1936 Decree recognized no more than 26.25 cfs from the Walker River to irrigate approximately 2,100 acres for 180 days of irrigation.

again fail to do so.[26] In their Response, Defendants' arguments largely overlap with those in support of their Seventh Affirmative Defense. For the reasons stated in Plaintiffs' Motion, Defendants misapply the law concerning the existence of a federal reserved water right.

Put simply, the law governing federal reserved water rights consists of two distinct determinations: (1) the existence of a right, and (2) the quantification of that right. *See Agua Caliente*, 849 F.3d at 1269; *New Mexico*, 438 U.S. at 698. To determine if a reserved water right exists, a court asks only if the reservation at issue was created for purposes that envision water use. *Winters v. United States*, 207 U.S. 564, 565 (1906); *Agua Caliente*, 849 F.3d at 1269. If so, water is reserved to fulfill those purposes, and only then does the court consider how much water is necessary. *See Agua Caliente*, 849 F.3d at 1269; *New Mexico*, 438 U.S. at 698. In contending that reserved rights to groundwater depend on the insufficiency of surface water, Defendants conflate these separate determinations, moving the issue of quantity into a determination of whether the right exists in the first instance. Response at 66, 68–69. This is not the law.

Defendants attempt to distinguish *Agua Caliente*, which is binding precedent, on the ground that "surface water in the Coachella Valley is minimal or entirely lacking for most of the year," and that some reservations are dependent entirely on groundwater. Response at 69. While these statements are certainly true of the Agua Caliente Reservation, the passages quoted by Defendants proved relevant to the *Agua Caliente* court only in reasoning *why* the *Winters* doctrine should apply to groundwater at all; the court did not rely on them in determining that the Tribe has a reserved right to groundwater. *Agua Caliente*, 849 F.3d at 1270–71, 1273. Indeed,

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[26] In fact, the bulk of Defendants Response in support of this defense asserts that Plaintiffs' groundwater right is barred by finality and repose (Defendants' Third Affirmative Defense) and *res judicata*. These arguments are addressed in Section III, *infra*.

the court rejected the argument by Defendant water agencies in that case that a reserved right to groundwater did not exist because the Agua Caliente Tribe had a right to surface water under an existing state court decree. The court's determination that a reserved right to groundwater existed was instead premised instead solely on anticipated water use to fulfill the purposes for which the Agua Caliente Reservation was established, regardless of any "demonstrated need" beyond existing surface water. *Id.* at 1269–71, 1273. Only after making this "purpose" determination did the court discuss quantifying the right based on the needs of the reservation. *Id.* at 1272.

Thus, Plaintiffs are entitled to summary judgment dismissing Defendants' Twelfth Affirmative Defense because it is plainly incorrect as a matter of law.

VI. Conclusion

For the reasons articulated herein, Plaintiffs are entitled to summary judgment as to Defendants' Third, Seventh, Twelfth, and Fourteenth Affirmative Defenses.

Dated: March 1, 2021

Respectfully submitted,

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Certificate of Service

It is hereby certified that on March 1, 2021 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 (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 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."

By */s/ Andrew "Guss" Guarino*
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