IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 14-0567

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

JOINT ANSWERING BRIEF FOR THE APPELLEES THE UNITED STATES OF AMERICA, THE STATE OF MONTANA, AND THE APSAALOOKE (CROW) TRIBE

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STATEMENT OF THE ISSUES

1. Whether the Montana Water Court correctly dismissed objections by the Allottee Objectors to the Crow Tribe-Montana Water Rights Compact, in light of Congress's plenary authority to settle claims relating to Indian trust property and Congress's express determination of allottee rights in the Crow Tribe Water Rights Settlement Act of 2010; and

2. Whether the Montana Water Court properly exercised its discretion to decline to stay proceedings on the Crow Compact pending the litigation of claims filed by the Allottee Objectors in federal district court, where the Water Court possessed jurisdiction to reach all issues relevant to resolution of the Allottee Objectors' objections.

STATEMENT OF THE CASE

A. Nature of the Case

The Appellants or "Allottee Objectors" are a group of allottees to land of the Crow Indian Reservation, who object to the Crow Tribe-Montana Water Rights Compact ("Crow Compact" or "Compact"), a settlement of water rights held by the United States on behalf of the Apsaalooke ("Crow") Tribe and all Reservation allottees. The Compact was approved by Congress, by the Montana Legislature, and by the Crow Tribe in a vote of its members. The 58 Allottee Objectors – who constitute roughly one percent of the up to 6,000 Reservation allottees – contend: (1) that the United States failed to adequately represent the interests of allottees during the negotiation and approval of the Compact, and (2) that Compact-approval proceedings should be stayed in the Water Court, pending a determination of the nature of allottee water rights and an adjudication of breach of trust and due process claims in a parallel suit filed by the Allottee Objectors in federal district court.

For reasons explained *infra*, neither assertion has merit. When approving the Compact in the Crow Tribe Water Rights Settlement Act of 2010 ("Settlement Act"), Congress expressly considered the interests of allottees and specifically acted "to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess[ed]" absent the Compact. Pub. L. No. 111-291, § 407(a),

124 Stat. 3104. Congress possesses plenary authority to dispose of Indian trust property or settle claims on behalf of Indian beneficiaries, and the Allottee Objectors raise no cognizable challenge to the valid exercise of that authority.

B. Adjudication Background

In 1975, the United States filed a complaint in federal district court in Montana for the adjudication and declaration of all water rights held by and on behalf of the Crow Tribe. In 1979, the Montana Legislature enacted Senate Bill 76 ("SB 76"), which, among other things, established a water court system, *see* Mont. Code Ann. §§ 3-7-101, 3-7-102, 3-7-501, and created a process for the initiation of unified proceedings in the Montana Water Court for the adjudication of all water rights in Montana, *see* Mont. Code Ann. §§ 85-2-212, 85-2-214, including Indian reserved water rights. Mont. Code Ann. § 85-2-701; *see also In re Dep't of Natural Resources and Conservation*, 226 Mont. 221, 228, 740 P.2d 1096, 1100 (Mont. 1987) (describing Act); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 553-557 (1983) (same).

The United States had earlier consented, through the McCarran Amendment, to being joined as a party defendant in State-court general stream adjudications. *See* 43 U.S.C. § 666; *see also State ex re. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 84, 712 P.2d 754, 759 (Mont. 1985). That waiver applies to the adjudication of Indian reserved water

rights. *Arizona*, 463 U.S. at 559-565. After Montana enacted SB 76, the federal action for adjudication of the Crow Tribe's water rights was stayed, pending the outcome of the Montana unified proceedings. *See Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit*, 721 F.2d 1187, 1189 (9th Cir. 1983); *see also Arizona*, 463 U.S. at 570 & n. 21 (affirming stay pending State-court adjudication).

In SB 76, the Montana Legislature also established a Reserved Water Rights Compact Commission, Mont. Code Ann. § 2-15-212, and directed the Commission to negotiate with Indian tribes and the United States to attempt to settle federal reserved water rights claims via negotiated compacts. Mont. Code Ann. §§ 85-2-701, 85-2-702. SB 76 provided that the adjudication of Indian reserved rights would be suspended during negotiations on such compacts. *See* Mont. Code Ann. § 85-2-217.

The Compact Commission and representatives of the Crow Tribe reached agreement on the terms of the Crow Compact in 1999. The Montana legislature ratified the Compact later that year. Mont. Code Ann. § 85-20-901. Congress authorized the Compact, subject to conditions, through the Settlement Act, Pub. L. No. 111-291, 124 Stat. 3097. *See* pp. 16-20, *infra*. The Crow Tribe ratified the Compact by a vote of the tribal membership in March 2011.

C. Water Court Proceedings on the Crow Compact

In accordance with the procedures set out SB 76 and the Crow Compact, the parties thereafter submitted the ratified Compact to the Water Court for entry of the water rights provisions in a judicial decree. *See* Mont. Code Ann. §§ 85-2-702; 85-20-901, Art. VII.B; *see also* Mont. Code Ann. §§ 85-2-231 to 85-2-235. The Water Court issued a preliminary decree containing the Compact and served and published notice of the decree's availability and rights to object. *See* Mont. Code Ann. 85-2-232 (notice requirements). The Water Court received two sets of objections: (1) objections from the 58 Allottee Objectors in this appeal and a few other allottees; and (2) a smaller number of objections by non-Indians. *See* Appellants' Ex. C (July 30, 2014 Order of Water Court) at 2 & App. A; *see also* Appellees' Ex. 1 at 1-6 (list of Allottee Objectors).

1. Allottee Objections

Each of the Allottee Objectors signed and submitted a pre-printed statement of objections on a form prepared for the allottees' common use with blanks for the objectors' name and other personal identifiers. *See, e.g.*, Appellants' Ex. B (objection of Sharon Peregoy). By endorsing the form, each objector asserted that he or she was an enrolled member of the Crow Tribe and the owner of a specified interest in one or more allotments within the Reservation. Appellants' Ex. C at 3

(order summarizing objections). The forms further asserted: (1) that allottees possess reserved water rights distinct from the Crow Tribe's water rights, (2) that the Crow Compact would impair allottee reserved rights by making allottee rights part of the Tribe's rights and taking away the senior priority of allottee rights, and (3) that the United States failed, as trustee, to provide the allottees with adequate legal representation in the negotiation of the Compact and in the Water Court proceedings. *See, e.g.*, Appellants' Ex. B (objection template at 4-5).

In addition, the forms asserted that the Crow Tribe and the United States had failed to prepare a report of "current uses" of the Tribal Water Right, as required under Article IV.E.2 of the Crow Compact. *See id.* (objection template at 3); *see also* p. 14, *infra* (describing reporting requirement). The forms asked the Water Court to extend the time for filing objections to the Crow Compact until 120 days after the Allottee Objectors are provided with a current use report, or, in the absence of such an extension, for a hearing on their present objections. *See id.* (objection template at 6).

2. Motion for Stay

On May 15, 2014, counsel from the law firm of Lund Law, PLLC entered an appearance on behalf of the Allottee Objectors and, in the same filing, moved the Water Court to stay proceedings on the Crow Compact, pending the resolution of a parallel action filed on the same date in federal district court on behalf of some of

the Allottee Objectors and the "Crow Allottee Association." *See* Appellees' Ex. 1 (Notice of Appearance and Motion for Stay).

As an attachment to their stay motion, the Allottee Objectors submitted a copy of their federal-court complaint, which asserted three claims against the United States: (1) that the United States breached its fiduciary duties to allottees by failing, in the terms of Crow Compact, to protect allottee water rights; (2) that the United States violated allottees' due process rights, by failing to adequately represent allottees in the Water Court proceedings on the Compact; and (3) that the United States violated 25 U.S.C. § 175, which requires the United States Attorney, "[in] all States and Territories where there are reservations or allotted Indians . . . to represent [said Indians] in all suits at law and in equity." Appellees' Ex. 2 (federal court complaint) at 16-20. The federal complaint sought, in its prayer for relief, a declaratory judgment and order compelling the United States to provide the Allottee Objectors with "adequate legal counsel" in the Water Court proceedings.[1] *Id.* at 21.

In turn, in their motion for stay, the Allottee Objectors asserted that the Water Court lacked jurisdiction to adjudicate the constitutional and statutory claims raised in the federal court action, that a ruling on the federal claims could

[1] The Allottee Objectors filed an amended federal-court complaint in September 2014, after the Water Court dismissed the Allottee Objectors' objections and denied their motion for stay. *See* Appellants' Ex. A.

"undermine the very foundation of" or "significant[ly] impact . . . the validity of the [Crow] Compact," and that the Water Court therefore should exercise its discretion to stay proceedings on the Compact pending resolution of the federal suit. Appellees' Ex. 1 at 9.

3. Order Dismissing Allottee Objections and Denying Stay

The United States and the Crow Tribe moved to dismiss the Allottee Objectors' objections and opposed the motion for stay. *See* Appellants' Ex. C at 3. On July 30, 2014, the Water Court issued an order granting the motions to dismiss and denying the stay. *Id.* at 19-20. The Water Court held, *inter alia*, that the Allottee Objectors were represented by the United States in the proceedings on the Crow Compact and thus could object "only . . . on the basis of fraud, overreaching, or collusion," allegations the Allottee Objectors had not made. *Id.* at 14-16, 19-20. The Water Court also determined, per the General Allotment Act (25 U.S.C. § 381) and the Compact as ratified by the Settlement Act, that Reservation allottees each possess a federal statutory right to a "just and equal distribution" from the negotiated "Tribal Water Right" and that the specific attributes of this right are not subject to adjudication in the Water Court proceedings. *Id.* The Water Court then denied the motion for stay as "moot." *Id.*

at 20. The Allottee Objectors filed the present interlocutory appeal from this July 30, 2014 order.[2] *See generally* Mont. Code Ann. § 85-2-235(3).

4. Proceedings on Other Objections

The Water Court held a hearing on the remaining objections on February 2 and February 3, 2015. The Water Court ordered post-hearing briefing to be completed in May 2015.

STATEMENT OF FACTS

A. Crow Indian Reservation

By treaty dated May 7, 1868, the United States reserved a large tract of land in southeastern Montana as a homeland for the Crow Tribe. *See Montana v. United States*, 450 U.S. 544, 548 (1981); *United States v. Powers*, 305 U.S. 527, 528 (1939) (citing 15 Stat. 649). The original reservation encompassed approximately 8 million acres,[3] but subsequent Congressional acts reduced the reservation to its present size of just under 2.3 million acres. *See Montana*, 450 U.S. at 548. These subsequent acts included a 1904 Act, by which the Crow Tribe

[2] After filing their appeal, the Allottee Objectors sought to obtain this Court's review instead on a Petition for Writ of Supervisory Control. This Court denied the petition, finding that there were no extraordinary circumstances rendering the direct appeal inadequate. *See* Order (Dec. 24, 2014).

[3] The 8 million acres was part of 38.5 million acres recognized as Crow territory in the 1851 Treaty of Fort Laramie. *See Montana*, 450 U.S. at 548.

"ceded" to the United States approximately 1,137,500 acres on the northern portion of the reservation, now referred to as the "Ceded Strip." *See Montana v. Crow Tribe of Indians*, 523 U.S. 696, 700 (1998). The United States holds mineral interests in the Ceded Strip for the benefit of the Crow Tribe. *Id.*

Decades after establishing the Crow Indian Reservation ("Crow Reservation" or "Reservation"), Congress provided for the allotment of Reservation lands to individual Indians. *See Montana*, 450 U.S. at 548. In the General Allotment Act of 1887, Congress authorized the President to set aside or "allot" land within Indian reservations for exclusive use by individual Indians for farming or ranching. *See Gobin v. Snohomish County*, 304 F.3d 909, 913 (9th Cir. 2002). In the Crow Allotment Act of 1920, Congress further provided for the allotment of irrigation and grazing lands on the Crow Reservation. *See Stray Calf v. Scott Land & Livestock Co.*, 549 F.2d 1209, 1210 (9th Cir. 1976) (describing Act of June 4, 1920, ch. 224, 41 Stat. 751).

Both acts directed the Secretary of the Interior, in most cases, to hold the allotted land in trust for a period of 25 years, and then to issue a fee patent to the named allottee.[4] *See Montana*, 450 U.S. at 548; *Gobin*, 304 F.3d at 913; see *also* 25 U.S.C. § 348. Both Acts were part of an "assimilationist policy," *Marceau v.*

[4] The Crow Allotment Act authorized the Secretary to issue fee patents to certain "competent" Indians immediately. *See Stray Calf*, 549 F.2d at 1210.

Blackfeet Housing Authority, 540 F.3d 916, 931 (9th Cir. 2008), designed to "extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Id.* at 932 (quoting *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992). As a result of the allotment policy and the conversion of Indian trust lands to fee lands freely alienable by Indian allottees, nearly 90 million acres passed out of Indian hands during the allotment era. *Gobin*, 304 F.3d at 913.

Congress ended the allotment era with the Indian Reorganization Act ("IRA") of 1934. *Id.*; *Marceau*, 540 F.3d at 932. The IRA restored unallotted lands to tribal ownership, *id.* (citing 25 U.S.C. § 463), and declared that "existing periods of trust" and "restrictions on alienation" placed upon Indian lands, including allotments, were "extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. This left the Crow Reservation divided into three categories of ownership: (1) fee lands, *i.e.*, lands that were allotted and patented to individual Indians prior to the IRA and are now mostly owned by non-Indians; (2) allotments as to which fee patents never issued and that the United States continues to hold in trust for individual Indians; and (3) unallotted lands held by the United States in trust for the Tribe. *See Montana*, 450 U.S. at 548. These separate ownerships lie within the reservation in a "checkerboard pattern." *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000).

There are approximately 8,000 members of the Crow Tribe residing on the Crow Reservation. *See* http://tribalnations.mt.gov/crow. Up to 6,000 members of the Crow Tribe (including the 58 Allottee Objectors) may hold interests in Reservation allotments. *See* Appellants' Ex. A at 12 (¶ 33).

B. Reserved Water Rights

Under federal law, when Congress establishes an Indian Reservation, Congress impliedly reserves, with a priority date no later than the date of reservation, "the right to the waters of reservation streams for irrigation and other purposes." *Lewis v. Hanson*, 124 Mont. 492, 496, 227 P.2d 70, 72 (Mont. 1951) (citing *Winters v. United States*, 207 U.S. 564 (1908)); *see also State ex rel. Greely*, 219 Mont. at 89-90, 712 P.2d at 762-765. The extent of this reserved right is measured by the purposes of the reservation. *State ex rel. Greely*, 219 Mont. at 92-93, 712 P.2d at 764. "For agricultural purposes, the reserved right is a right to sufficient water to 'irrigate all the practicably irrigable acreage on the reservation.'" *Id.* (quoting *Arizona v. California*, 373 U.S. 546, 600 (1963)). The reserved right may also include sufficient water for present and future domestic and industrial uses, for traditional hunting and fishing, and other uses associated with use of the reservation as a permanent homeland. *Id.*, 219 Mont. at 92-94, 712 P.2d at 764-65; *see also In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 35 P.3d 68, 77-81 (Ariz. 2001). As this Court has

noted, these reserved rights are "difficult to quantify." *State ex rel. Greely*, 219 Mont. at 92, 712 P.2d at 764.

The "title" to unquantified reserved water rights "vested" in the United States, as trustee for the Crow Tribe and its members, on the date Congress established the Crow Reservation. *Lewis*, 124 Mont. at 496, 227 P.2d at 72. No additional water rights were reserved when the United States, as trustee, allotted reservation lands to individual Indians. *Id.* However, when adopting the General Allotment Act, Congress authorized the Secretary of the Interior to ensure that allottees receive a fair distribution of reservation water. Specifically, in Section 7 of the General Allotment Act – codified at 25 U.S.C. § 381 – Congress stated that "[i]n cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing on any such reservation." Act of Feb. 8, 1887, Ch. 119, § 7, 24 Stat. 390.

C. Crow Compact

In lieu of litigating the Indian reserved water right and asking the Water Court to quantify and otherwise determine all aspects of that right following trial, the United States, the Crow Tribe, and the State of Montana agreed – per the Crow Compact – to a negotiated "Tribal Water Right." *See* Mont. Code Ann., § 85-20-

901, Art. VII.B.2. The Compact defines the Tribal Water Right by specifying, *inter alia*, the amount of water that the Crow Tribe and members may divert and use, per water basin, from the Big Horn River, the Little Big Horn River, and other creeks and drainages within the Crow Reservation and the Ceded Strip. *Id.* Art. III. Under the Compact, Tribal rights to the "natural flow" of reservation waters retain a priority date of 1868 (matching the date the reservation was created). *Id.* Art. III.A.2.a., III.B.2, III.C.2, III.D.2, III.E.2, III.F.2. The Compact provides, however, that "water rights Recognized Under State Law" – *e.g.*, water rights held by nonmembers on fee lands within the reservation – are "protected from . . . an assertion of senior priority in the exercise of current uses of the Tribal Water Right." *Id.* Art. III.A.6, III.B.6, III.C.6, III.D.6, III.E.6, III.F.6; *see also id.* Art. II.19 (defining "Recognized Under State Law").

As between all "current uses" of the Tribal Water Right and all existing rights Recognized Under State Law (both determined as of the date of the Montana Legislature's ratification of the Compact), the Compact replaces distribution on the basis of priority with a rule requiring these groups to share in shortages on an "equitable basis" as further specified by the Compact. *Id.* Art. IV.A.4. To facilitate such equitable apportionment, the Compact requires the Crow Tribe and the United States to prepare a report of current uses of the Tribal Water Right for the Montana Department of Natural Resources and Conservation. *Id.* Art. IV.E.2.

The Compact also: (1) closes, with limited exceptions, the affected water basins to any new development of State Law rights, *id.* Art. III.A.7, III.B.7, III.C.7, III.D.7, III.E.7, and IV.D.1; (2) permits the development of new uses of the Tribal Water Right that will not adversely affect existing State Law rights, *id.* Art. IV.C.1; (3) calls for the reallocation of storage water in Bighorn Lake to provide for storage rights in the Tribal Water Right and help ensure the availability of supply to serve the Tribal Water Right, *id.* Art. III.A.1.b, VI.B.1; (4) provides for millions of dollars of State funding to aid water and economic development on the Crow Reservation, *id.* Art. VI.A, and (5) acknowledges additional "[f]ederal contributions to settlement" to be "provided by Congress" in legislation approving the Compact. *Id.* Art. VI.C.; *see also* pp. 18, *infra.*

Under the Compact, the Crow Tribe must adopt a Tribal Water Code for administering the Tribal Water Right. *Id.* Art. IV.A.2.b. With respect to the development and application of the Tribal Water Code, the Compact states 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." *Id.* Art. IV.B.1.

D. Settlement Act

In February 2009, nearly ten years after the negotiation of the Crow Compact and its ratification by the State of Montana, the Crow Allottee Association wrote the Assistant Secretary of the Interior - Indian Affairs to demand funding to enable the Association or its members to "employ a water rights lawyer of their choice" with respect to "negotiations on the [proposed] Crow Water Rights Settlement Act of 2009." Appellants' Ex. E. Counsel for the Department of the Interior replied that the "Department [was] aware of the unique rights of allottees and how those rights might be impacted by the [Compact]," and that the Department would "continue [to] work[] with Congress and the Tribe to ensure that allottee interests [were] appropriately addressed in any legislation approving the Compact." Appellants' Ex. F.

In the 2010 Settlement Act, Congress gave special consideration to allottee concerns and made specific provisions to ensure that allottee rights are protected. First, Congress declared its intent "to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess" without the Compact, taking into consideration: (1) "the potential risks, cost, and time delay associated with . . . litigat[ing]" the Indian reserved water rights in lieu of settlement, (2) "the availability of funding" from Congress and "other sources," (3) "the availability of water from the [negotiated Tribal Water Right]," and (4) the applicability of 25

U.S.C. § 381 and the Settlement Act "to protect the interests of allottees." Pub. L. No. 111-291, § 407(a), 124 Stat. 3104.

Second, Congress specified that § 381 "shall apply" to the negotiated Tribal Water Right, *id.* § 407(d)(1), and that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from the [Tribal Water Right]," and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." *Id.* § 407(d)(2)-(3), 124 Stat. 3105.

Third, Congress mandated that the Tribal Water Code required by the Compact contain specific provisions to protect allottee rights, including "a process by which an allottee may request that the Tribe provide water for irrigation use in accordance with [the Settlement Act]," and "a due process system for the consideration and determination by the Tribe of any request by an allottee . . . for an [irrigation] allocation . . . on allotted land," including a process for "appeal and adjudication of any denied or disputed distribution." *Id.* § 407(f)(2), 124 Stat. 3105. Congress specified that the Tribal Water Code will not take effect until the Secretary of the Interior approves the required provisions. *Id.* § 407(f)(3)(B), 124 Stat. 3106. Under the Compact and Settlement Act, the Secretary will administer the Tribal Water Right until a valid Water Code is enacted. *Id.* § 407(f)(3)(A), 124 Stat. 3106; Mont. Code Ann. § 85-20-901, Art. IV.A.2.b.

Fourth, Congress specifically empowered the Secretary of the Interior "to protect the rights of allottees as specified" in the Settlement Act. Pub. L. No. 111-291, § 407(d)(6), 124 Stat. 3105. While allottees must "exhaust remedies available under the [Secretarially-approved] water code" or other applicable tribal law before asserting any claim against the United States, *id.* § 407(d)(4), Congress specified that, following such exhaustion, allottees "may seek relief under . . . 25 U.S.C. § 381 . . . or other applicable law." *Id.* § 407(d)(5), 124 Stat. 3105.

Finally, in addition to these provisions specific to allottees, Congress authorized hundreds of millions of dollars in federal appropriations for projects that will benefit users of the Tribal Water Right, including projects for the rehabilitation and improvement of the Reservation's municipal, rural, and industrial water system, and for the maintenance and improvement of the Crow Irrigation Project. *Id.* §§ 405-406, 411, 414, 124 Stat. 3100-04, 3113-16, 3120-21. Congress gave the Secretary of the Interior responsibility to carry out such projects and directed that the final design of irrigation improvements "take into consideration the equitable distribution of water to allottees." *Id.* § 405(c)(2), 124 Stat. 3100.

In exchange for the defined benefits provided in the Compact and Settlement Act for the Crow Tribe and its members and allottees, the Settlement Act authorizes and directs responsible federal officials to waive and release all claims

to water rights for the Crow Reservation and Ceded Strip that the United States has asserted or could assert as trustee for the Crow Tribe or allottees and that are not recognized in the Compact or Settlement Act. *Id.* § 410(a), 124 Stat. 3109. The waivers take effect on the Settlement Act's "enforceability date," *id.* § 410(b), 124 Stat. 3111, which is the date the Secretary of the Interior publishes, in the Federal Register, a statement of findings that specified enforceability conditions have been met. *Id.* §§ 403(6), 410(e), 124 Stat. 3098, 3112. These include the requirement that the Montana Water Court must issue a final judgment and decree approving the Compact and that any direct appeals to this Court must be complete.[5] *Id.*, §§ 403(7), 410(e)(1)(A), 124 Stat. 3098, 3112.

The Settlement Act states that the "benefits realized by the allottees" under the Act "shall be in complete replacement of and substitution for, and full satisfaction of" (1) "all [water rights] claims waived and released" in the Act, *id.*, § 409(a)(2)(A), 124 Stat. 3108; and (2) "any claims" that allottees "have or could have asserted" against the United States with respect to the litigation of water

[5] If the Secretary's findings are not published by March 31, 2016 or by an "extended date agreed to by the Tribe and the Secretary" and "after reasonable notice to the State of Montana," the waivers and funding provided in the Settlement Act are automatically repealed. Pub. L. No. 111-291, § 415, 124 Stat. 3121.

rights claims or the "negotiation, execution, or the adoption" of the Crow Compact. *Id.*, §§ 409(a)(2)(B), 410(a)(3)(C)-(D), 124 Stat. 3108, 3110.[6]

STANDARD OF REVIEW

The Water Court's dismissal of the Allottee Objectors' objections was akin to a dismissal for failure to state a claim on which relief can be granted. This Court reviews such dismissals *de novo*, under the same standard employed by the trial court. *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323, ¶ 18, 377 Mont. 244, 249, 339 P.3d 602, 607 (Mont. 2014). This Court must accept the Allottee Objectors' factual allegations as true and consider them in the light most favorable to the Objectors, but must affirm dismissal if it appears beyond doubt that the Objectors could prove no set of facts that would entitle them to relief. *Id.*

This Court reviews the denial of a motion for stay for abuse of discretion, while resolving any underlying legal issues de novo. *Lamb v. District Court of Fourth Judicial Dist.*, 210 MT 141, ¶ 13, 356 Mont. 534, 538, 234 P.3d 893, 896 (Mont. 2010).

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[6] Section 409(a)(2)(B) of the Settlement Act states that the benefits realized by the allottees under the Act shall be in "full satisfaction of . . . all claims of the allottees against the United States that the allottees have or could have asserted that are *similar in nature to those described in section 410(a)(3).*" *Id.* § 409(a)(2)(B), 124 Stat. 3108 (emphasis added). Section 410(a)(3) authorizes the Tribe to execute a waiver and release of claims against the United States, including claims "relating to the negotiation, execution, or the adoption of the Compact or [Settlement Act]." *Id.* § 410(a)(3)(D), 124 Stat. 3110.

ARGUMENT

I. CONGRESS HAS PLENARY AUTHORITY TO SETTLE CLAIMS TO WATER RIGHTS HELD ON BEHALF OF ALLOTTEES.

As the Water Court recognized, the Crow Compact – and any other compact negotiated pursuant to Mont. Code Ann. § 85-2-702 – functions in the nature of a consent decree. Appellants' Ex. C at 12. As a general rule, when a court reviews a consent decree, the court's task is to ensure that the decree conforms to applicable laws and is reasonable and fair to persons who are *not* party to the decree but whose interests might be impacted. *See United States v. State of Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990).

Here, the United States, including in its capacity as trustee for Reservation allottees, was a party to the Crow Compact, and the water rights that the United States holds in trust for the Tribe and allottees were specifically determined in the Compact and in the Settlement Act. *See* Pub. L. No. 111-291, § 409(a)(2), 124 Stat. 3108-3109 ("Satisfaction of Allottee Claims"); *id.* § 410(a)(2), 124 Stat. 3109-3110 ("Waiver and Release of Claims by the United States Acting in Its Capacity as Trustee for Allottees"). For this reason, the Water Court determined that the Allottee Objectors could not object to the substantive terms or fairness of the settlement of allottee claims. *See* Appellants' Ex. C at 14-16.

The Allottee Objectors argue (Appellants' Br. at 27-31, 38-44) that the Water Court should have held a hearing on their objections – or should have stayed

proceedings on the Compact pending resolution of the Allottee Objectors' claims in federal district court – because federal officials did not consult with the Allottee Objectors over the terms of the Compact or adequately represent their interests, leaving them in the same position as unrepresented third parties. *Cf. Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996 (9th Cir. 1985) (acknowledging need, when reviewing class action settlements, to "protect class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties"). This argument, however, disregards Congress's role in approving the Compact.

Congress possesses plenary authority to control and manage Indian trust assets via legislation. *See United States v. Jicarilla Apache Nation*, --- U.S. ---, 131 S.Ct. 2313, 2323-24 (2011). This includes "the power to modify or eliminate tribal rights," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and the power to "change the form of trust assets" as long as Congress acts, in good faith, to "provide [the Indian beneficiaries] with property of equivalent value." *United States v. Sioux Nation of Indians*, 448 U.S. 356, 416 (1980) (quoting and endorsing rule set out in *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1162 (Ct.Cl. 1979)).

In the present case, in addition to determining the Tribal Water Right, the Compact and Settlement Act provide millions of dollars for improvements to

Reservation water delivery systems and the reallocation of storage water for the benefit of the Tribe and allottees. Congress considered all such benefits, as well as litigation costs and risks, when deciding to release and waive the United States' litigation claims in exchange for the benefits guaranteed to the allottees by settlement. *See* Pub. L. No. 111-291, § 407(a), 124 Stat. 3104. This is similar to the approach Congress has taken in other recent Indian water rights settlements. *See, e.g.*, Pub. L. No. 108-447, tit. X, §§ 2, 7, 118 Stat. 2809, 3431-41 (2004) (Snake River Water Rights Act); Pub. L. No. 108-451, § 204, 118 Stat. 3478, 3502-03 (2004) (Arizona Water Settlements Act).

In short, pursuant to its authority as trustee to "change the form of trust assets" held for Reservation allottees, *see Sioux Nation*, 448 U.S. at 416, Congress acted to provide Reservation allottees equivalent or better water rights than they possessed pre-settlement, *see* Pub. L. No. 111-291, § 407(a), 124 Stat. 3104, and in return waived and released all pre-settlement claims on behalf of allottees. *Id.*, § 410(a)(2), 124 Stat. 3109. The Water Court was bound to give effect to this statutory determination. *See Arizona*, 463 U.S. at 571 (noting State court's "solemn obligation" in general stream adjudication "to follow federal law"); *State ex rel. Greely*, 219 Mont. at 95, 712 P.2d at 766 (same).

To be sure, the Settlement Act provides that the Compact will not be "enforceable" until the Water Court enters a final decree approving the Compact

and provides that no such decree will be final while subject to this Court's appellate review. Pub. L. No. 111-291, §§ 403(6)-(7), 410(e)(1)(A), 124 Stat. 3098, 3112. But Congress's acknowledgment of the need for a final decree and of the judicial review attendant to such process – *i.e.*, review to ensure that the Compact is reasonable and fair to nonparties, *Oregon*, 913 F.2d at 580-81 – cannot reasonably be construed as consent to the Water Court's review of the merits of the bargain that Congress struck, as trustee, on behalf of the allottee beneficiaries.

In the Settlement Act, Congress provided that "the benefits realized by the allottees" under the Compact and Settlement Act are in "full satisfaction" of "all claims waived and released" in the Settlement Act, *id.* § 409(a)(2)(A), 124 Stat. 3108, and "any claims . . . against the United States" "relating to the negotiation, execution, or the adoption of the Compact" or Settlement Act. *Id.* §§ 409(a)(2)(B), 410(a)(3)(D), 124 Stat. 3108, 3110.[7] When enacting these provisions, Congress necessarily understood that some allottees might not be satisfied personally with the terms of the Crow Compact. But as sovereign and trustee for the Crow Tribe and allottees, Congress possesses plenary authority to settle the reserved rights claim notwithstanding potential allottee objections, and the language of the Settlement Act leaves no doubt that Congress intended to exercise that authority. The Water Court was thus bound to carry out the terms of the Settlement Act –

[7] *See* p. 20, n. 7, *supra.*

subject to the Court's responsibility to ensure the Compact is reasonable and fair to nonparties, *see Oregon,* 913 F.2d at 580-81 – notwithstanding the dissatisfaction voiced by the 58 Allottee Objectors.

This is so even though the Allottee Objectors assert constitutional "due process" violations relating to the alleged denial of adequate counsel. The Allottee Objectors fail to appreciate that the Compact is not a proposed judgment following the litigation of water-rights claims, nor an ordinary consent decree. Rather, the Compact was adopted and confirmed, as a political compromise in lieu of litigation, by three sovereign entities – the United States, the State of Montana, and the Crow Tribe – through their respective legislative processes. When Congress alters substantive property rights via legislation, "the legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009). The Allottee Objectors identify no authority for the proposition that a tribe or individual Indian can bring a due process claim to void a federal statute that specifically determines the property held in trust for the tribe or Indian. The absence of any such remedy in the Water Court or federal district court is fatal to the Allottee Objectors' objections and motion for stay.

II. THE WATER COURT CORRECTLY DISMISSED THE ALLOTTEE OBJECTORS' OBJECTIONS.

Because the Water Court cannot review the merits of Congress's settlement of the United States' claims on behalf of allottees (as to allottee interests), or the procedural fairness of Congress's actions in enacting the Settlement Act, the Water Court correctly dismissed the Allottee Objectors' objections. The Allottee Objectors' arguments on appeal (Appellants' Br. at 27-39) disregard the binding effect of the Settlement Act and are without merit.

A. The Water Court Did Not Apply an Improper Standard.

There is no basis for the Allottee Objectors' contention (Appellants' Brief at 27-31) that the Water Court applied an improper standard of review. In their objections, the Allottee Objectors alleged: (1) that they were not consulted during the negotiation of or proceedings on the Crow Compact; (2) that they were not provided legal or technical counsel on the nature of their water rights; and (3) that the Compact will make the Crow allottees the "most junior water rights holders" in their respective basins "by assigning them a 1999 priority date." *See* Appellants' Brief at 28-29. The Allottee Objectors contend (*id.* at 30) that these "factual allegations," if accepted, prove inadequate representation and establish that the entry of a final decree approving the Compact will "result[] in the loss of [the Allottee Objectors'] property [in] violation of their right to due process of law." Because the Water Court dismissed their objections, notwithstanding what the

Allottee Objectors deem to be a *prima facie* due process violation, the Allottee Objectors conclude that the Water Court must have disregarded its duty, upon a motion to dismiss, to "deem[] all factual allegations to be true." *See generally Giese v. Blixrud*, 2012 MT 170, ¶ 10, 365 Mont. 548, 552, 285 P.3d 458, 461 (Mont. 2012).

This argument is readily dismissed. The Water Court did not question or reject the Allottee Objectors' allegations that they were not consulted on the Compact or in the Compact proceedings. The Court found these factual allegations irrelevant as a matter of law. *See* Appellants' Ex. C at 6-19.[8] As for the Allottee Objectors' allegation concerning priority dates, interpretation of the Compact is a question of law, not one of fact. *See United States v. Gila Valley Irrigation District*, 961 F.2d 1432, 1434 (9th Cir. 1992).

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[8] The Allottee Objectors also erroneously contend (Appellants' Brief at 29) that the Water Court failed to credit their allegation that they were not consulted regarding the report on current uses of the Tribal Water Right required under Compact Art. IV.E.2. The Water Court specifically "assum[ed] these assertions to be true," but held that "quantification of the allottees' rights" in a current use report is not a precondition to Compact approval. Appellants' Ex. C. at 17. Although the Allottee Objectors also purport to challenge this legal ruling, *see* Appellants' Brief at 7 (statement of issues), they fail to present any argument on point, *see id.* at 24-44, and have waived such argument. *Beery v. Grace Drilling*, 260 Mont. 157, 162, 859 P.2d 429, 432 (Mont. 1993). In any event, as the Water Court correctly determined (Appellants' Ex. C at 17-19), the Compact and Settlement Act do not make the current use report a precondition of Compact approval. *See* Mont. Code Ann. § 85-20-901, Art. IV.E.2 (reporting requirement); Pub. L. No. 111-291, § 410(e), 124 Stat. 3112 (enforceability conditions).

The Allottee Objectors misread the Compact in alleging (Appellants' Brief at 29) that it assigns allottee rights the "most junior" priority date in the affected basins. As explained (p. 14, *supra*), excluding storage rights, the Compact assigns a priority date of 1868 to the Tribal Water Right, inclusive of allottee use. Mont. Code Ann. § 85-20-901, Art. III.A.2.a., III.B.2, III.C.2, III.D.2, III.E.2, III.F.2. The Compact also adopts rules for the equitable apportionment of water, during times of shortage, between current uses of the Tribal Water Right and certain non-Indian water users, in lieu of apportionment on priority.[9] *Id.*, Art. IV.A.4. But these provisions do not make current uses of the Tribal Water Right "junior" to non-Indian uses. Rather, the rules require a roughly proportional reduction in delivery to all affected rights during times of shortage. *Id.*

In any event, the Water Court did not fail to accept the Allottee Objectors' injury claims. Although the Water Court observed that new storage rights provided by the Compact and Settlement Act will "attenuate[]" negative impacts to users of the Tribal Water Right, Appellants' Ex. C at 14 & n.4, the Water Court did

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[9] As the Water Court noted (Appellants' Ex. C at 14), such provisions are not uncommon in the settlement or reserved Indian rights. *See, e.g., United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428, 1431 (9th Cir. 1994). Moreover, an adjudicated *Winters* right for the Crow Tribe (inclusive of allottees) would not necessarily be senior to adjudicated non-Indian rights within the Crow Indian Reservation. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (non-Indian water right on former trust allotment held to share priority date of reserved right).

not specifically find that there would be no impairment to allottee water rights from the Compact's "subordination" provisions. Appellants' Ex. C at 14. Instead, consistent with the relevant standard of review, *see Salminen*, 2014 MT 323, ¶ 18, 377 Mont. at 249, 339 P.3d at 607, the Water Court held that "even if the [Allottee Objectors] were able to demonstrate injury as a consequence of [the Compact's] subordination [provisions]," such injury would not provide a basis for an objection by the Allottee Objectors (as represented parties). Appellants Ex. C at 14.

Ultimately, because appellate review of the dismissal order is *de novo*, *Salminen*, 2014 MT 323, ¶ 18, 377 Mont. at 249, 339 P.3d at 607, the question before this Court is not whether the Water Court was correct in all aspects of its decision, but whether the Allottee Objectors stated grounds for relief in the Water Court proceedings. *Id.* As explained (pp. 21-25, *supra*), the Settlement Act precludes objections by the Allottee Objectors based on their dissatisfaction with the terms of settlement and there is no due process claim that the Allottee Objectors can assert to void a Congressionally-authorized settlement. Accordingly, there was no relief the Water Court could provide on the Allottee Objectors' objections.

B. The Compact and Settlement Agreement Comport with Federal Law.

In addition to alleging that allottee water rights are impaired by a loss of priority under the Compact, the Allottee Objectors contend (Appellants' Brief at

36-39) that the Water Court failed to apply relevant federal law because, inter alia, the Compact and Settlement Act do not determine individual allottee rights in accordance with the United States Supreme Court's decision in *United States v. Powers*, 305 U.S. 527 (1939) and the Ninth Circuit's decision in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) ("*Walton II*"). This argument also lacks merit.

1. The Compact and Settlement are Consistent with Powers and Walton II

Powers involved an action by the United States to enjoin the diversion of waters within the Crow Reservation by certain non-Indians who had purchased former allotments in the Reservation and whose water use competed with an Indian irrigation project. 305 U.S. at 532. The *Powers* Court observed that the lands originally had been allotted for farming and had no value without water. *Id.* Because Section 7 of the General Allotment Act (25 U.S.C. § 381) contemplated "equal rights" to water "among resident Indians," the Court reasoned that the patents to the Indian allottees included an interest in the reserved water right that could be severed and conveyed in the sale to the non-Indians. *Id.* Without specifying the "extent or precise nature" of such interest, the Court concluded that there was no basis for enjoining all water use by the non-Indians. *Id.* at 533.

Walton II involved competing claims to certain waters on the Colville Indian Reservation by the Colville Confederated Tribes and a non-Indian who had

purchased former allotments. 647 F.2d at 45-46. Again referencing 25 U.S.C. § 381, the Ninth Circuit determined that the original Indian allottees possessed the right to a "ratable share" of the reserved irrigation right, and that, upon purchase, the non-Indian purchaser acquired a right to appropriate "with reasonable diligence" an amount up to the allottees' share, with a priority date matching the date of reservation. *Id.* at 49-51.

The Compact and Settlement Act are consistent with both rulings. The Compact specifies that the Crow 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." Mont. Code Ann, § 85-20-901, Art. IV.B.1. And the Settlement Act confirms that Section 381 "shall apply" to the Tribal Water Right, that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from" the Tribal Water Right, and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." Pub. L. No. 111-291, § 407(d)(1)-(3), 124 Stat 3104-05.

There is no question that, in exchanging disputed claims for specifically defined benefits, the Compact and Settlement Agreement transform allottee rights. Before the Compact and Settlement Agreement, allottees possessed claims under 25 U.S.C. § 381 to an equitable share of an unspecified (not yet adjudicated) reserved water right. *See Walton II*, 647 F.3d at 51. Under the Compact and

Settlement Agreement (pending approval in a final decree), allottees hold the right to a "just and equitable allocation of [irrigation] water" from the decreed Tribal Water Right. As already explained, however (p. 16, *supra*), Congress specifically determined that the Compact and Settlement Act provide allottees with water rights that are equivalent to or better than rights held pre-settlement, Pub. L. No. 111-291, § 407(a), 124 Stat. 3104, and Congress, as trustee, may alter the form of trust assets, so long as Congress acts in good faith to provide equivalent value. *Sioux Nation*, 448 U.S. at 416.

2. The Allottee Objectors Misread Powers and Walton II

The Allottee Objectors argue (Appellants' Brief at 36) that the Water Court failed to follow *Powers* and *Walton II* because the Compact and Settlement Act leave the determination and administration of individual allottee rights to the Tribe under a Tribal Water Code and fail to provide for such determination and administration in the Water Court. The Allottee Objectors further complain (*id* at 14.) that there is an "irreconcilable conflict" between the Crow Tribe and allottees over the use of water rights, and that the United States has "refuse[d] to take steps to protect" allottee rights in the face of such conflict. These arguments fail on three grounds.

First, most Tribal members residing on the Reservation hold an interest in one or more allotments. *See* pp. 12, *supra*. Accordingly, there is no basis for

presuming (per the Allottee Objectors' argument) that the Tribe's interests in the use of reservation waters are inherently adverse to allottee interests, or that Tribal and allottee interests are any more divergent than the interests of differently situated allottees.

Second, contrary to the Allottee Objectors' representation (Appellants' Brief at 14), the United States has taken steps to protect allottee rights. As explained (p. 17, *supra*), the Settlement Act dictates that the Secretary will administer the Tribal Right until the Crow Tribe adopts, and the Secretary approves, a Water Code that contains "due process" protections for allottees. Pub. L. No. 111-291, § 407(f), 124 Stat. 3105-3106. The Settlement Act also specifically preserves the Secretary's authority to take action to protect allottee rights, should the Crow Tribe fail to do so. *Id.*, §§ 407(d)(3)-(5), 124 Stat. 3105.

Third, neither *Powers* nor *Walton II* forecloses Tribal determination and administration of allottee rights. Contrary to the Allottee Objectors' argument (Appellants' Brief at 34, 36), the relevant issue here is not whether allottees possess water rights "distinct from" the reserved right created upon establishment of the Crow Reservation. Any individual allottee's right (per 25 U.S.C. § 381 and *Powers*) to ***share*** in the usage of the Indian reserved right (pre-settlement) or the Tribal Water Right (post-settlement) is distinct from the reserved right as a whole. The relevant question is whether the Allottee Objectors (and the thousands of other

allottees) have a right to demand that their individual allocations from the reserved right be individually adjudicated and decreed in the Water Court proceeding, where Congress, through the Settlement Act, has: (1) exchanged the reserved right for a negotiated Tribal Water Right, (2) granted allottees the right to share in use of the Tribal Water Right for irrigation purposes; and (3) provided for the determination and administration of allottee rights under a Tribal Water Code. *See* Pub. L. No. 111-291, § 407, 124 Stat. 3104-3106.

There is no legal basis for such a demand. *Powers* and *Walton II* involved water rights claimed by non-Indians for the irrigation of former trust allotments that, at the time of adjudication, were held in fee. *See Powers*, 305 U.S. at 532; *Walton II*, 647 F.2d at 45-46. Comparable fee owners within the Crow Indian Reservation were obligated to file, and are obligated to defend, their own claims before the Water Court. The Crow Compact and Settlement Act do not settle the claims of fee owners and the Water Court will need to determine the nature and extent of their water rights in a final decree for the relevant water basins.

In contrast, the allotments at issue in this case, as well as any associated water rights, are held in trust by the United States for the benefit of allottees. Section 381 vests the Secretary of the Interior with discretion "as he [or she] may deem necessary" to "prescribe . . . rules and regulations" for the equitable distribution of water rights among reservation Indians." 25 U.S.C. § 381. Nothing

in the text of the statute precludes the Secretary from allowing the Tribe to exercise its sovereign powers over water resources, subject to the Secretary's overriding authority to protect rights guaranteed by federal law.

Moreover, whether or not Section 381 addresses the issue, Congress plainly provides for Tribal administration of water resources in this case. *See* Pub. L. No. 111-291, § 407(f), 124 Stat. 3105-3107. The Settlement Act dictates that the allocation and distribution of the Tribal Water Right, as between allottees and other authorized uses, shall be in accordance with a federally-approved Tribal Water Code that contains provisions to protect allottee rights under 25 U.S.C. § 381. *Id.* The Settlement Act also requires allottees to exhaust remedies under tribal law before seeking relief under "any other applicable law." *Id.*, § 407(d)(4), 124 Stat. 3105. The Allottee Objectors' demand for a *judicial* determination of their individual water allocations cannot stand in the face of these federal statutory provisions authorizing and mandating an *administrative* determination.

C. The Water Court Did Not Exceed Its Jurisdiction.

There is also no merit to the Allottee Objectors' argument (Appellants' Brief at 31-36) that the Water Court exceeded its jurisdiction when rejecting the Allottee Objectors' demand for a judicial determination of their individual water rights. The Allottee Objectors suppose (Appellants' Brief at 34) that federal courts have exclusive jurisdiction to decide whether allottees' water rights are "distinct from

the Crow Tribe's reserved right." But, as just explained, this contention fails to accurately frame the issue. Under the Supremacy Clause and rule of preemption, because the Settlement Act specifically provides for an administrative determination of water allocations to individual allottees, the Water Court lacks jurisdiction to adjudicate such issues contrary to the terms of the Settlement Act. *See generally Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). As the Allottee Objectors acknowledge, "[e]very court has judicial power to hear and determine the question of its own jurisdiction." Appellants' Brief at 42 (quoting *Karr v. Karr*, 192 Mont. 388, 407, 628 P.2d 267, 277 (1981)).

Moreover, the Allottee Objectors fundamentally misperceive the limits of the Water Court's jurisdiction with respect to issues of "Indian law." The Allottee Objectors cite this Court's opinion in *Fellows v. Office of Water Com'r ex rel. Perry v. Beattie Decree Case No. 371*, 2012 MT 169, 365 Mont. 540, 285 P.3d 448 (Mont. 2012), for the proposition (Appellants' Brief at 31) that the Water Court "lacks jurisdiction to determine anything other than existing water rights." In so doing, the Allottee Objectors erroneously presume that the determination of the existing reserved water right for the Crow Indian Reservations would not be a matter of "Indian law," and they misinterpret *Fellows*. When observing, in *Fellows*, that "jurisdiction to determine existing water rights rests exclusively with the Water Court," this Court was noting an absence of jurisdiction in the Montana

District Court. *See Fellows*, 2012 MT 169, ¶15, 365 Mont. at 545, 285 P.3d at 452 (emphasis added). This Court did not address the scope of the Water Court's jurisdiction and did not imply that such jurisdiction is strictly limited to the act of determining existing water rights.

In SB 76, the Montana Legislature gave the Water Court jurisdiction to consider and resolve "*all matters . . . concerning* the determination and interpretation of existing water rights." Mont. Code Ann. § 3-7-501(3) (emphasis added). In addition, SB 76 specifies that the Water Court has jurisdiction: (1) to adjudicate federal reserved rights not settled by compact, Mont. Code Ann. 85-2-701(1); (2) to hear and resolve objections to compacts settling reserved rights, *id.*, §§ 85-2-701(1), 702(3); and (3) to enter final decrees containing the terms of compacts, where no objection is sustained. *Id.* § 85-2-702(3). These provisions give the Water Court jurisdiction to resolve federal and Indian-law issues that reasonably need to be resolved for purposes of determining federal reserved rights and facilitating the settlement of such rights by compact. *See generally State ex rel. Greely*, 219 Mont. at 89-96, 712 P.2d at 762-766 (finding Montana law "adequate to adjudicate Indian reserved water rights").

The Allottee Objectors similarly err when asserting (Appellants' Brief at 32) that federal law places all "issues of Indian law . . . within the exclusive jurisdiction of . . . federal . . . or tribal courts." The Indian Commerce Clause of

the United States Constitution, Art. I, § 8, cl. 3, "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). This power – combined with the Supremacy Clause of the United States Constitution, and the doctrines of federal preemption, federal sovereign immunity, and tribal sovereign immunity – operate to deprive State courts of jurisdiction over causes of action involving tribal matters on Indian reservations and federal management of such matters, except where specifically provided by Congress. *See generally Estate of Big Spring*, 2011 MT 109, ¶¶ 26-46, 360 Mont. 370, 380-389, 255 P.3d 121, 127-133 (Mont. 2011).

Nonetheless, where a State court possesses jurisdiction over a cause of action and the parties to a suit, there is no rule precluding the court from addressing issues of federal law pertaining to Indians and Indian rights that properly arise in such suit. In the McCarran Amendment, Congress consented to the joinder of the United States in State court proceedings for "the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666. The United States Supreme Court and this Court have specifically held that the McCarran Amendment permits the adjudication of reserved Indian water rights in the present unified Montana Water Court proceedings, *Arizona*, 463 U.S. 559-565; *State ex. rel. Greely*, 219 Mont. at 89-96, 712 P.2d at 762-766, and have stressed the Water Court's "solemn obligation to follow federal law" in such proceedings.

Arizona, 463 U.S. at 571; *State ex rel. Greely*, 219 Mont. at 95-96, 712 P.2d at 766. The Water Court did not exceed its jurisdiction in determining that federal law precludes the relief that the Allottee Objectors sought in that Court.

II. THE WATER COURT DID NOT ABUSE ITS DISCRETION IN DENYING A STAY PENDING RESOLUTION OF THE ALLOTTEE OBJECTORS' FEDERAL SUIT.

In their stay motion, the Allottee Objectors cited no abstention doctrine applicable to the circumstances of this case, and no authority for the proposition that State courts should stay proceedings in general stream adjudications pending the resolution of federal or Indian-law issues in federal court. The issues in this appeal are presently before this Court, in part, because the Supreme Court held that the original federal suit to adjudicate the water rights of the Crow Tribe and its members was properly stayed pending resolution of the unified proceedings in the Montana Water Court. *See Arizona*, 463 U.S. at 568-570 (applying "*Colorado River* abstention," citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 820 (1976)). In so ruling, the Supreme Court acknowledged that the arguments for resolving reserved Indian water rights in federal court had "a good deal of force," but concluded that these arguments did not trump the policies underlying the McCarran Amendment. *Id.*

In any event, the Allottee Objectors acknowledge that a court's decision to abstain from the exercise of its jurisdiction is discretionary and based on equitable

considerations. *See* Appellants' Brief at 43 (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). The Water Court did not abuse its discretion when denying a stay, because the arguments in favor of the requested stay are unfounded. Although the Allottee Objectors' endgame is somewhat difficult to discern, they evidently seek a stay of the proceedings on the Crow Compact: (1) to buy time to obtain a declaration from the federal district court that allottees hold water rights "distinct" from the reserved right for the Crow Tribe, and (2) to enable the Allottee Objectors to bring such a declaration back to the Water Court to compel an adjudication of their individual rights (which the United States allegedly failed to protect) before the waiver and release of federal claims on behalf of the allottees takes effect. *See* Appellants' Brief at 41.

The effort is misdirected for reasons already stated. Because Congress has plenary power to settle federal claims to federal water rights held on behalf of allottees, the allottees possess no right to an independent adjudication of those claims contrary to the plain terms of the Settlement Act. *See* pp. 21-25, *supra*. Nor do the Allottees possess a valid due process objection to the determination of their rights as specified by the federal legislation. *See* p. 25, *supra*.

This does not mean that there are no limits to Congress's authority to legislate with respect to property interests held by the United States on behalf of tribes or individual Indians. The United States Supreme Court has long recognized

that legislative enactments that take Indian trust property for a public purpose – as opposed to managing such assets in accordance with the United States' trust obligations – might give rise to an action for just compensation under the Fifth Amendment of the Constitution. *See Sioux Nation*, 448 U.S. at 407-424. The Allottee Objectors have not, however, asserted a takings claim in their federal complaint, Appellants' Ex. A at 45-50, and there is no basis for such a claim. Moreover, even if the Allottee Objectors could assert a colorable takings claim, the pendency of a claim for just compensation would not provide any basis for a stay of proceedings in the Water Court.

In sum, the Allottee Objectors have provided no grounds for a stay. In contrast, an indefinite stay pending the conclusion of the Allottee Objectors' federal suit could jeopardize the Compact. As noted (p. 19, n. 5, *supra*), the entry of a final decree approving the Compact is a precondition to "enforceability" of the federal authorizations and waivers. *See* Pub. L. No. 111-291, § 410(e)(1)(A)(i), 124 Stat. 3112. The Settlement Act includes an automatic repeal of the federal authorizations and waivers, if the Secretary does not publish findings, by March 31, 2016, or by an "extended date agreed to be the Tribe and the Secretary" and "after reasonable notice to the State of Montana," that all enforceability conditions have been met. *Id.* § 415, 124 Stat. 3121. The Water Court did not abuse its discretion when denying the requested stay on this record.

CONCLUSION

For the foregoing reasons, this Court should affirm the July 30, 2014 order of the Water Court dismissing the Allottee Objectors' objections and denying the Allottee Objectors' request for a stay.

Respectfully submitted,

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