

February 8, 2022

Governor Greg Gianforte
Office of the Governor
P.O. Box 200801
Helena, Montana 59620-0801

Re: Lake County Public Law 280 Impact

Dear Governor Gianforte,

Our law firm represents Lake County, Montana. We are writing in connection with a matter of great concern to its taxpayers and elected officials: The unfunded mandate imposed upon the County by the State's assumption of criminal law jurisdiction over Native Americans and Native American territory of the Flathead reservation pursuant to Public Law 280, 83rd Congress, 1st session, and Mont. Code Ann. § 2-1-301(1). This cost—approximately \$4.4 million annually—has a severe impact on the county's budget. This problem pre-dates your administration but has now reached critical mass. For the sake of Lake County taxpayers and local government, it is essential that a solution is quickly found. The enclosed ten (10) minute video (Exhibit A) explains the problem in more detail through the eyes of the local officials facing the problem. We encourage you to watch it before proceeding further.

By statute, the state of Montana is "obligate[d] and binds itself to assume . . . criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state." Mont Code Ann. §2-1-301. At present, the state is supplying neither the funding nor the infrastructure to fulfill its obligation. Instead, that burden has been forced on Lake County and its taxpayers.

The County has worked through its state representatives, including Greg Hertz and Joe Read, to enact a legislative solution. Unfortunately, however, the proposals they advanced were either not adopted, or were modified so substantially that they did not correct the unfunded mandate. At this point, the impact on the tax paying residents of the County has become so great that the County has no alternative but to make an appeal directly to your office. We are hopeful that a solution exists and would be well-received by Lake County



residents and other stake holders.

If we are unable to find such a solution, the County's last (and non-preferred) resort is to file a lawsuit. The purpose of this letter is to explain the history, identify potential solutions, and to outline the County's legal claims should it be left without other alternatives.

Our hope is to open a discussion that will ultimately lead to funding for Lake County in the current biennium, and also addresses past shortfalls and long-term solutions. In the end, the goal is to maintain stable law enforcement for the benefit of County residents and tribal members while eliminating the unfair expense burden imposed on the County.

I. BACKGROUND

The Flathead Reservation (the "Reservation") is located within the State of Montana, principally within the physical boundaries of Lake County. The Reservation is home to the Confederated Salish and Kootenai Tribes, a combination of the Bitterroot Salish, Upper Pend d'Oreille and Kootenai tribes ("CSKT"). Recent estimates show there are approximately 7,750 enrolled CSKT members, about 5,000 of whom live on or near the Reservation.

The history of Lake County and the Reservation is inextricably intertwined. The Reservation as it currently exists was created by the Hellgate Treaty of 1855, on July 16, 1855, was subsequently ratified by Congress on March 8, 1859 and proclaimed on April 18, 1859 ("Hellgate Treaty"). Congress made Montana a territory several years later, in May 1864. Montana became a state in 1889. Lake County as it currently exists was established August 11, 1923.

As a local government unit within the State of Montana, Lake County's self-governance is subject to any Montana law directing or requiring a local government or any officer or employee of a local government to carry out any function or service. *See, e.g.,* Mont. Code Ann. § 7-1-114(f) and its predecessors.

In 1953, Congress enacted Public Law 280 to transfer portions of criminal jurisdiction over Native Americans to certain states from the federal government. In 1963, the Montana Legislature enacted legislation authorizing Pub. L. 280 jurisdiction in Montana. During the hearing on the legislation, an official delegate of the tribe spoke, describing the situation thus:

I am a member of the Flathead Tribe and allotted on that reservation and authorized to appear behalf of the Committee and speak in support of House Bill No. 55. We would like to call attention of the Committee that there has been in effect a 'no mans land' as far as law and order are concerned. The Federal Government has limited itself to the ten major crimes and beyond that have done nothing. The state, counties and others cannot assume jurisdiction and will not because they don't have

the legal authority. It has fallen on the Tribal Council to spend \$30 to \$40 thousand per year attempting to provide some semblance of law and order among its people.

* * *

Montana on our reservation is crossed by two of the national highways, 10 and 93. We have problems of law and order with regard to highway patrol. Serious problems lie with our juvenile delinquents and there is no court to take them. Also, there are considerable problems with welfare matters. On the Flathead Reservation, we urge that the bill be passed.

(Tribal Testimony of Steve Demures from January, 1963 in the Montana House Judiciary Committee).

Ultimately, the Legislature passed legislation stating, “The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session).” Laws 1963, ch. 81, § 1 (presently codified at Mont. Code Ann. § 2-1-301(1) (2021)). In 1965, CSKT passed a tribal ordinance, Ordinance 40-A, agreeing to come under Pub. L. 280 jurisdiction. Thus, it became the *State of Montana’s* obligation to assume criminal jurisdiction over Native Americans and the Native American territory of the Reservation.

Since 1965, the State has repeatedly acknowledged the existence of its obligation. For example, in 1994, the CSKT withdrew consent to be subject to the misdemeanor jurisdiction of the State of Montana, and jurisdiction over such cases was transferred back to the CSKT. The related Proclamation of the State of Montana issued at that time began with the following recognition: “[T]he State of Montana *obligated itself* to assume criminal jurisdiction over Indians on the Flathead Indian Reservation in accordance with the consent of the United States given by act of August 15, 1953 . . .” State of Montana Proclamation (9/30/1994)(executed by Marc Racicot, Governor of Montana)(emphasis added). Likewise, the language now codified at Mont. Code Ann. § 2-1-301(1) has remained unchanged.

The Reservation is the only reservation in Montana with Pub. L. 280 jurisdiction. Lake County is the most affected county in the State due to the fact that most of the Reservation and the CSKT population resides in Lake County.

Although the State explicitly assumed criminal law jurisdiction over CSKT tribal members in 1965, it has in fact failed to satisfy its obligation, instead leaving it to the local government

unit, Lake County, to provide and fund the vast majority of services necessary to the exercise of Pub. L. 280 jurisdiction. Because the State itself lacks the infrastructure and has not supplied adequate funding, Lake County and its taxpayers were forced to incur costs, among them those for:

- Prosecution of crimes;
- Detention, prevention and suppression of crime;
- Enforcement of criminal and traffic codes;
- Youth placement and detention;
- Costs of care including health care, food, lodging and other incidentals for detainees;
- Operation and maintenance of detention facilities;
- Patrol of Reservation lands; and
- Personnel for detention, investigation, monitoring, prosecution, and deputies, detectives and support staff; and transportation costs of inmates to State and private mental health and addiction facilities.

The State's statutory obligation continues to apply in non-misdemeanor cases. In 2017, the Legislature passed Senate Bill 310 at CSKT's request to create a means for it to withdraw from Pub. L. 280 jurisdiction. CSKT has taken no action to withdraw, thus continuing to leave Lake County to bear the cost of fulfilling the State's Pub. L. 280 obligations. Additionally, the County's detention center is statutorily required to receive all inmates committed to the detention center pursuant to the State's assumption of Pub. L. 280 jurisdiction. *See* Mont. Code Ann. § 7-32-2205.

Over the years, the cost of providing these services has increased by many magnitudes. The aforementioned legislative testimony estimated the cost (inclusive of misdemeanor jurisdiction) to be \$30,000-\$40,000 per year in 1963. As will be explained below, the cost has grown to approximately \$4.4 million per year.

During the 2017 legislature, Representative Greg Hertz introduced HB 450, which would have required reimbursement from the Montana Department of Justice for net costs associated with enforcing criminal jurisdiction on the Reservation. In conjunction with the bill, the State prepared a fiscal analysis, a copy of which is attached as Exhibit B (the "Fiscal Analysis"). The Fiscal Analysis determined that the estimated cost to reimburse Lake County would have been \$4.011 Million in FY 2018, rising to \$4.383 Million by FY 2021.

During the 2021 legislature, Representative Joe Read introduced, and the legislature passed, HB 656. The bill described itself as "AN ACT REQUIRING COUNTY REIMBURSEMENT FOR ASSUMPTION OF CRIMINAL JURISDICTION WITHIN THE FLATHEAD INDIAN RESERVATION; . . . [and] PROVIDING AN APPROPRIATION . . ." 2021 MT H.B. 656 (as adopted). The bill, as passed, states that, "Unless the Confederated Salish and Kootenai tribes or Lake County withdraws consent to enforcement pursuant to 2-

1-306, the state shall reimburse Lake County for assuming criminal jurisdiction under this section annually to the extent funds are appropriated by the legislature. The annual amount of reimbursement must be adjusted each year based on the consumer price index.” Mont. Code Ann. § 2-1-301(2).

The original HB 656 bill draft had included a new section providing for an appropriation of “\$2,191,621 from the general fund to the department of justice in each year of the biennium beginning July 1, 2021, to reimburse Lake County for assuming criminal jurisdiction within the Flathead Reservation as required by 2-1-301.” 2021 MT H.B. 656 (as introduced). It went on to state, “The legislature intends that the appropriation be considered as part of the ongoing base for the next legislative session.” *Id.* Although the appropriation language remained identical in the bill as passed, the dollar amount of the appropriation was reduced to \$1.

As we view it, by enacting HB 656 the State expressly recognized that Lake County has been fulfilling the State’s obligation to assume criminal jurisdiction within the Flathead Reservation. It further appeared to recognize the State had the obligation to reimburse Lake County for the County’s fulfillment of the State’s obligation. Yet, the amount appropriated by the late amendment (\$1) was insignificant. The result: Lake County and its taxpayers were left to continue fulfilling the State’s obligation without material financial support from the State.

HB 656, as passed earlier this year, theoretically allows Lake County to withdraw its consent to enforce criminal jurisdiction on behalf of the State over CSKT with six months’ notice. Mont. Code Ann. § 2-1-306(3). However, if the County were to invoke this provision, it would leave the area in a state of law enforcement chaos not unlike the “state of chaos” described by Mr. Demures in his 1963 testimony, *supra*. Within Lake County, the State lacks detention facilities, law enforcement personnel, prosecutorial offices and many of the other fundamental necessities that would be required to fulfill the obligations the State assumed under Pub. L. 280. The County’s withdrawal would create a dangerous law enforcement vacuum and destroy what is presently a positive working relationship between County and Tribal law enforcement personnel. The State would have to hire its own law enforcement personnel, its own prosecutors and build a detention center.

Further, consent withdrawal by Lake County would require it to back out of the current Memorandum of Agreement (“MOA”) between it, the State, CSKT and several other counties and municipalities. The MOA exists for the stated purpose of “provid[ing] for timely and effective law enforcement and the protection of public safety.” Given the degree of interaction and the historical relationships between Lake County and CSKT, the county’s withdrawal of consent would have lasting and detrimental impacts on law enforcement and public safety within the Reservation for CSKT members and Lake County tribal and non-tribal residents alike. This in turn would have detrimental and lasting negative impacts on public health and safety. Thus, Lake County’s withdrawal of consent presents a paradoxical

Catch-22, i.e., its residents must continue to fund a criminal justice obligation that should by rights be borne by the State, or cease fulfilling the State's obligation and suffer a law enforcement crisis.

II. POTENTIAL SOLUTIONS

The necessary solutions fall into two categories: 1) Those available during the current biennium and 2) long-term funding. We have retained a consultant to assist in identifying potential funding sources, and identify a number of potential sources below, providing a rationale as to each.

A. Current (2021-2023) Biennium

The executive branch has several options to provide reimbursement to Lake County for criminal justice expenditures in the 2023 biennium. We believe these are appropriate sources of funding given the broad-ranging nature of services being provided by Lake County and the public health and safety function it is fulfilling. These are broken down into state organizational entity first, funding source second, authority third and finally explanatory information. These options are not intended to be a complete list as the executive branch may be aware of other options to assist Lake County.

Montana Highway Patrol

Fund – 02464 – Montana Highway Patrol (MHP) State Special Revenue (SSR) Account

Authority – MHP currently has over \$91 million¹ in SSR authority this biennium to spend for its operations. However, the Department of Justice has over \$152 million² in SSR authority this biennium for the entire agency. If there is unspent SSR authority anywhere in the agency, that authority can be matched up with monies in Fund 02464 to allow for the allocation of the monies in this fund with spending authority without impacting the operations of the MHP. Unspent SSR authority exists when 1) not all of the authority is needed or spent; or 2) there is not enough money in the fund to spend up to the authorized amount.

Explanation – Fund 02464 is established by Mont. Code Ann. § 44-1-110, as follows:

Highway patrol administration state special revenue

¹ Legislative Fiscal Division, *HB2 Narrative*, page D-29

² Legislative Fiscal Division, *HB2 Narrative*, page D-21

account. (1) There is an account in the state special revenue fund established by **17-2-102** to be known as the highway patrol administration account.

(2) Funds directed to the account by **15-70-403(2)(b)** and (3)(b) must be deposited in the account.

There is no definition or restriction on how these funds can be used. Therefore, there is nothing that restricts these funds from being allocated outside of MHP. In fact, these funds are currently allocated outside of the MHP division within the department.

The current *ending* fund balance in fund 02464 is \$6.8 million³. This ending balance is projected each year of the current biennium. The ending fund balance is the amount of money in the fund at the end of each fiscal year, assuming the fund revenues come in as projected, and the agency spends all that it has authority to spend. Therefore, there are available monies in the fund.

Division of Criminal Investigation

Fund – various State Special Revenue accounts

Authority – The division currently has over \$12 million⁴ in State Special Revenue authority this biennium.

Explanation – Funds from these SSR accounts may be available if the division's need for these funds is less than the appropriated amounts.

Montana Board of Crime Control (MBCC)

Fund – various Federal Special Revenue funds obtained via grant

Authority – MBCC currently has over \$27 million⁵ in Federal Special Revenue authority this biennium and can obtain additional authority from the governor's budget office.

Explanation – The MBCC is the state administering agency for many federal grants related to the criminal justice system. There may be an opportunity to obtain grant funds from 1) existing grant fund programs; 2) reverted grant funds; or 3) new grant opportunities that MBCC can

³ Legislative Fiscal Division, *LFD Budget Analysis*, page D-45

⁴ Legislative Fiscal Division, *HB2 Narrative*, page D-35

⁵ Legislative Fiscal Division, *HB2 Narrative*, page D-76

apply to obtain.

Department of Military Affairs

Fund – various Federal Special Revenue funds obtained via grant in the Disaster & Emergency Service Division (DES)

Authority – DES currently has over \$32 million⁶ in Federal Special Revenue authority this biennium and can obtain additional authority from the Governor’s budget office.

Explanation – The Disaster & Emergency Services Division of the Department of Military Affairs is the state administering agency for many federal grants related to the homeland security. Much of the grant funds are allocated to local governments. There may be an opportunity to obtain grant funds from 1) existing grant fund programs; or 2) reverted grant funds.

Department of Administration

Fund 06532 – Agency Insurance Internal Service Fund - Proprietary Fund

Authority – Risk Management and Tort Division has an appropriation of over \$61 million⁷ for the 2023 biennium

Explanation – Settlement funds are potentially available to mitigate risk involved in the event that Lake County cannot properly fund its criminal justice system. The executive and legislative branches of government have acknowledged a responsibility to provide funding reimbursement to the county thereby creating a risk to these branches of government. One statute that potentially allows such a settlement is as follows:

2-9-220. Loss mitigation program -- purpose. (1) There is a loss mitigation program administered by the department of administration.

(2) Funds for the program must be used by the department solely for the purpose of mitigating losses generated through claims against the state related to property, automobiles, aviation, and general liability.

⁶ Legislative Fiscal Division, *HB2 Narrative*, page A-215

⁷ Legislative Fiscal Division, *HB2 Narrative*, page A-125

(3) An agency seeking funds from the loss mitigation program shall present to the department a written request that:

(a) identifies the risk of loss and potential costs associated with the risk of loss;

(b) identifies matching funds from the agency to address or reduce the risk of loss; and

(c) provides a detailed explanation of how the funds will be spent to mitigate the risk of loss.

(4) Prior to distributing funds for an agency seeking funds from the loss mitigation program, the department of administration shall review the information provided by the agency and confirm the existence of a significant risk of loss to be mitigated with the requested funds.

(5) A distribution over \$30,000 for each written request, not including matching funds available to the agency, from the loss mitigation program to a single agency is subject to approval by the office of budget and program planning.

In addition to these sources identified by state organizational entity, there are additional potential sources as follows:

Reverted funds from previous years, pursuant to Mont. Code Ann. § 17-7-304 (4)(a):

Subject to subsection (4)(b), after the end of a fiscal year, 30% of the money appropriated to an agency for that year by the general appropriations act for personal services, operating expenses, and equipment, by fund type, and remaining unexpended and unencumbered at the end of the year may be reappropriated to be spent during the following 2 years for any purpose, except for increases in pay, that is consistent with the goals and objectives of the agency. The dollar amount of the 30% amount that may be carried forward and spent must be determined by the office of budget and program planning.

This provision can apply to any appropriate agency and any appropriate fund. It states that 30% of unspent funds in fiscal year 2020 can be spent in fiscal year 2021 or fiscal year 2022 (the current fiscal year). Thirty percent of unspent funds in fiscal year 2021 can be spent in fiscal year 2022 or fiscal year 2023.

General Fund – If determined to be a priority for the executive branch, current

general fund appropriations from any appropriate agency could be used to reimburse Lake County via an agreement, e.g., contract or memorandum of understanding. According to the Legislative Fiscal Division, there is a budget surplus of \$910 million at this time, making this a good time to address the funding.

Funds from the American Rescue Plan Act (ARPA) may be available to allocate to Lake County for various uses either directly related to the criminal justice system or indirectly related so as to ease the burden on the county's current budget. Implementation of ARPA at the state level can be found in HB632, passed to the last legislative body. Of note, Section 26(1) states:

The governor, or the budget director under the direction of the governor, is authorized to redirect appropriations to other projects or appropriations or modify provisions within [this act] to ensure conformity with the American Rescue Plan Act and applicable guidance.

This provision allows the governor's office significant discretion on the allocation of the American Rescue Plan Act Funds.

B. Future Biennia

Options for funding beyond the 2023 biennium include:

Direct appropriation from the general fund in HB2 to the Department of Justice – funds could be distributed to Lake County via a contractual agreement.

Direct appropriation from state special revenue funds, such as the highway patrol administration state special revenue account (02464), in HB2 to the Department of Justice. Funds could be distributed to Lake County via a contractual agreement.

BIA funding through the American Rescue Plan Act detailed as follows.

American Rescue Plan Act Funds – Public Law 117-2 – Section 11002⁸ provides the Bureau of Indian Affairs (BIA) an allocation of \$772,500,000 for Tribal “government services, public safety and justice, social services, child welfare assistance, and for other related expenses.”

⁸ U.S. Government Publishing Office, *Public Law 117-2--MAR. 11, 2021*, 135 STAT.241

The executive branch can initiate contact with the BIA immediately to discuss allocation of these funds to the Flathead Reservation in Montana with the express purpose of using these funds to provide reimbursement to Lake County for the criminal justice system in future biennia.

The governor's office is the appropriate requestor for this funding as 1) state statute places responsibility for funding of this function with the executive branch; and 2) the governor's office represents the entire state. The initial request from the governor's office would be most effective if supported by others to include Montana's legislative delegation; the state legislative branch; the Montana Department of Justice and Lake County officials. Justification would include that the BIA saves money by having PL280 in place on the Flathead reservation; therefore, allocation of these funds would be in their best interest. While this may be a viable option, it would likely only be a temporary solution.

Lastly, the Governor's office can work with the Montana's federal legislative delegation to secure a **direct federal appropriation** to the state of Montana to support funding the criminal justice system on the Flathead Reservation.

III. LEGAL CLAIMS

As outlined above, the County prefers to work with the State to find a solution to correct the unfunded mandate, and we believe those solutions exist. If we can agree on a means of funding the current biennium to the County's satisfaction and establish an appropriate framework going forward, the County would not seek judicial relief and would even be willing to provide a release as to the lack of funding preceding the current biennium. Make no mistake—this is the County's objective. It will pursue litigation only if no other option, fair to the taxpayers of Lake County, can be found. We firmly believe this situation presents an opportunity for the County and the State, with your office's help, to address the problem proactively. It began well before the current administration, and it is easy to see how unfair it is to the taxpayers of Lake County.

Despite litigation being the County's least-preferred option, we are obligated to notify the State of the basis for the County's legal claims. To the extent these may fall within the scope of claims which must be presented to the Department of Administration pursuant to Mont. Code Ann. § 2-9-301, we are also copying this letter to the Department and request it be treated as a notice of claim satisfying the requirements of that statute. The claims are outlined in the attached draft complaint (Exhibit C) which would be filed on behalf of the County if no other solution is reached.

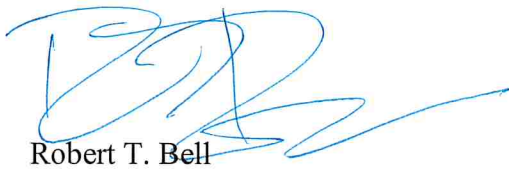
The causes of action contained in the draft complaint include a violation of Montana's prohibition on unfunded mandates (Mont. Code Ann. § 1-2-116(2)(a)), equitable relief under a theory of unjust enrichment, and declaratory judgment pursuant to the Montana Uniform Declaratory Judgments Act. We reserve the right to include additional causes of action related to the same subject matter prior to filing.

IV. FINAL THOUGHTS

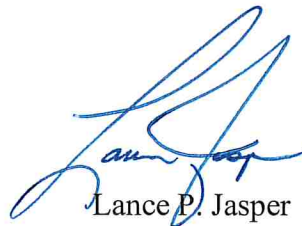
We would like to schedule a meeting within sixty (60) days of this letter with the Governor and other stakeholders to discuss possible solutions. We are open to ideas on where the meeting should be held and the persons who need to attend the meeting. To that end, we would appreciate if you could have the appropriate person from your office reach out to us to begin discussions.

Very sincerely,

REEP, BELL & JASPER, P.C.



Robert T. Bell



Lance P. Jasper

Enclosures

c: Misty Ann Giles, Director, Montana Department of Administration (w/enclosures)
Brett Dahl, Division Administrator, Risk Management & Tort Defense (w/enclosures)
William Gianoulas, Chief Defense Counsel, Risk Management & Tort Defense (w/enclosures)

DVD/CD Disc Mailer

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GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2019 Biennium

Bill # HB0450

Title: Revise assumption of criminal jurisdiction of Flathead Indian country laws

Primary Sponsor: Hertz, Greg

Status: As Introduced

- Significant Local Gov Impact
 Needs to be included in HB 2
 Technical Concerns
 Included in the Executive Budget
 Significant Long-Term Impacts
 Dedicated Revenue Form Attached

FISCAL SUMMARY

	<u>FY 2018 Difference</u>	<u>FY 2019 Difference</u>	<u>FY 2020 Difference</u>	<u>FY 2021 Difference</u>
Expenditures:				
General Fund	\$4,011,972	\$4,131,972	\$4,255,752	\$4,383,242
Revenue:				
General Fund	\$0	\$0	\$0	\$0
Net Impact-General Fund Balance:	<u>(\$4,011,972)</u>	<u>(\$4,131,972)</u>	<u>(\$4,255,752)</u>	<u>(\$4,383,242)</u>

Description of fiscal impact: HB 450 requires reimbursement from the Montana Department of Justice (DOJ) to counties for net costs associated with enforcing criminal jurisdiction on the Flathead Indian Reservation. This fiscal note reflects the estimated cost to reimburse Lake County. Note: The costs for reimbursement to other law enforcement agencies on the reservation cannot be estimated.

FISCAL ANALYSIS

Assumptions

Reimbursement Costs

- Public safety costs in Lake County include the county attorney's office, costs to operate the county jail, and costs to operate the sheriff's office are estimated to be \$5.7 million.
- It is estimated that 70% of county attorney prosecutions in Lake County are related to American Indians.
- Therefore it is assumed that 70% of the \$5.7M budget (or \$4.0 million) would be billed to the state.
- It is assumed this amount would be paid to Lake County each year. A 3.0 % inflation factor is applied for FY 2019, FY 2020, and FY 2021.
- The cost for enforcing criminal jurisdiction by other law enforcement agencies (including cities and towns) aside from Lake County cannot be determined but would increase the fiscal impact to the state.



Administrative Costs

6. It is assumed that the Department of Justice, Central Services Division (CSD) will have additional responsibility to track, audit, and pay invoices submitted by law enforcement agencies seeking reimbursement for costs incurred to enforce criminal jurisdiction on the Flathead Indian Reservation.
7. The CSD would contact each law enforcement agency to verify compliance with the reimbursement parameters set forth in HB 450.
8. This verification as well as processing invoices and conducting a monthly reconciliation would require a 0.25 FTE. Salary and benefits are estimated at \$11,972 per year
9. An inflation rate of 1.5% was applied to FTE costs in FY 2020 and 2021.

	<u>FY 2018</u> <u>Difference</u>	<u>FY 2019</u> <u>Difference</u>	<u>FY 2020</u> <u>Difference</u>	<u>FY 2021</u> <u>Difference</u>
<u>Fiscal Impact:</u>				
FTE	0.25	0.25	0.25	0.25
<u>Expenditures:</u>				
Personal Services	\$11,972	\$11,972	\$12,152	\$12,334
Local Assistance	<u>\$4,000,000</u>	<u>\$4,120,000</u>	<u>\$4,243,600</u>	<u>\$4,370,908</u>
TOTAL Expenditures	<u>\$4,011,972</u>	<u>\$4,131,972</u>	<u>\$4,255,752</u>	<u>\$4,383,242</u>
<u>Funding of Expenditures:</u>				
General Fund (01)	<u>\$4,011,972</u>	<u>\$4,131,972</u>	<u>\$4,255,752</u>	<u>\$4,383,242</u>
TOTAL Funding of Exp.	<u>\$4,011,972</u>	<u>\$4,131,972</u>	<u>\$4,255,752</u>	<u>\$4,383,242</u>
<u>Revenues:</u>				
General Fund (01)	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
TOTAL Revenues	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
<u>Net Impact to Fund Balance (Revenue minus Funding of Expenditures):</u>				
General Fund (01)	(\$4,011,972)	(\$4,131,972)	(\$4,255,752)	(\$4,383,242)

Technical Notes:

1. If funding is provided in HB 2 for reimbursements required by HB 450, and the funds appropriated are not sufficient to cover the submitted invoices, the state may be subject to the implications of Section 1 (5) prior to the time that additional funding could be sought from the legislature.

<i>Sponsor's Initials</i>	<i>Date</i>	<i>Budget Director's Initials</i>	<i>Date</i>
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1 Lance P. Jasper, Esq.
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5 bell@westernmontanalaw.com

6 Attorney for Plaintiff
7

8 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

9 LAKE COUNTY,) Dept. No.:
) Cause No.:
10 PLAINTIFF,)
)
11 vs.)
) COMPLAINT
12 STATE OF MONTANA,)
)
13 DEFENDANT.)

14 COMES NOW, Plaintiff Lake County, by and through its attorneys of
15 record, Lance P. Jasper and Robert T. Bell of Reep, Bell & Jasper, P.C.,
16 and for its Complaint against Defendant State of Montana alleges and
17 states as follows:

18 PARTIES

- 19 1. Plaintiff Lake County ("Lake County") is a local Montana
20 government unit as defined by the Montana Constitution, Art. 11, § 1.
2. Defendant State of Montana (the "State") is a sovereign state.



1 Within its boundaries of which lies the local government unit known as Lake
2 County.

3 3. The subject claim arises out of events occurring in Lake
4 County, Montana. Pursuant to Mont. Code Ann. § 25-2-126, venue is
5 proper in this Court.

6 BACKGROUND

7 4. The Flathead Indian Reservation (the "Reservation") is located
8 within the State of Montana, principally within the physical boundaries of
9 Lake County.

10 5. The Reservation is home to the Confederated Salish and
11 Kootenai Tribes, a combination of the Bitterroot Salish, Upper Pend
12 d'Oreille and Kootenai tribes ("CSKT"). Recent estimates show there are
13 approximately 7,750 enrolled CSKT members, about 5,000 of whom live on
14 or near the Reservation.

15 6. The history of Lake County and the Reservation is inextricably
16 intertwined. The Reservation as it currently exists was created by the
17 Hellgate Treaty of 1855, July 16, 1855, and was subsequently ratified by
18 Congress on March 8, 1859 and proclaimed on April 18, 1859 ("Hellgate
19 Treaty"). Congress made Montana a territory several years later, in May
20 1864. Montana became a state in 1889. Lake County as it currently exists

1 was established August 11, 1923.

2 7. As a local government unit within the State of Montana, Lake
3 County's self-government is subject to any Montana law directing or
4 requiring a local government or any officer or employee of a local
5 government to carry out any function or service. See, e.g., Mont. Code
6 Ann. § 7-1-114(f) and its predecessors.

7 8. In 1953, Congress enacted Public Law 280 to transfer portions
8 of criminal jurisdiction over Indians to certain states from the federal
9 government.

10 9. In 1963, the Montana Legislature enacted legislation
11 authorizing Pub. L. 280 jurisdiction in Montana. During the course of the
12 hearing on the legislation, an official delegate of the tribe spoke, describing
13 the situation thus:

14 I am a member of the Flathead Tribe and allotted on that
15 reservation and authorized to appear behalf of the
16 Committee and speak in support of House Bill No. 55. We
17 would like to call attention of the Committee that there has
18 been in effect a 'no mands land' as far as law and order
19 are concerned. The Federal Government has limited itself
20 to the ten major crimes and beyond that have done
nothing. The state, counties and others cannot assume
jurisdiction and will not because they don't have the legal
authority. It has fallen on the Tribal Council to spend \$30 to
\$40 thousand per year attempting to provide some
semblance of law and order among its people.

* * *

1 Montana on our reservation is crossed by two of the
2 national highways, 10 and 93. We have problems of law
3 and order with regard to highway patrol. Serious problems
4 lie with our juvenile delinquents and there is no court to
take them. Also, there are considerable problems with
welfare matters. On the Flathead Reservation, we urge
that the bill be passed.

5 (Tribal Testimony of Steve Demures from January, 1963 in the Montana
6 House Judiciary Committee).

7 10. Ultimately, the Legislature passed legislation stating, "The state
8 of Montana hereby obligates and binds itself to assume, as herein
9 provided, criminal jurisdiction over Indians and Indian territory of the
10 Flathead Indian reservation and country within the state in accordance with
11 the consent of the United States given by the act of August 15, 1953
12 (Public Law 280, 83rd congress, 1st session)." Laws 1963, ch. 81, § 1
13 (presently codified at Mont. Code Ann. § 2-1-301(1) (2021)). Thus, it
14 became the State of Montana's obligation to assume criminal jurisdiction
15 over Indians and the Indian territory of the Reservation.

16 11. In 1965, CSKT passed a tribal ordinance, Ordinance 40-A,
17 agreeing to come under Pub. L. 280 jurisdiction.

18 12. Since 1965, the State has repeatedly acknowledged the
19 existence of its obligation. For example, in 1994, the CSKT withdrew
20 consent to be subject to the misdemeanor jurisdiction of the State of

1 Montana, and jurisdiction over such cases was transferred back to the
2 CSKT. The related Proclamation of the State of Montana issued at that
3 time began with the following recognition: “[T]he State of Montana obligated
4 itself to assume criminal jurisdiction over Indians on the Flathead Indian
5 Reservation in accordance with the consent of the United States given by
6 act of August 15, 1953 . . .” *State of Montana Proclamation*
7 (9/30/1994)(executed by Marc Racicot, Governor of Montana). Likewise,
8 the language now codified at Mont. Code Ann. § 2-1-301(1) has remained
9 unchanged.

10 13. The Reservation is the only reservation in Montana with Pub. L.
11 280 jurisdiction. Lake County is the most affected county in the State due to
12 the fact that most of the Reservation and the CSKT population resides in
13 Lake County.

14 14. Although the State purported to assume criminal law jurisdiction
15 over CSKT tribal members in 1965, it has in fact failed to satisfy its
16 obligation, instead leaving it to the local government unit, Lake County, to
17 provide and fund the vast majority of services necessary to the exercise of
18 Pub. L. 280 jurisdiction. Because the State itself lacks the infrastructure
19 and has not supplied adequate funding, Lake County and its taxpayers
20 were forced to incur costs, among them those for:

- a. Prosecution of crimes;
- b. Detention, prevention and suppression of crime;
- c. Enforcement of criminal and traffic codes;
- d. Youth placement and detention;
- e. Costs of care including health care, food, lodging and other incidentals for detainees;
- f. Operation and maintenance of detention facilities; and
- g. Personnel for detention, investigation, monitoring, prosecution, and deputies, detectives and support staff; and transportation costs of inmates to State and private mental health and addiction facilities.

15. The State's statutory obligation continues to apply in non-misdemeanor cases. In 2017, the Legislature passed Senate Bill 310 at CSKT's request to create a means for it to withdraw from Pub. L. 280 jurisdiction. CSKT has taken no action to withdraw, thus continuing to leave Lake County to bear the cost of fulfilling the State's Pub. L. 280 obligations.

16. Additionally, the County's detention center is statutorily required to receive all inmates committed to the detention center pursuant to the State's assumption of Pub. L. 280 jurisdiction. See Mont. Code Ann. § 7-32-2205.

17. Over the years, the cost of these services has increased by many magnitudes. The aforementioned legislative testimony estimated the cost (inclusive of misdemeanor jurisdiction) to be \$30,000-\$40,000 per year in 1963. As will be explained below, the cost has grown to over \$4.3 million per year.

1 18. During the 2017 legislature, representative Greg Hertz
2 introduced HB 450, which would have required reimbursement from the
3 Montana Department of Justice for net costs associated with enforcing
4 criminal jurisdiction on the Reservation. In conjunction with the bill, the
5 State prepared a fiscal analysis, a copy of which is attached as Ex. 1 (the
6 “Fiscal Analysis”). The Fiscal Analysis determined that the estimated cost
7 to reimburse Lake County would have been \$4.011 Million in FY 2018,
8 rising to \$4.383 Million by FY 2021.

9 19. During the 2021 legislature, Representative Joe Read
10 introduced, and the legislature passed, HB 656. The bill described itself as
11 “AN ACT REQUIRING COUNTY REIMBURSEMENT FOR ASSUMPTION
12 OF CRIMINAL JURISDICTION WITHIN THE FLATHEAD INDIAN
13 RESERVATION; . . . [and] PROVIDING AN APPROPRIATION . . .” 2021
14 MT H.B. 656 (as adopted). The bill, as passed, states that, “Unless the
15 Confederated Salish and Kootenai tribes or Lake County withdraws
16 consent to enforcement pursuant to 2-1-306, the state shall reimburse Lake
17 County for assuming criminal jurisdiction under this section annually to the
18 extent funds are appropriated by the legislature. The annual amount of
19 reimbursement must be adjusted each year based on the consumer price
20 index.” Mont. Code Ann. § 2-1-301(2).

1 20. Unfortunately, the State has not appropriated a meaningful sum
2 for this purpose. Specifically, it appropriated one dollar (\$1.00).

3 21. The original HB 656 bill draft also included a new section
4 providing for an appropriation of “\$2,191,621 from the general fund to the
5 department of justice in each year of the biennium beginning July 1, 2021,
6 to reimburse Lake County for assuming criminal jurisdiction within the
7 Flathead Reservation as required by 2-1-301.” 2021 MT H.B. 656 (as
8 introduced). It went on to state, “The legislature intends that the
9 appropriation be considered as part of the ongoing base for the next
10 legislative session.” *Id.* Although the appropriation *language* remained
11 identical in the bill as passed, the *dollar amount* of the appropriation was
12 reduced to \$1.

13 22. In enacting HB 656, the State expressly recognized that Lake
14 County has been fulfilling the State’s obligation to assume criminal
15 jurisdiction within the Flathead Reservation. It further appeared to
16 recognize the State had the obligation to reimburse Lake County for the
17 County’s fulfillment of the State’s obligation. Yet, the amount appropriated--
18 \$1 -- was insignificant. Again, Lake County and its taxpayers were left to
19 continue fulfilling the State’s obligation without material financial support
20 from the State.

1 23. HB 656, as passed last year, also purports to allow Lake
2 County to withdraw its consent to enforce criminal jurisdiction on behalf of
3 the State over CSKT with six months' notice. Mont. Code Ann. § 2-1-
4 306(3). However, if the county were to invoke this provision, it would leave
5 Lake County law enforcement in a state of chaos not unlike the "state of
6 chaos" described by Mr. Demures in his 1963 testimony, *supra*. Within
7 Lake County, the State lacks detention facilities, law enforcement
8 personnel, prosecutorial offices and many of the other fundamental
9 necessities that would be required to fulfill the obligations the State
10 assumed under Pub. L. 280.

11 24. Further, consent withdrawal by Lake County would require it to
12 back out of Memorandum of Agreement ("MOA") between it, the State,
13 CSKT and several other counties and municipalities. The MOA exists for
14 the stated purpose of "provid[ing] for timely and effective law enforcement
15 and the protection of public safety." Given the degree of interaction and the
16 historical relationships between Lake County and CSKT, the county's
17 withdrawal of consent would have lasting and detrimental impacts on law
18 enforcement and public safety within the Reservation for CSKT members
19 and Lake County tribal and non-tribal residents alike. This in turn would
20 have detrimental and lasting negative impacts on public health and safety.

1 Thus, Lake County's withdrawal of consent presents a paradoxical Catch-
2 22, i.e., its residents must continue to fund a criminal justice obligation that
3 should by rights be borne by the State, or cease fulfilling the State's
4 obligation and suffer law enforcement chaos.

5 CAUSES OF ACTION

6 The following causes of action are plead as potential concurrent
7 and/or alternative causes of action. Some or all may apply, and the
8 allegations are not intended to be construed as mutually exclusive. Each
9 cause of action incorporates the applicable relevant allegations stated
10 elsewhere in the Complaint.

11 COUNT ONE: UNFUNDED MANDATE

12 25. Plaintiff restates the other allegations of this Complaint as if
13 fully set forth herein.

14 26. Pursuant to Mont. Code Ann. § 1-2-116(2)(a), a state agency
15 may not demand, bill, request or otherwise require a local government to
16 take certain actions including "pay[ing] for all or part of the administrative
17 costs of a program, activity or undertaking required by state law to be
18 carried out by a state agency."

19 27. A county is a local government entity within the meaning of the
20 statute. Mont. Code Ann. § 1-2-116(6)(b).

1 28. The Montana Department of Justice and Montana Department
2 of Corrections are state agencies within the meaning of Mont. Code Ann. §
3 1-2-116(6)(c). Other state agencies also perform services associated with
4 the exercise of criminal jurisdiction within the meaning of Mont. Code Ann.
5 § 1-2-116(6)(c).

6 29. In providing services and carrying out duties associated with
7 the exercise of criminal jurisdiction over CSKT members, Lake County is
8 paying for all or part of the administrative costs of programs, activities
9 and/or undertakings which state law, specifically Mont. Code Ann. § 2-1-
10 301(1) requires be carried out primarily by state agencies.

11 30. Lake County has had no alternative but to carry out duties and
12 incur the costs associated with the State's assumption of Pub. L. 280
13 criminal jurisdiction within the Reservation because the State itself lacks
14 the infrastructure and personnel to effectively exercise criminal jurisdiction
15 over CSKT within the Reservation, and has imposed these responsibilities
16 on Lake County. In failing to fulfill Pub. L. 280 obligations itself, the State
17 has "otherwise required" Lake County to provide services on behalf of the
18 State and thus has compelled Lake County to pay for nearly all costs
19 associated with the State's obligations pursuant to its assumption of
20 jurisdiction under Mont. Code Ann. Section 2-1-301(1) and Pub. L. 280.

1 provide many of the services. The benefit to the State is also self-evident
2 in that the State was not required to operate a separate detention facility
3 within Lake County, or station adequate law enforcement and prosecutorial
4 personnel within its boundaries.

5 37. The burden imposed on Lake County is unique in that CSKT is
6 the only tribe to have consented to Pub. L. 280 jurisdiction. Thus, the
7 State's assumption of criminal law jurisdiction imposes a unique and costly
8 burden upon Lake County where most CSKT members reside.

9 38. It is inequitable for Lake County to bear the burden and the
10 State to retain the benefit of Lake County's expenditures without
11 reimbursement to Lake County.

12 39. Lake County is entitled to restitution for the costs it incurred in
13 fulfilling the State's Pub. L. 280 obligations.

14 COUNT THREE: DECLARATORY JUDGMENT

15 40. The purpose of the Montana Uniform Declaratory Judgments
16 Act is to settle and afford relief from uncertainty and insecurity with respect
17 to rights, status and other legal relations; It is to be liberally construed and
18 administered. Mont. Code Ann. § 27-8-102.

19 41. Lake County's rights, status or other legal relations are affected
20 by statutes, including Mont. Code Ann. § 2-1-301 et. seq.

1 fulfillment of the State of Montana's obligations assumed by the
2 state under Pub. L. 280 and Mont. Code Ann. § 2-1-301(1); and

3 d. For such further and other relief as this Court may deem just.

4 DATED this ____ day of February, 2022.

5 REEP, BELL & JASPER, P.C.

6 By: _____
7 Attorneys for Plaintiff
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