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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. CV 19-90-M-DLC **CONFEDERATED SALISH AND KOOTENAI TRIBES' JOINT REPLY TO LAKE COUNTY'S AND LUNDEEN'S RESPONSES TO CSKT'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The dispositive question is whether Congress ever divested the Tribes of their Reservation land underlying the streets and alleys of the Big Arm townsite. The central incontrovertible material fact is that the U.S. never issued a patent for these lands to Lake County. Lake/Lundeen[1] argue that a patent is unnecessary—that the act of filing the plat *ipso facto* dedicates the streets. They concede "the resolution of this dispute is a matter of law." Doc. 92, p. 1. Thus, summary judgment is appropriate.

Lake/Lundeen make three arguments. First, they argue that the treaties (Hell Gate and Lame Bull) somehow authorize the establishment of county roads in Big Arm. Second, they argue that the sheer filing of the plat is tantamount to conveying title by patent. Third, they argue that the Tribes were compensated for the land in the townsite by virtue of a decision of the Court of Claims and are now barred from asserting title. The implied dedication issue is addressed below. The other two issues are addressed in the Tribes' response to Lake County/Lundeen's summary judgment motion.

[1]This joint reply addresses both Lake County's and Lundeen's separate briefs, Docs. 89 and 92.

ARGUMENT

I. ONLY CONGRESS CAN DIVEST INDIANS OF THEIR LANDS AND ANY SUCH ACTION MUST BE UNEQUIVOCAL. THE MERE FILING OF A PLAT DOES NOT MEET THE REQUIRED STANDARD FOR CONVEYANCE OF INDIAN LANDS.

A. Lake/Lundeen concede that federal law governs, thereby discarding their only statutory argument, which was based on Montana's dedication law.

In its pleadings, Lake County cited a section of state law that provided that streets and alleys were dedicated to public use upon the filing of a plat. Doc. 39, ¶¶ 59-60. The Tribes countered that this case is entirely governed by federal law—state law has no application. The Tribes also pointed out that Montana's dedication law was based on laws passed for public land townsites, not Indian land townsites, which are markedly different. Doc. 73, pp. 12-21. Lake County now abandons its reliance on state law, conceding that federal law governs. Doc. 88, p. 2.

Unlike the state statute, now abandoned, there is no federal law that provides that dedication of streets and alleys occurs upon the filing of a plat.

Thus, if Lake County is to prevail, it must resort to an "implied" dedication, but no such doctrine applies to federal divestments of Indian land.

B. Lake/Lundeen do not even mention *Solem v. Bartlett*, the seminal case on divestment of Indian lands.

The seminal case is *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), which held that "[O]nly Congress can divest a reservation of its land…" Doc. 73, p. 8. *Solem* added:

> Once a block of land is set aside for an Indian Reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until **Congress explicitly indicates otherwise.** *See United States v. Celestine,* 215 U.S. 278, 285…(1909).

Id. at 470 (emphasis added).

Despite *Solem's* obvious importance, it is not even mentioned in any of Lake/Lundeen's briefs, Doc. 88, pp. iv, v, Doc. 92, p. iv, and Doc. 89.

C. In the federal grant of Indian land, nothing passes by implication.

Ignoring *Solem*, Lake/Lundeen blithely proceed to make their argument that "the very notion of land…occupied as a townsite **implies** the existence of streets, alleys…" Doc. 92, p. 2, fn. 3 (emphasis added).

This dedication by "implication" is contrary to federal law. *McFarland v. Kempthorne*, 545 F.3d 1106, 1112 (9th Cir. 2008), stated:

> "In a public grant, nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign…" *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987).

Watt v. Western Nuclear, Inc. described this rule as:

> "The established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116…(1957). See *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 617…(1978)…

462 U.S. 36, 59 (1983).

This proposition, applicable to public land grants, applies with greater force to Indian lands. At least on public land grants, the government is dealing with **its own lands**. With respect to Indian lands, the government occupies a fiduciary/trust relationship which requires an even clearer statement of intent to divest. *See U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941) ("But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." At 354.) The court continued:

> As stated in *Choate v. Trapp*, 224 U.S. 665, 675…, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'

At 354. *See also Imperial Granite Co. v. Pala Band*, 940 F.2d 1269, 1272 (9th Cir. 1991) ("The whole purpose of trust land is to protect the land from unauthorized

alienation; Imperial cannot acquire property rights in trust property by prescription.")

In *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), the court emphasized:

> The "traditional solicitude for Indian tribes" incorporates two basic propositions of federal Indian law: first, "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government," [cases deleted]…and second, in agreements with Indian tribes, the "general rule" is that ambiguities or "'[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith…'" [cases omitted].

219 F.3d at 1132.

In *U.S. v. Pueblo of San Ildefonso*, 206 Ct.Cl. 649, 513 F.2d 1383 (1975), the court rejected an argument very similar to the one Lake County is now making. The *Pueblo* court said: "We know that the process of surveying lands and performing other deeds in anticipation of future white settlement does not itself affect Indian title." *Id.* at 1389. The court noted the lack of "any clear and convincing evidence" from which to imply an intent to terminate aboriginal ownership. *Id.* at 1390.

Lake County cites the inevitability of white settlement and western expansion as a basis for their argument. A similar argument was rejected by the Court of Claims in *Pueblo*, which noted that an acknowledgement that the territory "would sooner or later be used and occupied by migrating white settlers does not translate into a present intention on the part of Congress to destroy Indian title." *Id.* at 1389.

Notably, on this dispositive issue of whether Indian title can be somehow divested by implication, **Lake County cites not a single case**[2]—despite the rich history of litigation in this area. Lake County's problem is that none of the numerous cases support its position. Put another way, because of this absence of judicial precedent, there is no federal common law of implied dedication.

Further, Lake County also ignores the fact that its own official roadbook[3] does not indicate that there are roads within the Big Arm townsite, even though right next door in Sections 25-26, T24N, R21W, there are county roads depicted. Smith Decl., ¶ 3.3.O, **Ex. 17**.

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[2] Indeed, Lake County's entire brief cites only three cases. Doc. 92, p. ix. The brief does cite *dicta* from *Ashby v. Hall,* 119 U.S. 526 (1886), in a different section. *Id.* p. 2, fn. 3. *Ashby* is irrelevant because it deals with issues stemming from the 1867 federal public lands townsite act which is not applicable to Indian lands. *See* Doc. 73, pp. 12-21.

[3] Section 2631 of the Codes and Statutes of Montana (1895) required the commissioners to maintain a roadbook of county roads. *See also* § 7-14-2110, MCA.

Finally, 25 U.S.C. § 194 provides that the "burden of proof shall rest upon the white person" in trials "about the right of property in which an Indian may be a party on one side" and "whenever the Indian shall make out a presumption of title in himself…" *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664-669 (1979) (holding that the statute applies to Indian tribes, but that the definition of "white person" does not include states, but does apply to other non-Indians).

D. The language authorizing dedication of streets in one part of the 1906 statute, but not with respect to the Flathead Reservation, dispatches Lake County's claim on implied dedication.

The Tribes previously cited the 1906 amendment adding Section 17 to the FAA and another section of the **same statute** providing for creation of a townsite on the La Pointe Reservation of Wisconsin. In the latter case, the statute authorized the Secretary of Interior:

> …to cause the lands described to be surveyed and platted into suitable lots, streets, and alleys, **and to dedicate said streets and alleys** and such lots or parcel[s] as may be necessary to public uses…

Act of June 21, 1906, 34 Stat. 325 at 381 (emphasis added); Smith Decl. ¶ 2.2.E, Ex. 3, p. 381; Doc. 73, pp. 10-12. The fact that Congress, in one part of the Act, specifically authorized "dedication" but did not do so with respect to the Flathead Reservation, dispatches Lake County's argument that title to Big Arm's streets was

impliedly granted. If that were the case, it would have been superfluous for Congress to authorize specifically "dedication" on the La Pointe Reservation.

Lake County's only answer is that the dedication in the La Pointe instance was for an "Indian townsite" while Big Arm envisioned townsites for both Indians and non-Indians. This distinction is spurious.

Clearly, the authorization by Congress in the same statute for dedication in one instance, but not the other, is significant in terms of ascertaining the meaning of the statute and the intent of Congress.

E. The argument that the "plat is the patent" is an *ipse dixit*.

Lake/Lundeen argue that "the platting of the Big Arm townsite was, itself, the patent for the streets, alleys and public reserves." Doc. 92, p. 2. They argue "no 'patent' in Lake County's name is needed because the platting is a patent." *Id.* p. 15.

This occult argument has no basis in reality. A "patent" is not the same as a "plat." *See* Black's Law Dictionary, Deluxe 9th Edition, p. 1234 ("Patent…1. The governmental grant of a right, privilege, or authority. 2. The official document so granting…"), p. 1234[4] ("Plat. 2. A map describing a piece of land and its features,

[4] "To be valid, a patent must be actually executed. Before it can operate as a grant, the last formalities of the law prescribed for its execution must be complied with." *McGarrahan v. Mining Co.*, 96 U.S. 316, 322 (1877).

such as boundaries, lots, roads and easement."); p. 1268. In plain English, a "plat" is not a "patent."

F. "Implied easements" have been universally rejected with regard to the Homestead Laws.

Lake/Lundeen argue that access is necessary to fulfill the purposes of the creation of the townsite, so their right to access is implied. The same argument was made and rejected with respect to the homestead laws. *See, e.g., McFarland v. Kempthorne, supra* (discussed in more detail at Doc. 73, pp. 5, 9).

In *Fitzgerald Living Trust v. U.S.*, citing *Buford v. Houtz*, 133 U.S. 320 (1890) and *Light v. United States*, 220 U.S. 523, 535 (1911), the court stated:

> While we accept the Fitzgeralds' argument that the Homestead Act contemplated an inholder's access to his property over public lands, we agree with the Tenth Circuit holding in *United States v. Jenks*, 129 F.3d 1348, 1354 (10th Cir. 1997), that the access across government lands implied into the Homestead Act is not an implied easement."

460 F.3d 1259, 1265 (9th Cir. 2006). *Fitzgerald* added, "we conclude that Congress did not imply an easement over public lands into the 1862 Homestead Act."

Also, in *Jenks*, *supra*, the court said:

> To be sure, throughout our nation's western expansion, a right of access across government lands was implied if necessary to effectuate the purpose for which an inholding was granted. But it does not follow that the right of access

> accompanying the grant of an inholding was necessarily a property interest known as an implied easement.

At 1354. The court added that any such access over U.S. land would be an "implied license" which would provide settlers with unimpeded access to their property.

Lake County's argument is based on the same logic and, like the argument made in the homestead cases, it is unsupported by statute, Congressional intent, or case law.

In like manner, although those who actually purchased lots in the Big Arm townsite have a "license" to access their properties, it takes a great deal more to find that the Tribes were divested of their property interests.

G. Documents developed after the 1906 Act have little probative value.

Lake County cites a number of documents, mostly letters from Interior Department functionaries, which support its implied dedication argument. These and other documents directly to the contrary are discussed in the Tribes' response to Lake County/Lundeen's summary judgment brief.

Suffice it to say here that the language of the statute is by far the most important evidence in determining what Congress intended. "[T]he most probative evidence of Congressional intent is the statutory language used to open the Indian lands." *Solem v. Bartlett*, 465 U.S. 463, 470. The language of Section 17

of the FAA is clear. It does not provide for the conveyance or dedication of the land underlying purported streets and alleys in the Big Arm town site.

Whatever may have been stated by Interior officials over the years, they cannot alter the fact that only Congress can divest Tribes of their lands:

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and **officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence**, laches, or failure to act." *United States v. State of California*, 332 U.S. 19…(1889).

U.S. v. Ahtanum Irr. Dist., 236 F.2d 321, 334 (9th Cir. 1956) (emphasis added).

II. LAKE COUNTY HAS NO EXPLANATION FOR ITS ANOMALOUS CLAIM OF OWNERSHIP OF THE VIRTUAL STREETS AND ALLEYS OF THE WITHDRAWN SOUTH HALF OF BIG ARM.

The absurdity of Lake County's theory is best illustrated by the eighty-acre withdrawal from the townsite. Although Lake County acknowledges this withdrawal, their **theory** continues to be that the sheer filing of the plat in 1913 constituted conveyance to Lake County of the streets and alleys. If carried to its logical conclusion, this means that the south half, which is largely undeveloped, rolling, grassy hills, has a grid of "virtual" streets, even though this area has been withdrawn for some ninety years.

Lake County's only answer to this is the following clever argument:

> If, as CSKT argues, a patent is required to perfect title, CSKT has not identified any such patent in CSKT's name or in the United States' name in trust for CSKT for the streets and alleys in Big Arm, or for the 80 acres allegedly returned to CSKT, or for the lots restored to Tribal ownership in 1956…

Doc. 92, p.2, fn 2. This misses the point. The Tribes have owned those lands since "time immemorial." They were never divested of title. The effect of the 1906 FAA amendment was simply to withdraw certain Tribal territory for townsite disposition. Some lots were sold. For those, patents were issued. But for those which were not, as well as streets and alleys, **title has never left Tribal ownership**. No patent was necessary. The Tribes always owned those lands.

III. LAKE/LUNDEEN'S SHIFT FROM A "TITLE" TO AN "EASEMENT" CLAIM FARES NO BETTER.

Lake/Lundeen have transposed their theories. They initially sued to quiet title to all streets, alleys, and public reserves in Big Arm and for a declaration that "CSKT has no right, title, or interest in or to the real property at issue." Doc. 39, p. 16. They now seem to eschew this title argument in favor of a jurisdictional one. They argue "the fundamental dispute…is which entity has jurisdiction over the

streets…" Doc. 92, p. 1.[5] Regardless of which theory it is now espousing, the County is wrong and summary judgment is appropriate.

As to the jurisdictional issue, the Montana Enabling Act, Act of February 22, 1899 (25 Stat. 676), is significant. It provides that "until the **title** thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said **Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States**." Section 4 (emphasis added). *See Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942).

Given the weakness in their **title** claim, the Tribes anticipated that Lake/Lundeen might shift their theory from title to an **easement** theory. For that reason, the Tribes addressed the law governing easements across Indian Reservations, the 1901 Act, 25 U.S.C. § 311, and its supplement, the Act of March 4, 1915, Pub. L. No. 63-310, ch. 161, 38 Stat. 1188, 1189. Doc. 73, pp. 22-27. The Tribes crafted precise proposed undisputed facts on this issue. Doc. 83, nos. 2, 3.

Neither party has been forthcoming in responding to the Tribes' undisputed facts on this issue, nos. 2-3. This avoidance, however, makes no difference because

[5] Even this is left unclear because Lake/Lundeen ask that summary judgment be entered "…and title to the streets, alleys, and public reserves in Big Arm should be quieted in the public under jurisdiction of Lake County." Doc. 88, p. 1.

their position is that the 1901 and 1915 easement acts **do not apply to Big Arm streets** (Lundeen even calls this a "red herring," Doc 89, p. 6)[6]**.**

Given that Lake/Lundeen disclaim any reliance on these Acts, there is no further need to address this issue.

IV. THE TREATY AND COURT OF CLAIMS ISSUES ARE ADDRESSED ELSEWHERE.

The treaty and Court of Claims arguments are separately addressed in the Tribes' response to Lake County/Lundeen's brief in support of their motion for summary judgment. Those arguments are incorporated here.

CONCLUSION

For the foregoing reasons, the Tribes' motion for summary judgment must be granted.

[6] Neither party addresses the Tribes' on-point cases, *Peasley v. Trosper*, 103 Mont. 401, 64 P.2d 109, 112-113(1936) and *Pederson v. Dawson County*, 2000 MT 339, ¶¶20-22, 303 Mont. 158, 17 P.3d 393. Doc. 73, pp. 25-26.

Respectfully submitted this 29th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

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Dated this 29th day of January, 2020,

/s/ James H. Goetz
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