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STATE OF MONTANA
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION ROSEBUD CREEK - BASIN 42A
INTERLOCUTORY DECREE

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| CLAIMANT: Forty Mile Colony<br><br>OBJECTOR: United States of America (Bureau of Indian Affairs)<br><br>COUNTEROBJECTOR: Forty Mile Colony<br><br>NOTICE OF INTENT TO APPEAR: Northern Cheyenne Tribe | **CASE 42A-0033-I-2023**<br>42A 30125536<br>42A 30125563 |

# ORDER DENYING NORTHERN CHEYENNE TRIBE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING FORTY MILE COLONY'S MOTION FOR SUMMARY JUDGMENT

## I. INTRODUCTION

Forty Mile Colony ("Colony") filed two stockwater rights for use on land within the boundaries of the Crow Indian Reservation. The Colony initially claimed both rights based on historical use but asserted priority dates of May 7, 1868. These priority dates coincide with the date of the Treaty of Fort Laramie ("Treaty") between the United States and the Crow Tribe. Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649.

The United States of America, through the Bureau of Indian Affairs, objected to the Colony's water rights. The United States asserted that designation of those rights as use rights was inaccurate because they were not in use at the time of the Treaty. The United States asserted that both rights were derived from reservations of water in the

Treaty and that both rights should have priority dates of May 7, 1868, with the type of historical right designated as "reserved".

The water rights described by the United States are known as *Walton* rights based on federal court decisions recognizing such rights. *See Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981) ("*Walton I*"); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985) ("*Walton II*").

The Northern Cheyenne Tribe filed a Notice of Intent to Appear on both the Colony's rights. It disagrees with the position taken by the United States and asserts that *Walton* rights can only be recognized for irrigation but not stockwater. The Northern Cheyenne Tribe has water rights in the same basin as those claimed by the Colony, but the Northern Cheyenne Tribe's rights have priority dates of October 1, 1881.

The Northern Cheyenne Tribe moved for summary judgment asserting the Colony is not entitled to *Walton* rights and asserting that the correct priority dates for the Colony's water rights should match the date of the patents issued for the lands owned by the Colony. The dates of those patents are junior to the October 1, 1881, priority dates the Northern Cheyenne Tribe claimed for its water rights.

The Colony contends that Crow Tribe members received both irrigation and stockwater rights as part of the allotment process and that the Colony, as a successor to Tribal allottees, now owns the allottee's water rights.

The issue presented by the Northern Cheyenne Tribe's motion for summary judgment is whether *Walton* rights include claims for stockwater.

## II. THE ALLOTMENT ACT AND *WALTON* RIGHTS

The allotment of Tribal lands began with the General Allotment Act of 1887 ("General Allotment Act" or "Act"), also known as the Dawes Act. 25 U.S.C. § 348 (1887).

> The Dawes Act was a comprehensive congressional attempt to change the role of Indians in American society. Tribal members under the Act surrendered their undivided interest in the tribally owned or trust estate for a personally assigned divided interest, generally held in trust for a limited number of years, but

"allotted" to them individually. *Cohen's Handbook of Federal Indian Law,* § 104 (2005).

The General Allotment Act was a product of the federal policy of assimilation, aimed at integrating individual Indians into non-Indian society. Allotments were designed to convert reservations into private ownership in the belief that doing so would turn the Indians from a nomadic to an agrarian lifestyle. Once a Tribal member received ownership of their individual allotment, they were free to keep or sell their property. Many allotees sold their lands to non-Indians.

The United States reserved water to fulfill the purposes of Tribal reservations. *United States v. Winters*, 207 U.S. 564, 576, 28 S. Ct. 207, 211 (1908). In keeping with the purpose of allotments, Indian allottees are entitled to use *Winters* rights for agricultural purposes. This principle has its origins in *United States v. Powers*, 305 U.S. 527, 59 S. Ct. 344 (1939). In *Powers*, the Court noted that, although deeds to allottees were silent regarding the use of water, the purpose of allotment was to create individually owned parcels "for agricultural and grazing purposes." 305 U.S. at 530. The Court also concluded that the allotments had limited value for agriculture without water and held that allottees had "the right to use some portion of tribal waters essential for cultivation." *Powers*, 305 U.S. at 532.

When allottees sold their lands to non-Indians, questions arose about the water rights conveyed. In *Walton I*, the Colville Confederated Tribes sought to enjoin water use by a non-Indian purchaser of allotment lands named Walton. *Walton I*, 647 F.2d 42 (9th Cir. 1981). The trial court found Walton could not use the Tribe's reserved rights but could use other un-appropriated water in the source. *Id*. at 51.

The appeals court concluded an allottee could sell his reserved water and reversed the trial court's ruling that Walton was not entitled reserved water rights. *Id*. at 50. The appeals court reasoned that limiting the ability of an allottee to convey reserved rights would reduce the value of the allottee's right to reserved water. The court held that the

full quantity of water available to the Indian allottee could be conveyed to the non-Indian purchaser. *Walton I,* 647 F2d at 51.

The Northern Cheyenne Tribe asserts that the Colony may not claim *Walton* rights for stockwater. It contends that the Colony cannot claim stockwater rights because allottees did not receive such rights in the Treaty of Fort Laramie and could not have conveyed them when they sold their allotments.

## III. RESERVATIONS OF WATER FOR THE CROW TRIBE

The United States and the Crow Tribe entered the Treaty of Fort Laramie on May 7, 1868. The Treaty "set apart [lands] for the absolute and undisturbed use and occupation of the Indians …" Treaty, 15 Stat. 649 at Art. 2. The purpose of the Treaty was to enable members of the Tribe to "make said reservation their permanent home…" Treaty, 15 Stat. 649 at Art. 4. The Treaty promoted opportunities to pursue farming and provided seed and agricultural implements to those who wanted to cultivate the land. Treaty, 15 Stat. 649 at Art. 8. In addition, the Treaty obligated the United States to supply "one good American cow and one good, well-broken pair of American oxen…" to each lodge or family that moved to the reservation to "commence farming…" Treaty, 15 Stat. 649 at Art. 9.

Domestic animals were an integral part of life at the time of the Treaty. Horses, mules, and oxen provided transportation and the ability to cultivate fields. Other domestic animals provided food. Water for livestock was essential for survival and essential to fulfill a primary purpose of the Treaty, which was to provide Tribal members the opportunity to farm.

The General Allotment Act granted the President authority to create allotments "advantageous for agricultural and grazing purposes." Act of February 8, 1887, ch .119, § 5, 24 Stat. 388, as amended February 28, 1891, ch. 383, 26 Stat. 794.

It is axiomatic that grazing livestock needed water to drink, and that the availability of stockwater was crucial to the success of the General Allotment Act and the people it was intended to benefit. Given that livestock or livestock grazing is explicitly mentioned in both the Treaty of Fort Laramie and the General Allotment Act, it is

reasonable to conclude that allottees received water rights for livestock when they were granted allotments.

Consistent with the purposes of the Treaty and the General Allotment Act, Crow Tribal members made extensive use of livestock on their lands. By the early twentieth century, "the Crow had the largest horse herd in the world and a cattle herd of over 30,000 head." U.S.'s Resp. in Opp'n to Mot. for Summ. J., p. 5. (citations omitted).

## IV. THE NORTHERN CHEYENNE TRIBE'S ARGUMENT

The Northern Cheyenne Tribe asserts that allottees on the Crow reservation did not receive stockwater rights and could not transfer such rights to non-Indian purchasers of allotments. As grounds for this argument, the Northern Cheyenne Tribe cites Section 7 of the General Allotment Act which references water for irrigation but does not explicitly reference stock water rights. The Northern Cheyenne Tribe contends this distinction signifies that Congress did not intend for allottees to receive stockwater rights.

The General Allotment Act's reference to water for irrigation is important. At the time of the Act's passage irrigation would have been used for production of forage to feed livestock or for irrigation of land cultivated using farm equipment pulled by livestock. Under either scenario, water for livestock would have been essential to fulfill the purposes of the Act. The Northern Cheyenne Tribe's narrow reading of the Act is not consistent with its purpose, or with the *Winters* doctrine which states that Indian Tribes received water rights necessary to fulfill the purposes of the reservations they occupied.

The Northern Cheyenne Tribe argues that the *Walton* cases and other decisions such as *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), limit allottee's rights to irrigation water because stockwater rights were not explicitly mentioned. This argument glosses over the fact that those cases were about irrigation rights, and that irrigation and cultivation of land was either for production of livestock forage or could not have occurred without use of livestock. None of the cases cited by the Northern Cheyenne Tribe explicitly carve stockwater rights out of the bundle of property rights received by allottees.

A prohibition on the use of stockwater would have severely impaired the ability of allottees to make full use of their allotments for either cultivation or grazing and would have limited the value of those allotments to potential purchasers.

## V. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing Rule 56(c), M.R.Civ.P.). To determine whether genuine issues of material fact exist, Courts look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631. All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Id*., ¶ 25.

The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues and entitlement to summary judgment as a matter of law. *Id*. Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997). Once the moving party has demonstrated that no genuine issues of material fact remain, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the opposing party must "present material and substantial evidence, rather than merely conclusory or speculative statements." *Id*.

## VI. ANALYSIS

There is no material issue of fact regarding use of livestock by Crow allottees during and after the allotment era. Accordingly, the sole question for determination is one of law. That question is whether stockwater rights transfer when a Tribal member conveys an allotment. For reasons stated below, the answer to this question is yes.

The purpose of the General Allotment Act and other similar legislation was to assist Tribal members with a transition to western-style agriculture. That purpose is also described in the Treaty of Fort Laramie. The Treaty mentions agriculture repeatedly, and

livestock specifically, and there is no question that stockwater rights were reserved for use by the Crow Tribe and its members when the Treaty was signed.

Under federal law, allottees have rights to use reserved water. *United States v. Powers*, 305 U.S. 527 (1939). *Powers* also states that "some portion of Tribal waters essential for cultivation passed to the owners of allotments." *Id.*. at 532. In *Walton I*, the Ninth Circuit held that "an appurtenant right to share in reserved waters" transferred when an allotment was conveyed by an allottee. *Walton I*, 647 F.2d at 50.

The Northern Cheyenne Tribe's main argument is that the *Walton* line of cases focused on irrigation rights and that there is no federal case law explicitly recognizing the ability of an allottee to convey a stockwater right as an appurtenance to an allotment. This argument conflicts with the Treaty of Fort Laramie and ignores clear statements about the rights of allottees in the *Walton* cases.

The Treaty of Fort Laramie encouraged Tribal members to pursue cultivation of land. To that end, the United States agreed to supply Tribal members with seed and implements to undertake cultivation. The implication of this agreement was that cultivation meant plowing the land and seeding it with a crop. To assist with plowing, the United States agreed to supply Tribal members with "one good, well-broken pair of American oxen…" Treaty, 15 Stat. 649 at Art. 9. Those oxen required water to survive.

The Northern Cheyenne Tribe acknowledges that a Crow allottee had a right to share in all Tribal reserved waters but argues that federal case law does not explicitly recognize the ability of an allottee to convey a stockwater right. This argument makes no logical sense given that cultivation of crops required livestock.

There is no federal law restricting the ability of an allottee to convey the entirety of their estate. In *Walton I*, the district court ruled that an allottee could only convey whatever rights they had appropriated and only with priority dates equal to the date of appropriation. The Ninth Circuit reversed this ruling, holding that allottees had rights to use Tribal reserved rights and the ability to convey those rights along with their allotments. *Walton I*, 647 F.2d at 50.

The *Walton* court held that restrictions on transferability would amount to a diminution of Indian rights that could not be imposed in the absence of clear Congressional intent. "We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right." *Id*.

In keeping with this precedent, allottees had the ability to transfer stockwater rights along with their allotments. To conclude otherwise would conflict with the purposes of the Treaty of Fort Laramie, the General Allotment Act, and with the rule of law in *Walton I*.

The Northern Cheyenne Tribe's motion for summary judgment is denied. For the reasons set forth above, the Colony's motion for summary judgment arguing that it is entitled to claim stockwater rights with priority dates equal to the Treaty is granted.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

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***Note: Service List Updated 3/22/2024***



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