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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CROW ALLOTTEE ASSOCIATION, *et al.*, Plaintiffs, v. UNITED STATES BUREAU OF INDIAN AFFAIRS, *et al.*, Defendants.	Case No. 1:14-cv-00062-SPW-CSO **ALLOTTEES' RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION

A recent Supreme Court ruling provided, "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014). The Court explained that Fed. Rule Civ. Proc. 8(a)(2) "does not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.*

Instead of following the federal rules and the standard of review requiring that all facts be construed in Plaintiffs' favor, the Federal Defendants have argued for dismissal of the Crow Allottees' Amended Complaint in total. Further, the Federal Defendants have delved into the merits of the case, which are not pertinent to a Motion to Dismiss or Motion for Judgment on the Pleadings. Therefore, Federal Defendants' motion should be denied in its entirety. [1]

I. STANDARD OF REVIEW

Federal Defendants have filed a Motion to Dismiss the Crow Allottees' case for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and also for

[1] The Crow Allottees disagree with the Federal Defendants' discussion of the background involving Indian water rights and federal trust responsibilities, their discussion of Montana Water Rights litigation and the Compact, and their discussion of the Compact's and Settlement Act's terms; however, due to word constraints, the Allottees incorporate by reference the Introduction and Factual Background included in their response to the Judges' Motion to Dismiss. Doc 27, at pages 6-13.

a failure to state a claim, consistent with Rule 12(b)(6). Also, Federal Defendants have filed a motion for judgment on the pleadings under Rule 12(c), which 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).

When considering a Rule 12(b)(6) dismissal of a complaint, the Court must construe all of the complaint's allegations of material fact as true and in the light most favorable to the plaintiff. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008). Further, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The most recent pronouncement from the U.S. Supreme Court, decided only weeks ago, reiterates the policy of elevating merits over technicalities when assessing a complaint. *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014). The plaintiffs' Amended Complaint meets the *Marceau/Ashcroft/Johnson* standard and should be allowed to proceed on the merits.

II. ARGUMENT

A. This Court Has Jurisdiction Over This Case.

This Court has subject matter jurisdiction over all aspects of this case. 25 U.S.C. § 345 provides exclusive jurisdiction to federal courts in disputes

involving allotments. *U.S. v. Mottaz*, 476 U.S. 834 (1986). Moreover, federal courts have exclusive subject matter jurisdiction over suits involving title, ownership, or other rights appurtenant to title in allotted land. *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184 (1988); *Christensen v. U.S.,* 755 F.2d 705 (9th Cir. 1985); *Loring v. U.S.*, 610 F.2d 649 (9th Cir. 1979).

1. The Crow Allottees Have Standing.

Instead of presenting its argument related to standing based on the cases interpreting Allottees' rights, the Federal Defendants attempt to import standards for standing into this case that relate to environmental groups. However, environmental groups do not have specific statutes related to the federal government's trust duties to protect their interests, which the Allottees do.

Unlike the environmental groups and their members discussed in Federal Defendants' brief, the Crow Allottees have a statute that specifically confers standing to Indian Allottees. *Carlo v. Gustafson*, 512 F.Supp. 833, 836-37 (U.S. District Court, D. Alaska, 1981) (*citing United States v. Pierce,* 235 F.2d 885, 889 (9th Cir. 1956)). The statute provides, "[t]he district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any

allotment of land." 28 U.S.C. § 1353.

Here, as in the *Carlo* case, the Allottees allege that property to which they have a legal interest, water rights, has been wrongly allocated to the Crow Tribe through invalid agency action. In their 50-page complaint, the Allottees allege that the Federal Defendants failed in their trust duties "to protect, allocate, quantify or provide a ratable share of Allottees' individual water rights … It failed to protect and assert Allottees' trust water rights by not requiring actual adjudication of Allottees' *Winters* water rights." *See* Amended Complaint, Doc. 3. Allottees further allege Federal Defendants "failed to ensure that the Allottees had the same priority date for all uses of their water consistent with the Crow Tribe's *Winters* right priority date. *Id* at ¶ 115; 25 U.S.C. § 381; *see also Powers,* 305 U.S. at 533. Additionally, Allottees allege Federal Defendants "failed to ensure that the Allottees received enough water to irrigate all practicably irrigable acreage within their Allotment," as required by the *Winters* Doctrine. *Id* at ¶ 117.

The Ninth Circuit held, almost 80 years ago in a case arising from a dispute on the Crow Reservation, "that the waters were reserved *to the individual Indians and not to the tribe*; that under the treaty of 1868 each member of the Crow Tribe secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of 40 acres and such vested

rights has priority as of May 7, 1868." *U.S. v. Powers*, 94 F.2d 783, 784-85 (1938), *aff'd*, 305 U.S. 527 (1939) (emphasis added).

Any conveyance of allotted land also conveys a right to use the water. *Id.* Title 25 U.S.C. § 381 provides for the Secretary of Interior to prescribe all necessary rules and regulations to ensure a "just and equal" distribution of water to individual Indians. 25 U.S.C. § 381; *Powers,* 305 U.S. at 533; *see also Anderson v. Spear-Morgan Livestock Co.,* 107 Mont. 18, 79 P.2d 667, 670 (1938) (which discusses the intersection of *Powers* and 25 U.S.C. § 381, and confirms that individual Indian allotments have individual water rights appurtenant to the allotment).

The Allottees' Indian reserved water rights are real property rights, subject to the protections afforded by the Fifth Amendment to the United States Constitution. *Harrer v. N. Pac. Ry. Co.*, 410 P.2d 713 (Mont. 1966) ("One who has appropriated water in Montana acquires a distinct property right."). Here the Crow Allottees allege that Federal Defendants have taken their water rights and given them to the Crow Tribe, and compromised their senior priority in favor of non-Indian water users, in violation of statutory and common law. As in *Carlo*, "[t]his is clearly an allegation of injury in fact," demonstrating that the Crow Allottees have a direct personal interest in this action. *Carlo*, 512 F.Supp. at 837.

In their opening brief, Federal Defendants argued that "Plaintiffs must concede, the Water Court proceedings are not yet finished and any claimed injury is speculative." Fed. Defs. Brief at p. 16. This argument is disingenuous because no action by the Water Court will allow the Crow Allottees to retain their property rights in their water. Basically, the Water Court administrative process will do nothing to gain back the property rights that Federal Defendants have failed in their trust duties to protect and secure, and in fact have given to the Crow Indian Tribe.

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

"Under current Montana law the jurisdiction to determine existing water rights rests exclusively with the Water Court." *Fellows v. Office of Water Com'r ex rel. Perry v. Beattie Decree Case No. 371*, 2012 MT 169, ¶ 15, 365 Mont. 540, 285 P.3d 448. The corollary of this rule is the Montana

Water Court lacks jurisdiction to determine anything *other than* existing water rights. Further the Montana Water Court cannot change the terms of the Compact. Mont. Code. Ann. § 85-2-702 (providing that the Water Court must include the terms of the compact "in the final decree without alteration.")

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

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

appurtenant to title in allotted land. *U.S. v. Mottaz*, 476 U.S. 834 (1986); *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184 (1988); *Christensen v. U.S.*, 755 F.2d 705 (9th Cir. 1985); *Loring v. U.S.*, 610 F.2d 649 (9th Cir. 1979).

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

The Crow Allottees' Amended Complaint raises issues that the Montana state Water Court cannot resolve, such as:

(1) Plaintiff Allottees have a property right, a water right, that is distinct from the Crow Tribe's reserved right;

(2) The Crow Compact and the Settlement Act, including the waiver of Allottees' rights, will expropriate the Allottees' very valuable water rights appurtenant to their allotments

without affording them due process of law in violation of the Fifth Amendment; and,

(3) Whether the United States violated Allottees' right by refusing to provide them with legal counsel during the Crow Compact the negotiations and the Settlement Act discussions.

Only a federal court with jurisdiction over federal questions can properly decide the legal issues underlying Allottees' objections, which is why Allottees filed their federal court complaint and simultaneously moved to stay the Water Court proceedings pending the federal court's decision.

The Water Court has jurisdiction to approve the Crow Compact insofar as its approval is based upon its findings as to "existing water rights within the state boundaries." Mont. Code Ann. § 3-7-224(2). The Water Court does not have the jurisdiction or authority to resolve or in any way modify or address the Crow Allottees' claims against the federal government related to Allottees' property rights in water appurtenant to their allotments. Therefore, the Allottees' claims and injuries asserted in their federal suit are not in any way speculative because the Water Court action is not final, as argued by the Federal Defendants. As stated earlier, the Water Court cannot alter the Federal Defendants' waiver of Allottees rights, or the Crow Compact and the Settlement Act, in which the Federal

Defendants' gave away the Allottees' property. The expropriation of the Allottees' valuable water rights is final and is not speculative.

Next, Federal Defendants argue that "Congress has ensured as a matter of law that those claims will be satisfied." Fed. Defs. Brief at p. 16. First, this argument fails because it does not "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs," as Federal Defendants stated was the correct standard of review. *Id* at p. 5.

Second, even if this issue were properly before the Court on the merits instead of on a motion to dismiss, Federal Defendants' argument fails due to its circular logic. Even if Congress intended that each allottee should receive economically-equivalent benefits to their valuable water rights as they existed prior to the Compact and the Settlement Act, and that each Allottee would receive equivalent benefits for the rights that the Federal Defendants waived on their behalf, that would not change the fact that the Crow Allottees have standing pursuant to 28 U.S.C. § 1353. There is no provision that states Congress' mere intention negates the injury to the Allottees.

Lastly, Federal Defendants argue that the Crow Allottees have not been deprived of any rights because the tribal water code is not in place.

Fed. Defs. Brief at p. 17. The plaintiffs agree there is no tribal water code at this point, but assert that this fact demonstrates the strength of their claims. Pursuant to the Crow Compact and the Settlement Act, the Federal Defendants gave all of the water rights to the Crow Tribe and gave no water rights to the Crow Allottees, without due process or representation. That water is a finite amount, essentially a pie. The federal government and the Crow Tribe have given the whole pie to the Tribe, and now say there is no injury because the Allottees might somehow get a crumb or two, if the potential Crow Tribe's water code and system drop any on the floor. Any future Crow Tribal Water Code will not return the valuable senior water rights that Federal Defendants took from the Crow Allottees and gave to the Crow Tribe without due process. Therefore, the Crow Allottees' injuries are not imaginary or speculative. The Crow Allottees' claims are ripe for this Court's determination.

2. The United States Has Waived Sovereign Immunity.

A party bringing an action in federal court bears the burden of establishing the court's jurisdiction. The United States and its agencies may not be sued, absent a waiver of sovereign immunity. *Federal Deposit Ins., Corp. v. Meyer,* 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Therefore, when a party seeks to sue the United States, he must establish

that Congress has waived sovereign immunity and permitted the suit. In cases similar to this case, the Plaintiffs have relied upon 25 U.S.C. § 345 and 28 U.S.C. § 1353 both for this Court's jurisdiction and to establish a waiver of sovereign immunity. *Pence v. Kleppe,* 529 F.2d 135, 138–39 (9th Cir.1976); *see also Lord v. Babbitt*, 943 F. Supp. 1203, 1206 (D. Alaska 1996) (stating "This Court has jurisdiction over this action pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353.") *see also Segundo v. U.S.*, 123 F. Supp. 554 (D. Calif. Central Div. 1954).

The Federal Defendants' motions are for adjudication prior to trial, which is contrary to the intent of the Federal Rules of Civil Procedure. F.R.Civ.P. 1 mandates that the rules are to be construed to accomplish "a just, speedy and inexpensive determination of every action." The rules presume that justice is best served through trial on the merits, which is why both motions to dismiss and for judgment on the pleadings are to be decided in the light most favorable to the party desiring trial, here the plaintiff Crow Allottees. Indeed, the entire thrust of the "new" Rules of Civil Procedure, promulgated in 1948 and still in effect today despite repeated amendments, was to remove the complicated and technical pitfalls of the old Code pleading regime so that meritorious cases could obtain access to the federal courts.

The Amended Complaint does demonstrate subject matter jurisdiction in this court, even if it does not specifically identify 28 U.S.C. §1353 and 25 U.S.C. §345. The amended complaint does refer repeatedly to the conduct of the United States in failing to adequately protect the interests of the Allottees, and in entering into a Compact with the Tribe which purports to extinguish the Allottees' water rights. These allegations clearly invoke 25 U.S.C. §345, and thus this Court's subject matter jurisdiction over this action. Additionally, because the water here is appurtenant to the Allottees' land, 28 U.S.C. §1353 expressly provides subject matter jurisdiction in the federal district courts. In the alternative, the plaintiffs should be allowed to file a second amended complaint which does cite the statutory section for technical compliance with Fed.R.Civ.P. 8(a).

a) 25 U.S.C. § 345 and 28 U.S.C. § 1353

Pursuant to 28 U.S.C. § 1353, "[t]he district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty." 28 U.S.C. § 1353. In *Segundo*, 123 F. Supp. 554, a controversy between members of a tribe and the United States concerning the plaintiffs' rights to allotments, the court found jurisdiction pursuant to

both 25 U.S.C. § 345 and 28 U.S.C. § 1353. Id at 558 (stating, "an allotment of tribal land includes a just share of tribal water rights, *United States v. Powers*, (citations omitted) and this Court has jurisdiction in this action to declare that right to a just share of tribal waters is appurtenant to and accompanies an allotment of tribal land, 28 U.S.C. 2201.").

Further, the other statute provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, ... or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty . . ..

25 U.S.C. § 345.

The statutes "grants district court jurisdiction to 'try and determine any action involving the right of any person, in whole or in part in Indian blood or descent, to any allotment of land under any law or treaty.'" *Scholder v. United States*, 428 F.2d 1123, 1125-26 (9th Cir. 1970). In the *Scholder* case, the Court did not find that the United States had waived sovereign immunity because the plaintiffs in that case challenged the

administration of the irrigation system instead of challenging whether they had been denied a right that is appurtenant to their allotment. *Id* at 1126.

Further, the Ninth Circuit has held that the plaintiffs in one action did not have to sue the United States "for the purpose of claiming or establishing any assignment or distribution of water rights," because the allottee "owns the water the minute the reservation is created, and his rights become appurtenant to his land the minute he acquires his allotment." *U.S. v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965). As discussed in the *Preston* case, the Crow Allottees are not suing the United States to assign or distribute their water rights, they are suing the United States because the United States gave their water rights (property rights), which were appurtenant to their land, to the Crow Tribe. This is exactly the type of case that is allowed under 25 U.S.C. § 345.

In *Lord*, a federal district court faced a motion by the government to dismiss for lack of jurisdiction in the plaintiff's attempt to reclaim a native allotment which the United States had granted to the State of Alaska. *Lord*, 943 F.Supp. 1203. The Court denied the motion, holding that 43 U.S.C. §345 provided both subject matter jurisdiction and a waiver of sovereign immunity. *Id*. Similarly, this Court has subject matter jurisdiction over this case and the Federal Defendants have waived sovereign immunity.

b. APA § 706(2)

In the alternative to the waiver of sovereign immunity found under 28 U.S.C. § 1353 and 43 U.S.C. § 345, the Crow Allottees have also brought claims under Section 706(2) of the Administrative Procedure Act ("APA"), which provides that the Court:

> shall hold unlawful and set aside an agency action, findings, and conclusion found to be –
> a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> b) contrary to constitutional right, power, privilege, or immunity;
> c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> d) without observance of procedure required by law;
> ...

5 U.S.C. § 706(2). 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). Contrary to Federal Defendants' argument, the Crow Allottees have alleged actions in their Amended Complaint that meet the *Bennett v. Spear* test because the Federal Defendants have negotiated a final settlement that will forever impact the Crow Allottees water rights.

Due to the Federal Defendants' agreement to the Crow Compact and the Settlement Act, the Crow Allottees' appurtenant water rights have been

legally severed from their land and given to the Crow Indian Tribe. Both the Crow Compact and the Settlement Act are final agency actions by the Federal Defendants. It is true that the Montana Water Court is in the administrative process of implementing the Crow Compact by incorporating it into a final decree; however, there is nothing that the Montana Water Court can do to change the Federal Defendants' actions that have caused negative legal consequences to the Crow Allottees' property rights. *See* Discussion *supra* at pages 10-15. Further, there is nothing the Federal Defendants can do without this Court's action to modify the Crow Compact and the Settlement Act so that the Crow Allottees' property rights are not damaged or deeded to the Crow Indian Tribe.

The Crow Allottees have correctly pled this APA claim and have pled that the Federal Defendants' final actions directly and immediately had the legal consequence of negatively impacting the Crow Allottees' water and property rights. For example:

- "The United States, by waiving and releasing Named Plaintiffs' and the Allottee Class's water rights by entering into the Crow Compact and enacting the Crow Tribe Water Rights Settlement Act of 2010, P.L. 111-291 ("Settlement Act"), without providing Named Plaintiffs and the Allottee Class with the legal representation to which they are entitled as trust allotment beneficiaries, has 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." *See* Amended Complaint at ¶ 30.

- "[T]he United States has never provided legal counsel to represent the Allottees as required by 25 U.S.C. § 175." *Id* at ¶ 52.

- "[I]n spite of the fact that the Allottees have beneficial interests in far more land on the Crow Reservation than does the Tribe, the Crow Compact allocates all of the reserved water rights on the Crow Indian Reservation to the Crow Tribe." *Id* at ¶ 100.

- "The Crow Compact does not allocate any water rights to the Allottees." *Id* at ¶ 101.

- "The United States holds Indian Winters doctrine reserved water rights appurtenant to trust allotments for the benefit of all allottees including the Allottees in this case. As trustee, the United States has a fiduciary duty to the Allottees to protect private property rights." *Id* at ¶ 109.

- "The United States negotiated and concluded the Crow Compact without the participation or informed consent of the Allottees." *Id* at ¶ 110.

- "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 protect and assert Allottees' trust water rights by not requiring actual adjudication of Allottees' *Winters* water rights." *Id* at ¶ 111.

- Further, the United States failed to communicate with the Allottees and failed to get their participation or consent during the course of the Crow Compact negotiations and Settlement Act ratification." *Id* at ¶ 112.

- "The United States failed to ensure that the Allottees had the

same priority date for all uses of their water consistent with the Crow Tribe's *Winters* priority date." *Id* at ¶ 115.

- "The United States failed to ensure that the Allottees received enough water to irrigate all practicably irrigable acreage within their Allotment." *Id* at ¶ 116.

- "The United States failed to ensure that the Allottees received enough water for each Allottee to have a permanent home and abiding place on their lands." *Id* at ¶ 117.

- "The United States failed to protect the Allottees' individual water rights interests, and its wholesale surrender of those interests to the Crow Tribe and the State of Montana, violated its fiduciary duty to the Allottees." *Id* at ¶ 121.

- "The United States has caused or will cause the loss of the Allottees' Indian Winters Doctrine reserved water rights, which are real property, without due process of law, by ratifying the Crow Compact and purporting to waive and release all Allottees' claims of Winters Doctrine reserved water rights appurtenant to their trust allotments." *Id* at ¶ 130.

- "By depriving the Allottees of their water and property rights, and approving the waiver of all Allottees' water rights claims without notice and consent, and without providing adequate legal counsel, the United States violated the Allottees' right to due process of law." *Id* at ¶ 131.

The Crow Allottees' contend that the United States' failures listed in the above and other allegations in the Amended Complaint are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as is required by APA § 706(2)(a). Also, the Allottees have pled that the United States' failures in its duties are contrary to the Allottees' constitutional rights. APA § 706(2)(b). Additionally, the Allottees have pled

that the United States' actions were "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." APA § 706(2)(c). Finally, the Allottees' factual contentions also include allegations that the United States acted "without observance of procedure required by law." APA § 706(2)(d).

Further, the Federal Defendants, after receiving at least one letter from the Allottees, took final agency action that directly and immediately had the legal consequence of negatively impacting the Crow Allottees' water and property rights. These facts are clearly articulated in the Crow Allottees' Amended Complaint. *See e.g.* Amended Complaint at ¶¶ 52, 95, 97, 99, 103, 104, 122.

As is required when considering the Federal Defendants' motion, this Court must construe all of the Crow Allottees' allegations as true and in the light most favorable to the plaintiffs. *Marceau*, 540 F.3d at 919. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. Therefore, based on the factual allegations in the Amended Complaint and the legal standard governing the Federal Defendants' motion, the Crow Allottees Amended Complaint should be allowed to proceed on the merits.

B. The Crow Allottees Have Not Failed to State a Claim.

1. Based on the standards for a motion to dismiss, the Crow Allottees Count IV should be allowed to proceed to trial for adjudication on the merits.

Instead of construing the Crow Allottees' allegations of material fact as true and in the light most favorable to the Allottees, the Federal Defendants have again strayed to arguing the merits of the case in this part of their Motion to Dismiss. Further, it seems Federal Defendants think the fact that Courts have stated that 25 U.S.C. § 175 is discretionary, means the Courts have not looked at the facts to determine whether the United States has appropriately applied its discretion. Based on the cases cited by the Federal Defendants, the issue of discretion is still a factual issue, not a legal issue.

For example in *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082 (9th Cir. 1972), a case in which the Court determined that the United States could not represent both sides in the same case, the Court still determined whether the United States appropriately applied its discretion. *Id* at 1084-85; *also see Robinson v. New Jersey Mercer County Vicinage-Family Div.*, 514 Fed. Appx. 146 (3rd Cir. 2013) (Determining whether the United States appropriately applied its discretion).

The other cases cited by the Federal Defendants have entirely different facts from this case. In three of the cases, the party invoking 25 U.S.C. § 175 had already taken a case to court with private counsel and sought to get an award of attorney fees. *Siniscal v. U.S.*, 208 F.2d 406 (1953); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095 (D.C. Cir. 1974); *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476 (1995). The facts in this case are much different.

In this case, the Crow Allottees asked the United States to provide legal counsel pursuant to 25 U.S.C. § 175 because the United States had a conflict of interest and could not represent both the Crow Indian Tribe and the Crow Allottees during water quantification and allocation of the Allottees water rights or during negotiations related to the Crow Compact. Amended Complaint at ¶ 95. This case raises an issue of first impression of whether the United States utilized its discretion appropriately when the Crow Allottees requested independent legal representation that did not have a conflict of interest early in the process.

Based on the statute and the case law interpreting that statute, the Crow Allottees have a right to proceed to court on this Count. It is a factual issue that cannot be determined at this time, and for purposes of deciding Federal Defendants' motion, the fact must be interpreted in the Allottees'

favor.

2. Based on the standards for a motion to dismiss, the Crow Allottees' Count III should be allowed to proceed to trial for adjudication on the merits.

The Federal Defendants have again strayed to arguing the merits of the case in this part of their Motion to Dismiss, instead of construing the Crow Allottees' allegations of material fact as true and in the light most favorable to the Allottees. Further, as explained in *supra* pages 10-16, the Federal Defendants have taken final agency actions that have denied the Crow Allottees of their property, and that cannot be changed without the intervention of this Court.

Further, as pled in the Amended Complaint, "[t]he United States has caused or will cause the loss of the Allottees' Indian *Winters* Doctrine reserved water rights, which are real property, without due process of law, by ratifying the Crow Compact and purporting to waive and release all Allottees' claims of *Winters* Doctrine reserved water rights appurtenant to their trust allotments." Amended Complaint at ¶ 130. The Federal Defendants only focus on the waiver portion of this allegation in an argument that is somewhat disingenuous as discussed *supra* at pages 10-16. Further, also as explained, *supra* at pages 10-16, even if this issue were properly before the Court on its substantive merits instead of related to a

motion to dismiss, Federal Defendants' argument fails because even if Congress intended that each allottee should receive equivalent benefits as existed prior to the Settlement Act, that would not change the fact that the Crow Allottees have already lost their water rights due to the Federal Defendants' actions.

Also, in this section, Federal Defendants again argue that a potential process in the future by the Tribal Government that is outside of the Federal Government's jurisdiction, will somehow replace the Allottees' property that the Federal Government has given to the Crow Indian Tribe. There is no case that Federal Government cites or could cite that provides that a potential process in the future is a work around for due process violations that have already occurred. At pages 8-16 *supra,* the Crow Allottees discussed their current injuries due to the Federal Defendants' actions. This argument is a replay of that earlier argument and fails because it again is an argument on the merits and does not meet the standard of review requirements for a motion to dismiss.

3. Based on the standards for a motion to dismiss, the Crow Allottees' Count II should be allowed to proceed to trial for adjudication on the merits.

First, it seems that the Federal Defendants read this Count as limited to the Allottees' allegations that the United States failed to provide legal

counsel. *See* Fed. Defs. Brief at p. 26. Instead, as it is labeled, Count II alleges the "Violation of the United States' Fiduciary Duty to Named Plaintiffs and the Indian Allottees, Including the Duty to Provide Counsel to Named Plaintiffs and Allottees." Amended Complaint at p. 36. Additionally, as provided in the Complaint, the Crow Allottees alleged that "[t]he 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 protect and assert Allottees' trust water rights by not requiring actual adjudication of Allottees' *Winters* water rights." Amended Complaint at ¶ 109. Based upon this and other allegations in the Complaint, the Federal Government seems to have mischaracterized the Crow Allottees' allegations.

"The trust language of the Act [General Allotment Act] does not impose any fiduciary management duties or render on the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands," stated the *United States Supreme Court*. *U.S. v. Mitchell*, 463 U.S. 206 (1963). Here, the United States has failed in its trust duties precisely because the United States has alienated Allottees' *Winters*' water rights and deeded them to the Crow Indian Tribe. This is exactly the type of case that fits within the case law related to the United States trust

violations of the General Allotment Act.

Second, even though the Crow Allottees have argued substantive issues in a minor fashion in order to counter the Federal Defendants' arguments, this again is an issue that turns on facts. Based on the governing legal standard, all facts are to be construed in the Allottees favor in relation to the Federal Defendants' motion.

Therefore, in this portion of their brief, the Federal Defendants have mischaracterized the Crow Allottees' allegations, argued substantive law, and again disregarded the appropriate standard of review. Thus, Count II of the Allottees' Amended Complaint should be allowed to proceed to a determination in Court on the merits.

4. Based on the standards for a motion to dismiss, the Crow Allottees' Counts I,V and VI should be allowed to proceed to trial for adjudication on the merits.

In this argument, the Federal Defendants first argue that Count I does not allege a violation of law. Fed. Defs. Brief at p. 30. Count I is pled as a Uniform Declaratory Judgment Act case, which seeks a declaration of the legal duties of defendants, rather than alleging a claim per se. Even so, the Crow Allottees' first allegations in this Count re-allege and incorporate all prior allegations, which include plenty of allegations of violation of law by the Federal Defendants. Amended Complaint at ¶ 105.

Federal Defendants' arguments against Counts V and VI are exactly the type of uber technical arguments that the Supreme Court discussed in *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014). The Court stated that the Fed. Rule Civ. Proc. 8(a)(2) "does not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.*

Again, the Crow Allottees' first allegations in these Counts re-allege and incorporate all prior allegations, which include plenty of allegations of violation of laws by the Federal Defendants. Amended Complaint at ¶¶ 139, 144. The Supreme Court held:

> Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. (citations omitted). For clarification and to ward off further insistence on a punctiliously stated "theory of the pleadings," petitioners, on remand, should be accorded an opportunity to add to their complaint.

Johnson, 135 S.Ct. at 347. Similarly, if the Court finds that the Crow Allottees' Complaint should be more punctiliously stated, the Allottees should be accorded the right to file a Second Amended Complaint and allow the case to proceed to a determination on the merits.

III. CONCLUSION

While the Federal Defendants' Motion appropriately states the standard of review for motions under Fed. R. Civ. P. 12(b) and (c), their argument repeatedly fails to accept the Crow Allottees' allegations as true or construe the allegations in the light most favorable to the Allottees.

This Court has subject matter jurisdiction over the issues raised in Allottees' Amended Complaint and 28 U.S.C. § 1353 specifically confers standing to the Crow Allottees. The Montana Water Court is merely an administrative hurdle in the process of entering a decree incorporating the terms of the Crow Compact and Settlement Act and it lacks any authority or jurisdiction to address the claims raised by Allottees in their Amended Complaint.

The United States has waived sovereign immunity in the case of Allottees' claims under 25 U.S.C. § 345 and 28 U.S.C. § 1353. The Federal Defendants gave Allottees' water rights, which were appurtenant to their land, to the Crow Tribe. This is precisely the type of denial or exclusion from an allotment contemplated in 25 U.S.C. § 345. If the Court finds otherwise, Allottees have also alleged claims under Section 706(2) of the Administrative Procedure Act and have more than adequately alleged the

Federal Defendants' final action's direct and immediate legal consequences of negatively impacting the Allottees' water and property rights.

The Allottees claims are sufficient to survive the Federal Defendants' Motion to Dismiss for failure to state a claim. Each argument raised by Federal Defendants in support of this addresses a factual issue which must be interpreted, at least at this juncture, in the Allottees' favor. The Federal Defendants' seek to avoid a determination of these issues on the merits, but have fallen well short of their burden of demonstrating the Allottees' claims are not plausible on their face.

Based on the foregoing, this Court should deny the Federal Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings.

DATED this 20th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I hereby certify that the word count for the foregoing brief is 6,479 words, excluding the caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

/s/ Hertha Lund
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2015, a true and correct copy of the foregoing document was served upon the Clerk of Court, by CM/ECF filing, and the following individuals in the manner set forth below:

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