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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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No. 1:22-CV-01781-JEB

AMENDED COMPLAINT

JURY TRIAL DEMANDED

135 Cindy Dr. Crow Agency, MT 59022 Wailes Yellowtail 404 Fuller Lane Wyola, MT 59089 Willis N. Medicine Horse 3274 Highway One Crow Agency, MT 59022 Plaintiffs, v. THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her official capacity as United States Secretary of the Interior, and BRYAN NEWLAND, in his official capacity as Assistant United States Secretary of the Interior for Indian Affairs, 1849 C Street N.W. Washington, D.C. 20240, Defendants.	)

"Great nations, like great men, should keep their word."

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960).

The above-named plaintiffs ("Plaintiffs"), members of the Crow (Apsáalooké) Tribe of Indians ("Tribe") and owners of individual Indian trust allotment lands on the Crow Indian Reservation, by their undersigned attorneys, allege upon personal information as to themselves, and upon information and belief as to all other allegations, for their Amended Complaint ("Complaint") against the above-named Defendants as follows:

JURY DEMAND

The Plaintiffs hereby exercise their Seventh Amendment right of trial by jury pursuant to F.R.C.P Rule 38(b) and demand a trial by jury of all issues in law and equity triable of right by a jury.

INTRODUCTION AND NATURE OF THE ACTION

1. Plaintiffs seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. 2201, that the June 22, 2016, publication by the Secretary ("Secretary") of the United States Department of the Interior ("Interior") in the Federal Register of the "Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010" ("Statement of Findings" or "SOF") ostensibly causing certain waivers and releases of claims to become effective and, as required by the Crow Tribe Water Rights Settlement Act of 2010, 124 Stat. 3097-3122[1] (the "Act"), purporting to establish the Enforceability Date of the Act.

2. The Act is void and/or unenforceable because:

A. The Secretary's attempted extension of the Act's March 31, 2016, deadline for publication of the Statement of Findings to establish the Act's Enforceability Date, but without the required consent, agreement, and authorization of the Crow Tribe's General Council to an extension to June 22, 2016, of the Act's statutory SOF publication deadline, was legally ineffective and the Act was automatically repealed at midnight on March 31, 2016, by operation of law pursuant to Section 415 of the Act.

B. In the alternative, the Secretary published the SOF in the Federal Register prematurely in violation of the Act.

[1] The Act is Title IV of the Claims Resettlement Act of 2010, P.L. 111-291, 124 Stat. 3064, et seq. (Dec. 8, 2010).

C. The Secretary's publication of the SOF constituted a breach of the Defendants' common law fiduciary duties to protect the Plaintiffs' Indian "Winters Doctrine"[2] reserved water rights appurtenant to their individual Indian trust allotments.

D. The Act violates the Plaintiffs' Fifth Amendment constitutional rights to procedural and substantive due process and equal protection because of the Secretary's attempted effort to extinguish the Plaintiffs' Winters Doctrine water rights.

E. The failures to act properly and the final agency actions that were taken by the federal Defendants ("Defendants") to render the Act enforceable violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2).

3. This case is yet another example of the Defendant Department of the Interior's chronic "strategy of dealing with the [Tribal Executive Branch Chairman] as though he were the sole repository of [Crow] governmental authority." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1133 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978).

4. The Act purports to ratify the 1999 Crow Tribe-Montana Compact (the "Compact"), Montana Code Annotated ("MCA") Section 85-90-201, which was negotiated by the Crow Tribe, the State of Montana and the United States to quantify and limit Indian water use on the Crow Reservation, and to protect non-Indian Montana state law water rights users from Indian priority calls. Neither the Plaintiffs nor other trust allotment landowners ("Allottees") were included in the Compact negotiations; nor were they adequately or meaningfully represented by the United States as their trustee in that process.

[2] See, *Winters v. United States*, 207 U.S. 564 (1908).

5. The Plaintiffs were affirmatively denied the opportunity to adjudicate their Winters Doctrine water rights or to contest the Compact in the Montana Water Court ("MWC") and they are not bound by the Final Decree of the MWC.

6. The Act nonetheless attempts to substitute for Plaintiffs' Winters Doctrine water rights the Plaintiffs' and other Crow allottees' obligation to apply to the Tribe for a permit to use water pursuant to a Tribal Water Code ("TWC") approved by the Secretary.

7. A fundamental requirement of the Compact was the preparation of "Appendix 1." Appendix 1 is also known as the "Current Use List" ("CUL"). The purpose of the CUL was to identify all present and historic Indian water use on the Reservation—in other words their exercised Winters Doctrine water rights—as of the nominal effective date of the Compact (June 22, 1999). The CUL would necessarily include the Plaintiffs; and other Allottees' water use, to enable the Plaintiffs and other Allottees to access water pursuant to the TWC and enable implementation of the Compact's shortage sharing provisions. As "Appendix 1," the CUL was to be incorporated into the Final Decree of the MWC, which approved the Compact.

8. The CUL was to be the basis for the allocation of water among Crow users within the Reservation pursuant to the TWC and was essential for determining the priorities prescribed in the Compact for the Plaintiffs' and other Crow Allottees' use of water in relation to the Montana state law water rights of non-Indian water users within the Reservation. The Compact required that the CUL be prepared within one (1) year after the Compact was ratified by the Montana Legislature on June 22, 1999.

9. Now, nearly a quarter of a century later, no CUL has ever been created.

10. A fundamental requirement of the Act to enable the Plaintiffs and other Crow allottees to exercise and enforce their water rights was the approval by the Secretary of a TWC

prepared by the Tribe governing, *inter alia*, water allocations to Allottees, and establishing the conditions, permit requirements, and other limitations regarding the use by the Plaintiffs and other Crow Allottees of water in accordance with the Compact. The Act required the TWC to be submitted by the Tribe to the Secretary for approval within three (3) years of tribal ratification of the Compact, and further required the Secretary's approval (or disapproval) within a reasonable time after submission by the Tribe for the TWC to be "valid."

11. Although the Compact was ratified by a referendum vote of the Crow Tribal General Council on March 19, 2011, a TWC governing, *inter alia*, water allocations to the Plaintiffs and other Allottees, and establishing the conditions, permit requirements, and other limitations regarding their water use in accordance with the Compact, has never been approved by the Secretary up to and including the present day—twelve years (12) after the ratification of the Compact by the Tribe, and nine (9) years after the deadline prescribed by the Act.

12. There is no approved TWC, and any TWC that may exist in some form or iteration is not in legal effect.

13. 25 U.S.C. § 381[3] provides that the Secretary "is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution [of water] among the Indians residing upon any such reservation." Section IV(A)(b) of the Compact

[3] United States Code (2021), Title 25 – Indians, Chapter 11 - Irrigation of Allotted Lands, Sec. 381 Irrigation lands; regulation of use of water.

> 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; 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. (Feb. 8, 1887, ch. 119, §7, 24 Stat. 390).

provides that "[p]ending the adoption of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior." The Secretary has failed to adopt any rules or regulations governing the administration, enforcement, and distribution of water within the Crow Reservation.

14. Because the CUL and an approved TWC do not exist, there is no bona fide mechanism by which Plaintiffs can quantify and enforce their access to water as governed by the Compact and the Act. The CUL and TWC were to be relied on to determine the priority of the Plaintiffs' use of water in relation to non-Indian state law decreed water rights on the Reservation under the Compact.

15. The CUL and TWC are indispensable for the allocation of water as between Indian and non-Indian water users during times of shortage. Thus, the water use rights purported to be provided to Plaintiffs and other Crow allottees by the Compact, the Act and the Tribal Water Code were and are illusory because the Plaintiffs and other Allottees can receive no actual benefits.

16. To enable its enforceability, the Act required the Secretary to publish the SOF in the Federal Register on or before March 31, 2016 (the "Enforceability Date"), certifying that specific conditions had been met. By that publication, the United States–as trustee for the Plaintiffs and all other Crow allottees–purported to waive the Plaintiffs' and all Crow allottees' Winters Doctrine water rights claims as against all non-Indian water users on the Crow Reservation as provided in Act section 410(a)(2),

17. Under the Act the non-Indian users receive the valuable benefit of the federal waiver of the Plaintiffs' and other Allottees' Winters Doctrine water rights claims, and protection for the non-Indian users against any Indian 1868 priority calls, while the water rights purported

to be provided to the Plaintiffs under the Act are illusory because the Plaintiffs and other Allottees will receive no actual benefits, but will suffer the diminishment of their water rights and the value of their allotments.

18. The Act prescribed that the Enforceability Date deadline for publication of the SOF on or before March 31, 2016, or that the deadline could be extended to a later date if agreed to in advance "by *the Tribe* and the Secretary" (emphasis added).

19. Section 415 of the Act specifically provided that the Act would be automatically repealed if the Enforceability Date was not met by the Secretary's publication of the SOF in compliance with the statutory deadline.

20. The statutory March 31, 2016, SOF publication deadline was purported to be extended until June 22, 2016, by the Secretary and by the Tribal Chairman. Under the Act the extension of that date was required to be by agreement between *the Tribe* and the Secretary.

21. The Tribal Chairman did not have the power and the authority to unilaterally approve with the Secretary any extension of the Secretary's SOF publication deadline or make any amendment to the Act.

22. Under the Crow Constitution, the only power and authority for agreeing to any extension of the deadline for the Secretary to publish the SOF resides with the Crow Tribal General Council ("CTGC"), the body of the Crow government that was accordingly required under the Act to ratify the Compact.

23. The Crow Tribal Legislative Branch ("CTLB") — a governmental assembly of Crow elected representatives subordinate to the CTGC— had unequivocally advised the Defendants in 2012 by formal CTLB Legislative Resolution, LR No. 12-07, that the power and authority of the Tribal Chairman was limited to negotiation of the Act, that any and all approval

authority for the Crow Tribe rested with the CTLB and, ultimately, the CTGC, and that the Crow Tribal Executive Branch Chairman did not have any such independent or unilateral power or authority. A true and accurate copy of CTLB LR No. 12-07 is attached hereto as Exhibit 1, and incorporated herein by this reference.

24. The Secretary's attempted extension of the SOF publication deadline from March 31, 2016 to June 22, 2016, was void *ab initio* and absolutely ineffective to prevent the automatic repeal of the Act pursuant to Section 415.

25. The Defendants were fully aware that the MWC's Final Decree in the Crow water rights adjudication failed to comply with the most essential requirement of the Compact: the inclusion of the Current Use List. Thus, its finding in the SOF that the MWC had issued a Final Decree approving the Compact was materially incorrect and incomplete and ignored the fact that the Final Decree failed to comply with the most essential provision of the Compact as ratified by the Act and rendered the Plaintiffs' right to water under the Compact and the Act to be illusory.

26. The Act, per section 410(e), requires that the Secretary's SOF include a statement that a final judgment by a federal appeals court or the Supreme Court of the United States would hold that the Montana Water Court had jurisdiction to issue a final judgment and decree approving the Compact if that jurisdiction was challenged in federal court.

27. This provision of the Act specifically acknowledged the possibility of federal adjudication of challenges to the jurisdiction of the Montana Water Court and provided that publication of the SOF establishing the Enforceability Date was conditioned upon the finality of those proceedings. In this case, that was when the time to file a *certiorari* petition from the decision of the United States Court of Appeals for the Ninth Circuit in the appeal of the district court decision had run on September 27, 2017.

28. On the date of publication of the SOF, June 22, 2016, there still was a pending federal court action challenging the jurisdiction of the Montana Water Court to adjudicate a number of federal issues regarding the Compact that were alleged to be within the exclusive jurisdiction of the federal courts: *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.,* No. CV 14-62-BLG-SPW, 2015 WL 4041303 (D. Mont. June 30, 2015), *aff'd sub nom. Crow Allottees Ass'n v. United States Bureau of Indian Affs.,* 705 F. App'x 489 (9th Cir. 2017).

29. The Secretary's publication of the SOF on June 22, 2016, was premature and without legal force and effect, and did not avoid the automatic repeal date as mandated in the Act.

30. As further alleged herein, the Act and its illusory settlement of Plaintiffs' and Allottees' water rights cannot be tied rationally to the fulfillment of Congress's unique fiduciary obligations to Indians, including its express relationship as trustee and fiduciary to Plaintiffs under the terms of the Act.

31. The Act attempted to extinguish the Plaintiffs' Winters Doctrine water rights and violates their rights to procedural and substantive due process and equal protection under the Fifth Amendment.

32. The Defendants were or reasonably should have been fully aware before the Act was enacted of the substantial likelihood of the potential deficiencies and illusory nature of the tribal water permits and administrative processes to which the Plaintiffs were purportedly entitled under the Act and Compact.

33. The Defendants also were or reasonably should have been aware that these defects were not only just substantially likely, but also actually existed at the time the SOF was published. As such, the Findings were published illegally out of time and without the necessary

and proper legal Tribal authority —and prematurely under the terms of the Act with respect to the ongoing adjudications—to try and avert the Act's automatic repeal.

34. The Defendants' actions breached their trust and fiduciary duties owed to Plaintiffs, violated the APA, and did not save the Act from the automatic repeal at midnight on March 31, 2016.

35. The Defendants were aware, or reasonably should have been aware, from at least as early as 2009, that the Plaintiffs' and other Crow allottees' water rights were not protected by the Compact and the proposed Crow Tribal Water Rights Settlement legislation, and that many Crow Allottees objected to their purported representation by the United States and the Interior Department as their trustee in those proceedings.

36. The Defendants were or reasonably should have been aware from as early as June 2013 that the Plaintiffs and at least 58 other Allottees objected to the Compact and wished to adjudicate their Winters Doctrine water rights, yet the United States filed a motion to dismiss their objections in the MWC on May 29, 2014.

37. On July 30, 2014, the motion to dismiss the Allottees' objections was granted by the MWC on the grounds that the Plaintiffs and Allottees were "adequately represented" by the United States as their "trustee" and that the Compact was "binding" despite the fact that it was not yet ratified by the Secretary's publication of the SOF in the Federal Register.

JURISDICTION AND VENUE

38. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. § 701 *et seq.* (judicial review of federal agency action under the APA).

39. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1343(3) and (4), to redress deprivations of rights, privileges and immunities secured by the United States Constitution and by law.

40. Venue is proper in this district pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. Venue is proper against defendant United States of America under 28 U.S.C. § 1346.

PARTIES

41. Plaintiff Apsáalooké Allottees Alliance is an unincorporated association of Crow Allottee Indian trust allotment landowners.

42. Plaintiff Michael Hill is an enrolled member of the Crow Tribe and holds a majority real property interest in Allotment No. 1833, consisting of 720 acres, and several other allotments, including irrigated parcels. Mr. Hill also holds fractional interests in several other allotments on the Crow Reservation. Mr. Hill currently serves as the President of the Apsáalooké Allottees Alliance.

43. Plaintiff Alee Birdhat is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels. Ms. Birdhat also serves as the Vice-President of the Apsáalooké Allottees Alliance.

44. Plaintiff Jason Kills Pretty Enemy is an enrolled member of the Crow Tribe and currently serves in the Crow Nation Legislature as a Senator from the Arrow Creek District of the Crow Reservation. Senator Kills Pretty Enemy holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels.

45. Plaintiff Leeya Biglake Hill is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels.

46. Plaintiff Abby Birdhat is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels.

47. Plaintiff Francis White Clay is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels.

48. Plaintiff Wailes Yellowtail is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation, including irrigated parcels. Mr. Yellowtail owns and leases a total of approximately 12,000 acres of Crow Reservation land. This includes 2,500 acres of trust allotments and former trust allotments now held in fee, including 300 irrigated or irrigable acres; and 9,500 acres of pastureland, consisting of 2,200 acres of trust allotments and former trust allotments now held in fee and 7,300 acres of tribal trust land leased from the Crow Tribe and other Allottees.

49. Plaintiff Willis N. Medicine Horse is an enrolled member of the Crow Tribe and holds real property interests in several individual Indian trust allotments on the Crow Reservation.

50. Defendant United States Department of the Interior ("Interior") is the federal agency within the Executive Branch of Defendant United States of America ("United States") charged with administering the Bureau of Indian Affairs ("BIA"), which directly administers the laws and regulations applicable to individual Indians and the real property interests of tribes and

individual Indians in individual Indian trust allotments and Winters Doctrine water rights appurtenant to individual Indian trust allotments.

51. Defendant Secretary of the Department of the Interior, Deb Haaland, is the federal official responsible for proper administration of the Department of the Interior and the BIA and is the principal official responsible for implementing the federal government's trust and fiduciary duties as trustee over individual Indian trust allotments and water rights and other resources appurtenant to such allotments.

52. Defendant Assistant Secretary for Indian Affairs of the Department of the Interior Bryan Newland is the federal official directly responsible for the administration of the BIA and for administering all laws and regulations applicable to Indian affairs, Indian tribes and individual Indians and their real property held in trust by the United States.

STATEMENT OF FACTS

A. BACKGROUND

53. The Crow (Apsáalooké) Nation ("Tribe" or "Nation") is a federally recognized Indian tribe located on the Crow Indian Reservation ("Reservation") in south-central Montana along the Montana-Wyoming border as provided by treaties and agreements with the United States. The Crow Reservation comprises approximately 2.3 million acres. The Nation has a membership of approximately 11,000, of whom approximately 7,900 reside on the Reservation, and approximately 6,000 of whom are Allottees.

54. The Reservation includes three mountain ranges, rolling upland plains and fertile valleys. Reservation agriculture production consists mostly of grains, sugar beets and hay for livestock, much of it produced on irrigated lands within the various units of the Crow Irrigation Project operated by the U.S. Department of the Interior, Bureau of Indian Affairs ("BIA").

Expansive grasslands support herds of cattle, horses, and buffalo as well as abundant elk, deer and other wildlife.

55. The Tribe has long been a strategic ally of the United States. Almost two centuries ago, in 1825, the Tribe entered into a mutual friendship and defense treaty with the United States (Treaty with the Crow Tribe, 7 Stat. 266 (Aug. 4, 1825)). Members of the Tribe served as scouts assisting General George Custer in the 1876 Battle of Little Big Horn on the present Crow Reservation, where U.S. troops fought to expel other hostile Indian tribes who had illegally trespassed within the boundaries of the 1868 Crow Reservation. Crow Tribe members were among the casualties of the battle. The Crow Tribe, collectively and individually, has continued to perform in good faith its promises of friendship and peace with the United States.

56. The Tribe was a party to the first Treaty of Fort Laramie, signed on September 17, 1851, 11 Stat. 749 (Sept. 17, 1851), which also included the Cheyenne, Sioux, Arapaho, Assiniboine, Mandan, Hidatsa, and Arikara Nations. The Treaty delineated Crow Territory in southern Montana and northern Wyoming comprising approximately 38 million acres and encompassing many valuable water sources, including the Bighorn and Yellowstone Rivers and many smaller streams and springs.

57. The second treaty of Fort Laramie, 15 Stat. 649, was signed on May 7, 1868, and ratified on July 25, 1868. The Treaty reduced the Crow Reservation to approximately 8 million acres. The 1868 Treaty included several provisions and promises intended to facilitate the agricultural development of the Reservation.

58. Land cessions to the United States beginning in 1882 and continuing through 1904 reduced the Crow Reservation to its present size of approximately 2.3 million acres. These cessions included the 1904 cession, which reduced the Crow Reservation to its present

boundaries and created a "Ceded Strip" consisting of about 1,137,500 acres adjacent to the Reservation on the north.

59. Article 6 of the Fort Laramie Treaty of 1868 provides for heads of families and individuals who were age eighteen and older to take individual allotments for farming. Such tracts, "when so selected, certified, and recorded in the 'land book,' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it."

60. Beginning in 1881, pursuant to the 1868 Treaty, and continuing with the 1887 General Allotment Act (Dawes Act) and the 1920 Crow Allotment Act, the bulk of the Crow Reservation was allotted and privatized up to the foothills of the Big Horn Mountains by trust patents to individual Crow Indians. Pursuant to the allotment acts, every enrolled member of the Crow Tribe was to receive an allotment to be held in trust by the United States unless and until sold by the Allottee(s) with the approval of the BIA.

61. The primary sources of water on the Reservation are the Bighorn River, the Little Bighorn River, Pryor Creek and several smaller streams. The Bighorn and Little Bighorn Rivers originate in Wyoming and flow north into the Reservation. After flowing through the Reservation, the Little Bighorn enters the Bighorn River just outside the Reservation boundary near the town of Hardin, Montana. The Bighorn River then continues north to become a tributary of the Yellowstone River.

62. In *Winters v. United States*, 207 U.S. 564 (1908), the seminal case regarding Indian water rights, the Supreme Court recognized that when the United States establishes an Indian reservation, it impliedly reserves the right to sufficient water to support that reservation as a permanent tribal homeland with a water rights priority as of the date of creation of that

reservation. These rights are now known as Indian Winters Doctrine ("Winters Doctrine") reserved water rights ("Winters Rights").

63. Similarly, and pursuant to *Winters*, *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), held that an 1888 treaty creating the Blackfeet Reservation reserved in the Blackfeet tribe a "paramount right" to water as necessary for "irrigation and other useful purposes," which could be expanded in the future as need and opportunity arise.

64. In a suit brought by the United States on behalf of individual members of the Fort Hall Indian Reservation to protect their water rights, the Ninth Circuit held that water was permanently reserved for the irrigation of individual Indian trust allotments and that "neither the actual leasing of their lands under the authority to lease nor the surrender of possession to the lessees operated to relinquish any water rights in the lands which they so chose to retain." *Skeem v. United States*, 273 F. 93, 96 (9th Cir. 1921).

65. *United States ex rel. Ray v. Hibner*, 27 F.2d 909 (D. Idaho 1928) summarized and clarified the law of Indian trust allotment water rights, holding that Indian-owned allotments on the Fort Hall Reservation are entitled to water for lands "susceptible to irrigation" with a priority date as of the creation of that Reservation (1869). "The right of the Indians to occupy, use, and sell both their lands and water is now recognized, … and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, …." *Id.* at 912. *Hibner* further held that water rights appurtenant to Indian allotments can be expanded up to the requirements of the irrigable acres and domestic uses on an allotment, that the Indian rights are not subject to abandonment under state law, and that a non-Indian purchaser acquires the title and right of the Indian allottee (quantity and priority), subject, however, to state laws of appropriation and use.

66. The Winters Rights of the Crow Tribe and the Plaintiffs and other Allottees under the Fort Laramie Treaty of 1868, the General Allotment Act of 1887, and the 1920 Crow Allotment Act were confirmed by the Supreme Court in *United States v. Powers*, 305 U.S. 527 (1939). The United States sought to enjoin diversions of water above and outside the federal Crow Irrigation Project to serve former Indian trust allotments sold to non-Indians. In furtherance again of Winters Doctrine *water rights*, the injunction was denied on the grounds that "[m]anifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible." *Id*. at 533. Moreover, "[W]e can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes." *Id.*

67. In *Colville Confederated Tribes v, Walton*, 647 F. 2d 42 (9th Cir 1981) (*Walton II*), the Ninth Circuit Court of Appeals held that a non-Indian purchaser of an Indian trust allotment has the right to expand irrigation on the allotment with due diligence following purchase:

> "The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a 'diminution of Indian rights' that must be supported by a clear inference of Congressional intent." *Id.* at 50.
> ****
> "The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title." *Id.* at 51.

68. In *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985) (*Walton*

III), cert. denied, 475 U.S. 1010 (1986), the Ninth Circuit affirmed the *specific quantity* of Winters Doctrine water rights appurtenant to both Indian trust allotments and non-Indian fee allotments and reversed the district court's reduction of the Indian Allottees' rights for non-use. *Id.* at 404. Non-Indian water rights appurtenant to fee allotments are now called "Walton rights."

69. In *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984), the Appeals Court made clear that in enacting the allotment acts Congress intended for Indian Allottees to receive the full economic benefit of their allotments and that Winters Doctrine water rights are marketable real property.

> "The Ninth Circuit has recently addressed the matter of Winters rights in the context of the sale of allotted lands to non-Indians. The court held that when title passed from an Indian to a non-Indian for an allotted parcel, the appurtenant right to share in tribal reserved waters passed with it. Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (9th Cir.1981), cert. denied, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); United States v. Adair, 723 F.2d 1394 (9th Cir.1983). See also United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir.1956), cert. denied, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). The court's rationale in Walton was that, in order for an Indian allottee to enjoy the full benefit of his allotment, he must be able to sell his land together with the right to share in the reserved waters. 647 F.2d at 49–50."

The *Anderson* court also determined that the non-Indian successor also inherits his predecessor's priority: the date of the creation of the reservation. That priority date "is the principal aspect of the right that renders it more valuable than the rights of competing water users, and therefore applies to the right acquired by a non-Indian purchaser." *Id.* at 51.

70. Pursuant to the allotment statutes and the federal common law of Winters Rights, Indian Allottees were partitioned a portion of the Crow Reservation water sufficient to irrigate the practicably irrigable acres ("PIA") on each allotment as a permanent, expansive, marketable, real property water right with a senior priority of 1868. The Allottees hold valuable water rights for all PIA on their allotted lands whether they have historically irrigated all that acreage or not.

71. Economic hardship for Crow Indians has had a tragic and traumatic inter-generational impact for Crow Indians on the Reservation since the United States appropriated the Crows' ancestral lands and destroyed the traditional livelihood provided by those lands and reduced the Reservation to its present size. The Reservation has high levels of unemployment and poverty, severe shortages of housing, and serious needs for health care and other basic services. A large percentage of Crow Indians live in poverty, even though many have substantial holdings of Indian trust allotments. This is largely due to the unavailability of capital and credit to Indians on the Reservation. Non-Indians, however, have access to capital and credit, and have been able to prosper while amassing large land holdings within the Reservation in violation of Section 2 of the 1920 Crow Allotment Act.[4]

72. Crow Tribal Chairman Cedric Black Eagle testified to the importance of water to the Crow people in a Committee hearing in the 110th Congress. He stated that water is vital to the Tribe's health and a central part of the Tribe's culture and traditions. The Chairman cited the importance of water in the Tribe's creation story, where the land is brought up from the water. He testified that for the Crow people all things of tangible substance, all things that we can touch, feel, smell, see and hear come from water. As an example, he noted that in the Tobacco Dance Crow people repeat the central truth that all things come from water and with water they go. He also testified that tribal ceremonies, such as the sweat lodge, depend upon particular uses

[4] Section 2 of the 1920 Crow Allotment Act prohibits the Secretary from approving the conveyance of any Crow-owned lands, whether trust allotted lands or lands owned in fee, to any person, company or corporation who already owns 640 acres of agricultural or 1,280 acres of grazing land on the Crow Reservation, or who would own 1,280 acres of agricultural or 1,920 acres of grazing land on the Reservation following such conveyance. The 1920 Act voids and criminalizes the receipt of any conveyance "directly or indirectly" which violates the acreage limitations. As held by the U.S. Ninth Circuit Court of Appeals in *Dillon v. Antler Land Company, Inc., et. al.*, 507 F.2d 940 (9th Cir.), conveyances made in violation of this 1920 Crow Act are void.

of water that are sacred to the Crow people.

73. By 1935, there were 5,507 allotments on the Crow Reservation, consisting of 2,054,055 acres. Many allotments were sold out of trust status to non-Indians and were patented in fee. This resulted in non-Indian land ownership and claims of Montana state law water rights throughout the Reservation. Approximately 46% of the Reservation remains in the ownership of individual Crow tribal members as trust allotments held in trust by the United States, and approximately 10% is tribal trust land.

74. The balance of 44% of the Reservation has been purchased by non-Indians.

75. A significant amount of fee patented land is owned by Crow tribal members.

76. Some Crow tribal members filed claims for water rights (beneficial uses) established and existing before July 1, 1973, with the Montana Department of Land and Natural Resources as required by 85-2-212 MCA, and now hold state law water rights listed in Compact Appendix 3 as included in the MWC Final Decree of Crow Reservation water rights, which became final when the Montana Supreme Court affirmed the MWC's dismissal of the Allottees' objections to the decree on July 29, 2015.

77. Some trust allotments are held by Indians who are not members of the Crow Tribe.

78. In the absence of the Settlement, Indian Winters Doctrine water rights are senior in priority to those of non-Indian landowners, except those landowners who hold Walton rights. *Colville Confederated Tribes v. Walton,* 752 F.2d 397 (9th Cir. 1985) (*Walton III*), cert. denied, 475 U.S. 1010 (1986).

79. On April 17, 1975, the United States, in its own right and as a fiduciary on behalf of the Crow Tribe and individual Indian Allottees, filed *United States v. Big Horn Low Line*

Canal, et al. seeking a declaration of the rights of the United States, the Crow Tribe, and the Allottees in and to the use of the waters of the Tongue River, the Big Horn River, the Little Big Horn River, Pryor Creek, Sage Creek, Tullock Creek and Sarpy Creek; and all tributaries within the State of Montana.

80. In 1979, the Montana legislature amended the Montana Water Use Act, Title 85, MCA, to create the Montana Water Court. The Montana Water Court was given jurisdiction over all water rights claims and adjudications in the state. §§ 85–2-212 et seq. MCA.

81. The 1979, Montana legislature also created the Montana Reserved Water Rights Compact Commission ("MWRC") as part of the state-wide general stream adjudication. § 2-15-212 MCA. The Commission's mission is to negotiate settlements with Montana Indian tribes and federal agencies which claim federal reserved water rights within Montana to quantify those rights.

B. THE COMPACT

82. The 1999 Crow Tribe-Montana Compact, § 85-90-201, MCA, was negotiated by the Crow Tribe, the State of Montana and the United States to quantify and limit Indian water use on the Crow Reservation, and to protect non-Indian water users from Indian priority calls. The Compact was ratified by the Montana legislature on June 22, 1999.

83. The Compact was negotiated over a period of more than twenty (20) years without the participation of any designated Allottees' representatives or counsel for the Allottees, although Allottee representatives, including some of the Plaintiffs, frequently protested this situation.

84. The Compact seeks to re-collectivize (the opposite of the various allotment acts' purpose to privatize) and allocate all the Indian water rights on the Crow Reservation to the

Tribe, including the Plaintiffs', as part of the "Tribal Water Right". The Compact was ratified by the 1999 Montana Legislature and amended in 2009. § 85-20-901 MCA.

85. Generally, the Compact addresses the water rights of the Tribe and its members, including the Plaintiffs and other Allottees, and water rights of non-Indian allotment owners. Article II.30 defines the "Tribal Water Right" as "the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of this Compact." Article II.19 defines non-Indian water rights "Recognized Under State Law" as "a water right arising under Montana law, or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member."

86. Article III of the Compact, entitled "Tribal Water Right," establishes the quantification, source and volume of the Tribe's quantified water rights for the following water sources: (i) Bighorn River Basin (Art. III.A); (ii) Little Bighorn River Basin (Art. III.B); (iii) Pryor Creek Basin (Art. III.C); (iv) Rosebud Creek Basin (Art. III.D); (v) a series of 14 drainage sources (Art. III.E); and (vi) the Ceded Strip (Art. III.F).

87. Each of the sections regarding a water source in Compact Article III also has a subsection 6 entitled "Protection of Water Rights Recognized Under State Law." The Compact and the Settlement seek to extinguish the Plaintiffs' and all other Allottees' Winters Rights, and Subsections 6 create two new priority categories for the Tribal Water Right: pre-1999 Compact (June 22, 1999) and post-1999 Compact.

88. Non-Indians with documented pre-Compact state law rights (Compact Appendix 3 and Montana Water Court final decree) are protected from any Indian priority call.

89. Under Compact Article IV.A.4.a, shortages are to be allocated "on an equitable basis in proportion to the amount of water required for Tribal water use as listed pursuant to

Section E.2., of Article IV, and the amount of water required for water rights Recognized Under State Law…."

90. Post-Compact new uses of the Tribal Water Right are not to "adversely affect" either individual, pre-Compact Tribal Water Right uses or pre- or post-Compact non-Indian uses. New uses of the Tribal Water Right are therefore inferior to all non-Indian state law water rights.

91. As between non-Indians only, state law priorities continue to be enforceable by priority calls.

92. Indian Allottees' water use is to be governed by tribal permits issued pursuant to a Secretarially approved Tribal Water Code, which does not exist.

93. Compact Article IV.E.2 provides that "[w]ithin one (1) year after this Compact has been ratified by the Montana legislature, the TWRD [Tribal Water Resources Department] and the United States shall provide the DNRC [Montana Department of Natural Resources and Conservation] with a report listing all current uses of the Tribal Water Right, including uses by tribal members, existing as of the date this Compact has been ratified by the Montana legislature." That "Current Use List", identified as Appendix 1 to the Compact, was to be the basis for the current allocation of water among Reservation users and for determining which Indian water uses were developed prior to 1999 and are therefore not junior to post-1999 developed uses on the Reservation.

94. The fundamental requirement of the Compact to enable the Plaintiffs and other Tribal members to enforce and exercise whatever water rights they were entitled to under the Compact was the preparation of "Appendix 1"—the Current Use List—to be annexed to the Compact and the Final Decree of the Montana Water Court approving the Compact and listing all historical and current water uses of the Tribal members on the reservation. *See* Compact

Article VII.B.3, VII.C.

95. The Current Use List has never been compiled and it is impossible to know the respective amounts of pre-1999 and post-1999 developed Indian water uses.

96. The Current Use List has never been compiled and it is impossible to know the respective amounts of pre-1999 and post-1999 developed Indian water uses.

97. In the absence of the Current Use List, it is impossible to administer the water rights priorities established by the Settlement, including water allocations as between Indians and non-Indians in shortage years as provided in Compact Article IV.A.4.a.

98. Under the Compact, the Plaintiffs' and other Allottees' Winters Rights—water rights reserved by implication from appropriation under state law —whether attributable to a pre-1999 or post-1999 use—lose their senior priority over all state law rights.

99. Under Article VII.C of the Compact, "[t]he water rights and other rights confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on Winters[.]"

100. Under Section 410(a)(2) of the Settlement Act, "the United States, acting as trustee for allottees, is authorized and directed to execute a waiver and release of all claims for water rights within the Reservation and the ceded strip that the United States, acting as trustee for the allottees, asserted, or could have asserted, …, prior to and including the enforceability date, except to the extent that such rights are recognized in the Compact or this title."

101. Compact Article VII.B.3 requires the final decree by the Montana Water Court approving the Compact to include in Appendix 1, the Current Use List, "such other information as may be required by 85-2-234, MCA." The incorporated Section 85-2-234 states as follows at

subsection 7:

> (7) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree must state:
>
> (a) the name and mailing address of the holder of the right;
> (b) the source or sources of water included in the right;
> (c) the quantity of water included in the right;
> (d) the date of priority of the right;
> (e) the purpose for which the water included in the right is currently used, if at all;
> (f) the place of use and a description of the land, if any, to which the right is appurtenant;
> (g) the place and means of diversion, if any; and
> (h) any other information necessary to fully define the nature and extent of the right.

102. Section 404(b)(1) of the Settlement Act makes clear the Secretary had an affirmative duty to ensure an appropriate Appendix 1 (including the Current Use List) to the Water Compact is completed. This fact is abundantly clear in review of the legislative history of the Settlement Act, including the various warnings to Congressional committees in review of the proposed settlement from the federal government about moving forward with Appendix 1, and the basic workability and fairness of the Compact. Any deviation from the requirement is contrary to law and an abuse of discretion and is violative of the trust duties imposed upon the Defendants by Congress under the terms of the Settlement Act.

103. Section 404(b)(2) authorizes the Interior Secretary to approve modifications to "appendices" or "exhibits" to the Water Compact, provided that any such modifications be consistent with the Settlement Act. The Settlement Act provides for federal ratification of the Water Compact and, as set forth by its own terms (Section 402, titled "Purposes") is intended to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for the Crow Tribe and the United States for the benefit of the Tribe and Crow Allottees.

104. It is not clear whether the Interior Secretary has attempted to modify the Water Compact such that the Compact Article VII requirement that there be an Appendix 1 to the

Compact with individual, quantified water rights based upon the Current Use List (of pre-June 22, 1999, uses of the Tribal Water Right) not be included in the proposed final decree presented by the United States in the Montana Water Court.

105. Although the other reporting requirements in Compact Article IV.E are subject to modification by the agreement of the Tribe, Montana, and the United States under Article IV.E.4, the Current Use List is *not* included.

106. In the absence of the Current Use List including all the information for the Plaintiffs and each Allottee required by section 85-2-234 MCA, the water use rights purported to be provided to the Plaintiffs and other allottees by the Compact were and are illusory.

107. The Compact also includes a requirement for a Tribal Water Code, in Article IV.A.2.b, which states: "Administration and enforcement of the Tribal Water Right shall be pursuant to a Tribal water code, which shall be developed and adopted by the Tribe within two (2) years following the Effective Date of this Compact pursuant to any requirements set forth in the Constitution of the Crow Tribe."

108. Compact Article VI.A.1. requires the state of Montana to contribute $15,000,000 to the Settlement. Article VI.A.4 provides that "The Tribe agrees that the State's contribution will be dedicated to economic development and water and sewer infrastructure within the Crow Reservation." This money was paid to the Tribe in one lump sum and was not used for economic development or water and sewer infrastructure and did not benefit the Plaintiffs or other Allottees.

109. The "Effective Date" of the Compact was defined in Article II.12 as "the date on which the Compact is ratified by the Crow Tribal Council, by the Montana legislature, and by the Congress of the United States, whichever date is latest." Congress ratified the Compact when it

enacted the Act. The Tribal General Council ratified the Compact by a referendum vote on March 19, 2011.

C. THE ACT

1. Relevant Provisions

110. On November 30, 2010, the United States Congress ratified the Compact by enacting the Crow Tribe Water Rights Settlement Act of 2010 P.L. 111-291, 124 Stat. 3064 (Nov. 30, 2010) (Title IV of Claims Resolution Act of 2010) ("the Act"). President Barack Obama signed the Settlement Act on Dec. 8, 2010.

111. Sections 405 and 406 of the Act authorize the rehabilitation of the Crow Indian Irrigation Project ("CIP"), which serves irrigation water to some, but not all, of the Plaintiffs' land, and many of the Allottees and non-Indian owners of former Indian trust allotments; and the construction of the Municipal, Rural and Industrial ("MR&I") pipeline system to provide potable water from the Bighorn River to various parts of the Crow Reservation. These infrastructure projects are the primary *quid pro quo* for the extinguishment of the Plaintiffs' and Allottees' Winters Doctrine rights.

112. Section 410(a)(2) purports to allow the United States as trustee to waive and release all the Plaintiffs' and Allottees' Winters Doctrine water rights.

> (2) WAIVER AND RELEASE OF CLAIMS BY THE UNITED STATES ACTING IN ITS CAPACITY AS TRUSTEE FOR ALLOTTEES.— [I]n return for recognition of the water rights of the Tribe and other benefits as set forth in the Compact and this title, the United States, acting as trustee for allottees, is authorized and directed to execute a waiver and release of all claims for water rights within the Reservation and the ceded strip that the United States, acting as trustee for the allottees, asserted, or could have asserted, in any proceeding, including the State of Montana stream adjudication, prior to and including the enforceability date, except to the extent that such rights are recognized in the Compact or this title.

113. The Act seeks to expropriate and re-collectivize the Plaintiffs' and Allottees' Winters Doctrine Indian reserved water rights under Crow tribal ownership and control in violation of the United States Constitution's Fifth Amendment requirements of procedural and substantive due process and equal protection. As alleged in the Introduction and Nature of the Action, *supra,* a fundamental requirement of the Act to enable Plaintiffs and other Allottees to obtain water under the Compact is the Tribal Water Code ("TWC"). Section 407 of the Act sets out the requirements for the establishment of a "valid" TWC.

114. The enactment of a TWC is mandated under Section 407(f)(1) of the Act:

> (1) IN GENERAL.—Notwithstanding the time period set forth in article IV(A)(2)(b) of the Compact, not later than 3 years after the date on which the Tribe ratifies the Compact as set forth in section 410(e)(1)(E), the Tribe shall enact a tribal water code, that provides for—
>
> (A) the management, regulation, and governance of all uses of the tribal water rights in accordance with the Compact; and
>
> (B) establishment by the Tribe of conditions, permit requirements, and other limitations relating to the storage, recovery, and use of the tribal water rights in accordance with the Compact.

115. Section 407(2) requires, *inter alia,* that the TWC include a process for allottees to request water for irrigation and a satisfactory "due process system" for resolving disputes regarding irrigation water requests.

116. Section 407(3) states that the TWC and any amendments "shall not be valid" unless approved by the Secretary.

117. A proposed TWC was submitted by the Tribe to the Secretary as directed by Crow Tribal Legislature Resolution CLB 15-03, dated April 20, 2015, but the Secretary disapproved it.

118. The Secretary had not approved a TWC when the Statement of Findings was published in the Federal Register on June 22, 2016, and a valid TWC mandated by the Act still does not exist.

119. The "Enforceability Date" is defined in the Act section 403(6) as "the date on which the Secretary publishes in the Federal Register the statement of findings described in Section 410(e)." Section 410(e)(1) describes "in general" seven findings that must be included. The findings described in that section do not include the essential requirements of the Current Use List complying with the required Allottee information annexed to the Compact as Appendix 1 and the Final Decree of the Montana Water Court approving the Compact, or a valid TWC approved by the Crow Nation Legislature and the Secretary.

120. Section 415 of the Act, entitled "REPEAL ON FAILURE TO MEET ENFORCEABILITY DATE," provides in relevant part:

> If the Secretary does not publish a statement of findings under section 410(e) not later than March 31, 2016, or the extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana, as applicable—
>
> (1) this title is repealed effective April 1, 2016, or the day after the extended date agreed to by the Tribe and the Secretary after reasonable notice to the State of Montana, whichever is later; [and]
>
> (2) any action taken by the Secretary and any contract or agreement pursuant to the authority provided under any provision of this title shall be void[.]

Section 415 also addresses funding already provided under the Act at the time of repeal, and states in relevant part that:

> (5) the United States shall be entitled to set off against any claims asserted by the Tribe against the United States relating to water rights—
> (A) any funds expended or withdrawn from the amounts made available pursuant to this title[.]

Since the Secretary's publication of the Enforceability Date was premature, void and of no effect, the Act was automatically repealed as of April 1, 2016.

2. Congress Was Advised by the Administration Multiple Times Before the Act was Enacted About Serious Issues Regarding Allottee Water Rights, Including the Absence of the Current Use List

121. A proposed version of the Act, S. 3355, was initially introduced by Montana Senator Jon Tester (for himself and on behalf of Montana Senator Max Baucus) on July 29, 2008.

122. On September 11, 2008, Kris Polly, Interior Deputy Assistant Secretary for Water and Science of the Department of the Interior, testified on S. 3355 before the Senate Indian Affairs Committee, and submitted a prepared written statement.[5] Mr. Polly's written statement included a number of "Non-Monetary Concerns Regarding S. 3355" that were "major issues." Two such "major issues" specifically addressing the water rights of the Plaintiffs and other Allottees are particularly relevant here:

> First, as currently drafted, the provisions of the bill dealing with allottee water rights do not adequately protect the rights to which allottees are entitled under federal law. The Crow Reservation is heavily allotted and 46% of the Reservation land base is held in trust by the United States for individual Indians. The bill, however, fails to safeguard allottees' water rights. The United States owes a trust obligation directly to these individuals in addition to the obligations owed to the Tribe. …
>
> * * *
>
> Seventh, and of extraordinary concern to the Administration, is the fact that the appendices that are referenced in the Crow Tribe-Montana Compact have not yet been prepared. Of particular concern is the fact that Appendices 1 and 3 of the Crow Tribe-Montana Compact are not available for review. In the words of the Compact (Article III A.6.b), Appendix 3 is supposed to be a "list of existing water rights as currently claimed and permits and reservations issued" in the Bighorn River Basin. This list is of utmost importance to the water rights of the Crow Tribe that are recognized under the Compact and would be recognized by S. 3355 because the Compact provides (in Article III.A.6.a(1) and (2)) that the Tribal Water Right shall be exercised as junior in priority to any water rights listed in Appendix 3 to the Compact. Appendix 1 is supposed to be a proposed decree to be issued by the Montana Water Court. According to section 4 of S. 3355, this legislation would ratify the Crow Tribe-Montana Compact, and the term Compact is defined in

[5] *See* Sept. 11, 2008, Written Statement of Kris Polly (hyperlink)

> section 3 of S. 3355 as including any exhibit or part of or amendment to the Compact. Therefore, this bill seeks Congressional approval of the Compact as a whole, including the Appendices, which are critical to the terms of the settlement, and future amendments to the Compact, that the United States has not reviewed and that may not even have been drafted. The Administration strongly urges against the enactment of legislation that would provide United States approval of documents when the United States has not received these documents for review.

123. No action was taken on S. 3355, or an accompanying House bill introduced on February 4, 2009, by Montana Representative Denny Rehberg, H. R. 845. Representative Rehberg then introduced a new proposed version of the Act, H.R. 3563, on September 15, 2009.

124. On September 22, 2009, Michael Connor, Interior Department Bureau of Reclamation Commissioner, testified before and submitted a written statement to the House of Representatives Committee on Natural Resources, Subcommittee on Water and Power. Commissioner Connor's written statement discussed "a number of concerns [with H.R. 3563] that we want to work through with the Tribe, the sponsors, and the other parties so that we would be able to support this settlement.[6] Like Mr. Polly, Mr. Connor's written statement identified "several other [non-monetary] issues of particular concern," including the following:

> … The financial structure and timing of the waivers as proposed in this settlement raise serious concerns for the Administration. … [T]he waivers by the Tribe and the United States of further claims for the Tribe's federal reserved water rights are uncoupled from final receipt by the Tribe of the central settlement benefits …. The State of Montana and its water users will receive their most important settlement benefit waivers far in advance of the Tribe receiving its full settlement benefits. The Department of the Interior has consistently advocated that the settlement benefits that are provided in Indian water rights settlements should be made available to all parties at the same time. In this way, no entity benefits disproportionately in the event that all the major settlement benefits are not realized.

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[6] *See* Written Statement of Commissioner Michael L. Connor before the Committee on Natural Resources, Subcommittee on Water and Power, U.S. House of Representatives, on H.R. 3563, Crow Tribe Water Rights Settlement Act of 2009, Sep 23, 2009. https://www.usbr.gov/newsroom/congressional-testimony/207?year=2009 (Accessed on March 30, 2023).

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> Finally, several key Compact documents remain incomplete or at issue, including the list of existing water uses on trust land. … [T]his list of existing uses is important for determining shortage sharing and priority rights. Past Indian water rights settlements that were approved by Congress in an incomplete status have been very difficult to implement, causing lengthy delays and, in some cases, the need to come back to Congress. The Administration believes the better course is to complete all aspects of the settlement agreement in advance of congressional approval.

125. Commissioner Connor reiterated the Obama Administration's concerns about H.R. 3563, including the absence of the Current Use List of existing water uses on trust land, in a November 18, 2009, letter that substantially tracked the language of his September 22, 2009, written statement to Representative Grace Napolitano, the then-Chairwoman of the House Subcommittee on Water and Power.

126. Additionally, on January 19, 2010, a letter addressing the Act from the legislative affairs offices of both the Departments of Justice and Interior was provided to Representative Tom McClintock (then-Ranking member of the House Subcommittee on Water and Power) attaching Commissioner Connor's November 18, 2009, letter and confirming that it represented the views and concerns of the Administration.

3. Interior Department Officials Contravened Well-Established Law of Tribal Governance, and Crow Tribal Law, Which Required the Crow Nation Legislature and / or the Crow General Council, Not the Tribal Chairman, to Approve Any and All Waivers of Crow Land and Water Rights.

127. The Crow General Council voted to approve and ratify the Act and the Compact on March 19, 2011. However, as of that date, there still was no Current Use List as required by the Compact, and thus nothing that identified the Plaintiffs' and Allottees' rights to access water or could enable the Plaintiffs and other Allottees to exercise and enforce their water rights under the Compact.

128. Under the Crow Tribal Constitution,[7] Article III.3(f), the Tribal Executive Branch, including the Tribal Chairman, is authorized to "negotiate and approve or prevent any sale, disposition, lease or encumbrance of Tribal lands, interests in lands or other Tribal assets, including buffalo, minerals, gas and oil *with final approval granted by the Legislative Branch*" (emphasis added). Under Article III.3(j), the Executive Branch is authorized to "protect and preserve the property, wildlife, and natural resources including air and water of the Tribe in accordance with ordinances adopted by the Legislative Branch." And under Article IV.4(a), the Executive Branch is authorized "to implement all laws, resolutions, codes and policies duly adopted by the Legislative Branch."

129. Consistent with these provisions, Article V.2(a) of the Crow Constitution vests the Crow Nation Legislative Branch with the authority and duty "to promulgate and adopt laws, resolutions, ordinances, codes, regulations, and guidelines in accordance with this Constitution and federal laws for the governance of the Crow Tribe of Indians and for providing for the manner of the sale, disposition, lease or encumbrance of tribal lands, interests in land, or other assets of the Crow Tribe of Indians[.]" And Article V.2(c) vests the Legislative Branch with the authority and duty "to grant final approval or disapproval of items negotiated by the Executive Branch of Government pertinent to the sale, disposition, lease or encumbrance of Tribal lands, interests in lands or mineral assets provided that a process for such approval or disapproval may be established by legislation."

130. On April 27, 2012, the Crow Tribal Chairman, Cedric Black Eagle, Montana Governor Schweitzer, and Interior Secretary Salazar attended a signing ceremony in Washington, D.C. in which Chairman Black Eagle signed a document that purported to waive

[7] *See* Crow Tribal Constitution, effective July 21, 2001 (hyperlink) (Accessed March 30, 2023).

and release all claims as identified in the Act against the United States on behalf of the Crow Tribe, effective on the Enforceability Date.

131. On April 27, 2012, at the signing ceremony, Interior Secretary Salazar signed a document entitled, "Waiver and Release of Claims by the United States Acting in its Capacity as Trustee for Allottees" and stating:

> [T]he United States, acting as trustee for the Allottees, hereby waive and release all claims for water rights within the Reservation and the Ceded Strip that the United States, acting as trustee for the Allottees, asserted, or could have asserted, in any proceeding, including the State of Montana stream adjudication, prior to and including the Enforceability Date, except to the extent that such rights are recognized in the Compact or the Act.

132. On May 24, 2012, less than one month after Chairman Black Eagle signed the Compact at the April 27, 2012, ceremony, the Crow Legislature, during special session, passed LR 12-07, "A Resolution of the Crow Tribal Legislature to Protest the Legality of Executive Branch Chairman Cedric Black Eagle's April 27, 2012, Waiver and Release of Claims on Behalf of the Crow Tribe" (the "Resolution"). A copy of the Resolution is attached hereto as Exhibit 1 and incorporated herein by this reference.

133. Citing to the provisions of Article V of the Tribal Constitution quoted above (Resolution at 1), and stating that "neither the State of Montana nor the United States have performed all actions required by the Compact, including the fact that as of yet no entry of a final order has been made issuing the decree of the reserved water rights of the Crow Tribe as provided for in the Compact and Appendix 1 to the Compact," (Resolution at 2), the Legislature resolved unequivocally to reject Executive Branch Black Eagle's signing of the purported waiver and release document as "hav[ing] absolutely no validity, weight or bearing whatsoever to the Crow Tribal Legislature."

134. Resolution LR 12-07 (at 3) further gave "notice to the United States, through the Department of the Interior and the Department of Justice, that the proper lawful means by the Crow Tribe to waive and release claims as provided in the [Compact and the Act] is through a legislatively authorized final approval to the Crow Tribal Executive Branch negotiated settlement language contained in the [Act][.]"

135. Resolution LR 12-07 (p. 3) further gave notice that "no future waivers or releases of Crow tribal claims shall be authorized or considered authorized when signed by a single Crow tribal member, even if the Executive Branch Chairman, unless specific Crow tribal constitutional authority or tribal statutory authority can be cited … [and] that absolutely no waivers or releases of Crow tribal rights and claims shall be considered unless proposed Settlement terms are fully reviewed and deliberated by the Crow Tribal Legislature and the Crow Tribal General Council."

136. Resolution LR 12-07 (at 3) further "protest[ed] the Secretary of the Interior's April 27, 2012, waiver and release of claims held by Crow Allottees as premature given that no sufficient defense of the Allottees' water rights has yet been made so as to justify a waiver and release of historic claims to water rights."

137. Resolution LR 12-07 (at 3) further gave "notice to the Secretary of the Interior and the United States Attorney General that ignorance of Crow tribal law will no longer be tolerated, and continued disregard of the Crow tribal law shall be considered contemptuous of Crow tribal sovereignty."

138. Finally, Resolution LR 12-07 (at 3) directed the Secretary of the Crow Tribal Legislature to "immediately provide a certified copy of this tribal resolution to the Secretary of the Interior, United States Attorney General, United States Department of the Interior Field

Solicitor for Billings. Montana, and the United States Department of Justice in Denver, Colorado."

139. Resolution LR 12-07 and its directive to the Secretary to respect Crow tribal law and the final approval authority of the Tribal Legislative Branch and the Crow General Council went unheeded by the Obama Administration.

140. On January 25, 2013, Montana Governor Bullock signed a letter, addressed to Secretary of the Interior Kenneth Salazar and Crow Tribal Executive Branch Chairman Darrin Old Coyote, which served as an official concurrence by Montana to a document titled "Process for Finalizing the List of Current Uses of the Tribal Water Right for Purposes of Article IV of the Crow Tribe-Montana Water Rights Compact" ("Process Agreement"). According to the letter, Montana had "consent[ed] to the amendments to the Process Agreement governing the promulgation of a final Current Use List pursuant to Article IV.E.2 of the [Compact] that ha[d] recently been negotiated among the Tribe, the State and the United States."

141. Presumably, the Secretary had also approved the Process Agreement.

142. By its terms, the Process Agreement was seeking to implement Article IV.E.2 of the Compact and set out several provisions to accomplish that goal. There were twenty items set out in the Process Agreement through separate, numbered paragraphs. However, the first sentence of the first provision confirms the Defendants' failure to respect tribal law: "[t]he Parties shall first compile a comprehensive list of uses of the Tribal Water Right in existence during the period from 1989 to 1999 ("Preliminary List") that constitutes their collective agreement as to the water uses that should be included on the Final List."

143. Thus, under the Process Agreement, the Current Use List was to include only post-1989 Indian uses. There is no language in the Act or the Compact restricting the Current

Use List to post-1989 uses, and certainly no language which specifically allows only a ten-year window for actual Plaintiff and Allottee water use prior to Montana legislative ratification. Rather, the ten-year "look back" is a gratuitous reduction in Allottee water uses otherwise allowed under the Compact. It was not approved by the Crow Legislature or the Crow General Council, and there is no quid pro quo. It simply expropriates all Winters Rights based on historical Indian water uses prior to 1989, contrary to the federal Winters Doctrine common law.

144. To the extent this reduction in the Plaintiffs' and Allottees water rights would be effective, it is a violation of federal common law fiduciary duties to the Plaintiffs, other Allottees and the Crow Tribe.

145. An undated document titled "Listing of Current Uses of the Tribal Water Right" (which is not the Current Use List required by the Settlement), signed by Crow Tribal Chairman Carl Venne, purports to reduce the "look-back" from ten years to five years.

146. The Defendants' disregard of tribal law in connection with the Act culminates in the Secretary's unauthorized and unlawful attempted extension of the Act's repeal date and the June 22, 2016, publication of the Enforceability Date.

4. The Secretary has Attempted to Evade the Congressional Mandate of an Automatic Repeal of the Act for Untimely Compliance.

a. The Secretary has Attempted to Evade Repeal of the Act by Publishing the Statement of Findings Without Tribal General Council Approval Required by the Crow Constitution to Extend the Deadline to Publish the Enforceability Date.

147. As described above, the Act defines the Enforceability Date—the date the Act becomes finally effective and enforceable—in section 403(6) as "the date on which the Secretary publishes in the Federal Register the statement of findings described in Section 410(e)." Section

410(e)(1) of the Act, prescribes "in general" what must be included in the Statement of Findings, which when published establishes the Enforceability Date.

148. Under Section 415 of the Act ("REPEAL ON FAILURE TO MEET ENFORCEABILITY DATE"), the Act was automatically repealed, effective the day after the deadline, because the Secretary did not lawfully publish the Statement of Findings "not later than March 31, 2016, or the extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana." Subsequently, all the actions taken by the Secretary under the Act are void.

149. Section 415 provides that the March 31, 2016, deadline for the Secretary to publish the Enforceability Date could be extended by agreement between the Crow Tribe and the Secretary, with "reasonable notice" given to the State of Montana. The Crow Tribe, by and through its governing body (the General Council) did not authorize any extensions to this deadline, nor did the Crow Tribal Legislature.

150. Presumptively, at some point prior to March 31, 2016, an agreement for an extension of the repeal deadline was entered into by the Crow Tribal Chairman, without tribal constitutional or legislative authority, and contrary to stark warnings given to the Defendant Interior Department and the United States Department of Justice by the Crow Legislature through enactment of Council Resolution LR 12-07 of May 24, 2012, that the federal government's continued reliance on supra-lawful authority of the Tribal Chairman would be considered "contemptuous of Crow tribal sovereignty."

151. The federal Defendants carried out this unlawful tribal action despite the Crow Nation Legislature passing legislation in 2011 specifically providing for a ratification vote process for the Crow Tribal General Council in matters involving the Crow Tribe Water Rights

Settlement Act in Tribal CLB No. 2011-03, "An Act to Amend the Election Ordinance to Establish and Affirm Procedures for Tribal Ratification Votes, Including the Crow Tribe-Montana Water Compact and Crow Tribe Water Rights Settlement Act of 2010" (February 22, 2011),

152. The Secretary and the Defendant Interior Department were on clear notice from Resolution LR 12-07 that under the Tribal Constitution the Tribal Chairman was not authorized to take any actions that would render the waivers and releases in the Act finally effective and enforceable without the approval of the Crow Tribal Legislature and the Crow Tribal General Council. Under the Crow Constitution, the final authority for such an amendment rested with the Crow Legislature or the General Council. Necessary respect for tribal law was even more important because a Current Use List establishing the Plaintiffs' and other Allottees' water rights under the Compact still had not been made a part of the May 27, 2015, final decree of the Montana Water Court approving the Compact. The lack of a valid TWC approved by the Secretary for the Allottees to exercise and enforce their water rights rendered these water rights even more illusory.

153. As stated herein above in the Introduction and Nature of the Action at Paragraph 3, this case is yet another example of the Defendant Interior Department's chronic manipulative "strategy of dealing with the [Tribal Executive Branch Chairman] as though he were the sole repository of [Crow] governmental authority." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1133 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978). Particularly considering Crow Legislative Council Resolution LR 12-07, the actions of the Secretary in attempting to evade the Act's repeal date are intolerable and impermissible.

154. The failure to meet the publication deadline under the terms of the Act automatically repealed the Act making it void and unenforceable.

b. The Secretary Attempted to Evade the Automatic Repeal Provision of § 415 by Publishing the Statement of Findings Not in Compliance with the Requirements of the Act

155. One of the findings required to be included in the Statement of Findings necessary for the Enforceability Date under Section 410(e)(1) of the Act is as follows:

> (1) IN GENERAL – The enforceability date shall be the date on which the Secretary publishes in the Federal Register a statement of findings that—
> (A)(i) the Montana Water Court has issued a final judgment and decree approving the Compact; or
> (ii) if the Montana Water Court is found to lack jurisdiction, the district court of jurisdiction has approved the Compact as a consent decree and such approval is final.

156. The term "final judgment" as used in section 410(e)(1)(A) is defined in sec 403(7) of the Act as follows:

> (7) FINAL. —The term "final" with reference to approval of the decree described in section 410(e)(1)(A), means:
> (A) completion of any direct appeal to the Montana Supreme Court of a decree by the Montana Water Court . . . including the expiration of time for filing of any such appeal; or
> (B) completion of any appeal to the appropriate United States Court of Appeals, including the expiration of time in which a petition for certiorari may be filed in the United States Supreme Court, denial of such petition, or issuance of a final judgment of the United States Supreme Court, whichever occurs last.

157. The Secretary published the Statement of Findings purporting to comply with the requirements of the Act in the Federal Register in Fed. Reg. Vol. 81, No. 120 at 40720 (June 22, 2016). Specifically, the Statement of Findings included the following finding first: "The Montana Water Court has issued a final judgment and decree approving the Compact."

158. As alleged, *infra*, the final decree of the MWC approving the Compact did not include the Current Use List in Appendix 1 with the necessary detailed information regarding the

Plaintiffs' and other Allottees' water rights as prescribed in section 85-2-234 MCA and required under Compact Article VII.B.3 for them to exercise and enforce their water rights. Furthermore, the priorities prescribed in the Compact for the use of these Indian water rights in relation to non-Indian state law decreed water rights on the Reservation cannot be determined and implemented under the final decree of the Montana Water Court approving the Compact. It is an impossibility and compounds the illusory nature of the scheme coordinated by the Interior Department officials and fiduciaries.

159. After the MWC issued its final decree approving the Compact, it advised certain water rights claimants, including some or all the Plaintiffs in this case, of issues with their claims, including the following issue it identified for claimants identified as non-Indian water users under the Compact: "IT IS NOT CLEAR WHETHER THIS CLAIM IS A STATE-BASED WATER RIGHT OR PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE CROW TRIBE - MONTANA COMPACT. ADDITIONAL EVIDENCE MAY BE REQUIRED BEFORE THIS CLAIM CAN BE DECREED." MONTANA WATER COURT, YELLLOWSTONE DIVISON, BIGHORN RIVER BELOW GREYBULL RIVER, BASIN 43P NOTICE OF INTNT TO APPEAR, Claim No.: 43P 185007-00, served on Janice Knows the Ground (Crow Allottee landowner), July 24, 2017.

160. After the Statement of Findings was published by the Secretary on June 22, 2016, the BIA and the Department of Justice ("DOJ") filed objections to those so-called "uncertain" claims in which they conceded that they did not know what part of the water right might be an Indian water right under the Current Use List (the Current Use List which has never been prepared and was not included in the Montana Water Court final decree), the BIA and DOJ further conceded that the right or part of the right that might have been included in the Current

Use List could not be adjudicated by the MWC and should be dismissed, presumably because it was subject to adjudication under a TWC that was required, but never approved by the Secretary to be rendered "valid," under the Act:

> *Some or all* of the place of use or point of diversion is on land held in trust by the United States for the Crow Tribe, tribal members, or allottees. Any water right on this land is part of the Tribal Water Right defined by the Crow Compact, MCA 85-20-901[.] *The entire right or relevant portion* should be dismissed.

(Emphasis added.] PRELIMINARY DECREE, BIGHORN RIVER, BELOW GREYBULL RIVER, BASIN 43P, ABSTRACT OF WATER RIGHT CLAIM, JANICE KNOWS THE GROUND, Water Right Number: 43P 185007-00.

161. Furthermore, Finding #1 in the Statement of Findings, that "[t]he Montana Water Court has issued a final judgment and decree approving the Compact," also failed to comply with the timing requirements of the Act, and was premature.

162. As the Defendant Interior Department was fully aware, or reasonably should have been (because it appeared in both), there were two actions in which many Crow Allottees vigorously challenged the jurisdiction of the Montana Water Court to adjudicate their water rights under the Compact, and in which those Allottees asserted that the federal district court had exclusive jurisdiction with respect to their water rights claims. One action was in the Montana Water Court, and the other was in the United States District Court for the District of Montana.

163. The first case in the MWC was captioned: IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE CROW TRIBE OF INDIANS OF THE STATE OF MONTANA, NO. WC-2012-06.

164. On December 21, 2012, the MWC issued a Notice of Entry of the Compact Preliminary Decree constituting a preliminary water rights decree for the Crow Reservation

water basins included in the Compact. The MWC set a deadline of June 24, 2013, subsequently extended to September 23, 2013, to file objections to the preliminary decree. At least 58 Crow Allottees timely filed objections to the Montana Water Court's Preliminary Decree. Substantially all these objections included a specific objection to the MWC's jurisdiction to adjudicate their Indian water rights.

165. The MWC issued an order on July 30, 2014, dismissing the objections, specifically finding that it had jurisdiction under the McCarran Amendment, 43 U.S.C § 666 (waiving the sovereign immunity of the United States for general stream adjudications which include all claimants on a stream system (*Dugan v. Rank*, 372 U.S. 609, 618–19 (1963)), Montana state law, and Compact Article VI, which was not yet in force, and, contrary to the federal common law of the Winters Doctrine, that Allottees have no ownership interest in Winters Doctrine rights appurtenant to their allotments.

166. The MWC order was affirmed by the Montana Supreme Court on July 29, 2015. *See* 380 Mont. 168, 354 P.3d 1217 (2015). The Montana Supreme Court further held that the Allottees were adequately represented by the United States as the Allottees' trustee and the Allottees are consequently bound. A petition for certiorari to the United States Supreme Court from the decision of the Montana Supreme Court was denied on April 25, 2016. *See* 578 U.S. 945 (2016).

167. The MWC also issued orders dated December 24, 2014, and May 27, 2015, respectively granting the motion of the Compact's settling parties for summary judgment and approving the Water Compact with a final order and decree (without the Current Use List). Those orders also were affirmed by the Montana Supreme Court, on December 30, 2015. *See* 382 Mont. 46, 364 P.3d 584 (2015). A petition for certiorari to the United States Supreme Court

from the decision of the Montana Supreme Court was denied on June 13, 2016. *See* 579 U.S. 904 (2016).

168. The second case, in the United States District Court for the District of Montana, was commenced on May 15, 2014, by a nonprofit corporation, the Crow Allottees Association (later inactive and dissolved by the Corporation Division of the Montana Secretary of State) and many individual allottees (including Plaintiffs Hill and White Clay in this action). *Crow Allottees Ass'n, et al., v. United States Bureau of Indian Affairs, et al.,* No. 14-62-BLG-SPW.

169. On the same day that the federal court action was commenced, counsel for the plaintiffs in the federal action filed a motion in the MWC for a stay of those proceedings while the federal court action was being prosecuted. That motion for a stay was denied by the same July 30, 2014, order of the MWC that dismissed the objections of the MWC objectors (including their objection to the jurisdiction of the MWC).

170. Like the objectors in the MWC, the plaintiffs in the federal district court challenged the jurisdiction of the MWC to adjudicate or affect their Winters Doctrine water rights and asserted that the district court had exclusive jurisdiction over those claims. *See, e.g., Crow Allottees Ass'n, et al., v. United States Bureau of Indian Affairs, et al.,* No. 14-62-BLG-SPW, Dkt. # 3 (First Amended Complaint), at ¶¶ 20, 31; Dkt. #27 (Allottees' Response to Motion to Dismiss at 13).

171. The district court granted the federal defendants' motion for judgment on the pleadings on the ground that the United States had not waived sovereign immunity because the Statement of Findings required under the Act had not been published, and thus there was no final agency action under the APA. See, Id. at 2015 WL 4041303 (June 30, 2015).

172. On July 27, 2015, the District Court granted the motion of the MWC defendants to dismiss and denied the plaintiffs' motion to supplement their First Amended Complaint, including with additional challenges to the jurisdiction of the MWC. See *Crow Allotees Ass'n* at 2015 WL 4544508 (Jul. 27, 2015).

173. An amended judgment on the pleadings for the federal defendants and dismissal of the MWC defendants was entered on July 30, 2015. Dkt. # 64. Plaintiffs timely appealed from the amended judgment by filing a notice of appeal to the United States Court of Appeals for the Ninth Circuit on August 25, 2015. Dkt. # 65.

174. On March 8, 2017, the Ninth Circuit entered a mandate dismissing the plaintiffs' appeal only as to the MWC defendants. Ninth Cir. No. 15-35679, Dkt. # 22. On June 28, 2017, the Ninth Circuit issued its memorandum decision declining to the decide the issue of sovereign immunity under the APA, and instead affirmed the District Court on other grounds. *Crow Allottees Ass'n* at 705 F. Appx. 489 (9th Cir. June 28, 2017).

175. The time to file a petition for certiorari to the United States Supreme Court expired 90 days later, on September 27, 2017. At that point, under § 403(7) of the Act, the federal court challenges to the jurisdiction of the MWC had been "finally" decided by the district court under Section 403(7) of the Act.

176. Section 410(e)(1)(A)(ii) contemplates and allows challenges to the jurisdiction of the MWC in the federal district court before the federal district court can determine whether it can approve the Compact, where it states: "[I]f the Montana Water Court is found to lack jurisdiction, the district court of jurisdiction has approved the Compact as a consent decree and such approval is final." Any ambiguity in that provision must be construed in favor of the Indian Plaintiffs under federal law.

177. The publication of the Statement of Findings on June 22, 2016—before the completion and finality of the federal court proceedings--conflicted with section 410(e)(1)(A) of the Act and was premature. This is particularly true because any purported extension of the last day for the Secretary to publish the Statement of Findings under section 415 to avoid repeal of the Act lacked the necessary approval of the Crow Nation Legislature or the Crow Tribal General Council.

178. The publication of the Statement of Findings by the Secretary on June 22, 2016, seeking to establish the Enforceability Date was out of time and insufficient to preclude automatic repeal of the Act as mandated in Section 415. The publication was, therefore, void.

179. The publication of the Statement of Findings by the Secretary on June 22, 2016, seeking to establish the Enforceability Date constituted final agency action within the meaning of Section 704 of the APA.

D. FAILURE OF THE CROW WATER RIGHTS SETTLEMENT.

180. The Settlement Act is not just illusory and a violation of the Fifth Amendment – it is an abject failure. Thirteen years after passage of the Settlement Act and almost seven years after the publication of the Enforceability Date, there has been no construction of the MR&I pipeline system, and no more than a very small portion of the CIP has been rehabilitated.

181. The MR&I cannot be constructed in any event because the United States has not acquired the necessary rights-of-way (ROW) and is unable to acquire the ROW.

182. In September 2018, the Interior Department's Office of the Inspector General issued a "Final Report ‑ Audit of Contract Nos. R11AV60120 and R12AV60002 (Crow tribal contracts with the Bureau of Reclamation under the 1975 Indian Self-Determination and

Education Assistance Act, 25 U.S.C.A. § 5321 et seq. to rehabilitate the CIP and construct the MR&I system) Report No. 2017-FIN-040." The Report states:

> "This memorandum transmits the results of our audit of the Crow Tribe's interim costs incurred on Contract Nos. R11AV60120 and R12AV60002 with the Bureau of Reclamation (USBR).
>
> We found that the Tribe did not track and report its use of Federal funds in accordance with the contract terms, applicable Federal laws and regulations, and USBR guidelines, and that the USBR did not oversee the contracts in accordance with applicable Federal laws and regulations and USBR guidelines. These issues caused us to question $12,808,434 in costs claimed under the contracts."

The present status of these contracts and the status of federal funding to implement the Settlement Act is unknown to the Plaintiffs.

FIRST CLAIM FOR RELIEF

VIOLATION OF THE 2010 CROW TRIBE WATER RIGHTS SETTLEMENT ACT'S MANDATORY DEADLINE FOR PUBLICATION OF A "STATEMENT OF FINDINGS" AND ENFORCEABILITY DATE BY FAILING TO PROPERLY EXTEND THE TIME DEADLINE, THEREBY CAUSING THE AUTOMATIC REPEAL OF THE ACT BY OPERATION OF LAW PER SECTION 415

183. Plaintiffs allege and incorporate every paragraph set forth above in this Complaint as if set forth verbatim herein.

184. The Secretary's attempted extension of the Act's March 31, 2016, deadline for publication of the Statement of Findings to establish the Act's Enforceability Date, but without the required consent, agreement, and authorization of the Crow Tribe's General Council to an extension to June 22, 2016, of the Act's statutory SOF publication deadline, was legally ineffective and the Act was automatically repealed at midnight on March 31, 2016, by operation of law pursuant to Section 415 of the Act.

185. The Act prescribed that the Enforceability Date deadline for publication of the SOF on or before March 31, 2016, or that the deadline could be extended to a later date if agreed to in advance "by *the Tribe* and the Secretary" (emphasis added).

186. Section 415 of the Act specifically provided that the Act would be automatically repealed if the Enforceability Date was not met by the Secretary's publication of the SOF in compliance with the statutory deadline.

187. The statutory March 31, 2016, SOF publication deadline was purported to be extended until June 22, 2016, by the Secretary and by the Tribal Chairman. Under the Act the extension of that date was required to be by agreement between *the Tribe* and the Secretary.

188. The Tribal Chairman did not have the power and the authority to unilaterally approve with the Secretary any extension of the Secretary's SOF publication deadline or make any amendment to the Act.

189. Under the Crow Constitution, the only power and authority for agreeing to any extension of the deadline for the Secretary to publish the SOF resides with the Crow Tribal General Council ("CTGC"), the body of the Crow government that was accordingly required under the Act to ratify the Compact.

190. The Crow Tribal Legislative Branch ("CTLB") — a governmental assembly of Crow elected representatives subordinate to the CTGC— had unequivocally advised the Defendants in 2012 by formal CTLB Legislative Resolution, LR No. 12-07, that the power and authority of the Tribal Chairman was limited to negotiation of the Act, that any and all approval authority for the Crow Tribe rested with the CTLB and, ultimately, the CTGC, and that the Crow Tribal Executive Branch Chairman did not have any such independent or unilateral power or

authority. A true and accurate copy of CTLB LR No. 12-07 is attached hereto as Exhibit 1, and incorporated herein by this reference.

191. The Secretary's attempted extension of the SOF publication deadline from March 31, 2016 to June 22, 2016, was void ab initio and absolutely ineffective to prevent the automatic repeal of the Act pursuant to Section 415.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE CROW TRIBE WATER RIGHTS SETTLEMENT ACT SECTIONS 410(E)(1)(B) AND 403(7) BY PREMATURE PUBLICATION OF THE ENFORCEABILITY DATE

192. Plaintiffs reallege and incorporate herein every paragraph set forth in this Complaint as if set forth verbatim herein.

193. The § 410(e)(1(A)(i) precondition for publication of the Crow Water Rights Settlement Enforceability Date is that "the Montana Water Court has issued a final judgment and decree approving the Compact…."

194. The Act, Sections 403(7) and 403(7)(B), defines "final" for purposes of the condition precedent to publication of the Enforceability Date as:

> (7) FINAL. —The term ''final'' with reference to approval of the decree described in section 410(e)(1)(A), means—
>
> (A) completion of any direct appeal to the Montana Supreme Court of a decree by the Montana Water Court pursuant to section 85–2–235 of the Montana Code Annotated (2009), including the expiration of time for filing of any such appeal; or
>
> (B) completion of any appeal to the appropriate United States Court of Appeals, including the expiration of time in which a petition for certiorari may be filed in the United States Supreme Court, denial of such petition, or issuance of a final judgment of the United States Supreme Court, whichever occurs last.

195. The Interior Secretary's June 22, 2016, publication in the Federal Register purporting to establish the Enforceability Date of the Crow Tribe Water Rights Settlement Act of

2010 on the basis that all of the conditions required by Section 410(e) for the Act's water rights waivers to become effective had been met was more than fifteen months premature because the appeal of *Crow Allottees Association v. BIA* challenging the jurisdiction of the Montana Water Court was not concluded until September 27, 2017. The June 22, 2016, publication violated Sections 403(7) and 410(e)(1)(A) of the Act.

196. Plaintiffs are entitled to a judgment, pursuant to 28 U.S.C. §§ 2201-2202, declaring that the Secretary's June 22, 2016, publication in the Federal Register of the Crow Settlement Act Enforceability Date is a violation of Sections 403(7) and 410(e)(1)(B) of the Act, the March 16, 2016, extended deadline to publish the Enforceability Date was not met, the publication is void and of no effect, and consequently the Act is repealed pursuant to Act section 415(1). Further, the publication was a violation of the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

BREACH OF TRUST FAILURE TO PROTECT PLAINTIFFS' REAL PROPERTY INTERESTS IN APPURTENANT, MARKETABLE, INDIAN WINTERS DOCTRINE RESERVED WATER RIGHTS

197. Plaintiffs allege and incorporate every paragraph set forth above in this Complaint as if set forth verbatim herein.

198. The United States at all times relevant to this lawsuit purported to adequately represent the Plaintiffs and all other individual Indian trust allotment landowners as their trustee throughout the negotiation of the Compact and the adjudication of their Winters Doctrine water rights in the Montana Water Court.

199. The United States holds Winters Doctrine real property water rights appurtenant to the Plaintiffs' and all other Allottees' trust allotments on the Crow Reservation in trust for the Plaintiffs and other Allottees subject to extensive federal control through statutes, regulations,

and administrative policies. As the Plaintiffs' trustee, the United States has a common law fiduciary duty to protect all aspects of the Plaintiffs' and other Allottee landowners' Winters Doctrine property rights in water from loss, expropriation or diminishment, trespass, and non-Indian appropriation; and including the valuable, marketable, prior and paramount 1868 priority and the reserved right to expand beneficial water use at any time in the future.

200. The United States has a common law fiduciary duty to identify the Winters Doctrine water rights appurtenant to each of the Plaintiffs' and other Allottees' individual Indian trust allotments on the Crow Reservation. The United States as trustee failed to determine the extent of the uniquely valuable, marketable, expansive, reserved, prior and paramount Winters Doctrine water rights in actual use by the Plaintiffs' and each individual Indian trust allotment landowner on the Crow Reservation and to assert those rights in the Crow water rights adjudication before the MWC.

201. The United States failed to determine the extent of and to protect the Plaintiffs' and other Allottees' uniquely valuable and expansive 1868 priority Winters Doctrine rights to initiate irrigation of the practicably irrigable, but undeveloped, land on their allotments at any time in the future and to assert those rights in the Crow water rights adjudication before the Montana Water Court.

202. The 1999 Crow Compact and the Settlement Act (by reference to the Final Decree of the Montana Water Court) require the preparation of Appendix I to the Compact. Compact Articles. III.H, VII.B.2, VII.B.3, and VII.C. Settlement Act Sections 403(7), 410(c)(1), and 410(e)(1)(A). Appendix I, also referred to as the "Current Use List", is required to be a complete listing of all Indian water uses on the Crow Reservation from 1868 through June 22, 1999, including the specific details of each use as specified in Section 85-2-234 MCA for non-Indian

claims. In the absence of the Current Use List, neither the Plaintiffs nor any Crow Indian water user knows the nature and quantity of his / her water right vis-à-vis state law non-Indian water rights, or the Tribal Water Right.

203. Because the Current Use List does not exist, the Indian / non-Indian shortage sharing provision of Compact Article IV.A.4.a cannot be implemented.

204. The 1999 Crow Compact and the 2010 Settlement Act require a Secretarially approved Crow Tribal Water Code within three years of the March 19, 2011, ratification of the 1999 Crow-Montana Compact by the Crow Tribe General Council, or by March 18, 2014, at the latest, plus a reasonable time thereafter for Secretarial review. More than nine years after the deadline, there is no Secretarially approved Tribal Water Code.

205. The Secretary's Federal Register publication of the Enforceability Date seeks to extinguish or diminish the Plaintiffs' Winters Doctrine water rights appurtenant to their allotments by operation of the waivers and releases in the Act, Section 410(a)(2).

206. The Secretary's actions in publishing the Settlement Enforceability Date seeking to extinguish or diminish the Plaintiffs' Winters Doctrine water rights in the absence of Appendix I and the Crow Tribal Water Code has placed their water rights in limbo, placed a cloud on the title of all Indian trust allotments on the Crow Reservation, and materially reduced the market value of the Plaintiffs' and all Allottees' Winters Rights in violation of the common law fiduciary duties of the Defendants to protect the Plaintiffs' water rights.

207. The United States, acting as trustee for the Plaintiffs and Allottees, purported to surrender or diminish the Plaintiffs' and Allottees' Winters Doctrine water rights in favor of the Crow Tribe and non-Indian landowners without adequate notice to the Plaintiffs' and other Allottees, without their participation in negotiations, and without their consent, and in blatant

disregard of the Plaintiffs' and other Allottees' efforts to object by means of letters to Interior and Justice Department personnel, including then Interior Secretary Kenneth Salazar, Assistant Interior Secretary Larry Echohawk and the United States Attorney. It failed to protect the Plaintiffs' and other Allottees' individual appurtenant water rights in the adjudication of their Winters Doctrine water rights before the MWC and faithlessly filed a "…Motion to Dismiss All Objections Filed By Individual Indian Allottees" in the MWC on June 2, 2014.

208. At no time did representatives of the United States, the Interior Department or the Justice Department consult with or meet with the Plaintiffs or other Allottees about the extent of their allotted land, their historically irrigated or practicably irrigable acreage, their domestic and stock-watering uses and requirements, or the United States' representation of them as their trustee in the Crow water rights adjudication before the MWC.

209. Plaintiffs are entitled to a judgment, pursuant to 28 U.S.C. §§ 2201-2202, declaring that the Secretary's June 22, 2016, publication in the Federal Register of the Crow Settlement Act Enforceability Date is a violation of the common law fiduciary duties owed by the Defendants to the Plaintiffs, is a violation of the APA, 5 U.S.C. § 706(2) and is void and of no effect.

FOURTH CLAIM FOR RELIEF

VIOLATION OF THE PLAINTIFFS' FIFTH AMENDMENT CONSTITUTIONAL RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

210. Plaintiffs allege and incorporate every paragraph set forth above in this Complaint as if set forth verbatim herein.

211. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U. S. 40, 54 (1946) (plurality opinion).

212. Under federal common law and Montana statutory law, a water right is a real property right. The United States Constitution safeguards the Plaintiffs' and Allottees' Winters Doctrine reserved water rights from expropriation or diminishment in violation of the Fifth Amendment's procedural and substantive due process and equal protection provisions.

213. The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall ... be deprived of ... property, without due process of law; …." The publication of the 2010 Crow Settlement Act Enforceability Date in the Federal Register on June 22, 2016, attempted to cause an expropriation or diminishment of the Plaintiffs' and Allottees' valuable and marketable real property Winters Doctrine water rights without notice or due process of law, and in favor of non-Indians, in violation of the United States and Montana Constitutions.

214. The Plaintiffs were not parties to the Crow water rights adjudication in the Montana Water Court and are not bound by the May 27, 2015, Final Decree of the Montana Water Court. *Martin v. Wilks*, 490 U.S. 755 (1989), *Taylor v. Sturgell*, 553 U.S. 880, (2008).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment in their favor, as follows:

A. Declaring that the Secretary's publication in the Federal Register of the Enforceability Date of the 2010 Crow Tribe Water Rights Settlement Act is void and unenforceable because neither the Crow Tribe General Council nor the Crow Legislature consented to the extension of the deadline for the Secretary to publish the Enforceability Date

from March 31, 2016 to June 22, 2016, in violation of the Crow Constitution and laws, including Crow Legislature Resolution 12-07, and in violation of the Defendants' legal and common law fiduciary duties to abide by Indian tribal law.

B. Declaring that the 2010 Crow Tribe Water Rights Settlement Act has been automatically repealed pursuant to Section 415 of the Act because the deadline to publish the Enforceability Date had passed before the Secretary's publication.

C. Declaring that the Secretary's publication in the Federal Register of the Enforceability Date of the 2010 Crow Tribe Water Rights Settlement Act is void and unenforceable because the publication was premature in violation of the Act sections 403(7) and 410(e)(1)(A).

D. Declaring that the 2010 Crow Tribe Water Rights Settlement Act is void and unenforceable because of Defendants breached their common law trust and fiduciary duties owed to Plaintiffs.

E. Declaring that the 2010 Crow Water Rights Settlement Act is void and unenforceable because it exceeds the power of Congress under, and violates, the Indian Commerce Clause, Constitution, Article I, Section 8, paragraph 3.

F. Declaring that the Enforceability Date of the 2010 Crow Water Rights Settlement Act is void and unenforceable because it violates Plaintiffs' constitutional right to procedural and substantive due process and equal protection under the Fifth Amendment.

G. Declaring that the Plaintiffs are not bound by the May 27, 2015, Final Decree of the Montana Water Court because they were not parties to that proceeding and were not adequately represented by any other party, and their Winters Doctrine reserved water rights remain unaffected thereby.

H. Awarding the fees, costs and disbursements incurred in connection with this action, including reasonable attorney's fees, expert witness' fees, costs and expenses, and;

I. Granting such other and further relief as the Court deems equitable, just and proper.[8]

"One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2527 (2022) (Justice Gorsuch dissenting)

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Respectfully Submitted,

/s/ Thomas E. Luebben

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[8] Plaintiffs are not asserting any claims for damages or monetary relief.