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No. _____

In The

Supreme Court of the United States

CROW ALLOTTEES, et al.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDING

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

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

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

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

The Court should grant plenary review.

OPINIONS BELOW

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

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

JURISDICTION

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

PROVISIONS INVOLVED

This case involves Indian Treaty Rights.

STATEMENT OF THE CASE

A. Basic Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Prior Court Proceedings

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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