UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

CROW ALLOTTEES ASSOCIATION, *et al.*	)	Case No. 1:14-cv-00062-SPW-CSO
Plaintiffs,	)	BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
v.	)	
UNITED STATES BUREAU OF, INDIAN AFFAIRS, *et al.*	)	
Defendants.	)	

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INTRODUCTION

In 2010, Congress enacted the Crow Tribe Water Rights Settlement Act ("Settlement Act" or "Act"), which ratified a water rights Compact among the Crow Nation ("Tribe"), the United States, and the State of Montana. Pub. L. No. 111-291, 124 Stat. 3064, Title IV, §§ 401–16 (2010); *see also* Mont. Code Annotated § 85-20-901 (2009) (state act adopting the Compact). The Compact amicably resolves litigation and negotiations dating to the mid-1970s. Although Congress has ratified the Compact, by the terms of the Settlement Act, the Compact has not yet taken effect and it will not take effect until certain Montana state court actions, in which Plaintiffs are also parties, are resolved.

Approximately 5000 individual Indians have interests in allotted land on or near the Crow Reservation. The Compact and the Settlement Act provide for a tribal water code process that will address the water claims of individual Indian allottees. The Settlement Act states that "[i]t is the intent of Congress to provide to each allottee benefits that are equivalent to *or exceed* the benefits allottees possess . . . ." Settlement Act § 407(a) (emphasis

added). Plaintiffs are 14 of those allottees, along with an association that purports to represent others.[1]

Plaintiffs ask this Court to award broad equitable relief that would circumvent the state water court and the tribal water code process. They seek, *inter alia*, a declaratory judgment making sweeping pronouncements on 32 different points of fact and law (Compl. Request for Relief ¶¶ 1–7) and an injunctive order or writ of mandamus ordering the United States to provide independent legal counsel to all allottees (*Id*. ¶¶ 8–9).

Judgment on the pleadings is proper here for three reasons, the first two jurisdictional, the third due to failure to state any claim:

First, Plaintiffs have not pled any injury to establish standing for any of their claims. They claim to be injured by the Interior Department's waiver of allottees' claims, which was a pre-requisite to entering the Compact. But that waiver will not be effective until after the water court proceedings are finally resolved. And even once the waiver is effective, as a matter of law, the

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[1] The association does not specify how many allottees are members of the association, and only states that "[m]any" of the 14 named Plaintiffs are members. First Am. Class Action Compl. ¶ 3 (ECF No. 3) ("Compl.").

allottees will receive substitute resources equal to or greater than the value of the waived claims. To claim any injury now is speculative and cannot establish standing. *See Cole v. F.B.I.*, 719 F. Supp. 2d 1229, 1243 (D. Mont. 2010) ("[T]he injury suffered by the plaintiff must be actual or imminent, not merely speculative, conjectural, or hypothetical.") (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)), *rev'd* on other grounds, 465 Fed.Appx. 687 (9th Cir. 2012).

Second, Plaintiffs have not identified an applicable waiver of the United States' sovereign immunity. To invoke the Administrative Procedure Act, the only potential waiver cited in the Complaint, a plaintiff must either challenge final agency action or identify a failure to act under a discrete, enforceable legal duty. The Plaintiffs have done neither here.

Finally, the Complaint fails to state a claim. Three counts—Counts I, V, and VI—are requests for relief that do not allege any violation of law. The remaining three counts—Counts II, III, and IV—claim violations of an alleged duty to provide allottees with independent counsel, each count under a different theory. But none of the laws cited create an enforceable duty to provide counsel. The United States therefore respectfully requests that this

Court enter judgment on the pleadings against Plaintiffs' Complaint and dismiss this action in its entirety.

STANDARD OF REVIEW

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) "faces the same test" as a motion to dismiss under Rule 12(b). *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). In this case, Federal Defendants move to dismiss due to lack of jurisdiction, consistent with Rule 12(b)(1), and also due to failure to state a claim, consistent with Rule 12(b)(6).

A motion to dismiss due to lack of jurisdiction under Rule 12(b)(1) may be facial, arguing that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction," or factual, in which "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Eveyrone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A jurisdictional defense such as this may be raised at any time. Fed. R. Civ. P. 12(h)(3).

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted if the plaintiffs "have not pled 'enough facts to state a claim to relief that is

plausible on its face,'" and is therefore limited to the content of the complaint. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court should "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs." *Zucco Partners, LLC. v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (internal citation omitted). But a successful complaint must contain "more than labels and conclusions." *Twombly*, 550 U.S. at 555. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief," and therefore should be dismissed. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (internal quotation marks and citations omitted).

BACKGROUND

I. The Crow Reservation and Allotments.

The 1868 Treaty of Fort Laramie established the Crow Indian Reservation for the exclusive use and occupancy of the Tribe. *See* Treaty With the Crow Indians, Arts. I-XII, 15 Stat. 649; *see also Montana v. United States*, 450 U.S. 544, 553 (1981); Compl. ¶¶ 42–46. The Reservation is approximately 2.3 million acres, most of which is held in trust by the United

States for the benefit of the Tribe and allottees. *See* S. REP. NO. 111-118, at 1 (2010); *see also Legislative Hearing on H.R. 3563, H.R. 2288, and H.R. 2316 Before the Subcomm. on Water & Power of the H. Comm. on Natural Resources*, 111th Cong. (unpublished) (2009) (statement of Michael L. Connor, Comm'r, Bureau of Reclamation, Dep't of the Interior, at 2) ("Connor Statement") (Attached as Exhibit 1).[2]

The Crow Reservation, like many others, was allotted pursuant to the General Allotment Act of 1887 and, later, the Crow Allotment Act of 1920. *See* 25 U.S.C. § 331; Ch. 224, 41 Stat. 751 (1920). Through allotment, individual Indians received trust patents to parcels within the Reservation. Today, the United States holds in trust title to many allotments in and near the Reservation's boundaries, with beneficial ownership held by allottees.

II. Indian Water Rights and Federal Trust Responsibilities.

Section 7 of the General Allotment Act—25 U.S.C. § 381, the only part of the Act expressly to address water—directed the Secretary to ensure a "just and equal distribution" of water to allottees where irrigation was necessary for

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[2] The exhibits to this brief consist exclusively of portions of the Compact's and the Settlement Act's legislative histories.

farming. 25 U.S.C. § 381. When tribal land was allotted, "the right to use some portion of tribal waters essential for cultivation passed to the owners." *United States v. Powers*, 305 U.S. 527, 532 (1939) (emphasis added); *see also United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); *Colville Confederated Tribes v. Walton* (*Walton III*), 752 F.2d 397 (9th Cir. 1985).

Where an allotment is held in trust, both the land and associated water rights are subject to Congress's plenary authority to manage and control the property of Indians "in good faith for their betterment and welfare." *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 497 (1937); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). This power includes the exclusive right to extinguish Indian title. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 350 (1941).

But Congress's authority is not unlimited; notably, it is subject to the Fifth Amendment's protection against the taking of property without just compensation. *Shoshone Tribe of Indians*, 299 U.S. at 497. But Congress may substitute one form of trust asset for another if the assets' values are approximately equal. *Sioux Nation*, 448 U.S. at 409 n.26. A good faith

standard is used to determine whether Congress has properly substituted assets:

> In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired [them], we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, . . . and similar evidence relating to the acquisition. . . .
>
> The 'good faith effort' and 'transmutation of property' concepts . . . are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence.

Id. at 416-17 (internal quotation marks omitted).

III. Montana Water Rights Litigation and the Compact.

In 1973, Montana enacted the Montana Water Use Act, which required all water rights then existing in Montana to be finalized through a state-wide adjudication. Mont. Code Ann., tit. 82, ch. 2. The United States initiated litigation in this Court to quantify the Tribe's federal Indian reserved water rights. *See United States v. Big Horn Low Line Canal Co.*, No. CIV-75-34-BLG (D. Mont. filed Apr. 17, 1975). That litigation resulted in a Supreme Court opinion holding that the state courts, not the federal district courts, were often the more proper forum for adjudicating federal reserved water rights

pursuant to the McCarran Amendment, 43 U.S.C. § 666. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). In adjudicating those claims, state courts are bound by a "solemn obligation to follow federal law." *Id.*

In 1979, the Montana Legislature established a Commission to negotiate compacts for the distribution of water among the state, Indian tribes, and non-Indian federal interests claiming reserved rights to water in Montana. Mont. Code Ann. §§ 2-15-212(1), 85-2-702. The Commission requested the Crow Tribe's participation in negotiations in 1979, negotiations began in the 1980s, a Federal Negotiation Team was established in 1991, and formal negotiations started in earnest in 1998. In 1999, the Tribe and the Compact Commission reached a settlement resulting in the Compact, which the Montana legislature then ratified.

In 2008, the first of several bills to ratify the Compact was introduced in Congress. *See* S. 3355, 110th Cong. (2008); H.R. 4783, 111th Cong. (2009); H.R. 845, 111th Cong. (2009); H.R. 3563, 111th Cong. (2009); S. 375, 111th Cong. (2009). Interior Department officials testified against ratification multiple times, noting in each case that the bills as they were then drafted did not "adequately protect the rights to which allottees are entitled

under federal law." *Hearing on S. 3355 The Crow Tribe Water Rights Settlement Act of 2008 Before the S. Comm. On Indian Affairs*, 110th Cong. 13-20 (2008) (statement of Kris Polly, Deputy Assistant Secretary for Water & Science) (attached as Exhibit 2); *see also* Ex. 1, Connor Statement, at 2; S. Rep. No. 111-118, at 20-23. Later bills addressed many of the United States' concerns but still failed to "assure that the water rights waived and substitute benefits are of equivalent value" because they did not include mechanisms for the Secretary to ensure allottees would receive adequate benefits from Crow Irrigation Project improvements and rehabilitations—key benefits of the proposed settlement. Connor Statement at 5; S. Rep. No. 111-118, at 22.

Negotiations between the Tribe and the United States resulted in draft legislation addressing the United States' concerns regarding allottees. The United States supported enactment of the draft legislation if Congress accepted the amendments as proposed. Letter from Interior Department to Byron Dorgan, Chairman, Senate Committee on Indian Affairs 4 (July 8, 2010) (attached as Exhibit 3). The Settlement Act bill as amended required promulgation of a tribal water code that protects allottees' procedural rights

and provides mechanisms for the Secretary to ensure that allottees receive adequate benefits. H.R. 4783, 111th Cong. (2009); Pub. L. 111-291 (2010).

The Act directs the Secretary to "execute the Compact, including all exhibits to or parts of the Compact requiring the signature of the Secretary" only "[t]o the extent that the Compact does not conflict with [the Settlement Act]." *Id.* § 404(b)(1). On April 27, 2012, the Secretary, the Tribe, and the State signed the Compact, and the United States and the Tribe signed the necessary waivers of Indian water claims. *See* Settlement Act § 410.

Neither the Compact nor the waivers take effect until the Montana Water Court has issued a final judgment and decree approving the Compact. *Id.* § 410(e)(1)(A)(i). Those proceedings are ongoing. Any judgment issued by the Water Court will not become "final" until "completion of any direct appeal to the Montana Supreme Court of a decree by the Montana Water Court . . . , including expiration of time for filing of any such appeal." *Id.* § 403(7)(A). The Water Court dismissed Plaintiffs' objections to the Compact on July 30, 2014, and they have appealed to the Montana Supreme Court where the matter is partially briefed. Proceedings in the Montana Water Court against the remaining objectors are nearly complete.

IV. The Compact's and Settlement Act's Terms

A primary purpose of the Settlement Act is to "achieve a fair, equitable, and final settlement of claims to water rights . . . for the Crow Tribe . . . [and] the United States for the benefit of the Tribe *and allottees*." *Id.* § 402(1) (emphasis added). "It is the intent of Congress to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess[ed]" prior to enactment of the Act, taking into consideration such factors as: litigation risks, the availability of funding, the availability of water from the Tribal Water Right, "the applicability of [25 U.S.C. § 381]," and the applicability of provisions in the Settlement Act intended to "protect the interests of allottees." *Id.* § 407(a). The benefits provided to allottees are intended to be "in complete replacement of and substitution for, and full satisfaction of" claims to water that the United States could have brought on behalf of allottees and claims by allottees similar to those waived by the Tribe. *Id.* §§ 409(a)(2); 410(a).

The Compact defines the "Tribal Water Right" 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." Mont. Code Ann. § 85-20-901

(Compact, art. II.3). The Tribal Water Right is "held in trust by the United States for the use and benefit of the Tribe *and the allottees*." Settlement Act § 407(c)(1) (emphasis added). The Settlement Act provides that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights." *Id.* § 407(f)(2). Thus, allottees who are entitled to a distribution of water for irrigation pursuant to 25 U.S.C. § 381 will have their water claims satisfied from the Tribal Water Right.

The Tribe must administer the Tribal Water Right—including allottees' allocations from the Tribal Water Right—under a tribal water code, which itself must be approved by the Secretary. Settlement Act § 407(f); Mont. Code Ann. § 85-20-901 (Compact, art. IV.A.2.b). The tribal water code must include specific protections for allottees:

- Allocations for allottees will be satisfied out of the Tribal Water Right. Settlement Act § 407(f)(2)(A).
- Charges for delivery of irrigation water to allottees must be assessed on a just and equitable basis. *Id.* § 407(f)(2)(B).
- There must be "a process by which an allottee may request that the Tribe provide water for irrigation use" and "a due process system for the consideration and determination by the Tribe of any request by an allottee, or any successor in interest to an allottee, for an allocation of such water for irrigation purposes on allotted land." *Id.* § 407(f)(2)(C-D). The tribal due process system must include processes for "appeal and adjudication of

any denied or disputed distribution of water" and "resolution of any contested administrative decisions." *Id.* § 407(f)(2)(D)(i-ii).

- All tribal water code provision affecting allottees, or amendments thereto, must be approved by the Secretary before entering into effect. *Id.* § 407(f)(3).
- Congress preserved the Secretary's authority to "protect the rights of allottees" once allottees exhaust their remedies under the tribal water code. *Id.* § 407(d)(6). Until a tribal water code is adopted, administration and enforcement shall be by the Secretary. *Id.* § 407(f)(3)(A); Mont. Code Ann. § 85-20-901 (Compact, art. IV.A.2.b).

V. Plaintiffs' Claims.

Plaintiffs' Complaint includes six counts, only three of which allege violations of law by the United States[3]: Count II (alleging violations of a fiduciary duty), Count III (alleging violations of Plaintiffs' due process rights under the federal and Montana state constitutions), and Count IV (alleging violations of 25 U.S.C. § 175). In each of these Counts, Plaintiffs allege the United States violated a duty to provide legal counsel to allottees during the Compact negotiation process.

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[3] The remaining three counts seek various forms of relief rather than setting forth allegations of any violation of law. *See* Compl. Count I (declaratory judgment), Count V (writ of mandamus), and Count VI (injunction).

ARGUMENT

I. This Court Lacks Jurisdiction Over This Case.

Federal courts are of limited jurisdiction and it is the plaintiff's burden to establish jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Here Plaintiffs have not pled any concrete and particularized harm that constitutes an injury for purposes of constitutional standing. Nor have they identified any waiver of the United States' sovereign immunity. This Court thus lacks jurisdiction over their claims and their Complaint should be dismissed.

A. Plaintiffs have not pled any injury traceable to any governmental action or inaction to establish their standing.

Plaintiffs lack standing to bring this action because they cannot demonstrate any injury stemming from any of the government action or inaction alleged in any Count of their Complaint. To satisfy the "case or controversy" requirement of Article III of the U.S. Constitution, Plaintiffs must demonstrate three elements: (i) an "injury in fact" that is "concrete and particularized," (ii) is "fairly traceable" to Defendants' action, and (iii) can be redressed by a favorable judicial decision. *Summers v. Earth Island Inst.*, 555

U.S. 488 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Plaintiffs allege "[i]f the Crow Compact is finalized in the Montana water rights adjudication process, Allottees' property, due process, and other rights will be irreversibly violated." Compl. ¶ 55. They further claim "[o]nce the Water Court enters its final decree, Allottees' real property rights in the Indian *Winters* Doctrine reserved water rights appurtenant to trust allotments will be extinguished and expropriated for the benefit of the [S]tate of Montana, non-Indian water users with priority dates later than 1851, and the Crow Tribe." *Id.* ¶ 89. But, as Plaintiffs must concede, the Water Court proceedings are not yet finished and any claimed injury is speculative.

Furthermore, Congress has ensured as a matter of law that those claims will be satisfied with the substituted water rights and other benefits provided in the Settlement Act. Settlement Act §§ 407(a), (d)(2), 409(a)(2), 410(a)(2), (a)(3)(C). The Settlement Act provides that "[i]t is the intent of Congress to provide each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act" and that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from

the tribal water right," as that right is defined in the Compact and the Settlement Act. *Id.* §§ 407(a), (d)(2). The benefits guaranteed to allottees under the Act "shall be in complete replacement of and substitution for, and full satisfaction of all claims for water rights within the Reservation and the ceded strip that the United States, acting as trustee for allottees, asserted, or could have asserted, in any proceeding, including the State of Montana stream adjudication, prior to and including the enforceability date, except to the extent that such rights are recognized in the Compact or this [Act]" and also in "complete replacement of and substitution for, and full satisfaction of any claims . . . against the United States . . . related to the pending litigation of claims relating to the water rights of the Tribe in the State of Montana." *Id.* §§ 409(a)(2), 410(a)(2), (a)(3)(C).

Plaintiffs cannot claim they have been deprived of any rights because the tribal water code is not yet in place and no allottee has requested, let alone received, any further determination of rights through that system. The Secretary will not approve the water code unless it meets the statutory criteria set forth in the Settlement Act to protect allottees' rights. If the Secretary were to approve a water code that does not meet those statutory criteria—or

if, in the absence of a water code, the allottee's petition to the Secretary is denied—it is only then that that Plaintiffs could potentially claim an injury and bring suit. Until then, Plaintiffs' claim is merely that they *assume* they will be deprived of rights in the future. The Plaintiffs' alleged injury is speculative at best and cannot support Article III standing.

For the same reasons, Plaintiffs' claims are not yet ripe. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1996) (characterizing ripeness as "standing on a timeline."). Regardless of whether Plaintiffs may suffer a constitutional injury in the future, they have suffered none now and their case is not ripe.

B. Plaintiffs have not identified any applicable waiver of the United States' sovereign immunity.

A party may bring a cause of action against the United States only to the extent it has waived its sovereign immunity. A party suing the federal government bears the burden of demonstrating an unequivocal waiver of sovereign immunity. *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986) (citations omitted). In this case, there is no applicable waiver of the United States' sovereign immunity.

Plaintiffs invoke the Court's jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (Declaratory Judgment Act), 5 U.S.C. §§ 701–06 (Administrative Procedure Act ("APA")), and 28 U.S.C. § 1361 (mandamus). Most of these statutes do not provide a waiver of sovereign immunity; it is well-established that 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 28 U.S.C. § 1361 do not waive the United States' sovereign immunity. *See Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007) (addressing 28 U.S.C. § 1331); *White v. Adm'r of Gen. Servs. Admin.*, 343 F.2d 444, 447 (9th Cir. 1965) (addressing 25 U.S.C. §§ 1361 & 2201); *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954) (addressing 25 U.S.C. § 2201).

The only remaining potential waiver of sovereign immunity is the APA, which does not apply to the facts of this case. The APA provides two separate causes of action: Sections 706(1) and 706(2). Plaintiffs do not specify which provision they intend to rely on here. Regardless, both provisions have statutory pre-requisites that Plaintiffs cannot meet.

APA § 706(2)

The most commonly-invoked provision of the APA is § 706(2), which allows courts to set aside arbitrary and capricious agency action. But § 706(2) only applies where the plaintiff challenges final agency action, a condition that is jurisdictional in this circuit. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n. 1 (9th Cir. 1990). An agency action is final if its impact is "'direct and immediate,'" if it "'marks the consummation of the agency's decision making process,'" and if it is one by which "'rights or obligations have been determined, or from which legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Here, Plaintiffs identify no action that meets the *Bennett v. Spear* test. The bulk of their averments allege inaction, not action, by the United States. *See*, *e.g.*, Compl. ¶ 111. ("The United States, acting as trustee for the Allottees, failed to protect, allocate, quantify or provide a ratable share of Allottees' individual water rights when negotiating and approving the Crow Compact. It failed to assert Allottees' trust water rights by not requiring actual adjudication of Allottees' *Winters* water rights."). The only affirmative agency action challenged by Plaintiffs is the "United States' release of the

Allottees' claims against the United States." *Id.* ¶ 122. But the waiver of those claims does not enter into effect until the Compact's enforceability date. *See* Background Section IV, *supra*.

Even once the waiver is final, it is not the end of the story. Plaintiffs' settlement allocations from the tribal right will be administered through the tribal water code, which has not yet been finalized and must be approved by the Secretary. Settlement Act § 407(f)(3). Accordingly the waiver is not the consummation of the agency's decisionmaking process as to any of the allottees' water rights, nor do any rights or duties flow from, or are otherwise diminished or altered by, the waiver. No final agency action has occurred.

APA § 706(1)

The APA also includes a separate provision, 5 U.S.C. § 706(1), which allows challenges where an "agency failed to take a discrete action *that it is required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*") (emphasis added). "Absent such an assertion, a Section 706(1) claim may be dismissed for lack of jurisdiction." *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 803-04 (9th Cir. 2013) (citation omitted); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th

Cir. 2006) (affirming dismissal of a breach of trust claim for lack of jurisdiction because the government was not required "to take discrete nondiscretionary actions").

Section 706(1) is inapplicable to this case because the Complaint does not identify any statute, case, or other law that requires the Secretary to take the specific action Plaintiffs demand, *i.e.*, to provide Plaintiffs with independent legal counsel, as discussed in the following section on Plaintiffs' failure to state a claim. In sum, Plaintiffs do not fall within the limited waiver of sovereign immunity provided by the APA.

II. Plaintiffs Have Failed to State a Claim.

Plaintiffs' Complaint consists of six counts. Only Counts II, III, and IV of the Complaint allege any violations of law, but each of those three claims fails as a matter of law. The remaining three counts consist entirely of requests for relief and do not even attempt to plead a claim. Because Plaintiffs' Complaint fails in its entirety to plead any claim, Federal Defendants respectfully request that it be dismissed.

A. Count IV fails to state a claim: 25 U.S.C. § 175 does not require the United States to provide attorneys to individual allottees under these facts.

Plaintiffs assert in Count IV that "[t]he United States is required by 25 U.S.C. § 175 to provide independent legal counsel, not subject to conflicts of interest, to represent the Allottees and protect and assert their water rights in both federal and state law water rights adjudications and in water rights settlement negotiations." Compl. ¶ 135. Section 175 states "[i]n all states and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and equity."

Courts have consistently held that § 175 is discretionary and does not give rise to a cause of action for failure to provide counsel. "We have held that the statute (section 175) is not mandatory." *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972) (quoting *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953)); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1481–82 (D.C. Cir. 1995). "The provision does not withdraw discretion from the Attorney General, and it offers no standards for judicial evaluation of the Attorney

General's litigating decisions. . . ." *Shoshone-Bannock Tribes*, 56 F.3d at 1482. As the Third Circuit recently noted, "the unanimous weight of authority suggests that the duty of representation contained [in § 175] is discretionary, not mandatory." *Robinson v. New Jersey Mercer County Vicinage-Family Div.*, 514 Fed.Appx. 146, 151 (3rd Cir. 2013). Because § 175 does not create any mandatory duty or cause of action, Plaintiffs cannot have pled a cognizable claim under that provision.

B. Count III fails to state a claim: The United States has not violated Plaintiffs' due process rights by not providing them with separate counsel.

Count III alleges the United States denied Plaintiffs of due process.[4] Procedural due process imposes certain requirements on government decisions depriving an individual of an interest in life, liberty, or property. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The first inquiry in

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[4] Plaintiffs invoke both the federal and Montana constitutions. But the Montana Constitution cannot bind the United States. Under the Supremacy Clause, federal law controls conflicting state law, including state constitutional provisions. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); U.S. Const. art. VI, cl. 2. The Montana Constitution does not require the United States to provide counsel in any circumstances but, even if it did, it could not create a cause of action against the Federal Defendants.

every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). If a government action does not deprive an individual of a property or liberty interest, the due process guarantee does not require any hearing or process whatsoever – even if the challenged action adversely affects that individual in other ways. *See e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980).

In this case, as discussed in Section I.A., *supra*, Plaintiffs have not suffered any deprivation of property. They claim they were deprived of property rights by the Interior Department's waiver of allottees' water rights claims, but those waivers have not yet become effective. And even once the waivers are effective, Congress has concluded that any waived claims will be substituted with equal or greater rights. Nothing on the face of the Compact or Settlement Act can be deemed to have deprived Plaintiffs of due process. The analysis can end here.

The Settlement Act's guarantee of adequate substitution of claims is reinforced by the Compact's and Settlement Act's procedural protections. The Settlement Act expressly requires the tribal water code, under which

allottees' rights will be administered, to include "a due process system for . . . appeal and adjudication of any denied or disputed distribution of water; and resolution of any contested administrative decision." Settlement Act § 407(e)(2)(D). This is exactly the kind of protection for allottees the Interior Department urged Congress to adopt when it initially testified against ratification of the Compact. *See* Background Section III, *supra*. Yet Plaintiffs ask this Court to find their due process rights have been violated before Tribal administration has begun, and indeed before the Tribe has finalized its water code. The text and history of the Settlement Act and the Compact demonstrate that allottees' procedural rights will be fully protected under the tribal code.

C. Count II fails to state a claim: The United States had no fiduciary duty to provide attorneys to individual allottees under these facts.

In Count II, Plaintiffs allege that the United States violated a fiduciary duty to Plaintiffs and other allottees by not providing them with independent attorneys. Plaintiffs' breach of trust claim fails as a matter of law because no substantive source of law tasks the United States with a trust duty to provide allottees with independent legal counsel under facts like these.

There is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *Gros Ventre*, 469 F.3d at 810 (quoting *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983)). But the existence of this general trust relationship "does not always translate into a cause of action." *See Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 921 (9th Cir. 2008). Instead, a court must look first for an unambiguous provision by Congress that clearly outlines a federal trust responsibility. *See N. Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980).

A tribe or individual Indian attempting to assert that the United States has violated a trust duty "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 506 (2003); *United States v. Navajo Nation (Navajo II),* 556 U.S. 287, 302 (2009) (dismissal required where plaintiffs had failed to identify "a specific, applicable, trust-creating statute or regulation that the Government violated"); *Gros Ventre*, 469 F.3d at 810 ("[T]he Tribes cannot allege a common law cause of action for breach of trust that is wholly

separate from any statutorily granted right.”). Though the relationship between the United States and Indian tribes has been described as a trust, “Congress may style its relations with the Indians a ‘trust’ without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is ‘limited’ or ‘bare’ compared to a trust relationship between private parties at common law.” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) (citing *United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1979); *Mitchell II*, 463 U.S. at 224). Notably, the Supreme Court has recognized that legal affairs are placed firmly in the United States’ discretion as trustee, finding that “the Secretary was traditionally given wide discretion in the handling of Indian affairs and that discretion would seldom be more necessary than in determining when to institute legal proceedings.” *Creek Nation v. United States*, 318 U.S. 629, 639 (1943).

In this case, Plaintiffs claim that by waiving and releasing allottees’ water rights claims without seeking their consent and providing separate counsel, the United States “violated its fiduciary duty to Named Plaintiffs and Allottees under the *Winters* Doctrine, the Constitutions of the United States and Montana, its treaties with the Crow Tribe, and the laws of the United

States, including the Indian Civil Rights Act and 25 U.S.C. § 175." Compl. ¶ 30. As discussed in the preceding sections, 25 U.S.C. § 175, the Indian Civil Rights Act, and constitutional due process guarantees do not require the government to obtain allottees' consent or to provide separate attorneys to allottees under these circumstances.

Three supposed sources for this legal duty remain. The first, the *Winters* doctrine, says nothing about providing counsel to anyone. *Winters v. United States*, 207 U.S. 564 (2008). It stands for the proposition that tribes are entitled to appropriate quantities of water to fulfill the purposes of their reservations. *Id*. As a corollary, allottees are entitled to a ratable share of the reserved water for irrigation. *See Walton III,* 752 F.2d 397. A right to separate counsel is not implicated in these cases.

The second remaining source of law identified by Plaintiffs is the Crow treaties, but Plaintiffs cite no provision of those treaties that provides any right to counsel.

Finally, Plaintiffs argue that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–04, entitled them to separate attorneys. Compl. ¶ 30. That Act, in brief, requires tribes to afford certain protections of the Bill of Rights,

and other rights, to their members. *See* 25 U.S.C. § 1302(a). Plaintiffs do not explain how the Act enables them to sue the *United States* for its role in negotiating a Compact under civil law.

In sum, to raise a trust claim Plaintiffs are obligated to identify a substantive source of law that establishes the specific duty they allege the United States has breached. They have not done so here. The grab bag of laws they cite are either inapplicable to these facts or say nothing about a duty to provide counsel. Plaintiffs have failed to state a claim involving a breach of the United States' fiduciary duties as trustee.

D. Counts I, V, and VI do not even attempt to state a claim, but instead merely request relief.

The remaining three Counts do not allege any substantively violation of law, but instead merely seek relief based on the purported legal violations discussed in the other three counts. As such, these Counts do not set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a)(2). Because Plaintiffs have failed to plead any viable claim in any Count of their Complaint, as discussed in the preceding sections, they cannot be entitled to the remedies requested in

Counts I, V, and VI. The United States thus respectfully requests that those counts be dismissed as well.

CONCLUSION

No allottee on the Crow Reservation, including the named Plaintiffs, has been deprived of any water rights under the Compact or the Settlement Act. The waiver of claims they identify is not yet effective. Congress has determined that the waiver is appropriate because the settlement provides substitute resources equal to or greater than the rights waived. As part of the future process under the tribal water code they will be afforded extensive procedural guarantees.

These principles are matters of law that demonstrate, first, that the Plaintiffs have suffered no injury to establish their standing. Second, they demonstrate that the United States has neither taken final agency action nor violated any legal duty, and so the Plaintiffs cannot rely on the APA as a waiver of sovereign immunity. The Court thus lacks jurisdiction to hear this case. Even if the Court were to find it has jurisdiction, Plaintiffs have not identified any law that supports their allegation that the United States was required to provide them with separate counsel during the Compact

negotiation process. The United States respectfully requests that this Court enter judgment on the pleadings and dismiss Plaintiffs' Complaint.

Dated and respectfully submitted: February 25, 2015.

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CERTIFICATE OF COMPLIANCE
WITH LOCAL RULE 7.1(d)(2)

The body of this brief consists of 6448 words, meeting the 6500 word limit imposed by Local Rule 7.1(d)(2)(A).

*/s/ Ty Bair*___________________
TY BAIR