No. 15-35679

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW ALLOTTEES ASSOCIATION, a Montana non-profit corporation; ERMA JEAN FIGHTER MOCCASIN; CLAUDIA E. FLATMOUTH; KATHLEEN L. FLATMOUTH; LEON B. FLATMOUTH; REBECCA K. FLATMOUTH; RONALD J. FLATMOUTH; CARLSON GOES AHEAD; MICHAEL HILL; FLOYD HORN; BEVERLY GRAY BULL HUBER; STEPHEN D. HUBER; HENRY OLD HORN; SHARON S. PEREGOY; LYNNA SMITH; FRANCIS JOE WHITE CLAY,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as United States Secretary of the Interior; KEVIN K. WASHBURN, Esquire, in his official capacity as Assistant Secretary of the Interior for Indian Affairs; RUSSELL MCELYEA, Montana Water Court Chief Judge; DOUGLAS RITTER, Associate Water Judge,
Defendants-Appellees,

On Appeal from the U.S. District Court for the District of Montana

---

APPELLANTS' OPENING BRIEF

Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28 and Fed. R. App. P. 26.1, the undersigned attorney for the Crow Allottees Association ("Allottees") certifies that the Allottees Association has no parent corporation and, because it has never issued any stock, there is no publicly held corporation that owns any stock of the Association.

DATED this 3rd day of February 2016.

Respectfully submitted,

/s/ Hertha L. Lund
Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules and Regulations

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs brought claims under federal law. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as the district court entered final judgment on June 30, 2015 disposing of all claims as to all parties. The Crow Allottees filed notice of appeal on August 25, 2015, and the appeal is thus timely filed under 28 U.S.C. § 2107(b) and Fed. R. App. Proc. 4(a)(2), 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the 25 U.S.C. § 345 serves to protect the Crow Allottees' interest and rights in their allotments, including their *Winters* Indian reserved water rights.

2. Whether the United States negotiations and agreement to a Compact with the state of Montana and the Crow Tribe, and Settlement Act which

extinguish the vested water rights owned by the Allottees, all without inclusion of the Allottees, were final agency actions.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

On May 15, 2014, the Crow Allottees filed suit in the U.S. District Court for the District of Montana challenging the United States' decisions to negotiate and finalize the Crow Compact and the Settlement Act. Excerpt of Record ("ER"), p. 34. On June 30, 2015, the District Court granted the United States' Motion for Judgment on the Pleadings. ER, p. 15. The Crow Allottees filed notice of appeal on August 25, 2015. ER, p. 1.

II. Case Summary

The Crow Tribe is a federally recognized American Indian tribe located on the Crow Indian Reservation in southeastern Montana. In this location, water is critical to life which is a reason that the Supreme Court has recognized that the right to water is essential to a right to land. In 1891, via an act of Congress, the Crow Tribe ceded two million acres of land to the federal government. Individual 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 further allocated individual trust allotments of Crow Reservation lands to enrolled members of the Crow Tribe, 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 Indian allottees, the United States has a fiduciary responsibility to the allottees. Once Crow Allottees received an allotment, the property ceased to be held in common with the Crow Tribe and it became the exclusive property of the Allottee. *United States v. Powers*, 305 U.S. 527, 528 (1939). Further, this Court held, "The waters were reserved to the individual Indians and not to the tribe." *United States v. Powers*, 94 F.2d 783, 784 (9th Cir. 1938); upheld by *United States v. Powers*, 305 U.S. 527 (1939).

The Crow Tribal government, the United States, and the State of Montana began the effort to quantify the Indian reserved water rights on the Crow Reservation in 1975. Negotiations proceeded in fits and starts beginning in the mid-1980s, with the Compact passing into Montana State law in 1999. Mont. Code Ann. § 85-20-901 et seq. The U.S. Congress

ratified the compact in 2010 and the Compact was approved by Crow Tribal referendum in 2011. Congress. Pub. L. 111-291 (Dec. 8, 2010). The Montana Water Court issued the preliminary decree for the Compact in 2013.

The Allottees have repeatedly attempted to participate in this nearly forty-year process to protect their individual water rights. Their attempts have been continually rebuffed. The United States has barely communicated with the Allottees, let alone obtained their participation and consent. The Allottees have legal rights to water that are distinct from the Tribe's rights and from non-allottee tribal members. The United States refuses to acknowledge those rights, much less take steps to protect them. Therefore, as the Allottees' fiduciary, the United States had a duty to provide the Allottees with separate legal representation in negotiating and implementing the Compact. It has refused to do so.

Without approval or input from the Allottees, the United States, as trustee for both the Allottees and the Tribe (a role creating an irreconcilable conflict because water is a finite resource), negotiated the Compact with the State of Montana and the Tribe. Later in 2010, the United States negotiated and secured passage of the Crow Tribe Water Rights Settlement Act of 2010 ("Settlement Act") in Congress. Pub. L. 111-291 (Dec. 8, 2010). This Compact allocates all of the Winters Indian reserved water rights to the

Crow Tribe. Mont. Code Ann. § 85-20-901. Further, the United States acting as Trustee for the Allottees, and without Allottees' approval, waived the Allottees potential claims against the United States for United States violations of its trust obligations to the Allottees. Settlement Act, §410(a)(2), Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. This waiver will become effective on the enforceability date of the Crow Compact. *Id*. at § 410(e)(1)(A).

The Crow Allottees filed this action against the United States based on four counts. First, the Allottees asked the District Court to follow the plethora of federal law and declare and enforce the Crow Allottees' *Winters* Indian reserved water rights. Second, the Allottees asked the District to find that the United States had violated its fiduciary duty as trustee to the Allottees by negotiating and entering into the Crow Compact and Settlement Act. Third, the Crow Allottees asked the District Court to find that the United States violated the Allottees' due process rights when the United States negotiated and gave the Allottees' Winters Indian reserved water rights to the Crow Tribe and the state of Montana. Further, the Allottees asked the Court to find that the United States had failed to comply with 25 U.S.C. § 175, which provides separate legal counsel for Indians in cases such as this.

The District Court did not find facts or reach the merits of any of these issues because the Court granted the United States' Motion for Judgment on the Pleadings as a matter of law, on the grounds of sovereign immunity because the Court found that the United States had not waived sovereign immunity.

SUMMARY OF ARGUMENT

This Court should reverse the District Court's judgment on the pleadings in this matter. The United States did, in fact, waive sovereign immunity for purposes of this action under 25 U.S.C § 345. The Allottees' *Winters* Indian reserved water rights are appurtenant to their individual allotments granted in 1851. The United States, in negotiating the Crow Compact and trading away Allottees' water rights, has acted to deprive Allottees of their water rights.

Even if the United States did not waive sovereign immunity, the District Court erred in finding there had been no final agency action for purposes of Allottees' claims under the Administrative Procedure Act. The United States rendered its final decision regarding the issues raised in the Crow Allottees' Complaint. The practical and legal effects of the United States' actions in depriving Allottees of water rights appurtenant to their allotments are final and cannot be changed without this Court's

intercession. This Court should reverse the judgment of the District Court and remand the case for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] the district court's conclusions of law de novo." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014).

II. THE CROW ALLOTTEES SOUGHT TO ENFORCE THEIR PROPERTY RIGHTS, WHICH IS WITHIN THE WAIVER OF SOVEREIGN IMMUNITY IN 25 U.S.C. § 345.

This Court held:

> this section [25 U.S.C. § 345] is not limited to actions seeking to compel the issuance of an allotment in the first instance. It serves also to protect 'the interests and rights of the Indian in his allotment or patent after he has acquired it.'

Scholder v. U.S., 428 F.2d 1123, 1129 (1970). The *Winters* Indian reserved water rights doctrine, vests property rights in the water allocated to the Crow Allottees., *Winters v. United States*, 207 U.S. 564 (1908). The United States has violated these rights. The Crow Allottees filed suit to protect their water rights. "The waters were reserved to the **individual Indians and not to the tribe**," according to the Ninth Circuit in a 1938 case also arising from the Crow Reservation in Montana. *United States v. Powers*, 94 F.2d 783 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939) (emphasis added).

The Supreme Court held in *San Carlos Apache Tribe* that the tribal water rights "[v]ested no later than the date each reservation was created," and that the rights were superior to all subsequent appropriations under state law. Further, the Court noted that scope of *Winters* reserved water rights had not been resolved. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 573-74 (1983). The Court assigned to the federal courts the very task at hand when it 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.*

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"). As such, Allottees' claimed water rights are "designed to protect or preserve an allotment once issued." *Scholder*, 428 F.2d at 1126 (citing *United States v. Pierce,* 235 F.2d 885 (9th Cir. 1956); *Gerard v. United States*, 167 F.2d 951 (9th Cir. 1948)).

The District Court erred in this case by ignoring this very clear precedent interpreting and applying the *Winters* Indian reserved water rights doctrine to the allotments on the Crow reservation. The Allottees' case falls within 25 U.S.C. § 345's waiver of sovereign immunity because it is a case about the *Winters* Indian reserved water rights that are an appurtenant right to the allotment. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 142-43 (1972). As the Supreme Court stated, "courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment." *Arenas v. U.S.*, 322 U.S. 419 (1944). The issue before the Court is not about administration of allotment lands, which is the type of case in which the Courts have not found a waiver of sovereign immunity.

The District Court erroneously found that 25 U.S.C. § 345 does not waive the United States' sovereign immunity. The Court held, "This suit fits into the second type of cases described by *Mottaz*, as the Crow Allottees

seek a declaration of their rights associated with their allotments." ER, p. 30. The Court erred. This case is about the Crow Allottees' *Winters* Indian reserved water rights and is not about administration of rights associated with their allotments.

In *United States v. Mottaz*, 476 U.S. 834 (1986), the issue before the Supreme Court was whether plaintiff's suit against the United States was time barred. *Id.* at 836. The Court found that the suit was a suit to adjudicate title to real property pursuant to the Quite Title Act and was time barred by the Act's 12-year statute of limitations. *Id.*

In *Mottaz* the Court discussed 25 U.S.C. § 345 because the plaintiff argued that the Act provided her a means to get around the Quite Title Act statute of limitations. *Id.* at 845. The Court found that the plaintiff "cannot use § 345 for a quiet title action against the Government." *Id.* Further, the Court stated in dicta, "The structure of § 345 **strongly suggests**, however, that § 345 itself waives the Government's immunity only with respect . . . cases . . . seeking an original allotment." *Id.* at 846 (emphasis added). The *Mottaz* case discussed § 345; however, the Court issued its ruling based on the Quiet Title Act and whether plaintiff had missed her deadline to file against the Government.

The Court did not find that in the case of *Winters* Indian reserved water rights, the United States failed to waive sovereign immunity. In fact, in a case cited by the *Mottaz* Court, *Affiliated Ute, supra* the Supreme Court focused on whether mixed-blood Indians had a right to mineral interests in the allotments. *Affiliated Ute Citizens*, 406 U.S. 128. In that case, the allottees claimed an interest in mineral rights on their allotments. *Id.* at 141. The Court reasoned that § 345 was an allotment statute, and that "allotment" was a term of art. *Id.* at 142. Allotment "means a selection of specific land awarded to an individual allottee from a common holding." *Id.*

Furthermore, the Court found that the mineral rights had not been awarded to the individual allottees and that the mineral estate was not appurtenant to the allotment and was not subject to the allotment. *Id.* at 143. Based on the facts that the allottees in that case, did not have specific property rights that were appurtenant to their allotments, the Supreme Court held that § 345 did not provide governmental consent. *Id.*

In this case, the Crow Allottees have *Winters* Indian reserved water rights that are appurtenant to their allotments, which means the Crow Allotees claims are the type of claims that the Government has waived sovereign immunity for pursuant to § 345. The Crow Allottees case is solely about the United States failure to uphold their *Winters* Indian reserved

water rights, which were part and parcel of their allotments. Nowhere in the complaint did the Crow Allottees ask the Court to determine whether the United States was correctly administering the allotments.

The District Court mistakenly found that the Crow Allottees were seeking a declaration of rights, and that this was not the type of case pursuant to § 345 that waived sovereign immunity. ER, p. 29. The Court cited *Lord v. Babbitt,* 943 F. Supp. 1203 (1996) for its ruling against the Crow Allottees. *Id.* However, as in the *Lord* case, the Crow Allottees brought suit to establish their right to *Winters* Indian reserved water rights. Therefore, opposite of the Court's holding, both the *Lord* case and the Crow Allottees case, are cases in which § 345 waives sovereign immunity.

Further, the Court erred in its finding that the Crow Allottees' reliance on *United States v. Preston*, 352 F.2d 352 (9th Cir. 1965), actually supported the United States' argument. In *Preston*, the Court held:

> [u]nder the rule of *Winters v. United States* (citations omitted), as soon as a reservation for Indians has been established, there is an implied reservation of rights to use of the waters which arise, traverse or border upon the Indians' reservation, which rights may be exercised in connection with Indian lands. . . . Thus when Arenas and Segundo received his allotment, he had also acquired a right to use waters on the reservation. Since the water rights were already theirs, a suit to procure them would be meaningless. The doctrine of the *Winters* case has been enunciated many times.

Id. at 357. Even though in 1965, the 9th Circuit found that an Allottee had no need to sue the United States to establish that Allottees owned water rights pursuant to the *Winters* doctrine, in this case, the United States has ignored and traded away the Allottees' *Winters* Indian reserved water rights. Contrary to the District Court's finding, this case is not about the administration of allotments. Instead, this case is about the allocation of property rights that occurred at the time the reservation was set aside, which clearly falls within the purview of 25 U.S.C. § 345. *Mottaz*, 476 U.S. at 845. Further, in *Preston*, there were no claims by persons of Indian blood, which was a determinative factor in that case. *Preston*, 352 F.2d at 355-356. In this case, there is no dispute that the Crow Allottees are persons of Indian blood as discussed in § 345.

Additionally, the District Court erred when it compared the Crow Allottees case to the *Jachetta v. United States*, 653 F.3d 898 (9th Cir. 2011). The *Jachetta* case was about an Alaska Native applying for a Native allotment pursuant to the Alaska Native Allotment Act of 1906. *Id.* at 902. In that case, the Court found that since the Bureau of Land Management had already granted Jachetta an allotment and since Jachetta sought only injunctive and monetary relief related to the condition of the allotment

when it was issued, that § 345 did not waive sovereign immunity. *Id.* at 906-907.

The Crow Allottee case is distinguishable from the *Jachetta* case for several reasons. First, the Crow Allottees are not seeking relief related to the government's management of the land. Instead, the Crow Allottees are requesting that the Courts enforce the original allotment from 1851. Clearly, the Crow Allottees were issued their allotment rights in 1851 when the Crow Reservation was set aside. According to the *Winters* Indian reserved water rights doctrine, the Crow Allottees were issued appurtenant water rights in 1851.

The District Court erred in this case by ignoring the Supreme Court and Ninth Circuit precedent interpreting and applying Allottees' *Winters* Indian reserved water rights doctrine. Contrary to the District Court's ruling, the Allottees' case falls within 25 U.S.C. § 345's waiver of sovereign immunity because it is a case about the *Winters* Indian reserved water rights that are appurtenant to the allotments.

III. THE UNITED STATES' DENIAL OF DUE PROCESS, LEGAL COUNSEL, AND NEGOTIATIONS TO TAKE THE CROW ALLOTTEES' WATER RIGHTS WERE ALL FINAL AGENCY ACTIONS.

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 also brought claims

under Administrative Procedure Act ("APA"). 5. U.S.C. §§ 701-706. 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).

This Court has held: "In determining whether an agency's action is final, we look to whether the action "amounts to a definitive statement of agency's position." *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). Also, "the finality element must be interpreted in a pragmatic and flexible matter." *Id.* (citing *Oregon Natural Resource Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995)).

Most of the case law interpreting the APA relates to environmental regulatory actions by various United States agencies. This case is different; there is no government implementation of an environmental regulatory statute. Instead, the United States, as trustee for the Crow Allottees, negotiated and agreed to compact, which has been passed by the State of Montana and the United States Congress, and which explicitly deprives the plaintiffs of their *Winters* water rights.

In order to meet the first prong of the *Bennett* test, the "agency action must represent the consummation of the agency's decision making

process." *Id.* at 984. The facts related to whether the government's action are final consummation of the government's decision making process are as follows:

1. There are no further steps in the decision making process that the United States can do to change the fact that the United States failed to provide due process to the Crow Allottees during the negotiation of the Crow Compact and Settlement Act.
2. There are no further steps in the decision making process that the United States can do to change the fact that the United States failed to provide independent legal counsel to the plaintiffs in this process.
3. There are no further steps in the decision making process that the United States can do to change the fact that the United States has negotiated and agreed to a Compact with the State of Montana and the Crow Tribe, and a Settlement Agreement that fails to recognize, protect and enforce (indeed, extinguishes) the Crow Allottees' *Winters* Indian reserved water rights.

The United States has rendered its last word related to these issues and the Crow Allottees' *Winter* rights. Due to the United States' agreement to the

Crow Compact and the Settlement Act, the Crow Allottees' appurtenant water rights have been severed from their land and given to the Crow Indian Tribe and state of Montana.

The District Court erred in finding that there was no final agency action because the Compact and Settlement Act are not enforceable. In this case, regardless of whether the state of Montana's adjudication of the Crow Compact is involved in legal appeals, the United States cannot go back and change the facts that it violated the Crow Allottees' due process rights, failed to provide them with legal counsel, and negotiated away their *Winters* Indian reserved water rights. The United States has rendered its final word relating to the issues raised in the Crow Allottees' Complaint. The practical and legal effects of the United States' actions in this case are final and cannot be changed without this Court's intercession. Thus, the U.S. government's action is final, and subject to review by the judiciary under the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court and remand the case for further proceedings on the merits.

Dated this 3rd day of February, 2016.

Respectfully submitted,

/s/ Hertha L. Lund
Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has a typeface of 14 points or more, and contains 3760 words.

Dated this 3rd day of February 2016.

/s/ Hertha L. Lund
Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 3rd day of February, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 3rd day of February 2016.

/s/ Hertha L. Lund
Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2

Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Plaintiffs-Appellants Allottees are aware of the following related case, pending in the Supreme Court of the United States, pursuant to Ninth Circuit Rule 28-2.6, which involve the same transaction or event:

Crow Allottees, et al. v. USA et al., S.Ct No. 15-779.

Allottees have filed Petition for Writ of Certiorari on December 14, 2015. The Crow Tribe and State of Montana Filed a Brief in Opposition on January 15, 2015. The U.S. Department of Justice's response brief is currently due on February 16, 2016.

Dated this 3rd day of February 2016.

/s/ Hertha L. Lund
Hertha L. Lund
LUND LAW, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, Montana 59718
Phone: (406) 586-6254
Fax: (406) 586-6259
Lund@Lund-law.com

Attorney for Plaintiffs-Appellants