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State-Tribal Relations Committee

61st Montana Legislature

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TO: State-Tribal Relations Committee Members
FROM: Jeremy Gersovitz, Staff Attorney
RE: Fixing the Fort Belknap/Blaine County road maintenance/gasoline tax issue:
constitutionally sound legislative remedy or void special legislation?
DATE: July 27, 2010

Mister Chair, members of the committee:

I have been asked to give the following background information and an opinion as to whether the Fort Belknap/Blaine County road maintenance /gas tax issue can be resolved through a bill draft or whether this might constitute "special legislation". Committee members will recall that this more than 15-year-old problem has been a recurrent theme during this committee's tenure.

QUESTION: Can the Fort Belknap/Blaine County road maintenance/gas tax issue be legislatively resolved without running afoul of the constitutional injunction against "special legislation"?

SHORT ANSWER: It is my opinion that, if it wishes to, Blaine County can currently enter into an agreement with the Fort Belknap Tribal Council that would allow the county to transfer fuel tax funds to the council in return for the latter's maintenance of the county rural roads at issue. This is contrary to Blaine County's position but in line with the opinions of at least three other State attorneys who have examined this issue. The road maintenance issue, however, is a discretionary one. Most importantly, the proposed legislative fix would potentially constitute "special" legislation.

BACKGROUND:

Reduced to its essence, the tribe's complaint is that roads within their reservation are not maintained despite the fact that the county receives gas tax funds for this purpose from the State. Fort Belknap has asked Blaine County to give it the proportional share of this money so it could perform the maintenance duties. For its part, Blaine County worries that if they released these funds to Fort Belknap and an audit showed any of the funds were not spent in accordance with statutory requirements, Blaine County would be the entity left holding the bag. Blaine County further believes that Fort Belknap has an existing agreement with the state whereby they retain the gas taxes on all fuels sold within the exterior boundaries of Fort Belknap, so to that extent they are sharing in these taxes.

LEGAL ANALYSIS AND OPINION:

It should be noted from the outset that the degree of maintenance of a county road is up to the discretion of the board of county commissioners. See, for example, § 7-14-2103, MCA:

Duties of county commissioners concerning county roads. (1) A board of county commissioners has general supervision over the county roads within the county.

(2) A board may survey, view, lay out, record, open, work, and maintain county roads that are established in accordance with this chapter. Guideposts must be erected.

(3) A board may discontinue or abandon county roads when freeholders properly petition for discontinuance or abandonment.

(4) **A board of county commissioners may determine the level and scope of maintenance on a county road under its jurisdiction,** and a local entity or the state may not withhold funds based on the board's maintenance determinations.

(Emphasis supplied.)

This is in keeping with legislative policy and intent. See, for example, § 60-1-102, MCA: Consistent with the foregoing determinations and declarations, **the legislature intends:**

(1) to place a high degree of trust in the hands of those officials whose duty it is, within the limits of available funds, to plan, develop, operate, maintain, and protect the highway facilities of this state for present as well as for future use;

(2) to make the department of transportation custodian of the federal-aid and state highways and to impose similar responsibilities upon the boards of county commissioners with respect to county roads and upon municipal officials with respect to the streets under their jurisdiction;

(3) that the state shall have integrated systems of highways, roads, and streets and that the department of transportation, the counties, and municipalities assist and cooperate with each other to that end;

(4) **to provide sufficiently broad authority to enable the highway officials at all levels of government to function adequately and efficiently in all areas of their respective responsibilities, subject to the limitations of the constitution and the legislative mandate hereinafter imposed.**

(Emphasis supplied.)

The tribe's perception of the maintenance issue thus may unfortunately revolve around the "level and scope" standard which, by state statute, is clearly and purposely left to the discretion of the board of county commissioners.

Article V, Section 12, of Montana's Constitution provides: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable."

To effectuate the change suggested by Blaine County, the following statute would need to be amended due to the highlighted language:

15-70-101. Disposition of funds. (1) **All taxes collected under this chapter must, in accordance with the provisions of 17-2-124, be placed in a highway revenue account in the**

state special revenue fund to the credit of the department of transportation. All interest and income earned on the account must be deposited to the credit of the account and any unexpended balance in the account must remain in the account. Those funds allocated to cities, towns, counties, and consolidated city-county governments in this section must, in accordance with the provisions of 17-2-124, be paid by the department of transportation from the state special revenue fund to the cities, towns, counties, and consolidated city-county governments.

(Emphasis supplied.)

Such an amendment was in fact last tried during the 2003 Session when SB 319 would have added the following : "(10) A county may enter into an agreement with a tribal government to transfer a proportionate share of the funds received under this section by the county for the construction, reconstruction, and maintenance of eligible roads by the tribal government. " The hearing on this bill, scheduled for February 12, 2003, in Senate Highways and Transportation, was cancelled, thus there is no record from this time that might provide any guidance as to whether members ever fretted over the special/local dichotomy.

So just what is this beast, named the special or local act? How do we read the tracks to discern if the law applies only to particular localities or to strictly defined circumstances?

Montana case law does provides some guideposts. Here's this valuable nugget from a case involving the hauling of garbage, wherein the Montana Supreme Court held the code section on the preservation of garbage service in the event of annexation to be a general law and thus constitutional: "A general law need not be a law which operates on all persons. "The word 'general' comes from the Latin 'genus' and relates to the whole kind, class or order; hence a law which affects a class of persons less than all may be a general law." ... Special laws are made for individual cases, or for less than a class; local laws are special as to place. Such laws are prohibited in order to prevent a diversity of laws on the same subject. ... The test for a special law is: "Does it operate equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves?" D & F Sanitation Serv. v. Billings, 219 Mont. 437 (1986). Applying this test to the facts at hand leads to the conclusion that the suggested fix is fraught with special legislation criticisms.

CONCLUSION:

While it may be an admirable goal to amend the relevant statute to allow a county to enter into a co-operative agreement so that it may share a portion of its gas tax revenue payment directly with the tribe, it is my opinion that the proposed legislation will establish preferential pockets throughout the state. A general, statewide bill is not needed, as has been shown above. Thus, what may result, should the effort continue, is a bill draft susceptible to a legal challenge for extending special treatment to one or two reservations and their neighboring recalcitrant counties. The proposed legislation would also only allow for the practice of sharing the money - it would not mandate it. Also, please recall the maintenance issue is a discretionary one.

One alternative to a bill draft, of course, is to see if the intermittent talks between the tribe and the county leads to a favorable resolution. Possibly the two entities could resolve their differences and come to some sort of rapprochement.

Committee members may also find themselves wishing that this issue is dealt with through the State-Tribal Cooperative Agreements Act (§18-11-101, MCA) that would allow the State to enter into tax revenue sharing agreements and transfer the fuel tax monies directly to the Tribes. The State has a gas tax revenue sharing agreement with the Fort Belknap Indian Community as it does with five others. The agreement expires June 30, 2019. By statute, these agreements are subject to review and comment by the Revenue and Transportation Interim Committee (§15-70-234, MCA), the approval of the Montana Attorney General (§18-11-105, MCA) and a public meeting (§18 -11-103).

I am happy to answer any questions you may have. Thank you.

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