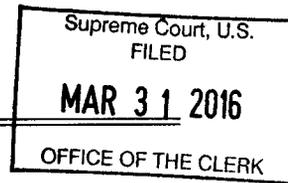


No. 15-779



In The
Supreme Court of the United States

—◆—
CROW ALLOTTEES, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
THE CROW TRIBE, AND THE STATE OF MONTANA,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The Montana Supreme Court**

—◆—
**REPLY IN SUPPORT OF
PETITION FOR CERTIORARI**

—◆—
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**REPLY IN SUPPORT OF
PETITION FOR CERTIORARI
INTRODUCTION**

The United States offers no legitimate reason why this Court should not grant the Crow Allottees' (Allottees) petition for certiorari.

First, and foremost, the Montana courts lack jurisdiction to determine the underlying basis for all of the United States' arguments opposing the Allottees' petition for certiorari. Further, the Montana courts lack jurisdiction to determine Congress' intent in the Settlement Act, as argued by the United States.

Second, the United States failed to address Allottees' argument that pursuant to the *Winters* Indian reserved water rights doctrine, Allottees are entitled to an individual water right, which is a property right separate from the Crow Tribe's property rights. Allottees provided ample case law upholding Allottees' right to individual water rights for their allotted property. In contrast, the United States offers no legal authority demonstrating the Allottees' potential to share in the Tribe's communal water rights in the future constitutes an individual water right, as provided by the *Winters* Doctrine for Indian reserved water rights.

Finally, the United States failed to inform this Court that if certiorari is not granted, the Settlement Act will extinguish Allottees' right to ever seek remedy against the United States based the waiver of all Allottees' claims against the United States contained

in the Settlement Act. This waiver of the Allottees' rights becomes final when all appeals to the Montana Water Court's ruling have run their course. Thus, the United States inserted a poison pill into the Settlement Act that serves to void any action by the Allottees against the United States for the United States violating its trust duties to the Allottees. If this Court denies certiorari, Allottees' claims against the United States, according to the Settlement Act, are extinct.



ARGUMENT

I. The Montana Courts Lack Jurisdiction Over the Issues in this Case.

The United States' argument that the Montana courts had jurisdiction to resolve the issues presented in this case is baseless for several reasons. In its discussion of the McCarran Amendment (U.S. 14-15), the United States completely failed to address this Court's statement: "Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). Additionally, the United States failed to respond to the Allottees' argument that many of the Allottees' objections to the Crow Compact are claims

that the Montana Water Court did not have jurisdiction to decide. These objections are:

- Whether Allottees have a legal right to water distinct from the Crow Tribe's reserved right;
- Whether the Crow Compact will harm the Allottees' legal and property interests; and
- Whether the United States' representation as trustee of the Allottees during the Compact negotiations was inadequate.

Allottees' Opening Brief to the Montana Supreme Court at p. 21. There is nothing in the McCarran Amendment that gives the Montana Water Court jurisdiction to decide these issues.

Further, the United States failed to respond to Allottees' argument that only the federal district courts have original jurisdiction of any civil action involving the rights of persons with "Indian blood or descent, to any allotment of land." 28 U.S.C. § 1353. There is nothing in the McCarran Amendment giving the Montana courts jurisdiction over Indians and their allotments. The Chief Water Judge, commonly known as the Water Court, is a position created by state statute. Mont. Code Ann. § 3-7-224(2). "The chief water judge and the associate water judge have jurisdiction over cases certified to the district court under 85-2-309 and *all matters relating to the determination of existing water rights within the boundaries of the state of Montana.*" *Id.* (emphasis added).

The United States even argues the Montana courts have jurisdiction to decide if Congress correctly applied its Constitutional plenary authority over Indian affairs. (U.S. 17-18). Essentially, the United States would expand the jurisdictional authority of Montana courts to include review of the constitutionality of the actions by the United States and Congress.

Further, the United States argues that Congress has the authority to “‘change the form of [Indian] trust assets’ as long as it acts, in good faith, to ‘provide [trust beneficiaries] with property equivalent value.’” (U.S. 17 (*citing United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980))). The *Sioux Nation* case did not address the issue of whether state courts had jurisdiction to determine whether Congress correctly applied its Constitutional authority. *Id.* Instead, the *Sioux Nation* case was a case from the United States Court of Federal Claims [Court of Claims at that time] in which the Court upheld a takings claim against the United States. *Id.*

Even if the United States correctly argues that Congress properly exercised its authority, which the Allottees do not concede, the Montana courts are not the proper jurisdiction to decide that issue. In fact, the Montana Water Court found “[t]hat means the allottees’ remedy for improper allocation of the Tribal Water Right, should such an event occur, is not with this Court.” Water Court Order Dismissing Allottee Objections and Denying Request for Stay dated July 30, 2014, pp. 10-11. Even the Settlement Act provides

that it does not confer jurisdiction on any State court to “conduct judicial review of Federal agency action.” Crow Tribe Water Rights Settlement Act of 2010 (Settlement Act or Act), Pub. L. No. 111-291, 124 Stat. 3097, § 410(d)(3)(C). Further, the Act explicitly states that it does not waive the sovereign immunity of the United States. *Id.* at § 413(a).

This issue relating to whether Congress and the United States correctly applied their Constitutional authority illustrates the exact problem with the Settlement Act. If the Montana Supreme Court’s decision is upheld, the Allottees’ rights to argue that the United States violated the Allottees’ rights is forever gone because the Settlement Act waives Allottees’ rights to ever bring those claims. Crow Tribe Water Rights Settlement Act of 2010 (Settlement Act or Act), Pub. L. No. 111-291, 124 Stat. 3097, § 410(a)(2) (“[T]he United States, acting as trustee for allottees, is authorized and directed to execute a waiver and release of all claims for water rights within the Reservation. . .”).

The Montana courts have no jurisdiction and in fact did not decide whether Congress and the United States have violated Allottee rights and the Constitution. Yet, the United States now argues that Congress and the United States were within their Constitutional authority and the Montana courts correctly ruled on how the United States and Congress used their authority.

The United States argues: “[e]ven if petitioners were correct there is a difference between their federal water-use rights before and after the Settlement Act, that would not provide a basis for sustaining their objections to the Compact,” because “the power to manage property and other rights held in trust for the benefit of Indian tribes and their members ‘is a sovereign function subject to the plenary authority of Congress.’” (U.S. 22) (*citing United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011)). Essentially, the United States argues the Allottees have no right to complain because Congress and the United States have the power to do whatever they want with Allottees’ water rights. This argument ignores the plight of Allottees in seeking a Court with jurisdiction to determine whether Congress and the United States failed in their trust duties to the Allottees.

According to this Court’s admonition that it would safeguard Indian water rights against state courts doing anything to abridge those rights, it cannot be right for the United States, the Crow Tribe and the state of Montana to be able to negotiate a deal that strips the Allottees of their rights without any due process and scrutiny of those issues by a Court of competent jurisdiction. *Arizona*, 463 U.S. at 571. There is no doubt that the United States, the Crow Tribe, and the state of Montana seek efficiency in determining the extent of *Winters* Doctrine Indian reserved water rights. Further, there is no doubt that those three parties to the negotiated deal (which

excluded the Allottees from participating), also agreed to provisions that serve to forever bar Allottees from defending their rights in a court of competent jurisdiction.

Contrary to the United States' arguments, the Montana courts do not have jurisdiction to decide Allottees' issues. None of the cases cited by the United States ever came close to holding that state courts have the jurisdiction to determine issues related to Allottees' rights and whether Congress and the United States complied with the United States Constitution and their trust duties to the Allottees.

II. The Montana Courts Erred in Determining that Allottees Have No Water Rights.

Again arguing the Montana courts correctly exercised the authority given to them by Congress, the United States relies on its interpretation of the plenary power of Congress and ignored the plethora of case law the Allottees cited to support their argument that they were deprived of their *Winters* Doctrine Indian reserved water rights. (U.S. 16-17).

The Allottees contend the United States violated their rights during the negotiations and the United States and Congress violated their rights in negotiating and passing the Settlement Act. (Pet. App. 8). The Allottees argue the result was not fair or equitable to them because the deal gave their *Winters* Doctrine Indian reserved water rights to the Crow Tribe. (Pet. App. 26).

Based on its brief, the United States does not understand water rights in the prior appropriation states or as provided by the *Winters* Doctrine Indian reserved water rights. The United States argues the “Allottees’ right to a share of the Crow Tribal Water Rights” was an enforceable water right. (U.S. 19). Water rights, though amorphous in nature, are none the less enforceable, distinct property rights in the West. A future right to share in the Crow Tribe’s water right is not a water right.

Based on the *Winters* Indian reserved water rights doctrine, the Allottees had a right to their own legally distinct water right. (Pet. App. 14). Indeed, the United States fails to even respond or address the plethora of case law interpreting Allottees’ rights to water rights separate from the Crow Tribe’s water rights. Additionally, the United States failed to respond or address this Court’s previous holding that the Allottees’ property ceased to be held in common with the Crow Tribe and that Allottees’ property became the exclusive property of the Allottees. (Allottees 24 (*citing United States v. Powers*, 305 U.S. 527, 528 (1939))).

The United States, the state of Montana and the Crow Tribe, which were all at the negotiating table to the exclusion of the Allottees, may all believe that a fair deal was struck. However, it is the Allottees who are now left without a water right for their land: a violation of the Allottees’ *Winters* Doctrine Indian reserved water rights guaranteed to Allottees by the 1868 Treaty of Fort Laramie. Treaty of Fort Laramie

of May 7, 1868, 15 Stat. 649; *see also Winters v. United States*, 207 U.S. 564 (1908).

III. The Question of Whether a Federal Law Entitling Allottees to a Future Process is an Equivalent Property Right is Outside of the Montana Courts' Jurisdiction.

The United States argues: “[e]ven if petitioners were correct that there is a difference between their federal water-use rights before and after the Settlement Act, that would not provide a basis for sustaining their objections to the Compact.” (U.S. 22). The United States stated: “[t]he [Settlement] Act guarantees allottees a portion of the Tribal Water Right specified in the Compact, as well as other benefits, in exchange for a comprehensive waiver of claims.” (U.S. 23). Further, the United States correctly mentions that in this case the Allottees have not directly challenged the Settlement Act. However, the United States again failed to offer a legitimate reason why this Court should not grant certiorari.

First, even if the United States and Congress correctly executed their trust duties to the Allottees, this issue was not within the jurisdiction of the Montana courts. Second, the Allottees received no benefits in exchange for the United States waiving Allottees' rights to sue the United States for violation

of the United States' trust duties.¹ Lastly, Allottees did not ask the Montana Water Court to adjudicate a takings claim, a due process claim, or a claim of whether the United States and Congress correctly executed their trust duties to the Allottees because those issues are not within the Montana courts' jurisdiction.

The United States neglected to inform the Court that these claims, except for the Tucker Act takings claim, were brought against the United States in federal court. *See* First Amended Complaint Cause No. CV-14-62-BLG-SPW-CSO D. Mont., attached as Appendix A. However, the federal court ruled against Allottees on the United States' motion for judgment on the pleadings and dismissed Allottees' case. That case is currently pending on appeal before the Ninth Circuit.

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CONCLUSION

The United States argues the Montana courts have jurisdiction to determine whether the United States and Congress upheld their Indian trust duties. Further, the United States argues that the Settlement Act was "a direct manifestation of Congress' intent," which is another issue that was not properly

¹ The Settlement Act provides millions of dollars from the United States to the Crow Tribe. Settlement Act at §§ 411, 414.

before the Montana courts. However, the most egregious outcome based on the United States' reasoning, is that the Allottees will never have a court of competent jurisdiction determine whether the United States violated its trust duties to the Allottees. If this Court does not grant certiorari, the Settlement Act will become final and will serve to kill any remedies that the Allottees should have against the United States and Congress.

For all these reasons, the Court should grant Allottees' petition.

Respectfully submitted,

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