Case No. 21-35223

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC.,

Plaintiff-Appellant,

v.

ALDEN BIG MAN, et al.,

Defendants-Appellees.

On Appeal from the U.S. District Court for Montana, Billings
D.C. No. 1:17-cv-00065-SPW-TJC
The Honorable Susan P. Watters, U.S. District Judge

BRIEF OF TRIBAL APPELLEES

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ISSUES PRESENTED

1. Whether the District Court correctly concluded that federal law recognizes the inherent authority of the Crow Tribe to apply its Utility Winter Disconnection Law to a disconnection by Big Horn County Electric Cooperative, in the middle of winter, of electric energy and service to a Tribe member's residence located on tribal trust land, and to adjudicate in its Tribal Court claims by the Tribe member against Big Horn County Electric Cooperative arising under the Tribal Law from the disconnection?

2. Whether the District Court correctly concluded, in the alternative, that federal law recognizes the inherent authority of the Crow Tribe to apply its Utility Winter Disconnection Law to a disconnection by Big Horn County Electric Cooperative, in the middle of winter, of electric energy and service to a Tribe member's residence located on land within the Crow Reservation pursuant to both the "consensual relationship" and the "direct effect" tests set forth in *Montana v. United States*, 450 U.S. 544 (1981), and to adjudicate in its Tribal Court claims by the Tribe member against Big Horn County Electric Company arising under the Tribal Law from the disconnection?

RELEVANT STATUTES

Pursuant to Circuit R. 28-2.7, an addendum setting forth verbatim the statutory and regulatory provisions pertinent to this case is attached to this brief.

STANDARD OF REVIEW

Issue No. 1 was raised and ruled on at Excerpts of Record (ER)-5-10 and 173-174. Issue No. 2 was raised and ruled on at ER-11-13 and 169-173. This Court "review[s] questions of tribal court jurisdiction . . . de novo and factual findings for clear error." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013), *cert. denied*, 571 U.S. 1110 (2013) (citations omitted).

STATEMENT OF THE CASE

The Crow Tribe of Montana ("Crow") is a federally-recognized Indian tribe that occupies the Crow Indian Reservation ("Reservation"). *See* 86 Fed. Reg. 7,554, 7,555 (Jan. 29, 2021); ER-3 and 17. In 1986, Crow, like many States,[1] including the State of Montana, enacted a Utility Winter Disconnection Law, codified at Crow Law and Order Code, Title 20, Utilities ("the Tribal Law"). ER-133-143. Section 20-1-110(2) of the Tribal Law provides, in relevant part, that no termination of residential electric service to indigent, elderly, and disabled customers on the Reservation may occur between November 1 and April 1, without specific prior approval of the Crow Tribal Health Board. *Id*. at 139-140.

[1] At least 34 states prohibit utility disconnections during winter months, and an additional 5 states and the District of Columbia prohibit utility disconnections based on the temperature. *See Winter and COVID-19 Utility Shut-Off Moratoriums*, Nat'l Energy Assistance Dirs. Ass'n (Mar. 15, 2021), https://neada.org/wintercovid19moratoriums/

Section 20-1-110 of the Tribal Law, ER-139-140, is identical to the equivalent Montana law promulgated in 1980, Mont. Admin. R. 38.5.1410 (Termination of Service During Winter Months), *reprinted in* Add. at 10-11 Certain utilities, such as electric cooperatives like Appellant Big Horn County Electric Cooperative ("BHCEC"), are not subject to regulation by Montana's Public Service Commission and thus are exempt from regulations like Montana's winter disconnection law. *See* Mont. Code Ann. §§ 69-8-103(4), 69-8-311(2). The Tribal Law does not have a similar exemption; in fact, electric cooperatives are expressly defined as utilities subject to the Tribal Law. Section 20-1-101(l), ER-134. As such, the Tribal Law fills the gap in protection left by the state law exemption.

Like most utility seasonal disconnection laws, the Tribal Law contains straightforward pre-disconnection notice and approval provisions. Section 20-1-105(3)(a) requires utilities to provide notice to the customer in writing via personal service or certified mail ten days prior to the proposed termination date, and Section 20-1-117(1) requires notice to the Tribal Health Board of the proposed termination. ER-136 and 142. Section 20-1-110(2) requires the Tribal Health Board's approval before disconnection occurs between November 1 and April 1. *Id*. at 140.

BHCEC is a non-Indian entity and the primary provider of electric energy and service on the Reservation. ER-3. BHCEC has been aware of the Tribal Law since its enactment. Tr. Appellees' Supplemental Excerpts of Record (SER)-021 (Tribal

Defendants' Statement of Undisputed Facts in Support of their Motion for Summary Judgment (Tr. Defs' SUF) ¶ 6).

Appellant Alden Big Man is an elderly enrolled member of Crow. ER-3, 18, and 115. He resides on tribal trust land that he leases from Crow pursuant to a Homesite Lease. *Id*. at 18, 56, 63, 66-68 and 70-74. BHCEC provides electric energy and service to Big Man's residence. *Id*. at 3, 18, 58-59 and 115. In January 2012, BHCEC disconnected Big Man's electric energy and service for nonpayment. *Id*. at 4, 19, 59, 64, and 118.

Big Man sued BHCEC in Crow Tribal Court, alleging violations of the Tribal Law. ER-6, 19 and 127-132. Big Man claims that any notice given by BHCEC did not comply with the Tribal Law, and that no prior approval of the Tribal Health Board was obtained before the disconnection occurred, as the Tribal Law requires. *Id*. at 128-129.

The Tribal Court dismissed Big Man's claims for lack of jurisdiction. ER-181-190. Big Man appealed, and the Crow Tribal Court of Appeals vacated, reversed, and remanded. ER-144-178. The Tribal Court of Appeals held that tribal regulatory and adjudicatory jurisdiction were supported under both the "consensual relationship" and the "direct effect" tests set forth in *Montana*. ER-170, 171 and 173. Independently of, and alternatively to, the *Montana* tests, the Tribal Court of Appeals upheld tribal regulatory and adjudicatory jurisdiction over BHCEC under *Merrion v.*

Jicarilla Apache Tribe, 455 U.S. 130 (1982), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), cases holding that tribal civil jurisdiction over non-Indians on tribal land is presumed. ER-174-175. The Tribal Court of Appeals then remanded to the Tribal Court for proceedings on the "non-jurisdictional merits" of Big Man's claims against BHCEC. *Id*. at 177.

Before any further proceedings occurred in Tribal Court, BHCEC filed this action in the United States District Court for the District of Montana, seeking declaratory and injunctive relief on the grounds that exhaustion of tribal remedies had occurred; that the Tribal Law does not apply to BHCEC; and that the Tribal Court lacks jurisdiction over Big Man's claims against BHCEC arising under the Tribal Law. ER-112-126. In addition to Big Man, BHCEC sued the Tribal Court of Appeals Justice and Judges, and Unknown Members of the Crow Tribal Health Board (collectively, "Tribal Defendants"). *Id*. at 114-115.[2]

Big Man and Tribal Defendants moved to dismiss, primarily on the ground that exhaustion of tribal remedies had not occurred because the Tribal Court had not determined the status of the land on which Big Man resides. *See* ER-262-264 (ECF Nos. 31, 32, 33, 34, and 45). The District Court denied dismissal on the ground that

[2] The Tribal Court proceedings have been stayed pending resolution of federal court review of the tribal jurisdictional issues. *See* ER-266 (ECF No. 70, Preliminary Pretrial Statement of Defendant Big Man at 7).

BHCEC appeared to have exhausted its tribal remedies. ER-85-91. Big Man and Tribal Defendants then filed their Answers. *See* ER-265 (ECF Nos. 58 and 60).

All parties filed and briefed cross-motions for summary judgment on the issues of tribal jurisdiction. ER-4; *see also* ER-267-270 (ECF Nos. 83-89, 99-107, 109-126, and 128). After oral argument in June 2020, *see* ER-270 (ECF No. 127, Minute Entry), the Magistrate Judge entered detailed Findings and Recommendations in favor of summary judgment for all Defendants. ER-16-40. BHCEC filed numerous objections to the Findings and Recommendations, all of which were rejected by the District Judge, who adopted the Magistrate Judge's Findings and Recommendations in a detailed Order dated February 26, 2021. ER-1-15.

The District Court upheld Crow's regulatory and adjudicatory jurisdiction over BHCEC's activities and conduct on the land where Big Man resides because it determined that the land is tribal trust land. ER-10 ("This case regulates non-member actions on trust property. . . . [T]he Court's conclusion [is] that Judge Cavan did not err in determining that Big Man's homesite is properly considered tribal land"). The District Court further agreed with the Magistrate that BHCEC had not met its burden of showing any intent of Congress to divest Crow of its inherent jurisdiction to condition BHCEC's actions and conduct on that land with the Tribal Law. *Id*.

Additionally and alternatively, the District Court upheld Crow's regulatory and adjudicatory authority over BHCEC's activities and conduct on the land where Big Man resides even if that land were the equivalent of non-Indian fee land for purposes of determining tribal jurisdiction. ER-10-11 ("[E]ven if the land were alienated from Tribal control . . . the Tribe still possesses jurisdiction to regulate and adjudicate the dispute under both *Montana* exceptions[.]"). The District Court found a consensual relationship sufficient to sustain tribal jurisdiction to regulate BHCEC's disconnection of electric energy and service from "BHCEC's decision to provide electrical service to tribal members on the reservation[.]" *Id*. at 12. The District Court also found a direct effect in that BHCEC's conduct—the termination of electric service during Montana's harsh winter—"clearly imperils the health and welfare of any Tribal member who obtains service from BHCEC." *Id*. at 13.

BHCEC appealed, ER-253, and filed its Opening Brief on August 2, 2021. Dkt. Entry 8. On August 5, 2021, BHCEC filed a Motion for Summary Disposition Dkt. Entry 11, which all Appellees opposed. Dkt. Entry 14. On September 23, 2021, this Court denied BHCEC's motion for summary reversal. Dkt. Entry 18. Tribal Defendants, now Tribal Appellees, file this brief in response to BHCEC's Opening Brief.

ARGUMENT SUMMARY

Like the laws of almost forty states, including Montana, the Tribal Law protects vulnerable citizens in times of need; in this instance, during the cold Montana winters. Like comparable state utility seasonal disconnection laws, the Tribal Law does not prohibit utility disconnection. Instead, it only requires specific advance written notice by the utility to the customer and approval by a governmental agency before disconnection occurs during certain months. BHCEC is the primary provider of electric energy and service to the Reservation, and disconnected its service to Big Man, a Crow member and Elder, in the middle of winter, allegedly without the notice and prior approval required by the Tribal Law.

This Court should affirm the holdings of the District Court that the conventional and appropriately-tailored Tribal Law applies to BHCEC's activities and conduct at issue in this case, and that the Tribal Court can hear Big Man's claims against BHCEC arising under the Tribal Law. The Tribal Law is an exercise of the inherent sovereign authority of Indian tribes that federal law recognizes and supports, including authority over the activities and conduct of non-Indians. The District Court appropriately began its analysis of the tribal jurisdiction issues in this case by acknowledging the two frameworks for determining tribal civil jurisdiction over non-Indian activities and conduct as set forth forty years ago by the Supreme Court in *Montana*, a case involving Crow and its Reservation.

Montana establishes that the status of the land upon which non-Indian activities and conduct occurs is the threshold inquiry for determining tribal jurisdiction. Where the land is owned by a tribe or held in trust by the United States, tribes' inherent tribal jurisdiction over non-Indian activities and conduct is presumed. This presumption can be defeated only by an express treaty or statutory provision. Where the land upon which non-Indian activities and conduct occurs is land held in fee by non-Indians, or is determined to be the equivalent of non-Indian fee land, inherent tribal jurisdiction can be upheld if the non-Indian has entered in to a consensual relationship with the tribe or tribe members, or if the non-Indian's activities and conduct threatens or directly affects the political integrity, the economic security, or the health, or welfare of the Tribe.

The District Court correctly determined that: 1) the land at issue here is tribal trust land; 2) on that land, Crow has retained its inherent sovereign authority to apply the Tribal Law to BHCEC's electric energy and service provision, and to adjudicate claims by Crow members against BHCEC arising under the Tribal Law; and 3), in the alternative, even if the land is the equivalent of non-Indian fee land, Crow has inherent authority under both *Montana*'s consensual relationship test and direct effect test to apply the Tribal Law to BHCEC's electric energy and service provision, and to adjudicate claims by Crow members against BHCEC arising under the Tribal Law.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY STATED THE FRAMEWORKS FOR ANALYZING TRIBAL JURISDICTION OVER THE ACTIVITIES AND CONDUCT OF NON-INDIANS WITHIN AN INDIAN RESERVATION

Land status plays an important role in determining tribal jurisdiction. "The Crow Tribe first inhabited modern-day Montana more than three centuries ago." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1692 (2019) (citing *Montana*, 450 U.S. at 547). In two treaties with United States, Crow reserved an 8-million-acre reservation. *Montana*, 450 U.S. at 548 (citing Treaty of Fort Laramie, 11 Stat. 749 (1851); Treaty of Fort Laramie, 15 Stat. 649 (1868)). Several subsequent acts of Congress reduced the Reservation to under 2.3 million acres. *Id*. (citations omitted). These acts "created a patchwork of [land] ownership, with portions of the Reservation owned by the federal government in trust for the Tribe and its members, as well as fee land owned by tribal members and non-tribal members." ER-3 (citation omitted).

Tribes are "distinct, independent political communities exercising sovereign authority.'" *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (internal quotation marks and citations omitted). Forty years ago, the Supreme Court held unequivocally that, pursuant to that authority, Crow could exercise civil jurisdiction over the activities and conduct of non-Indians on "land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana*, 450 U.S. at 557; *see LaPlante*, 480 U.S. at 18 ("Civil jurisdiction over such activities presumptively lies in the tribal

courts unless affirmatively limited by a specific treaty provision or federal statute."). The Court in *Montana* expressly held that Crow could prohibit non-Indians from hunting and fishing on that land, and could condition their entry to the land by charging a fee or establishing bag and creel limits. 450 U.S. at 557.

Montana fashioned a more detailed test for determining whether a tribe has civil jurisdiction over non-Indian activities and conduct on non-Indian fee land within a reservation. Generally, on such land, tribes may exercise civil jurisdiction over a non-Indian who has entered into a consensual relationship with the tribe or its members, or whose activities or conduct threatens or has a direct effect on the political integrity, economic security, or health or welfare of the tribe. *Id*. at 565-66.[3]

In *Window Rock Unified School District. v. Reeves*, this Court, relying on *Montana*, reiterated that there are "two distinct frameworks for determining whether a tribe has jurisdiction over" nonmembers, based on the status of the land on which the nonmember activities and conduct occur. 861 F.3d 894, 898 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018). The first framework typically falls under "the right to exclude, which generally applies to nonmember conduct on tribal land." *Id*. at 898. The second falls under the consensual relationship and direct effect tests "articulated

[3] In addition to the two *Montana* tests, tribal civil jurisdiction over non-Indians on non-Indian fee land may be expressly authorized by federal statute or treaty. *FMC Corp. v. Shoshone-Bannock Tribes,* 942 F.3d 916, 932 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1046 (2021) (citations omitted).

in *Montana*, which generally apply to nonmember conduct on non-tribal land." *Id*. (internal citation simplified). Subsequent Ninth Circuit cases adhere to this distinction. *See e.g.*, *FMC Corp.*, 942 F.3d 916 at 931; *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899-900 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 513 (2019). Thus, the District Court correctly held that "[d]etermining the status of the land at issue is key" to resolving issues of tribal jurisdiction over non-Indians. ER-6.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE LAND HERE IS TRIBAL TRUST LAND AND CROW CAN APPLY ITS UTILITY WINTER DISCONNECTION LAW TO BHCEC'S ACTIVITIES AND CONDUCT ON THAT LAND

A. Big Man Resides On Tribal Trust Land

The District Court correctly adopted the Magistrate Judge's factual finding that Big Man resides on tribal trust land. ER-3. "Big Man . . . lives on land leased from the Tribe. The land is owned by the Tribe and held in trust by the United States." ER-18 (Findings and Recommendations of U.S. Magistrate Judge). As the District Court noted, the Magistrate's finding was based primarily on consideration of the Bureau of Indian Affairs Title Status Report showing that the land is tribal trust land. ER-7 and 9. The District Court rejected BHCEC's argument that rights-of-way reflected in the Title Status Report "bounding" Big Man's leased land altered the land's status from being "trust property." *Id*. at 9-10. "[T]he Court's conclusion [is] that Judge

Cavan did not err in determining that Big Man's homesite is properly considered tribal land." *Id*. at 10.

Notably, in the District Court, BHCEC did not dispute Tribal Defendants' stated material fact that Big Man resides on trust land. *See* Tr. Appellees' SER-020-021 (Tr. Defs' SUF) ¶¶ 2 and 7). Further, BHCEC's brief expressly stated that the land on which Big Man resides is "unallotted land[]" that is "tribal trust land." ER-268 (ECF No. 99, BHCEC's Brief in Response to [Tribal] Defendants' Motion for Summary Judgment at 8 fn.1). Hence, the Magistrate Judge found that "BHCEC concedes that Big Man's home is situated on Tribal trust land." ER-23-24.

Similarly, BHCEC tells this Court that "Big Man has a 2.09 acre homesite lease within [a parcel] which consists of 288 acres of *tribal trust land*[.]" BHCEC Opening Br. at 21 (Dkt. Entry 8) (emphasis added). "Big Horn's relevant activities and conduct all occurred upon *tribal trust land* leased by Big Man." *Id*. at 28 (emphasis added). Notwithstanding BHCEC's efforts to argue that Big Man's land should not be *treated* as tribal trust land, at least for the purpose of determining the jurisdictional issues raised in this case, discussed *infra*, there is no question that the only land involved here is tribal trust land.

B. Tribal Jurisdiction On Tribal Trust Land Is Presumed, And BHCEC Has Not and Cannot Meet Its Burden Of Showing Express Divestment by Congress Of That Jurisdiction

On tribal land, inherent tribal civil jurisdiction over non-Indian activities and conduct is presumed to exist. *Window Rock*, 861 F.3d at 900 (citing *LaPlante*, 480 U.S. at 18); *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (tribe has jurisdiction over non-Indians "for claims arising from their activities on tribal land, independent of *Montana*"). BHCEC's argument that this presumption has been discredited and even "rejected" by the Supreme Court is belied by the very cases on which BHCEC primarily relies for its argument: *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Big Horn County. Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). BHCEC Opening Br. at 17-18 and 23-28. *Strate* unanimously and expressly affirmed that "tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 454, citing *Montana*, 450 U.S. at 557) (footnote omitted). and in *Adams*, this Court held that "[t]his Court's post-*Strate* jurisprudence leaves no doubt that Montana's framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land," 219 F.3d at 950-51 (citing *Allstate Indem. Co. v. Stump*, 191 F. 3d 1071, 1074 (9th Cir. 1999) ("Generally speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal land"); *see also Knighton*, 922 F.3d at 899 (citations omitted) (noting that this Court has "declined to" "eliminate[e] the right-to-exclude framework as an independent source of regulatory power over nonmember conduct on tribal land" (citation omitted)).

As the District Court acknowledged, the presumption of tribal jurisdiction over non-Indians on tribal land emanates, in part, from the sovereign right of tribes to exclude non-Indians from tribal land. ER-5-6; *see Window Rock*, 861 F.3d at 899.[4] The tribal right to exclude is a broad right that includes the general powers to regulate and adjudicate. *Window Rock*, 861 F.3d at 899-900. It also includes subsidiary powers such as the right to place specific conditions on the entry by non-Indians to tribal land and on their continued presence on the land. *Id*. at 899 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)). These conditions include typical governmental regulatory means such as taxes, fees, and other measures with which the tribe is entitled to require compliance. *Id*. The District Court noted that the Magistrate Judge, relying on *Merrion*, viewed the Tribal Law "as a valid condition" on BHCEC's activities and conduct on tribal land. ER-7.

The District Court then correctly adopted the Magistrate Judge's finding that, "unless abrogated by a treaty provision or federal statute, the Tribe may regulate non-member conduct" on tribal land. ER-7. Indeed, *Window Rock* holds that to defeat the presumption of tribal civil jurisdiction over non-Indians on tribal land, the treaty or

[4] Tribes have inherent sovereignty over non-Indians on tribal land independent of their authority arising from their power to exclude. See *Cooley*, 141 S. Ct. at 1644; *accord Knighton*, 922 F.3d at 899, 902. That sovereignty derives from tribes' inherent sovereign powers necessary to self-government, territorial management, and control of internal relations. *Knighton*, 922 F.3d at 902-3.

federal statutory provision must be express. 861 F.3d at 899-900 (citation omitted). "In interpreting the extent of any such limits, courts do not 'lightly assume that Congress . . . intend[ed] to undermine Indian self-government.'" *Id*. at 900 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). As the District Court held, the test is whether tribal jurisdiction has been "affirmatively limited by a specific treaty provision or federal statute." ER-7.[5]

1. There are No Express Treaty or Statutory Divesting Provisions

During discovery, BHCEC admitted that there are no treaty provisions or acts of Congress that divest or diminish Crow's civil jurisdiction over non-Indian activities and conduct on tribal land. Tr. Appellees' SER 004 (Plaintiff's Response to Tribal Defendants' First Set of Interrogatories, Requests for Admission, and Request for Production of Documents at 2). BHCEC nevertheless argued in the District Court that "the Tribe's authority was divested by the General Allotment Act of 1887, the Crow Allotment Act of 1920, or the Tribe's prior designation of the land for public purposes." ER-7. The District Court correctly adopted the Magistrate Judge's

[5] Under *Nevada v. Hicks*, certain state interests also can supersede tribal civil jurisdiction over non-Indian activities and conduct, even on tribal land. 533 U.S. 353, 362 (2001). Applicable state interests typically involve activities or conduct of a state official or an issue of enforcement of state law, *Window Rock*, 861 F.3d at 901-3. The state interest must be "significant." *Knighton*, 922 F.3d at 900. BHCEC does not argue that there are any superseding significant state interests.

rejection of that argument "because those acts are insufficiently explicit to abrogate jurisdiction." ER-7.

Before this Court, BHCEC argues that the provisions of the Crow Allotment Act allowing the Secretary of the Interior to set aside unallotted land for town-sites, schools, and other specific public purposes divest Crow's inherent sovereignty over, and the right to exclude non-Indians from, tribal land. BHCEC Opening Br. at 21-23. But as the District Court correctly found, these general provisions do not expressly prohibit or limit tribal jurisdiction. To the extent that BHCEC argues that Congress implicitly divested Crow of jurisdiction over non-Indian activities and conduct on tribal land by designating that land for a specific purpose, the Supreme Court has rejected the implicit divesture argument. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2466 (2020) (rejecting a similar implicit divestiture argument, and stating that "congressional intrusions on [certain] pre-existing [tribal] treaty rights fall short of eliminating all tribal interests in the land"). Moreover, BHCEC never reconciles this argument with *Montana*, where the Court considered the General Allotment Act, the Crow Allotment Act, and Crow's Treaties, 450 U.S. at 547-48, and expressly upheld tribal jurisdiction over non-Indians on tribal land. *Id*. at 557.

2. For Several Reasons, BHCEC's Argument that its Rights-Of-Way Divest Tribal Jurisdiction Also Fails

a. The Holdings in *Adams* Regarding BHCEC's Rights-Of-Way Are Inapposite And Do Not Control the District Court's Land Status Holding Here

In *Adams*, this Court held that some of BHCEC's rights-of-way for its transmission and distribution system within the Reservation are the equivalent of non-Indian fee land, and that Crow could not impose an ad valorem tax on BHCEC's utility property within those rights-of-way. 219 F.3d at 949-53. The District Court correctly held that *Adams* does not have preclusive effect on its holding that Crow has regulatory and adjudicatory jurisdiction over BHCEC's provision of electric energy and services to Big Man on tribal land. ER-9-10.

Crow's attempted regulation of BCHEC in *Adams* is distinguishable from the regulation here. The District Court correctly noted that *Adams* concerned a tax asserted by Crow on BHCEC's physical property located within its rights-of-way, while the present case concerns Crow's regulation of BHCEC's "actions on trust property." *Id*. at 10. As the District Court held, the Title Status Report for the tract of tribal trust land within which Big Man's leased parcel is located indicates that there are rights-of-way that merely "bound," or are adjacent to, the tribal trust land tract, ER-9, and the Magistrate Judge correctly found that the electrical easements identified by BHCEC merely allow BHCEC access to the land to provide electric service to Big Man's residence. *Id*. at 7. These distinctions deprive *Adams* of any weight on these issues. The District Court correctly adopted the Magistrate's Judge's findings that BHCEC's rights-of-way and easements do not divest Crow of the right

to exclude or the right to enforce the Tribal Law as a condition on BHCEC's conduct and continued presence on the tribal land where Big Man resides. *Id*. at 7-8.

b. The District Court Correctly Held that the Existence of a Right-of-Way Does Not *Per Se* Divest or Limit Tribal Jurisdiction

The District Court properly rejected BHCEC's argument that the existence of BHCEC's rights-of-way in-and-of themselves divests Crow's jurisdiction in this case.[6] The District Court concluded that BHCEC's argument is not only unsupported by any authority, but is contrary to pertinent authority. As the District Judge noted, pursuant to Supreme Court precedent such as *Merrion*, the Magistrate Judge correctly determined that the rights-of-way which allow BHCEC to provide electric energy and service are co-existent with, not eliminative of, Crow's right to exclude BHCEC and to condition BHCEC's presence, activities, and conduct on tribal land

[6] BHCEC complains to this Court that the Magistrate Judge improperly considered an incomplete version of the Title Status Report when it determined that the rights-of-way do not divest Crow of inherent jurisdiction. BHCEC Opening Br. at 12. This is untrue, as evidenced by BHCEC's Excerpts of Record, Dkt. Entry 9. BHCEC submitted a complete Title Status Report into the record after the Magistrate Judge granted a motion to submit the complete report made by BHCEC at oral argument on summary judgment, *i.e.*, *before* the Magistrate issued his Findings and Recommendations. See ER-50, Minute Entry (granting BHCEC's Unopposed Second Motion for Leave to file Supplemental Declaration); ER-41-50, Plaintiff's Second Supplemental Declaration, Title Status Report. The District Court expressly rejected BHCEC's similar objection to the Magistrate's Findings and Recommendations: "Judge Cavan properly considered the full report and BHCEC's objection on this specific point is without merit." ER- 9.

pursuant to the Tribal Law. ER-7-8. *See Merrion*, 455 U.S. at 144 (tribal authority based on the power to exclude means generally that non-Indians who are lawfully on tribal land "remain subject to the risk that the tribe will [further] exercise its sovereign power" and place "conditions on the non-Indian's conduct or continued presence").

Moreover, the District Court aptly stated that "[t]o hold that the presence of electrical service easements defeats tribal jurisdiction would render the entire Reservation (at least the portions with power) outside of Tribal control—a result clearly in conflict with the purpose of the doctrine that express Congressional intent is required to divest a tribe of jurisdiction over tribal lands." ER-10 (citation omitted). Such a holding, of course, would conflict with *Montana*, 450 U.S. at 557, and *McGirt*, 140 S. Ct. at 2462-63 (citations omitted) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." To alter the status of Indian reservation land, "Congress [must] clearly express its intent to do so . . . .").

c. To the extent that BHCEC relies on the Terms of its Rights-of-Way, this Court is Precluded from Considering those Terms as the Rights-of-Way Themselves are Not in the Record in this Case

The mere existence of a right-of-way over tribal trust land does not convert that land into the equivalent of non-Indian fee land for purposes of tribal jurisdiction. Determining whether a right-of-way has such an effect requires a detailed

examination of the instrument itself and whether, "[u]nder the congressionally-granted right-of-way, the Tribe ha[s] no reserved power to exclude the [non-Indian] from the reservation, or to exercise dominion or control over the right-of-way.". *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000); *Strate*, 520 U.S. at 454-56. BHCEC does not point to any specific language in its rights-of-ways that divests Crow of its "gatekeeping" authority over the trust land on which Big Man resides. *Strate*, 520 U.S. at 456. Nor can BHCEC point to any such language because, due entirely to its own volition, the rights-of-way are not in the record in this case as BHCEC has refused to submit them.

BHCEC refused to submit the rights-of-way into the record in either the Tribal Court or in the District Court. In the District Court, Tribal Appellees sought discovery with respect to BHCEC's rights-of-way. BHCEC's response is instructive:

> **[Tribal Defendants'] Interrogatory No. 9:** Please state how many rights-of-way agreements BHCEC has on the Reservation.
>
> **[BHCEC] Answer:** Objection. Tribal Health Board Defendants seek information concerning right of way agreements which is impermissibly broad including irrelevant information which exceeds the scope of permissible discovery and *which has no bearing upon whether the Crow Tribe has the jurisdictional authority to regulate the business activities of BHCEC through enforcement of Title 20*. Responding comprehensively to this overly broad interrogatory will require unwarranted examination of over seventy-nine years accumulation of business records, and not withstanding exposing BHCEC to excessive unnecessary expense, would not reasonably be calculated to lead to the discovery of admissible evidence.

Tr. Appellees' SER-006 (Plaintiff's Response to Tribal Defendants' First Set of Interrogatories at 4) (emphasis added)). Not only has BHCEC never even attempted to put its rights-of-way into the record in this case, *compare Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 53 F. Supp. 2d 1047, 1050 (D. Mont. 1999) ("Plaintiff has attached copies of two right-of-way easements, one granted by the Crow Tribe and another granted by an individual tribal member"), it expressly has disavowed their relevancy to the issue of Crow's jurisdiction in this case.

Consequently, to the extent that BHCEC asks this Court to rely on the terms of the rights-of-way themselves, *see, e.g.*, BHCEC Opening Br. at 28 (Big Man's "leased premises is . . . within a right-of-way"); *id.* at 29 (implying that Crow failed to reserve the right to exercise dominion and control over the rights-of-ways); *id*. at 35-36 (the rights-of-way are "unqualified"), this Court must decline that invitation. This Court's review on appeal "is limited to the record presented to the district court at the time of summary judgment." *Schneider v. Cnty. of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995) (citation omitted); *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003), *cert. denied*, 541 U.S. 937 (2004) (citation omitted) (reliance by party on material outside the summary judgment record will not be considered in appellate review). This Court cannot consider, and BHCEC cannot rely upon, material not submitted to the District Court during summary judgment, including the rights-of-way. If the rights-of-way contained

language dispositive for the issues presented here, BHCEC had every opportunity to enter them into the record. Because BHCEC failed to do so, and expressly exclaimed their non-relevance to the jurisdictional issues in this case, the terms of the rights-of-way remain unrevealed, and this Court should not now consider them.[7]

Finally, even assuming *arguendo* that BHCEC's rights-of-way contain the necessary language to divest Crow of its "gatekeeping" authority, *Strate*, 520 U.S. at 456, and convert the tribal trust land where Big Man resides into the equivalent of non-Indian fee land for tribal jurisdictional purposes, such a result would mean only that Crow's jurisdiction over BHCEC would have to be upheld under *Montana*'s two tests. As discussed below, the District Court correctly upheld tribal jurisdiction on such land under *Montana* as independent and alternative grounds.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT, IN THE ALTERNATIVE, IF THE LAND WHERE BIG MAN RESIDES IS THE EQUIVALENT OF NON-INDIAN FEE LAND, CROW CAN APPLY THE TRIBAL LAW TO BHCEC'S ACTIVITIES AND CONDUCT UNDER BOTH THE *MONTANA* CONSENSUAL RELATIONSHIP AND DIRECT EFFECT TEST

Because the only land at issue here is tribal trust land, Crow's jurisdiction over BHCEC can be upheld without considering the two *Montana* tests. *See Water Wheel*,

[7] Further, any effort by BHCEC to seek to introduce its rights-of-way in its appeal to this Court should be rejected. *See Vargas v. Howell*, 949 F.3d 1188, 1198 (9th Cir. 2020) (citation omitted) (applying the general rule, that documents not filed with the district court cannot be made part of the record on appeal, to reject a party's effort to supplement the record on appeal with various documents produced in discovery but not made part of the district court record).

642 F.3d at 814 ("[T]he tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*."); *see also N. Cent. Elec. Coop., Inc. v. N.D. Publ. Serv. Comm'n*, 837 N.W. 2d 138, 146 (N.D. 2013) (recognizing tribes' inherent sovereign authority to regulate the provision of electric services by non-Indian utility to tribal businesses on tribal trust land "without application of the *Montana* exceptions"). Nevertheless, even when this Court has concluded "that the Tribe had authority to regulate [non-Indian] conduct on tribal land pursuant to its sovereign exclusionary powers[,]" it still has alternatively applied the *Montana* tests. *Knighton*, 922 F.2d at 904-05. Whether this Court applies *Montana* additionally or alternatively, determines that *Montana* controls in the first instance, or determines that the land upon which Big Man resides is the equivalent of non-Indian fee land, the District Court's holdings regarding the *Montana* tests should be affirmed.

A. Under *Adams* and Otherwise, BHCEC's Voluntary Provision of Electric Energy and Service Is the Requisite Consensual Relationship, and the Requisite Nexus between the Consensual Relationship and the Tribal Law Also Is Present

1. *Adams* Precludes BHCEC from Re-Litigating the Issue of the Existence of a *Montana* Consensual Relationship

The District Court correctly held that "BHCEC has chosen to avail itself of the Tribe's customer base and in so doing created a consensual relationship" sufficient to sustain jurisdiction under *Montana*. ER-12. "[T]he relationship arises

from BHCEC's decision to provide electrical service to tribal members on the reservation." *Id*. This issue has been definitively resolved by this Court in *Adams*.

BHCEC calls this ruling a "misstatement," BHCEC Opening Br. at 33, and complains that the Magistrate Judge's finding of a consensual relationship is "unsupported [and] unwarranted," *id*. at 36, but it is precisely what this Court held in *Adams*: "Big Horn's voluntary provision of electrical services on the Reservation . . . create[s] a consensual relationship" under *Montana*. *Adams*, 219 F.3d at 951. It is BHCEC that mischaracterizes *Adams*' holding as being based on BHCEC's "contracts with tribal members for the provision of electrical services." BHCEC Opening Br. at 34 (citation omitted); *accord* at 35 ("the consensual relationship [here is] the contract [*i.e.*, Membership Agreement] between Big Horn and Big Man"); and 20 ("the Membership Application [was] identified as the consensual relationship by this Court in the *Adams* case"). *Adams*' consensual relationship holding was not dependent on the Membership Applications; rather, it was expressly based on BHCEC's "voluntary provision of electrical services." 219 F.3d at 951; *see also Glacier Elec. Coop. Inc. v. Gervais*, No. CV 14-75-GF-BMM, 2015 WL 13650531, at *4 (D. Mont. Apr. 24, 2015), citing *Adams*, 219 F.3d at 951) (non-Indian electric cooperative that provides electricity to tribe members on reservation "has entered into a consensual relationship" under *Montana*); *DISH Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *7 (D. Ariz. Nov. 1, 2012), citing *Adams*,

219 F.3d at 951) (provider of satellite television services has a consensual relationship under *Montana* with tribe members on reservation).

Adams remains good law on this point and precludes BHCEC from re-litigating the issue of the existence of a consensual relationship. All four elements of collateral estoppel—that the issue is identical, was actually litigated, with a full and fair opportunity to litigate, and was necessary to the decision—are met here. *See Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 864 (9th Cir. 2021) (citation omitted).

The consensual relationship issue in *Adams* and in this case are identical: whether BHCEC has entered into a consensual relationship with Crow members for purposes of determining tribal civil jurisdiction over its activities and conduct under *Montana* by providing electric energy and service within the Reservation. It does not matter that the asserted tribal regulation in *Adams* was a utility tax and that the tribal regulation here is the Tribal Law. As *Adams* explained, the consensual relationship determination is a threshold and independent inquiry from the subsequent inquiry of whether the consensual relationship is sufficient to sustain the specific exercise of tribal jurisdiction at issue. 219 F.3d at 951.

The issue of whether BHCEC has a consensual relationship was actually litigated and decided in *Adams*. In *Adams*, BHCEC argued that "neither exception to *Montana*'s main rule applies." *Big Horn Cnty. Elec. Coop. v. Adams*, No. 99-35799,

2000 WL 33997507, at *18 (9th Cir. filed Jan.18, 2000) (Br. of Appellee). The Tribal Appeals Court, the District Court, and this Court all determined that a consensual relationship existed between BHCEC and Crow and Crow members. *Adams*, 219 F.3d at 951 (citations omitted) ("Big Horn's voluntary provision of electrical services on the Reservation . . . create[s] a consensual relationship"); *Adams*, 53 F. Supp. 3d at 1051 ("Big Horn delivers electricity to the Crow Tribe and its members and it charges a fee for that delivery. Big Horn's activities constitute a 'consensual relationship' as defined by *Montana*.").

Adams afforded BHCEC a full and fair opportunity to litigate the consensual relationship issue, and the issue was necessary to deciding the merits of *Adams*' jurisdictional question. BHCEC's utility property at issue in *Adams* was located on rights-of-way within the Reservation that this Court determined to be "the equivalent of non-Indian fee land." 219 F.3d at 949. This Court recognized that "post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over non-members on non-Indian fee land, the precise situation presented by this case." *Id.* at 950 (citations omitted). This Court then proceeded to determine whether a consensual relationship existed as the first step in determining whether Crow had jurisdiction under *Montana*. *Id*. at 951.

Additionally, *Adams* and this case represent "litigation between the same parties." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1031 (9th Cir. 2001).

BHCEC acknowledges its participation in both cases. The tribal defendants / appellants in *Adams* were the Tribe's Tax Commissioner, "Unknown Members of the Crow Public Utilities Commission," and Tribal Appeals Court Judges. *Adams*, 53 F. Supp. 2d at 1050. Here, the Tribal Defendants / Appellees are Unknown Members of the Crow Tribal Health Board, and the Tribal Appeals Court Justice and Judges. ER-113 (Compl., ECF No. 1 at ¶ 1). While the agencies, officials, and judges are different, they are all named in their official capacities as representatives of Crow. *See Wash. Mut., Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011) (citation omitted) (collateral estoppel applies not only against actual parties to prior litigation, but also against a party that is in privity to a party in previous litigation); *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008), *cert. denied*, 558 U.S. 850 (2009) ("privity" required for application of res judicata or collateral estoppel is a legal conclusion designating persons in subsequent litigation with parties to former litigation as representing the same rights and interests).[8]

2. Alternatively, BHCEC's Voluntary Provision of Electric Energy and Service to Crow Members is the Requisite Consensual Relationship

[8] Alternatively, even if Tribal Appellees here are not in privity with the Tribal Appellants in *Adams*, this Court has broad discretion to apply offensive non-mutual collateral estoppel, where a party is estopped from re-litigating an issue that it previously litigated and lost against another party. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880-82 (9th Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

Assuming *arguendo* that *Adams* does not preclude BHCEC from re-litigating the issue, there nevertheless is a consensual relationship in this case. It is well established that consensual relationships need not be express. *FMC Corp*., 942 F.3d at 932 (citations omitted). Generally, the applicable determining factors for a consensual relationship include the length of time and the extent of a non-Indian's agreements, dealings, or interactions with a tribe or tribe members, and whether the non-Indian was reasonably on notice of tribal laws and its being subject to those laws. *See, e.g.*, *Water Wheel*, 642 F.3d at 818. Application of these factors here strongly supports a consensual relationship.

BHCEC's agreements, dealings, and interactions with Crow and Crow members are long-standing and extensive. BHCEC has voluntarily and continually provided electric energy and service on the Reservation for over 80 years and to Big Man for over 20 years. Tr. Appellees' SER-005 (Plaintiff's Response to Tribal Defendants' First Set of Interrogatories at 3 and 5). When the Tribal Law was enacted in 1986, "approximately 60 percent of the [total] geographic area served by [BHCEC was] located on the . . . Reservation, . . . and approximately 50 percent of its members [were] . . . enrolled members of the . . . Tribe." *Harris v. Big Horn Cnty. Elec. Coop., Inc*., No. 86-223, 14 Indian Law Rep. 6023, 6023 (Crow Tribal Ct. Dec. 9, 1986), Tr. Appellees' SER-012. When BHCEC began providing electric energy and service to Big Man, BHCEC was providing electric energy and service to approximately "1,700

customers, both tribal and non-tribal members, . . . within the exterior boundaries of the . . . Reservation." *Adams*, 53 F. Supp. 2d at 1049.

Crow's sovereignty certainly pre-dates the inception of BHCEC's electric energy and service provision to the Reservation in 1940. Based on eight decades of providing electric energy and service to hundreds of Crow members, BHCEC is "no stranger to the Tribe's governance and laws" and "should reasonably have anticipated that [its] conduct . . . would fall within the Tribe's [civil] jurisdiction." *Knighton*, 922 F.3d at 904. BHCEC admittedly has been aware of the Tribal Law at issue here since at least 1986, Tr. Appellees' SER-004 (Plaintiff's Response to Tribal Defendants' First Set of Interrogatories at 2), and in fact was sued that same year in Tribal Court for non-compliance with the Tribal Law, based on facts similar to those in this case, *i.e.*, failure to comply with, *inter alia*, the notice provisions before disconnecting the electric energy and service to a Crow member's residence on the Reservation. *Harris,* 14 Indian Law Rep. at 6023-24, Tr. Appellees' SER-11-13.

3. There is a Nexus between the Consensual Relationship and the Tribal Law

In addition to the existence of a consensual relationship, the asserted tribal jurisdiction must have a "nexus" to the consensual relationship. *Knighton*, 922 F.3d at 904 (citation omitted). The consensual relationship here being BHCEC's voluntary provision of electric energy and service, there is a nexus because the Tribal Law and Big Man's claims against BHCEC arise "directly out of" that consensual relationship.

Id. The Tribal Law governs "Termination of Electric Service" to utility customers. ER-133-143. The Tribal Law applies to "any person, firm or corporation, including an electric cooperative, which furnishes electric service within the Crow Reservation." ER-134 (Section 20-1-101(l)). The Tribal Law specifies the timing and means of notice and approval that is required before service is terminated to indigent, elderly, and disabled residential customers during winter months. ER- 136-140 (Sections 20-1-105, 20-1-106, and 20-1-110). The law is more than "in the same area" as BHCEC's consensual relationship with Crow and Crow members, *Knighton*, 922 F.3d at 904, and bears more than "a close nexus" to that relationship, *Water Wheel*, 642 F.3d at 817; it is point blank directed at BHCEC's activities and conduct at issue here.

BHCEC argues that the requisite nexus is lacking because the tribal jurisdictional issues here do not arise out of, and are precluded by, provisions in its Membership Application about state law and state court jurisdiction. BHCEC Opening Br. at 33-36.[9] Again, as the District Court correctly held, BHCEC misconstrues the *Montana* consensual relationship jurisprudence.

[9] In a footnote, BHCEC argues that if this Court reverses the District Court, it should instruct the District Court on remand to reconsider its determination that the Membership Agreement's forum selection and choice of law clauses do not divest Crow of jurisdiction. BHCEC Opening Br. at 16 fn.1. Tribal Appellees join in Appellee Big Man's brief that this issue is not properly raised before this Court and therefore waived. Moreover, BHCEC did not object to the Magistrate Judge's

> BHCEC argues that BHCEC's provision of electrical service cannot be related to the [asserted tribal] regulation because the underlying Tribal suit is centered on BHCEC's violation of Title 20, which BHCEC asserts is unrelated to its 'actual provision of service' to Big Man. BHCEC insists that because the consensual relationship involves contracts, only regulations involving those contracts have a nexus as contemplated by the first Montana exception, and further insists that Title 20 does not regulate those contracts. . . .
>
> [This] position[] is illogical. Title 20 prevents termination of electrical service during winter months without approval of the tribal health board. BHCEC has chosen to avail itself of the Tribe's customer base and in doing so created a consensual relationship. The Tribe then conditioned one aspect of that service with Title 20. This is exactly the nexus required by the first [*Montana*] exception.

ER-11-12. In short, the consensual relationship—the provision of service—and the activity regulated by the Tribal Law—the provision of service—are one and the same. *C.f. Devils Lake Sioux Indian Tribe v. N.D. Pub. Serv. Comm'n*, 896 F. Supp. 955, 961 (D.N.D. 1995) ("[W]here the service sought is to a Tribal business located upon

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findings that these provisions do not divest Crow of jurisdiction. ER-14 ("Neither party objects to Judge Cavan's Finding that the choice of law provision in the BHCEC membership agreement did not constitute a waiver of Tribal sovereign authority and therefore it is not an issue in the instant case"). The District Court thus properly adopted the Magistrate's findings that these provisions do not divest the Tribal Court of jurisdiction and that their validity and enforceability should be decided by the Tribal Court in the first instance. *Id*.; *see Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (1st Cir. 2000); *Picayune Rancheria of Chukchansi Indians v. Rabobank*, No. 1:13-CV-00609 LJO, 2013 WL 2434705, at *4 (E.D. Cal. June 4, 2013); *Snowbird Constr. Co., Inc. v. United States*, 666 F. Supp. 1437 (D. Idaho 1987).

Trust land, the necessary nexus between Tribal interests and inherent sovereignty is present.").

B. BHCEC's Termination Of Electric Energy During A Winter Month Directly Affects The Health And Welfare Of Crow Members

Either *Montana* test can confirm tribal civil jurisdiction. *Grand Canyon,* 715 F.3d at 1205. Tribal jurisdiction also may be affirmed when a non-Indian's activities or conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 1206 (citation omitted). The activities and conduct at issue "must do more than injure the [Tribe], [they] must 'imperil the subsistence or welfare' of the tribal community." *FMC Corp*., 942 F.3d at 935 (citations omitted). Nevertheless, the focus for this test should not be on "abstract elements," but on "specific nonmember [activities and] conduct," and should take a functional view of the effect of the activities and conduct on the tribe. *Knighton*, 922 F.3d at 905 (citations omitted).

The District Court correctly held that BHCEC's activities and conduct, the disconnection of electric energy and service in Montana's harsh winter without proper notice and approval, seriously threaten the health and welfare of Crow. The District Court had previously considered this precise issue in *Glacier Electric*. Construing the direct effect test for purposes of whether exhaustion of tribal remedies was required, the District Court in *Glacier Electric* held that an allegation that the

utility cooperative "conducts winter shut-offs undoubtedly has a direct effect on the health and welfare of the . . . Tribe." *Glacier Elec.*, 2015 WL 13650531, at *4.

It is widely recognized that the disconnection of utilities in the winter, especially heat and electricity, has significant impacts on the health, welfare, and safety of utility customers. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 14 n. 15 (1978) ("The uninterrupted continuity of [electric service] is essential to health and safety."); *id*. at 18 ("Utility service is a necessity of modern life; indeed the discontinuance of water or heat for even short periods of time may threaten health and safety."); *Stanford v. Gas Serv. Co.*, 346 F. Supp. 717, 719-20 (D. Kan. 1972) ("It is not open to question that food, clothing and shelter are considered necessary to sustain life. However, unheated shelter affects life itself."); *Palmer v. Columbia Gas Co. of Ohio*, 342 F. Supp. 241, 244 (N.D. Ohio 1972) ("The lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal."); David L. Schulman, et al., *Public Health Legal Services: A New Vision* at 32 (2008), *available at* https://www.hivlawandpolicy.org/sites/default/files/Public%20health%20legal%20svcs--published%20version.pdf (identifying "utility shut-offs during the cold winter months" as one of the problems contributing to, or causing, health problems in vulnerable children); Roger D. Colton, *Prepayment Utility Meters, Affordable Home Energy, and the Low Income Utility Consumer*, 10 J. of Affordable Housing Cmty.

Dev. L. 285 (2001) ("There is . . . a documented relationship between utility disconnection and homelessness"); Jenifer Bosco, *Protecting Older Adults from Utility Disconnection* 3, National Consumer Law Center (Sept. 2018), https://ncler.acl.gov/Files/Protecting-Older-Adults-from-Utility-Disconnection.aspx ("Disconnection of utility service can be life-threatening for those who are particularly susceptible to heat of cold temperature—frail older individuals, the very young, and those with certain chronic health conditions. Loss of service is also dangerous to those who need electricity or water for medical equipment for refrigeration of medication."). Indeed, the Montana Public Service Commission has opined expressly that its identical regulation preventing the disconnection of utility service between November and April is "in the interests of public health, safety, and welfare." Order No. 6696, *In Re N.W. Energy*, Docket No. D2005.9.145 (Mont. Public Serv. Comm'n Sept. 28, 2005), Tr. Appellees' SER-14-16.

Under the direct effect test, the magnitude of the actual or potential harm must be substantial, and the tribal regulation must be reasonable, *i.e*., appropriately tailored to address that harm. *FMC Corp*., 942 F.3d at 940. Given the risk of substantial harm that may occur from utility disconnection, the Tribal Law's typical and straightforward notice and approval provisions are well-within the realm of reasonableness. The Tribal Law does not *prohibit* utility disconnection; it simply

requires proper notice and prior approval before disconnection occurs. Moreover, the Tribal Law is reasonably tailored to the risks and imposes comparable requirements on BHCEC when compared with Montana's similar law. *See* Mont. Admin. R. 38.5.1410 (2) ("No termination of service [for indigent, elderly, or disable customers] may take place during the period of November 1st to April 1st except with specific prior approval of the [Montana Public Service] Commission"), *reprinted in* Add. 011; *see Montana*, 450 U.S. at 566 n.16 (taking into account similar state regulation when analyzing the direct effect test). The Tribal Law simply and vitally fills in a regulatory gap left by the Montana Public Service Commission's lack of regulatory authority over BHCEC that otherwise would leave vulnerable Crow members unprotected from winter disconnections.

CONCLUSION

For the reasons set forth above, the judgment of the District Court that the Tribe can apply Tribal Law to BHCEC's activities and conduct on the land where Big Man resides should be affirmed.

DATED this 20th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *Brief of Tribal Appellees* complies with the length limitations of Circuit R. 32-1(a) because it contains 9,595 words.

Dated this 20th day of October, 2021.

Respectfully submitted,

/s/ Melody L. McCoy
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ADDENDUM
TO BRIEF OF TRIBAL APPELLEES

TABLE OF CONTENTS

Crow Law and Order Code, Title 20, Utilities

TITLE 20

UTILITIES

Chapter 1. Termination of Electric Service

20-1-101 DEFINITIONS For purposes of this chapter.
(a) "Appliances essential for maintenance of health" means any electric device which is certified by a licensed physician as being essential to prevent or to provide relief from serious illness or to sustain the life of a member of the household and for which there is no reasonable alternative.

(b) "Board" means the Crow Tribal Health Board.

(c) "Customer" means any purchaser of gas or electric service supplied by a utility for residential purposes.

(d) "Delinquent Account" means an account for residential service which remains unpaid for at least 20 days after the bill is rendered. The exact due date shall be printed on the face of the bill.

(e) "Elderly" means any residential electric or gas consumer aged 62 or older, who resides at the service address.

(f) "Handicapped" means any residential electric or gas consumer who resides at the service address and has any physical or mental impairment which substantially limits one or more of such person's life activities, and such person:

(i) is certified as being physically disabled by a licensed physician, or

(ii) is certified as being mentally disabled by a licensed psychiatrist or registered psychologist, Veterans Administration, Social Security Administration, or local board of health.

(g) "Landlord Customer" means one or more individuals or an organization listed on a gas or electric utility's records as the party responsible for payment of the gas or electric service provided to one or more residential units of a building, which is occupied by a tenant.

(h) "Person unable to pay or to pay only in installments" means any purchases of electric service for residential purposes, who is a recipient of public assistance and/or has an income at or below Federal poverty guidelines.

(i) "Residential Building" means a building containing one
or more dwelling units occupied by one or more tenants, but excluding hotels and motels not used primarily for residential purposes.

(j) "Tenant" means any person or group of persons whose dwelling unit in a residential building is provided natural gas or electricity, pursuant to a rental agreement, but who is not the customer of the utility which supplies said gas or electricity.

(k) "Termination of Service" means a cessation of service effectuated by the utility and not voluntarily requested by a customer.

(l) "Utility means any person, firm or corporation, including an electric cooperative, which furnishes electric service with the Crow Reservation.

20-1-102 GROUNDS FOR TERMINATION OF SERVICE Subject to the requirements of this chapter a utility may terminate service to a customer for any of the following reasons:

(a) Non payment of a delinquent account;

(b) Misrepresentation of identity for the purpose of obtaining utility service;

(c) Unauthorized interference, diversion or use of the utility's service situated or delivered on or about the customers premises;

(d) Failure to comply with the terms and conditions of a deferred payment agreement made in accordance with these rules;

(e) Continual refusal to grant a duly authorized representative of a utility access to equipment upon the premises of the customer at reasonable times for the purpose of inspection, maintenance or replacement when the utility has given the customer reasonable notice of the need for such access and the time of visitation;

(f) Violation of other rules of the Board or utility which adversely affects the health or safety of the customers or other persons, or the integrity of the utility's delivery system.

20-1-10 3 PROHIBITED GROUNDS FOR REFUSAL OR TERMINATION OF SERVICE

None of the following shall constitute grounds for a utility to refuse or terminate service:

(a) The failure of any person, other than the customer against whom termination is sought, to pay any charges due to the utility;

(b) The failure of a customer to pay for merchandise, appliances or other services not related to delivery of electric service to the customer.

(c) The failure of a customer to pay a minimum periodic service charge incurred prior to the customer's request for service.

(d) The failure of customer or landlord to grant a right of way for utility lines other than those lines delivering electricity directly to the customer.

(e) The failure of the customer to give a lien upon any property, to secure payment for utility service, provided nothing in this section shall prevent a utility from requiring a security deposit consistent with this chapter and rules adopted by the Board.

20-1-104 STATEMENT OF TERMINATION POLICY (1) A current general statement of the utility's termination policy shall be posted in all local business offices of the utility, shall be made available upon request to all existing customers and shall be provided to all new customers when they initiate service. This statement must be written in clear and understandable language and must include the following information:

(a) The time allowed to pay outstanding bills:

(b) A statement that arrangements for installment payment of delinquent bills can be made at any time prior to termination of service;

(c) The title and telephone number of the utility employee to which inquiries and disputes may be directed;

(d) The time allowed to initiate a dispute;

(f) Instructions for designating elderly or handicapped status or a medical emergency;

(g) Instructions for designating the presence of special appliances essential for maintenance of health or safety.

(h) Details of the method of termination as described in 20-1-113.

(i) Availability of a copy of this chapter, regarding termination of service.

20-1-105 NOTICE PRIOR TO AND AT THE TIME OF TERMINATION

(1) A utility may not terminate service to any residential, firm, commercial, industrial or other customer unless written notice is served.

(2) The utility shall have an employee available during normal business hours to orally explain the utility's termination policy. The oral explanation must be available in both the Crow and English languages.

(3) Termination notice shall be served as follows:

(a) If no payment or request for installment payment is received within 20 days of mailing of a utility bill, the utility must send a second notice by personal service or certified mail (return receipt requested). The second notice must notify the customer that utility service will be disconnected if payment or arrangement for installment payments are not made. Service on the customer must be made at least ten days prior to the date of the proposed termination.

(b) A utility may terminate utility services upon serving written notice five business days prior to the proposed termination date when a customer:

(i) remits an insufficient funds check as payment to the utility after receiving the notice of termination, or

(ii) breaches a payment agreement made pursuant- to 20-1-115

(c) The provisions of (a) shall govern notice of termination to landlord customers, except that the first notice must be sent at least 30 days prior to the date of the proposed termination.

(d) The utility shall give written notice of the proposed termination for nonpayment to each residential unit reasonable Likely to be occupied by an affected tenant of a landlord customer subject to termination. Such notice shall not be rendered earlier than five business days following initial notification to the landlord customer. However, if the landlord
customer disputes the amount owing, such notice shall not be rendered until the dispute has been resolved. In no event shall such notice be served upon the tenants less than 15 days prior to the termination of service to the landlord customer on account of nonpayment. Upon affidavit, the Board may, for good cause shown by the utility, reduce the minimum time between notification of the landlord customer and notification of the tenants.

(c) Service to tenants shall not be terminated because of a landlord's delinquent account if the tenants or any of them agree to accept responsibility for all future changes. A utility must provide the tenant or tenants at least 30 days to pay any required security deposit if they assume responsibility for changes when the landlord's account is delinquent.

(d) Prior to termination of service the utility must make a diligent attempt to contact the customer, either in person or by telephone, to apprise him of the proposed action. If telephone or personal contact is not made, the utility employee shall leave notice in a place conspicuous to the customer that service will be terminated on the next business day unless the delinquent charges have been paid.

(4) When service is terminated, the utility employee terminating service shall leave notice upon the premises in a place conspicuous to the customer that service has been terminated which gives the address and telephone number of the utility where the customer may arrange to have service restored. The utility shall have personnel available after the time of termination and during normal business hours authorized to reconnect service if the conditions cited as grounds for termination are corrected to the utility 's satisfaction and upon payment of any reconnection charge specified in the utility's filed tariffs.

(5) The time required between notices and before termination of service are a minimum. A utility is free to give greater amounts of time.

20-1-106 CONTENTS OF WRITTEN NOTICE (1) The written notices required by these rules must contain:

(a) The utility's statement of termination policy;

(b) An identification of the customer and service account affected by the proposed termination;

(c) A statement of reasons for termination;

(d) The date of proposed termination;

(e) The amount of the reconnection fee, if any;

(f) A summary of rights and remedies, including procedures to dispute the termination notice, provisions relating to elderly and handicapped consumers and those suffering a medical emergency, provisions for customers who are unable to pay their bills and steps necessary to make a claim of inability to pay, availability of installment payment arrangements and sources of financial assistance.

(g) Designation of the bill in question as actual or estimated;

(h) Except for notification of tenants, amount owed and time period over which amount was incurred; -

(i) Instructions on how service can be restored;

(j) In the case of a landlord customer, the date on or after which the utility will notify tenants of the proposed termination.

(k) In the case of notification of tenants:

(i) The amount of an average monthly bill for utility service to the premises and the largest bill for utility service to the premises in the previous 12 months;

(ii) A statement that Board procedures and the Laws of The Crow Tribe may give the tenant certain rights with respect to which the tenant may wish to consult an attorney or Montana Legal Services.

20-1-107 GROUNDS FOR TERMINATION OF SERVICE WITHOUT WRITTEN NOTICE (l) A utility may terminate service without prior notice only:

(a) If a condition immediately dangerous or hazardous to life, physical safety or property exists;

(b) Upon order by the Crow Tribal Court, the Board or any other public authority authorized by the Crow Tribe.

(c) If such service is obtained fraudulently or without authorization of the utility.

20-1-108 CUSTOMER'S RIGHT TO DISPUTE A TERMINATION NOTICE

(1) Utilities must provide a reasonable procedure for customers and tenants to dispute the termination of service, If

the utility decides such a dispute against the customer, it must do so in writing and must advise the customer that he or she may appeal the decision to the Board. The utility may not terminate service until ten days after it renders a decision on the dispute.

(2) In its investigation of the proposed termination or during any hearing regarding the proposed termination, the Board may make inquiry of the parties as to the following matters, among others:

(a) The extent to which the customer lacks control over their source of money for payments, including such matters as the lateness of public assistance checks;

(b) Weather conditions;

(c) The existence of illness of residents in the affected residences;

(d) The ages of the persons residing in the affected units;

(e) The existence of, or potential for, termination of service by other companies.

(3) The Board may consider and give due weight to the above matters in any decision rendered on the appeal.

(4) The Board may order continuation of service pending appeal provided sufficient arrangements are made to insure payment for future service. -

20-1-109 TERMINATION NOTICE FOR NONPAYMENT - WHEN PROHIBITED (l) A notice of, termination of service may not be issued for nonpayment of a delinquent account if the entire amount is disputed by the customer and the customer is currently negotiating the dispute with the utility or has filed a complaint with the Board. A utility may, however, issue a notice of termination of service with respect to that portion of any delinquent account which is not disputed by the customer.

20-1-110 TERMINATION OF SERVICE DURING WINTER MONTHS
(1) During the period of November 1st to April 1st and on any day when the reported ambient air temperature at 8:00 a.m. is at or below freezing or if the U.S. Weather Service forecasts a snowstorm or freezing temperatures for the succeeding 24-hour period, no termination of residential service may take place if the customer establishes that he or she is unable to pay, or able to pay only in installments, that he or she or a member of the household is at least 62 years old or that he or she or a member of the household is handicapped.

(2) No termination of service may take place during the period of November 1st to April 1st except with specific prior approval of the Board.

20-1-111 MEDICAL EMERGENCIES (l) Service may not be terminated to a residence where a physician or local board of health certifies to the utility that the absence of service will aggravate an existing medical emergency of any permanent resident. All certifications must be in writing. The certificate must provide the name and address of the person with a medical emergency that would be aggravated by a termination of service and the office address and telephone number of the certifying physician or local board of health. All written certification must be signed by a physician or by a person with knowledge of the facts at the local board of health. A medical emergency certificate expires in 30 days, but may be renewed on a monthly basis.

(2) To avoid the burden of substantial arrearage at the end of the medical emergency, the utility and the customer, or a representative of the customer, shall negotiate an equitable payment plan that is reasonable and consistent with the customer's ability to pay. If the parties cannot reach a satisfactory agreement, either party may seek such an agreement through the Board.

20-1-112 TIME OF TERMINATION (l) Service shall not be discontinued on a day, or a day immediately preceding a day, when the services of the utility are not available to the general public for the purpose of reconnecting terminated service. Service may be terminated only between the hours of 8:00a.m.and 12:00 noon.

20-1-113 METHOD OF TERMINATION (1) Actual termination may not take place until one day after personal or telephone notice or, in the alternative, one business day after notice has been posted in a place conspicuous to the customer when the customer was not contacted personally or by phone.

(2) The utility's representative (employee) shall attempt to inform the occupant of the affected residence that service is to be discontinued. The employee shall present the occupant with a statement of charges due and shall request verification that the delinquent charges have not been paid or are not subject to a dispute previously registered with the utility or the Board. Upon the presentation of evidence which reasonably indicates that the charge has been paid or is subject to a dispute previously registered with the utility or the Board, service shall not be terminated.

(3) The employee shall be authorized to accept payment. If payment in full of all delinquent charges is tendered, service shall not be terminated.

(4) Payment may be tendered in any reasonable manner including personal check. Payment by personal check is not reasonable if the customer has paid the utility with checks returned for insufficient funds twice or more within the previous two years.

20-1-114 THIRD-PARTY NOTIFICATION (1) If a customer designates a third person to receive customer notifications of termination of service, the utility shall forward a duplicate of such notices to the designated third party. The third party so notified will not be liable for the account of the customer, unless he or she has agreed to be a guarantor for the customer.

(2) Each utility shall promptly, and in no event later than 90 days after the effective date of these rules, devise procedures reasonably designed to provide a voluntary system of third party notification for all customers. Such procedures shall be submitted by each company in writing to the Board. The Board may require, by a written notification, such modifications of a utility's procedures as it considers reasonably necessary to carry out the purposes of this rule.

20-1-115 PAYMENT ARRANGEMENTS (1) When a customer cannot pay a bill in full, the utility must continue to serve the customer if the customer and the utility can agree on a reasonable portion of the outstanding bill to be paid immediately, and the manner in which the balance of the outstanding bill shall be paid.

(2) In deciding on the reasonableness of a particular agreement, the utility shall take into account the customer's ability to pay, the size of the unpaid balance, the customer's payment history, and the amount of time and reasons why the debt is outstanding.

(3) If a customer fails to make the payment agreed upon by the date that it is due, the utility may, but is not obligated to, enter into a second such agreement.

(4) No such agreement or settlement shall be binding upon a customer if it requires the customer to forego any right provided for in these rules.

20-1-116 IDENTIFICATION OF LANDLORD CUSTOMERS

Utilities shall determine, prior to termination, whether the residence subject to termination is occupied by a tenant.

20-1-117 NOTICE TO BOARD OF TERMINATIONS AFFECTING TENANTS

(l) Notwithstanding anything contained elsewhere in this chapter, prior to any termination for nonpayment which would affect tenants, the utility shall notify the Board in writing of the proposed termination. Upon notice and investigation of such proposed termination, or during any hearing pursuant to the complaint procedures pursuant to 20-1-108, the Board may make inquiry of the parties as to the following matters, among others:

(a) The amount the tenants have paid to the utility in relation to the amount equal to one month's bill, and the arrearage on any earlier bill due from tenants;

(b) The number of vacant units in the building;

(c) The extent to which the tenants have control over their source of money for rent payments, including such matters as the lateness of public assistance checks, direct rent payments by the Welfare Department to the tenants' landlord, or participation by tenants' in a leased housing or rental assistance program;

(d) Whether the tenants are engaged in rent withholding against their landlord;

(e) The amount of payments recently received by the utility from the landlord and the size of the past due bill of the landlord;

(f) Whether the utility has pursued collection remedies, other than threatened termination of service, against the landlord;

(g) Weather conditions;

(h) The existence of illness of persons residing in the affected units;

(i) The ages of the persons residing in the affected units;

(j) The availability of other housing to the tenants; and

(4) The Board may order continuation of service for a period not to exceed 30 days to allow the tenants to make arrangements for service.

20-1-118 EXEMPTIONS (l) If hardships result from the application of any of this chapter, or if unusual difficulty is involved in complying with any of this chapter, application may be made by any utility to the Board for an exemption of the application of a particular provision. Such application shall be made on a case by case basis. The Board may not grant a general exemption to any provision of this chapter.

20-1-119 BOARD AUTHORIZED TO ADOPT RULES. (l) The Board is authorized to adopt rules to implement this chapter.

(2) The Board must send copies of any rules adopted to all electric utilities at least 30 days prior to the effective date. Service of the rules shall be made by certified mail (return receipt requested).

20-1-120 REMEDIES (l) Any person dissatisfied with any decision of the Board made pursuant to this chapter may seek review of the Board's decision, in the Crow Tribal Court. The Court shall affirm the decision of the Board if it is supported by substantial evidence and within the discretion of the Board.

(2) The Board and any customer or tenant harmed by a utility's failure to follow this chapter are each entitled to recover twice any actual damage but in no event less than twice the amount of a delinquent bill or other charge sought to be collected by the utility. The utility shall be barred from recovery of charge due at the time it takes action in violation of this chapter.

(3) The Court may order continuation or restoration of service during the pendency of any action. The Court may require a bond or other security to insure payment for future charges if it orders continuation or restoration service ex parte.

(4) The Court may award attorneys fees to the prevailing party in any action brought under this section.

Mont. Admin. R. 38.5.1410

Mont. Admin. R. 38.5.1410

Rule 38.5.1410 - TERMINATION OF SERVICE DURING WINTER MONTHS

(1) During the period November 1st to April 1st and on any day when the reported ambient air temperature at 8:00 a.m. is at or below freezing or if the U.S. Weather Service forecasts a snowstorm or freezing temperatures for the succeeding 24-hour period, no termination of residential service may take place if the customer establishes that he or she is unable to pay, or able to pay only installments, that he or she or a member of the household is at least 62 years old or that he or she or a member of the household is handicapped.

(2) No termination of service may take place during the period of November 1st to April 1st except with specific prior approval of the Commission.

Mont. Admin. R. 38.5.1410

NEW, 1980 MAR p. 650, Eff. 2/29/80.

Sec. 69-3-103, MCA, IMP, Sec. 69-3-102, MCA;

General Allotment Act, 24 Stat. 388 (1887)

Remedy by existing law not impaired.

SEC. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement.

Approved, February 4, 1887.

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

President authorized to allot land in severalty to Indians on reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

Distribution.

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

Provisos.

Allotment pro rata if lands insufficient.

Allotment by treaty or act not reduced.

Additional allotment of lands fit for grazing only.

Selection of allotments.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Improvements.

Proviso.

On failure to select in four years, Secretary of the Interior may direct selection.

Allotments to be made by special agents and Indian agents.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

Certificates.

Indians not on reservations, etc., may make selection of public lands.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Fees to be paid from the Treasury.

Patent to issue.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be

To be held in trust.

Conveyance in fee after 25 years.

Provisos.

Period may be extended.

Laws of descent and partition.

Negotiations for purchase of lands not alloted.

Lands so bought to be held for actual settlers if arable.

prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void.

Patent to issue only to person taking as homestead.

Purchase money to be held in trust for Indians.

And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

Religious organizations.

Indians selecting lands to be preferred for police, etc.

And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Citizenship to be accorded to allottees and Indians adopting civilized life.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Secretary of the Interior to prescribe rules for use of waters for irrigation.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

Lands excepted.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

Appropriation for surveys.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

Rights of way not affected.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

Southern Utes may be removed to new reservation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

Feb. 8, 1887.

CHAP. 120.—An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes.

Certain lands granted to New Orleans, Baton Rouge and Vicksburg R. R. Co. forfeited.
Vol. 16, p. 579.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the fifth day of January, eighteen hundred and eighty-one; and said lands are restored to the public domain of the United States.

Certain lands confirmed to New Orleans Pacific R. R. Co., assignee of New Orleans, Baton Rouge and Vicksburg R. R. Co.

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Proviso.
Lands of actual settlers at the time excepted.

When grant to be in effect.

SEC. 3. That the relinquishment of the lands and the confirmation of the grant provided for in the second sections of this act are made and shall take effect whenever the Secretary of the Interior is notified that

Crow Allotment Act, 41 Stat. 751 (1920)

a fee of $1 for executing each application of an alien for a visé and $9 for each visé of the passport of an alien: *Provided*, That no fee shall be collected from any officer of any foreign Government, or members of his immediate family, its armed forces, or of any State, district, or municipality thereof, traveling to or through the United States, or of any soldiers coming within the terms of the public resolution approved October 19, 1918 (Fortieth Statutes at Large, part 1, page 1014).

Fees for visé and application for.
Proviso.
Persons exempt.

Vol. 40, p. 1014.

SEC. 3. The validity of a passport or visé shall be limited to two years, unless the Secretary of State shall by regulation limit the validity of such passport or visé to a shorter period.

Validity limited.

SEC. 4. Whenever the appropriate officer within the United States of any foreign country refuses to visé a passport issued by the United States, the Department of State is hereby authorized upon request in writing and the return of the unused passport within six months from the date of issue to refund to the person to whom the passport was issued the fees which have been paid to Federal officials, and the money for that purpose is hereby appropriated and directed to be paid upon the order of the Secretary of State.

Return of passport fee if visé refused by foreign officer.

SEC. 5. Section 1 of the Act approved March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad" (Thirty-fourth Statutes at Large, part 1, page 1228), authorizing the Secretary of State to issue passports to certain persons not citizens of the United States is hereby repealed.

Authority to issue passports to persons not citizens repealed.
Vol. 34, p. 1228, repealed.

Approved, June 4, 1920.

June 4, 1920.
[S. 2890.]
[Public, No. 239.]

CHAP. 224.—An Act To provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be alloted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior) and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on

Crow Indian Reservation, Mont.
Allotment of unreserved lands on.
Distribution.

Titles subject only to tribal leases.

Trust patents for homesteads.
Vol. 24, p. 388.

Priority of selection.

the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians who are found to be competent may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement.

Proviso.
Patents in fee to competent Indians.

Homestead restrictions.

Conveyance by Indians to large landowners forbidden.

SEC. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

Conveyance void.

Punishment for accepting.

Classification and allotment.
Vol. 36, p. 859.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

Complete rolls of Tribe to be prepared.

SEC. 3. That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also, a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are living and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe living six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made. The rolls shall show the English, as well as the Indian, name of the allottee; the age, if living; the sex, whether declared competent or incompetent; the description or descriptions of the allotments; and any other fact deemed by the Secretary of the Interior necessary or proper. Said rolls shall be completed within one year after the approval of this Act, and allotments shall be completed within one year and six months from the date of the approval of this Act.

Made final allotment rolls.

Contents.

Completion.

Fraudulent names to be stricken off, etc.

SEC. 4. That any names found to be on the tribal rolls fraudulently, may, at any time within one year from the passage of this Act, be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, after giving all parties in interest a full opportunity to be heard in regard thereto; and any allotment made to such fraudulent allottee shall be canceled and shall then be subject to disposition under the provision of this Act: *Provided*, That nothing herein contained shall be construed to deprive

Proviso.
Protection of legal rights.

any such persons of the protection in the premises provided under existing law.

Agency, etc., reservations retained.

SEC. 5. That such of the unallotted lands as are now used for agency, school, cemetery, or religious purposes shall remain reserved from allotment so long as such agency, school, cemetery, or religious institutions, respectively, are maintained for the benefit of the tribe: *Provided*, That the Secretary of the Interior, upon the request of the tribal council, is hereby authorized and directed to cause to be issued a patent in fee to the duly authorized missionary board or other proper authority of any religious organization heretofore engaged in mission or school work on the reservation for such lands thereon as have been heretofore set aside and are now occupied by such organizations for missionary or school purposes: *Provided further*, That not more than six hundred and forty acres may be reserved for administrative purposes at the Crow Agency, and six tracts of not exceeding eighty acres each, in different districts on the reservation, may be reserved for recreation grounds for the common use of the tribe, or purchased from the tribal funds if no tribal lands are available, and all such lands shall be definitely described and made a matter of record by the Indian Office.

Provisos.
Fee patents to religious organizations, etc.

Agency and recreation lands reserved.

Mineral deposits reserved for tribal benefit.

Leases authorized.

SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however*, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further*, That at the expiration of fifty years from the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

Provisos.
Allotments with mineral reservations.

To become property of allottee after fifty years.

Appropriation for expenses.

SEC. 7. That there is hereby appropriated the sum of $50,000, or so much thereof as may be necessary, from any funds in the Treasury of the United States to the credit of the Crow Tribe of Indians not otherwise appropriated, for the purpose of making the surveys and allotments and for other expenses provided for herein.

Irrigable lands to pay irrigation charges.

SEC. 8. That any allotment, or part of allotment, provided for under this Act, irrigable from any irrigation system now existing or hereafter constructed by the Government on the said reservation, shall bear its pro rata share, computed on a per acre basis, of the cost of constructing such system: *Provided*, That no additional irrigation system shall be established or constructed by the Government for the irrigation of Indian lands on the Crow Reservation until the consent of the tribal council thereto has been duly obtained. All charges against allotments authorized by this section shall be reimbursed in not less than twenty annual payments, and the Secretary of the Interior may fix such operation and maintenance charges against such allotments as may be reasonable and just, to be paid as provided in rules and regulations to be prescribed by him. Unless otherwise paid, these latter charges may be paid from or made a charge upon his individual share of the tribal fund, when said fund is available for distribution; and if any allottee shall receive patent in fee to his allotment before the amount so charged against his land has been paid, such unpaid amount shall become and be a lien upon his allotment,

Proviso.
Consent of tribe required for additional project.

Payment of charges

of which a record shall be kept in the office of the superintendent of the reservation at the agency; and should any Indian sell any part of his allotment, with the approval of the Secretary of the Interior, the amount of such unpaid charges against the land so sold shall remain a first lien thereon, and may be enforced by the Secretary of the Interior by foreclosure as a mortgage. All expenditures for irrigation work on the Crow Reservation, Montana, heretofore or hereafter made, are hereby declared to be reimbursable under such rules and regulations as the Secretary of the Interior may prescribe and shall constitute a lien against the land benefited, regardless of ownership, and including all lands which have heretofore been sold or patented. All patents or other instruments of conveyance hereafter issued for lands under any irrigation project on the said Crow Indian Reservation, whether to individual Indians or to purchasers of Indian land, shall recite a lien for repayment of the irrigation charges, if any, remaining unpaid at the time of issuance of such patent or other instrument of conveyance, and such lien may be enforced or, upon payment of the delinquent charges, may be released by the Secretary of the Interior. In the case of lands under any project purchased in the bona fide belief on the part of the purchaser that by his purchase he acquired a right to have water from the system for the irrigation of the land purchased by him in the same manner as the Indian owner, the Secretary may, after notice to the Indians interested, determine the value of the land at the time of the purchase from the Indian, and give to the purchaser or his assigns credit on the charge for construction against the land to the amount of the difference between the price paid and the value as so determined, and shall withhold for the benefit of the tribe from the Indian or Indians of whom the purchase was made, an equal amount from any funds which may be due or distributable to then hereunder. Delivery of water to such land may be refused, within the discretion of the Secretary of the Interior, until all dues are paid: *Provided*, That no right to water or to the use of any irrigation ditch or other structure on said reservation shall vest until the owner of the land to be irrigated shall comply with such rules and regulations as the Secretary of the Interior may prescribe, and he is hereby authorized to prescribe such rules and regulations as may be deemed reasonable and proper for making effective the foregoing provisions: *Provided, however*, That in no case shall any allottee be required to pay either construction, operation, or maintenance charges for such irrigation privileges, or any of them, until water has been actually delivered to his allotment: *Provided further*, That the Secretary of the Interior shall cause to be made immediately, if not already made, an itemized statement showing in detail the cost of the construction of the several irrigation systems now existing on the Crow Indian Reservation separately, the same to be placed at the Crow Agency, and with the Government farmers of each of the districts of the reservation, for the information of the Indians affected by this section.

Irrigation expenditures reimbursable.

Lien for charges to be recited in patents.

Purchasers believing Indian right of water acquired.

Credit allowed.

Right to water subject to compliance with rules, etc.

No payment until delivery of water.

Detailed statement of construction costs to be made, etc.

Intoxicants prohibited.

SEC. 9. That lands within said reservation, whether allotted, unallotted, or otherwise disposed of, shall be subject to all laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country until otherwise provided by Congress.

Water power reservations.

SEC. 10. That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians.

Trust funds disposition under former Act, repealed.

Vol. 33, p. 357, repealed.

SEC. 11. That so much of article 2 of the Act of April 27, 1904, entitled "An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect" (Thirty-third Statutes, page 353), as

relates to the disposition of the trust funds of the tribe at the expiration of the fifteen-year period named in the Act, to the purchase of cattle, to the distribution of cattle among the Indians of the reservation, to the purchase of jackasses, stallions, and ewes, to the building of fences, the erection of schoolhouses and hospitals, the purchase of additional cattle or sheep, the construction of ditches, dams, and canals, and to the establishment of a trust fund for the benefit of the Crow Indians thereunder, be, and the same is hereby, repealed, effective from and after June 30, 1920: *Provided*, That all unexpended balances of trust funds arising under said agreement shall thereupon be consolidated into one fund to the credit of the tribe, the same to bear interest at the rate of 4 per centum per annum: *Provided further*, That there shall be reserved and set aside from such consolidated fund, or any other funds to the credit of the tribe, a sufficient sum to pay the administrative expenses of the agency for a period of five years; $100,000 for the support of the agency boarding school; $50,000 for the support of the agency hospital, and not to exceed $4,000 of this amount shall be expended in any one year for the support of said hospital; and $50,000 for a revolving fund to be used for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, under conditions to be prescribed by the Secretary of the Interior for its repayment to the tribe on or before June 30, 1925: *Provided further*, That the expenditure of the sums so reserved are hereby specifically authorized, except those for administrative expenses of the agency, which shall be subject to annual appropriations by Congress: *Provided further*, That after said sums have been reserved and set aside, together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distributed per capita to the Indians entitled: *Provided further*, That the Secretary of the Interior is hereby authorized to permit competent Indians who have received patents in fee and other Indians who have demonstrated their ability to properly care for live stock to withdraw their pro rata share of cattle out of the tribal herd within one year after the approval of this Act, under such rules and regulations as the Secretary of the Interior may prescribe and on condition that said Indians shall execute a stipulation relinquishing all their right, title, and interest in said tribal herd thereafter: *Provided further*, That any Indian who has received his share of live stock in accordance with the above provision and who has also demonstrated his ability to properly care for and handle live stock may also be permitted to withdraw the pro rata shares of his wife and minor children under the same rules and regulations as applied to the live stock already issued to him and on condition that such cattle be branded with the individual brands of his wife and minor children, which shall be recorded in the names of the respective members of his family. It shall be the duty of the superintendent of the Crow Reservation to observe closely the manner in which such stock are handled and cared for, and in case of failure or neglect to properly care for the same the Secretary of the Interior is authorized to take charge of such shares and sell them for the benefit of the individual owners, to whose credit the proceeds of the sale shall be placed, or return them to the tribal herd or handle them with tribal cattle for the minor or incompetent owners and charge a fee to cover the cost of caring for such live stock.

Provisos.
Consolidation of all trust funds balances.

Reservation for designated tribal expenses.

Expenditures authorized hereby.

Per capita distribution of balances undisposed of.

Competent Indians may withdraw pro rata share of tribal herd cattle.

Family share also.

Superintendent to supervise sales, etc.

SEC. 12. That upon the approval of this Act the Secretary of the Interior shall forthwith appoint a commission consisting of three persons to complete the enrollment of the members of the tribe as herein provided for, and to divide them into two classes, competents and

Enrollment commission to be appointed.

Composition.

incompetents, said commission to be constituted as follows: Two of said commissioners shall be enrolled members of the Crow Indian Tribe and shall be selected by a majority vote of three delegates from each of the districts on the Crow Reservation; and one commissioner shall be a representative of the Department of the Interior, to be selected by the Secretary of the Interior. Said commission shall be governed by regulations prescribed by the Secretary of the Interior, and the classification of the members of the tribe hereunder shall be subject to his approval. That within thirty days after their appointment said commissioners shall meet at some point within the Crow Indian Reservation and organize by the election of one of their number as chairman. That said commissioners shall then proceed personally to classify the members as above indicated. They shall be paid a salary of not to exceed $10 per day each, and necessary expenses while actually employed in the work of making this classification, exclusive of subsistence, to be approved by the Secretary of the Interior, such classification to be completed within six months from the date of organizing the commission.

Duties, etc.

Salary and expenses.

Homesteads. Trust patents for.

SEC. 13. That every member of the Crow Tribe shall designate as a homestead six hundred and forty acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee: *Provided*, That the trust period on such homestead allotments of incompetent Indians may be extended in accordance with the provisions of existing law: *Provided further*, That any Crow Indian allottee may sell not to exceed three hundred and twenty acres of his homestead, upon his application in writing and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe: *And provided further*, That said land to be sold by said Indian allottee shall not exceed more than one-half of his irrigable nor more than one-half of his agricultural land and shall not include the improvements consisting of his home.

Provisos. Extension of trust period.

Sale of one-half authorized.

Restriction.

Exchanges of allotments permitted.

SEC. 14. That exchanges of allotments by and among the members of the tribe may be made under the supervision of the Secretary of the Interior with a view to enabling allottees to group their allotted lands on the Crow Reservation, but always with due regard for the value of the lands involved. And in cases where patents have already been issued for such allotments proper conveyance shall be made back to the United States by the allottee, whereupon the land shall become subject to disposition in the same manner as other lands under the provisions of this Act.

Sales of allotments to soldiers, etc., serving in World War, etc.

SEC. 15. That the Secretary of the Interior be, and he is hereby, authorized to sell allotted and inherited Indian land held in trust by the United States on the Crow Reservation, Montana, with the consent of the Indian allottee or the heirs, respectively, to any soldier, seaman, or marine who served under the President of the United States for ninety days during the late war against the Imperial German Government, or in any war in which the United States was engaged with a foreign power, or in the Civil War, who will actually settle on said land, on annual payments covering a period not to exceed twenty years, as may be agreed upon under such rules, regulations, and conditions as the said Secretary of the Interior may prescribe and in accordance with the provisions of this Act.

Actual settlement, etc., required.

Montana. School sections granted to.

SEC. 16. That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the

Lieu lands for allotments.

approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided*, That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State.

Appropriation for.

Provisos.
Mineral rights reserved.

Admission of Indian pupils.

SEC. 17. That the Secretary of the Interior (with the approval of the Crow Tribal Council) is authorized to set aside for administrative purposes (at the Crow Agency and at Pryor subagency) such tracts for town-site purposes as in his opinion may be required for the public interests, not to exceed eighty acres at each town site, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is authorized also to set apart and reserve for school, park, and other public purposes not more than ten acres in said town sites; and patents shall be issued for the lands so set apart and reserved for school, park, and other purposes to the municipality or school district legally charged with the care and custody of lands donated for such purposes: *Provided, however*, That the present park at Crow Agency shall not be included in such town site or be subject to such disposition. The purchase price of all town lots sold in town sites shall be paid at such time as the Secretary of the Interior may direct and placed to the credit of the Crow Tribe of Indians.

Town sites.
Reservations authorized for public uses at.

Proviso.
Agency park excluded.
Proceeds to tribal credit.

SEC. 18. That the sum of $10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *Provided*, That not to exceed $2,500 shall be expended in any one fiscal year.

Approved, June 4, 1920.

Appropriation for council expenses, etc., from tribal funds.

Committee to Washington.

Proviso.
Limit.

June 4, 1920.
[H. R. 1024.]
[Public, No. 240.]

CHAP. 225.—An Act Authorizing the Secretary of the Interior to issue a patent to John Zimmerman for certain lands in the Colorado National Forest upon the surrender of other lands of an equal acreage also located in the Colorado National Forest, Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to issue a patent to John Zimmerman for the following-described lands: The north half of the southwest quarter of the southeast quarter of section thirty-two; the south half of the southeast quarter of the southeast quarter of section thirty-three, township nine north, range seventy-four west of the sixth principal meridian; and the north half of the north half of the northeast quarter of the northwest quarter of section four, township eight north, range seventy-four west of the sixth principal meridian, upon the transfer by the said John Zimmerman to the United States of the following-described lands: The northeast quarter of the north-

Colorado National Forest, Colo.
Exchange of lands with John Zimmerman.
Descriptions.

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2021, I electronically filed the foregoing *Brief of Tribal Appellees* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case were registered CM/ECF users at the time of this filing, and service will be accomplished by the appellate CM/ECF system.

Dated this 20h day of October, 2021.

Respectfully submitted,

/s/ Melody L. McCoy
Melody L. McCoy