No. 15-779

In The
Supreme Court of the United States

CROW ALLOTTEES, ET AL.,

*Petitioners*,

v.

UNITED STATES; STATE OF MONTANA; AND APSAALOOKE (CROW) TRIBE.

*On Petition for a Writ of Certiorari to the Supreme Court of Montana*

# BRIEF OF THE APSAALOOKE (CROW) TRIBE AND STATE OF MONTANA IN OPPOSITION

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## QUESTION PRESENTED

Whether the Montana Supreme Court correctly affirmed the Montana Water Court's decision dismissing Petitioners' objections to the Crow Tribe-Montana Water Rights Compact.

## PARTIES TO THE PROCEEDING

Petitioners are members of the Apsaalooke (Crow) Tribe who objected to the Crow Tribe-Montana Water Rights Compact in the Montana Water Court.

The Apsaalooke (Crow) Tribe, the State of Montana, and the United States are the parties to the Compact. The Tribe and the United States moved to dismiss Petitioners' objections in the Montana Water Court.

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## STATEMENT

This case concerns the Montana Water Court's approval of the Crow Tribe-Montana Water Rights Compact—a water-rights settlement between the Apsaalooke (Crow) Tribe, the State of Montana, and the United States. Petitioners, a small subset of enrolled members of the Tribe who hold allotted land on the Tribe's reservation, objected to the Compact. The Montana Water Court dismissed Petitioners' objections, finding that they fell outside the scope of review permitted by its precedent and, in any event, were contrary to this Court's straightforward explication of allottee water rights in *United States v.*

*Powers*, 305 U.S. 527 (1939). The Montana Supreme Court affirmed.

### A. Factual Background

1. For three centuries, the Crow Tribe has occupied land in what is now Montana. In 1851, the First Treaty of Fort Laramie identified approximately 38.5 million acres as Crow territory. In 1868, the Second Treaty of Fort Laramie established the Tribe's roughly 8-million-acre reservation, since diminished to 2.3 million acres. *Montana v. United States*, 450 U.S. 544, 547-548 (1981).

A portion of the Crow Reservation remains allotted under the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act, Act of June 4, 1920, ch. 224, 41 Stat. 751. The General Allotment Act "authorized the President of the United States to allot agricultural or grazing land to individual tribal members residing on a reservation." *United States v. Navajo Nation*, 537 U.S. 488, 504 (2003). Because "[t]he policy of allotment of Indian lands quickly proved disastrous for the Indians," it was discontinued in the 1930s. *Hodel v. Irving*, 481 U.S. 704, 707-708 (1987).

Under *Winters v. United States*, 207 U.S. 564 (1908), the creation of the Tribe's reservation necessarily reserved water rights sufficient to accomplish the purposes of the reservation. In *Powers*, this Court held that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the

owners." 305 U.S. at 532. Section 7 of the General Allotment Act authorizes the Secretary of the Interior "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." Ch. 119, § 7, 24 Stat. at 390 (codified at 25 U.S.C. § 381).

**2.** In 1999, long-running litigation and negotiation between the Tribe, the State, and the United States over the quantification of the Crow Tribe's water rights culminated in the Crow Tribe-Montana Water Rights Compact. *See* MONT. CODE ANN. § 85-20-901, art. I. As relevant here, the Compact satisfies the Crow Tribe's claim to reserved water rights under *Winters* with a defined "Tribal Water Right." *Id.* art. III, *see also id.* art. VII.C. The Compact also preserves each allottee's entitlement under Section 7 of the General Allotment Act to distribution of a "just and equal portion of the Tribal Water Right." *Id.* art. IV.B.1. Those rights are to be administered and enforced by the Secretary of the Interior, pending the Crow Tribe's adoption of a tribal water code. *Id.* art. IV.A.2.b.

The Compact specifies that it "shall become [e]ffective on the date it is ratified by the Tribe, by the State, and by the Congress of the United States, whichever date is latest." MONT. CODE ANN. § 85-20-901, art. VII.A.1. In addition, the Compact directs the Tribe, the State, or the United States to "file, in the [pending] general stream adjudication initiated by the State of Montana, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of *** [a] decree of the water rights held by the United States

in trust for the Crow Tribe," as set forth in the Compact. *Id.* art. VII.B.2.

**3.** The State of Montana enacted legislation ratifying the Compact, MONT. CODE ANN. § 85-20-901, and the Crow Tribe ratified the Compact by a vote of its members, Pet. App. 4. The United States—acting in its capacity as trustee "for the benefit of the Tribe and allottees"—"authorized, ratified and confirmed" the Compact in the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, §§ 402(1)(B), 404(a)(1), 124 Stat. 3097, 3097, 3099.

The Settlement Act codifies numerous provisions of the Compact into federal law. In particular, the Act adopts the definition of "Tribal Water Rights" set forth in the Compact, § 403(17), 124 Stat. at 3099, and specifies that such rights "shall be held in trust by the United States for the use and benefit of the Tribe and the allottees," § 407(c)(1), 124 Stat. at 3104.

With respect to allottees, the Settlement Act expresses "the intent of Congress to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act." § 407(a), 124 Stat. at 3104. The Act provides that "[a]llottees shall be entitled to a just and equitable allocation of water," which "under Federal law shall be satisfied from the tribal water rights." § 407(d)(2)-(3), 124 Stat. at 3105. The Act also extends the application of the General Allotment Act's water-rights provision and authorizes the Secretary of the Interior "to protect the rights of allottees." § 407(d)(1), (4)-(6), 124 Stat. at 3104-3105.

The Settlement Act withholds federal enforcement of the Compact, however, pending the Secretary of the Interior's publication of a Federal Register notice acknowledging, *inter alia*, that "the Montana Water Court has issued a final judgment and decree approving the Compact." § 410(e)(1)(A)(i), 124 Stat. at 3112; *see also* § 403(7), 124 Stat. at 3098 (defining "final"). Failure of the Secretary to do so by March 31, 2016, or any extended deadline agreed to by the Secretary and the Tribe (with reasonable notice to the State), results in the repeal of the Act. § 415(1), 124 Stat. at 3121.

### B. Procedural History

1. To effectuate the Compact, the Tribe, the State, and the United States filed in the Montana Water Court a motion for entry of a final decree. *See* MONT. CODE ANN. § 85-20-901, art. VII.B.2; Pet. App. 6. As required by Montana law, the Water Court issued a preliminary decree containing the terms of the Compact, provided notice to thousands of individuals and the general public, and in return received approximately 100 objections. Pet. App. 6, 23; *see also* MONT. CODE ANN. §§ 85-2-231 to -235 (providing procedure for approving water compact).

Petitioners, 58 enrolled members of the Crow Tribe who hold trust allotments, were among the objectors. Pet. App. 23-24. Each of their objections, filed in template form, asserted "an ownership interest in an Indian reserved water right appurtenant to the objector's allotment." *Id.* at 24. Based on that asserted right, Petitioners claimed that the Compact could not be ratified without

quantification of their existing allottee rights in a "current use list," and that they "were entitled to but did not receive proper legal representation during the Compact negotiation process." *Id.*

In addition, certain Petitioners stated as follows:

> 1. The allottees/objectors did not receive adequate notice of the Compact or the preliminary decree of the Compact issued by this Court.
>
> 2. The allottees/objectors did not receive adequate technical or legal assistance from their trustee, the United States.
>
> 3. The allottees/objectors were not asked to participate in the development of the current use list of Indian reserved water rights appurtenant to allotment lands.
>
> 4. Their Indian reserved rights will be harmed by subordination to other rights.
>
> 5. The Montana Water Court does not have jurisdiction to adjudicate the Indian reserved rights claimed by the allottees.
>
> 6. The Crow Nation reserved water rights and individual allottees' reserved water rights are not the same.
>
> 7. The individual allottees' reserved water rights cannot be considered part of the preliminary decree issued by this Court.

Pet. App. 24-25.

The United States and the Crow Tribe separately moved to dismiss Petitioners' objections. Collectively, they argued that the objections were not subject to review by the Water Court in the first instance, and that Petitioners' characterization of their water rights and claims of injury lacked merit under *Powers*, the Settlement Act, and other authorities. Pet. App. 25-26.

**2.** The Montana Water Court determined that it had jurisdiction to review the Compact "under the authority granted by the McCarran Amendment of 1952," Pet. App. 29 (citing 43 U.S.C. § 666), granted the motions, and dismissed Petitioners' objections. It identified six reasons for doing so.

*First*, the Water Court determined that Petitioners possess "a right to use an equitable portion of the Tribe's *Winters* rights, but not an ownership interest in them." Pet. App. 34. The Water Court reached that conclusion under *Powers*, which held that allottees have a "right to use some portion of tribal waters essential for cultivation." 305 U.S. at 532. In the Water Court's view, that language establishes "that the right of allottees to use water is derived from the Tribe's *Winter* rights," and "that although allottees receive a right to use *Winters* rights, they do not have an ownership interest in them." Pet. App. 32. Congress "codifie[d] [that] federal common law" when it approved the Compact. *Id.* at 33.

*Second*, the Water Court found that, although federal law ordinarily makes the Secretary of the Interior "responsible for allocating water to allottees,"

"[t]hat responsibility is delegated to the Crow Tribe by the Compact" once the tribal water code is in force. Pet. App. 34. In discharging that responsibility, the Tribe is precluded from "depriv[ing] allottees of rights to usage provided by federal law." *Id.* at 35-36.

*Third*, the Water Court held that both Petitioners and the United States "agree the allottees were represented [in negotiations over the Compact], with disagreement over the adequacy of that representation." Pet. App. 38. That conclusion followed from the allottees' assertion that "the representation they received from the United States during the Compact negotiation process was not adequate" and the United States' response that it in fact "represented the allottees as their trustee." *Id.*[1]

*Fourth*, given that Petitioners were represented parties to the negotiation, the Water Court held that "allottees' objections are a collateral attack on an

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[1] During the Water Court's consideration of their objections, Petitioners filed a separate action in the U.S. District Court for the District of Montana, alleging that the United States did not adequately represent them in Compact negotiations, in violation of federal trust obligations. On the same day, Petitioners filed a motion to stay in the Water Court. *See Crow Allottees Ass'n v. United States Bureau of Indian Affairs*, No. 14-cv-62-BLG-SPW, 2015 WL 4041303, at *5-*6 (D. Mont. June 30, 2015) (granting federal defendants' motion to dismiss); *see also Crow Allottees Ass'n v. McElya*, No. 14-cv-62-BLG-SPW, 2015 WL 4544508, at *1 (D. Mont. July 27, 2015) (granting Montana Water Court judges' motion to dismiss). In dismissing Petitioners' objections, the Water Court also dismissed as moot Petitioners' motion to stay proceedings pending federal court adjudication of that trust claim. Pet. App. 52.

agreement" that could not be countenanced. Pet. App. 38. It explained that the "balancing of interests was addressed by the parties themselves during the negotiation process and reviewed at numerous levels by representatives of those parties after the Compact was finalized." *Id.* at 43-45. As such, Water Court precedent limited a compacting party's objections to an allegation that the compact was the "product of fraud or overreaching by, or collusion between the negotiating parties." *Id.* at 39. (citation and quotation marks omitted). Because Petitioners' objections went beyond those subjects, they were subject to dismissal. *Id.* at 42.

*Fifth*, the Water Court concluded that Petitioners were not entitled to personal notice of the preliminary decree. Notice had been provided to more than 16,000 water users and published in multiple newspapers of general circulation, as specified by Montana law. Beyond that statutorily required notice, the Water Court had held public meetings throughout the Compact area. Pet. App. 46-47.

*Sixth*, the Water Court determined that the Compact could be approved without first quantifying allottees' water rights. "[N]o requirement in case law or statute" mandated "that a Compact separately quantify the allottees' rights to use of [the Crow Tribe's] water." Pet. App. 48.

**3.** Petitioners appealed the Water Court's judgment of dismissal to the Montana Supreme Court. They identified three issues for review: (1) whether the Water Court applied the proper

standard of review; (2) whether the Water Court exceeded its jurisdiction in dismissing the objections; and (3) whether the Water Court erred in concluding that Petitioners' water rights derive from the Crow Tribe's, that the United States adequately represented Petitioners during Compact negotiations, and that there was no need to quantify allottees' rights or current use prior to approving the Compact. Pet. App. 3.

The Montana Supreme Court rejected each claim of error.

As to the standard of review, the court held that there was no need to assume the truth of Petitioners' factual allegations, as in a traditional civil case. Unlike "Rule 12(b)(6) jurisprudence," Montana law specifies that "a properly filed claim of water right" like the Compact "constitutes prima facie proof of its content until the issuance of a final decree." Pet. App. 12-13 (citation and internal quotation marks omitted).

As to jurisdiction, the court concluded that the McCarran Amendment "specifically allows state courts to adjudicate federal and Indian reserved water rights," as Petitioners acknowledged. Pet. App. 13. The court rejected the contention that the Water Court failed to apply federal law in resolving the objections. *Id.* at 14.

The Montana Supreme Court also rejected the argument that the Water Court exceeded its jurisdiction when it dismissed Petitioners' objections as not raising allegations of fraud, collusion, or overreaching. Pet. App. 15. Consistent with

Petitioners' filing of a separate federal court action, the Montana Supreme Court noted that the adequacy of the United States' representation of allottee interests during compact negotiations was "not an issue that the Water Court can resolve." *Id.* at 16. In the Montana Supreme Court's view, the Water Court "applied the fraud or collusion analysis" without "determin[ing] whether the United States breached a fiduciary duty to [Petitioners]." *Id.*[2]

As to the merits, the Montana Supreme Court determined that the Water Court correctly applied *Powers* in holding that Petitioners' water rights derived from the Crow Tribe's reserved water rights and that Petitioners are entitled to a "just and equitable share" of those rights. Pet. App. 14, 18. The Montana Supreme Court further agreed that "there is no requirement that the specific water rights or claims of these Allottees be quantified as a precondition to implementing the Compact." *Id.* at 19.

## REASONS FOR DENYING THE PETITION

In an attempt to revive their objections to the Crow Tribe-Montana Water Rights Compact, Petitioners raise two issues: (1) whether the Water Court had jurisdiction to decide questions of federal law related to allottees' rights; and (2) whether the Water Court's interpretation of this Court's decision

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[2] The Montana Supreme Court also upheld the Water Court's refusal to stay proceedings pending federal court resolution of the trust claim. Pet. App. 16-17, 19; *see* note 1, *supra*.

in *Powers* was correct. Pet. i. Neither issue warrants this Court's review.

The Montana decisions below are correct and do not conflict with any decision of this Court or any other court. Having failed to persuade the Water Court to sustain their objections, Petitioners now ask this Court to vacate the Water Court's adverse ruling for lack of jurisdiction. But as Petitioners readily admit, the McCarran Amendment, as interpreted by this Court, provides the Water Court with jurisdiction to decide questions of federal law relating to allottee water rights. Petitioners do not allege any conflict on that legal point. Any suggestion that the Water Court exceeded its jurisdiction on the facts of this case—in particular, by purportedly deciding the adequacy of the United States' representation of Petitioners in Compact negotiations (Pet. 15)—is belied by the record.

On the merits, Petitioners' interpretation of water rights is unmoored from federal law and precedent. Contrary to Petitioners' assertion, this Court's decision in *Powers* explicitly holds that an allottee's water right is a "right to use some portion of tribal water[]" rights. 305 U.S. at 532. None of the authorities cited in the Petition—including the Ninth Circuit's underlying decision in *Powers*—suggests that an allottee's water right bears no relation to a tribe's water right. Nor do Petitioners point to any authority precluding the Compact's provision of a "just and equal" share of the Crow Tribe's water right. That standard has been used to distribute water to allottees since the United States initiated its allotment policy more than a century ago. The

Compact's continued use of that standard—especially in light of the additional safeguards provided to allottees by Congress—does not transform or diminish Petitioners' rights, or otherwise cede them to the Crow Tribe.

In any event, Petitioners fail to challenge an independent basis for affirmance: the courts below held that Petitioners, as parties to the Compact negotiations represented (even if inadequately) by the United States as their trustee, can challenge the Compact in Water Court only as the product of fraud, collusion, or overreaching. None of Petitioners' objections fall into that category. That additional obstacle, which Petitioners do not address in this Court, alone makes this case unsuitable for further review.

## I. THE DECISIONS BELOW ARE CORRECT AND DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT

According to Petitioners, two flaws in the decisions below require this Court's intervention: (1) the Montana Water Court lacked jurisdiction "to make legal determinations regarding Allottees' federal claims"; and (2) the Montana Water Court incorrectly held that Petitioners' water rights derive from the Crow Tribe's reserved water right. Pet. 10, 16 (capitalization omitted). Both arguments lack merit, and no authority contradicts the decisions below.

### A. The Water Court Had Jurisdiction To Resolve Petitioners' Objections

As Petitioners concede (Pet. 12), "[t]he McCarran Amendment waives the sovereign immunity of the United States in state adjudications of reserved water rights, including Indian reserved water rights," and "vests the Water Court with concurrent jurisdiction to adjudicate federal water rights reserved to the Crow Indians." *See* 43 U.S.C. § 666; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976) ("We conclude that the state court had jurisdiction over Indian water rights under the Amendment."). Petitioners further concede (Pet. 18) that, in exercising jurisdiction under the McCarran Amendment, the Water Court is "solemn[ly] obligat[ed] to follow federal law." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983); *see Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 765-766 (Mont. 1985) ("We hold that state courts are required to follow federal law with regard to [Indian reserved] water rights.").

As the Montana Supreme Court observed, that is precisely what the Water Court did below:

> [T]he Water Court expressly applied federal law in its consideration of the Allottees' arguments that they have water rights that are "distinct from the Crow Tribe's reserved right." The Water Court applied *Powers* to determine that the Allottees' have water rights that are derived from the reserved rights of the

> Crow Tribe, and that they are entitled to use a just and equitable share of the Tribe's rights.

Pet. App. 14.

Petitioners' insistence that "[o]nly a federal court with jurisdiction over federal questions can properly decide the legal issues underlying Allottees' objections," Pet. 13 (citation and quotation marks omitted), makes no legal or logical sense. As just explained, it is well established that the McCarran Amendment empowers the Water Court to apply federal law in adjudicating federal reserved water rights. That necessarily includes resolving objections based on the "nature of [allottees'] water rights vis-à-vis the Crow Tribe." *Id.* at 14 (citation and quotation marks omitted). If it were otherwise, no predicate "state court decision alleged to abridge Indian water rights protected by federal law" could be "brought for review before this Court." *San Carlos Apache Tribe*, 463 U.S. at 571.[3]

Indeed, Petitioners' reliance on *San Carlos Apache Tribe* for their argument (Pet. 15) that "the Montana Supreme Court failed to follow the controlling federal law" reinforces—rather than

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[3] Federal law and Petitioners' argument before the Water Court reinforce that conclusion. *See* Settlement Act, Pub. L. No. 111-291, § 410(e)(1)(A)(i), 124 Stat. at 3112 (contemplating that Compact will be effective when "the Montana Water Court has issued a final judgment and decree approving the Compact"); Pet. App. 44 (discussing Petitioners' argument that Montana Revised Code § 85-2-233 entitles them to pursue their objections despite being a represented party).

undermines—the Water Court's jurisdiction to apply federal law, subject to this Court's review. Petitioners ultimately acknowledge that fact in arguing that "[t]his case, in which the Montana Supreme Court has erred in interpreting *federal law* to find Allottees have no vested property rights, invokes this Court's particular and exacting scrutiny to safeguard the Allottees' property rights." *Id.* at 17 (emphasis added). At bottom, Petitioners seek to vindicate their view of allottee water rights under federal law, not vacate the unfavorable adjudication of their objections.

To be sure, the McCarran Amendment's conferral of concurrent state-court jurisdiction does not reach the claim that the United States breached its fiduciary responsibility to Petitioners. But Petitioners are wrong to suggest (Pet. 15) the Water Court "determined that the United States adequately represented the Crow Allottees." The courts below explicitly distinguished between the *fact* and *adequacy* of representation, and made clear that the latter was not broached. *See* Pet. App. 16 (holding that "[t]he Water Court determined only that the Allottees were represented by the United States, which they do not deny, and that this representation determined the level of scrutiny," and agreeing that "only the United States District Court can determine whether the United States breached a fiduciary duty"); *id.* at 38 (noting that disagreement is over "the adequacy of that representation," not the fact of representation).

### B. Allottees Hold A Right To A Just And Equal Distribution Of Water That Is Protected By The Compact

Although Petitioners maintain that "[t]his proceeding is properly framed for this Court to determine the extent and precise nature of Allottees' rights in Indian reserved water rights," Pet. 17 (internal quotation marks omitted), the specific legal principles that Petitioners advance here have been rejected by this Court, Congress, and commentators. The Montana courts below correctly applied that established law to the facts of this case.

**1.** The Montana Supreme Court's conclusion (Pet. App. 14) that Petitioners are entitled to use a portion of the Crow Tribe's water rights follows directly from this Court's decision in *United States v. Powers*, 305 U.S. 527. In that case, the United States sought to enjoin the diversion of water by non-Indian fee owners of former Crow Tribe allotments created under various allotment acts. The Court held that, because the allotments were created with agricultural use in mind and water was necessary to that use of the land, the United States could not "den[y] [the allottees] participation in the use of waters essential to farming and home making." 305 U.S. at 532-533.

Critically, in reaching that conclusion, the Court explained that the water right that had "passed to the owners" of the allotments was originally "reserved for the equal benefit of [Crow Tribe] members" under *Winters*. *Powers*, 305 U.S. at 532. As such, the scope of the allottees' rights was for "*use*

[of] some portion of *tribal waters*." *Id.* (emphasis added).

That reasoning defines Petitioners' rights in a key respect: "allottees' water rights *** derive from tribal rights." 1-19 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[8][a] (Nell Jessup Newton ed., 2012). As the decision below puts it, "the Allottees have water rights that are derived from the reserved rights of the Crow Tribe." Pet. App. 14.[4]

Although Petitioners elsewhere deny (Pet. 23) any dispute over the Crow Tribe's "ownership of the corpus of the water" or the Tribe's "right to administer the water rights within the boundaries of the Crow Reservation," they nonetheless claim (Pet. 16) that "[t]he decision below cannot be reconciled with this Court's precedent." Rather than apply this Court's decision in *Powers*, however, Petitioners rely principally on the Ninth Circuit's underlying decision in that case. In their view, the Ninth Circuit "articulated *** the parameters of an Allottee's property interest in *Winters* reserved water rights" (Pet. 21) in stating "that the waters were reserved to individual Indians and not to the tribe," and that "under the treaty of 1868 each member of the Crow Tribe secured a vested right in the use of sufficient

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[4] The Compact carries that construct forward. *See* Settlement Act, Pub. L. No. 111-291, § 407(d)(2), 124 Stat. at 3105 ("Any entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights."); MONT. CODE ANN. § 85-20-901, art. IV.B.1 (providing for distribution of a "portion of the Tribal Water Right").

water to irrigate his irrigable land." *United States v. Powers*, 94 F.2d 783, 784-785 (9th Cir. 1938).

Petitioners' reliance is misplaced. The quoted passage is drawn from the Ninth Circuit's recital of the *district court's* conclusions and does not constitute the Ninth Circuit's reasoning. But even if the district court's holding had been endorsed by the Ninth Circuit, it would not change the fact that this Court in *Powers* recognized an allottee's right to *use* the water right held by the Crow Tribe, not a free-standing right to water untethered to that of the Tribe. *See Powers*, 305 U.S. at 532 (holding that water rights are "reserved for the equal benefit of tribal members").

None of Petitioners' other authorities (Pet. 19-22)—many of which are directed at uncontested issues such as transferability or priority date—casts doubt on that fundamental principle. Quite the opposite, the relevant cases cite *Powers* for the proposition that allottees have a right to use the Crow Tribe's reserved water. *See United States v. Adair*, 723 F.2d 1394, 1415-1416 (9th Cir. 1983) ("Individual Indian allottees have a right to *use* a *portion* of this reserved water.") (emphasis added); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981) ("Indian allottees have a right to *use* reserved water.") (emphasis added); *United States v. Preston*, 352 F.2d 352, 357 (9th Cir. 1965) (Indian allottees "acquired a right to *use* waters on the reservation") (emphasis added); *United States v. Adair*, 478 F. Supp. 336, 346 (D. Or. 1979) (holding that individual Indian allottees "acquired the right to *use* a *portion* of the *tribal waters* essential for

cultivation" and that the right was transferrable to a successor in interest "to the same extent as if the allottees still possessed the land"); *see also United States ex rel. Ray v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928) (holding pre-*Powers* that non-Indian allottees are "entitled to a water right" that is "somewhat different" from that held by Indians).

In Petitioners' view (Pet. 19), the decision below is at odds with those authorities because it purportedly holds "that Allottees have no enforceable property right in water." But that contention is refuted by the Montana Supreme Court's confirmation that "Allottees' have water rights" under *Powers* and will continue to have "rights to a share of the Crow Tribal Water Right" under the Compact. Pet. App. 14. The Settlement Act and the Compact could not be clearer on that point. *See* Settlement Act, Pub. L. No. 111-291, § 407(d)(3), 124 Stat. at 3105 ("Allottees shall be *entitled* to a just and equitable allocation of water for irrigation purposes.") (emphasis added); MONT CODE ANN. § 85-20-901, art. IV.B.1 ("[T]he Tribe may not limit or deprive Indians residing on the Reservation *** of any *right*, pursuant to [Section 7 of the General Allotment Act], to a just and equal portion of the Tribal Water Right.") (emphasis added). The fact that those rights derive from the Crow Tribe's water right does not "launder[] Allottees' property rights in the use of water into something much less than a property right" or make them "owned by the Crow Tribe." Pet. 19, 24.

**2.** Petitioners also attack the Montana Supreme Court's holding that allottees are entitled to a "just

and equal share of the Tribal Water Right" under the Compact. Pet. 23 (citation and quotation marks omitted). According to Petitioners, "[a]n entitlement to a 'just and equal share' *** is not a property right" and the effect of the decision below is to "reduce[] the Allottees' vested water rights to an entitlement to participate in some future process." *Id.* at 23, 26. Unsurprisingly, Petitioners identify no authority supporting those unpersuasive arguments or conflicting with the Montana Supreme Court's decision.

Congress's use of the "just and equal" standard for distributing water to allottees is as old as allotments themselves. To effectuate the General Allotment Act's goal of encouraging Indians' use of reservation lands for agriculture and grazing, Congress provided:

> 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 is 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."

Act of Feb. 8, 1887, Ch. 119, § 7, 24 Stat. at 390 (codified at 25 U.S.C. § 381) (emphasis added).

The Compact unremarkably adopts that standard, *see* MONT. CODE ANN. § 85-20-901, art. IV.B.1 (providing "Indians residing on the Reservation" with a "right, pursuant to 25 U.S.C.

§ 381, to a just and equal portion of the Tribal Water Right"), which Congress codified as federal law for purposes of the settlement, *see* Settlement Act, Pub. L. No. 111-291, § 407(d)(3), 124 Stat. at 3105 ("Allottees shall be entitled to a just and equitable allocation of water for irrigation purposes."); *see also* § 407(d)(1) (stating that Section 7 of the General Allotment Act "shall apply to the tribal water rights"). The Montana Supreme Court correctly recognized that those provisions determined the scope of Petitioners' water rights. *See* Pet. App. 14.[5]

There is no basis, moreover, for concluding that Petitioners' water rights have been "reduced." Pet. 26. Petitioners essentially confirm that their existing rights under *Powers* are based on a "just and equal" share. Petitioners assert that, "[p]ursuant to federal law, Allottees are entitled to a 'ratable share' of the reserved water rights." *Id.* at 18. But the authority cited for that proposition explains that the "ratable share" calculation "follows from the provision for an equal and just distribution of water needed for irrigation." *Colville Confederated Tribes*, 647 F.2d at 51. The fact that their Compact water rights will be

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[5] The process by which the United States releases allottee water rights claims has no bearing on the propriety of using the "just and equitable" standard. *Contra* Pet. 25-26 (arguing that only the United States as trustee and the individual allottee, as opposed to the tribal government, can waive or release claims). In any event, there can be no claim here that the *Crow Tribe* released Petitioners' claims. *See* Settlement Act, Pub. L. No. 111-291, § 410(a)(2), 124 Stat. at 3109 (stating that "the United States, acting as trustee for allottees, is authorized and directed to execute a waiver and release of all claims").

distributed using the "just and equal" standard under a tribal water code approved by the Secretary, rather than by the Secretary using that same standard under the General Allotment Act, undermines any claim that the Compact causes the dramatic change in allottee water rights that Petitioners posit.

Nor is there any basis for concluding that Petitioners' water rights have been "g[iven] *** to the Crow Tribe." Pet. 25. The Settlement Act "provide[s] to each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act"—including by specifying various protections for allottees that must be included in a tribal water code, preserving allottees' ability to "seek relief under section 7 of the [General Allotment] Act," and authorizing the Secretary of the Interior "to protect the rights of allottees." Pub. L. No. 111-291, § 407(a), (d)(5)-(6), (f), 124 Stat. at 3104-3105. Although Petitioners may ultimately dispute the amount of water they are allocated as their just and equitable share, subject to independent recourse to the Secretary of the Interior or under the tribal water code (as applicable), that potential future factbound dispute does not negate Petitioners' continuing right to a "just and equal share" of the Crow Tribe's water right.

## II. AN INDEPENDENT BASIS FOR DISMISSAL OF PETITIONERS' OBJECTIONS MAKES THIS CASE AN EXCEPTIONALLY POOR VEHICLE

Contrary to Petitioners' assertion (Pet. 1), this case is anything but "an ideal vehicle to flesh out the

extent and precise nature of Allottees' vested property rights pursuant to the *Winters* doctrine" or "to address concerns *** relating to the McCarran Amendment and state court jurisdiction of the adjudication of Indian water rights." That is because Petitioners fail to address the Montana Water Court's dismissal of their objections as outside the applicable scope of review. All else aside, that independent basis for affirmance presents a glaring impediment to this Court's review.

As the Water Court explained, review of water compacts—which, "like consent decrees, are settlement agreements"—is narrowly circumscribed. Pet. App. 39. Under Water Court precedent, "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* (citation and quotation marks omitted). The upshot of that rule, which distinguishes between parties and non-parties, is that "if the negotiating parties wish to object, they must make a showing that the negotiations were tainted by fraud, collusion, or overreaching." *Id.* at 39-40. Reviewing objections in that manner makes sense because "[t]he purpose of *** judicial approval is not to protect the negotiating parties; rather, it is to ensure that the agreement is fair to those who were not a party to the negotiation." *Id.* at 40 (citation and quotation marks omitted).

Consistent with that authority, the Water Court dismissed Petitioners' objections as improper. "[B]oth [the Petitioners and the United States] agree the allottees were represented" by the United States during the Compact negotiation process. Pet. App. 38. The Petitioners' "dissatisf[action] [with] some [of] the Compact's provisions" therefore could not factor into the Water Court's review. *Id.* at 42. And "[a]bsent *** an objection" that "the Compact was the product of fraud, collusion, or overreaching"—an objection Petitioners have never lodged, *id.* at 45, 52—Petitioners were "bound by the terms of their agreement." *Id.* at 42. To hold otherwise, the Water Court emphasized, would "substitut[e] [the court's] judgment for that of the parties" and permit represented parties to undermine an agreement that had been "approv[ed] by the governor of Montana, the Montana Legislature, the United States Department of Interior, the United States Congress, and the Crow Tribe." *Id.* at 41; *see also id.* at 43-45 (reiterating "narrow role").

The Montana Supreme Court agreed: "The Water Court properly concluded that since the Allottees were represented in the Compact negotiations, its review of the compact was limited to determining whether the Compact was the 'product of fraud, collusion or overreaching.'" Pet. App. 15; *see also id.* ("[T]he Water Court relied, as it has in other cases, upon the established rules for judicial oversight of consent decrees[.]") (footnote omitted) (citing *Matter of the Adjudication of Existing and Reserved Rights to the Use of Water of the United States Forest Service Within the State of Montana,*

Water Court Cause No. WC-2007-04). The Water Court's determination that Petitioners' objections failed to meet that standard was "the proper analysis." *Id.* at 16.

In this Court, Petitioners all but ignore that independent basis for affirming the dismissal of their objections. At most, in making their jurisdictional argument, Petitioners raise the adequacy of the United States' representation of the allottees in negotiations. *See* Pet. 6-8, 13-15. But as Petitioners' decision to bring a separate federal action confirms, *see* note 1, *supra*, the adequacy of that representation is "not an issue that the Water Court can resolve." Pet. App. 16. A finding that the United States violated its fiduciary obligation to Petitioners *under trust principles* would not negate the Water Court's still-unchallenged finding that Petitioners were represented parties for purposes of determining the propriety of objections *under Water Court precedent*. *See* pp. 8-9, *supra*.

As such, regardless of how this Court would resolve the questions presented, dismissal of Petitioners' objections would still be necessary. This case thus does not warrant further review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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