No. _____

In The
Supreme Court of the United States

CROW ALLOTTEES, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE, THE CROW TRIBE, AND THE STATE OF MONTANA,

Respondents.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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December 14, 2015

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QUESTION PRESENTED

Can the water rights owned by individual Crow Indian allottees – which this Court in *United States v. Powers*, 305 U.S. 527 (1939) recognized as distinct individual rights, separate from water rights possessed by the Crow Tribe – be awarded to the Crow Tribe in negotiations between the United States, the tribe, and the State of Montana?

Further, do the Montana Courts have jurisdiction to decide these questions of federal law related to allottees' rights?

PARTIES TO THE PROCEEDING

Petitioners, who were the Appellants below, are Crow Indian allottees ("Allottees") who appealed to the Montana Supreme Court from a Montana Water Court dismissing their objections to the Crow Water Compact and refusing to stay proceedings pending federal court review of the federal questions raised by the Allottees.

Respondents, who were the Appellees below are the United States Department of Justice, the Crow Tribe, and the State of Montana.

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PETITION FOR A WRIT OF CERTIORARI

This case offers this Court an ideal vehicle to flesh out the extent and precise nature of Allottees' vested property rights pursuant to the *Winters* doctrine Indian reserved water rights. Further, this case offers the Court the opportunity to address concerns that it raised more than three decades ago relating to the McCarran Amendment and state court jurisdiction of the adjudication of Indian water rights. Additionally, this case offers the opportunity to address whether an agreement between the state of Montana, the Crow Tribe and the United States can be binding on individual Crow Allottees, who were denied an opportunity to negotiate.

The questions related to the nature and extent of Allottees' property interests in *Winters* doctrine reserved water rights, the appropriate Court to determine federal questions related Indian water rights, and whether the United States in its trust capacity for Allottees and in direct violation of federal law, can give away the Allottees' property rights to the Crow Tribe and state of Montana, will not subside until this Court resolves them. Time is of the essence. If this Court does not grant certiorari, the Crow Allottees' property rights will forever be lost due to the state court decree in direct contradiction of federal law. Further, other Allottees across the West need to know the extent and precise nature of their rights so they can protect them in the numerous future state proceedings adjudicating Indian reserved water rights. The state and federal courts need to know

when federal court jurisdiction supersedes state court jurisdiction. This case presents the ideal vehicle for this Court to resolve these controversies.

Lastly, if this Court does not accept certiorari, the Crow Allottees' rights will expire because the United States acting as Trustee for the Allottees waived the Allottees' potential claims against the United States for United States violations of its trust obligations to the Allottees. In the Settlement Act passed by Congress to approve the Crow Water Rights Compact, the Secretary of the Interior, acting as trustee for the Allottees, executed a waiver and release of all Allottees' claims for *Winters* doctrine reserved water rights appurtenant to trust allotments. Crow Tribe Water Rights Settlement Act of 2010, P.L. 111-291, § 410(a)(2), 124 Stat. 3097 (Dec. 8, 2010). This waiver will become effective on the enforceability date of the Crow Compact. Settlement Act § 410(e)(1)(A). In a somewhat convoluted fashion, the Crow Allottees' treaty rights, property rights and rights to sue the United States for trust duty violations expire upon completion of any appeal to this Court or the appropriate United States Court of Appeals. Settlement Act § 403(7).

The Court should grant plenary review.

OPINIONS BELOW

The Montana Supreme Court's decision, *In re the Crow Water Compact*, is reported at 354 P.3d 1217

(Mont. 2015). There is a related case from the Federal District Court of Montana, in which the Allottees requested an injunctive relief and a declaratory judgment on issues of federal questions related to Indian reserved water rights. The court granted the State of Montana's Motion to Dismiss and the United States Motion for Judgment on the pleadings. These orders have not been published and are being appealed to the Ninth Circuit Court of Appeals.

JURISDICTION

The Montana Supreme Court rendered its decision on July 29, 2015. This Court has jurisdiction under 28 U.S.C. § 1257. The Montana Courts' decision violates the United States Treaty with the Crow Allottees, statutes governing the United States in relation to the Allottees, and violates the Allottees' Constitutional rights to due process and private property.

PROVISIONS INVOLVED

This case involves Indian Treaty Rights.

STATEMENT OF THE CASE

A. Basic Statement of Facts

The Crow Tribe is a federally recognized American Indian tribe located on the Crow Indian Reservation in southeastern Montana. In 1891, via an act of Congress, the Crow Tribe ceded two million acres of land to the federal government. Crow tribal members were permitted to hold trust allotments on the ceded portion that were issued pursuant to the 1887 Dawes Severalty Act, also known as the 1887 General Allotment Act or Dawes Act. 24 Stat. 388, codified at 25 U.S.C. §§ 331-333. In 1904, the federal government reduced the size of the Crow Reservation to 2.3 million acres, its present size.

The 1920 Crow Allotment Act allocated Crow Reservation lands to every enrolled member of the Crow Tribe as individual trust allotments, with the legal title held in trust by the United States. Tribal members were issued trust patents, unless they elected in writing to have them patented in fee. 41 Stat. 751 (June 4, 1920). As the holder of title in trust for the benefit of individual Allottees, the United States has a fiduciary responsibility to the Allottees.

The relationship between the federal government and Indian tribes has long been considered a trustee relationship. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing Indians as "domestic dependent nations"). According to one scholar, "[t]he word 'dependent' was not meant to be pejorative. It meant, vis-à-vis the treaties that the United States

had entered into with the tribes, the tribes were owed protection." Brett J. Stavin, *Responsible Remedies: Suggestions for Indian Tribes in Trust Relationship Cases*, 44 Ariz. St. L.J. 1743, 1747 (2012) (citations omitted).

In addition to its trust responsibility to Indian tribes, the United States also stands in a fiduciary role as the holder of title in trust for the benefit of individual Allottees, and purported to represent the Allottees' interests throughout the Crow Compact negotiations.

The purpose of Indian allotment – to undermine tribal ownership and cultivate individual ownership in Native Americans – has been called "an unmitigated disaster for Native Americans, an example of ethnic cleansing in the literal sense: the idea was to 'cleanse' the Native Americans of their ethnic identity and to force them to become independent farmers, part of 'mainstream' America." Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 Gonz. L. Rev. 609, 616 (2011).

This is the painful and unjust irony of Allottees' claims: Having been stripped of their communal lands 100 years ago and forced onto allotments, they now assert their legal rights as individual owners of real property to their appurtenant water rights. In response, they are told that all water within the boundaries of the Crow Reservation is owned communally, by the Crow Tribe, and that they have no legally recognizable rights to the water they use and need.

The Allottees have alleged in their federal court complaint as well as in their objections to the Montana Water Court, which was appealed to the Montana Supreme Court, that the United States never consulted with them about these waivers, never obtained their consent to these waivers, failed to provide them with adequate legal representation, failed to protect their rights under the Compact, and violated its fiduciary responsibility to them through its actions. *Crow Allottees Assoc., et al. v. United States Bureau of Indian Affairs, et al.*, Case 1:14-cv-00062-SPW-CSO, First Amend. Compl., U.S. Dist. Ct. for the Dist. of Mont., Billings Div. (Sept. 11, 2014).

The Allottees sent several letters to the United State Bureau of Indian Affairs related to these issues. On November 16, 2009, the Crow Allottees Association sent a letter to the Assistant Interior Secretary for Indian Affairs, Larry Echohawk, stating:

> As you are no doubt aware, the Crow Tribal allottees of land on the Crow Reservation have a well established legal water right that is distinguishable and mutually exclusive to that of the Tribal water right. . . . CAA allottees have an individual right to be represented in the negotiation of a water settlement agreement which seeks to include Crow Tribal member allotees. CAA and its members **do not** wish to be represented by the Tribal Administration in connection with water quantification, allocation, and the

> negotiation of allottees water rights. (Emphasis in original).
>
> . . .
>
> Most CAA members are *in forma pauperis*. CAA requests that the Secretary of Interior provide CAA with adequate funds for CAA and or its individual members to employ a water rights lawyer of their choice, because the BIA has a conflict of interest in representing the federal government's water rights while simultaneously living up to its fiduciary responsibilities to Crow Tribal members claiming water rights.

See Letter from Crow Allottees Association to Larry Echohawk, Assistant Secretary of the Interior, Bureau of Indian Affairs (Nov. 16, 2009) (Attached as Exhibit E to the Crow Allottees' Opening Brief to the Montana Supreme Court).

In response, Alletta Belin, Counselor to the Deputy Secretary, responded:

> Your letter raises a number of difficult questions. At the outset, it is important to explain that the Department is aware of the unique right of allottees and how those rights might be impacted by the Compact entered into by the Crow Tribe and the State of Montana pending legislation before Congress to approve and ratify the Compact. The Department intends to continue working with Congress and the Tribe to ensure that allottee

> interests are appropriately addressed in any legislation approving the Compact.
>
> The role to be played by individual allottees or allottee associations in settlement negotiations is complicated. I have been informed that there are thousands of allottees holding interests in trust lands on the Crow Reservation. Obviously, negotiating with this many people is a practical impossibility.

See Letter from Alletta Belin, Counselor to the Deputy Secretary, to the Crow Allottees Association (Feb. 5, 2010) (Attached as Exhibit F to the Crow Allottees' Opening Brief to the Montana Supreme Court).

Instead of responding to the Crow Allottees continuous request to be at the negotiating table and adequately represented during the negotiations, the United States continued on with its negotiations with the State of Montana and the Crow Tribe to negotiate and finalize the Crow Compact, which had the purpose of "settling any and all existing water right claims of or on behalf of the Crow Tribe of Indians in the State of Montana." Mont. Code Ann. § 85-20-901. In addition to leaving the Allottees out of the negotiations, the United States, the State of Montana and the Crow Tribe left any mention of the Allottees out the of the Compact. Nowhere is the term "Allottees" used. In contrast, the term Allottee is used 34 times in the Water Rights Compact for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, which passed the Montana Legislature in 2015. Mont. Code Ann. §§ 85-20-1901 *et seq*. Further, the

Salish and Kootenai Compact was for the purpose of not only settling the Tribes claims, but also for settling the Allottees' claims. Mont. Code Ann. § 85-20-1901.

B. Prior Court Proceedings

The Crow Allottees asked the Montana Supreme Court to reverse the Montana Water Court's dismissal of Allottees' objections to the preliminary decree approving the Crow Water Compact ("Compact") and stay the Water Court proceedings pending resolution of the Allottees' claims in federal court. This interlocutory appeal raised questions of law, not fact. Mont. Code Ann. § 85-2-235(3).

Additionally, Allottees filed a complaint in U.S. District Court for the District of Montana on May 15, 2014, alleging violations of their constitutional and statutory rights and citing their formal objections to the Crow Water Compact. *Crow Allottees Assoc. v. U.S. Bureau of Indian Affairs*, CV-14-62-BLG-SPW-CSO (May 15, 2014). Allottees filed their objections individually in the Montana Water court between March and June 2013.

On the same day their federal complaint was filed, Allottees moved to stay the Montana Water Court proceedings, in which a preliminary decree approving the Crow Compact was issued on Jan. 28, 2013. Notice of Appearance and Motion to Stay, WC 2012-06 (May 15, 2014); http://www.dnrc.mt.gov/wrd/water_rts/adjudication/adjstatus_report.pdf. The Crow

Tribe moved to dismiss Allottees' Objections on May 23, 2014, and the United States moved to dismiss on June 2, 2014. Both parties resisted Allottees' motion to stay.

Without a hearing, the Water Court dismissed Allottees' objections and denied their motion to stay as moot. Order (July 30, 2014). The Montana Supreme Court affirmed the Water Court's order dismissing the Allottees' objections to Compact and refused to order a stay.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Determine Whether the Montana Supreme Court Erred in Finding the Montana Water Court Had Jurisdiction to Make Legal Determinations Regarding Allottees' Federal Claims.

The Montana Water Court does not have the jurisdiction nor the legal authority to modify the terms related to the Crow Compact or the Settlement Act. The Chief Water Judge, commonly known as the Water Court, is a position created by statute. Mont. Code Ann. § 3-7-224(2). "The chief water judge and the associate water judge have jurisdiction over cases certified to the district court under 85-2-309 and *all matters relating to the determination of existing water rights within the boundaries of the state of Montana*." *Id.* (emphasis added).

"Under current Montana law the jurisdiction to determine existing water rights rests exclusively with the Water Court." *Fellows v. Office of Water Com'r ex rel. Perry v. Beattie Decree Case No. 371*, 2012 MT 169, ¶ 15, 365 Mont. 540, 285 P.3d 448. The corollary of this rule is the Montana Water Court lacks jurisdiction to determine anything *other than* existing water rights. Further the Montana Water Court cannot change the terms of the Compact. Mont. Code. Ann. § 85-2-702 (providing that the Montana Water Court must include the terms of the compact "in the final decree without alteration.").

Additionally, issues of Indian law are within the exclusive jurisdiction of the federal courts. "Through the Supremacy Clause of the United States Constitution, federal preemption of state law in Indian affairs has continued as the principal doctrine underlying Indian law." *In re Estate of Big Spring*, 2011 MT 109, ¶ 26, 360 Mont. 370, 255 P.3d 121 (citing U.S. Const., art. VI, cl. 2). "Adherence to these principles has resulted in federal treaties, executive orders, and statutes preempting state law in areas that would otherwise be covered by a state's residual jurisdiction over persons and property within the state's borders." *Id.* (citing *Cohen's Handbook of Federal Indian Law* §§ 2.01, 6.01[2]).

"The [federal] district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land." 28 U.S.C. § 1353. The federal courts also have exclusive jurisdiction of

disputes involving Indian allotments, including suits related to title, ownership, or other rights appurtenant to title in allotted land. *United States v. Mottaz*, 476 U.S. 834 (1986); *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184 (9th Cir. 1988); *Christensen v. U.S.*, 755 F.2d 705 (9th Cir. 1985); *Loring v. U.S.*, 610 F.2d 649 (9th Cir. 1979).

The McCarran Amendment waives the sovereign immunity of the United States in state adjudications of reserved water rights, including Indian reserved water rights. 43 U.S.C. § 666; *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 811 (1976). While the McCarran Amendment vests the Water Court with concurrent jurisdiction to adjudicate federal water rights reserved to the Crow Indians, it does not grant it with jurisdiction to decide issues of federal Indian or constitutional law.

This Court addressed similar issues related to state court jurisdiction over Indian rights in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). In that case the Court stated:

> We also emphasize, as we did in Colorado River, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized

> and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Id. at 571. In this case, the Montana courts abridged Allottees' Indian water rights. The courts failed to follow federal precedent and also decided issues of federal jurisdiction that were not properly before the Court.

For example, in their Opening Brief to the Montana Supreme Court, Allottees argued:

> Fundamental to Allottees' objections are specific legal claims that:
>
> (1) Allottees have a legal right to water that is distinct from the Crow Tribe's reserved right;
>
> (2) The Crow Compact will harm the Allottees' legal and property rights; and
>
> (3) The United States' representation as trustee of the Allottees during the Compact negotiations was inadequate.
>
> These are not claims that the Water Court can resolve. Only a federal court with jurisdiction over federal questions can properly decide the legal issues underlying Allottees' objections, which is why Allottees filed their federal court complaint and simultaneously moved to stay the Water Court proceedings pending the federal court's decision.

> The Water Court has jurisdiction to approve the Crow Compact insofar as its approval is based upon its findings as to "existing water rights within the state boundaries." Mont. Code Ann. § 3-7-224(2). The United States and the Crow Tribe opposed Allottees' motion to stay and moved to dismiss Allottees' objections on the grounds that Allottees' claims are without merit. (citations omitted). The governments' actions cannot and do not empower the Water Court with the proper jurisdiction, however. The Water Court should have recognized the limitations on its power and deferred to the federal court.
>
> Instead, the Water Court ignored Allottees' factual allegations and improperly decided Allottees' claims regarding the nature of their water rights vis-à-vis the Crow Tribe, the adequacy of the United States' representation of them in the Compact negotiations and its waiver of their claims against the Tribe and the United States, and the necessity of a current use list to preserve Allottees' rights – issues that far exceed its limited jurisdiction.
>
> These legal conclusions are reversible error. The Water Court relied on disputed issues of fact and failed to construe those facts in a light most favorable to the Allottees. Moreover, it reached conclusions it lacks jurisdiction to decide and applied federal law incorrectly.

Allottees' Opening Br. at pgs. 34-36.

Instead of addressing Allottees' specific arguments, the Montana Supreme Court ruled that based on a Montana Supreme Court decision, *Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754 (1985), Montana courts were "sufficient to provide a McCarran Amendment forum for the determination of federal and reserved water rights." *In re the Crow Water Compact*, 354 P.3d 1217, 1222. Further, as discussed in the next section, the Montana Supreme Court failed to follow the controlling federal law.

Even though the Montana Water Court did not have jurisdiction to determine whether Allottees were adequately represented during the Compact proceedings, that court determined that the United States adequately represented the Crow Allottees. *Id*. ¶ 13. This is a question of federal law that does not fall with the McCarran Amendment concurrent jurisdiction.

The Crow Allottees need this Court to follow up on their words in the *Arizona* case and provide protection for the Allottees' federal interests to safeguard against the state court action that runs afoul of federal precedent and that would serve to forever alienate the Crow Allottees constitutionally protected property rights – *Winters* doctrine Indian reserved water rights.

II. The Court Should Grant Review to Determine Whether the Montana Courts Erred in Determining Allottees Have No Water Rights Pursuant to Federal Law.

The decision below cannot be reconciled with this Court's precedent concerning Allottees' *Winters* doctrine Indian reserved water rights. The Montana Supreme Court erred in failing to apply the plain language from the cases interpreting the seminal Indian reserved water rights. *Winters v. United States*, 207 U.S. 564 (1908). "The waters were reserved to the ***individual Indians and not to the tribe***," said the Ninth Circuit in a case upheld by this Court in a 1938 case also from the Crow Reservation in Montana. *United States v. Powers*, 94 F.2d 783 (9th Cir. 1938); upheld by *United States v. Powers*, 305 U.S. 527 (1939) (emphasis added). Instead, of following *Powers* and in direct opposition to *Powers*, the Montana Supreme Court held, "the Allottees have water rights that are derived from the reserved rights of the Crow Tribe." *In re the Crow Water Compact*, 354 P.3d 1217, 1220.

The Montana Supreme Court also erred in holding that Allottee rights to a "just and equal portion" of the Crow Tribe's water rights was the extent or precise nature of Allottees' *Winters* doctrine Indian reserved water rights. In 1939, this Court stated, "[w]e do not consider the extent or precise nature of respondents' [Allottees] rights to the water. The present proceeding is not properly framed to that end." *United States v. Powers*, 305 U.S. 527, 533 (1939).

This proceeding is properly framed for this Court to determine the "extent and precise nature" of Allottees' rights in Indian reserved water rights.

In a case out of Arizona, this Court emphasized, "[a]ny state court decision alleged to abridge Indian water rights protected by federal law can expect to receive . . . a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983). This case, in which the Montana Supreme Court has erred in interpreting federal law to find Allottees have no vested property rights, invokes this Court's particular and exacting scrutiny to safeguard the Allottees' property rights. Without this Court's intercession, the Crow Allottees will never receive the property promised to them by the *Winters* Doctrine and the Crow Treaty of 1968.

Further, the Crow Tribe, the State of Montana, and the United States Government negotiated for years, excluded the Allottees from those negotiations, and agreed to a deal in which the Crow Tribe received millions of dollars and all of the water allocated for use by Indians on the Crow Indian Reservation. The Crow Tribe owns approximately twenty percent of the lands within the boundaries of the Crow Reservation. The individual Allottees own approximately forty-five percent of the land within those same boundaries. Even though the Allottees' property rights were at stake, they did not have a seat at the negotiating

table, and the tribe, state and federal government cut a deal to the detriment of the Allottees.

The Code of Federal Regulations establishes a procedure under which the Secretary of Interior can grant right-of-ways across individual allotments, if the allotment has multiple owners. 25 C.F.R. § 169.3. However, the easement cannot be granted unless a majority of those who own an interest in the allotment consent. *Id*. In this case, not only did a majority of those with interests in the allotments not consent, they were not even allowed at the negotiating table. A water right is an equal to or greater property interest than a right-of-way. Therefore, the United States should not be able to give away the Allottees' property rights without at the very least, a majority consent from the Allottees.

A. The Montana Supreme Court erred in holding the Allottees had no *Winters* reserved water rights.

This Court held that state courts have a "solemn obligation to follow federal law" when adjudicating reserved water rights of Allottees and tribes. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). Pursuant to federal law, Allottees are entitled to a "ratable share" of the reserved water rights. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

Instead of following the plethora of federal law holding that an Allottee has a vested right in the use

of water sufficient to irrigate his land, the Montana Supreme Court held that Allottees have no enforceable property right in water. Instead the Montana Supreme Court found that upon passage of the Compact and the Settlement Act, Allottees' previous property right to an enforceable, pro-rata share of the *Winters* doctrine Indian reserved water rights was now an entitlement to a "just and equitable share of the Tribe's rights." *In re the Crow Water Compact*, 354 P.3d 1217, 1222. Basically, the Montana Supreme Court found that the passage of Montana and Federal legislation laundered Allottees' property rights in the use of water into something much less than a property right.

1. Attributes of the property interest in an Allottee *Winters* reserved water right.

Unlike most property rights being creatures of state law, *Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), *Winters* reserved water rights are creatures of federal law. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) (finding "[r]eserved rights are "federal water rights" and "are not dependent upon state law or state procedures"). This Court stated, "[t]his doctrine, known as the *Winters* doctrine, is unquestionably a matter of federal, not state, law." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 573-74 (1983). The Court found that the water rights were "[v]ested no later than the date each reservation was

created," and the rights were superior to all subsequent appropriations under state law. Further, the Court noted that the scope of *Winters* doctrine Indian reserved water rights had not been resolved. *Id.* at 574. The Court stated, "[t]he important task of elaborating and clarifying these federal law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible." *Id*. Lastly, it should be noted the Allottees' water rights were reserved to them when the Indians made the treaty granting the rest of their property to the United States. *Winters v. United States*, 143 F. 740, 749 (9th Cir. 1906); *Winters v. United States*, 207 U.S. 564 (1908).

Even though the scope of *Winters* Indian reserved water rights has not been fully determined, federal law recognizes that *Winters* reserved water rights are vested property rights for the Allottees. *United States ex rel. Ray v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928) (finding that a non-Indian successor in interest is entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians); *United States v. Powers*, 94 F.2d 783, 784-85 (9th Cir. 1938) upheld by *United States v. Powers*, 305 U.S. 527 (1939); *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965) (holding that an allottee "owns the water the minute the reservation is created, and his rights become appurtenant to his land"); *United States v. Adair*, 478 F.Supp. 336, 346 (D. Or. 1979) (holding that "Indian successors in interest acquired the allottees' water rights to the same extent

as if the allottees still possessed the land"). In *Powers*, the Ninth Circuit articulated some of the parameters of an Allottee's property interest in *Winters* reserved water rights. That court held:

> [t]he waters were reserved to individual Indians and not to the tribe; that under the treaty of 1868 each member of the Crow Tribe secured a vested right in the use of sufficient water to irrigate his irrigable land.

United States v. Powers, 94 F.2d 783, 784-85 (9th Cir. 1938) upheld by *United States v. Powers*, 305 U.S. 527 (1939). The court further articulated that the Allottees' *Winters* reserved water rights have a priority date as of the time the reservation was set aside. *Id.* at 784. Lastly, the court clarified that the Allottee's property rights were freely transferrable even to a non-Indian successor in interest. *Id.* at 785 (holding, "the purchaser of such lands . . . acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantor").

In 1981, the Ninth Circuit applied *Powers* as follows: "It is settled that Indian allottees have a right to use reserved water. '[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.'" *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981) (citing *United States v. Powers*, 305 U.S. 527, 532). Further, this Court found that the Allottees rights were fully transferrable property rights. *Id*.

In *Adair*, the Ninth Circuit found "[t]he scope of Indian irrigation rights is well settled. It is a right to sufficient water to 'irrigate all the practicably irrigable acreage on the reservation.' Individual Indian allottees have a right to use a portion of this reserved water." *United States v. Adair*, 723 F.2d 1394, 1415-16 (9th Cir. 1983) (internal citations omitted). The *Winters* Indian reserved water right is a right retained by Allottees to use a certain amount of water and is limited by the Allottees' irrigable acres. *Id.*; *see also In re the General Adjudication of all Rights to Use Water in Gila River System and Source*, 35 P.3d 68 (Ariz. 2001) (discussing a broader standard than practically irrigable acres to quantify *Winters* reserved water rights).

Based on the federal law precedent, Allottees retained a water right at the time the reservation was created to be able to irrigate some amount of property and Allottees can transfer that property to their successor in interest. This right is usufructory similar to most water rights in the West that are based on the prior-appropriation doctrine. The prior-appropriation doctrine refers to the ownership interest in the right to use the water, not ownership of the corpus of the water itself. Wells A. Hutchins, Harold H. Ellis, J. Peter DeBraal, Vol. I, P. 142. In summary, even though the federal courts have not fully defined the scope of a *Winters* doctrine Indian Allottee reserved water rights, it is clear that the Allottees acquired a vested property right in a certain amount

of water with the priority date of when the reservation was set aside for the Indians.

2. A "just and equal share" of the Crow Tribe's Water Right is not equivalent to a *Winters* doctrine water right.

Instead of following the federal law related to *Winters* Indian reserved water rights, the Montana Supreme Court found all the Allottees were entitled to pursuant to *Winters*, was a "just and equal share of the Tribal Water Right." *In re the Crow Water Compact*, 354 P.3d 1217, 1220. This holding ignores federal law establishing the Allottees have vested property rights in *Winters* doctrine Indian reserved rights. An entitlement to a "just and equal share" of the Crow Tribe's water rights, is not a property right. At most, it is a potential future process; however, it is impossible to know what the process will allocate because according to the Montana Courts, the Crow Tribe received all of the water rights, even those water rights that according to federal law are appurtenant to Allottees' land. There is no dispute that the Crow Tribe has ownership of the corpus of the water similar to the state of Montana owning the corpus of the water in Montana. Further, there is no dispute that the Crow Tribe has the right to administer the water rights within the boundaries of the Crow Reservation. The dispute is that the Montana Courts ignored federal law and found Allottees have no water rights

anymore and Allottees' rights are now owned by the Crow Tribe.

As the Ninth Circuit stated, "the lands . . . occupied by the Indians, under the treaty with the government, are dry and arid, and crops cannot be grown thereon without sufficient water to irrigate the same. Unless water is obtained, the lands and homes of the respective parties would be rendered valueless and useless." *Winters v. United States*, 143 F. 740, 742 (9th Cir. 1906). Similarly, this Court stated, "[t]he lands were arid, and, without irrigation, were practically valueless." *Winters v. United States*, 207 U.S. 564, 576 (1908). Based on its ignorance of federal law, the Montana Supreme Court has determined Allottees have no appurtenant water rights. This determination has rendered Allottees' land practically valueless.

There is no doubt the *Powers* case discussed the word "just and equal share" of water; however, the Court additionally stated:

> The Secretary of the Interior had authority (Act of 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear he ever undertook so to do. Certainly, he could not authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.

United States v. Powers, 305 U.S. 527, 347 (1939). To date, the Secretary of Interior has not prescribed such

rules and regulations necessary to secure a just and equal distribution of water among the Indians. *Segundo v. United States*, 123 F.Supp. 554, 558-59 (S.D. Cal. 1954). However, the Secretary of Interior's failure to perform his duties does not in turn limit the scope of Allottees' vested water rights to a future, potential process by the Crow Tribe to somehow share the Crow Tribe's water rights with the Allottees in a just and equal fashion.

As this Court found in *Powers*, the Allottees' property ceased to be held in common with the Crow Tribe and became the exclusive property of the Indian claiming the property for his permanent home site. *United States v. Powers*, 305 U.S. 527, 528 (1939). Similar to the *Powers* case, on January 19, 2001, John D. Leshy, Solicitor for the United States Department of Interior, issued a Memorandum stating, "only the United States acting as trustee ***and the individual allottee*** (and not the tribal government) can waive or release claims to those assets [water rights]." Memo from John D. Leshy, Solicitor, U.S. Dept. of Int., to David Hayes, Deputy Secretary, U.S. Dept. of Int., *Tribal Water Rights Settlement and Allottees* 3 (Jan. 19, 2001) (emphasis added). Mr. Leshy said that "allotted land and allottees' interests in water are not common assets, but individual assets." *Id*. Instead, of meeting the Allotteees to get their consent, the United States gave the Allottees' water rights to the Crow Tribe and then waived and released any potential future claims that the

Allottees may have in the future related to the United States actions as the Allottees' trustee.

The federal law is clear that Allottees have a vested water right in the *Winters* doctrine Indian reserved water rights. When the Montana Supreme Court held the Montana Water Court correctly "applied Powers to determine that the Allottees have water rights that are derived from the reserved rights of the Crow Tribe, and that they [the Allottees] are entitled to use a just and equitable share of the Tribe's rights," the court erred. Based on federal law, the Allottees have a vested property right to use the water that is owned by the Tribe. Instead of upholding federal law, the Montana Supreme Court reduced the Allottees' vested water rights to an entitlement to participate in some future process related to what has now been wrongly classified as the Crow Tribe's water rights. A right to participate in a future process is not a property right that is equivalent or in any way similar to the vested property right established in *Winters* and *Powers*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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December 14, 2015 *Counsel for Petitioners*

DA 14-0567

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2015 MT 217

IN RE THE CROW
WATER COMPACT,

IN THE MATTER OF THE
ADJUDICATION OF
EXISTING AND RESERVED
RIGHTS TO THE USE OF
WATER, BOTH SURFACE
AND UNDERGROUND, OF
THE CROW TRIBE OF
INDIANS OF THE STATE
OF MONTANA.

(Filed Jul. 30, 2015)

APPEAL FROM: Montana Water Court,
Cause No. WC-2012-06
Honorable Russ McElyea,
Chief Water Judge

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Submitted on Briefs: June 10, 2015
Decided: July 29, 2015

Filed:

/s/ Ed Smith
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Members of the Crow Allottees Association appeal from the Montana Water Court's order of July 30, 2014, dismissing their objections to the Crow Water Compact and refusing to stay proceedings. We affirm.

ISSUES

¶2 *Issue One: Whether the Water Court applied the proper legal standard of review in granting the motions to dismiss the Allottees' objections.*

¶3 *Issue Two: Whether the Water Court exceeded its jurisdiction by dismissing the Allottees' objections rather than staying consideration of the Compact pending resolution of the Allottees' action in United States District Court.*

¶4 *Issue Three: Whether the Water Court erred in determining that the Allottees do not have individual water rights apart from the Crow Tribal Water Right; that the United States adequately represented the Allottees during the Compact negotiations; and whether a "current use list" is a prerequisite for including the Compact in a final decree.*

BACKGROUND

¶5 This case arises from the Crow Compact, an agreement among the United States, the Crow Tribe, and the State of Montana. The Compact recognizes and specifies a Tribal Water Right of the Crow Tribe and its members in a number of sources of water that abut or cross the Crow Indian Reservation in Montana. The Compact also provides for cash payments to the Tribe, allocates coal tax revenue, and creates a tribal administrative structure for distribution of the Tribal Water Right. The Crow Tribe, the United States through the Department of the Interior, and

the Montana Reserved Water Rights Compact Commission agreed to the terms of the Compact in 1999, and the Montana Legislature ratified it the same year. The Compact is codified at § 85-20-901, MCA. The Crow Tribe ratified the Compact by vote of its members in 2011.

¶6 The United States Congress "authorized, ratified and confirmed" the Compact in the Crow Tribe Water Rights Settlement Act of 2010 ("Act"), Pub. L. 111-291, § 404(a)(1). The Settlement Act provides that the Tribal Water Right established by the Compact "shall be held in trust by the United States for the use and benefit of the Tribe and the allottees" and that the right "shall not be subject to forfeiture or abandonment." Act, § 407(c). The Crow Tribe on behalf of itself and its members, and the United States as trustee for the Allottees, waived and released all other claims to water in return for those recognized in the Compact. Act, § 410(a). The Compact contains a similar provision. Section 85-20-901, MCA, Art. VII, Sec. C. The Compact is a negotiated compromise among the parties, in lieu of settling the water claims of the Crow Tribe and its members in protracted, expensive and uncertain litigation.

¶7 The Settlement Act expresses the "intent of Congress to provide to each allottee benefits that are *equivalent to or exceed the benefits allottees possess as of the date of enactment of the Act*. . . ." Act, § 407(a) (emphasis added). The Act provides that "allottees shall be entitled to a just and equitable allocation of water for irrigation purposes" that "shall be satisfied

from the tribal water rights." Act, § 407(d). After exhausting relief provided under tribal law, Allottees with claims relating to water may seek relief under 25 U.S.C. § 381 (authorizing the Secretary of the Interior to secure a just and equal distribution of water) or any other applicable law. Act, § 407(d).

¶8 The Compact requires that the Montana Water Court a [sic] enter a final decree incorporating the Tribal Water Right as set out in the Compact:

> The water rights and other rights confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based in *Winters v. United States*, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, and of performance by the State of Montana and the United States of all actions required by this Compact, *including entry of a final order issuing the decree of the reserved water right of the Tribe held in trust by the United States as quantified in the Compact* and displayed in Appendix 1, the Tribe and the United States as trustee for the Tribe and Tribal members hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the State of Montana existing on the date this Compact is ratified by the State, the Tribe, and Congress and conditional upon a final decree, whichever date is later.

Section 85-20-901, MCA, Art. VII, Sec. C (emphasis added). The parties to the Compact complied with this provision by submitting it to the Montana Water Court for entry of a judicial decree of the Compact's water rights provisions. Pursuant to § 85-2-702(3), MCA, the Water Court has limited discretion in this process. Montana law provides that the terms of a compact "must be included in a preliminary decree," and unless an objection to a compact is sustained, the decree of the Water Court must include the rights established by the compact "without alteration." Section 85-2-702(3), MCA. The Compact requires that the Water Court's review of the Compact be "limited to Article III and Appendix 1" thereof, which contain the specific water rights agreed to. Section 85-20-901, MCA, Art. VII, Sec. B.3. The Settlement Act contains an automatic repeal if the Secretary of the Interior does not publish a statement of findings by March 31, 2016, which must include a finding that the Montana Water Court has issued a final judgment and decree approving the Compact. Act, § 410(e).

¶9 In 2012 the Water Court entered a preliminary decree containing the terms of the Compact, and served and published notice of the decree and of rights to object. The Water Court sent notice of the preliminary decree to over 16,000 persons and entities and received approximately 100 objections.

¶10 In June 2013 a group of Crow tribal member Allottees objected to the Compact in the Water Court. Allottees are persons who hold interests in allotments, which are parcels of former Tribal land, mostly created

by the General Allotment Act of 1887, 25 U.S.C. §§ 331-358. *Big Spring v. Conway*, 2011 MT 109, ¶ 31, 360 Mont. 370, 255 P.3d 121. Among other things, the General Allotment Act aimed to break tribal organization on reservations and replace it with plots of private land farmed by individual Indians who would then be assimilated into the non-tribal culture. While some Allottees hold their land in fee simple, the interests of many others are held in trust by the United States. The Indian Reorganization Act, 25 U.S.C. § 462, ended allotment of reservation lands in 1934 and extended the allotment trust period indefinitely.

¶11 The Allottees made a number of contentions in their Water Court objections to the Compact. Their contentions are centered on the argument that they have reserved water rights appurtenant to their allotments, and that these rights are separate from the reserved rights held by the Tribe as recognized in *Winters v. U.S.*, 207 U.S. 564, 28 S. Ct. 207 (1907). The Allottees' second major contention is that they did not receive adequate notice of the proceedings leading to the Compact and that their interests in the Compact negotiations were not adequately represented by the United States. They contend that their water rights cannot be part of the decree of the Water Court; that their rights will be harmed by implementation of the Compact; and that the Water Court lacks jurisdiction to adjudicate their rights. The Allottees also asked the Water Court to stay its proceedings concerning the Compact pending resolution of a

separate lawsuit the Allottees brought in United States District Court in May 2014.

¶12 The Allottees' action, *Crow Allottees Assoc. v. United States*, Cause No. CV-14-62-BLG, United States District Court for the District of Montana, asserts claims that the United States breached its fiduciary duties to the Allottees by failing to protect their water rights in the Compact. The Allottees further contend that the United States violated their due process rights by failing to adequately represent them in Compact proceedings. The complaint seeks a declaratory ruling and order that the United States be required to provide the Allottees with adequate legal counsel in all matters regarding the Compact.

¶13 Upon motion of the Crow Tribe and the United States, the Water Court dismissed the Allottees' objections to the Compact and denied their request for a stay. The Water Court concluded that it had jurisdiction to review the Compact under federal and state law, including the McCarran Amendment, 43 U.S.C. § 666; §§ 85-2-231, -234, and -702, MCA; and Article VI of the Compact. The Water Court concluded that under federal law, *United States v. Powers*, 305 U.S. 527, 59 S. Ct. 344 (1939), and the Compact, the Allottees are entitled to a "just and equal share" of the Tribal Water Right recognized by *Winters* and established in the Compact as "the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of this Compact." Section 85-20-901, MCA, Art. II, Sec. 30. The right of Allottees to a just and equitable allocation of the

Tribal Water Right was confirmed by Congress in the Settlement Act, § 407(d)(2), (3).

¶14 The Water Court noted that the responsibility for allocating water to the Allottees rests with the Secretary of the Interior under the General Allotment Act, 25 U.S.C. § 381, and is delegated to the Crow Tribe by the Compact. Section 85-20-901, MCA, Art. IV, Sec. A.2.a, b. The Compact requires the Tribe to provide "Indians residing on the Reservation . . . to a just and equal portion of the Tribal Water Right." Art. IV, Sec. B.1. Congress included similar guarantees in the Settlement Act, §§ 402(1)(B) and 407(f)(2)(A). Pursuant to these provisions, the Water Court determined that any claims that the Allottees have regarding allocation of the Tribal Water Right must be addressed in some forum other than the Montana Water Court.

¶15 The Water Court observed that the United States, pursuant to its trust responsibility to administer Indian lands and property, *Lewis v. Hanson*, 124 Mont. 492, 496-97, 227 P.2d 70, 71 (1951), agrees that it represented the Allottees during the process of negotiating the Compact. The United States as trustee waived and released any claims of the Allottees in exchange for recognition of the Tribal Water Right and the Allottees' right to use a just and equal share of that right. Section 85-20-901, MCA; Act, § 410(a)(2). The Allottees contend that they were not individually consulted and were entitled to independent legal representation furnished by the United States. As noted,

they commenced an action in United States District Court seeking to establish that position.

¶16 The Water Court determined that because the Allottees were represented by the United States during Compact proceedings, their status is that of represented parties. The Water Court noted the "unique nature of water rights Compacts, including prior review and approval by the Governor, the Legislature, the Department of the Interior, Congress, and the Crow Tribe." Relying on case law regarding objections to consent decrees, the Water Court concluded that consideration of objections by represented parties is limited to a required showing that the negotiations were the product of fraud, collusion or overreaching among the negotiating parties. *Officers for Justice v. Civil Service Comm.*, 688 F.2d 615, 625 (9th Cir. 1982). This high standard precludes a reviewing court from substituting its judgment for that of the negotiating and settling parties. The Water Court determined that the Allottees, while dissatisfied, have not asserted that the Compact was the product of fraud, collusion or overreaching and so are bound by its terms.

¶17 The Water Court determined that the purpose of its proceeding

> is not for the Court to assess the relative merits of each party's position and adjust the outcome to conform to what the parties might have obtained from trial. That balancing of interests was addressed by the parties themselves during the negotiation process

> and reviewed at numerous levels by representatives of those parties after the Compact was finalized.

Further, since the objective of the Compact is "to define the Tribe's *Winters* rights, eliminate litigation risk and expense and achieve finality for the Tribe and other parties," there is no requirement at this stage that the Allottees' water claims be separately quantified. The Water Court determined that it was not tasked to review whether the Tribe or other parties have fulfilled their responsibilities under the Compact, such as preparing a current water usage list.

¶18 The Water Court therefore granted the motions of the United States and the Crow Tribe and dismissed the Allottees' objections to the adoption of the Compact. The Allottees appeal.

STANDARD OF REVIEW

¶19 This Court applies the same standards of review to decisions of the Water Court as it does to decisions of a district court. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 16, 361 Mont. 77, 255 P.2d 179. This Court reviews the Water Court's findings of fact under the clearly erroneous standard. *Weinheimer Ranch v. Pospisil*, 2013 MT 87, ¶ 19, 369 Mont. 419, 299 P.3d 327. This Court reviews the Water Court's conclusions of law de novo to determine whether they are correct. *Skelton Ranch v. Pondera*

Co. Canal & Res. Co., 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644.

¶20 This Court reviews a court's orders related to trial administration, such as a motion to stay proceedings, for an abuse of discretion. *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 23, 341 Mont. 467, 178 P.3d 102.

DISCUSSION

¶21 *Issue One: Whether the Water Court applied the proper legal standard of review in granting the motions to dismiss the Allottees' objections.*

¶22 The Allottees contend that the Water Court erred in dismissing their objections without applying Rule 12(b)(6), M.R. Civ. P., and accepting the truth of their allegations.

¶23 Water Court judges have the powers of a district court within their area of jurisdiction, § 3-7-224(3), MCA, and the Montana Rules of Civil Procedure generally apply to Water Court proceedings. Rule 2(b), Montana Water Adjudication Rules. However, that does not mean that Rule 12(b)(6), M. R. Civ. P., applies to the Water Court's consideration of an objection to a water compact.

¶24 The Allottees have not presented any persuasive authority that the Water Court is bound to apply Rule 12(b)(6) when considering the disposition of an objection to a preliminary decree. Rule 12(b)(6)

applies when a party moves to dismiss a complaint in a civil action. *Western Sec. Bank v. Eide Bailly*, 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35. There is nothing that requires the Water Court to apply Rule 12(b)(6) jurisprudence in its consideration of an objection to a preliminary decree. There is no authority that requires the Water Court to accept the truth of factual allegations made in an objection to a preliminary decree.[1] To the contrary, in water rights matters a properly filed claim of water right "constitutes prima facie proof of its content until the issuance of a final decree." Section 85-2-227(1), MCA.

¶25 Therefore, the Water Court did not err by not applying Rule 12(b)(6), M.R. Civ. P., in its review of the Allottees' objections to the Compact.

¶26 *Issue Two: Whether the Water Court exceeded its jurisdiction by dismissing the Allottees' objections rather than staying consideration of the Compact pending resolution of the Allottees' action in United States District Court.*

¶27 The Allottees acknowledge that the McCarran Amendment, 43 U.S.C. § 666, specifically allows state courts to adjudicate federal and Indian reserved water rights. They contend, however, that this only allows state courts to "decide issues of federal Indian or constitutional law" but withholds from state courts the power to "decide Indian law issues of first impression;

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[1] In the Water Court proceedings the Allottees argued that the court "must construe Allottees' objections as being true. . . ."

[they] can only apply existing federal law." Allottees cite *Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985) in support of this novel proposition. However, nothing in that decision supports such a proposition. *Greely* establishes that Montana courts are sufficient to provide a McCarran Amendment forum for the determination of federal and Indian water rights, and that they are "required to follow federal law with regard to those rights." *Greely*, 219 Mont. at 95, 712 F.2d at 765.

¶28 In this case the Water Court expressly applied federal law in its consideration of the Allottees' arguments that they have water rights that are "distinct from the Crow Tribe's reserved right." The Water Court applied *Powers* to determine that the Allottees' have water rights that are derived from the reserved rights of the Crow Tribe, and that they are entitled to use a just and equitable share of the Tribe's rights. As discussed above, the Tribe, the United States Congress and the State of Montana have all expressly recognized the Allottees' rights to a share of the Crow Tribal Water Right. Allottee rights are recognized in the Compact, which requires the Tribe to provide "Indians residing on the Reservation of . . . a right . . . to a just and equal portion of the Tribal Water Right." Section 85-20-901, MCA, Art. IV, Sec. B.1. Congress included similar express guarantees in the Settlement Act, §§ 402(1)(B) and 407(f)(2)(A), stating "the intent of Congress to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act. . . ."

¶29 The Allottees contend that the Water Court erred in treating them as represented parties for purposes of considering the Compact. As noted above, existing law restricts the Water Court's power over Compact issues. The Compact was the product of extensive negotiations over a period of years, resulting in a negotiated compromise of interests and claims.

¶30 Montana law requires that the terms of a compact "must be included in a preliminary decree" and unless an objection to a compact is sustained, the terms of the compact must be included in the decree "without alteration." Section 85-2-702(3), MCA. The Compact requires that the Water Court's review of the Compact be "limited to Article III and Appendix 1" thereof, which specify in detail the Crow Tribe's reserved water rights. Section 85-20-901, MCA, Art. VII, Sec. B.3. As the Water Court recognized, determining the adequacy of the United States' representation of the Allottees is not within the scope of its review. The Water Court properly concluded that since the Allottees were represented in the Compact negotiations, its review of the compact was limited to determining whether the Compact was the "product of fraud, collusion or overreaching." In doing so, the Water Court relied, as it has in other cases,[2] upon the established rules for judicial oversight of consent decrees as set out in *Officers for Justice.*

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[2] *Matter of the Adjudication of Existing and Reserved Rights to the Use of Water of the United States Forest Service Within the State of Montana*, Water Court Cause No. WC-2007-04.

¶31 The Allottees contend that the United States inadequately represented their interests during the extended negotiations that led to adoption of the Compact. They contend that they were entitled to separate representation that should have resulted in recognition and a listing of their claimed separate water rights. However, they have acknowledged, by filing a separate action on these issues in United States District Court, that this is not an issue that the Water Court can resolve. In fact, the Allottees contend that only the United States District Court can determine whether the United States breached a fiduciary duty to them. The Water Court determined only that the Allottees were represented by the United States, which they do not deny, and that this representation determined the level of scrutiny. The Water Court applied the fraud or collusion analysis from *Officers for Justice.* The Allottees contend that this was the wrong analysis to apply, but their alternative is that the Water Court should have applied a Rule 12(b)(6) analysis, construing all their allegations as true. As discussed above, Rule 12(b)(6) does not apply to this situation and the Water Court conducted the proper analysis.

¶32 The Allottees' [sic] contend that the Water Court should have stayed its final action on the Compact pending resolution of their separate lawsuit in United States District Court. We review a lower court's determination on a motion to stay proceedings to determine whether the court abused its discretion. *Lamb v. Dist. Ct.*, 2010 MT 141, ¶ 14, 356 Mont. 534, 234 P.3d

893. We consider whether the decision on the request for a stay was arbitrary or exceeded the bounds of reason resulting in substantial injustice. *Wamsley*, ¶ 33.

¶33 It is clear that a final resolution of the Allottees' federal action will take an unknown but substantial period of time, which alone could fatally doom the future of the Compact. This would happen not because of any determination of the merits of the Compact, but simply because of the time it would take to finally resolve the Allottees' lawsuit and its aftermath. Congress provided for an automatic repeal of its approval of the Compact if the Water Court's decree, including the Compact, is not issued prior to March 31, 2016. Act, § 415. It would work a hardship and a potential injustice on the parties who have worked for many years to develop and implement the Compact to put everything in abeyance for an unlimited time, and to risk repeal of the Compact, to see whether the Allottees can prevail on their representation claims in federal court. We have upheld a district court's discretion refusing to stay a Montana lawsuit pending the outcome of a related lawsuit in another state, *Wamsley*, ¶ 33, or in a federal court, *Henry v. Dist. Ct.*, 198 Mont. 8, 14, 645 P.2d 1350, 1353 (1982).

¶34 The Water Court acted within its discretionary power to deny the Allottees' request for a stay and we find no error.

¶35 *Issue Three: Whether the Water Court erred in determining that the Allottees do not have*

individual water rights apart from the Crow Tribal Water Right; that the United States adequately represented the Allottees during the Compact negotiations; and whether a "current use list" is a prerequisite for including the Compact in a final decree.

¶36 The issues regarding the nature of the Allottees' water rights and the representation of the Allottees during the negotiations were discussed above and need not be repeated. The Allottees' objections to the Compact filed in the Water Court included the assertion that the Crow Tribe and the United States had not prepared a list of "current uses" of the Tribal Water Right, and that no action should be taken on the Compact until that list is prepared.

¶37 Article IV, Section E.2 of the Compact provides that after the Montana Legislature ratifies the Compact, the United States and the Crow Tribal Water Rights Division will provide the State with a "report listing all current uses of the Tribal Water Right, including uses by Tribal members. . . ." The Allottees contend that no such report has been submitted to the State and that the Water Court should therefore not include the Compact in a final decree. However, the Compact attaches no such significance to the water use report, and specifically provides that the Compact is effective when "ratified by the Tribe, by the State and by the Congress of the United States. . . ." Section 85-20-902, MCA, Art. VII, Sec. A. Those ratifications have taken place. The Congressional Settlement Act, § 410(e), likewise, does not

make the water use report a prerequisite to the validity of the Compact.

¶38 More to the point, there is no requirement that the specific water rights or claims of these Allottees be quantified as a precondition to implementing the Compact. As the Water Court explained:

> The objective of the Compact, which is a negotiated settlement, is to define the Tribe's *Winters* rights, eliminate litigation risk and expense, and achieve finality for the Tribe and other parties to the agreement. Although the parties to a Compact might agree to define allottees' right to use of the Tribal reserved water right, such a definition is not required to achieve settlement. Because the allottees' rights to use of water are derived from the Tribal reserved water right, there is no requirement in case law or statute that a Compact separately quantify the allottees' rights to use of that water.

We find no basis for concluding that the Water Court should have deferred action on the Compact based upon the absence of a current use list.

¶39 We affirm the Water Court's order dismissing the Allottees' objections to the Compact and refusing to order a stay.

¶40 The Water Court's order of July 30, 2014, is affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER
/S/ PATRICIA COTTER
/S/ JAMES JEREMIAH SHEA
/S/ MICHAEL E. WHEAT
/S/ LAURIE McKINNON
/S/ JIM RICE

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IN THE WATER COURT OF
THE STATE OF MONTANA

* *

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE CROW TRIBE OF INDIANS OF THE STATE OF MONTANA	**CASE NO. WC-2012-06**

ORDER DISMISSING ALLOTTEE OBJECTIONS AND DENYING REQUEST FOR STAY

(Filed Jul. 30, 2014)

I. STATEMENT OF THE CASE

This matter involves a motion by the United States and the Crow Tribe to dismiss objections to the Crow Compact filed by owners of allotments within the Crow Reservation. The owners of such allotments are called allottees. The Crow Tribe Water Rights

Settlement Act of 2010 (Settlement Act) defines an allottee as any individual holding "a beneficial real property interest in an allotment of Indian land that is – (A) located within the Reservation or ceded strip; and (B) held in trust by the United States." Pub. L. No. 111-291, § 403.1, 124 Stat. 3064, 3097 (2010). The definition of allottee supplied in the Settlement Act is used in this Order.

The Crow Compact is a settlement agreement negotiated between the United States, the Crow Tribe, and the State of Montana. It recognizes a Tribal Water Right for the Tribe and its members, provides for cash payments to the Tribe, allocates revenue from taxes collected on production of coal, and creates an administrative structure, operated by the Tribe, for distribution of the Tribal Water Right. It states:

> The water rights and other rights confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on *Winters v. United States*, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, and of performance by the State of Montana and the United States of all actions required by this Compact, including entry of a final order issuing the decree of the reserved water rights of the Tribe held in trust by the United States as quantified in the Compact and displayed in Appendix 1, the Tribe and the United States as

> trustee for the Tribe and Tribal members hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the State of Montana existing on the date this Compact is ratified by the State, the Tribe, and Congress and conditional upon a final decree, whichever date is later.

Crow Tribe-Montana Compact (Compact), Article VII Section C, (codified at § 85-20901, MCA (2012)).

The Compact was finalized between the Montana Reserved Water Rights Compact Commission and the Tribe in 1999 and ratified by the Montana Legislature in the same year. § 85-20-901, MCA. It was approved by the United States Congress through the Settlement Act, 124 Stat. at 3097-3119. The Compact was signed by the United States Department of the Interior, the Tribe and the State of Montana.

The final stage of the Compact process occurs in the Montana Water Court. To initiate this process, the Water Court issues a preliminary decree containing the Compact. Once the preliminary decree is issued, it is subject to objections. The original objection period for the Compact closed on June 24, 2013. Pursuant to requests by potential objectors, the objection period was extended for two additional ninety day periods.

The objections filed to the Compact fall into two general categories. The first and smallest group consists of objectors who are not allottees. The second and

largest group consists of allottees who are enrolled members of the Crow Tribe. The latter objections are the subject of this Order.

The allottees' objections are similar. The key elements of these objections are as follows:

1. Each objector asserts he or she is an enrolled member and citizen of the Crow Nation and an owner of allotment lands within the exterior boundaries of the Crow Reservation.

2. Each objector asserts an ownership interest in an Indian reserved water right appurtenant to the objector's allotment.

3. Each objector asserts that the Compact requires development of a current use list of Indian reserved water rights appurtenant to allotment lands, and that drafts of the list produced to date are inadequate.

4. Each of them asserts that the allottees/objectors were entitled to but did not receive proper legal representation during the Compact negotiation process. Some objections assert the following additional arguments:

1. The allottees/objectors did not receive adequate notice of the Compact or the preliminary decree of the Compact issued by this Court.

2. The allottees/objectors did not receive adequate technical or legal assistance from their trustee, the United States.

3. The allottees/objectors were not asked to participate in the development of the current use list of Indian reserved water rights appurtenant to allotment lands.

4. Their Indian reserved rights will be harmed by subordination to other rights.

5. The Montana Water Court does not have jurisdiction to adjudicate the Indian reserved rights claimed by the allottees.

6. The Crow Nation reserved water rights and individual allottees' reserved water rights are not the same.

7. The individual allottees' reserved water rights cannot be considered part of the preliminary decree issued by this Court.

By separate motion, the allottees have also asked for a stay of this proceeding pending the outcome of a parallel lawsuit in federal court.

The United States and the Crow Tribe assert these objections should be dismissed for the following reasons:

1. The rights claimed by the allottees were part of, not separate from, the reserved water right recognized for the benefit of the Crow Tribe by the *Winters* doctrine. The Tribe's *Winters* rights have, through the Compact negotiation and settlement process, been replaced by the Tribal Water Right. The Tribal Water Right is defined within the Compact, and is different

than the *Winters* rights it replaces. As with the Tribe's *Winters* rights, the allottees also have a right to use a just and equal distribution of the Tribal Water Right.

2. The allottees' interests were represented by the United States during Compact negotiations, and are therefore not subject to review by this Court.

3. The allottees' interests will not be injured by the Compact because Congress, by passage of the Settlement Act, effected a substitution of the allottees' interests.

4. The Crow Tribe asserts the Compact does not impact the allottees' interests because they remain entitled to a just and equal distribution of the Tribal Water Right.

5. The Tribe has authority to regulate use of the Tribal Water Right, and the allottees' remedy for improper allocation of that right is with the Tribe.

II. ISSUES

The issues to be decided are as follows:

1. Do allottees have reserved water rights separate from the Tribal reserved right?

2. How are the allottees' rights to use of water allocated?

3. Were the allottees represented by the United States during the Compact negotiation process?

4. On what basis may represented parties object to a Compact?

5. Were the allottees entitled to receive individual notice of the preliminary decree of the Compact?

6. Is a current use list necessary for approval of the Crow Compact?

III. APPLICABLE LAW

Indian Reserved Water Rights

Indian reserved water rights are determined by federal law. The first case recognizing such rights was *Winters v. United States*, 207 U.S. 564 (1908). The *Winters* case involved installation of diversion structures by non-Indians along the Milk River upstream of the Fort Belknap Reservation. These structures impaired the ability of Indians on the Reservation to obtain water for irrigation. The *Winters* Court determined that upstream diversions interfered with the purpose of the reservation, which was to promote conversion of the Tribe from a nomadic to an agricultural existence. "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government." *Id.* at 211.

The Court concluded that the reservation of land included sufficient water rights to effectuate the purpose of the reservation.

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste – took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Id. at 212.

Winters did not describe how a reserved water right should be quantified. Quantification first occurred in *Arizona v. California*, where the Court upheld rights based on the practicably irrigable acreage within a reservation. 373 U.S. 546 (1963). Other methods of defining the extent of an Indian reserved water right have also been used. *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307 (Ariz. 2001) (holding that in quantifying reserved water rights a court should consider a myriad of factors including cultural considerations, historical use, geography, topography, natural resources, and population).

Jurisdiction of the Water Court to Review a Compact

The Montana Water Court has jurisdiction to review the Compact under the authority granted by the McCarran Amendment of 1952, 43 U.S.C. § 666 (2012); §§ 85-2-231, 85-2-233,234, 85-2-701, 702, MCA, and Article VI of the Compact. *See also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983), *reh. denied* 464 U.S. 874 (1983), and *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* ("*Greely II*"), 219 Mont. 76, 89, 712 P.2d 754, 762 (1985).

The jurisdiction of the Water Court to review the Crow Compact is further defined by the Compact itself. "Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, and Appendix 1, and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights." Compact, Art. VII(B)(3).

IV. ANALYSIS

1. Do allottees have reserved water rights separate from the Tribal reserved right?

The allottees assert rights to ownership of part of the Tribe's *Winters* rights. The Crow Tribe and the United States assert the allottees have rights to use a just and equal share of the Tribe's *Winters* rights, but

not an ownership interest in them. The Crow Tribe and the United States also assert the allottees' rights to use *Winters* rights was replaced by the terms of the Compact, which grants allottees rights to a just and equal share of the Tribal Water Right. On this basis, the Crow Tribe and the United States seek dismissal.

Creation of Allotments

Water usage within the boundaries of a reservation is affected by the existence of allotments. Allotments are parcels of land created for the benefit of individual Tribal members. Allotments may be held in trust by the United States for the benefit of a Tribal member, or owned by a member in fee.

Allotments were created by a variety of mechanisms. A common method was pursuant to the General Allotment Act, or Dawes Act. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-358 (1988)). The General Allotment Act was a product of the federal policy of assimilation, aimed at integrating individual Indians into non-Indian society. Allotments were designed to convert reservations into private ownership, in the belief that individual property ownership would turn the Indians from a nomadic to an agrarian lifestyle. To that end, the Act allotted to individual Indians a certain number of acres, to be held in trust for the individual for 25 years and then patented in fee. General Allotment Act, 25 U.S.C. § 331 (1988) (repealed Nov. 7, 2000) (enacted under 24 Stat. 388 (1887)).

The policy of converting reservation lands into allotments ended in 1934, when Congress formally ended the allotment program and indefinitely extended the trust status of existing allotments.[1] During the existence of the program, millions of acres of Reservation lands were converted from Tribal ownership to allotments. Approximately 9 million acres are still held in trust for individuals today. Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development*, 145 (University Press of Kansas, 1990). The issue is whether the owners of allotment lands are entitled to use of the Tribal *Winters* right to water, and if so, to what extent.

Water Use on Allotments

Consistent with the purpose of creating allotments, Indian allottees are entitled to use *Winters* rights for agricultural purposes. This principle has its origins in *United States v. Powers*, 305 U.S. 527 (1939). In *Powers*, the Court noted that, although deeds to allottees were silent regarding the use of water, the purpose of the Allotment Act was to create individually owned parcels "for agricultural and grazing purposes." 305 U.S. at 530. The Court also concluded that the allotments had no value for agriculture without water, and held that allottees had

[1] The Indian Reorganization Act of 1934 provided that trust allotments would continue in trust until Congress provided otherwise. Act of June 18, 1934, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 462 (1988)).

"the right to use some portion of tribal waters essential for cultivation." *Powers*, 305 U.S. at 532.

Thus, under *Powers*, the allottees' rights are limited by the agrarian purposes of the allotment policy. Use of *Winters* rights for purposes other than agriculture, such as water for instream flows to maintain fisheries, does not pass to allottees but remains with the Tribes. *Colville Confederated Tribes v. Walton* (*Walton II*), 752 F.2d 397, 400 (9th Cir. 1985).

The *Powers* Court did not expressly determine what rights to use of water allottees received. However, use of the term "right to use some portion of tribal waters" gives rise to two implications. The first is that the right of allottees to use water is derived from the Tribe's *Winters* rights, and is not based upon creation of a separate water right for allottees. The second implication is that although allottees receive a right to use *Winters* rights, they do not have an ownership interest in them.

For years, federal case law has supported limiting allottees to use of a portion of the Tribe's *Winters* rights. "When the reservation land was allotted, and the Project developed, the allottees acquired the *right to use* a portion of the tribe's reserved water right with a priority date no later than the creation of the reservation." *Hackford v. Babbitt*, 14 F.3d 1457, 1469 (10th Cir. 1994), citing *Powers*, 305 U.S. at 532-33. (emphasis added). "[A]n allotment of tribal land includes a *just share* of tribal water rights." *Segundo v. United States*, 123 F. Supp. 554, 558 (S.D. Cal. 1954).

(emphasis added). "[I]t does not diminish the allottees' water rights to hold that the water and irrigation system belong to the Tribe with a concomitant right to delivery of water in the allottees." *Northern Paiute Nation v. United States*, 10 Cl. Ct. 401, 409 (Cl. Ct. 1986).

As with the *Winters* decision, the Court in *Powers* did not quantify the amount of water available to an allottee. It did, however, refer to language in the Allotment Act authorizing the Secretary of the Interior "to secure a just and equal distribution" of water among Indians residing on the reservation "where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes." *Powers*, 305 U.S. at 530. An Indian allottee may use water for present and future irrigation needs based on "the number of irrigable acres he owns." *Greely II*, 219 Mont. at 93, citing *Walton I*, 647 F.2d at 51. "If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i.e., a 'ratable share'). This follows from the provision for an equal and just distribution of water needed for irrigation." *Walton I*, 647 F.2d at 51.

The Settlement Act codifies federal common law pertaining to water use by allottees. The Settlement Act states that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights" and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." § 407(d)(2)-(3). The Settlement

Act also affirms that the right to use of *Winters* rights created by the General Allotment Act of 1887 also applies to the Tribal Water Right created by the Compact. "The provisions of section 7 of the Act of February 8, 1887 (25 U.S.C. § 381), relating to the use of water for irrigation purposes shall apply to the tribal water rights." § 407(d)(1).

The General Allotment Act, the cases interpreting it, and the Settlement Act all grant allottees a right to use an equitable portion of the Tribe's *Winters* rights, but not an ownership interest in them. The creation of allotments did not result in a severance of *Winters* rights for the benefit of allottees, nor did it create separate reserved rights for the benefit of allottees.

2. How are the allottees' rights to use of water allocated?

The Secretary of the Interior is responsible for allocating water to allottees under the provisions of the General Allotment Act. 25 U.S.C. § 381. That responsibility is delegated to the Crow Tribe by the Compact.

The Compact defines the Tribe's power to administer its reserved rights as follows:

> Subject to the limitations imposed by this Compact and federal law, the use of the Tribal Water Right shall be administered by the Tribe through TWRD within the Reservation,

> in the Ceded Strip, and outside the Reservation . . .
>
> Subject to the limitations imposed by this Compact, the Tribe shall have the final and exclusive jurisdiction to resolve all disputes concerning the Tribal Water Right between holders of water rights under the Tribal Water Right.
>
> Administration and enforcement of the Tribal Water Right shall be pursuant to a Tribal water code, which shall be developed and adopted by the Tribe within two (2) years following the Effective Date of this Compact pursuant to any requirements set forth in the Constitution of the Crow Tribe. Pending the adoption of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

Compact, Art. IV(A)(2)(a)-(b).

The term "Tribal Water Right" is defined to mean "the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of this Compact." Compact, Art. II(30). The Tribal Water Right is not the same as the Tribal reserved right recognized by *Winters*. The Tribal Water Right represents a final quantification of the Tribe's *Winters* rights. It is a product of the settlement negotiations that resulted in the Compact.

Although the Tribe has the ability to allocate its reserved water right, it may not deprive allottees of

rights to usage provided by federal law. In this regard, the Compact restates the protections given to allottees in the General Allotment Act:

> *Persons Entitled to Use the Tribal Water Right.* The Tribal Water Right may be used by the Tribe, Tribal members, or Persons authorized by the Tribe, provided that, *the Tribe may not limit or deprive Indians residing on the Reservation or in the Ceded Strip of any right, pursuant to 25 U.S.C. § 381, to a just and equal portion of the Tribal Water Right set forth in Article III.*

Compact, Art. IV(B)(1). (emphasis added)[2]

The same protections are found in the Settlement Act. The Crow Compact was ratified by the United States "for the benefit of the Tribe and allottees." Crow Tribe Water Rights Settlement Act, § 402(1)(B). The Settlement Act mandates that the Tribal Water Code shall provide that "tribal allocations of water to allottees shall be satisfied with water from the tribal water rights." § 407(f)(2)(A).

In summary, the Secretary of the Interior has the power to allocate water to allottees under the terms

[2] The Compact's adoption of the protections found in the General Allotment Act rebuts the allottee's assertion that "the Compact does not entitle the Allottee Objectors to a ratable share of the Crow Tribe's reserved water right." Allottees' Reply to the Apsaalooke (Crow) Tribe's Response to Motion to Stay and Response to Tribe's Motion to Dismiss Allottee Objections, p. 8, filed June 11, 2014.

of the General Allotment Act. Both the Compact and the Settlement Act delegate that power to the Crow Tribe upon adoption and approval of a Tribal Water Code. Until then, federal law gives the Secretary of the Interior power to administer and enforce the Tribal water right. That means the allottees' remedy for improper allocation of the Tribal Water Right, should such an event occur, is not with this Court.

3. Were the allottees represented by the United States during the Compact negotiation process?

The United States has trust responsibilities to administer Indian lands and property. *Cohen's Handbook of Federal Indian Law*, § 19.06 (Nell Jessup Newton et al, eds., 2005 ed.). That obligation includes "trust responsibilities to protect Indian water rights." Western Water Policy Review Act of 1992, 43 U.S.C. § 371. The Federal Claims Court stated that "the title to plaintiffs' water rights constitutes the trust property . . . which the government, as trustee, has a duty to preserve. Defendant's obligation to perform 'all acts necessary' to preserve the trust . . . would necessarily include prudently representing plaintiffs' interests in litigation in which ownership to those water rights is placed in issue." *Fort Mojave Indian Tribe v. United States* (*Fort Mojave I*), 23 Cl.Ct. 417, 426. In relation to the Crow Compact, the Montana Supreme Court stated, "By Treaty of May 7, 1868, 15 Stat. 649, creating Crow Indian Reservation, title to waters of reservation stream was vested in United States as

trustee for Indians." *Lewis v. Hanson*, 124 Mont. 492, 493, 227 P.2d 70, 70 (1905).

The allottees assert the representation they received from the United States during the Compact negotiation process was not adequate, and that they should have been provided separate legal counsel. The United States agrees it represented the allottees as their trustee during the Compact negotiation process. Thus, both parties agree the allottees were represented, with disagreement over the adequacy of that representation.

4. On what basis may represented parties object to a Compact?

Because the allottees were represented by the United States as their trustee, the United States and the Crow Tribe contend the allottees cannot challenge the Compact. They assert the allottees' objections are a collateral attack on an agreement to which the allottees were a party, and that such attacks are precluded by the Settlement Act and case law pertaining to Water Court review of Compacts.

The Settlement Act does not contain language expressly preventing the allottees from challenging the Compact, although it does confirm that the United States, acting as trustee for the allottees, waived and released any claims of the allottees in exchange for recognition of the water rights of the Tribe and other benefits contained in the Compact. § 410(a)(2).

Case law addresses challenges to a Compact more directly. The Water Court has long applied a standard of review for Compacts drawn from the standards applied to approval of consent decrees. This standard was selected because Compacts, like consent decrees, are settlement agreements. Despite considerable law on this subject, however, the standard of review for objections by parties to such agreements differs depending on the type of consent decree being reviewed and the jurisdiction of the reviewing court. This means the Water Court must select the proper standard for application in this matter.

Previous Orders by this Court have cited *Officers for Justice*, where the court held that its "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." 688 F.2d 615, 625 (9th Cir. 1982), *cert denied, Byrd v. Civil Service Commission*, 459 U.S. 1217(1983). *Officers for Justice* does not directly distinguish between parties to the negotiation and other concerned persons who may be affected by the Compact. It does, however, raise an implication that if the negotiating parties wish to object, they

must make a showing that the negotiations were tainted by fraud, collusion, or overreaching.[3]

The difference between review of objections by parties and non-parties is more sharply defined in *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). "The purpose of this kind of judicial review is not to ensure that the settlement is fair or reasonable between the negotiating parties, but that it is fair and reasonable to those parties and the public interest that were not represented in the negotiation, but have interests that could be materially injured by operation of the compact." The Ninth Circuit has further stated that "judicial approval is not to protect the negotiating parties; rather, it is to ensure that the agreement is fair to those who were not a party to the negotiation." *Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982). Other circuits have stated that preliminary approval of a consent decree which was the product of arms-length negotiations makes the decree presumptively reasonable and an objecting party has a heavy burden of demonstrating that the decree is

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[3] *Officers for Justice* was a class action. Class actions are different from preliminary decrees of Compacts. "Class actions are unique creatures with enormous potential for good and evil." *Johnson v. General Motors Corp.*, 598 F.2d 432, 439 (5th Cir 1979), "Fed. R. Civ. P. 23 establishes a procedural framework designed to protect against the shortcoming of the class action device." *Officers for Justice*, 688 F.2d at 623. Under Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." In contrast, Compacts are subject to layers of review before they reach the Water Court.

unreasonable. *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983), *citing Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980).

Based on these cases, and the unique nature of water rights Compacts, including prior review and approval by the governor of Montana, the Montana Legislature, the United States Department of Interior, the United States Congress, and the Crow Tribe, an objection to a Compact by a represented party requires a showing of fraud, overreaching, or collusion.

The adoption of this high standard is based on the principle that a reviewing Court must exercise care in substituting its judgment for that of the parties to a Compact. Here, the Crow Tribe has agreed to quantify its water rights, including substantial amounts of storage water. It has also agreed to subordinate the priority date of its *Winters* rights to non-Indian claims outside the reservation under certain circumstances. In exchange, the Compact obligates the State of Montana and the United States to make cash payments to the Tribe and to fund irrigation improvements on the Reservation for the benefit of the Tribe and its members. Negotiation of this agreement has taken almost thirty years.

Without having settled their rights in the Compact, the Crow Tribe would have to assert their claims in Montana's general stream adjudication. That alternative would produce uncertainty and consume many years and millions of dollars in litigation costs.

The parties had an opportunity to ensure that the results of the negotiation were fair and reasonable during the negotiation process. The Compact affirms the allottees' rights to use the Tribal Water Right in a manner consistent with the General Allotment Act, *Powers*, and the Settlement Act. Although they are dissatisfied by some [sic] the Compact's provisions, the allottees have not asserted the Compact was the product of fraud, collusion, or overreaching. Absent such an objection, represented parties to the Compact are bound by the terms of their agreement.

Claims of Injury Arising From Subordination

Other than claiming ownership of a portion of the Tribal reserved right, the allottees' principal substantive objection is that their interests are impaired by subordination of the Tribal Water Right to certain non-Indian claims.

Such subordination provisions are a common feature of other Compacts regarding both Indian and federal reserved rights in Montana. The Blackfeet, Northern Cheyenne, Fort Peck, Rocky Boys, National Park Service, United States Forest Service, and National Bison Range Compacts, among others, all have subordination provisions. Moreover, the Crow Compact recognizes substantial storage rights in favor of

the Crow Tribe, a provision that attenuates negative impacts associated with subordination.[4]

Even if the allottees were able to demonstrate injury as a consequence of the Tribe's agreement to subordinate its rights, this injury alone is an insufficient basis for objection to the Compact by a represented party. There are several reasons for this conclusion.

First, it is the Tribe's *Winters* rights that are at stake. Quantifying and defining these rights is the primary purpose of the Compact negotiation process. Both the Tribe and the United States must have broad discretion to negotiate quantification of these rights for the Tribe's benefit. Forcing the Tribe to accommodate the competing interests of 6,000 allottees on the Crow reservation through adoption of a no injury standard would doom Compact negotiations to failure.

Second, Compacts are compromise settlements of disputed issues. Such agreements necessarily require all parties to accept limitations on what they might theoretically achieve at trial in exchange for less cost, more certainty, better relationships, and a quicker

[4] Storage water is often impounded outside the irrigation season when demand for water is low. Once impounded, it can be released without being subject to a call by other water users with senior priority dates. Stored water is effectively exempt from the hierarchy of the priority system, making it a flexible and therefore valuable form of water right.

outcome. "Of course, the very essence of settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624, citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). The creation of negotiated limitations is a common feature of settlement agreements, and it is natural for those limitations to adversely impact represented parties. The existence of such limits is evidence of compromise.

Third, the allottees were represented during the Compact negotiations. In the absence of fraud, overreaching, or collusion between the negotiating parties, an allegation of injury alone is not sufficient to sustain an objection to a Compact by a represented party.

The allottees assert that § 85-2-233, MCA establishes the scope of objections to the Compact. This section states that a hearing must be held on any objection to a preliminary decree "for good cause shown." § 85-2-233(1)(a), MCA. "Good cause shown" is defined as "a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree." § 85-2-233(1)(b), MCA.

The "good cause shown" standard has been liberally construed by the Water Court when assessing the standing of parties objecting to a Compact. That liberal interpretation has resulted in application of a "broad tent" standard to such objections. *In Re Adjudication of Existing and Reserved Rights of Chippewa*

Cree Tribe, 2002 ML 4232, (Mont. Water Court 2002). The broad tent standard does not apply to objections by parties to a Compact. It applies only to those who were not represented in the Compact negotiation process. *Oregon*, 913 F.2d at 581. To hold otherwise would result in tentative agreements subject to later challenge by signatories seeking leverage for a better deal, or destruction of the Compact after it has been agreed upon.

The purpose of judicial review of Compacts is not for the Court to assess the relative merits of each party's position and adjust the outcome to conform to what the parties might have obtained from trial. That balancing of interests was addressed by the parties themselves during the negotiation process and reviewed at numerous levels by representatives of those parties after the Compact was finalized. Accordingly, the narrow role of the Water Court when considering objections by represented parties is not to determine whether the Compact was fair or reasonable, but whether it was the product of fraud, overreaching, or collusion. The allottees have not made such an objection to the Compact.

5. Were the allottees entitled to receive individual notice of the preliminary decree of the Compact?

The allottees contend they should have received individual notice of the preliminary decree containing the Compact.

Notice of a preliminary decree is provided pursuant to statute. Section 85-2-232, MCA sets forth a list of persons who must receive notice when a preliminary decree is issued. That list includes:

– each person who has filed a claim for an existing right within the basin or their successor;

– each purchaser under a contract for deed of an existing right;

– those who have been issued or who have applied for and not been denied a permit for a new water right in the basin;

– those granted a reservation within the basin; and

– those who request notice.

Based on the foregoing list, 16,199 notices of the decree were mailed to water users in nine basins within the State of Montana. These basins included Rosebud Creek, the Tongue River, Pryor Creek, the Shoshone River, the Little Bighorn River, the Bighorn River below the Greybull River, and three basins encompassing portions of the Yellowstone River. These notices involved 28,748 water rights claims. Notice was also mailed to the states of North Dakota and Wyoming, and to sixty interested parties.

In addition, notice of the decree must be published once a week in newspapers of general circulation covering the water division where the basin is located. Pursuant to this requirement, notice was

published for three consecutive weeks in May 2013 in the *Billings Gazette*, the *Big Horn County News* and the *Sheridan Press.* Though not required by statute, the Water Court also held public meetings regarding the Compact in Crow Agency, Hardin, Pryor, and Billings. Notice of these meetings was provided throughout the Compact area.

The allottees do not assert notice of the preliminary decree failed to meet the standard prescribed by statute. Instead, they argue personal notice should have been given to them because they are owners of existing water rights within the meaning of § 85-2-232(1)(e), MCA.

This argument is tied to the allottees' mistaken assertion that they own individual water rights by virtue of their allottee status, rather than limited rights to use a portion of the Tribal Water Right. Because the allottees are not the owners of individual water rights, and because they were represented by the United States as their trustee, individual notice was not required.

6. Is a current use list necessary for approval of the Crow Compact?

The allottees object that their rights to use of the Tribal Water Right were not properly quantified in the Compact. They also assert they were not consulted during the Compact negotiation process regarding the extent of their rights to use water.

Even assuming these assertions to be true, quantification of the allottees' rights is not a precondition to approval of a Compact. As the history of litigation over Tribal reserved water rights shows, there is considerable room for dispute over the quantification of such rights. The objective of the Compact, which is a negotiated settlement, is to define the Tribe's *Winters* rights, eliminate litigation risk and expense, and achieve finality for the Tribe and other parties to the agreement. Although the parties to a Compact might agree to define allottees' rights to use of the Tribal reserved water right, such a definition is not required to achieve settlement. Because the allottees' rights to use of water are derived from the Tribal reserved water right, there is no requirement in case law or statute that a Compact separately quantify the allottees' rights to use of that water.

Although the Compact does not define allottees' rights to use of water, it does provide a method for quantification of such usage.

> Within one (1) year after this Compact has been ratified by the Montana legislature, the TWRD and the United States shall provide the DNRC with a report listing all current uses of the Tribal Water Right, including uses by Tribal members, existing as of the date this Compact has been ratified by the Montana legislature. DNRC may request additional information from TWRD or the United States to assist in reviewing the report. DNRC must approve or disapprove of the listing of all current uses of the Tribal

> Water Right within six (6) months after receipt of the report.

Compact, Art. IV(E)(2).

The allottees contend that the Compact *requires* the United States and the Tribe to prepare a current use list quantifying their rights. They contend that failure to prepare such a list within the time frames specified in the Compact is a violation of the Compact. There are several problems with this argument.

First, a current use list was prepared and made available for review and comment by allottees. Crow Tribe Motion for Dismissal, pp. 10-11, May 23, 2014.

Second, the allottees' request for creation of a current use list in conformance with the Compact amounts to a request to enforce the Compact. Insisting upon enforcement of the Compact necessarily presumes it is valid, and contradicts the allottees' objection to the contrary. The allottees cannot assert the terms of the Compact must be enforced at the same time they assert it must be declared invalid.

Third, resolution of disputes arising under the Compact is not within the Water Court's scope of review. By the terms of the Compact itself, this Court's review is limited to Article III of the Compact, "and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights." Compact, Art VII(B)(3).

Finally, the current use list described in Article IV is simply a list of uses of the Tribal Water Right. It

is not intended to identify additional water rights, nor does it create an ownership interest in water rights for allottees. Its purpose is to supply the Montana DNRC with information regarding use of the Tribal Water Right. Accordingly it cannot be used by this Court to undertake a "determination of existing water rights."

Failure to produce a current use list does not invalidate the Compact and is not therefore a valid basis for objection to the Compact.

V. CONCLUSIONS OF LAW

1. The allottees do not have reserved water rights separate from the Tribal reserved right.

2. Under the General Allotment Act, the allottees' rights to use of *Winters* rights are determined by the Secretary of the Interior. Under the Compact, the allottees' rights to use of the Tribal Water Right are allocated to the Secretary of the Interior and then to the Tribe upon passage of a Tribal Water Code.

3. The allottees were represented by the United States during the Compact negotiation process.

4. Represented parties may only object to a Compact on the basis of fraud, overreaching, or collusion.

5. The allottees were not entitled to receive individual notice of the preliminary decree of the Compact.

6. A current use list is not necessary for approval of the Crow Compact.

VI. CONCLUSION

The allottees' rights to use of water were established by the General Allotment Act of 1887. Pursuant to that Act, they were entitled to a just and equal share of the Tribe's *Winters* rights. The Tribe's *Winters* rights were replaced by the Tribal Water Right, which is defined and quantified by the Compact. The Compact recognizes the right of allottees to use a portion of the Tribal Water Right and establishes a mechanism for allocation of that use. The power to allocate use by allottees rests with the Secretary of the Interior until the Tribe creates its own body of legislation for that purpose.

Allottees do not own a portion of the Tribe's *Winters* rights. Accordingly, they were not entitled to receive separate notice of the Compact under statutes providing for such notice to water right owners. Likewise, they are not entitled to dictate how the Tribe's *Winters* rights are memorialized in the Compact. That decision rests with the Tribe or the Tribe's trustee. While the Compact preserves many of the attributes of the Tribe's *Winters* rights, it also subordinates those rights in certain circumstances. The allottees may be impacted by that subordination, but the possibility of such impacts alone is not enough to sustain an objection to the Compact. To prevail with an objection, the allottees, as a represented party, must

show the Compact is the product of fraud, overreaching, or collusion. They have not made such an objection.

The motion of the United States and the Crow Tribe is GRANTED. The allottees' objections are DISMISSED. A list of objections dismissed by this Order is attached as Appendix A.

The allottees' motion for a stay is moot.

DATED this 30th day of July, 2014.

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Note: Service List Updated 7/29/2014

WC-2012-06

APPENDIX A
LIST OF ALLOTTEE OBJECTIONS DISMISSED

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