No. 15-779

In the Supreme Court of the United States

CROW ALLOTTEES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1-20) is reported at 354 P.3d 1217. The opinion of the Montana Water Court (Pet. App. 21-52) is unreported.

JURISDICTION

The judgment of the Montana Supreme Court was entered on July 30, 2015. On October 22, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 14, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

The Crow Tribe-Montana Water Rights Compact (Compact) is a settlement of water rights on the Crow Indian Reservation in southeastern Montana. Following the Compact's approval by the United States Con-

gress, by the Montana legislature, and by the Apsaalooke (Crow) Tribe, the Compact was submitted to the Montana Water Court for entry of a judicial decree approving the Compact. Petitioners are members of the Crow Tribe who hold allotments on the Reservation. Petitioners objected to the decree, asserting that the Montana Water Court was without jurisdiction and that the Compact failed to protect their rights. The Montana Water Court dismissed petitioners' objections (Pet. App. 21-52), and the Montana Supreme Court affirmed (*id.* at 1-20).

1. a. The Crow Tribe has lived in southern Montana for centuries. The Treaty of Fort Laramie of May 7, 1868, 15 Stat. 649, reserved a large tract of land within the Tribe's aboriginal territory to serve as a homeland for the Tribe. See *Montana* v. *United States*, 450 U.S. 544, 547-548 (1981); *United States* v. *Powers*, 305 U.S. 527, 528 (1939). The Crow Reservation originally encompassed approximately 8 million acres, but subsequent congressional acts reduced the Reservation to its present size of just under 2.3 million acres. See *Montana*, 450 U.S. at 548.

Decades after the Crow Reservation was established, Congress enacted the General Allotment Act, ch. 119, 24 Stat. 388, which authorized the President to "allot" land within Indian reservations for use by individual Indians for farming or ranching. See *Montana*, 450 U.S. at 548. Congress also provided for the allotment of irrigation and grazing lands on the Crow Reservation through the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751. Both acts provided that the allotted land would be held by the United States in trust for a period of 25 years, after which the Secretary of the Interior was to issue a fee patent to the

named allottee. See *Montana*, 450 U.S. at 548; see also 25 U.S.C. 348 (patents to be held in trust for allottees).

The allotment policy proved "disastrous for the Indians" and was ended in 1934 by Congress upon enactment of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984. *Hodel* v. *Irving*, 481 U.S. 704, 707-708 (1987). The IRA restored to tribal ownership unallotted reservation lands, 25 U.S.C. 463, and it "extended and continued" indefinitely all "restriction[s] on alienation" on Indian lands, 25 U.S.C. 462. Those actions left the Crow Reservation divided primarily into three categories of land ownership: (1) unallotted lands held by the United States in trust for the Crow Tribe; (2) allotments as to which fee patents never issued, which the United States holds in trust for individual Indians; and (3) fee lands that were allotted and patented prior to the IRA, which are now owned mostly by non-Indians. See *Montana*, 450 U.S. at 548; see also *Big Horn Cnty. Elec. Coop., Inc.* v. *Adams*, 219 F.3d 944, 948 (9th Cir. 2000).

b. The establishment of an Indian reservation under federal law includes an implied reservation of water necessary for the purposes of the reservation. See *Winters* v. *United States*, 207 U.S. 564, 576-578 (1908). By establishing a reservation, "the United States acquires a reserved right in unappropriated water," *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976), which it holds in trust for the benefit of the tribe. Beginning with the General Allotment Act, Congress has authorized the Secretary of the Interior to ensure an equitable sharing of reservation water among Indian residents:

> 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 on any such reservation * * * .

25 U.S.C. 381.

The McCarran Amendment, ch. 651, 66 Stat. 560 (43 U.S.C. 666), waives the sovereign immunity of the United States in a suit "for the adjudication of rights to the use of water of a river system or other source." In *Colorado River Conservation District* v. *United States*, 424 U.S. 800 (1976), this Court held that the McCarran Amendment gives state courts "concurrent" jurisdiction to adjudicate federal water rights, including "federal reserved rights held on behalf of Indians." *Id.* at 809. In the wake of that decision, the State of Montana enacted a statute providing for the statewide adjudication of all water rights, including rights held by "the United States of America on its own behalf or as trustee for any Indian or Indian tribe." Mont. Code Ann. § 85-2-212 (1979). Litigation over Indian reservation water rights in Montana followed in both state and federal court. See, *e.g.*, *Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation* v. *Adsit*, 721 F.2d 1187 (9th Cir. 1983); *State ex rel. Greely* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 757 (Mont. 1985).

c. In 1999, efforts to resolve disputes over the quantification and administration of water rights on the Crow Reservation culminated in the Crow Tribe-

Montana Water Rights Compact (which appears, as ratified, at Mont. Code Ann. § 85-20-901 (1999)). The Compact, which was negotiated among the United States, the State of Montana, and the Crow Tribe, is intended to "settl[e] any and all existing water rights claims of or on behalf of the Crow Tribe of Indians in the State of Montana." Compact Pmbl. It sets forth an agreed "Tribal Water Right" that includes specified rights to divert and use water from the Bighorn River, the Little Bighorn River, and creeks and drainages within the Crow Reservation and the "Ceded Strip" (defined to comprise certain former reservation lands, now outside the Crow Reservation, that the United States holds in trust for the Crow Tribe). *Id.* Art. III; see *id.* Art. II.7; see *Montana* v. *Crow Tribe*, 523 U.S. 696, 700-701 (1998) (describing the ceded strip). The Tribal Water Right encompasses "the right[s] of the Crow Tribe, including any Tribal member," Compact Art. II.30, which are to be held in trust by the United States, *id.* Art. IV.A.1.

The Compact assigns responsibility for administering the Tribal Water Right to the Crow's Tribal Water Resources Department. Compact Art. IV.B.2; see *id.* Art. II.28. The Compact also requires the Crow Tribe to develop and adopt a Tribal Water Code. *Id.* Art. IV.A.2.b. In administering water rights, "the Tribe may not limit or deprive Indians residing on the Reservation or in the Ceded Strip of any right, pursuant to 25 U.S.C. § 381, to a just and equal portion of the Tribal Water Right." *Id.* Art. IV.B.1.

The Compact specifies that, once it has been ratified by the Crow Tribal Council, by the State of Montana, and by Congress, the parties shall file in the Montana Water Court a "motion for entry of [a] pro-

posed decree," as set forth in an appendix to the Compact. Compact Art. VII.B.2; see *id.* App. 1 (proposed decree). In June 1999, the Compact was ratified and enacted into law by the Montana Legislature. Mont. Code Ann. § 85-20-901 (1999). The Crow Tribe ratified the Compact by a vote of its members in 2011. Pet. App. 4.

2. Congress approved the Crow Compact by enacting the Crow Tribe Water Rights Settlement Act of 2010 (Settlement Act or Act), Pub. L. No. 111-291, 124 Stat. 3097. The Settlement Act is designed "to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for the Crow Tribe and the United States for the benefit of the Tribe and allottees," as well as "to authorize, ratify, and confirm the [Compact]." § 402(1) and (2), 124 Stat. 3097 (headings and punctuation altered).

The Settlement Act provides that the tribal water rights described in the Compact "are ratified, confirmed, and declared to be valid" and shall be "held in trust by the United States for the use and benefit of the Tribe and the allottees." § 407(b)(1) and (c), 124 Stat. 3104. With respect to allottees in particular, the Act confirms Congress's intent "to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess[ed]" at the time of its enactment, "taking into consideration":

> (1) the potential risks, cost, and time delay associated with litigation that would be resolved by the Compact and [the Act];
>
> (2) the availability of funding under [the Act] and from other sources;
>
> (3) the availability of water from the tribal water rights; and

> (4) the applicability of * * * (25 U.S.C. 381) and [the Act] to protect the interests of allottees.

§ 407(a), 124 Stat. 3104 (formatting altered). The Act also provides that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights," and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." § 407(d)(2) and (3), 124 Stat. 3105; see § 407(d)(1), 124 Stat. 3104 (specifying that 25 U.S.C. 381 "shall apply").

The Settlement Act gives the Crow Tribe "authority to allocate, distribute, and lease the tribal water rights in accordance with the Compact." § 407(e)(1), 124 Stat. 3105 (formatting and punctuation altered). The Tribe must establish a Tribal Water Code, as specified in the Compact, that contains protections for allottee rights, including "a process by which an allottee may request that the Tribe provide water for irrigation use in accordance with [the Act]." § 407(f)(2)(C), 124 Stat. 3105. The Tribal Water Code must also contain "a due process system for the consideration and determination by the Tribe of any request by an allottee * * * for an allocation of such water for irrigation purposes on allotted land," including a process for "appeal and adjudication of any denied or disputed distribution." § 407(f)(2)(D), 124 Stat. 3105; see § 407(f)(3), 124 Stat. 3106 (Secretary of Interior must confirm that Tribal Water Code contains necessary protections before it goes into effect). The Act further provides that, following exhaustion of remedies under the Tribal Water Code or other applicable tribal law, an allottee may seek relief under 25 U.S.C. 381 or other applicable law. § 407(d)(5), 124 Stat. 3105; see § 407(d)(6), 124 Stat. 3105 (authorizing

Secretary of Interior "to protect the rights of allottees").

The Settlement Act further authorizes hundreds of millions of dollars in federal appropriations for projects to benefit all users of the Tribal Water Right, including projects to rehabilitate and improve the Crow Reservation's municipal, rural, and industrial water system and to maintain and improve the Crow Irrigation Project. §§ 405-406, 411, 414, 124 Stat. 3100-3104, 3113-3116, 3120-3121. The Act assigns responsibility for carrying out such projects to the Secretary of the Interior and directs that the final design of irrigation improvements "take into consideration the equitable distribution of water to allottees." § 405(c)(2), 124 Stat. 3100.

In exchange for the Tribal Water Right, funding for water projects, and other benefits, the Settlement Act contains a comprehensive release of claims. The 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." § 409(a)(2), 124 Stat. 3108; see § 410(a)(3), 124 Stat. 3110 (describing claims released). 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. § 410(a)(2), 124 Stat. 3109. However, the Act reserves "all claims for enforcement of the Compact, and any final decree, or [the Act]" itself. § 410(c)(1), 124 Stat. 3111.

The Settlement Act provides for an "enforceability date," which is the date that the Secretary of the Interior publishes, in the Federal Register, a statement of findings that specified conditions have been met. § 410(e), 124 Stat. 3112; see § 410(b), 124 Stat. 3111 (Act's claim waivers "shall take effect on the enforceability date"). Among other things, the Secretary must state that:

> (i) the Montana Water Court has issued a final judgment and decree approving the Compact; or
> (ii) if the Montana Water Court is found to lack jurisdiction, the district court of jurisdiction has approved the Compact as a consent decree and such approval is final * * * .

§ 410(e)(1)(A), 124 Stat. 3112; see § 403(7), 124 Stat. 3098 (defining "[t]he term 'final' with reference to approval of the decree"). If the Secretary does not publish the required findings by March 31, 2016, or by an "extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana," the Settlement Act will be repealed. § 415, 124 Stat. 3121.

3. In accordance with the Settlement Act, the United States, Montana, and the Crow Tribe jointly submitted a Proposed Decree to the Montana Water Court and moved for "entry of a final order issuing the decree of the reserved water right of the Tribe held in trust by the United States as quantified in the Compact." Pet. App. 5 (italics omitted). The court issued a preliminary decree containing the Compact; in compliance with Montana law, see Mont. Code Ann. § 85-2-232 (2009), the court published and served notice on affected parties of the preliminary decree. Pet. App. 6. Of more than 16,000 persons and entities

who received notice, approximately 100 submitted objections to the court. *Ibid.*

a. Among those filing objections were approximately 48 allottees who are members of the Crow Tribe (now petitioners in this Court identified as "Crow Allottees"). Petitioners alleged that they possess reserved water rights distinct from the rights of the Crow Tribe; that the Crow Compact would impair their rights by subordinating them to the Tribe's rights; and that the United States had failed, in its capacity as trustee, to adequately represent their interests. Pet. App. 6-8, 23-25. Petitioners also argued that the Water Court was without jurisdiction to adjudicate their rights. *Id.* at 7. Petitioners moved to stay proceedings in the Water Court pending the resolution of a suit that they filed simultaneously in federal district court. *Id.* at 7-8; see p. 13, *infra*.

On July 30, 2014, the Water Court dismissed petitioners' objections and denied their request for a stay. Pet. App. 21-52. The court stated that the purpose of reviewing the Proposed Decree was not to assess its merits, but rather to determine whether it was "fair and reasonable to those parties and the public interest that were not represented in the negotiation." *Id.* at 40 (citation omitted). Because the United States had, in its capacity as trustee, represented the allottees' interests in negotiating and approving the Crow Compact, *id.* at 37-38, the court determined that petitioners could object only on the basis of "fraud, overreaching, or collusion" by the settling parties, *id.* at 41, 50, 52. Although petitioners had alleged that representation by the United States was "not adequate," petitioners did not allege fraud, overreaching, or collusion. *Id.* at 38. Accordingly, the court held that peti-

tioners had failed to state a valid claim for relief, *id.* at 44, 52, and it denied as moot petitioners' motion for a stay, *id.* at 52.

b. Petitioners sought interlocutory review in the Montana Supreme Court of the Water Court's dismissal of their objections. In a unanimous opinion, the Montana Supreme Court affirmed. Pet. App. 1-20.

As an initial matter, the Montana Supreme Court rejected petitioners' argument that the Water Court had erred in not applying the standard for considering a motion to dismiss for failure to state a claim when reviewing their objections to the preliminary decree. Pet. App. 12-13. The Montana Supreme Court also rejected petitioners' argument that the Water Court had exceeded its jurisdiction by addressing questions of federal law. It explained that when state courts exercise jurisdiction over federal claims pursuant to the waiver of sovereign immunity contained in the McCarran Amendment, the state courts have the authority and obligation to interpret and apply federal law. *Id.* at 13-14. The Water Court did so, the Montana Supreme Court continued, in determining that petitioners "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." *Id.* at 14; see *ibid.* ("[T]he Tribe, the United States Congress and the State of Montana have all expressly recognized the Allottees' rights to a share of the Crow Tribal Water Right.").

The Montana Supreme Court also held that the Water Court had not erred in declining to address petitioners' challenge to the adequacy of the United States' representation of the allottees. Pet. App. 15. In the Montana Supreme Court's view, the Water

Court had correctly recognized that such a determination was "not within the scope of its review," which was instead confined to deciding "whether the Compact was the 'product of fraud, collusion or overreaching'"—the standard to be applied by Montana courts in overseeing consent decrees. *Ibid.* The Montana Supreme Court further held that the Water Court had not abused its discretion in denying petitioners' request for a stay pending resolution of their federal district court suit, which would have "work[ed] a hardship and a potential injustice on the parties who have worked for many years to develop and implement the Compact." *Id.* at 17.

Finally, the Montana Supreme Court rejected petitioners' argument that a "'current use list' [wa]s a prerequisite for including the Compact in a final decree." Pet. App. 18 (italics omitted). Petitioners had objected to the Compact based on its failure to specify "a list of 'current uses' of the Tribal Water Right." *Ibid.* The Montana Supreme Court determined, however, that the Compact itself and the Settlement Act do not "make [a] water use report a prerequisite to the validity of the Compact." *Id.* at 18-19; see *id.* at 19 ("We find no basis for concluding that the Water Court should have deferred action on the Compact based upon the absence of a current use list.").

c. On May 27, 2015, while petitioners' appeal to the Montana Supreme Court was pending, the Water Court issued a final judgment approving the Crow Compact. A group of non-Indian objectors separately appealed from that judgment, which the Montana Supreme Court affirmed on December 30, 2015. See *In re Crow Water Compact*, 364 P.3d 584 (Mont. 2015). A petition for rehearing was largely denied on Febru-

ary 3, 2016 (other than correction of a factual error in the opinion).[1]

d. On May 15, 2014, petitioners had filed suit in the United States District Court for the District of Montana against the Bureau of Indian Affairs, the Interior Department, and several federal officials (collectively, the "federal defendants"), as well as against two judges of the Montana Water Court. Petitioners' complaint, filed as a putative class action, alleged that petitioners had been denied their fair share of water rights, and it requested an order enjoining proceedings in the Montana Water Court. *Crow Allottees Ass'n* v. *U.S. Bureau of Indian Affairs*, No. 14-cv-62, Doc. 3 (D. Mont.) (Amended Compl.). On June 30, 2015, the district court granted judgment on the pleadings to the federal defendants, concluding that the United States had not waived its sovereign immunity. See Doc. 59. On July 27, 2015, the court granted judgment for the remaining defendants, finding petitioners' requests for relief against the Water Court judges to be moot and barred by the *Rooker-Feldman* doctrine. See Doc. 62. Petitioners have appealed. See *Crow Allottees Ass'n* v. *Bureau of Indian Affairs*, No. 15-35679 (9th Cir. filed Aug. 26, 2015).

ARGUMENT

The Montana Supreme Court was correct to affirm the decision of the Montana Water Court dismissing petitioners' objections and denying their request for a stay. The McCarran Amendment gives state courts

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[1] https://supremecourtdocket.mt.gov/view/DA%2015-0370%20Other%20--%20Order?id={50F5A752-0000-CC13-B15D-FA73376732A9}.

jurisdiction to adjudicate federal water rights, and the Settlement Act expressly contemplated that the Montana Water Court would issue "a final judgment and decree approving the Compact." § 410(e)(1)(A)(i), 124 Stat. 3112. Petitioners' objections also fail on the merits. Congress possesses plenary authority to settle claims for water rights held in trust for Indian tribes and Indian allottees, and the Settlement Act is a valid exercise of that authority. The Montana Supreme Court's decision does not conflict with any decision of this Court, any state supreme court, or any federal court of appeals. Further review is unwarranted.

1. Contrary to petitioners' argument (Pet. 10-15), this case does not involve any significant question regarding the Montana Water Court's jurisdiction to address and resolve issues of federal water law. The McCarran Amendment waives the sovereign immunity of the United States in a suit "for the adjudication of rights to the use of water of a river system or other source," 43 U.S.C. 666(a), thereby allowing state courts to exercise "concurrent" jurisdiction to adjudicate federal water rights, including "federal reserved rights held on behalf of Indians." *Colorado River Conservation Dist.* v. *United States*, 424 U.S. 800, 809 (1976). In *Arizona* v. *San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), which involved Indian water-rights claims in a case from Montana as well as Arizona, this Court explained that the McCarran Amendment not only "allows" but also "encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications." *Id.* at 569. The Court accordingly upheld the decision of a federal district court to de-

cline to adjudicate federal Indian water-rights claims in favor of resolution of those claims in Montana state court. *Id.* at 570. The Court noted that, because state courts "have a solemn obligation to follow federal law," the choice of a state-court forum "in no way changes the substantive law" that would apply. *Id.* at 571.

Petitioners acknowledge (Pet. 12) that the McCarran Amendment gives Montana courts "concurrent jurisdiction to adjudicate federal water rights reserved to the Crow Indians." They nevertheless argue (*ibid.*) that state courts lack "jurisdiction to decide issues of federal Indian or constitutional law." But there is no valid distinction between a state court's jurisdiction to adjudicate "federal water rights reserved to" an Indian tribe (on one hand) and its jurisdiction over "issues of federal Indian * * * law" (on the other). Indeed, the Montana court proceedings at issue in *Arizona* addressed a number of different issues of federal Indian law, see 463 U.S. at 553-557, and involved "blanket adjudication of *all* claims, including federal and federal trust claims," *id.* at 555 (citation omitted). This Court approved the state courts' exercise of jurisdiction over those claims, noting that "actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." *Id.* at 552 (citation omitted). Finally, as to the Montana courts' jurisdiction over questions of constitutional law, that issue is not presented here: Petitioners do not raise any issue of constitutional law.[2]

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[2] Petitioners also argue (Pet. 15) that, in adjudicating their claims, "the Montana Supreme Court failed to follow the controlling federal law." See Pet. 13 ("The courts failed to follow federal

Petitioners' jurisdictional argument fails for another reason. The Settlement Act expressly contemplates submission of the Compact to the Montana Water Court for entry of "a final judgment and decree approving the Compact." § 410(e)(1)(A)(i), 124 Stat. 3112. The Act defines "[t]he term 'final' with reference to approval of the decree" to mean the "completion of any direct appeal to the Montana Supreme Court of a decree by the Montana Water Court pursuant to section 85-2-235 of the Montana Code Annotated (2009)." § 403(7)(A), 124 Stat. 3098. The referenced provision of Montana law specifies the appellate rights of "[a] person whose existing rights and priorities are determined in a final decree" issued by the Water Court. Mont. Code Ann. § 85-2-235(1) (2009); see *id.* § 85-2-234 (content required for final decree). Therefore, Congress clearly intended for the Compact to be submitted to the Montana Water Court for entry of a "final judgment and decree" approving the Compact—which is precisely the type of judgment that the Water Court issued.

2. Petitioners argue that "the Montana courts erred in determining [that] allottees have no water rights pursuant to federal law." Pet. 16 (capitalization altered). The premise of that argument is incorrect, however, because the Montana Supreme Court did not adjudicate the nature or scope of petitioners' claims—and certainly did not determine that "allottees have no water rights pursuant to federal law." Instead, in resolving petitioners' objections to the preliminary

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precedent"). That contention, which in any event is incorrect, see pp. 16-25, *infra*, relates to the merits of petitioners' claims, not the jurisdiction of Montana courts to resolve them

decree, the court correctly performed the responsibilities given to it by Congress under the Settlement Act.

a. The Constitution grants Congress plenary authority over Indian affairs. That plenary authority extends to "the Indian trust relationship," including the power to protect, control, and manage Indian trust assets via legislation, *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011); see *id.* at 2323-2324, as well as through litigation. Congress accordingly may "change the form of [Indian] trust assets" as long as it acts, in good faith, to "provide [trust beneficiaries] with property of equivalent value." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) (citation omitted).

In the Settlement Act, Congress exercised its authority, as trustee for the Tribe and for Indian allottees within the Crow Reservation, to "achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana." § 402(1), 124 Stat. 3097. The Act recognizes that the beneficial use of water by allottees is subject to a number of factors, including "the potential risks, cost, and time delay associated with litigation," "the availability of funding," and "the availability of water from the tribal water rights." § 407(a)(1)-(3), 124 Stat. 3104. Congress stated its intention to provide Indian allottees with "benefits that are equivalent to or exceed" their pre-settlement federal rights. § 407(a), 124 Stat. 3104. To achieve that goal, the Settlement Act endorses the Tribal Water Right specified in the Compact, and it affirms that allottees possess "entitlement to water" that "shall be satisfied from" that right. § 407(d)(2), 124 Stat. 3105. The Act further specifies that the "the benefits realized by the allottees" under the Compact

are "in complete replacement of and substitution for, and full satisfaction of" any claims that the allottees otherwise might have, including "any claims of the allottees against the United States." § 409(a)(2)(A) and (B), 124 Stat. 3108; see § 410(a)(3)(D), 124 Stat. 3110 (waiver of claims "relating to the negotiation, execution, or the adoption of the Compact" or Settlement Act). The Settlement Act was thus an exercise of Congress's authority to settle claims to water rights that the United States holds in trust for the benefit of the Crow Tribe, its members, and allottees, in exchange for the quantified Tribal Water Right, funds for infrastructure improvements, and other valuable benefits.[3]

b. Petitioners nevertheless contend (Pet. 19) that the Montana Supreme Court erroneously held "that Allottees have no enforceable property right in water." Petitioners argue (Pet. 19-23) that allottees are entitled to a pro-rata share of water rights reserved under *Winters* v. *United States*, 207 U.S. 564 (1908), rather than the "just and equal portion of the Tribal Water Right" that is specified in the Compact. Compact Art. IV.B.1; see Settlement Act § 407(d)(3), 124 Stat. 3105 ("just and equitable allocation of water"). Petitioners suggest (Pet. 1) that this case would be "an ideal vehicle to flesh out the extent and precise nature of Allottees' vested property rights."

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[3] The global resolution of water-rights claims in the Settlement Act is similar to the approach that Congress has taken in other recent Indian water-rights settlements. See, *e.g.*, Snake River Water Rights Act, Pub. L. No. 108-447, Tit. X, 118 Stat. 3431-3432, 3434-3435; Arizona Water Settlements Act, Pub. L. No. 108-451, 204, 118 Stat. 3502-3503.

Petitioners have not accurately characterized the Montana Supreme Court's ruling. The court did not hold, as petitioners assert, that allottees have no enforceable water rights. To the contrary, the court stated that "the Tribe, the United States Congress and the State of Montana have all expressly recognized the Allottees' rights to a share of the Crow Tribal Water Rights." Pet. App. 14. But the court otherwise declined to determine the precise nature or extent of the rights secured to individual allottees by the Compact. For instance, petitioners had argued that "no action should be taken on the Compact" until "the Crow Tribe and the United States * * * prepared a list of 'current uses' of the Tribal Water Right," including current uses by allottees. *Id.* at 18. The court disagreed, finding "no requirement that the specified water rights or claims of these Allottees be quantified as a precondition to implementing the Compact." *Id.* at 19; see *id.* at 18-19 (neither the Compact nor the Settlement Act "make[s] the water use report a prerequisite to the validity of the Compact"). The court accordingly rejected petitioners' argument that the failure to quantify their specific water rights was a valid basis to object to the Compact or to delay the Water Court's issuance of a decree approving the Compact. *Id.* at 19. The Montana Supreme Court did not, however, endeavor to further define those rights.

To be sure, the Montana Supreme Court did say, in the course of rejecting petitioners' argument, that the Water Court had correctly described one of the "objective[s] of the Compact" as "defin[ing] the Tribe's *Winters* rights." Pet. App. 19. In *Winters*, this Court addressed the water-use rights of Indians living on

the Fort Belknap Reservation in Montana. 207 U.S. at 575-578. The question was whether the rights of the Indians to use water had been impliedly reserved when the Fort Belknap Reservation was created by treaty, or whether instead their rights had been extinguished by the treaty or by "the admission of Montana into the Union." *Id.* at 577-578. Noting that "[t]he lands [at issue] were arid, and, without irrigation, were practically valueless," *id.* at 576, the Court construed the treaty as impliedly reserving water for use by the Indians; it also rejected the notion that Congress had, without saying so explicitly, intended to withdraw or eliminate that right. *Id.* at 576-578. *Winters* thus established "what has come to be called the 'implied-reservation-of-water doctrine.'" *United States* v. *New Mexico*, 438 U.S. 696, 700 (1978).

Although the Montana Supreme Court stated that "defin[ing] the Tribe's *Winters* rights" was one of the Compact's "objective[s]," Pet. App. 19, the court did not *itself* attempt to determine the nature of any rights that the Tribe or its members might impliedly have possessed under the *Winters* doctrine standing alone. There was no need for the court to do so, because the Compact, as implemented by the Settlement Act, *explicitly* addresses the water rights of the Tribe, its members, and allottees as a settlement of claims based on *Winters*. The Montana Supreme Court accordingly did not have occasion to address—and did not address—that issue. This case therefore provides no occasion "to flesh out the extent and precise nature of Allottees' vested property rights pursuant to the

Winters doctrine [of] Indian reserved water rights." Pet. 1.[4]

c. Petitioners are similarly incorrect when they argue that the Montana Supreme Court held that allottees are entitled to "a 'just and equal share of the Tribal Water Right.'" Pet. 23 (quoting Pet. App. 8). The quoted portion of the court's opinion was in fact a description of *the Water Court's* ruling. See Pet. App. 8 ("The Water Court concluded that under federal law, and the Compact, the Allottees are entitled to a 'just and equal share' of the Tribal Water Right.") (citation omitted).

In any event, even if the Montana Supreme Court had held that allottees are entitled to a "just and equal share" of the Tribal Water Right, that ruling would provide no basis for this Court's review. The Compact specifies that the Tribal Water Right encompasses "the right[s] of the Crow Tribe, including any Tribal member." Compact Art. II.30. The Settlement Act provides that "[a]ny entitlement to water of an allot-

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[4] For the same reason, petitioners cannot here rely (Pet. 19-22) on court of appeals decisions that, based on *Winters*, involve impliedly reserved federal water rights. See *Colville Confederated Tribes* v. *Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (*Winters* addressed "reserved rights [that] are properly implied"), cert. denied, 475 U.S. 1010 (1986); *United States* v. *Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983) (*Winters* allows the "implied reservation of water rights"), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Preston*, 352 F.2d 352, 357 (9th Cir. 1965) (under *Winters*, "as soon as a reservation for Indians has been established, there is an implied reservation of rights to the use of the waters which arise, traverse or border upon the Indians' reservation"). None of those decisions involved an instance in which Congress exercised its authority to resolve, by means of a federal statute like the Settlement Act, federal Indian reserved water rights that the United States holds in trust for a tribe, its members, and allottees.

tee under Federal law shall be satisfied from the tribal water rights," and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." § 407(d)(2) and (3), 124 Stat. 3105. The Act also specifies the applicability of 25 U.S.C. 381, which authorizes the Secretary of the Interior to prescribe rules and regulations as "necessary to secure a just and equal distribution [of water] among the Indians residing upon any * * * reservation." See § 407(d)(1), 124 Stat. 3104. The Settlement Act thus entitles allottees to a "just and equitable share" of water, to be satisfied from the Tribal Water Right specified in the Compact. Any holding to that effect thus would have been correct.

Petitioners argue (Pet. 23) that the "just and equitable" share of water to which the Settlement Act entitles allottees "is not equivalent" to the rights that allottees possessed under federal law before the Act's passage. Petitioners contend (Pet. 23) that "[a]n entitlement to a 'just and equal share' of the Crow Tribe's water rights[] is not a property right" at all, but rather "a potential future process." Instead, petitioners argue (Pet. 19-28), federal law entitled allottees to a vested property right that is separate from any right possessed by the Tribe.

Even 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. 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." *Jicarilla Apache Nation*, 131 S. Ct. at 2323. Congress may accordingly deter-

mine that the interests of a tribe and its members are best served by settling disputes concerning property held in trust or by altering the form or content of tribal property or other rights. See *Sioux Nation*, 448 U.S. at 416. The 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. The Act, which petitioners have not directly challenged, represents a valid exercise of Congress's power to manage trust property for the benefit of the Crow Tribe, its members, and allottees.[5]

This Court's decision in *United States* v. *Powers*, 305 U.S. 527 (1939), on which petitioners rely (Pet. i, 20-22, 24-26), is not to the contrary. *Powers* involved a claim for water rights on the Crow Reservation under the Fort Laramie Treaty of 1868, which "contain[ed] no definite provision concerning apportionment or use of waters." 305 U.S. at 529. Non-Indians who had purchased land from tribal members argued that "waters within the Reservation were reserved for the equal benefit of tribal members * * * and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee [to non-members], the right to use some portion of tribal waters essential for cultivation passed to the [non-member] owners."

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[5] The acquisition by Congress of property from an Indian tribe or its members may trigger an obligation to pay just compensation. *Sioux Nation*, 448 U.S. at 423-434. But petitioners have not asserted a takings claim, nor would their allegations support such a claim. And the Montana Water Court would not have had jurisdiction to adjudicate a takings claim against the United States even if petitioners had raised one. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984) (remedy for alleged taking by federal Government presumptively lies under the Tucker Act).

Id. at 532 (citing *Winters*). This Court agreed, "find[ing] 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." *Id.* at 533. The Court accordingly determined that the non-Indian purchasers were entitled to a "just and equal distribution of waters" under rules and regulations prescribed by the Secretary of the Interior under authority of the General Allotment Act, although the Court declined to "consider the extent or precise nature of [the purchasers'] rights in the waters." *Ibid.*

Powers does not support petitioners' argument. *Powers* recognizes that when "waters within [a] Reservation [a]re reserved for the equal benefit of tribal members," and "allotments of land" are made within the reservation, "the right to use some portion of tribal waters" may be "passed to the owners" of the allotments absent "Congressional intent" to the contrary. That principle does not help petitioners: Here, there is no dispute that the Settlement Act is a direct manifestation of Congress's intent to address the water rights of Crow Reservation allottees. And Congress explicitly secured for allottees "a just and equitable allocation of water" by entitling them to a share of the Tribal Water Right, § 407(d)(2) and (3), 124 Stat. 3105, which represents the resolution of issues concerning the scope of the Crow Tribe's reserved water rights under *Winters*. Nothing in *Powers* suggests that Congress lacked that power.

d. Finally, there is no significant difference between the rights secured to allottees under the Settlement Act and the rights that petitioners possessed before the Act. *Powers* stated that the right of allot-

tees on the Crow Reservation to "participat[e] in the use of waters" was subject to the Secretary of the Interior's authority under the General Allotment Act "to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters." 305 U.S. at 533. The "just and equal distribution" standard mentioned in *Powers* is the same standard that has long applied to the water rights of Indians residing on a reservation. 25 U.S.C. 381 ("just and equal distribution"). The Settlement Act affirms that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes," § 407(d)(3), 124 Stat. 3105. The Act also states that 25 U.S.C. 381 "shall apply to the tribal water rights," § 407(d)(1), 124 Stat. 3104, and that Congress intended for the Act "to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess[ed]" at the time of its enactment, § 407(a), 124 Stat. 3104. There is therefore no basis for petitioners to argue that the water rights secured under the Settlement Act differ from the implied rights to a share of the water right reserved to the Tribe under *Winters* that they possessed before the Act.[6]

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[6] Petitioners appear to base their argument in part on the fact that the Settlement Act requires "[a]ny entitlement to water of an allottee under Federal law [to] be satisfied from the tribal water rights." § 407(d)(2), 124 Stat. 3105. That is not significantly different from the way the Court described the rights of allottees in *Powers*. See 305 U.S. at 532 ("the right to use some portion of tribal waters essential for cultivation passed to the owners"). In any event, even if the Settlement Act did change the nature of allottees' rights, Congress may "change the form of [Indian] trust assets." *Sioux Nation*, 448 U.S. at 416 (1980) (citation omitted); see pp. 22-24, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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