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DISTRICT COURT JUDGE
Montana Eleventh Judicial District Court
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CLERK OF DISTRICT COURT
LYN FRICKER

NOV 09 2023

FILED BY [Signature]
CLERK/DEPUTY

MONTANA TWENTIETH JUDICIAL DISTRICT COURT
LAKE COUNTY

LAKE COUNTY, <i>Plaintiff,</i> vs. STATE OF MONTANA, <i>Defendant.</i>	Cause No. DV-22-117 ORDER RE: MOTIONS FOR SUMMARY JUDGMENT
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The following *Motions for Summary Judgment* are pending before the Court:

- (1) Lake County's *Motion for Summary Judgment (Declaratory Relief)*, filed August 18, 2023. (Doc. 33). The State filed a *Response in Opposition* on September 20, 2023 (Doc. 40), to which Lake County filed a *Reply* on September 29, 2023. (Doc. 41).
- (2) The State's *Motion for Summary Judgment*, filed August 21, 2023. (Doc. 35). The Plaintiff filed a *Response* on September 19, 2023 (Doc. 39), to which the State filed a *Reply* on October 5, 2023. (Doc. 43).

Neither party requested oral argument and the Court does not deem it necessary for resolution of these matters. Additionally, while this matter had been set for a nonjury trial, the parties filed a *Stipulation* on October 5, 2023, agreeing this matter should be resolved on summary judgment, and the nonjury trial was not necessary. (Doc. 42). Accordingly, having reviewed the file and being fully apprised, the Court hereby rules as follows:

ORDER

Lake County's *Motion for Summary Judgment (Declaratory Relief)* is DENIED.

The State's *Motion for Summary Judgment* is GRANTED.

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RATIONALE

A. Historical Background¹

In 1953, Congress adopted P.L. 280 which authorized states to *unilaterally* assert criminal and/or civil jurisdiction over Indian country:

The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (emphasis added);² Doc. 36, Ex. 1-1.

P.L. 280 was immediately controversial for both Tribes and States. The Tribes objected to the unilateral exercise of jurisdiction and the infringement on tribal sovereignty. At least the initial six mandatory states resented being required to assume jurisdiction without any allocation of necessary funds, which was considered an unfunded mandate. *See* Ada Pecos Melton and Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country* (2019).

In 1963,³ HB 55 was brought to the Legislature at the request of the CSKT due to the lack of law and order on the Flathead Reservation arising out of the federal government's failure to provide effective law enforcement. Doc. 36, Ex. 1-5. The CSKT was in the position of having to expend \$30,000-\$40,000 annually to provide some semblance of safety on the Flathead Reservation but had no court system to hold individuals accountable. *Id.* The CSKT pointed out that there were two national highways crossing the Flathead Reservation and there were serious problems related to highway patrol. *Id.* It was represented during the committee hearings, that "[w]hen asked how much it would cost the state, Turnage said it would cost virtually nothing because the state authorities now working would suffice. As far as Lake County is concerned, it will be no extra burden." This was a position unique Lake County as at least one other county, Big Horn, opined it could not absorb the cost. *Id.*

In response, the State of Montana enacted legislation authorizing PL 280 jurisdiction in Montana:

¹ While not intended to comprehensively explore the historical contours of criminal jurisdiction in Indian country, some basic background is necessary to understand the current dispute between the parties. The Court's Order Re: Motion to Dismiss provides additional historical context.

² "Although Congress ultimately approved a provision in the 1968 Indian Civil Rights Act that required a state to obtain tribal consent before adopting P.L. 280, seven states had already unilaterally asserted some measure of jurisdiction." 87 Wash. L. Rev. at 931-932.

³ A similar bill had failed in 1961 due to cost concerns. Doc. 18, Ex. D.

The state of Montana hereby obligates and binds itself to assume, as provided in this section, 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 (currently codified at Mont. Code Ann. §2-1-301); Doc. 36, Ex. 1-2.⁴

Despite being authorized by P.L. 280 to act unilaterally, Montana chose not to do so and instead provided:

(1) Whenever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.

(2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, *and there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.*

En. Sec. 2, Ch. 81, L. 1963; R.C.M. 1947, 83-802; amd. Sec. 2, Ch. 184, L. 1979 (currently codified at Mont. Code Ann. §2-1-302) (emphasis added).⁵

Montana also originally included a limited mechanism for a Tribe, *but not a county*, to withdraw its consent to P.L. 280 jurisdiction:

Any Indian tribe, community, band, or group of Indians that may consent to come within the provisions of this part may within 2 years from the date of the governor's proclamation withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within 60 days after receipt of such resolution, the governor shall issue a proclamation to that effect.

En. Sec. 6, Ch. 81, L. 1963; R.C.M. 1947, 83-806 (currently codified at Mont. Code Ann. §2-1-306).⁶

⁴ The language of Mont. Code Ann. §2-1-301 remained unchanged from 1963-2021.

⁵ The language of Mont. Code Ann. §2-1-302 has remained unchanged since 1963.

⁶ The language of Mont. Code Ann. §2-1-306 remained unchanged from 1963-1993.

On May 5, 1964, CSKT passed *Ordinance 40-A (Revised)*, agreeing to come under P.L. 280 jurisdiction, the only tribe in Montana to do so. Doc. 36, Ex. 1-3. On May 19, 1964, Lake County approved a *Resolution* consenting to P.L. 280 jurisdiction. Doc. 18, Ex. A.

In response and consistent with Mont. Code Ann. §2-1-302, Governor Babcock issued the necessary *Proclamation*, which states in relevant part:

WHEREAS, Such proper documents have been prepared entitled "Tribal Ordinance 40-A (Revised)" under date of May 5, 1965; and

WHEREAS, Approval has been secured from the Counties of Sanders, Lake, Flathead and Missoula; and

* * *

NOW, THEREFORE, By the power vested in me, as Governor of the State of Montana, I, Tim Babcock, hereby proclaim *that criminal and civil jurisdiction of the State of Montana and its subdivisions does extend to The Confederated Salish and Kootenai Tribes* as expressed in their approved Ordinance No. 40-A (Revised), and Chapter 81, Montana Session Laws of 1963, and I further declare that sixty days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect.

Doc. 36, Ex. 1-4 (emphasis added).

From 1965 to 1993, it appears the exercise of P.L. 280 jurisdiction on the Flathead Reservation continued essentially unchanged. In 1993, at the request of CSKT, the Legislature enacted SB 368 which significantly amended Mont. Code Ann. §2-1-306 to allow the Tribe, *but not a county*, to withdraw consent to misdemeanor criminal jurisdiction:

No sooner than 6 months after April 24, 1993, and after consulting with local government officials concerning implementation, the Confederated Salish and Kootenai tribes may, by tribal resolution, *withdraw consent to be subject to the criminal misdemeanor jurisdiction of the state of Montana*. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

Mont. Code Ann. §2-1-306(1) (emphasis added); Doc. 36, Exs. 1-6, 1-7.

Correspondingly, in 1994 the CSKT entered into a *Memorandum of Agreement* to reassume criminal jurisdiction over misdemeanor crimes committed by Indians. Governor Racicot issued the subsequent *Proclamation*. Doc. 34, Ex. 1.

Due to escalating costs, on January 11, 2017, the Board of Lake County Commissioners issued a *Resolution of Intent to Withdraw from Public Law 280*. Doc. 18, Ex. E. The purpose of the *Resolution* was to work with the 2017 Legislature to resolve funding issues related to P.L. 280 and explore how to withdraw consent. The *Resolution* was based on changed circumstances since the State assumed P.L. 280 jurisdiction, including a significant number of felonies being committed by tribal members, tribal members being significantly over-represented in incarceration in relation to their population, and Lake County's limited tax base being unable to

generate sufficient funds to meet P.L. 280 obligations without diverting resources from other significant needs. Doc. 18, Ex. E.

In 2017, again at the request of the CSKT, Mont. Code Ann. §2-1-306(1) was amended to also allow the Tribe, *but not a county*, to withdraw from state felony jurisdiction as well:

No sooner than 6 months after April 24, 1993, and after consulting with local government officials concerning implementation, the Confederated Salish and Kootenai tribes may, by tribal resolution, withdraw consent to be subject to the criminal jurisdiction of the state of Montana. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

Mont. Code Ann. §2-1-306(1) (2017).

The CSKT has not exercised the option to withdraw consent to felony criminal jurisdiction. *Lozeau v. Anciaux*, 2019 MT 235, ¶¶8-13, 397 Mont. 312, 449 P.3d 830.

The 2017 Legislature also considered, but did not pass, HB 450 which would have required the State to reimburse the counties for all costs incurred in the exercise of criminal jurisdiction on the Flathead Reservation. The bill provided that if the State failed to reimburse the counties, the State would be required to request retrocession, or the county could decline to enforce the State's criminal jurisdiction. Doc. 36, Ex. 1-8.

In 2021, Mont. Code Ann. §2-1-306 was amended again. Subsection (3) was inserted allowing Lake County to withdraw consent to enforcement of the State's criminal jurisdiction on the Flathead Reservation:

No sooner than 6 months after July 1, 2021, and after consulting with tribal government officials concerning withdrawal, the board of county commissioners of Lake County may, by resolution, withdraw consent to enforce criminal jurisdiction on behalf of the state of Montana over the Confederated Salish and Kootenai tribes. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

This amendment to Mont. Code Ann. §2-1-306 was the first time Lake County had any mechanism to withdraw consent.

The 2021 Legislature also amended Mont. Code Ann. §2-1-301 to add subsection (2) requiring the State to reimburse Lake County for exercising the State's criminal jurisdiction over the Flathead Reservation:

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.

Pursuant to the above, the 2021 Legislature appropriated \$1.00 to reimburse Lake County. Doc. 1, ¶20.

B. Current Dispute

It is undisputed that in 1965 the State assumed the federal government's trust obligation to exercise criminal jurisdiction over felony cases. It is also undisputed Lake County has enforced the State's assumption of criminal jurisdiction since that time—almost 60 years—and incurred the cost of doing so. These costs have included enforcement, investigation and prosecution of crimes, costs of care, and operation and maintenance of detention facilities. Lake County asserts that payment of these costs has resulted in Lake County losing control of its budget, diversion of limited law enforcement to the expense of other areas, compromise of other county services, and lost opportunity costs. With “a substantial portion” of Lake County real property being tax exempt, Lake County is without adequate revenue to construct a detention facility or expand law enforcement. Doc. 34, Ex. 3. Despite repeated requests and negotiations, the State has refused to assist Lake County in enforcing its criminal jurisdiction.

While Lake County has had authority since 2021 to withdraw its consent, it alleges that doing so would throw the Flathead Reservation back into the chaotic lack of law and order that existed in 1963 and precipitated State assumption of criminal jurisdiction. While the CSKT does exercise misdemeanor criminal jurisdiction, it has no authority to exercise felony criminal jurisdiction and cannot step into this vacuum. Lake County's withdrawal would presumably require the State to provide for all aspect of criminal jurisdiction, unless it attempted retrocession.

On January 3, 2023, the Board of Lake County Commissioners issued *Resolution No. 22-42(a) to Withdraw from Public Law 280*. Doc. 18, Ex. A. The *Resolution* was effective May 26, 2023, unless withdrawn, and pursuant to Mont. Code Ann. §2-1-306(3), would have required Governor Gianforte to issue a *Proclamation* by November 26, 2023, recognizing the withdrawal of consent.

On May 2, 2023, HB 479 passed its third reading in the House after being amended in the Senate. Effective, July 1, 2023, HB 479 authorized appropriating \$2.5 million each year in the biennium. It also required the Lake County Commissioners to rescind and vacate *Resolution No. 22-42(a) to Withdraw from Public Law 280* and purported to require Lake County not to adopt any further *Resolutions* regarding withdrawing consent during the biennium. Finally, it created a P.L. 280 task force within the Department of Justice to make recommendations to the Governor and the Legislature regarding the continued exercise of felony criminal jurisdiction.

HB 479 then walked back the State's current obligation under Mont. Code Ann. §2-1-301(2) (2021) (“the state shall reimburse Lake County for assuming criminal jurisdiction”), and asserted the State had no obligation to fund law enforcement in Lake County. Irrespective, it sought to appropriate \$2.5 million annually for the biennium to the Department of Justice to preserve the status quo while Lake County and CSKT determine whether they “wish to continue the relationship with their collective resources, but in the absence of ongoing appropriations in future bienniums from the state.”

It must be noted that HB 479 began as a bill to appropriate money for the Department of Justice to assume P.L. 280 jurisdiction on the Flathead Reservation, as Lake County had issued *Resolution No. 22-42(a) to Withdraw from Public Law 280*. The original February 20, 2023, fiscal note projected expenditures of \$37.5 million annually (FY2023-FY2027) to cover personnel needs, operating expenses, equipment and facilities. While HB 479 was ultimately vetoed by Governor Gianforte, the original fiscal note represents the value to the State of Lake County enforcing the State's assumption of P.L. 280 jurisdiction. Doc. 39, Ex. 1. In contrast, the Governor's Office of Budget and Program Planning estimates the cost to reimburse Lake County for the services currently being provided is \$4.982 million for FY 2024 and \$5.438 million for FY 2027. (Doc. 41, Ex. 1, ¶9; Doc. 19, Exs. 1, 2).

Following Governor Gianforte's veto of HB 479, on May 25, 2023, Lake County issued *Resolution No. 22-42(b) to Withdraw from Public Law 280*, which amended the earlier *Resolution No. 22-42(a)*, and provided in pertinent part:

WHEREAS, subsequent to the passage of Resolution No. 22-42(a) and prior to the Governor's veto of HB 479, the Court issued an order in the Lawsuit denying the State of Montana's motion to dismiss and allowing Lake County's declaratory judgment action to proceed; and
WHEREAS, the Board believes it is in the best interest of the people of Lake County and the Confederated Salish and Kootenai Tribes to obtain and consider the Court's declaratory judgment ruling in the Lawsuit before exercising its right to withdraw from enforcement of P.L. 280 jurisdiction.

IT IS HEREBY RESOLVED

Unless amended, modified or withdrawn, this resolution shall be formally delivered to the Governor of the State of Montana on or about 30 days after the Court in the Lawsuit issues a substantive declaratory ruling determining the scope of the State of Montana's obligations under Mont. Code Ann. §2-1-301(1) and Pub. L. 280. When and if delivered, the resolution shall be accompanied with a request that the Governor initiate the procedure for issuing a proclamation of withdrawal as set forth at Mont. Code Ann. §2-1-306(3).

Doc. 34, Ex. 4; Doc. 36, Ex. 1-13.

C. Standard of Review

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits, demonstrate that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). A material fact is one that involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. The movant carries the initial burden of demonstrating the absence of a genuine issue of material

fact. *Spain-Morrow Ranch v. West*, 264 Mont. 441, 444, 872 P.2d 330, 332 (1994). The burden then shifts to the non-moving party to prove by more than mere denial or speculation, and by competent evidence, that a genuine issue of material fact exists. *Roy v. Blackfoot Tel. Coop., Inc.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301.

Upon motion, “evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn therefrom in favor of the party opposing the summary judgment. *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 16, 295 Mont. 416, 986 P.2d 1081.

D. Legal Analysis

On July 14, 2022, Lake County had filed the *Complaint* in this matter asserting the Legislature had failed to meaningfully make an appropriation to meet its obligations under Mont. Code Ann. §2-1-301(2), and it continues to accrue harm. It brought the present action alleging Count One: Unfunded Mandate, Count Two: Unjust Enrichment, and Count Three: Declaratory Judgment. This Court ultimately dismissed Lake County’s Count I: Unfunded Mandate and Count II: Unjust Enrichment claims based on the running of the applicable statute of limitations, leaving only Count III: Declaratory Judgment. *See Order Re: Motion to Dismiss*, filed 5/4/2023 (Doc. 29). Both parties have now filed their respective *Motions for Summary Judgment* as to Count III.

The purpose of the Montana Declaratory Judgment Act is remedial. It is intended “to settle and to afford relief from *uncertainty and insecurity* with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.” Mont. Code Ann. §27-8-102 (emphasis added). Mont. Code Ann. §27-8-202 further states, “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.”

Specifically, Lake County has requested the following declarations from the Court:

- (1) Under Mont. Code Ann. §2-1-301(1), it is the State of Montana’s legal duty, not Lake County’s, to provide the services necessary to fulfill criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with PL 280; and
- (2) Under Mont. Code Ann. §2-1-301(2) the state is required to reimburse Lake County for its costs incurred to enforce criminal jurisdiction under PL 280 on behalf of the state of Montana from the statute’s effective date (July 21, 2021) forward.

Doc. 33, pp. 4:16-5:3.

The Court will address these issues in turn:

(1) Is it the State or Lake County’s duty to provide the services necessary to fulfill criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with PL 280?

Pursuant to Mont. Code Ann. §3-1-301(1) (“The state of Montana hereby obligates and binds itself to assume”), Lake County seeks a declaration that it is the sole obligation of the State to provide for criminal jurisdiction on the Flathead Indian reservation. The State does not necessarily disagree that it was the State who was authorized to assume, and in fact did assume, criminal jurisdiction over the Flathead Indian Reservation. However, the State argues that its criminal jurisdiction is exercised through Lake County, as it is exercised by counties across the State. This is also evident from Governor Babcock’s *Proclamation* that “criminal and civil jurisdiction of the State of Montana *and its subdivisions* does extend to The Confederated Salish and Kootenai Tribes.”

Nonetheless, the State has recognized the unique position of Lake County in relation to the exercise of criminal of criminal jurisdiction on the Flathead Reservation. For this reason, since 2021, Lake County has been able to withdraw its consent:

the board of county commissioners of Lake County may, by resolution, *withdraw consent to enforce criminal jurisdiction on behalf of the state of Montana* over the Confederated Salish and Kootenai tribes. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

Mont. Code Ann. §2-1-306(3) (emphasis added).

While the mechanics and effect of Lake County withdrawing its consent have not been addressed by either party, it is clear that under the plain statutory language that the State is “obligated” to provide for criminal jurisdiction on the Flathead Reservation, without or without the consent of Lake County.

(2) Is the State required to reimburse Lake County for its costs incurred to enforce criminal jurisdiction under PL 280 on behalf of the state of Montana from the statute’s effective date (July 21, 2021) forward?

Pursuant to the plain language of Mont. Code Ann. §2-1-301(2), the Legislature has determined “the state shall reimburse Lake County for assuming criminal jurisdiction under this section annually to the extent funds are appropriated by the legislature.” If Lake County is not satisfied with the amount of the appropriation, pursuant to the plain language of Mont. Code Ann. §2-1-306(3), Lake County may “withdraw consent to enforce criminal jurisdiction on behalf of the state of Montana over the Confederated Salish and Kootenai tribes.”

Nonetheless, Lake County seeks a declaration from this Court that despite the plain language and structure of Title 2, Chp. 1, Part 3, should Lake County not withdraw consent, the State is obligated to reimburse Lake County for all costs it incurs in enforcing the State’s criminal jurisdiction—regardless of the amount actually appropriated by the Legislature.

In response, the State points out that in 2023, the legislature appropriated funds to Lake County in the amount of \$1—an appropriation this Court has previously characterized as, and now reiterates, patently absurd. The State argues Lake County has the power to withdraw its consent if it is dissatisfied with this appropriation and Lake County’s failure to do so has produced “a self-inflicted injury.” As a practical matter, the State dares Lake County to act upon its threat.

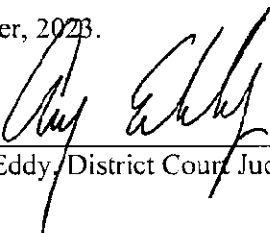
It is unfortunate that, during a legislative session noteworthy for its unprecedented budget surplus, the parties were unable to reach an agreement to provide for the ongoing safety and security of the Flathead Indian reservation and Lake County—particularly as Lake County’s enforcement of the State’s criminal jurisdiction on the Flathead Indian Reservation has been described by Governor Gianforte as “a model of success.” (Doc. 39, Ex. 1). Be that as it may, it is not the work of this Court to mediate this dispute. The Court’s role is simply to apply the law.

Nothing in Mont. Code Ann. §2-1-301 obligates the State to appropriate any particular dollar amount, range, or even a reasonable dollar amount, to reimburse Lake County’s costs incurred pursuant to P.L. 280. The plain language of the statute obligates the State to reimburse only “to the extent” the legislature sees fit to appropriate funds. Given this reality, coupled with the ability of Lake County to withdraw consent, this Court lacks the authority to grant the relief Lake County seeks. If the financial burden Lake County bears is unacceptable, which by all accounts it appears to be, its remedy is to withdraw.

CONCLUSION

Based on the foregoing, Lake County’s *Motion for Summary Judgment (Declaratory Relief)* is DENIED, and the State’s *Motion for Summary Judgment* is GRANTED. Because these issues could be resolved based on the plain statutory language, the Court need not address the further arguments of the parties.

DONE and DATED this 9th day of November, 2023.



Amy Eddy, District Court Judge

cc: Counsel and Parties of Record