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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Apsáalooké Allottees Alliance, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	**No. 1:22-CV-01781-JEB** **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' UNITED STATES MOTION TO MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED PURSUANT TO LCvR 7(f)**

INTRODUCTION

Respondent's Motion to Dismiss should be denied in its entirety. Each of Petitioners' claims is properly before this Court and adequately states a claim upon which relief can be

granted. Plaintiffs have standing and are within the applicable statute of limitations for every claim. The Plaintiff Apsaalooke Allottees Alliance ("AAA") is an organization of members of the Crow Indian Tribe who are individual Indian trust allotment landowners on the Crow Indian Reservation. All members of the AAA and the individual Plaintiffs hold valuable, marketable private property in federal common law Indian *Winters* doctrine reserved water rights appurtenant to their individual Indian trust allotted lands with a paramount priority date of 1868, the date of the 1868 treaty between the Crow Tribe and the United States which created the present Crow Indian Reservation. Some of the individual plaintiffs additionally own lands in fee on the Reservation. *See, e.g.,* ECF 14 ("Amended Complaint" or "*Compl*") at ¶¶ 48, 75 (p.13, 22).

This lawsuit challenges the Interior Department Secretary's (hereinafter "Secretary") June 22, 2016, Federal Register publication of the 2010 Crow Tribe Water Rights Settlement Act, P.L. 111–2911, 24 Stat. 3097 (Dec. 8, 2010) (hereinafter "Settlement Act" or "Act") Enforceability Date on the grounds that:

> 1) the publication was a violation of federal law, which mandates that the federal government not violate otherwise valid tribal law, and which tribal law was violated because the Crow Tribal Constitution required that the Crow General Council approve the statutory publication deadline extension from March 31, 2016 to June 30, 2016, as agreed to by the Secretary and the then Crow Tribal Chairman;
>
> 2) the publication was premature on the face of the Act because a challenge to the jurisdiction of the Montana Water Court to issue its final decree of Crow Reservation water rights was not concluded in federal court until September 27, 2017[1], more than nine months beyond the deadline;
>
> 3) the publication was a violation of the fiduciary duties of the trustee United States to the Plaintiffs because it waived their valuable private property *Winters* doctrine water rights appurtenant to their allotments and failed to ensure accounting, protection and access to equivalent water rights as part of the adjudicated collective Tribal Water Right; and,

4) the publication was a violation of the Plaintiffs' Fifth Amendment rights to procedural and substantive due process of law and equal protection of the laws because it waived the Plaintiffs' Winters doctrine private property rights in water appurtenant to their allotments without their consent and to the relative advantage of non-Indian water users.

STANDARD OF REVIEW

To withstand a motion to dismiss under Rule 12(b)(6), "a complaint must set forth 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Bowman v. Iddon*, 848 F.3d 1034, 1039 (D.C. Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A court reviewing a challenge under Rule 12(b)(6) must "accept[ ] as true all of the factual allegations contained in the complaint and draw[ ] all inferences in favor of the nonmoving party." *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014) (quotation marks omitted). Alternative explanations advanced by parties must be resolved in favor of the Plaintiff. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Even if the defendant believes that its version will "prove to be the true one . . . that does not relieve defendant[ ] of [its] obligation to respond to a complaint that states a plausible claim for relief, and to participate in discovery." *Id.*

The court may consider the complaint allegations as well as "documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice as well public records subject to judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002), citing *EEOC v. St. Francis Xavier Parochial Sch*., 117 F.3d 621, 624–25 (D.C. Cir. 1997).

ARGUMENT

I. The Plaintiffs' Have Standing.

Interior's lead argument that the Plaintiffs lack standing is premised on incorrect framing of the case that misconstrues the Plaintiffs' injuries and claims for relief as being limited to

"alleged 'expropriation or diminishment' of their *Winters* water rights by operation of the waivers and releases in the Settlement Act." ECF 16 at 20. It also selectively minimizes the administrative actions attributable to Interior and attempts to deflect responsibility for its own actions by characterizing the waiver and release of the Plaintiffs' water rights claims as solely attributable to Congress through "the terms of the Settlement Act," and not likely to be redressed by a favorable ruling of this court. *Id*. at 20-21. Those premises are unfounded.

"To establish standing to litigate in the federal courts, Article III of the United States Constitution requires a plaintiff to 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Hawkins v. Haaland*, 991 F.3d 216, 224 (D.C. Cir. 2021)(quoting *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019)). Plaintiffs have suffered clear and more than one particularized injury in fact at the hands of Interior. Those injuries are the direct result of Interior's actions and can be redressed by a favorable ruling of this court. The waivers of Plaintiffs' *Winters* doctrine water rights, which Interior is attempting to effectuate and highlight in their Motion to Dismiss, although of significant importance and impact to Plaintiffs, are not the only injury visited upon Plaintiffs by Interior's actions; nor is the Secretary's publication of the "Statement of Findings" (SOF) on June 22, 2016, which established the Settlement Enforceability Date, dispositive of any of Plaintiffs' claims.

A. The Plaintiffs Hold Private Real Property Interests in Indian *Winters* Doctrine Reserved Water Rights Appurtenant to Their Trust and Fee Allotments.

There is no doubt that Plaintiff Crow landowners hold real property interests in Indian *Winters* doctrine water rights appurtenant to their allotments. These rights, recognized under the Fort Laramie Treaty of 1868, the General Allotment Act of 1887, and the 1920 Crow Allotment Act as water necessary for irrigation and domestic use, were confirmed by the Supreme Court in

United States v. Powers, 305 U.S. 527 (1939). In recognition of *Winters* rights, the Court explained: "Manifestly 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.

Plaintiffs' Amended Complaint ("Complaint") clearly details this historical legal basis for their *Winters* rights rooted in the 1868 Treaty and allotment Acts. *Compl.* ECF 14 ¶¶ *57-62, 66, 78.* Even Interior's Motion to Dismiss quotes *Powers*: "[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Powers*, 305 U.S. at 532). ECF 16 at 11. It also sets forth in detail authority recognizing other valuable aspects of Plaintiffs' Winters rights. *Compl.* ECF 14 ¶¶ 64, 65, 67-70, 78-79. For example, conveyances of Winters rights to non-Indians include the right to expand irrigated acreage by exercising due diligence. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton II*)("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.) *See also United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984)**;** *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985) (*Walton III*), *cert. denied*, 475 U.S. 1010 (1986). Moreover, on appeal from the Montana Water Court ("MWC") in *In re Crow Water Compact*, the MWC recognized:

> "In this case the Water Court expressly applied federal law in its consideration of the Allottees' arguments that they have water rights that are **'distinct from the Crow Tribe's reserved right.'** The Water Court applied *Powers* to determine that the Allottees' have water rights that are derived from the reserved rights of the Crow Tribe, and that they are entitled to use a just and equitable share of the Tribe's rights.

In re Crow Water Compact, 354 P.3d 1217, 1222 (2015) (emphasis added).

B. The Plaintiffs Have Been Injured in Fact by the Defendants' Attempted Waiver of their *Winters* Rights and the Creation of a Cloud on Their Title.

Plaintiffs' claims are premised on other injuries as well. For instance, Plaintiffs' Winters rights appurtenant to their trust allotments and fee lands, and their paramount priority vis-a-vis post-1868 non-Indian landowners' water rights as they existed prior to and at the outset of the Crow water rights settlement process, were not identified or quantified as required under the terms of the Compact and Act. *Compl*. ECF 14 ¶¶ 7-9, 14-15, 35, 93-107 (citing Act § 404(b)(1)). *See also* Compl. ECF 14 ¶¶ 10-15 (failure to ensure the existence of the Tribal Water Code or prescribe rules necessary to secure just and equal distribution of water); *Id.* ¶¶ 25-28 (failure to include the CUL in Montana Water Court adjudication or otherwise ensure proper approval of the Compact by a court with jurisdiction); *Id.* ¶¶ 70-71, 87-88 (resulting lack of quantification of Crow allottees' Winters rights, devaluation of those rights, and resulting economic disadvantage relative to non-Indians.

The Compact requires that Plaintiffs' and all other Crow allottees' water rights be assessed, inventoried, and described in detail consistent with Montana Code Annotated ("MCA") 85-2-234, MCA 85-2-224, and the January 25, 2013 "Process Agreement" ("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"). It also requires the detailed compilation of Plaintiffs' and other allottees' current and historical water uses as of June 22, 1999 as Appendix 1 to the Compact, also known as the "Current Use List" (hereinafter "CUL"). See Exhibit 1, "Process Agreement" at 1. The CUL does not exist. Moreover, Interior agreed to provisions in the Process Agreement which severely compromise whatever diminished rights to water the allottees might have under the as-yet non-existent Crow Tribal Water Code (hereinafter "TWC").

But for this litigation, the publication of the Enforceability Date to finalize the Settlement, if deemed to be validly executed, would waive Plaintiffs' and all other allottees' uniquely valuable, marketable, private property Indian *Winters* rights. *Compl.* ECF 14 ¶¶ 1, 16, 100, 112, 124, 134, 152, 195, 205. It would also eliminate the advantage of Plaintiffs' 1868 priority and place a cloud on title to their allotments due to the lack of quantification of their Winters rights, thereby significantly devaluing their allotments. *Compl.* ECF 14 ¶ 206 . The effect also puts Plaintiffs at a financial disadvantage in obtaining financing to develop agriculture on their allotments because their water rights are uncertain and undefined, particularly in times of shortage, whereas non-Indian fee allotment owners have firm, detailed, state law adjudicated and decreed water rights protected from Indian priority calls. *Compl.* ECF 14 ¶ 206.

The Plaintiffs' *Winters* rights are further impaired by Interior's failure to approve a TWC, or to promulgate appropriate regulations in the alternative for the administration of the Crow Tribal Water Right as provided in the Act § 407(f)(3)(A). Act § 407, entitled "TRIBAL WATER RIGHTS," states Congressional intent to "provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act," subject to certain conditions such as availability of funding and water, among others. However, the only means for Plaintiffs to identify and quantify their access to the Tribal Water Right is by application for permits under the Tribal Water Code, required be adopted within two years of the Compact's Effective Date. *Compl.* ECF 14 ¶¶ 6. 15, 92, 107, 113, 114, 205, 206; Settlement Act, 407(f)(1); Compact, Article IV.A.2.b.

Whether water claims are waived or not, the TWC is necessary to establish conditions, permit requirements and other limitations that would enable Crow allottees to recover and use tribal water rights, to request water for irrigation, and to access a "satisfactory 'due process

system' for resolving disputes regarding irrigation water requests." 407(f)(1) & (2). *Compl*. ECF 14 ¶¶ 114-117. The only alternative is for the Secretary to promulgate regulations for the administration of the Tribal Water Right as authorized by Act § 407(f)(3)(A), which the Secretary has failed to do.

Additionally, key trade-offs anticipated in the scope of the Compact and Act–economic development and access to potable water for all uses plus sewer infrastructure–have not been realized. *Compl*. ECF 14 ¶¶ 108. "[t]hese infrastructure projects are the primary quid pro quo for the extinguishment of the Plaintiffs' and other allottees' *Winters* doctrine rights" *Id.* 111. See also *Id.* 124, 180-182. As indicated in the complaint, some money was paid to the Tribe and other funding is pending, but none has been allocated for the benefit of Plaintiffs. *Id.* 182. Plaintiffs remain significantly impaired, compared to non-Indian water users on the Reservation, in their ability to access clean and safe drinking water, irrigate, and conduct other agricultural activities on their lands. *Compl.* ECF 14 ¶¶ 14-17, 108. Plaintiffs' private property in *Winters* rights appurtenant to each of their allotments have been abandoned, waived, or severely diminished for illusory benefits which are not specific to each individual landowner or allotment. These are concrete, particularized and actual injuries, born directly by the Plaintiff allottees.

C. The Plaintiffs' Injuries Directly Result From and are Directly Traceable to Interior's Actions and Failures.

The emphasis of traceability is whether the actions of the Defendants, rather than an absent third party, caused or will cause the particularized injury to the Plaintiffs. *Fla. Audubon Soc. V. Bentsen,* 94 F.3d 658, 663 (D.C. Cir. 1996). "Causation requires a 'fairly traceable connection between the plaintiff's injury and the complained of conduct of the defendant.'" *Hawkins v. Haaland, supra* at 225, quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Interior incredulously argues that the complained of injuries must be pinned upon Congress, not the agency itself, specifically as to the terms of the Settlement Act that set forth the waiver and release of Plaintiffs' *Winters'* rights. ECF 16 at 14. In doing so, they acknowledge only two of the Secretary's actions: the improper extension agreement attempting to meet the Act's deadline to publish the required statement of findings ("SOF") to establish the Enforceability Date. Act § 403(6), 410(e). ECF 16 at 14. The Defendants argue simply that they extended the deadline to publish the SOF necessary to comply with the Act and "had no effect whatsoever on Plaintiffs" and that the publication of the statement of findings, moreover, just determined the enforceability date and similarly had no impact. *Id.*

That superficial analysis misconstrues the scheme created in the Settlement Act in which Congress attempted to ensure fair compliance with all its terms for the benefit of every party to the compact and, to some extent, even to Plaintiffs, although they were not allowed at the negotiation table. Congress directed the Secretary to waive all Plaintiffs' water rights and related claims; Act § 410(A)(2); however, it premised those waivers on a number of reciprocal benefits that would (at least on paper) enable the Crow allottees to do a number of things, including but not limited to: (1) realize, quantify and access their water rights in an amount commensurate with their original Winters rights; (2) resolve disputes in the exercise of those rights vis-a-vis non-Indians and in times of scarcity; (3) access water for household use through sewer and water infrastructure funding and development; and (4) enjoy the benefits of increased economic development. And it set forth a sequence of checks and balances in order to protect and, even, restore those rights should Interior not comply with the terms of the Act. *See*, *e.g.*, Act at §§ 410(e)(1), 410(f) and 415.

Contrary to what Interior suggesst, there is nothing in the Act that results in an automatic diminishment or waiver of Plaintiffs' rights. The Act itself does not cause Plaintiffs' harm. As Interior concedes, under the Act's plain terms, the waivers of Plaintiffs' Winters rights do not take effect at least until the enforceability date. ECF 16 at 16 (citing Pub. L. No. 111-291 Section 410(b), 124 Stat. 3111). Initial enforceability, however, is directly dependent on Interior's completion of certain steps by a deadline, March 31, 2016, or an extended date agreed upon by the Tribe and Secretary after reasonable notice to the State of Montana. Act at § 415. No waiver or diminishment automatically springs into effect. What does happen automatically under law is a full repeal of the Act itself, Act § 415, expiration of the waivers, Act § 410(g)(1), and the tolling of all otherwise applicable statutes of limitations, Act §§ 410(f) and (g), in the event Interior fails to meet the deadline. The Act is not the cause of Plaintiffs' harms - the Secretary's failures are.

To effectuate its comprehensive plan, including the reciprocal benefits Plaintiffs were to receive in exchange for their original Winters rights and claims, the Act bestowed upon the Secretary several key administrative responsibilities to be completed within a time frame and in a precise manner, but included several escape hatches in the event the Secretary did not comply. Publishing the SOF was one. Doing it by March 31, 2016, or getting a proper agreement with the Tribe for an extension, was another. But, these were not the only acts required of the Secretary. The Secretary was required to certify in the SOF that seven discrete conditions were met by the deadline. Act § 410(e).

Additionally, as discussed above and detailed in Plaintiffs' complaint, the Secretary had fiduciary obligations to assure the development and approval of the CUL (Appendix 1 to Compact) and the TWC before publication of the Enforceability Date. Furthermore, to meet the

requirements of the Act § 410(e)(1)(A)'s assurance of a final judgment and decree approving the Compact in the Montana Water Court, or the federal district court in the case of a jurisdictional challenge, litigation regarding the validity of the Compact and the MWC Final Decree had to be completed prior to the publication of the SOF. Although Interior filed the SOF on June 22, 2016, the federal court litigation and appellate deadlines on the matter did not end until September 27, 2017. *Compl.* ECF 14 ¶¶ 174-75. See *Crow Allottees Ass'n* at 705 F. Appx. 489 (9th Cir. June 28, 2017).

These are complex steps, requiring careful coordination and negotiation by Interior with the appropriate authorities for the Tribe and State of Montana, understanding of tribal and state governance and jurisdiction, an election of the Crow tribal voting membership, and implementation of several key components of the Compact regarding getting water to the Tribe, its members, and Plaintiffs and other allottees.

D. The Waivers and Releases of the Plaintiffs' Water Rights were not Absolute Upon Passage of the Act as the Interior Department Contends.

Interior concedes that under the Settlement Act's plain terms, the waivers of Plaintiff's *Winters* rights do not take effect until the Secretary's publication of the SOF establishing the Enforceability Date. ECF 16 at 16 (citing Pub. L. No. 111-291, §410(b), 124 Stat. 3111). Moreover, as detailed above, the Enforceability Date is directly dependent on Interior's determination that all of the conditions required to be announced in the SOF are satisfied.

To ensure that all steps were completed in a way that honored the terms of the parties' rights under the Settlement, Congress established an enforceability date and prescribed that the waivers not begin to take effect until that tolling date: "EFFECTIVENESS OF WAIVERS AND RELEASES.—The waivers under subsection (a) shall take effect on the enforceability date." Act

§ 410(b). That Enforceability Date was established as the date the Secretary finished the required actions and published the SOF in the Federal Register. Act § 410 (e).

1. Act Section 415 Automatically Repeals the Act and Section 410(f) Tolls Statutes of Limitation in the Event of Repeal.

Congress was so concerned that all terms of the agreed Settlement be properly and timely effectuated for the benefit of the parties, including Plaintiffs and the Tribe, that it provided a number of clear remedies in case the Secretary did not meet its obligations by the March 31, 2016, deadline.

First and foremost, it provided the primary remedy now sought by Plaintiffs: repeal of the entire Act and voiding of any Secretarial action, including all contracts and agreements made pursuant to its terms. 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[.]

Interior concedes it did not file the SOF by March 31, 2016, and that deadline was extended to June 22, 2022, by agreement between the Crow Tribal Chairman and Secretary. ECF 16 at 26, fn. 2. Plaintiffs, of course, challenge the validity of that deadline extension due to Interior's failure to obtain the necessary authorization of the deadline extension by the Crow General Council in accordance with Article I of the Crow Tribe's Constitution[2] and as a matter of proper tribal governance. *Compl.* ECF 14 ¶¶ 20-25, 33, 183-191. This is a fundamentally

[2] Constitution and Bylaws of the Crow Tribe of Indians, http://www.crow-nsn.gov/constitutions-and-bylaws.html (accessed Aug. 28, 2023).

critical issue in the case; and the statutory remedy of repeal would bring ultimate redress to Plaintiffs. Interior's failure to meet the deadline or get proper tribal approval to extend the deadline to publish the SOF rendered the final Publication of the SOF void and triggered the Act's remedy of repeal, thereby refuting Interior's standing argument that the waivers and releases somehow irreversibly went into effect upon publication of the SOF.

2. The Tribe Can Terminate the Settlement if the 1920 Allotment Act Section 2 is not Resolved or the Settlement is not Fully Funded by 2030.

In addition to automatic repeal of the Act, Act § 415, nullification or withdrawal of waivers were anticipated for other breaches as well. Section 410(g) provides, for example: "In the event that all appropriations authorized by this Act have not been made available to the Secretary by **June 30, 2030**, waivers authorized in this section shall expire and be of no further force or effect." If waivers are voided under this subsection, the United States approval of the Compact itself shall be no longer effective. Act § 410(h)(1). Ultimately, the waivers and releases of claims, both tribal and allottees claims, will not be final until all the terms of the Settlement Act are completed, the Settlement is fully funded, the funds are disbursed in compliance with the Act and the issue of Section 2 of the 1920 Crow Allotment Act is not resolved. *Compl.* ECF 14 ¶ 71, fn.4. There appears to be no deadline on the Tribe's right to terminate the Compact under this provision. Compact, Article VII.A.2(e). And this would not be possible until June 30, 2030, just under seven years from now. Act § 410(g). In addition to these statutory provisions, the Compact also provides that the Tribe reserves the right to withdraw as a Party based upon a number of circumstances that may transpire at points before and after the Enforceability date. Compact, Article VII.A.2.

E. Plaintiffs' Injuries are Redressable by This Court.

As Interior states (ECF 16 at 22), redressability requires that Plaintiffs' injuries are "capable of being remedied 'by a favorable decision.'" *United States v. Texas*, No. 22-58, 2023 WL 4139000, at *11 (U.S. June 23, 2023) (Gorsuch, J. concurring)(citing *Lujan*, 504 U.S. at 561); however, Interior's repeated assertion that Plaintiffs' claims could not be remedied by a favorable ruling of the court because the waivers and releases have already taken effect under the Settlement Act is patently false.

1. Declaratory Relief That the Act is Void Will Exactly Redress Plaintiffs' Claims.

As discussed in detail above, the waivers and releases are not set in stone under the Act and can be undone for a number of reasons, until at least June 30, 2030. *See* provisions of the Act providing for termination and repeal, *supra*. The Act places the burden to complete all of the administrative steps necessary to effectuate the waivers and releases of the Tribe's and the Plaintiffs' *Winters* rights and claims squarely on the Secretary; and this must be timely done as set forth in the Act § 410(e), Enforceability Date. From executing the waiver documents themselves to ensuring judicial resolution of the claims, preparing the CUL, approving the TWC, and all the other steps set out in 410(e)(1), Congress established an ambitious set of conditions to be met by Interior, the State, and the Tribe to allow the Secretary to publish the Statement of Findings.

There is nothing more for the agency to investigate or fix at this juncture. There is no basis for a remand to Interior for reconsideration of the APA claims. ECF 16 at 22 (citing *Fla. Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985)). Automatic repeal is the remedy set forth in the Act at §415(1). Defendant's "all's well that ends well" argument that the ultimate publication of the Enforceability Date somehow corrects Interior's deficiencies fixes in the stone

the statutory waivers and releases is directly refuted by the construction and language of the Act. The Secretary had to do all the steps set out in the Act correctly and in the time period set forth. The Secretary failed.

A declaratory judgment by this court that the Act is void gives the Plaintiffs exact redress for Interior's failed administration of the Act's requirements. It voids the waivers and releases of their appurtenant *Winters* rights and all contracts connected with the Act. It also voids claims attempted to be unilaterally abandoned by the United States in earlier actions in negotiating the Compact and "adjudicating" the Plaintiffs' and the Tribe's water rights in the Montana Water Court. It removes the cloud on the Plaintiffs' and other allottees' title, ensures that the Plaintiffs' extremely valuable, marketable, 1868 prior and paramount water rights priority remains intact and enforceable by priority call, and allows them to use their water (with or without a tribal water code), advance agricultural plans, lease or finance development projects on their land, or even sell their allotments with their appurtenant Winters rights. *See, United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984).

Without this determination, the only people who can advance their agricultural goals within the Crow reservation are the Tribe itself and non-Indian allottees or lessees of allotted lands who hold fully adjudicated and decreed water rights, are not fettered by the Act or a tribal water code requiring that they apply to the Tribe for a permit to use the water they have been using. This necessary relief squarely addresses and remedies the Plaintiffs' APA and breach of fiduciary duty claims.

2. This is not a Claim for Damages.

With respect to the breach of trust/fiduciary duty and Constitutional Fifth Amendment claims, Interior argues that damages would be the only remedy for the alleged expropriation or

diminishment of the Plaintiffs' trust property, citing the Tucker Act, 28 U.S.C. § 1491(a)(1), which provides jurisdiction in the United States Court of Federal Claims for money damage claims against the United States. ECF 16 at 23. However, the Supreme Court has squarely established a basis for standing and declaratory relief to remedy the taking of Indian lands or associated property rights by nullifying the taking and returning the property. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court held that the original version of the "escheat" provision of the Indian Land Consolidation Act of 1983. . . .effected an unconstitutional "taking" without just compensation for individual allottees' fractional interests in property they would have inherited but for the terms of the Act.

The Eighth Circuit in *Hodel* stated:

> It is clear that the vested property rights of individual Indians are "secured and enforced to the same extent and in the same way" as the equivalent rights of other citizens. *Choate v. Trapp,* 224 U.S. 665. . . (1912); *see Morrow v. United States,* 243 F. 854 (8th Cir.1917). It is also clear, however, that Congress may alter and condition rights that have not yet vested in individual Indians, *see Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 . . . (1976); *United States v. Jim,* 409 U.S. 80,. . . (1972) (per curiam), ….

Irving v. Clark, 758 F.2d 1260, 1262 (8th Cir. 1985), *aff'd sub nom. Hodel v. Irving*, 481 U.S. 704 (1987). *Hodel* also found standing. *Id*. at 1267–1268. The Supreme Court affirmed. *Hodel v. Irving*, 481 U.S. 704 (1987).

In *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Court similarly held that the amended version of the Indian Land Consolidation Act "does not cure the constitutional deficiency this Court identified in the original version of § 207" voided as unconstitutional in *Hodel v. Irving*. In each of these cases, the Plaintiffs, individual Indian trust allotment landowners, challenged through declaratory judgment actions in federal district court, provisions of a federal statute determined to violate the Fifth Amendment's Takings Clause. Although the Interior Department had probated thousands of small, fractional interests in Indian trust allotments to the tribes

occupying the reservations of which such allotments were a part pursuant to Section 2 of the Indian Land Consolidation Act, these interests were reprobated to the rightful heirs. This is precisely the remedy sought here and is well within the court's authority to resolve.

II. Plaintiffs' Claims 1 and 2 of Unlawful Publication of the Settlement Act Enforceability Date are Cognizable Claims.

A. Claim 1 is Reviewable Under the APA.

1. The Secretary's Publication was the Final Agency Action Triggering Review Under the APA

Interior argues that Plaintiffs' Claim I was not reviewable under the APA because the extension of the final publication date agreed to by the Secretary and the Tribe was not a final agency action. However, it is not the extension of the publication date that was the final agency action. Rather, it was the June 22, 2016, publication of the Statement of Findings itself that was the final agency action. See, *Compl*. ¶¶ 1, 2, 20, 24, 28, 29, 118, 157, etc. The APA is the vehicle for advancing claims under the Settlement Act as well as the breach of trust violations. *See El Paso Nat Gas Co. v. United States*, 750 F.3d 863, 890 (D.C. Cir. 2014). The government expressly acknowledges this with respect to claims under the Settlement Act. ECF 16 at 26. § 704 of the APA does require "final agency action." 5 U.S.C. § 704. In the affirmative form of administrative action, the APA defines action as "the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof. . . " 5 U.S.C. § 551(13). Additionally, this definition "focuses on an agency's *determination of rights and obligations*[.]" *Vill. Of Bald Head Island v. Army Corp of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013), aff'g 833 F.Supp. 2d 524, 532 (E.D.N.C. 2011) (emphasis added). The requirement of final agency action under the Administrative Procedure Act ("APA") is a jurisdictional requirement that serves to prevent courts from prematurely adjudicating matters that are initially committed to the agency's expertise and discretion. *See, e.g., Barrick Goldstrike Mines v. Browning*, 215 F.3d 45, 47 (D.C.

Cir. 2000). *See also Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). The Supreme Court clarified this two-part test for determining finality as well: namely, that the action (1) "must mark the 'consummation' of the agency's decision-making process" and not be "merely tentative or interlocutory" and (2) "must be one by which 'rights or obligations have been determined," or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1977) (citations omitted).

In this case, the final agency action for the purposes of judicial review is clearly the Publication of the SOF. If done correctly under the carefully prescribed terms of the Settlement Act, that action announced completion of all necessary steps to establish the Enforceability date and it was the moment upon which Plaintiffs' *Winters*' water rights would have passed from their original state to the terms established in the Compact and Settlement Act. Settlement Act § 410(e)(1). *See* ECF 16 at 23, citing Settlement Act § 410(b). The Settlement Act clearly establishes that as the significant final date of enforceability of the Compact. It is not tentative or interlocutory. Moreover, the most significant of legal consequences and rights or obligations are triggered upon proper publication of that Statement.

2. The Plaintiffs Are Not Asserting That the Agreement to Extend the Deadline was the Final Agency Action.

In contrast, the negotiation with the Tribe regarding the extension of time, from the statutory March 31, 2016 deadline to June 30, 2016 was an interlocutory act, aimed at granting Interior additional time to complete the obligatory steps required by Congress in order to effectuate the terms of the settlement and the resulting waivers. The government does not dispute this latter fact. ECF 16 at 26-27. As stated in the Amended Complaint, the fact that that required extension was not properly effectuated by the Secretary through "consent, agreement

and authorization of the Crow Tribe's General Council" rendered it "legally ineffective." *Compl.* ¶ 2(A). *See also id.* at ¶¶16-24, 184-191. The result was to render the effort at extension and the delayed SOF publication itself "void ab initio and absolutely ineffective to prevent the automatic repeal of the Act pursuant to Section 415." *Id.* at ¶24, 184. In the absence of a properly negotiated extension (and completion of the Act's other predicate requirements for the SOF), the Act must be declared repealed under its express terms. Plaintiff's Amended Complaint amply lays out the factual basis for this claim. Moreover, nowhere do they allege that the March 21, 2016 letter sent by the Secretary to the Tribe and to the State of Montana giving notice of the attempted extension was a final agency action. That is only suggested by the government. ECF 16 at 26, n. 2. And the government's own Motion cites to authority expressly ruling out agency letters as constituting agency action. ECF 16 at 20.

3. Publication of the SOF was a mandatory agency action subject to judicial review

Because it focuses on the wrong agency action, the government's argument under §701(a)(2) of the APA is not well-taken. ECF 16 at 28-29. For the reasons stated in the government's motion itself, publication of the SOF in the manner and time frame under the Act was a clear and mandatory directive under the Act. *Id.* *See* § 415 and § 410(e). As such, there is a "judicially manageable standard" to guide meaningful review. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).[3]

[3] Although not addressed in the Defendant's motion, other actions alleged in the Amended Complaint as breaches of the government's fiduciary duty to Plaintiffs are similarly committed to judicial review by the Act's mandatory directives to the agency, including but not limited to determining whether the waivers were in the beneficiaries' interest, ensuring enactment of a proper Tribal Water Code or other means for Plaintiffs to access their water rights, preparation of the CUL, and that the rights of all parties were properly determined in the Montana Water Court or federal district court.

B. Plaintiffs' Second Claim for Relief is Reviewable Under the APA.

Plaintiffs' Amended Complaint sets forth in detail the timeline of litigation regarding the adjudication of water rights under the Compact and the legal basis for their argument that the SOF was published prematurely. *Compl*. ¶¶ 155-179. Contrary to Interior's assertions, the Plaintiffs' Amended Complaint alleges, with respect to the previous federal litigation, still pending at the time of publication of the SOF, "[T]he plaintiffs 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." *Compl*. ¶ 170, citing First Amended Complaint in *Crow Allottees Ass'n, et al., v. United States Bureau of Indian Affairs*, et al., No. 14-62-BLG-SPW, Dkt. # 3 [citations omitted].

Interior is correct, that the language of §410(e)(1)(A) is disjunctive, *i.e.*, satisfaction of either (i) or (ii) will suffice. ECF 16 at 30. There is no dispute that (i) was satisfied, the Montana Water Court issued a final decree. The problem is for purposes of the Secretary's publication, the Act, §403(7) defines "final" and is again disjunctive and either subparagraph (A) or (B) will satisfy the definition of "final." But, there is a condition: "whichever occurs last." Plaintiffs assert that (B) occurred last - "completion of any appeal to the appropriate United States Court of Appeals," plus the 90 days allowed to file a petition for certiorari. Plaintiffs did challenge the jurisdiction of the MWC and continue to maintain its lack of jurisdiction. Plaintiffs' appeal to the Ninth Circuit was not concluded until June 28, 2017. *Compl*. ¶ 171-174. The time to file a certiorari petition to the United States Supreme Court did not expire until September 27, 2017. *Compl*. ¶ 175. It was only at this point that the Montana Water Court final decree was "final" for purposes of Act § 410(e)(1)(A)(i). *Compl*. ¶ 175-176; Act, §§ 403(7) & 410(e)(1)(A)(ii).]

III. BREACH OF TRUST: Plaintiffs' Allege a Cognizable Claim of Defendants' Violation of Fiduciary Duties Owed to Plaintiffs.

Interior argues that "The Court should dismiss Plaintiffs' breach of trust claim because they fail to identify any substantive source of law that establishes a specific fiduciary duty." ECF 16 at 34. Additionally, they allege that the claim derives from "publication of the statement of findings" and that Plaintiffs "rely exclusively on 'common law fiduciary duties and the Winters doctrine." *Id.* Their response woefully mischaracterizes both the source and nature of Plaintiffs' claims and reflects a lack of understanding of the doctrinal parameters of the federal trust responsibility to Indians generally as well as to those specifically owed to Plaintiff Crow allottees. In fact, the government is bound by its longstanding set of fiduciary responsibilities by virtue of its treaty and concomitant trust relationship with the Plaintiffs and other Crow allottees; and these responsibilities are reaffirmed and particularized in the scheme created by the Compact, the Process Agreement and the Settlement Act. The Plaintiffs' Amended Complaint amply sets forth the United States' trust relationship with the Plaintiffs and the fiduciary duties it owes them as their trustee.

A. **Interior's Longstanding Trust Relationship With the Plaintiffs is Expressly Acknowledged and Asserted in the Compact, the Settlement Act, the Execution Documents and the United States Pleadings Before the Montana Water Court.**

The existence of a general trust relationship between the United States and Indian tribes was recognized by the Supreme Court in its foundational cases establishing the doctrinal contours of federal Indian law. *See Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)* (Marshall, C. J.). The Court's decisions have repeatedly reaffirmed this "undisputed existence of a general trust relationship between the United States and the Indian people." *See United States v. Mitchell, 463 U.S. 206* (1983) (*Mitchell II*). *See also Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("distinctive obligation of trust incumbent upon the

Government in its dealings with Indians"). In *Seminole Nation*, the court analyzed the Tribe's breach of trust claims on "well established principle[s] of equity" derived from "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." 316 U.S. at 296 [citations omitted].[4]

In addition to the Court's doctrinal pronouncements on the trust relationship and the Government's fiduciary duties to Indians, Congress has recognized the trust relationship, enacting federal statutes that "define the contours of the United States' fiduciary responsibilities" with regard to its management of Indian tribal property and other trust assets. Mitchell II, 463 U.S. at 224. In the words of the D.C. Circuit, while charged with resolving a seminal breach of trust claim involving mismanagement of Individual Indian Money (IIM) accounts on allotted lands in which individual Indians hold interests:

> The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. "[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians." It is equally clear that the federal government has failed time and again to discharge its fiduciary duties.

Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001), quoting *Mitchell II*, 463 U.S. at 225.

With respect to this litigation regarding the Plaintiffs' *Winters* rights, this general obligation has long existed and has been clearly acknowledged by Interior in the context of the Compact and the Act. *Compl*. ¶ ¶ 2(C), 55-60, 66, 70, 100, 112-113, 122, 197-208. The Compact makes clear there is a trust relationship between the Secretary and the Plaintiffs and

[4] "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Id*. at 296-97.

other allottees as it pertains to the use of water. *See* Compact Article IV(A)(1) ("The Tribal Water Right shall be held in trust by the United States."). This is echoed with express reference to the allottees in in the Act at § 407(c), which reads:

> (c) HOLDING IN TRUST.—The tribal water rights— (1) shall be held in trust by the United States for the use and benefit of the Tribe and the allottees in accordance with this section; and (2) shall not be subject to forfeiture or abandonment.

The April 27, 2012 Execution Documents, which only become effective upon the Secretary's publication of the Enforceability Date, similarly assert the United States' role as trustee for the Plaintiff allottees in the waiver as well as in the retention of claims and rights related to water. See *Compl.* at ¶ 131. The January 19, 2001, Policy Guidance Memorandum by Interior Solicitor Leshy to Interior Department Deputy Director Hayes, titled "Tribal Water Rights Settlement and Allottees" similarly recognizes this trust responsibility (copy attached hereto as Exhibit 2):

> As you know, for some time we have, in the water rights context, been dealing with some of the complex issues regarding the relationship between tribal governments and allottees, and the responsibility of the United States in such matters. Past settlements of Indian water rights have not dealt with these issues in any uniform way; some settlements do not address them at all. In my judgment, this is increasingly unacceptable. **Among other things, the Secretary has a trust responsibility and statutory duties to both tribes and allottees that cannot be ignored.**

Exhibit 2 at 1 (emphasis added). The Memorandum also states that "only the United States as trustee **and the individual allottee** (and not a tribal government) can waive or release claims to those [allottee trust] assets." *Id*. at 4 (emphasis added).

B. The government's general, common law trust responsibility is not restricted in claims like Plaintiffs' that seek specific performance and equitable remedies in federal district, not monetary damages in the Court of Claims.

Drawing from cases set in specific statutory contexts largely inapposite to this case, Interior's Motion to Dismiss states that "the contours of the United States' fiduciary

responsibilities are defined not by the common law or general notions of trust, but by specific "statutes and regulations." ECF 16 at 34, quoting *Jicarilla*, 564 U.S. at 177. This statement mischaracterizes the state of the law applicable to breach of trust cases.

Interior relies upon United States Court of Federal Claims (formerly the United States Court of Claims) ("Claims Court") cases requesting monetary damages brought under the Indian Tucker Act to interpret the scope of the United States' trust relationship with Indians. Those cases, however, focus on the United States' sovereign interests in immunity from suit where monetary damages are sought. The text of the Indian Tucker Act explicitly premises jurisdiction on claims arising under "the Constitution, laws or treaties of the United States, or Executive Orders of the President." *Navajo II* at 1558, quoting 28 U.S.C. § 1505. As indicated in this passage, in *Navajo II*, this articulation of the government's trust obligation does not exist in the context of claims brought by Indian plaintiffs under the "ordinary Tucker Act." *Id.* More importantly for the purposes of the instant case, Plaintiff allottees' causes of action seek only specific declaratory and equitable relief, not monetary damages. As such, jurisdiction and U.S. waiver of sovereign immunity are premised on the APA, which does not contain the restrictions of the Indian Tucker Act. 28 U.S.C. § 1505. As explained by the D.C. Circuit, in the *Cobell v. Norton* case:

> [S]ection 702 of the Administrative Procedure Act waives federal officials' sovereign immunity for actions "seeking relief other than money damages" involving a federal official's action or failure to act. 5 U.S.C. § 702. Insofar as the plaintiffs seek specific injunctive and declaratory relief—and, in particular, seek the accounting to which they are entitled—the government has waived its sovereign immunity under this provision. . . . That plaintiffs rely upon common law trust principles in pursuit of their claim is immaterial, as here they seek specific relief other than money damages, and federal courts have jurisdiction to hear such claims under the APA.

240 F.3d 1081, 1094-95 (D.C. Cir. 2001), citing *Bowen v. Massachusetts*, 487 U.S. 879, 894-95 (1988). Indeed, *Mitchell II* itself was really a case resolving the issue of whether the Indian

Tucker Act waived federal sovereign immunity for the purpose of **expanding** remedies for those injured by the government's breach of trust, i.e., authorizing monetary damages in court of claims in addition to specific, declaratory and equitable remedies that may be sought in federal district court, not a limitation on the fiduciary responsibilities of the government as Interior maintains. *Supra,* 463 U.S. at 212. In the Court's most recent case involving breach of trust claims in the context of tribal water rights, *Navajo Nation v. Arizona*, Justice Gorsuch's dissent also highlights this difference between claims for money damages in the Court of Federal Claims and claims for specific or equitable relief that must be raised in federal district court. ___ U.S. ___, 143 S.Ct. 1804, 1830-31 (2023) (dissenting opinion) (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011); *United States v. Navajo Nation*, 537 U.S. 488, (2003) (*Navajo I*); and . . . (*Mitchell I*). Explained Justice Gorsuch:

> This Court's decisions have long recognized that claims for equitable relief in federal district court operate under a distinct framework than claims for money damages brought in the Court of Federal Claims under the Tucker Acts. In [Mitchell II], . . . for example, the United States argued that the Court should not allow an action for damages under the Tucker Acts to proceed because the plaintiffs could have brought a separate "actio[n] for declaratory, injunctive, or mandamus relief against the Secretary" in federal district court.

Id., quoting *Mitchell II* at 227, 103 S.Ct. 2961.[5]

C. Interior's trust obligation to Plaintiff allottees is firmly established; treaty, statutes and regulations as well as common law direct the agency to fulfill specific fiduciary duties with respect to protecting Plaintiffs' rights.

1. **Even under the standard articulated by the Supreme Court in the context of the Indian Tucker Act, the circumstances of this case, as set forth in Plaintiff's Amended Complaint, would meet the standard of *Jicarilla***

[5] This dissent also highlights lower court decisions in which courts have regularly allowed tribes to mount suits for declaratory or equitable relief when the government has breached its fiduciary responsibility to uphold treaty obligations. *Id.*, citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256 (DDC 1973) (requiring the Secretary of the Interior to "justify any diversion of water from the Tribe with precision"); and *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F.Supp. 1515, 1520 (WD Wash. 1996) ("In carrying out its fiduciary duty, it is the government's ... responsibility to ensure that Indian treaty rights are given full effect").

***Apache, Navajo I* and *Mitchell II* for establishing a trust obligation on Interior.**

Even in Indian Tucker Act court of claims cases, general common law breach of trust doctrine continues to have meaning, defining the contours of the specific fiduciary responsibilities owed by the U.S. as trustee to Indian allottees. Under that Tucker Act standard, "to succeed on a breach of trust claim, a tribal plaintiff "must establish, among other things, that the text of a treaty, statute, or regulation impose[s] certain duties on the United States." *Arizona v. Navajo Nation*, 2023 WL 4110231, at *5. This requires identifying "specific rights-creating or duty-imposing' language in treaty, statute or regulation. *Id, quoting United States v. Navajo Nation ("Navajo I")*, 537 U.S. 488, 506 (2003). Once a substantive source of law is identified, tribal plaintiff must then "allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation* ("Navajo I"), 537 U.S. 488, 506 (2003) (citation omitted); *see also Navajo II, supra*, 143 S.Ct. 1804 at . .. n. 1.

Under this standard, the Supreme Court has held in the context of managing timber resources, that the General Allotment Act itself "created only a limited trust relationship between the United States and allottees that does not impose any duty upon the Government to manage timber resources." *Mitchell I*, 445 U.S. at 542. However, upon remand the Court acknowledged that the right of allottees to recover money damages from the Government for mismanagement of timber resources, in fact, was based on a whole host of sources of this obligation, statutory and common law. *Mitchell II,* 463 U.S. at 210-211. The key issue statutorily is whether there is evidence that the government's trust responsibility exists with respect to a particular area of management. In *Mitchell II*, the question was over management of timber resources; and the Court agreed that a number of statutes besides the General Allotment Act extended the government's trust obligation to that area of management. *Id.* at 226 ("Because the statutes and

regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.").

Careful analysis of *Mitchell II*, moreover, reveals that the Court actually does deem certain fiduciary responsibilities to flow from common law understandings adherent to the trust obligation itself; namely, that duties may be identified in treaties, statutes, regulations and longstanding understandings of the responsibilities of a trustee to its beneficiary. The *Mitchell II* Court specifically emphasized how the construction of statutes and regulations "is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people and sets out the key doctrinal precedent establishing that obligation of trust. *Id.* at 225. Additionally, it discussed how the establishment of the trust obligation makes the trustee liable for breach of its fiduciary duties required in executing the trust. Explained the Court:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.. . . This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

Id. at 26, citing Restatement (Second) of the Law of Trusts §§ 205–212 (1959); G. Bogert, The Law of Trusts & Trustees § 862 (2d ed. 1965); 3 A. Scott, The Law of Trusts § 205 (3d ed. 1967).

2. **Establishing the existence of a federal "Trust relationship" is a different inquiry than what particular fiduciary duties apply; if there is a trust relationship, the fiduciary duties may be defined by the common law.**

Once it is established that the federal government's trust responsibility extends to the particular area of management at issue in a case, i.e., timber on allotted lands in *Mitchell I and II*

and water, in the instant case, then, the specific fiduciary duties this entails may be derived from common law understandings of the trust relations, treaties, statutes, regulations and other sources of understanding. The government's motion to dismiss in the instant case confuses these two steps. It is only in the assessment of whether the government has waived its sovereign immunity in monetary damages claims before the Court of Claims that the existence of the trust obligation itself must be specifically established as based in treaty, statute or agency regulation.

3. **That the government has a trust obligation to protect the interests of Plaintiff Allottees is beyond question.**

As established above, Interior has expressly recognized the trust relationship in the Compact, the Act, the Execution Documents, its Montana Water Court Motion to Dismiss the Plaintiffs and allottees Objections, and Interior Solicitor's January 19, 2001 Memorandum. Further, the General Allotment Act of 1887 provided the Secretary of the Interior with the authority to set rules "as he may deem necessary to secure a just and equal distribution" in situations where irrigation water "is necessary to render the lands within any Indian reservation available for agricultural purposes." *Compl*. ¶ 13; 25 U.S.C. § 381 (2018).[6] Although not inclusive of all of the agency's trust responsibilities, certain Interior regulations also acknowledge and seek to implement some of the applicable fiduciary duties with regard to water rights and distribution on Indian allotments. *See, e.g.,* 25 C.F.R. § 171.105 (2019) (applying regulations to allotments within an irrigation project where BIA accesses fees and collects

[6] *See also* 25 U.S.C. § 382 (2018) (making irrigation projects under the Reclamation Act specifically applicable to "allotments made to Indians"); 25 U.S.C. § 385 (2012) (providing that Federal Indian irrigation projects may charge their costs "reimbursable out of tribal funds…said costs to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe").

money to administer, operate, maintain, and rehabilitate irrigation project facilities); 25 U.S.C. §§ 386-386(a) (2012) (relating to costs of construction and other costs).

Additionally, as explicitly referenced in Plaintiff's Complaint, the Supreme Court has expressly recognized the basis in both treaty and statutes for the trust obligation over Indian allotment water rights in amounts sufficient for cultivation and living. *Compl.* ¶ 66, citing *United States v. Powers*, 59 S.Ct. 344 (1939). *See also Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). *Id.* Stated the *Powers* Court, after canvassing the Congressional landscape set forth in the General Allotment Act of 1887 and the 1920 Crow Allotment Act, "We 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.* at 346-47. Many of those acts confirmed an affirmative role for the Secretary of Interior in protecting, quantifying and otherwise transferring or administering water rights appurtenant to Indian allotments. [7]

Commented [1]: Note that Non-Intercourse Act applies to allotments and establishes trust per Passamaquoddy. Find authority for NIA application to allotments.

Commented [2R1]: I think we have enough.

4. The Plaintiff's Amended Complaint Alleges Specific Breaches of the Government's Fiduciary Duties to the Plaintiffs and Allottees.

[7] In addition to the Treaty and allotment acts discussed above, *Powers* analyzed 25 U.S.C.A. s 381; the Act of March 3, 1891, Ch. 543, 26 Stat. 989, 1040; The Act of May 8, 1906, Ch. 2348, 34 Stat. 182, 183 (authorizing the Secretary of the Interior to issue to Indian allottees patents in fee simple, thereby removing restrictions to sale); 25 U.S.C.A. § 349; 25 U.S.C.A. § 404 (creating responsibilities in the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final). Furthermore, although the Department of Interior has not memorialized most of its fiduciary responsibilities into written regulation, there are some regulations (not mentioned in Powers) that address and confirm its trust obligation to Indian allottees. *See, e.g.*, 25 CFR 171.110 (how the BIA administers irrigation facilities); and 25 CFR § 2530.0-8 Land subject to allotment.

Besides the statutes and regulatory structure discussed in *Powers* as a matter of treaty implementation, the Crow Water Settlement Act articulates specific fiduciary responsibilities necessary for the Department of Interior to complete in furtherance of its trust obligation. Not only is it evidence of Interior's over-arching trust obligation to plaintiff allottees, but as indicated above in the discussion of standing, the Act also enumerates specific administrative tasks that must be completed by the Secretary. Publishing the Statement of Findings is one; doing it in compliance with the Enforceability Date of March 31, 2016, or getting a proper agreement with the Tribe for an extension was another. See, *e.g.*, *Compl.* at ¶¶ 200-02, 205, 209, and 206. The list of specific requirements in § §§ 410(a)(2) and 410(e)(1) were others**.** Of particular importance was the necessity of ensuring promulgation of a tribal water code that would enable the Plaintiffs to access their water and/or adjudicate disputes over such rights. So, too, was the Secretary's fiduciary obligation to assure development and approval of the CUL (Appendix 1 to Compact). See Exhibit 1 (the "Process Agreement").[8]

The CUL is critical not just to detail the Plaintiffs' water rights as required by MCA §§ 85-2-224 and 234 so that their Winters rights are at least equivalent to non-Indian rights, but also because the provisions of the Compact allocating water between Indians and non-Indians when supplies are insufficient simply cannot be implemented. Compact § IV.A.4 provides that for

[8] Process Agreement, ¶ 1: "Preliminary List shall also include those uses of water on tribal lands and trust lands from sources other than the mainstem of the Bighorn River, including but not limited to irrigation, springs, stockponds, and municipal and commercial uses, that were exercised during the period from 1989 to 1999, and such other water uses as the Parties determine is fair and appropriate. The Preliminary List shall also include those uses of water on tribal lands and trust lands from the mainstem of the Bighorn River that the Parties agree fall within Cardno Entrix's classifications of irrigated lands as provided by the United States to the State in July, 2011, as well as all wells, springs, stockponds, municipal and commercial uses, that were in existence during the period from 1989 to 1999, and such other water uses as the Parties determine is fair and appropriate. The Preliminary List shall be completed prior to submission of the proposed Decree by the United States.

water developed pre-Compact, distribution between the Indian water users and State law water rights will be in proportion to the total Indian requirement as listed in the CUL (required by Compact § IV.E.2 to be compiled within one year after Montana ratification) and the total of State law rights. This ratio cannot be calculated without the CUL.

Ultimately, the enumerated items in the Act reflect and particularize Interior's most salient of trust obligations to Plaintiffs: namely, to protect their *Winters'* water rights appurtenant to their allotments and to ensure identification and quantification Plaintiffs' water rights in litigation before the Montana Court purporting to adjudicate them. They do not alter the nature or scope of the fiduciary duties owed by the government to Plaintiffs. Like the Indian Trust Fund Management Reform Act at issue in the *Cobell* case, the Settlement Act "explicitly reaffirmed the Interior Secretary's obligation to fulfill the 'trust responsibilities of the United States.'" *Id.* In the words of the D.C. Circuit: "From this express language, 'we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'" *Id.,* citing *NLRB v. Amax Coal Co*., 453 U.S. 322, 330, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981).

The failure to complete these crucial fiduciary duties within the time frame provided under the Compact and Act, well-pled in Plaintiffs' Amended Complaint, are exactly the kinds of "substantive sources of law" that constitute breaches of the government's fiduciary authority.

D. Plaintiffs' Breach of Fiduciary Duty Claims were not Ripe Until Publication of the Enforceability Date and are timely presented.

Interior argues that certain of the Plaintiffs' breach of fiduciary duties are barred by a six-year statute of limitations, as "the conduct complained of occurred prior to June 22, 2016." ECF 16 at 21, n. 1, citing 28 U.S.C. 2401(a). Specifically, they attribute the government's failure to take certain actions in the water compact negotiations or litigation in the Montana Water Court

as being barred. *Id.*, and at 34. First of all, this litigation does NOT seek remedies for those negotiations or the prior litigation in the Montana Water Court. Those allegations are merely part of the background of the case. The focus in this suit, as indicated throughout this document and the Amended Complaint, is on the untimely publication of the SOF and steps Interior was required to complete prior to its publication.

Additionally and most significantly, however, the Plaintiffs could not initiate this lawsuit until the Secretary published the Enforceability Date because none of the Plaintiffs' claims were ripe. Neither the Compact, nor the Secretary's April 27, 2012, "Waiver and Release of Claims by the United States Acting in its Capacity as Trustee for Allottees" ("Execution Documents" or "Signing Documents"), nor the final decree of the Montana Water Court adopting the Compact as the decree, nor the Settlement Act itself were effective until the Secretary published the Enforceability Date. Act §§ 403(6) and 410(e). The Plaintiffs' and all other allottee landowners' *Winters* rights remained intact until that date. The federal district court highlighted this impediment to earlier legal action in the previous litigation filed prior to the Enforceability date. *Crow Allottees Association v. B.I.A.*, *supra*, 2015 WL 4041303 at 8. Explained the court:

> Since the waivers of claims identified in the Compact and the Settlement Act are not yet enforceable, there has not been a final agency action to challenge under the APA. Because the Secretary still needs to find that the Water Court adopted the Compact and all appeals have been exhausted, there has not been an agency action with "an indicia of finality." . . . In the absence of a final agency action, the APA has not waived the Federal Defendants' sovereign immunity.

Id., citing *Indus. Customers of Nw. Utilities v. Bonneville Power Admin*., 408 F.3d 638, 646 (9th Cir 2005). As indicated above, the earliest date the SOF should have been filed due to the pending appeals on the earlier federal litigation was September 27, 2017. *Compl.* ¶ ¶ *174-75.* But even using the final publication date of the SOF as the tolling action for final agency action, this action was filed within six years of that date.

Moreover, some of the breaches of fiduciary responsibility alleged in the Complaint are ongoing duties for which no statute of limitations would yet apply. These include the duty to prepare a CUL, accounting and quantification of Indian allottees' water rights, protection of those rights and their priorities, ensuring fair and equitable distribution vis a vis non-Indian rights holders, providing a means of gaining access to water for living and agricultural use.

IV. The Plaintiffs Have Properly Alleged Violations of the Constitution's Fifth Amendment.

A. This is a Claim to Protect the Plaintiffs' Private Property Interests in Their *Winters* Water Rights, not a Claim for Compensation.

The Government's brief urging the dismissal of the Plaintiffs' Fourth Claim for violation of the Plaintiffs' Fifth Amendment constitutional rights to procedural and substantive due process and equal protection begins by assuming that this claim is for compensation for a taking of the plaintiffs' *Winters* rights, and argues that it is either a claim under the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). This litigation does not seek compensation for a taking – it seeks to preserve the Plaintiffs' uniquely valuable *Winters* water rights; including their paramount 1868 priority, the right to expand beneficial uses, and their marketability; and to remove the cloud on title to their private property imposed by the Secretary's publication of the Enforceability Date and restore the full value of their marketable *Winters* water rights.

This litigation is on all fours with both *Hodel v. Irving, supra,* 481 U.S. 704 (1987), and *Babbitt v. Youpee,* supra, 519 U.S. 234 (1997), which sought and obtained the restoration of the rights of heirs and devisees to inherit small fractional interests in individual Indian trust allotments which Congress sought to escheat to the tribes occupying the reservations on which the allotments were located. In response to the *Babbitt* decision, the Interior Department

reopened all of the Indian probate cases and re-probated the fractional interests escheated to the tribes back to their rightful individual Indian owners. Interior Secretarial Order of February 19, 1999. *In the Matter of all Estates in Which Property Escheated to an Indian Tribe Pursuant to 25 U.S.C. 2206* (*Indian Land Consolidation Act*).[9]

> Water rights are private real property. The Montana Supreme Court has stated that:
>
> "[w]ater rights are property rights, and adjudication of property rights requires that a property owner be afforded due process. [Citations omitted.] Due process mandates notice and the opportunity to be heard prior to modification of those rights. [Citations omitted.] 'Notice must be reasonably calculated to inform parties of proceedings [that] may directly and adversely affect their legally protected interests.' [Citation omitted.].'"

Little Big Warm Ranch, LLC v. Doll, 431 P.3d 342, 345–46 (2018).

As a result of the 1999 Compact and its implementation by the Settlement Act and the Secretary's publication of the Enforceability Date, non-Indians received fully-detailed, marketable, Montana state-law decreed water rights under MCA ¶¶ 85-2-224 and 85-2-234 while the Secretary purports to have waived the Plaintiffs' Winters Doctrine water rights in favor of no identifiable water rights at all and only the opportunity to apply to the Crow Tribe under a non-existent Tribal Water Code for a defeasible permit to use an undefined portion of the Tribal Water Right. The uniquely valuable and marketable aspects of the Plaintiffs' *Winters* rights, including all aboriginal and historic uses before 1989, the Indian paramount priority of 1868, and the ability to expand beneficial water use in the future are all lost. See Exhibit 1, "Process Agreement" ¶ 1, for the limitation of Indian water rights to uses between 1989 and 1999 only. The Federal Register publication implements blatant racial discrimination by waiving the

[9] "Reopening Certain Escheated Estates," 64 Fed.Reg. 9520-9521 (Feb. 26, 1999), https://www.govinfo.gov/content/pkg/FR-1999-02-26/pdf/99-4791.pdf (accessed Aug. 27, 2023). Permalink: https://www.federalregister.gov/documents/1999/02/26/99-4791/reopening-certain-escheated-estates .

Plaintiff's *Winters* property rights while preserving the full measure of non-Indian water rights and violates the Fifth Amendment's guarantee of substantive due process and equal protection. Strict scrutiny is required standard of review. *Grutter v. Gollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). To pass the strict scrutiny test, a law must be narrowly tailored to serve a compelling governmental interest. *Grutter v. Gollinger*, *supra*. The Government has not shown a compelling interest in waiving the Plaintiffs' *Winters* water rights whereas it could have, as the Plaintiffs' trustee, fully detailed, litigated and validated those rights in the Montana Water Court adjudication proceeding.

B. In the Settlement Act, Congress Stated it was Acting as the Plaintiffs' Trustee.

As detailed, *supra*, stated in the Settlement Act and in the Execution Documents, and as alleged in the *Compl.* ¶¶ 16, 30, 35, 37, 51, 100, 112, 131, 166, 198, 199, 200, 207, 208, and acknowledged by Interior in its Motion (ECF 16 at 36-37), the Secretary acted as the Plaintiffs' and all other allottees' trustee in waiving their water rights by publishing the Enforceability Date. In addition to asserting that both the Crow Tribal Water Right and the allottee water rights are "held in trust," Act § 407(b)(2), the Act asserts that in authorizing the Secretary to waive and release the Plaintiffs' water rights claims, "THE UNITED STATES [is] ACTING IN ITS CAPACITY AS TRUSTEE FOR ALLOTTEES." Act at § 410(a)(2). Consequently, on the face of the Act and consistent with the *Fort Berthold* and *Sioux Nation* analyses, there is no Fifth Amendment taking, although there is nonetheless a violation of the Fifth Amendment's requirement of procedural and substantive due process and equal protection.

Both *Three Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686 (1968) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) inform the analysis in this case. The *Fort Berthold* doctrine analyzes whether in enacting legislation affecting Indian trust

assets, Congress was acting as trustee and merely transmuting the form of the Indian property, or was exercising its power of eminent domain giving rise to a claim for compensation for a taking:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.
>
> Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee. While not every word of every opinion can be harmonized with this guideline, it is basic to the holdings of at least the great majority of cases in this area.

Fort Berthold Reservation. v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968).

In *Fort Berthold*, the Claims Court concluded the United States exercised its power of eminent domain to take some Fort Berthold Reservation land without compensation, and as to another claim acted as trustee, "merely" transmuting land into money. In *Sioux Nation*, applying the *Fort Berthold* analysis, the Supreme Court concluded the United States was not acting as trustee, but rather exercising its powers of eminent domain to take the Black Hills from the Sioux. *Id.* at 407-08. Both cases were claims for compensation for the taking of tribal land and did not involve individual Indian trust allotments.

Here, Interior purported to act as trustee in seeking to transmute the Plaintiffs' uniquely valuable Winters Doctrine proprietary water rights into something allegedly of equal or better value. Interior describes the effect of the Settlement in its Motion to Dismiss in sweeping terms:

> In exchange for the Tribal Water Right, funding for water projects, and other benefits, the Settlement Act contains a comprehensive waiver and release of claims. The Settlement Act specifies that the 'benefits realized by the allottees' under the Act 'shall be in

> complete replacement of and substitution for, and full satisfaction of [,]' the allottees' water rights claims, including 'any claims of the allottees against the United States that the allottees have or could have asserted [.] [Citations omitted.] It also directs the United States to waive and release any claim that the United States, 'acting as trustee for the allottees,' had asserted or could have asserted on the allottees' behalf. [Citation omitted.]

[Emphasis added.] ECF 16 at 14-15.

At best, what the Plaintiffs and other allottees might get is a share of the Tribal Water Right requiring a tribal permit with no priority over non-Indian water uses and no definition or detail consistent with MCA 85-2-224, MCA 85-2-234, and the Process Agreement, and not equivalent to non-Indian decreed rights. ECF 16 at 36-37. In fact, none of the alleged benefits to the Plaintiffs and allottees actually accrue to them. There is no CUL, which was intended to detail and quantify the Plaintiffs' water rights in accordance with MCA 85-2-224 and 85-2-234, and there is no Tribal Water Code to administer those rights (or any Secretarial regulations to administer Reservation water in the absence of a Water Code as provided in the Act § 407(f)(3)(A)). Consequently, there is no promised certainty as to the nature and extent of the Plaintiff's rights. There is no Municipal, Rural and Industrial pipeline system across the Reservation which might or might not deliver water to each of the Plaintiffs' allotments. *See* Act §§ 403(11), 406. The Crow Irrigation Project has not been rehabilitated. *See* Act § 405. The Settlement's benefits were illusory to begin with and the Settlement has failed in fact.

Interior asserts that the Settlement Act has provided "hundreds of millions of dollars," which "have been appropriated and deposited in the Crow Settlement Fund." ECF 16 at 14-15. On the contrary, while much of the authorized funding has been deposited, the Settlement Fund is still not fully funded.

C. The Settlement Act as Applied by Publication of the Enforceability Date is Unconstitutional as a Violation of Fifth Amendment Procedural Due Process, Substantive Due Process and Equal Protection Guarantees.

1. **The Settlement Act is Unconstitutional as Applied to Plaintiffs.**

Interior argues that Plaintiffs have failed to state a facial challenge to the Settlement Act, and that, regardless, it would be time-barred. ECF 16 at 24, 37-38, and at 21, n.1 & 38, n.6, etc. Those are erroneous assertions. Plaintiffs are challenging the constitutionality of the Act as it is applied to them. The effective date and subsequent applications of the terms of the Act by Interior and various agencies of the executive branch of the federal government were activated by the Secretary's final agency action of publishing the Enforceability Date on June 22, 2016. *See, e.g., Compl.* ECF 14 at ¶ 2.D,[10] and ¶¶ 31, 113, 210, and 212. Interior admits in its motion that "certain waivers and releases affecting their water rights would go into effect on the enforceability date" (ECF 16 at 37), as the Act would only then be applied against the Plaintiffs, and they have standing to challenge the constitutionality of a statute as it adversely affects their own rights. *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-155 (1979); *Craig v. Boren*, 429 U.S. 190 (1976).

The Plaintiffs have stated the kind of "concrete" and "particularized" "invasion of a legally protected interest" -- their water rights under the Treaty and pursuant to the Winters Doctrine -- necessary to demonstrate an injury in fact, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). The operation of the Act plainly has inflicted "injury in fact" upon Plaintiffs sufficient to guarantee their "concrete adverseness," and to satisfy the constitutionally based

[10] "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."

standing requirements imposed by Art. III. *Boren* at 194 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). This case was timely filed on June 21, 2022, pursuant to the APA within the applicable six-year statute of limitations, 28 U.S.C. § 2401(a), and there is adequate basis for this claim and for which relief can be granted.

2. Congress Does not Have "Plenary"; i.e., Constitutionally Unlimited; Power to Compromise Indian Real Property, or to Unilaterally Substitute Other Property.

Interior cites *Winton v. Amos*, 255 U.S. 373, 391 (1921) for the proposition that "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property." However, *Winton* does not hold, and cannot hold, that Congress's power to legislate pursuant to the Indian Commerce Clause is not subject to constitutional limitations.

Despite much loose language in reported decisions at all levels of the federal judiciary suggesting the contrary by use of the term "plenary," the power of Congress to unilaterally alter the nature of Indian real property is not unlimited. There is by definition no "plenary" power in a constitutional system of limited governmental powers. The fundamental concept of the American political system is to preserve liberty by means of an organic document, the Constitution, which distributes power with checks and balances as between the Executive Branch, the Congress and the Judiciary. The power of Congress is limited by the Constitution and by the ability of the Judiciary to declare void acts of Congress which are inconsistent with the Constitution and the Bill of Rights. Constitution Article I, Section 8, Paragraph 3, the Commerce Clause, gives Congress the power "To regulate Commerce … with the Indian tribes." The power of Congress to regulate commerce with the Indian tribes is no more unlimited than the more general Commerce Clause, although it has been interpreted broadly. *See, e.g., United States v. Lopez*,

514 U.S. 549 (1995) (Gun-Free School Zones Act exceeded Congress's commerce clause authority).

In Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), the Supreme Court stated:

> "The statement in Lone Wolf, … that the power of Congress 'has always been deemed a political one, not subject to be controlled by the judicial department of the government,' however pertinent to the question then before the Court of congressional power to abrogate treaties, see generally Antoine v. Washington, 420 U.S. 194, 201-204, 95 S.Ct. 944, 949-950, 43 L.Ed.2d 129 (1975), has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e. g., Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). '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, 67 S.Ct. 167, 174, 91 L.Ed. 29 (1946) (plurality opinion); see also United States v. Creek Nation, 295 U.S. 103, 109-110, 55 S.Ct. 681, 683, 684, 79 L.Ed. 1709 (1935); cf. United States v. Jim, 409 U.S. 80, 82 n. 3, 93 S.Ct. 261, 262, 34 L.Ed.2d 282 (1972)."

Id. at 84. Most recently the Court has said:

> [W]e have never wavered in our insistence that Congress's Indian affairs power " 'is not absolute.' " *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54, 67 S.Ct. 167, 91 L.Ed. 29 (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute"); *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 79 L.Ed. 1331 (1935) (plenary power is "subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions"). It could not be otherwise—Article I gives Congress a series of enumerated powers, not a series of blank checks. Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.

Haaland v. Brackeen, 143 S. Ct. 1609, 1629 (2023). Many reported decisions have either directly held, or stated in dicta, that Congress's powers to legislate Indian matters are not absolute, are not actually "plenary;" i.e., extra-constitutional; and are limited by the Constitution. "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). This is necessarily so in a constitutional system of government and laws. E.g., *United States v. Creek Nation*, 295 U.S. 103, 109–10, 55 S. Ct. 681, 684, 79 L. Ed. 1331 (1935). It is certainly true if non-Indian real property is involved.

3. The Strict Scrutiny Standard of Review Applies.

This claim also asserts that the Secretary's publication of the Enforcement Date is unconstitutional as applied because it violates the Fifth Amendment requirements of procedural due process, substantive due process and equal protection. The Secretary's Federal Register publication of June 22, 2016, is intended to effectuate the Secretary's April 27, 2012, waiver of the Plaintiffs' and other Crow trust allotment landowners' constitutionally fundamental, private, real property *Winters* doctrine water rights. Since the Secretary's triggering of the Settlement Enforceability Date constitutes invidious discrimination between the Crow Indian Plaintiff individual Indian *Winters* doctrine water right owners and non-Indian fee owners of former Crow Reservation allotments based on a racial classification, this court must apply strict scrutiny to determine the constitutionality of the Secretary's implementation of the Compact and the Act. *Grutter v. Gollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The Plaintiffs' have alleged "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 567 (1992).

4. The Settlement Act Lacks a Rational Basis and Provides no Benefits.

The standard of review to determine the constitutionality of Indian legislation most recently expressed by the Supreme Court is that the legislative judgment should not be disturbed "(a)s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Morton v. Mancari*, 417 U.S. 535 (1974). *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977). The "tied rationally" analysis is not applicable to the instant case, however, because in the *Mancari* case the legislation at issue, the 1934 Indian Reorganization Act, was indisputably intended to **benefit** Indians and the Court characterized

Indians as a political classification, not a racial classification. Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 et seq. The *Weeks* case is distinguishable because no racial or political classification was at issue. The *Weeks* issue was only whether Congress had a rational basis for limiting the per capita distribution of an Indian Claims Commission award compensating for a treaty breach to the members of two federally recognized tribes, but excluding the Kansas Delawares who were not tribal members and had no vested right to shares of the award.

Even if the Court applies the rational basis standard instead of strict scrutiny, the Settlement fails constitutional muster. The Act as applied by the Secretary's publication of the Enforceability Date cannot be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." While it waives and releases the Plaintiffs' *Winters* doctrine water rights as against all the world, it provides them with no benefits, directly to the individual Plaintiffs as offsetting value for the loss of their individual *Winters* doctrine water rights, or indirectly by way of the "benefits" touted by Interior. The Settlement required neither the compilation of the detailed CUL of the Plaintiffs' appurtenant water rights, nor tribal adoption and Secretarial approval of the Tribal Water Code, which is supposed to be the substitute basis for the Plaintiffs' water rights, as conditions of the Secretary's publication of the Enforcement Date. Neither exists. Consequently, the Act and the Secretary's publication created a cloud on the Plaintiffs' and all other allottees land and water titles and significantly reduced the value of their allotments. The Plaintiffs are entitled to retain, or to realize through sale, the full value of their allotments:

> 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 court 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. The *Walton* decision accords with the Congressional policy of ensuring to an Indian allottee the full economic benefit of the allotment.

United States v. Anderson, 736 F.2d 1358, 1362 (9th Cir. 1984).

Nor has the Settlement provided the Plaintiffs with any other benefits. The Crow Irrigation Project Rehabilitation and Improvement and the Municipal, Industrial and Rural pipeline ("MR & I system") authorized by the Act, §§ 405 and 406, have not been constructed. The MR & I system was not and is not feasible, in significant part due to the inability of the Bureau of Reclamation ("BOR") , a subagency of the Interior Department, or the Tribe, to acquire the necessary rights of way across hundreds of individual allotments since neither has condemnation power. Compl. ¶ 181. The Settlement is a failure, not just because it attempts an unconstitutional waiver of the Plaintiffs' *Winters* rights and violates the Plaintiffs' Fifth Amendment property and equal protection rights.

Even if application of the so-called *Fort Berthold* doctrine (see *Fort Berthold Reservation v. United States*, 390 F. 2d 686 (1968)), allowing Congressional taking and "substitution" of Indian property, were constitutional under the Fifth Amendment, and despite the assertion in § 407(a) of the Act that "[i]t is the intent of Congress to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess as of the date of enactment of this Act," the Act provides no benefits to the Plaintiffs' or other allottees, directly or indirectly. It fails the rational basis test as well as strict scrutiny. Any benefits provided by the Act redound to the Tribe as a corporate body and its Executive Branch officials, not the Plaintiffs. The Settlement is

a failure and simply benefits non-Indian former allotment landowners whose water use is now fully decreed, marketable and insulated from the exercise of the Plaintiffs' and other allottees *Winters* rights and paramount 1868 priority.

CONCLUSION

The Court should deny the Motion to Dismiss in this case. The Plaintiffs have alleged four cognizable claims and have standing. The Secretary violated the plain language of the Act by premature publication of the Enforceability Date. The Secretary violated federal law by purporting to obtain an extension of the statutory deadline to publish the Enforceability Date from March 30, 2016, to June 30, 2016 for the Crow Tribal Chairman without the Crow constitutionally required approval of the Crow General Council. The Crow Tribe Water Rights Settlement Act has been voided and repealed by its own terms as a necessary result of both or either of these actions. The Secretary's publication of the Enforceability Date violated the Government's fiduciary duties to protect the Plaintiffs' and other allottees' private property interests in *Winters* rights appurtenant to their trust allotted lands and their fee lands as described, *supra*, and in the absence of the full inventory of the Plaintiffs' and other allottees' *Winters* rights required by the Compact Appendix 1 (the CUL) and the Process Agreement, and in the absence of either a Tribal Water Code or Interior Department regulations governing the use and allocation of water on the Crow Reservation as required by the Act and 25 U.S.C. § 381.

The totality of the Act and Interior's actions to implement the Act have enhanced the value, marketability and accessibility of water rights appurtenant to former Indian trust allotments on the Crow Reservation owned by non-Indians, while doing the opposite to the Plaintiffs' and other allottees *Winters* rights by terminating the uniquely valuable *Winters* characteristics of the Indian rights, devaluing those rights, throwing the status of those rights into

legal limbo, and casting a cloud on title to the Plaintiffs' otherwise marketable allotments with appurtenant *Winters* rights. The implementation of the Act by the Secretary's publication of the Enforceability Date violates the Fifth Amendments' guarantees of procedural due process, substantive due process and equal protection.

DATED this August 28, 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served on all counsel of record by the Court's ECF system on August 28, 2023.

/s/ Thomas E. Luebben
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