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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES,

Plaintiff,

v.

LAKE COUNTY BOARD OF COMMISSIONERS; and LORI LUNDEEN,

Defendants.

Cause No. 9:19-cv-00090-DLC

BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL SOURCES

FEDERAL STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

TREATIES

INDEX OF EXHIBITS

(These Exhibits are expressly referenced herein. An index identifying all of Lake County's Exhibits is included in the Statement of Undisputed Facts filed simultaneously)

Exhibit No.	Description
A	Relevant Page from Exhibit No. 1 – Excerpt from Lee-Kenney Report Describing Big Arm Townsite
254	April 28, 1911 Letter from Project Engineer to H.N. Savage, Supervising Engineer at the U.S. Reclamation Service (CSKT0000224 – CSKT0000228)
255	Petition from certain Big Arm residents to Department of the Interior, United States Indian Service, received August 1, 1911 (CSKT0000231 – CSKT0000233)
258	June 9, 1906 Decision of the Department of the Interior (CSKT0000065 – CSKT0000067)
259	February 4, 1929 Decision of the Department of the Interior (LakeCty001865)
261	March 2, 1960 Memorandum from Department of the Interior, Roy F. Allan for the Field Solicitor, to Area Director, Bureau of Indian Affairs (LakeCty001773 – LakeCty00174)
262	March 16, 1960 Memorandum from Department of the Interior, Roy F. Allan for the Field Solicitor, to Area Director, Bureau of Indian Affairs (CSKT0000875 – CSKT0000876)
263	1966 Letter from Bureau of Indian Affairs Area Director to W.A. Burley, Chairman of the Board of County Commissioners (LakeCty001771)
266	September 23, 1959 Memorandum from the Office of the Area Director, Assistant Area Director M.A. Johnson, to the Field Solicitor (CSKT0000632)
267	June 12, 1970 Letter from Department of the Interior, Kenneth J. Sire, Chief Branch of Oil & Gas and Title & Records, to Richard A. Baenen (CSKT0000648)

Defendants Lake County Board of Commissioners ("Lake County") and Lori Lundeen ("Defendants") submit this brief in support of their Joint Motion for Summary Judgment.

I. INTRODUCTION

By its Complaint, CSKT seeks to nullify two Treaties, the Hell Gate Treaty and the Lame Bull Treaty, and an act of Congress—the Flathead Allotment Act, and Section 17 of that Act, added in 1906. These have been the law of the land and relied upon by the United States, Lake County, and the public in relation to the Big Arm Townsite since its platting in 1913. When the first lots in the townsite were sold, the purchasers relied on the dedication of public roads. Now, however, CSKT argues that there are no public roads; rather, according to CSKT, in Big Arm and all the townsites platted under the authority of Congress through the Flathead Allotment Act all that exists is "a private license." CSKT Brief in Support of Their Brief in Support of Their Motion for Summary Judgment (Doc. 73) at 5.[1] CSKT's position is contrary to law and the undisputed facts.

As set forth herein, the undisputed facts and applicable law establish that summary judgment should be entered against CSKT on its Complaint and title to the streets, alleys, and public reserves in Big Arm should be quieted in the public under the jurisdiction of Lake County.

[1] Defendants will be filing responses to CSKT's Motion for Summary Judgment.

Defendants demonstrate the following:

(A) CSKT is barred by *res judicata*, estoppel, and payment from asserting that it owns the Big Arm streets, alleys, and public reserves or that they are held in trust for CSKT. Specifically, CSKT sued the United States in the Court of Claims in Case No. 50233. Experts from both sides compiled the Lee-Kenney Report (Exhibit No. 1), which identifies 126.66 acres of the Big Arm Townsite as being withdrawn from the Reservation and for which CSKT was subsequently paid as a result of the Court of Claims case. The 126.66 acres for which CSKT sought compensation in that case includes the Big Arm streets, alleys, and public reserves.

(B) The Hell Gate Treaty and Lame Bull Treaty, which are the supreme law of the land for the Reservation, U.S. Const. art. VI, cl. 2, establish the importance of a public right to travel across and through the Reservation and that roads are necessary to effectuate this purpose. This purpose, although ignored by CSKT in this litigation, was stressed by CSKT in filings made in other courts.

(C) Congress enacted the FAA, which provided for the platting of townsites, including laying out streets and alleys, and it was under this Act that the Big Arm Townsite was platted. It is this Act, and not state laws, that established the process for the federal government, acting through the Secretary of the Interior and other Interior officials, to lay out and approve townsites, which resulted in the dedication to public use of the streets, alleys, and public reserves in the townsites. In reliance

on Congress' action, the public purchased lots with public right-of-ways to access not only their property, but also to access the businesses opening in the new townsite to support its residents and neighboring areas. Purchasing lots—or establishing townsites—without the right of public access through roads and alleys simply makes no sense. *Accord Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) ("It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.").

(D) The understanding that counties have jurisdiction for streets and alleys in townsites platted under the congressional acts like the FAA, and including the FAA, has been confirmed by decades of analysis and correspondence by the Department of the Interior. Indeed, the "general rule" is that approval of a plat by the Secretary of the Interior constitutes a dedication to public use of the streets and alleys shown on the plat.

CSKT's Complaint is directly contrary to this general rule of law and summary judgment should be entered against CSKT and in favor of Defendants.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) provides for the entry of summary judgment where the moving party demonstrates that "there is no genuine issue as to any material fact" and that, upon the facts established, "the moving party is entitled to judgment as a matter of law." Fed.

R. Civ. P. 56(c). A moving party who does not bear the burden of proof at trial may discharge its burden of showing that no genuine issue of material fact exists by demonstrating "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). CSKT bears the burden of proof at trial on its Complaint. To avoid summary judgment, the nonmoving party must go beyond the pleadings and offer "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

III. ARGUMENT

A. CSKT Sued for, and Received Payment for, Lands Within the Big Arm Townsite Including Roads, Alleys, and Public Reserves.

CSKT sued the United States in the United States Court of Claims Case No. 50233 (the "Court of Claims Case") alleging, *inter alia*, that CSKT had not been adequately compensated for the United States' opening of the Flathead Indian Reservation (the "Reservation") in breach of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (the "Hell Gate Treaty"). *See* UMF No. 1 and *Confederated Salish & Kootenai Tribes of Flathead Reservation v. United States*, 437 F.2d 458, 460-61 (Ct. Cl. 1971) (Commissioner's Opinion). As part of the Court of Claims Case, two land record experts (Georgette B. Lee for CSKT and John T. Kenney for the United States) jointly compiled a report "as to the amount and location of Reservation land disposed of by the United States pursuant to the [Flathead Allotment Act]." *Id.* at 479 (finding 21). This is the Lee-Kenney Report admitted as Exhibit 1 by the Court.

The Lee-Kenney Report identifies the Big Arm Townsite under the description for Township 24 North, Range 21 West, P.M, Section 33, Lots 1, 2, N 1/2, SE ¼: 126.66 Acres, Big Arm Townsite Approval Date of Plat of Survey 10/28/14.[2] The relevant page is attached hereto as **Exhibit A**. Upon information and belief, the description of the Big Arm Townsite containing 126.66 acres and consisting of the north half of the southeast quarter of Section 33, as opposed to the 206.66 acres originally platted in 1913, is a result of the fact that 80 acres of the Big Arm Townsite—consisting of the south half of the southeast quarter of Section 33—had been eliminated from the Big Arm Townsite in 1930. *See* Declaration of Ian Smith [Doc. 67] at 34-35.[3] Critically, the Lee-Kenney Report's description of the acreage included the entirety of the Big Arm Townsite (less the 80 acres), including roads, alleys, and public reserves.

Because the Lee-Kenney Report included the roads, alleys, and public reserves in the Big Arm Townsite and CSKT sued and prevailed in receiving compensation for these roads, alleys, and public reserves, CSKT's Complaint in this action is barred. CSKT's suit seeking compensation of the entire 126.66 acres of the

[2] This is found on the page title "TOWNSITES" which is found on page 131 of the .pdf file of the Lee-Kenney Report. There is no page number on the copy of the Lee-Kenney Report itself.

[3] Defendants do not concede that this 80 acres was properly eliminated from the Big Arm Townsite or that it was returned to tribal jurisdiction or restored to tribal beneficial ownership. CSKT has not produced any documents establishing that the 80 acre tract was returned to CSKT or transferred to the United States in trust for CSKT. However, Defendants recognize that Ms. Lee and Mr. Kenney believed that this 80 acres had been eliminated from the Big Arm Townsite for purposes of the appraisal.

Big Arm Townsite is an acknowledgment that CSKT no longer had title in those lands, including that it had no title (beneficial or otherwise) in the streets, alleys, and public reserves. Consequently, CKST's Complaint fails under the doctrines of *res judicata* or collateral estoppel, estoppel, and payment, or in the alternative, accord and satisfaction—although any one of them, independently, is sufficient to enter judgment against CSKT on its Complaint. As an initial matter, Defendants pleaded all of these defenses. *See* Lake County Answer [Doc. 12] at 10-11, ¶¶ 5, 9, 11, and 14; Lundeen Answer [Doc. 16] at 8-9, ¶¶ 5, 8, 10, 13.

1. CSKT's claims are barred by res judicata or collateral estoppel.

The preclusion doctrines prevent endless litigation of the same issues. Here, CSKT brought the Court of Claims Case seeking compensation for lands CSKT asserted were improperly removed from the Reservation and these lands included the same lands that CSKT now claims are still part of the Reservation. That is exactly the type of relitigation that is precluded by the preclusion doctrines. As the Ninth Circuit has held:

> The doctrine of res judicata provides that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. The application of this doctrine is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction. Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003) (citations and quotation marks omitted). "[I]ssue preclusion requires that an issue must have been actually and necessarily determined by a court of competent jurisdiction to be conclusive in a subsequent suit." *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) (citation and quotation marks omitted).

In the Court of Claims Case, the central issue was the value of the land that CSKT alleged was improperly removed from the Reservation. To resolve this issue the Court of Claims appointed two experts—one each selected by the two parties—to determine the acreage and character of the land so removed. This was an effective and efficient way to resolve a fundamental question in the Court of Claims Case and the Commissioner found (and the Court of Claims adopted) the agreed findings of the two experts in the Lee-Kenney Report. As set forth above, the Lee-Kenney Report found that 126.66 acres of the Big Arm Townsite, which included the roads, alleys, and public reserves, were removed from the Reservation when the plat was approved in 1913. This issue was litigated and determined by a court of competent jurisdiction. CSKT's request to relitigate that issue must be denied.

"Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002) (citation omitted). As it relates to CSKT's claims in this matter and CSKT's claims in the

Court of Claims Case, all three elements are met. First, in both cases, CSKT sought to establish the character of lands on the Reservation. The fact that, in the Court of Claims Case, CSKT alleged that the roads, alleys, and public reserves in the Big Arm Townsite were removed from the Reservation and in the case at bar CSKT takes the opposite position is immaterial; there is an identity of claims. Second, as established by the reported case of *Confederated Salish & Kootenai Tribes of Flathead Reservation v. United States*, 437 F.2d 458 (Ct. Cl. 1971), to which no appeal was taken, there was a final judgment on the merits. Finally, CSKT was the party bringing both claims, establishing privity.

2. CSKT's claims are barred by estoppel.

By succeeding in its claim against the United States that the Big Arm Townsite was removed from the Reservation, CSKT is now estopped from asserting—as it is here—the exact opposite position. "The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000)).

> Courts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the

> party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted). All three elements are met here. CSKT's position in this suit, that the streets and alleys remain in trust for CSKT's benefit is inconsistent with CSKT's position in the Court of Claims case that the lands in the Big Arm Townsite, among others, were improperly conveyed out of tribal or United States ownership. Second, CSKT persuaded the Court of Claims as is evidenced by the judgment in CSKT's favor. Although Defendants were not parties to the Court of Claims Case, the third factor is also met here because CSKT will derive an unfair benefit if it is allowed to assert its inconsistent positions, which will in turn result in an unfair detriment on Defendants and the public.

3. CSKT's claims are barred by payment or accord and satisfaction.

Based on the judgment rendered by the Court of Claims, CSKT received payment for the lands disposed of by the United States under the FAA including the roads, alleys, and public reserves in the Big Arm Townsite and, accordingly, CSKT's claims to these lands were extinguished. Payment discharges a liability. *See In re LTC Holdings, Inc.*, 597 B.R. 565, 576 (Bankr. D. Del. 2019). By accepting payment, any claim CSKT had to the lands paid for was discharged.

To the extent payment is not applicable, the doctrine of accord and satisfaction is. By accepting the payment sought in its lawsuit, CSKT deemed the claim satisfied.

> [W]here a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted 'in full discharge of his claim' or not at all, the retention and use of such check or draft constitutes an accord and satisfaction[.]

Teledyne Mid-Am. Corp. v. HOH Corp., 486 F.2d 987, 994 (9th Cir. 1973) (citations omitted). Although the claim to the lands removed under the FAA may not have been disputed after the ruling by the Court of Claims, by accepting payment without further appeals or litigation, CSKT gave the United States and the public all reason to believe that the claim was discharged in full.

B. Both Treaties to Which CSKT Is a Signatory Guarantee a Public Right to Travel Across and Through the Reservation and Roads Are Necessary to Effectuate the Treaties' Purposes.

When the Reservation was established, travel was a critical issue. As CSKT has identified itself in its *amicus* briefing in *Washington State Department of Licensing v. Cougar Den, Inc.*, ___ U.S. ___, 139 S.Ct. 1000 (2019), travel was important and was addressed in both the Lame Bull Treaty, 11 Stat. 657 ("Lame Bull Treaty") and the Hell Gate Treaty, 12 Stat. 975—both of which bind CSKT directly—and was also addressed in the Treaty With Great Britain, In Regard To Limits Westward Of The Rocky Mountains, June 5, 1846, 9 Stat. 869 (the Lame Bull Treaty and the Hell Gate Treaty are referred to herein as the "Treaties"). The

Treaties establish that the United States intended to make roads that were public ways of right through and across the Reservation and CSKT agreed to this. As set forth in Section C, *infra*, this intent carried through the streets and alleys of the Big Arm Townsite when it was platted in accordance with the FAA.

The Lame Bull Treaty, signed after the Hell Gate Treaty but ratified before the Hell Gate Treaty, contains several important obligations relevant to non-Indian access and travel across and through the Reservation. In the Lame Bull Treaty, CSKT agreed and consented to the United States "construct[ing] roads of every description" "[f]or the purpose of establishing travelling thoroughfares through [CSKT's] country." 11 Stat. 657, Art. VIII. CSKT "agree[d] that citizens of the United States *may live in and pass unmolested through* the countries respectively occupied and claimed by [CSKT]." Art. VII (emphasis added). CSKT agreed that "navigation of all lakes and streams shall be forever free to citizens of the United States." Art. VIII. CSKT "promise[d] to be friendly with all [United States'] citizens . . . , and to commit no depredations . . . upon such citizens." Art. XI.[4] CSKT also agreed that the Treaty "shall be obligatory upon" it as soon as it was ratified by the President and the Senate. Art. XVI. Significantly, the Lame Bull Treaty contemplated a number of uses of Reservation lands and resources, not limited to

[4] By placing a locked gate on a public road at a time when it would inflict maximum economic damage, CSKT committed a depredation against Defendants. This claim is not at issue in this case.

roads, but that would be served by roads, including housing, missions, schools, farms, shops, and mills. Art. VIII. By signing the Lame Bull Treaty, CSKT consented to roads through the Reservation for non-Indian use and agreed that non-Indians could live in and pass through the Reservation.

The Hell Gate Treaty, like the Lame Bull Treaty, contemplated public highways, available for public travel (non-Indian and Indian alike), across and through the Reservation. Specifically, the Hell Gate Treaty provides:

> That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

12 Stat. 975, Art. III. In addition, CSKT "promise[d] to be friendly with all citizens [of the United States] and pledge themselves to commit no depredations upon the property of such citizens." Art. VIII. CSKT agreed that the Hell Gate Treaty would be obligatory upon it once it was ratified, which occurred in 1859. Art. XII.

In the Hell Gate Treaty, the United States promised to build an agricultural and industrial school on the Reservation, to maintain the school and furnish a suitable instructor. Art. V. The United States also promised to provide a blacksmith shop, a carpenter shop, a wagon and plough-maker's shop, and to furnish "two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker" to instruct CSKT members and to assist them. *Id.* In addition, the

United States promised to provide a saw mill and flour mill, a hospital, along with providing buildings and employees. *Id.* Roads were needed to serve these purposes—for wagons to travel on, for lumber and flour to be transported to the mills, and for access to the various shops and other public services provided for in the Treaty.

The Hell Gate Treaty confirms that 1) public roads could be run through the Reservation and 2) access across and over the Reservation on those roads was to be available to both CSKT and its members and to "citizens of the United States." The fact that CSKT consented to roads through the Reservation for "public convenience" demonstrates that such roads—including the streets and alleys in Big Arm—are dedicated to public use and not under CSKT's control.

The 1846 Treaty with Great Britain, although not a treaty between the United States and CSKT, is important in that it confirms the importance of travel across and through CSKT's territory even before the Hell Gate Treaty was signed. The 1846 Treaty with Great Britain establishes the Columbia River system as navigable for all and provided for free access and the right to travel with goods and produce on such rivers. 9 Stat. 869, Art. II.

The streets and alleys in Big Arm, as in other townsites and villa sites, are public roads, not roads over which CSKT has the right to issue (or deny) a license. Once a public road is constructed (and, as here dedicated), the Treaties guarantee to

the U.S. citizens an easement in gross, in common with tribal members. *Cf. United States v. Winans*, 198 U.S. 371, 382 (1905). This easement in gross is administered under the jurisdiction of the County (or, if the area is incorporated, city) where such road is located; here, Lake County.

C. The FAA Established the Process for the United States to Create Townsites on the Reservation, Which Resulted in a Dedication of Streets And Alleys Within those Townsites to Public Use.

Although CSKT repeatedly expresses displeasure with Congress' enactment of the FAA, the Act was properly enacted. Pursuant to the FAA, the Big Arm Townsite was platted and upon the sale of the first lot, the roads, alleys, and public reserves described therein were dedicated to the public without the need for any patent. To hold otherwise is illogical because nobody would purchase a lot in a townsite without access and CSKT's own real estate records reveal that no license or patent has been issued or is necessary for a street or alley to access a lot.

1. Overview of the FAA and Section 17.

Congress enacted the FAA in 1904 with the stated purpose to survey the Reservation, allot lands to tribal members, and then dispose of all "surplus lands." In 1906, Congress added Section 17 to the FAA, which provides: "That the Secretary of the Interior is hereby authorized and directed to reserve and set aside for town-site purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks . . . ." 34 Stat. 354 (1906). Section 17 mandated that the town site lots "be surveyed,

appraised, and disposed of as provided in section twenty-three hundred and eighty-one of the United States Revised Statutes." *Id.* Section 2381 of the United States Revised Statutes, in turn, provides for the sale of lots. It does not address streets, alleys, or parks. This makes sense. No person, Indian or non-Indian, would purchase a lot without a public right-of-way to access such lot. *Accord Montana*, 450 U.S. at 559 n.9. Section 17 coincides perfectly with the Hell Gate Treaty's provision for lots for permanent home sites for Tribal Members and with the Hell Gate Treaty's inclusion of the Treaty of Omaha.[5] *See* Hell Gate Treaty, Art. VI. Congress, by enacting Section 17 of the FAA, set out the process for laying out townsites, without the need for a patent or other conveyance to or by the County in order to dives the lands from tribal or federal ownership for the streets, alleys, and public reserves.

2. *The Secretary of the Interior complied with Congress' mandate and applicable federal law, resulting in dedication to public use.*

Pursuant to Section 17 of the FAA, the federal government (not Lake County) took the actions described in Undisputed Facts No. 8 to 15, which resulted, as a matter of law, in the dedication of the streets, alleys, and public reserves to public use. The Department of the Interior, acting pursuant to an act of Congress and based on the BIA's and Bureau of Reclamation's recommendations, "*withdrew for townsite purposes* 206.66 acres of land embraced in [Big Arm Townsite] . . . ."

[5] As set forth above, to the extent the FAA is inconsistent with the Hell Gate Treaty, CSKT's claim has been discharged through the Court of Claims Case.

Undisputed Fact No. 11 (emphasis added). Significantly, the Bureau of Reclamation specifically chose Big Arm to be a townsite, and obtained approval of the same from the local BIA officials. The Big Arm Townsite location was approved by the Commissioner of Indian Affairs, approved by the Secretary of Indian Affairs, and then platted by the General Land Office, as ordered by the Secretary. The plat was then approved by the Secretary of the Interior in 1913. Consequently, the streets, alleys, parks and lots became dedicated to public use by virtue of Congress' and the DOI's actions. Section 17 does not require a patent be issued to the County either expressly or impliedly and, importantly does not contemplate or require any County action for a dedication to be effectuated.

Roads were needed to support the Big Arm Townsite, both for access to the lots and to fulfill the FAA and the Treaties' purposes, including without limitation, access to schools and delivery of lumber and other products. As of 1911, even before the plat was approved, and in reliance on the approval of the plat and the appraisal and disposition of lots within the townsite, the townsite "contain[ed] about 125 buildings and ha[d] a population estimated between 200 and 300 people and further building operations [were] in progress."[6] *See* Exhibit 254.

[6] The evidence in this case suggests that the residents of Big Arm were there lawfully under permit from the Superintendent of Indian Affairs. *See* Exhibit 255.

D. Department of Interior Memoranda, Opinions, and Correspondence Confirm County Jurisdiction Over the Streets and Alleys.

The consistent message from the Department of the Interior is that the streets and alleys platted under Congressional authority are dedicated to public use. This means that Lake County, and not CSKT, has jurisdiction over the roads and alleys within town sites and villa sites in the County, including in the Big Arm Townsite.

The majority of the Department of the Interior memoranda, opinions, and correspondence confirm County jurisdiction over the streets and alleys follows the "general rule of law" that "approval of a townsite plat by the Secretary of the Interior, in accordance with law and sale of lots thereunder constitutes a dedication to public use of the streets and alleys shown on the plat *without the necessity of special words of dedication on the plat* . . . ." *See* Exhibit No. 261, 1960 Letter from Roy Allen, Field Solicitor to Area Director quoting May 17, 1934 Letter from John Collier, Commissioner of Indian Affairs, approved by Oscar L. Chapman, Assistant Secretary (emphasis added). The Interior Department opinions and BIA memoranda that are consistent with this general rule are:

- 1906 Department of the Interior Opinion (in the context of telegraph rights-of-way in Indian Territory (now Oklahoma): United States Assistant Attorney General Campbell opines: "I am of the opinion that the approval of the plats within the Indian Territory by the Secretary of the Interior operated as a dedication of the streets and alleys therein to public use."

Consequently, he concluded that the 1901 Act did not apply. Secretary of the Interior Hitchcock approved this opinion. Exhibit No. 258.

- 1929 Department of the Interior Opinion: First Assistant Secretary affirmed the Commissioner's denial of a petition to vacate certain streets and alleys "on the ground that the adoption of the plat by the Government and the sale of lots by reference thereto resulted in an actual dedication to public use of the tracts or stripes designated thereon as streets and alleys." Exhibit No. 259. The opinion goes on to set out a general principle that where the owner of land (here the United States) lays out a town and divides lands into lots intersected by streets and alleys and sells any of the lots, the streets and alleys are thereby dedicated to the public. *Id.*
- May 17, 1934 Letter from John Collier, Commissioner of Indian Affairs, approved by Oscar L. Chapman, Assistant Secretary: "The rule to be deduced from the above cited cases is that, approval of a townsite plat by the Secretary of the Interior, in accordance with law and sale of lots thereunder constitutes a dedication to public use of the streets and alleys shown on the plat *without the necessity of special words of dedication on the plat*…." Quoted in Exhibit 261.
- Mr. Johnson, Assistant Area Director, writes the Filed Solicitor, regarding the impact of restoration of lots on adjoining streets and alleys. The Area

Director states: "The approval of a plat of townsite survey by the Secretary of Interior in accordance with the applicable acts governing the established of townsites within the reservation boundaries constitutes a dedication of the streets, alleys, parks and school reserves to the public." Exhibit No. 266. The Area Director confirmed that "such dedications remain effective and unaltered by any subsequent restoration of platted lands to tribal ownership." *Id.* The Area Director requested information from the Field Solicitor regarding any options for the streets to be restored to tribal ownership, and specifically asked for information with respect to Flathead and Fort Belknap Indian Reservation. *Id.*

- Presumably, in response to the Area Director's September 1959 request for guidance with respect to restoration of streets in the Fort Belknap Reservation, Mr. Roy Allen, Field Solicitor, wrote a letter to the Area Director, dated March 2, 1960 entitled: "Restoration of streets, alleys and public reserves to tribal ownership in the townsite of Lodge Pole, Montana—Fort Belknap Indian Reservation, Montana." In that letter, Mr. Roy Allen states: "It is a general rule of law that when a plat or map of an area is made and recorded the requisite intention to dedicate streets and alleys and other public uses areas on the plat or map as designated is *indisputable*." Exhibit No. 261 (emphasis added). Mr. Allen continues:

"When the lots are sold, the streets, alleys and other public areas are dedicate to the lot owners and the public." *Id.* For that reason, Mr. Allen concluded that the lands could not be restored to the Tribe and, if the roads were to be vacated, Montana state law would apply.

- March 16, 1960 Memorandum from Roy Allen, Field Solicitor, to Area Director, Billings, Montana regarding "Restoration to tribal ownership of streets, alleys and public reserves in the townsite of Yellow Bay and the northeast part of Camas Townsite, Flathead Reservation": Mr. Allen again writes: "As we have previously advised you, it is a general rule of law that when an area is platted and recorded the streets, alleys and other public use areas are dedicate to the public use and considered as alienated by the United States." Exhibit No. 262. Mr. Allen again cites the 1934 letter from Mr. Collier in support of his conclusion that this is the "accepted rule of the Department of the Interior." *Id.* Mr. Allen again states that if the streets, alleys, or public reserves are to be vacated or abandoned, Montana state law would apply. *Id.*
- 1966 Letter from Billings Area Director to Lake County Commissioner: "It is a general rule of law that when an area is platted and recorded, the streets, alleys, and other public use areas are dedicated to the public use and considered as alienated by the United States . . . . Therefore, the

administration of these areas is under the jurisdiction of the County Commissioners if the area is an unorganized townsite and under the City Council if in an organized townsite." Exhibit No. 263.

- June 1970 Letter from Kenneth Sire, BLM Chief Branch of Oil and Gas and Title Records: "It has been held by the Department of the Interior in its decision of February 4, 1929 (52 I.D. 558), that the adoption of a plat by the Government and the sale of lots by reference thereto resulted in an actual dedication to public use of the tracts or strips thereon as streets or alleys." Exhibit No. 267.

In other words, DOI and BIA considered the general principle of law to apply to all tribes, which is demonstrated by DOI's and BIA's application of that law to a variety of tribes and circumstances, including the streets, alleys, and public reserves in Big Arm.[7]

IV. CONCLUSION

Summary judgment should be entered in Defendants' favor. CSKT's prior litigation in the Court of Claims Case demonstrates CSKT's acknowledgment that the entirety of the Big Arm Townsite, including the streets, alleys, and public reserves were removed from the Reservation—and CSKT was compensated for

[7] The limited, "contrary" evidence cited by CSKT and its expert is unavailing in that even those documents confirm County and not CSKT jurisdiction over the streets and alleys.

those lands. CSKT objects—again—to the Flathead Allotment Act and argues that the plain language of the Lame Bull Treaty and Hell Gate Treaty should not be applied, but that objection must be made to Congress not to this Court. As authorized by the Flathead Allotment Act, the Secretary of the Interior followed the process mandated by the FAA to approve the laying out of the Big Arm Townsite for townsite purposes. The 1913 plat approved by the Secretary included streets, alleys, public reserves necessary to accomplish townsite purposes, and the Secretary's act of approving that plat dedicated the streets, alleys, and public reserves set forth therein to the public with the public right of way administered by Lake County. The history and facts are undisputed and the law is clear. Summary judgment should be awarded to the Defendants.

DATED this 10th day of January, 2020.

DATSOPOULOS, MACDONALD & LIND, P.C.

By: *Approved 1/10/20*

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CERTIFICATION OF COMPLIANCE

Under Civil Rule 7.1(d)(2) of the Local Rules of Procedure of the United States District Court for the District of Montana, I hereby certify that the foregoing brief excluding caption, certificate of compliance, table of contents, table of authorities, exhibit index, signature block, and certificate of service contains 5647 words, as determined by the word count function of Microsoft Word.

By: */s/ Spencer L. Edelman*
Spencer L. Edelman

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, the foregoing was filed electronically with the Clerk of Court using the CM/ECF System, which caused ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

By: /s/ Spencer L. Edelman
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