

October 17, 2017

Dear Tribal Council member,

On September 14, the Montana Legislature convened a hearing in Helena that provided an opportunity for members of a panel to testify on the impact of Indian trust land on local governments. Lake County, CSKT and the Montana Department of Revenue were invited to send representatives to the hearing. I represented Lake County, Mr. Ryan Rushe spoke for the CSKT and Charlena Torreo presented for DOR.

I am including a transcript of Mr. Rushe's testimony. This transcript was prepared by listening to his audio presentation and then putting it in word form. I point this out, because I believe his original transcript underwent significant revision as he presented after me. I don't know if members of Council were provided a draft of his testimony prior to the convening of the interim committee.

I would like to comment on some of the points Mr. Rushe made in his testimony and hope that you will take the time to read and reflect on my comments. I would have liked to keep my comments briefer, but was fearful that I would not be able to distill everything into a single page. I will bullet point some of the statements made by Mr. Rushe and then comment. I will present the bullet points chronologically so you may find them more easily on the transcript I provided.

- There is "no probability that there is going to be a special appropriation in the next coming session for Lake County." Later Rushe commented that Lake County was, "blaming the Tribes for their problems, but have presented no viable solutions."

Comment: House Joint Resolution No. 38 "Resolved that the committee consider whether and how to supplement or address taxing jurisdiction for property held by the United States in trust for Indians within the jurisdictions boundaries." Mr. Rushe apparently has a crystal ball that he can look into and predict what the next legislative session will do when debating the trust land issue. Interestingly also, Mr. Rushe asserts that the tribes support the efforts of Lake County to improve the manner of funding for our government, even though he sees no probability of any appropriation from the legislature. Mr. Rushe appeared indigent that Representative Greg Hertz, who put the topic on the Taxation and Revenue interim committee agenda, was involving the State of Montana in a discussion of the loss of revenue due to trust lands as he believes this to be a Federal issue and the state should not be involved in any solution. I would point out that CSKT has never been reluctant to seek out financial aid through state legislation in the past. A recent example would be the millions of state dollars allocated to the implementation of the water compact.

- "singling out Indians is not productive," (reference to Lake County's economic problems).

Comment: The present Board of Lake County Commissioners has NEVER singled out Indians for causing some of the economic issues we are attempting to resolve. This statement smacks of

racism and is counterproductive to producing any meaningful discussions between the County and CSKT.

- “CSKT provides all the same services Lake County does.”

Comment: This is a false statement. Following are examples of services that CSKT does not provide: Establishment of Road Improvement or Road Maintenance Districts for all citizens; creation of water and sewer districts that benefit all citizens; prosecution of all felonies committed in Lake County by any individual, resident or non-resident; registration of all residents to vote and carry out elections for local and state governments; replacement of bridges, repairing of potholes, or chip sealing of roads. There could be many other additions to this list.

- “Now, have the Tribes been engaged in purchasing land that was illegally taken from them in violation of the Fifth Amendment.” During the question and answer period following the panel discussion, Rushe further stated, “Every property tax dollar that is collected in Lake County comes from land that was illegally taken from CSKT.”

Comment: Mr. Rushe, and other Tribal lawyers have repeatedly made the claim that land appropriated for the Flathead Reservation, the National Bison Range, the Yellow Bay Experimental Station, etc. were “illegally taken” from the CSKT. Additionally, Mr. Rushe now claims that all property tax collections are generated from properties “illegally taken.”

This is a falsehood perpetrated by some Tribal legal staff. Included in the *Public Land and Resources Law Review* is an article authored by current CSKT attorney Brian Upton entitled “Returning to a Tribal Self Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives.” The observations made by Upton in this document would apply to all reservation lands allegedly “illegally taken” from CSKT. In the article Upton writes: “Under the Hellgate Treaty CSKT ceded the majority of their traditional lands to the Federal Government.” The ceding of this land to the Federal Government placed the Federal Government in the position of being trustee of the land. As trustee, the Federal Government was provided the authority to make decisions related to the use of the land for the Flathead Nation. Later in the piece Upton noted, “the creation of the Range coincided with the Federal Government allotment of reservation land to CSKT tribal members and the subsequent ‘opening’ of the Flathead Reservation to non-Indians for homesteading, farming and grazing.” As trustee, the Federal Government had the legal right to take this action. Upton never referred to the land as being “illegally taken” because he understands the claim has no basis. Certainly, the land was taken over Tribal protests, but acquiring land using the Fifth Amendment to the United States Constitution does not make the “taking” illegal. Additionally, the United States Supreme Court ruled in the *Fort Berthold Decision* in 1968 that: “Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, **there is no taking**, (my emphasis). This is a mere substitution of

assets or change of form and is a traditional function of a trustee.” The United States Court of Claims in January of 1971, after months of testimony and taking of exhibits, made a “good faith effort” to award the CSKT the full value of the land. The amount of the award was never appealed by the CSKT. The creation the Flathead Reservation via the Hellgate Treaty, the reserving of lands for public use and the allotting of unclaimed reservation lands through the Flathead Reservation Allotment Act, were all accomplished through Congressional action. All actions passed every test of legality under United States law. Insistence on rendering the land an “illegal taking” promotes an ideology that is factually incorrect, and impedes any discussion of possible mitigation of loss of property tax revenue due to trust land at the local, state or Federal level.

On a side note, Mr. Rushe did not shy away from advocating for a clause in a failed mediation agreement between CSKT and Lake County in the fall of 2016 that would have taken away the Constitutional first amendment rights of the Commissioners. The clause read, “The County, and its Commissioners in their official or **individual** (my emphasis) capacity, will refrain from taking any adverse positions to the Tribes in the media, in any litigation, or for the purpose of influencing any legislative body pertaining to the following...” Rushe then lists the water rights debate, and the NBR Transfer draft bill. Suggestion of such a restriction on any individual’s right to free speech is repugnant.

- “Wild Horse Island, Big Arm State Park, Finley Point State Park could generate thousands, if not hundreds of thousands, in taxable revenue.”

I find it ludicrous that Mr. Rushe would even float the idea that Lake County should go after property tax revenue generated from some of the properties named above. Lake County provides no services to any of these entities with the exception of occasional contracted noxious weed spraying paid for by the Montana Department of Natural Resources. Does Mr. Rushe not understand that the underlying root of Lake County’s financial situation is an inability to pay for services due all of our residents? His solution is to tax entities who receive no services in order to provide services to others??? Interestingly, he would have Big Arm State Park pay for County services, while the Tribally owned Big Arm Grill and Mariana less than a mile away and receives County services, should not be obligated to contribute if the property and improvements eventually achieve trust status.

- “10 trips to Pablo from Polson is more effective, more cost effective and less burdensome on the County taxpayer than one more trip to Helena.”

Mr. Rushe would like to cast Lake County as an unwilling partner to engage in conversations with CSKT to resolve local issues. A breakdown of the details of the last meeting that the Lake County Commissioners and Tribal Council had might shed a different light on this comment. On January 10, 2017, the Lake County Commissioners emailed Robert McDonald, Tribal Council liason, a request for a meeting with Council. Twenty seven emails and 77 days later the meeting finally convened. Application of some math to the comment suggests that 10 potential

meetings would require 270 emails and over two years accomplish. During the five years I have been Commissioner, the CSKT have never requested to meet with the Commissioners. Any meetings held have come by suggestion from Lake County. In 2016, the Commissioners had a meeting scheduled with Council in Pablo, drove to Pablo for the meeting only to find a note on the door of the meeting room saying the meeting had been cancelled. Mr. Rushe needs to look elsewhere to place blame for the Commissioners not meeting with Tribal Council more often.

- Roads were, “built to serve other properties.”

Comment: Mr. Rushe believes that since roads in Lake County were originally constructed to transport people and materials from properties that were in fee to other properties that were in fee; the fact that many of the roads passed through or bordered trust land was incidental. The use of these already constructed roads by properties in trust should remove the obligation to pay for any maintenance or improvement of these roads. If Mr. Rushe had any historical knowledge of how and where roads on the Reservation were constructed, he might understand how illogical this claim is. Roads were created by petition of landowners; fee and trust alike. Upon verification of the petition, the roads were constructed to serve all residents. Mr. Rushe used the Finley Point Road as an example of a county road constructed for fee properties and that there are a “few” Tribal members that use that road. Research done by Lake County’s GIS Department identified 48 parcels in trust bordering the Finley Point Road, significantly more than just a “few.” In his testimony Mr. Rushe made the claim that CSKT “has yet to receive one single proposal,” from Lake County for assistance on any road project. Mr. Rushe apparently was unaware of the request made to Council at a meeting in Pablo on March 28, 2017 at which time the Commissioners’ requested help with funding a major renovation of the Finley Point Road. The renovation is being considered due to a significant upgrade to the Finley Point State Park Campground and the additional traffic that would come with the improvements. Montana State Fish Wildlife and Parks and Lake County are willing to commit significant dollars to the project, but the Commissioners were told by Council that there were no tribal monies available. The minutes of that meeting note the Commissioners’ request.

To summarize: If Mr. Rushe is the spokesperson for the CSKT, there are significant questions as to his credibility. As a Lake County Commissioner I desire a good working relationship with CSKT. But, to gain this type of relationship there must be truthfulness and transparency and a willingness to discuss issues that are difficult. There are areas where we can agree and work together cooperatively for all of our residents; there are other areas where we will probably never agree. My hope is that we can keep the conversations truthful and open so all residents can see why we disagree.

Sincerely,

Gale Decker

