

No. 15-35679

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CROW ALLOTTEES ASSOCIATION, *et al.*,

Plaintiffs-Appellants

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, *et al.*,

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The United States Supreme Court held that to presume that the Executive Branch had the authority to revoke Indian usufructuary rights “would run counter to the principles that treaties are to be interpreted liberally in the favor of the Indians.” *Washington v. Washington State Commercial Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979). Further, any treaty ambiguities are to be resolved in the favor of the Indians. *Winters v. United States*, 207 U.S. 564, 576-577 (1908).

In this case, contrary to the *Winters* Doctrine Indian reserved water rights, the United States and Congress negotiated and passed the Settlement Act that violates the Crow Allottees’ (“Allottees”) civil and property rights, as well as their treaty rights. Crow Tribe Water Rights Settlement Act of 2010, P.L. 111-291, 124 Stat. 3097 (Dec. 8, 2010) (“Settlement Act”).

Instead of addressing the issues that are correctly before this Court upon appeal from the District Court, the United States asserted issues that were not even addressed by the District Court. The United States is asking the Ninth Circuit Court of Appeals to act as a district court and decide factual and legal issues that have not been developed by the District Court.

Further, the United States made numerous assertions related to a potential takings case that are also not before this Court.

Additionally, the District Court erred in finding that the United States had not waived sovereign immunity. Therefore, this case should be remanded back to the District Court for further development of the issues based on fact finding and legal determination of Allottees' constitutional claims against the United States.

ARGUMENT

I. The United Failed to Provide Allottees' Their Constitutional Rights.

Pursuant to the *Winters* Doctrine, the Allottees, not the Crow Tribe, have had reserved water rights that date back to when the Crow Reservation was created by an act of Congress. *United States v. Powers*, 94 F.2d 783 (9th Cir. 1938), *aff'd* 305 U.S. 527 (1939). These water rights are part of the underlying rights that the Crow Allottees retained to their native lands when the reservation was set aside. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981)(citing *United States v. Powers*, 305 U.S. 527 (1939)).

The United States asserted that the Settlement Act substituted the Allottees' *Winters* Doctrine Indian reserved water rights, for another water right. Doc. 28, p. 44 (filed June 8, 2016). The United States erred because

in order for one property right to be substituted for another property right, you have to exchange one property right for another property right. The *Winters* Doctrine water right is a property right. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 573-74 (1983). The Settlement Act's statement that it **intended** "to provide the allottee benefits that are equivalent to or exceed the benefits allottees possessed[ed]" prior to Congress' passage of the Settlement Act does not change the fact that the Act failed to provide the Allottees with any property right at all.

Based on its brief, the United States does not understand water rights in the prior appropriation states nor as provided by the *Winters* Doctrine Indian reserved water rights doctrine. Water rights, though amorphous in nature, are none the less enforceable, distinct property rights in the west. A future right to share in the Crow Tribe's water right is not a separate, distinct, enforceable property rights as the *Winters* Doctrine promises to Allottees based on their treaty rights.

Pursuant to the *Winters* Indian reserved water rights doctrine the Allottees had a right to their own legally distinct water right. *United States v. Powers*, 16 F.Supp. 155, 160 (D. Mont. 1936); *United States v. Powers*, 94 F.2d 783 (9th Cir. 1938), *aff'd*, *United States v. Powers*, 305 U.S. 527, 528 (1939); *United States ex rel. Ray v. Hibner*, 27 F.2d 909, 912, (D.

Idaho 1928); *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965); *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970); *United States v. Adair*, 478 F.Supp. 336, 346 (D.Or.1979). Allottees' rights to water rights are separate from the Crow Tribe's water rights. *Id.* Additionally, the Supreme Court held that the Allottees' property ceased to be held in common with the Crow Tribe and that Allottees' property became the exclusive property of the Allottees. *Powers*, 305 U.S. at 528.

The United States asserted, "[t]he [Settlement] Act entitles allottees to a "just and equitable share" of water, to be satisfied from the Tribal Water Right specified in the Compact." Doc. 28, p. 47 (filed June 8, 2016). An "entitlement" to a share of the Crow Tribe's water right, is not a *Winters* Doctrine Indian reserved property right, which the Allottees had pursuant to their Treaty Rights prior to Congress passing the Settlement Act.

An analogy related to land instead of water rights would be as follows: the Crow Allottees hold a beneficial real property interest in their allotments, which is protected by the Constitution. The Crow Tribe, pursuant to the Interior Department's Indian Land Buy-Back Program established under §101(e) of the Claims Resettlement Act of 2010, P.L. 111-291, is currently seeking to buy allotments from the Crow Allottees. If the Buy-Back Program functioned in a fashion similar to the Crow Tribe Water

Rights Settlement, instead of the Crow Tribe buying back the allotments, Congress would have simply reclassified the allotments as belonging to the Crow Tribe while stating that Congress intended that the Allottees receive equivalent benefits. Congress' intention that the Allottees receive an equivalent benefit by some unknown process at some point in the future would obviously not meet Constitutional muster because the Allottees would have received nothing of equal value to the marketable real property rights that were confiscated. The Allottees have not received equivalent benefit even though Congress said that was its intention.

In *Powers*, the Ninth Circuit articulated some of the parameters of an allottees' property interest in *Winters* reserved water right. 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.

Powers, 94 F.2d at 784-85. This Court further articulated that the Allottees' *Winters* reserved water right has a priority date as of the time the reservation was set aside. *Id* at 784. Lastly, this Court clarified that the Allottees' property right was 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, this Court 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* 647 F.2d at 50 (citing *Powers*, 305 U.S. at 532). Further, the Court found that the allottees rights were fully transferrable property rights. *Id.*

In *Adair*, this Court 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).

Instead of providing the Allottees with their constitutionally protected property right and rights guaranteed by Treaty, the United States asserted that Allottees would be entitled to a just and equitable share of the Crow Tribe's water right. Doc. 28, 47. As this Court found, "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*, 143 F. at 742. Similarly, the Supreme Court stated, "[t]he lands were arid, and, without irrigation, were practically valueless." *Winters*, 207 U.S. at 576.

There is no doubt the Supreme Court discussed the word "just and equal share" of water in the *Powers*; 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.

Powers, 305 U.S. at 347. 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). 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.

As the Supreme 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. *Powers*, 305 U.S. at 528. 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]." Further Excerpts of Record, pp. 1-4 (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 Allottees 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 related to the United States actions as the Allottees' trustee.

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 are supposed to be able to transfer that property to

their successor in interest. The Settlement Act did not give the Allottees a water right with the priority date of when the reservation was set aside and a right that that is freely transferable. The United States violated Allottees' civil and property rights that are constitutionally protected.

The constitutionality of the United States' actions was raised in Allottees' Complaint (Excerpt of Record ("ER") 73 [Complaint ¶¶ 30, 37, 125-26, 130-32, 149]) and has not been addressed by the District Court because the District Court dismissed Allottees' case without addressing Allottees' constitutional challenge. ER 5. Allottees raise this issue in their Reply Brief in response to the United States assertion that there is no relief the District Court could now grant the Allottees. The District Court could find that the Settlement Act violated Allottees' civil and property rights in violation of the United States Constitution.

Further, in addition to the United States' assertions failing as a legal matter, the District Court did not rule on the legal issues or the factual issues related to whether or not the Allottees received their constitutionally-protected property rights, treaty rights, or whether the United States is correct in its assertion that Allottees received a fair and equitable distribution of water. These issues are not properly before this

Court because the District Court did not decide these issues or render any fact finding in the case that has been appealed.

II. The Crow Water Rights Settlement Act is Void Ab Initio Because It Violates Allottees' Constitutional Rights.

The Allottees clearly claimed a violation of both their substantive and due process rights. Counts I – III of the Complaint. The District Court did not address these issues when the Court dismissed Allottees' Complaint.

The United States asserts that Congress could violate Allottees' civil rights and then waive Allottees' claims against the United States based on Congress's authority. (U.S. Brief at page 47 of 153). Different rules govern the Court's review of cases in which a person allegedly waives civil rights claims. *See Cirillo v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 862 F.2d 448, 451 (3rd Cir. 1988). This Court has previously held, "[a] release of claims for violations of civil and constitutional rights must be voluntary, deliberate, and informed." *Salmeron v. United States*, 724 F.2d 1357, 1361 (9th Cir. 1983). The Allottees alleged a violation of their procedural and substantive due process rights. *See Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (To state a claim for the denial of property without due process of law, the plaintiff must allege (1) deprivation of a constitutionally protected property interest; (2) governmental action; (3) and constitutionally inadequate process).

The District Court dismissed the Allottees' claims that the United States violated Allottees' due process rights without hearing any facts related to whether the Allottees voluntarily, deliberately, or in an informed fashion, relinquished their constitutional rights. Allottees allege in their First Amended Complaint that the United States' waiver of their constitutional rights was not voluntary, deliberate, or informed as to the Allottees' civil and constitutional rights. (ER, 73).

The United States asserted that since there is no remedy, the Allottees have no standing. Doc. 28, 40. The remedy is for the District Court to declare the Settlement Act an unconstitutional violation of the Allottees' civil and constitutional rights and to find that the Act is null and void.

Additionally, the Defendants argue that "[t]he Constitution grants Congress plenary authority over Indian affairs." Doc 28, p. 34. This is simply not true. Plenary means unqualified or absolute. The notion of a plenary power of Congress over Indian affairs and property is an oxymoron. Whatever "plenary power" may mean in the context of Indian affairs, in reality Congress cannot have extra-Constitutional power to legislate with respect to Indian property. The so-called "plenary power" of Congress over Indians is no more than a judicial interpretation that the Indian Commerce Clause, Const., Art. I, Sec. 8, gives Congress broad power over Indian

affairs, not extra-Constitutional powers. *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977). The so-called “plenary power” cannot override the Constitutional protections of due process and property rights.

In a similar argument, the United States cite *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) for the proposition that Congress can change the form of Indian trust assets without incurring liability for a taking so long as it gives the trust beneficiary Indians property of equal value. Doc. 28, p. 35. Here, it is obvious on its face that the Crow Allottees are not receiving equal value and that no attempt was made by the United States to determine the relative value of the marketable senior water rights the Allottees will lose in comparison to the right they will receive. No appraisals were performed. The Allottees will receive nothing more than the right to apply to the Tribe under an as yet non-existent tribal water code for a permit to use tribal water, a permit that could be denied and cannot be sold. Therefore, the United States has failed in its trust duties and the District Court has not addressed this factual and legal issue.

III. The District Court Erred in Concluding that Allottees Failed to Establish a Waiver of Sovereign Immunity.

In addition to failing to decide any factual or legal issues related to Allottees' pled constitutional and civil rights violations, the District Court also erred in its conclusion that the United States had not waived sovereign immunity. The United States asserted that the Supreme Court in *United States v. Mottaz*, 476 U.S. 834 (1986) found that the 25 U.S.C. § 345 waives sovereign immunity for those suits related to the original allotments. Doc. 28, p. 59. The reality is that this case is more similar to the grant of an original allotment than it is to administration of the allotment.

In this case, the issue is *Winters* Doctrine Indian reserved water rights. 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. *Arizona*, 463 U.S. at 574. 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. at 749. Therefore, this case is more similar to the issuance of an original allotment than it is to the other cases related to administration of an allotment that the United States relied upon in its Response. Doc. 28.

Similarly, this Court found that “it is equally plain that the Indian allottee is not authorized by § 345 to sue the United States for the purpose of claiming or establishing any assignment of or distribution of water rights, rights which he automatically acquired as a result of the creation of the reservation as demonstrated in the *Winters* case.” *United States v. Preston*, 352 F.2d at 358. The Court found that the Allottees **automatically** acquired Winters Doctrine reserved water rights when their reservation was created. *Id.* This case is about the United States violating the Allottees’ constitutionally protected civil and property rights that they acquired pursuant to the creation of the reservation, which is a valid waiver of the United States sovereign immunity.

Additionally, the United States’ assertion that the United States had not completed a final agency action for the purposes of the APA fails. The United States’ action is the consummation of the agency’s decision making and the United States has issued its last word related to the Crow Allottees’ treaty, civil and property rights. *Bennet v. Spear*, 520 U.S. 154, 178 (1997).

This case seeks a declaratory judgment of the unconstitutionality of certain provisions of the 2010 Crow Water Rights Settlement Act, and injunctive relief, to prevent the expropriation under the Act of extremely valuable, marketable, real property rights in water appurtenant to over one

million acres of individual Indian trust allotment lands on the Crow Indian Reservation. Those rights were established by the 1887 Dawes Severalty Act (General Allotment Act), 24 Stat. 388, 25 U.S.C. §§331-333, and the *Winters* Doctrine of Indian reserved water rights. *Winters*, 207 U.S. 564. Waivers by the United States of the Allottees' water rights, which will accomplish the expropriation, will go into effect on the Enforceability Date of the Settlement Act.

The Enforceability Date is the date the Interior Secretary publishes in the Federal Register a statement of findings that all of the requirements of Settlement Act §410(e)(1) have been satisfied. Final agency action triggering a waiver of federal sovereign immunity under §702 of the Administrative Procedures Act occurred on April 27, 2012, when the Interior Secretary signed the Crow Tribe-Montana Water Rights Compact and waived the Allottees' water rights claims in the Montana Water Court such that the Montana Water Court could then issue a final decree of Indian water rights on the Crow Reservation based on the provisions of the Compact. That decree was issued on May 27, 2014. The only impediment to the Interior Secretary's publication of the statement of findings required by §410(e)(1) of the Settlement Act is this proceeding. In the absence of appropriate relief, the Allottees in this case and the class they represent will

lose nearly one billion dollars' worth of real property without due process of law, as required by the Constitution.

There are three underlying waivers of sovereign immunity: the Allottees have a right to challenge the constitutionality of the Settlement Act; the Allottees have a waiver pursuant to § 345; and, since the United States has completed a final agency action, the APA waives sovereign immunity.

IV. The United States Raised Issues on Appeal that are Not Appropriately Before this Court.

Throughout its brief, the United States asserted issues related to a potential takings claim. The Allottees did not allege a takings in their Complaint. All of these assertions related to a potential, future takings claim are not correctly before this Court and are not part of this Court's jurisdiction.

Additionally, the United States asserted that Allottees' Counts IV and V should be dismissed under Fed. R. Civ. P. 12(b)(6). Doc. 28, p. 40. The United States failed to file for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) at the District Court. Instead, the United States filed under Fed. R. Civ. P. 12(c) Federal Defendants Motion for Judgment on the Pleadings, Doc. 34, filed February 25, 2015. The District Court did not address these issues raised for the first time by the United States at this appellate stage of the

case. The United States has cited no case law that allows the Ninth Circuit to address new issues of law never raised or decided by the District Court.

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 22nd day of June, 2016.

Respectfully submitted,

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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 4204 words.

Dated this 22nd day of June 2016.

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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 22nd day of June, 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 22nd day of June 2016.

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