

**THE NATIONAL COMMISSION ON INDIAN TRUST ADMINISTRATION  
AND REFORM**

**Fort Berthold on September 12, 2012  
Bismarck, North Dakota on September 13, 14, 20  
Presentation by  
Beverly Greybull Huber**

**My name is Beverly Greybull Huber, and I am an enrolled member of the Crow Sovereign Nation, a right given by The Creator. I am an allottee; I own tracts of land located within the Crow Indian Reservation.**

**A BRIEF HISTORY OF THE 1999 CROW WATER COMPACT BETWEEN  
CROW TRIBE, THE STATE OF MONTANA AND U.S. FEDERAL  
GOVERNMENT:**

**In 1999, the Chairwoman of the Crow Tribe, Clara Nomee and the State of Montana got together in Helena, Montana, and created a water compact; a water right negotiation between the Crow Tribe and the State of Montana. Madam Chair Clara Nomee had been Chairwoman for the Crow Tribe from 1990 through 2000, a term of 10 years. I cannot afford not to mention that Chairwoman Clara Nomee had been indicted and so charged at the time of her and the State of Montana Creating the water compact. When a new Crow Tribal Chairman was elected, Clifford Birdinground; at the first Crow Tribal Council Meeting in 2000, with Chairman Birdinground, a tribal resolution was passed during the council meeting disapproving the 1999 Crow Water Compact with its entire language.**

**When several of us Crow allottees became aware that the 1999 Crow Water Compact between the Crow Tribe, the State of Montana and the U.S. Federal Government was in the process of being ratified, we formed a group of allottees and began looking into the truth of the issue. Our group made or tried to make contact with the Crow Tribal Chairman and his administration involved, and other State and federal agencies involved to try to obtain concrete information and relay our opinion of the matter without favorable outcome. At the last, in May of 2011, several of our members of our group filed complaints in the Crow Tribal Courts and were immediately dismissed.**

**At some time during these events, contact was made with Attorney Tom Luebben and continue to make contact and have had meetings with him and others. We are still in contact with him for reasons relating to the 1999 Crow Water Compact and the 2011 Crow Water Settlement Act.**

**1. Brief history of the allotment of the Crow Reservation**



**d. Allottee rights will be terminated when Montana Water Court issues final decree.**

**e. U.S. claims to act as allottee trustee, but does not talk to allottees and waives their rights.**

**f. Outrageous violations of allottees' constitutionally-guaranteed rights of property and due process of law.**

**4. The Crow Tribe Water Settlement and the U.S. waiver of allottee water rights is a massive breach of the trust obligations to individual Indian allottees by the allottees' federal trustee.**

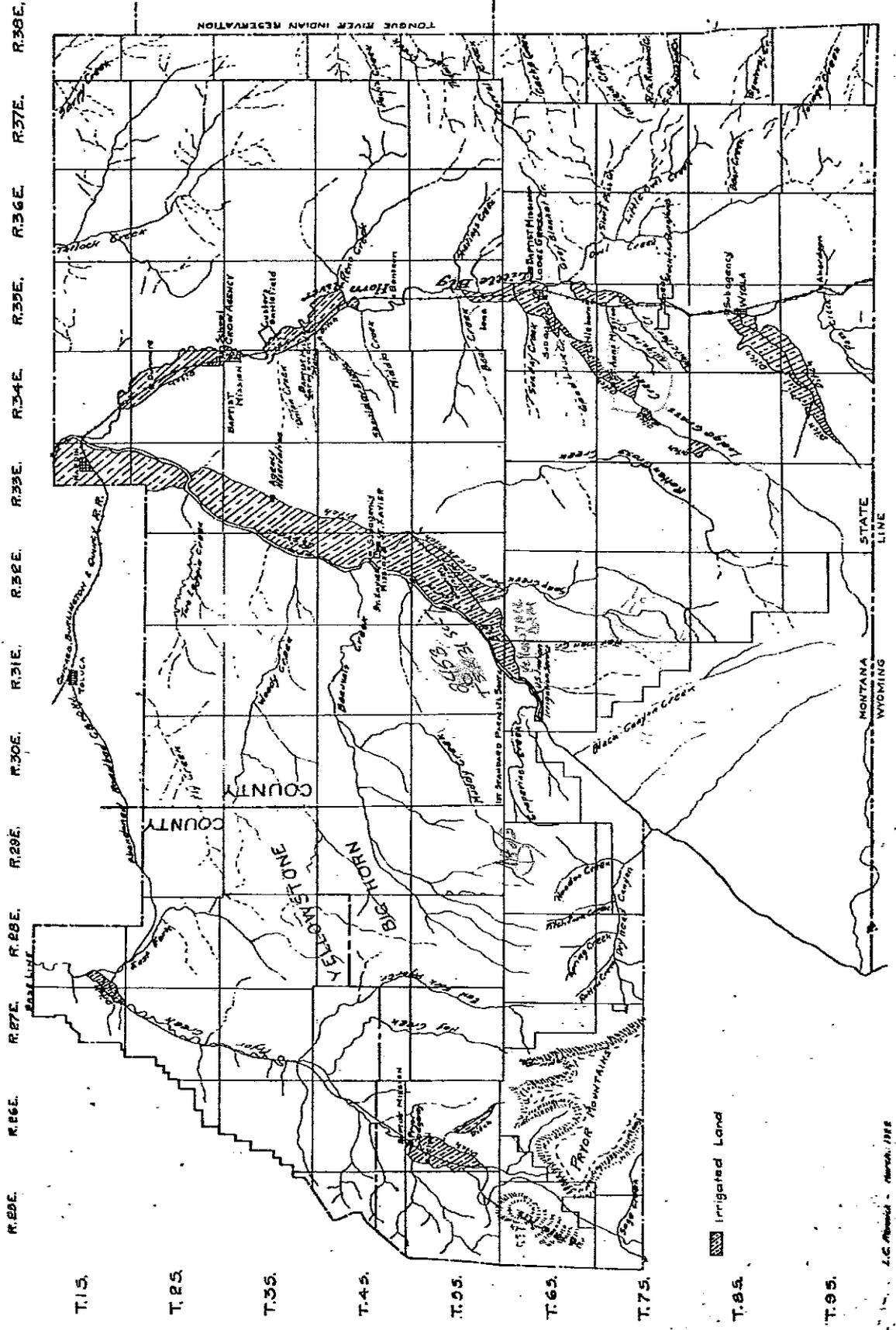
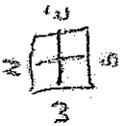
**5. Responds to the waivers; a statement of Kris Polly, Deputy Assistant Secretary for Water and Science, U.S. Department of the Interior before the U.S. Senate Committee on Indian Affairs, The Crow Tribe Water Rights Settlement Act of 2008: "The Administration has concerns that the waivers and releases in the bill do not sufficiently protect the United States from future claims by the Tribe. For these reasons and others described in this settlement, the Administration opposes S.3355 as introduced."**

**a. Has these concerns of Kris Polly been satisfied when the 2011 Crow Water Settlement was enacted?**

# MAP OF CROW INDIAN RESERVATION MONTANA

SHOWING TOWNSHIP ARRANGEMENT AND DRAINAGE

Scale 1 inch = 6 miles



L.C. Howard - March, 1888

## SUMMARY OF THREAT TO CROW ALLOTTEES' WATER RIGHTS

July 12, 2011

This is a summary of the present situation on the Crow Indian Reservation where Indian trust allotment landowners' constitutionally-protected property rights in water appurtenant to their individual allotments are threatened with an uncompensated taking by the United States.

The Crow Reservation includes approximately 2.5 million acres. 89% of the Reservation was allotted in trust to individual Crow Tribe members under the Dawes Allotment Act of 1887 and the Crow Allotment Act of 1920. 46% of the Reservation lands are still held as individual Indian trust allotments, while 43% of the Reservation lands have been sold to non-Indians. Only 11% of the Reservation lands are owned by the Crow Tribe. Much of that land is mountainous and not irrigable.

Federal law holds that Indian allottees own unadjudicated water rights appurtenant to their allotments. In fact, the vast majority of the Indian water rights on the Crow Reservation are owned by individual Indians. Indian allottees are entitled to enough water to irrigate all of the "practicably irrigated acres" on their allotments with a priority date of 1868 (date of creation of the Reservation). Although firm data is not available, allottees believe there are approximately 250,000 "practicably irrigable acres" on Indian trust allotments on the Reservation. Non-Indians who purchased allotments acquired the Indian allottees' water rights, together with the Indians' 1868 priority. Individual allottees own several hundreds of thousands of acre-feet of water rights appurtenant to their allotments.

In 1999 the Montana Legislature ratified the Crow Tribe – Montana Compact adjudicating Crow Tribe water rights in the Bighorn River and its tributaries on the Crow Reservation. The Compact was negotiated by the federal and tribal government with the Montana Reserved Water Rights Compact Commission. Allottees were not represented by counsel and did not participate in the Compact negotiations on their own behalf. The Compact does not even mention allotments or allottees. The Compact confirms all Indian water rights on the Reservation to the Tribe itself, and subordinates those senior rights to the non-Indian Reservation landowners, who retain the 1868 Indian priority date.

In December 2010 Congress enacted the Crow Tribe Water Rights Settlement Act. The Act ratifies the 1999 Crow Tribe – Montana Compact. It also directs the United States "acting as trustee for allottees" to waive and abandon the allottees' water rights. The allottees have not been included as parties to the adjudication (although their non-Indian neighbors are), received no formal notice of the adjudication, or due process of law, or just compensation as required by the Fifth Amendment to the U.S. Constitution, and did not consent to this expropriation of their very valuable property rights in water appurtenant to their allotments. Non-

Indian water rights on the Reservation are unaffected. The excuse for this theft of individual Indian property is that it is better for the Tribe as a whole to extinguish the allottees' water rights in favor of a tribal right to natural flow and reservoir storage on the Big Horn River.

Wholly apart from the important question whether the settlement is in fact good for the Tribe, the Settlement Act is an inexcusable breach of the Government's trust obligations to the individual Indian trust allotment landowners and is plainly unconstitutional. It is difficult to estimate the fair market value of the real property being expropriated from the allottees, but it could well be more than \$1 billion.

This water rights settlement scheme will not become effective or enforceable until the Interior Secretary publishes a notice in the Federal Register that certain actions and requirements have been completed. Allottees still have an opportunity to challenge the settlement and protect their property rights, but they have no financial or legal resources to do so.

## CROW INDIANS BATTLE FOR WATER RIGHTS

Imagine finding out that your rights to irrigate the family farm are being negotiated away by a distant relative without your knowledge and without your input.

Imagine that when you do find that out, your distant relative tells you not to worry, everything's in order, I'm taking care of you. You'd say, hey wait a minute, I'm old enough to take care of myself and besides, you're more interested in taking care of your kids, not mine.

The American legal system would rise in your defense. You'd hire your own lawyer, intervene in the proceeding, and establish your claims under ordinary legal rules.

That's true for non-Indians, but not for Indians.

Indians have an older relative they can't get rid of, one legally empowered to protect their interests as their trustee. Trouble is, he's also empowered to act as trustee for your collective family which may or may not care about your individual circumstances or interests.

You've guessed it. The Indians' trustee is that old man in Washington, D.C., the one with the beard and stripes. He's called the United States Government, and a ton of legal precedents have established that he has what's called a fiduciary duty as trustee to protect both Indian tribes and their members. Which includes you. The tribe is a single entity and has global tribal interests to advance, interests which may or may not accord with yours. Its members number in the thousands and you are only one of those. "I don't have the money or the time to look into your individual situation and every other individual Indian's circumstances and advance your wishes," says the old man.

So what do you do? Your trustee is pretending to look out for you and your immediate family, but in reality he can't and he doesn't. He hasn't even sent you a notice of what's going on, or told you what's at stake or what he proposes to do for you. You've never even met him.

Moreover, your old relative is more interested in the Big Picture and thus listens to the tribe exclusively. Meanwhile, he and his buddies, powerful off-reservation business owners who covet your water, and even some tribal leaders, have forgotten about you. Their aim is to commercialize your water, sell it to coal companies, so they can haul more coal away from your reservation. So its no

surprise that the old relative wants to sell your rights for pennies when its worth much more.

Six thousand Crow Indian allottees just like you are now subject to the detrimental effects of a water compact ratified (after hurried and false propaganda) on March 19, 2011. That's when they conducted a ratification vote which is suspected to have included individuals who are not Crow; and in any case was preceded by strong BIA pressure including false statements of what would happen if the pact is not ratified and other strong arm tactics by local politicians.

Here are some statistics:

Of the 11,000 Crow Indians, 6,000 are allottees holding title to small farms or homesteads under 2000 acres, most much smaller than that.

The Crow Reservation is reports an unemployment rate of 80%.

Most kids don't graduate from high school and those who do have very little to look forward to at home, despite the beauty of this enormous territory with the Big Horn Mountains in its center, with pastures, and forests, and mineral wealth underground.

Under the *Winters Doctrine* (1908) and subsequent cases, your rights as an Indian allottee should be protected. But often these allottee rights are forgotten. Even private organizations which provide legal assistance to Indian tribes fail to provide legal assistance to allottees. Their agendas seems focused on tribal sovereignty, the doctrine that Indian tribes retain status as independent countries. The interests of individual Indians only rare get attention from them.

This is also true for the trustee, the United States, which also seems to feel that tribes are more important than individuals. It pleads poverty when asked to devote some of its resources to paying for your legal defense. As a result very few Indian individuals are able to go to court to vindicate their rights.

Without water no tribes, no communities and no individuals can exist. But where only tribal rights are being protected by the trustee, everyone else he's supposed to look out may lose out. Your family farm may be subordinated to large development goals. Without resources for allottees Indian life in this country is likely to be corporatized to satisfy big money interests. Pasture lands, aboriginal hunting grounds, and family farms are likely to fade away.

A nation founded on the notion that religious freedom and due process must be protected, a nation with a unique responsibility to protect Indian cultural and community life, can do so only by coming to the aid of Crow Indian allottees in their fight for water, the sacred fuel, the life spring. And that won't happen unless you become involved.



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

JAN 19 2001

## Memorandum

To: David Hayes, Deputy Secretary

From: John D. Leshy, Solicitor

Subject: Tribal Water Rights Settlement and Allottees

### Introduction

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.

Therefore, by letter dated September 25, 2000, I requested comments from Indian tribes and other interested persons with respect to a proposed policy regarding Indian water rights settlements involving allotted lands. Numerous tribes, individual allottees and representatives of allottees responded to our September 25<sup>th</sup> letter, offering a variety of views which we believe are representative of Indian country as a whole.

After careful review and consideration of these responses, I believe these issues ought to be addressed in future Indian water rights settlement discussions in as consistent and uniform a way as possible. To that end, I offer the following legal guidance to the Secretary's Indian Water Rights Office and the Working Group on Indian Water Rights Settlements. This guidance is designed to assist the Department in the negotiation of current and future Indian water rights negotiations, in order to promote comprehensive Indian water rights settlements while at the same time offering basic federal law protections to individual allottees to whom the United States owes a trust responsibility along with the trust responsibility it owes the tribes.

### Limitations

Let me first emphasize what this guidance does not do. It states general principles, and is not intended to address every substantive or procedural aspect of settlements involving allottees. For example, a number of tribes and allottees who commented requested specific direction regarding whether and how allottees or allottee organizations ought to participate in the negotiation process. This question, like some others, is best handled on a case-by-case basis, giving due

consideration to the specific circumstances of the settlement being negotiated. Second, this it is not intended to be applied retrospectively to settlements already in place, nor to be expanded to govern other issues involving allottees or the relationship between tribal and federal regulatory authority. Third, it is not intended to, and does not rescind, the January 15, 1975, memorandum from Secretary Morton directing the Bureau of Indian Affairs to disapprove any tribal ordinance, resolution, code or other enactment purporting to regulate the use of water on Indian reservations (the so-called "water code moratorium").

### General Principles

This guidance is based on applicable statutes, Supreme Court and lower federal court decisions, and Solicitor's Opinions. The starting point is section 7 of the General Allotment Act (25 U.S.C. 381) which reads, in pertinent part:

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations.

The Supreme Court long ago read the General Allotment Act as entitling allottees to water: "[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." United States v. Powers, 305 U.S. 527, 532 (1939). See also United States v. Anderson, 736 F.2d 358 (9th Cir. 1984); Walton v. United States, 647 F.2d 42 (9th Cir. 1981) (Walton II); 460 F.Supp. 1320 (W.D.Wash. 1978) (Walton I); Skeem v. United States, 273 F. 93 (9th Cir. 1921).

I addressed many of the questions on the application of this statute and the general principles involved in Solicitor's Opinion M-36982, Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA) (March 30, 1995). The legal interpretations set forth in M-36982 - for example, that 25 U.S.C. § 381 is applicable only to irrigation water - form the basis the guidance set out below, and the guidance must be read in conjunction with it. Furthermore, while section 7 of the General Allotment Act authorizes the Secretary to exercise his responsibility through regulations, it is more in keeping with the policy of promoting tribal self-determination to give tribes primary responsibility to safeguard the interests of allottees, so long as the Secretary ensures that sufficient standards and processes to protect allottee interests are included. The fundamental goal should be, therefore, to defer to tribal governmental decisionmaking on water rights matters, so long as those decisions meet the standards in federal law for protecting the interests of allottees.

### Guidance

In order to assist the United States in carrying out its trust responsibility to allottees, the following minimum protections should be included in any Indian water rights settlement involving allotted lands:

1. The settlement should expressly acknowledge that 25 U.S.C. § 381 is applicable to all water rights granted or confirmed by the settlement that are in satisfaction of allottees' rights to irrigation water.
2. The settlement may contain a provision to the effect that a tribe shall have the right, subject to applicable federal law, to manage, regulate and control the on-reservation use of all of the water rights granted or confirmed by the settlement; if so, it must also require that, within a set period of time following execution of the settlement, the tribe enact a comprehensive water code governing all water rights granted or confirmed by the settlement. To be effective, the code should contain (a) a procedure by which any allottee may request and receive an equitable distribution of irrigation water for use on his or her allotted lands; and (b) a decision making process that gives the allottee due process of law in deciding on such requests, including a process for appeal and hearing before an impartial judge or tribunal; and (c) a provision that the code does not take effect until the Secretary of the Interior has approved those parts of it, or any subsequent amendments thereto, that address irrigation water use by allottees.
3. The settlement should provide generally that (a) the water rights and other benefits in the settlement are intended to be in replacement of and substitute for all claims of water rights and past or present claims for injuries to water rights of the tribe, all individual members of the tribe, and all allottees within the Reservation as against the settling parties; (b) the United States waives and releases any past or present claims it may have for water rights or injuries to water rights held by allottees; and (c) no further actions may be brought against the United States or other parties to the settlement based on claims by allottees for water rights or injuries to water rights they may hold.

The third principle requires some explanation. Unlike settlements involving only tribal trust lands and water rights, allotted lands and allottees' interests in water are not common assets, but individual assets. Therefore, only the United States as trustee and the individual allottee (and not a tribal government) can waive or release claims to those assets. A single Indian water rights settlement may involve hundreds or thousands of allotted interests. As a practical matter, securing waivers and releases from individual allottees in such cases may be very difficult and time-consuming, delaying final, comprehensive settlement of water rights claims. In such cases, then, the only realistic course is for Congress to settle allottee claims as part of the overall settlement. The general rule is that the United States may, as trustee, substitute one form of trust asset for another as long as the value of the assets is approximate. See, e.g., Three Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (D.C. Cir. 1968).

The Office of the Solicitor's Division of Indian Affairs is available to answer any questions and to otherwise assist the Secretary's Indian Water Rights Office and the Working Group on Indian Water Rights Settlements concerning this matter.

cc: Assistant Attorney General, Environment and Natural Resources Division



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

March 30, 1995

M-36982

Memorandum

To: Secretary

From: Solicitor *Andrew Lesby*

Subject: Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA)

This memorandum is in response to questions that have arisen regarding the interpretation of the Southern Arizona Water Rights Settlement Act (SAWRSA), Pub. L. No. 96-293, Title III, 96 Stat. 1274 (1982). In order to proceed with the implementation of SAWRSA, the Department requires legal guidance on the nature of the rights in, and authority over, settlement water enjoyed by certain allottees of San Xavier District<sup>1</sup> (allottees) and the Tohono O'odham Nation (Nation).<sup>2</sup>

In considering this matter, I examined the legislative history of SAWRSA, available information on the history of the Tohono O'odham Nation, and relevant case law pertaining to allottee water rights. In addition, I solicited and reviewed comments from both the allottees and the Nation on these issues of significant importance to them. I also received and considered several other helpful comments on an earlier letter to members of Congress addressing these issues. Letter from Solicitor to Senators McCain and DeConcini, Senator-elect Kyl, and Congressmen Kolbe and Pastor, all of Arizona (Dec. 22, 1994).

I conclude that, with the limited exception of the right to convey settlement water, neither the text of SAWRSA nor its legislative history resolves the fundamental issue of relative entitlements of the Nation and the allottees to settlement water.

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<sup>1</sup> The "San Xavier District," a political subdivision of the Tohono O'odham Nation, is coterminous with the "San Xavier Reservation" and the terms are used interchangeably. Of all the lands within the Tohono O'odham Nation, only the San Xavier Reservation was significantly allotted.

<sup>2</sup> The basic question presented here involves the relationship between the Tohono O'odham Nation and the allottees. Nothing in this Opinion addresses or is intended to provide guidance on the respective water rights or jurisdictional authority of Indian tribes vis-a-vis states or non-Indians.

Accordingly, the legal interests of the Nation and the allottees under SAWRSA must be what each has under legal principles generally applicable to federal Indian reserved water rights. The basic attributes of tribal and allottee interests in such water rights are as follows:

1. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes.
2. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights.
3. The quantity of water to which an allottee may be entitled is not subject to precise formulae.

## I. BACKGROUND

### A. SAWRSA

The Southern Arizona Water Rights Settlement was enacted to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation (formerly the Papago Tribe). The rights granted under SAWRSA were intended "to fully satisfy any and all claims of water rights or injuries to water rights (including water rights in both ground water and surface water)" within these two Districts.<sup>3</sup>

Briefly, SAWRSA provides that in exchange for waiver and release of existing and future Indian water rights claims: (1) the United States will deliver Central Arizona Project (CAP) or other replacement water to the San Xavier and Shuk Toak Districts; (2) the United States will bear the cost of rehabilitating or constructing irrigation systems to put the water to use; and (3) a limited measure of groundwater within the Districts may be withdrawn for use each year.

### B. The Positions of the Nation and the Allottees

Since SAWRSA is, for the most part, silent on the manner in which these benefits are to be allocated, certain allottees of the San Xavier District and the Tohono O'odham Nation have advanced substantially different interpretations of their respective settlement entitlements. This disagreement has been a principal cause of an unfortunate delay in the implementation of SAWRSA. The result has been that many of the benefits of the settlement have not been realized within the time frames originally contemplated by Congress.

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<sup>3</sup> SAWRSA, section 307(e). The legislation did not settle all water rights claims within the Tohono O'odham Nation. Claims in the Sif Oidak, Gu Achi, and Hickwan Districts remain at issue in the ongoing Gila River general stream adjudication.

The key issue requiring resolution is the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation. While the allottees and the Nation agree that their respective interests in groundwater were unaffected by SAWRSA, they disagree on other matters. The respective positions of the allottees and the Nation may be summarized as follows:

The allottees contend that because the CAP or other replacement water provided by the settlement is a substitute for federal Indian reserved water rights appurtenant to allotted land, their property interests in that water must be equivalent to the rights they held in reserved water. They believe they are entitled to a ratable share of all settlement water (both confirmed groundwater rights and replacement water) based upon their ownership of practicably irrigable acreage within the San Xavier District. In their view, they have the right to use, lease, and otherwise exercise control over this water.

The Nation contends that the right to use all surface water and groundwater within the boundaries of the Nation, including the replacement water provided by SAWRSA, is held by the Nation for the benefit of its members. The Nation further contends that section 306 of SAWRSA<sup>4</sup> expressly gives the Nation the right to lease and otherwise control all settlement water regardless of whether it is pumped from the ground or delivered by the United States as replacement water.

### C. Reservation History

By Executive Order dated July 1, 1874, President Grant set aside approximately 71,000 acres in Arizona for the Papago Indian Reserve (commonly referred to as the San Xavier Reservation or the San Xavier District) "for the use of the Papago and such other Indians as it may be desirable to place thereon." 1 Charles J. Kappler, Laws and Treaties 805-06 (2nd ed. 1904). While the San Xavier Reservation itself has never been expanded, additional non-contiguous lands totaling approximately 2,774,370 acres were set aside for Papago Indians by several executive orders and acts of Congress between 1916 and 1939. These lands are commonly referred to as the "Papago Reservation" or the "Sells Papago Reservation." Both

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<sup>4</sup> 96 Stat. at 1279-80. The most pertinent passage is found in section 306(c)(1), which reads, in part:

The Papago Tribe shall have the right to devote all water supplies under this title, whether delivered by the Secretary or pumped by the tribe, to any use ... whether within or outside the Papago Reservation so long as such use is within the Tucson Active Management Area and that part of the Upper Santa Cruz Basin not within such area.

the San Xavier and Sells Papago Reservations are included within the territory of the Tohono O'odham Nation, a federally recognized Indian tribe operating under a constitution adopted on January 18, 1986, and approved by the Secretary on March 6, 1986, pursuant to 25 U.S.C. § 476. The Tohono O'odham Nation currently has approximately 18,538 members.

In 1890, when the San Xavier Reservation had approximately 363 residents, allotment commenced pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349 & 381 (1982)). Between 1890 and 1917, the United States issued 292 trust allotments on the Reservation.<sup>5</sup> Approximately 85 consisted of "arable" lands; the remainder were timber or mesa lands. The mesa lands were viewed as suitable only for grazing purposes. Annual Report of the Commissioner of Indian Affairs, 1893, 117-19. Approximately 41,566 acres were allotted, of which "arable" allotted lands comprised approximately 2289 acres. The "arable" allotments were grouped together around the Santa Cruz River in the northeast corner of the Reservation.

Even prior to non-Indian contact, the Tohono O'odham were an agricultural people. Historic records of farming in the San Xavier area date to at least the early 1700s. When allotment commenced in 1890, 400 acres were irrigated on the Reservation. By the turn of the century, irrigation had expanded to 1000 acres. Originally, the allotments were irrigated with water from the Santa Cruz River, but non-Indian development adjacent to the Reservation soon began to deplete the flow of the river. By the early 1900s, the allottees began to withdraw and use groundwater. For a time, combined use of groundwater and surface water allowed farming to continue. According to Bureau of Indian Affairs records, irrigated lands on the Reservation reached a maximum of 1781 acres in 1926. (If fallowing practices are taken into consideration, the maximum acreage may have been as high as 2100 acres.) In the 1940s Reservation farming went into a decline when, again due to non-Indian off-reservation development, groundwater supplies beneath the Reservation were depleted. The combined depletion of both surface water and groundwater supplies made Indian farming virtually impossible by the late 1970s.

In 1975, the United States filed suit in federal district court on behalf of the Tribe and the heirs of the original allottees of the San Xavier Reservation. The case, United States v. City of Tucson, Civ. 75-39 TUC-JAW (D. Ariz.), named the City of Tucson and over a thousand other non-Indian water users as defendants and sought to establish and protect the water rights of the Tribe and allottees.

Congress' enactment of SAWRSA seven years later was intended to resolve the claims made by the United States on behalf of Indians in City of Tucson so that the case could be dismissed. The case is still pending because the San Xavier allottees have opposed dismissal on account of their continuing concern about the adequacy of the benefits provided them

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<sup>5</sup> At present approximately 1275 Indians, most of whom are members of the Nation, hold interests in allotments on the Reservation.

under SAWRSA.

## II. ANALYSIS OF THE PROVISIONS OF SAWRSA

SAWRSA's legislative history shows that the purpose of the settlement was to "provide a fair and reasonable settlement of the water rights claims of the San Xavier Papago Indian Reservation and the Schuk Toak District of Sells Papago Reservation with a minimum of social and economic disruption to the Indian and non-Indian communities in Tucson and eastern Pima County, Arizona." H.R. Rep. 855, 97th Cong., 2d Sess. 37 (1982).

Unfortunately, in fashioning SAWRSA little attention was paid to questions that have now become critical to its implementation--the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation. The answers are, of course, integral to determining how settlement benefits are to be allocated between the Nation and the allottees.

Several provisions of SAWRSA address the rights of the "Papago [sic] Tribe;" e.g., §§ 303(c); 306(a),(c); 309. Numerous statements in the legislative history refer to the "Tribe's claims" and the "Tribe's water rights;" e.g., H.R. Rep. 855, 97th Cong., 2d Sess. 37, 39-41, 43,47 (1982). With the exception of section 306(c), which speaks of the Nation's right to convey settlement water rights,<sup>6</sup> however, none of these provisions or statements directly addresses the question of relative entitlements of the Nation and the allottees to settlement water.

Indeed, the weight that might be given to SAWRSA's references to "tribal" rights is counterbalanced by the qualification in section 307(e) that the benefits of the settlement are to flow not only to the Tribe, but also to "all individual members of the Papago Tribe that have a legal interest in lands of the San Xavier Reservation...."<sup>7</sup> Although section 307(e) does not utilize the term "allottees," allottees are the only individuals having "legal interest[s] in lands of the San Xavier Reservation."<sup>8</sup> I must conclude, therefore, that neither the text of

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<sup>6</sup> See footnote 4, *supra*, and accompanying text. Section 306(c)(1) is discussed in more detail further below.

<sup>7</sup> Section 307(e) also says that the settlement "shall be deemed to fully satisfy" all water right related claims of such tribal members, and that "[a]ny entitlement to water of any individual member of the Papago Tribe shall be satisfied out of the water resources provided in this title."

<sup>8</sup> A literal reading of section 307(e) would limit settlement benefits to only those allottees who are members of the Tohono O'odham Nation. In fact, a small number of Indians holding trust interests in allotted lands on the Reservation are not members of the Nation. (Congress ought to consider deleting the requirement of Tohono O'odham

SAWRSA nor its legislative history resolves the fundamental issue.

The replacement water and other benefits provided by SAWRSA were intended to be a substitute for federal Indian reserved water rights. Accordingly, in the absence of Congress expressly settling the question in SAWRSA, the legal interests of the Nation and the allottees under SAWRSA must be generally what each enjoyed under legal principles generally applicable to federal Indian reserved water rights.<sup>9</sup> Put another way, I interpret SAWRSA to leave intact the basic nature of the interests in water held by the Nation and the allottees prior to enactment of SAWRSA.

### III. GENERAL PRINCIPLES OF INDIAN LAW

The basic attributes of tribal and allottee interests in water are as follows:

- A. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes.

The allottees and the Nation claim competing rights to use and control settlement water received in satisfaction of federal Indian reserved water rights. The General Allotment Act secured water to allottees where necessary for farming. Section 7, 25 U.S.C. § 381,<sup>10</sup> the

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membership as a condition to receiving settlement benefits, for there does not seem to be any reason to deny the benefits of settlement water to other Indians holding trust interests in lands on the Reservation.) There is minimal non-Indian ownership of formerly allotted lands on the Reservation. It is my understanding that two parcels of allotted land passed into fee status when they were sold to non-Indians in 1909. In addition, some undivided fractional interests in allotments have passed into non-Indian ownership by virtue of inheritance. It is not necessary to address here the nature of the rights held by non-Indians in formerly allotted lands, see Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), because SAWRSA does not purport to settle or otherwise affect such rights. In this respect, SAWRSA is consistent with the general approach followed by the United States in water rights litigation and settlement. Because the United States has no trust responsibility for, and holds no legal title to, non-Indian water rights, we do not assert claims for such rights and have no authority to compromise them in settlement.

<sup>9</sup> The general rule is that the United States may, as trustee, substitute one form of trust asset for another as long as the value of the assets is approximate. See, e.g., Three Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (D.C. Cir. 1968).

<sup>10</sup> This section provides:

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for

only part of the Act expressly to address water, directs the Secretary to ensure a "just and equal distribution" of water among the resident Indians for irrigation purposes. In the context of the General Allotment Act, this clearly means or at least includes allottees. In United States v. Powers, 305 U.S. 527, 532 (1939), the Supreme Court interpreted section 7 to entitle allottees to water: "[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." Therefore, the allottees' claim to a share of reserved water rights and, accordingly, settlement water rights, is accurate, at least as far as agricultural irrigation is concerned.

A basic standard for quantifying federal Indian reserved water rights is the amount of water necessary to irrigate the "practicably irrigable acreage" on the reservation. See Arizona v. California, 373 U.S. 546 (1963). Particularly where, as here, Indian water rights claims are settled by negotiation and congressional legislation rather than by final court decree, the amount of water available to Indians under the settlement may not reflect the amount of practicably irrigable acreage on the reservation. Accordingly, an allottee's share may not be sufficient to irrigate all practicably irrigable allotted acres.

It is also beyond dispute that allottees have the right to lease the water to which they are entitled, at least for use on the allotted land as part of an otherwise authorized lease of that land. See Skeem v. United States, 273 F. 93 (9th Cir. 1921).<sup>11</sup> Tribal consent is not necessary for such leases.

On the other hand, as discussed in the next section, a tribe may, among other things, regulate and perhaps proscribe uses of natural resources, including water, over which it has regulatory jurisdiction. See generally Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). This includes water uses by allottees or their lessees.

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agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

<sup>11</sup> Skeem addressed 25 U.S.C. § 403, which authorizes short term leases of allotted land. Since Skeem was decided in 1921, Congress has enacted a more comprehensive statute authorizing longer term leases, 25 U.S.C. § 415, which applies to most reservations. Leasing on the San Xavier Reservation is covered by 25 U.S.C. § 416, which is virtually identical to section 415 except for some special provisions owing to the proximity of the land to a major urban center. These are not relevant to the issue being addressed here, and the holding of Skeem applies to section 416 as well as 415.

Tribal sovereign power over water may be particularly important, and given particular deference, in the desert environment of the Tohono O'odham Nation.

It might be argued that 25 U.S.C. § 415 or § 416 authorizes allottees to lease water apart from allotted land, perhaps even off-reservation. This is by no means clear, however, and I have not yet had to resolve this issue because no lease raising it has been presented to the Department for approval. In acting on such a proposed lease I believe it appropriate to consider not only these statutes, but other federal law and any relevant tribal law.<sup>12</sup> A tribal prohibition of off-reservation water marketing by individuals, for example, would be entitled to great weight.

In the context of SAWRSA, however, I believe Congress has foreclosed the possibility of allottees marketing their right to use water off-reservation, for I read section 306(c)(1) as providing the Nation with exclusive marketing authority over "all water supplies under this title, whether delivered by the Secretary or pumped by the tribe ...." 96 Stat. at 1280. See footnote 4, supra. While this subsection speaks of the Nation's right to control the use of water on or off-reservation, I believe its right to control on-reservation water use by agricultural allottees is constrained in ways discussed in the next section.

B. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights.

The Nation maintains sovereign control over Reservation resources, including water, within the limits of federal law. The Nation's sovereign power to regulate the water use of those within its jurisdiction may be described as a form of "ownership" in much the same way that the individual states claim ownership of natural resources. That is, as the Supreme Court has noted, "ownership" of water can be described as a "fiction expressive in legal shorthand of the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource." Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 951 (1982).<sup>13</sup>

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<sup>12</sup> The recently enacted American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. §§ 3701-3715, 3741-3745 (1993), recognizes extensive tribal rights to control reservation agricultural resources, expressly including water resources. Section 102(a) of the AIARMA requires that the Secretary conduct all land management activities in accordance with tribal agricultural resource management plans and tribal law unless such compliance would be contrary to the Secretary's trust responsibility or is prohibited by federal law. 25 U.S.C. § 3712(a).

<sup>13</sup> The analogy between the rights of a tribe and those of a state is admittedly not perfect. For instance, Congress has imposed specific limits on a tribe's authority to deal with allottees' water rights, see, e.g., 25 U.S.C. § 381, discussed further below, but it has not so constrained the ability of a state to affect individual water users within its jurisdiction.

A tribe's sovereign power to regulate reservation resources continues to exist unless divested by Congress. United States v. Wheeler, 435 U.S. 313, 322-23 (1978); see Felix S. Cohen's Handbook of Federal Indian Law 230-32 (1982 ed.). While many in and out of Congress at the time of enactment of the General Allotment Act expected that tribes would eventually wither and disappear, nothing in the Act affirmatively divests Indian tribes of regulatory control over reservation water. Indeed, the cases interpreting section 7 of the Act recognize that both the tribes and the Secretary have regulatory control over allottee water use. See Colville Confederated Tribes v. Walton (Walton II), 647 F.2d 42, 52 (9th Cir. 1981); Colville Confederated Tribes v. Walton (Walton I), 460 F. Supp. 1320, 1332 (E.D. Wash. 1978). The tribes' regulatory power is similar to that possessed by states over appropriations of state "owned" water resources.

A tribe's sovereign power includes some authority to allocate water to allotments and to determine the parameters of its use (such as type, amount, required conservation measures, etc.)<sup>14</sup> But a tribe's regulatory authority is circumscribed by the command of section 7 of the General Allotment Act, that an allottee not be denied a "just and equal distribution" of irrigation water. 25 U.S.C. § 381, quoted in footnote 10, *supra*. While section 7 does not directly address tribal authority, it plainly makes the Secretary responsible for protecting the allottees' interest in agricultural water use. Therefore, the Secretary may, by promulgating federal regulations, preempt tribal regulation that would thwart allottee interests protected by this statute. In this respect, I agree with the view of the Claims Court in Grey v. United States, 21 Cl. Ct. 285, 299-300 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 934 (1992), to the extent it suggests that section 381 gives allottees a right to some available water.

The question has been raised whether an allottee's right to use water is derivative of the

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In other respects, however, a tribe's sovereign authority over water on the reservation may be greater than that enjoyed by a state over water within its jurisdiction. Tribes may not, for example, be as constrained by the commerce clause as a state. Compare the Court's view of the dormant interstate United States Constitution's commerce clause limitation on states applied in Sporhase, *supra*, with its view of the Indian commerce clause in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

<sup>14</sup> Of course, if allotted land is transferred to non-Indian ownership, determining the extent of tribal regulatory powers becomes more complicated. Compare Walton II, 647 F.2d. 42 (tribe has jurisdiction to regulate non-Indian water use in hydrologic system situated entirely within the boundaries of the reservation) with United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (state has jurisdiction to regulate on-reservation non-Indian use of water in excess of tribal needs in hydrologic system originating and substantially flowing off-reservation). This complex issue is beyond the scope of our current discussion.

practicably irrigable acres held by an allottee. 647 F.2d at 51. But Walton II also recognized that ownership of irrigable acreage does not guarantee the delivery of that full measure of water: "In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately." Id.

Section 381's command of a "just and equal distribution" of agricultural water is necessarily dependent on the supply of water available upon any particular reservation. If sufficient water sources are available to satisfy all the purposes for which a reservation was established, each allottee should receive water sufficient to irrigate all practicably irrigable land allotted for agricultural purposes.

It is important to note, however, that only water necessary for irrigation is subject to "just and equal distribution" under section 381. See Joint Board of Control of the Flathead, Mission and Jocko Irrigation District v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987) (criticizing lower court finding that all reservation waters are subject to equal distribution). Water reserved for fisheries or other purposes may not bear the burden of "equal" reduction. Although the Ninth Circuit first held in Walton II that all reservation uses (irrigation, fisheries, domestic, etc.) should in times of shortage be proportionately reduced, Walton II, 647 F.2d at 51; see also Colville Confederated Tribes v. Walton (Walton III), 752 F.2d 397, 405 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986), subsequent Ninth Circuit decisions have retreated from that approach. See Joint Board of Control of the Flathead, Mission and Jocko Irrigation District v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987); United States v. Adair, 723 F.2d 1395, 1416 n.25, (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 460 U.S. 1015 (1983). In these latter cases, pro rata reductions were avoided by the court's determination that the time immemorial priority date recognized for fisheries water was superior to the reservation establishment priority date recognized for agricultural water use.

Given the provisions of the General Allotment Act, the circumstances surrounding allotments on the San Xavier Reservation, and the history of water use on the Reservation, those allotments originally identified as arable and intended for farming have a stronger legal interest in settlement water than other allottees. Allotments created primarily for grazing, timber or other purposes may not receive the same measure of water vis-a-vis other reservation uses as those created for agricultural purposes.

I do not mean to suggest, however, that the principles applicable to the distribution of water secured by federal reserved Indian water rights among tribes and allottees in any way affects the standard for quantification of such rights in the first instance. When a reservation is established, water rights in an amount sufficient to accomplish the purposes of the reservation are impliedly reserved. Winters v. United States, 207 U.S. 564 (1908). Whether measured by the practicably irrigable acreage standard or otherwise, the aggregate reservation water right is neither reduced nor enlarged by subsequent federal actions distributing it among reservation Indians for particular purposes.

In sum, the history of allotments, the history of allottee water use, and the nature and type of other reservation interests in water all should inform the allocation and priority of allottee entitlements when there are insufficient supplies to meet all demands. This is, however, a complex matter and definitive determinations must be left for the future.

#### IV. CONCLUSION

The relative rights and authority held by allottees and tribes with respect to federal Indian reserved water is a complex area of law. Many questions must necessarily be addressed in the context of the facts unique to a particular reservation. The above discussion shows, however, that it is inaccurate to speak of either tribal governments or agricultural allottees as having plenary rights in water vis-a-vis each other. Agricultural allottees have rights tribes cannot wholly defeat; at the same time, tribes have regulatory authority over reservation water use from which allottees are not immune.

This Opinion was prepared with the substantial assistance of Pamela S. Williams and Daniel L. Jackson in the Office of the Solicitor, and was reviewed by more than a dozen attorneys in the Office with responsibility for Indian water rights issues.

\*\*\*DRAFT LETTER TO DOI SOLICITOR re: ALLOTTEE WATER RIGHTS\*\*\*

Mr. John D. Leshy  
Solicitor  
United States Department of the Interior  
1849 C Street  
Washington, D.C. 20240

Re: Proposed federal policy on allottee rights  
in Indian water rights settlements

Dear Mr. Leshy:

This is in response to your request for comments on the above-referenced policy proposal which you originally sent out on September 25, 2000, and then sent out a corrected version on October 16, 2000. Our comments are directed to the latter corrected version.

We are individual Indian owners of allotments on the Wind River Reservation, and speak for several thousand Wind River allottees represented by our Save Wind River Water organization.

As you may be aware, recently more than 450 of our Wind River allottees filed objections to a proposed consent decree by Judge Gary Hartman in the Big Horn stream adjudication proceedings pending in the Wyoming state courts. Our objections focused on the failure of the consenting parties to include several hundred affected allottees as parties to a supposedly "comprehensive" general stream adjudication, given that the federal McCarran Act grants state-court jurisdiction over federal Indian trust lands only in "comprehensive" general stream adjudications which include as parties all water users on the stream. Miller v. Jennings, 242 F.2d 157, 159 (5th Cir. 1957).

Our objections also pointed out that the obvious intent of the proposed consent decree is to bind us to the decree's determination and quantification of water rights appurtenant to each of our allotted parcels identified in the decree -- even though we have never been made parties to the past 20 years of litigation or to the past several years of negotiations leading to the proposed final adjudication and quantification of our individual water rights, and thus we cannot be legally bound by the proposed consent decree under the Supreme Court's decision in Martin v. Wilks, 490 U.S. 755, 765 (1989). Despite our objections, on December 11 Judge Hartman entered a consent decree (without our consent) which not only fixes the water rights of the consenting parties, but also purports to adjudicate and quantify the rights of our non-party allottees. As you can see, our concerns are very real and current. Consequently, we hope that you will carefully consider the following comments.

First of all, we compliment you for dealing with a difficult

and long-neglected problem. A coherent federal policy is overdue, and you have taken a valuable step forward.

Having said that, we feel strongly that a number of changes and additions should be made in your proposed policy, to ensure that allottee water rights are fairly and adequately protected. Our suggested changes and additions are as follows:

(1) Allottee participation and representation in litigation

The proposed policy omits any mention of the involvement and/or legal representation of allottees in litigation. Ordinarily, federal Indian water-rights settlements emerge from agreements among parties to complex litigation extending over many years and even decades. If allottees have not been active participants with effective legal representation in the litigation leading to a settlement agreement, it is unlikely that the settlement agreement will fairly and adequately deal with allottee rights. Certainly that has been our experience.

The consent decree in Big Horn purports to finally adjudicate and quantify our water rights without involving us at any stage of the litigation and negotiation processes. As a result of omitting us from the process, the decree erroneously understates the actual water needs for some of our allotments, while erroneously leaving other historically irrigated allotments without any water rights at all.

These mistakes would not have happened, had we been included in the litigation and negotiation processes.

**SUGGESTED ADDITION:** The proposed policy should be expanded to provide for active participation by and legal representation of Indian allottees in all water-rights litigation affecting their federal Indian trust lands.

In particular, the policy should recognize the necessity (which we believe is imposed by elemental principles of due process) of including all affected Indian property owners in any water-rights litigation adjudicating and/or quantifying the water rights appurtenant to their trust allotments.

Further, the policy should recognize the practical (if not legal) necessity of the federal trustee's ensuring adequate legal representation of all affected Indian trust beneficiaries -- either through direct representation by Government attorneys, or through private attorneys paid (or at least subsidized) by the Government.

(2) Tribal protection of allottees

The proposed policy would "give tribes primary responsibility to safeguard the interests of allottees." As Indian tribal members, of course we support tribal sovereignty and self-determination. From sad experience, however, we must recognize that there may be instances in which conflicts arise between our individual property rights and

the property rights of our tribe. In those fortunately rare instances of conflict with tribal property rights, we have found it necessary to protect our own property rights against adverse claims by our tribe.

Consequently, we must differ to some extent with your proposal "to give tribes primary responsibility to safeguard the interests of allottees."

SUGGESTED CHANGE: We suggest that your policy make some distinction between (litigation or settlement) proceedings where the respective property rights of a tribe and its member allottees are being determined and/or quantified, and proceedings where such established rights are being regulated or administered. In the latter "regulatory" situation, we agree that the tribe needs and has sovereign powers to regulate all Reservation water uses, whether by the tribal land owner or by individual land owners. However, we do not think it realistic or right to entrust a tribal property owner with the adjudication/quantification of property rights of individual allottees which are in competition with the property rights of the tribe.

(3) Allottee participation and representation in settlement negotiations

The proposed policy omits any mention of the participation of allottees in the negotiation of settlements. In our experience, neither the federal trustee nor the tribe can be relied upon to provide fair and adequate representation of the interests of Indian allottees in water-rights settlements. Allottees must be actively involved in the negotiation of settlements which affect their individual property rights, and allottees need competent legal representation in the lengthy and complex negotiations typically needed to resolve any federal Indian water-rights litigation.

SUGGESTED ADDITION: The proposed policy should be expanded to provide for active participation by and legal representation of Indian allottees in all water-rights settlement negotiations affecting their federal Indian trust lands.

In particular, the policy should recognize the practical necessity of including all affected Indian property owners in any water-rights negotiations of settlements which would result in the adjudication and/or quantification of the water rights of such Indian property owners, whether they be tribal or individual. Obviously, it would not be feasible to put hundreds or thousands of individual allottees at a negotiating table, but certainly it would be feasible to include a few representative allottees and/or their attorneys in complex and lengthy settlement negotiations.

Further, the policy should recognize the practical (if not legal) necessity of the federal trustee's ensuring adequate legal representation of all affected Indian trust beneficiaries -- either

through direct representation by Government attorneys, or through private attorneys paid (or at least subsidized) by the Government.

Like many other Indian communities, it is not possible for us at Wind River fully to finance the legal representation needed for the kind of long and complex settlement negotiations involved in a stream adjudication such as Big Horn.

(4) Congressional imposition on allottees of settlements not negotiated or agreed to by affected allottees.

We strongly disagree with your apparent proposal (at pages 2-3 of the proposed policy) that Congress dictate to individual Indian property owners how their property rights shall be determined. To make clear our objection, we will quote the pertinent language from your proposal:

. . . This last suggestion requires some explanation. Unlike settlements involving only tribal trust lands and water rights, allotted lands and allottees' interests in water are not common assets, but individual assets. Therefore only the United States as trustee and the individual allottee, not a tribal government, can waive or release claims to those assets. Indian water rights settlements may involve hundreds or thousands of allotted interests. As a practical matter, it would be very difficult to secure individual waivers and releases, and in the meantime the settlement would be delayed. In these circumstances, we think the only realistic course is for Congress to settle allottee claims as part of the overall settlement. The general rule is that the United States may, as trustee, substitute one form of trust asset for another as long as the value of the assets is approximate. . . . [citation omitted] In these circumstances, this is the only realistic way to achieve a final, comprehensive settlement of water rights claims.

(Proposal, pp. 2-3) (emphasis added). We believe that your proposal is both factually and legally defective.

From a factual standpoint, it is not impractical to involve several hundred (or even several thousand) allottees in negotiations affecting their property rights. We know that from the experience of fellow Indian allottees on the San Xavier Reservation in Arizona, it has been possible to involve more than 1,200 San Xavier allottees actively in the negotiation of a water-rights settlement which promises to deal fairly and adequately with their individual property rights. At San Xavier, some 1,200 Indian property owners have found ways to designate suitable representatives in court and at the bargaining table. After years of difficult and complex negotiations, the San Xavier allottees anticipate no significant problem with getting any "individual waivers and releases" from individual allottees which may be needed to conclude the settled litigation. As a matter of fact, then, it is simply not true that "the only realistic

course is for Congress to settle allottee claims as part of the overall settlement."

From a legal standpoint, we do not believe that your proposal comports with pertinent federal law. Individual Indian allottees have vested property rights in their allotted lands and appurtenant interests, including appurtenant water rights. These vested property rights are constitutionally protected under specific "property" safeguards of the Fifth and Fourteenth Amendments, and constitute "fundamental" interests the taking or impairment of which are subject to strict judicial scrutiny. Under the "strict scrutiny" test which the Supreme Court has applied to governmental actions affecting "fundamental" constitutionally protected interests, there must be a showing both that the Government has a compelling interest in taking the affected property, and that the Government's interest cannot be achieved in a less intrusive way than it has chosen to pursue. We are informed that in the pending water-rights litigation at San Xavier, more than 1,800 non-Indian property owners are parties defendant and will have to agree individually to any settlement of that litigation.

We see no reason why "individual waivers and releases" cannot be obtained from a similar number of Indian property owners. Like non-Indian property owners, Indian allottees are rational human beings entitled to due respect -- and due process of law.

**SUGGESTED CHANGE:** The proposal that Congress impose settlements on affected Indian allottees, without their agreement and/or despite their objection, should be deleted.

If the present proposal is revised to provide for suitable allottee involvement in litigation and settlement negotiations affecting their interests, there will be no need for consideration of a Congressionally imposed "settlement" -- which of course is a contradiction in terms, since a "settlement" is by definition the result of a voluntary process among the settling parties.

#### CONCLUSION

The Wind River allottees respectfully request that you revise your policy proposal to incorporate the changes and additions we have set forth above. We would welcome an opportunity to discuss this matter with you further, should you decide that would be useful. Thank you for your kind consideration.

Sincerely,

c: Thomas E. Luebben, Esq.

**CROW ALLOTTEES ASSOCIATION LETTERHEAD  
DRAFT #8**

Hon. Eric Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530

*and*

Hon. Kenneth Salazar  
Secretary of the Interior  
1849 C Street, NW  
Washington, DC 20240

Re: Crow Reservation Allottees Need Legal Representation to Protect their Individual Water Rights in Montana Water Court Adjudications.

Dear Attorney General Holder and Secretary Salazar:

We are a non-profit organization of Crow Indian trust allotment landowners (allottees) whose water rights are now being adjudicated in the Montana Water Court without our participation.

We seek to protect the water rights of some 6,000 Crow allottees whose rights are threatened by a long standing adjudication of Indian and non-Indian water rights on the Crow Indian Reservation. Only a very few individual Crow trust allotment landowners are parties in this adjudication. Our trustee, the United States, has not provided us legal representation. We do not have the money to hire lawyers.

Without our consent, the State of Montana, the Crow Tribe, and the United States Government have entered into the 1999 Crow Compact. The Compact, which does not even mention Indian trust allotments or Indian allottees, together with the Crow Tribe Water Rights Settlement Act of 2010, are intended to expropriate our very valuable winters doctrine Indian reserved water rights with an 1868 priority date appurtenant to our allotments. The Compact will come into effect when adopted by the Montana Water Court. The Compact parties are preparing a final decree adopting the Compact to be presented to the Water Court in the near future. The final decree of the Court will encompass the basins in which our allotments are located.

We have had no meaningful input into shaping this Compact, nor does it contain any protection of our real property rights in water. If the final decree of the Montana Water Court is issued before we are officially made parties to the adjudication and our claims are presented and adjudicated, our valuable property rights may be lost, leaving us with only an inverse condemnation claim for damages against the United States.

The petition for a final decree now being now being prepared by the United States, the State of Montana, and the Crow Tribe will encompass the Pryor Creek and Little Big Horn Basins on the Crow Reservation where our lands are located. Although we have tried to obtain private lawyers to represent

us, our efforts have been unsuccessful. Water adjudications are especially complex and time consuming. All of the many lawyers we have consulted have declined to represent us because they cannot commit to work indefinitely for free on a matter as complex and time consuming as this.

We have asked the Interior and Justice Departments for legal assistance and representation to protect our allottee water rights for many, many years. We have been told many times by federal, tribal and state officials not to worry, that our water rights are being protected. This assertion is demonstrably false. Both the United States and the Tribe are conflicted. First, the United States itself claims water that flows on and through the Crow Reservation. Second, the United States is the trust title holder and trustee for the Crow Indian Tribe, which has its own lawyers. The United States cannot faithfully defend our interests while promoting its own interests and those of the Crow Tribe.

We allottees number more than half the members of the Crow Tribe, about 6,000 out of 11,000. A recently conducted referendum narrowly approved the Crow Tribe Water Rights Settlement. But individual water rights cannot be constitutionally extinguished by referendum, especially one such as this, which was conducted under questionable circumstances.

In 1855 and 1868, the United States signed treaties with the Crow Tribe, and then unilaterally ignored them. The General Allotment Act of 1887 sought to break up reservations into individually owned plots in an effort to turn Indians into farmers or ranchers. The 1920 Crow Allotment Act continued the same policy. It was then that allotments and appurtenant water rights were granted to our ancestors as successors to the rights of the Crow Tribe.

Although the allotment policy ended with passage of the Indian Reorganization Act in 1934, the allotments already granted continue to be the individual property of the allottees, and are the basis of our present existence as ranchers and farmers. Ironically, many of our allotments have been leased or sold to non-Indians. These non-Indian allotment holders are, in fact, individual parties in the adjudications of water rights on the Crow Reservation now before the Montana Water Court. But we, the individual trust allotment landowners, are unrepresented before that tribunal, even though we are similarly situated to the non-Indian allotment owners in all respects but for our status as Indians.

Our individual land and water rights are distinct and separate from those of the Crow Tribe and all other claimants in these basins. The Government persists in its mistaken view that our interests coincide with those of the Crow Tribe or that they can be protected under a yet to be drafted tribal water code.

As a matter of trust law and as a matter of fundamental fairness, we ask the United States as our trustee to provide funds sufficient for us to be represented by retaining our own lawyers.

In the alternative we ask that you establish an "allottees' protection" unit within your departments, staffed by seasoned lawyers and separated by a Chinese Wall from all other lawyers working on this litigation. This unit would then be assigned the task of defending our individual trust allotment property rights in water appurtenant to our allotments pursuant to ordinary attorney-client relationships.

Nothing else will suffice to protect our vital interests in our homes, our allotments, our water rights, our culture, and our very existence.

We also respectfully ask that until these arrangements are made, you refrain from petitioning the Montana Water Court for a final decree or decrees in any of the stream systems on the Crow

Reservation, and instead ask the Montana Water Court to stay its proceedings so that our claims can be filed and heard. Entry of any final decrees without our presence and without effective legal representation would be a breach of trust and a travesty of justice unworthy of the United States.

We look forward to your speedy and favorable reply.

Thank you for your attention.

CROW ALLOTTEES ASSOCIATION

President

cc: Hillary Tompkins, Interior Department Solicitor  
Patrice Kunesh, Assistant Solicitor for Indian Affairs  
Edward Parisian, Regional Director, Bureau of Indian Affairs  
Vianna Stewart, Superintendent, Crow Indian Agency

[Attach signed petitions attached to this letter from as many allottees as possible.]



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

**DEC 14 2011**

Mr. Richard WhiteClay  
President, Crow Allottees Association  
P.O. Box 160  
Pryor, Montana 59066

Dear Mr. WhiteClay:

Thank you for your recent letter expressing concerns about the proposed decree for the Crow Tribal Water Rights Settlement. The Secretary has asked me, as Chair of the Indian Water Rights Working Group, working in partnership with the Department of Justice, to respond to your letter.

As the Department of the Interior (Interior) explained in our letter of March 15, 2011, we recognize the interest that allottees have in Indian reserved water rights, and we understand the concern that allottees may have about the protection of those rights in the context of the Montana General Stream Adjudication.

The Departments of the Interior and Justice were conscious of allottees and allottee water right interests during the negotiation of the Crow Tribe-Montana Water Rights Compact and during the drafting of the Crow Tribe Water Rights Settlement Act of 2010. We believe both documents preserve the water use and water right interests of allottees. Interior's March response provided an explanation of allottee protections in the Settlement Act and how the Secretary of the Interior will oversee the drafting of a comprehensive water code to address allottee concerns.

If the United States is forced to litigate the Crow Indian reserved water rights because the Settlement process fails, the claims that the Department has filed and the claims that would need to be filed will take allottee water needs into account.

The Department of Justice, on the recommendation of Interior, has filed hundreds of objections to claims on the Crow Reservation on behalf of the United States, seeking to protect the Crow Indian reserved water rights, which include the interests of the Tribe and allottees, and to clarify the rights of those seeking an interest that could conflict with those rights. The Bureau of Indian Affairs is preparing cases in support of each objection, and we will prosecute each objection in accordance with the law.

Concerning your request for legal funds, the United States does not provide direct funding for legal representation for any entity other than Federal agencies and tribes. The United States has an active presence in the Montana Adjudication. We are confident that all interests safeguarded by the United States, including those of allottees, will be protected.

If you have further questions, please contact Mr. Doug Davis, Chairman of the Crow Implementation Team (406-247-7710).

Sincerely,

A handwritten signature in black ink, appearing to read "Alletta Belin". The signature is fluid and cursive, with the first name "Alletta" written in a larger, more prominent script than the last name "Belin".

Alletta Belin  
Counselor to the Deputy Secretary

cc: Douglas Davis Chairman, Crow Implementation Team  
Matthew McKeown, Regional Solicitor  
David Harden, Department of Justice ENDR