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February 17, 1994

Mary O'Donnell
Rolette County States Attorney
P.O. Box 1079
Rolla, ND 58367

Dear Mary:

Thank you for your December 10, 1993, letter requesting an opinion on criminal jurisdiction over events occurring on land owned by the Turtle Mountain Housing Authority. You state that these lands are 2½ acre tracts located outside of the Turtle Mountain Reservation. They are purchased by the Housing Authority to relieve an on-reservation housing shortage. The Housing Authority enters an agreement with a purchaser and upon payment of the purchase price the Authority deeds the land to the buyer.

Within Indian Country the state, federal government, and tribe may have criminal jurisdiction depending upon the kind of crime committed and upon the race of the victim and perpetrator. General rules for criminal jurisdiction in Indian Country are discussed in my August 31, 1993, letter to Representative Merle Boucher, of which you have a copy. They are briefly reviewed in a January 13, 1994, proposed policy statement of U.S. Attorney John Schneider, a copy of which is enclosed.

For criminal jurisdictional purposes, Indian Country is defined by 18 U.S.C.A. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all

> Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

If the Turtle Mountain Housing Authority's 2½ acre tracts are not an allotment, a dependent Indian community, or part of a reservation, then they are not Indian Country and the state, as a general rule, would have jurisdiction over criminal activity that occurs there. See Decoteau v. Dist. County Ct., 211 N.W.2d 843, 844 (S.D. 1973), aff'd 420 U.S. 425, 427 n.2 (1975); St. Cloud v. US, 702 F. Supp. 1456, 1459 (D.S.D. 1988).

The tracts are not Indian allotments. Indian allotments are lands owned by the United States in trust for Indians or tribes, or lands owned by Indians subject to a statutory restriction against alienation. Cohen's Handbook of Federal Indian Law 40 (1982) (citing United States v. Ramsey, 271 U.S. 467 (1926), and United States v. Pelican, 232 U.S. 442 (1914)). See also Ahboah v. Housing Authority of Kiowa Tribe of Indians, 660 P.2d 625, 627 (Okla. 1983); State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77, 82 (Okla. 1985). Based on the information you provided, the Housing Authority's tracts are neither owned by the United States in trust for a tribe or for individual Indians, nor are they owned by Indians subject to a restraint against alienation. Therefore, they are not Indian allotments.

Determining whether any of these tracts is a dependent Indian community requires consideration of four factors:

> (1) whether the United States has retained "title to the lands which it permits the Indians to occupy," and "authority to enact regulations and protective laws respecting this territory" [citations omitted]; (2) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area" [citations omitted]; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality" [citations omitted]; and (4) "whether such lands have been set apart for the use, occupancy and

> protection of dependant Indian peoples" [citations omitted].

United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

None of these factors is determinative. "'The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standards such as percentage of Indian occupants.'" Id. at 842. For example, the fact that a state has asserted jurisdiction over an area does not necessarily defeat a finding of a dependent Indian community. Id. Each determination is unique. "'[T]he ultimate conclusion as to whether an Indian community is Indian country is quite factually dependant.'" Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098, 1101 (Okla. 1990).

It is, therefore, inappropriate for me to state whether any of the Turtle Mountain Housing Authority's 2½ acre tracts constitute a dependent Indian community. I have, however, reviewed a number of decisions that address the dependent Indian community issue. Below are some of the factors considered by courts in their review of this question.

The factors include: tribe controls the housing authority which manages the land; housing built with federal money; purpose is to provide adequate housing which is unavailable on the reservation; land owned in trust by the United States; Indian Health Service provides water, sewer, and medical services; BIA maintains roads; county never asserted criminal jurisdiction; area's ties to federal government; presence of non-Indians; kind of tribal services provided as compared with tribal services provided on the reservation; percentage of Indian residents; BIA provides school bus service; BIA assists in providing fire protection and schools; distance from reservation; Indian churches and ceremonial grounds nearby; role of BIA in law enforcement; Indian or non-Indian character of surrounding area; need of Indians to travel outside of area to obtain BIA and tribal services; state provides schools; state provides water, law enforcement, and sanitation services; state maintains roads; businesses in the area pay state tax and are subject to state and county health and building codes; primary purpose of area is commercial activity not protection of Indians; land owned by tribal housing authority; and land involved in

a HUD housing program and subject to extensive federal regulations.

This list was derived from the following cases. After each case is a note about the kind of land at issue. United States v. Driver, 755 F. Supp. 885 (D.S.D. 1991), aff'd 945 F.2d 1410 (8th Cir. 1991), cert. denied, 112 S. Ct. 1209 (1992) ("home located in a community called Blackpipe Housing"); United States v. Cook, 922 F.2d 1026 (2d Cir.), cert. denied sub nom. Tarbell v. United States, 111 S. Ct. 2235-36 (1991) (6 mile area that is home to the St. Regis Tribe); Blatchford v. Sullivan, 904 F.2d 542 (10th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) (Navajo Estates, a small housing subdivision in a rural settlement); Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okla. 1990) (a 6½ acre tract with four houses); Indian Country U.S.A. Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987), cert denied, 487 U.S. 1218 (1988) (gaming establishment located on the 100 acre "Mackey Site"); United States v. Azure, 801 F.2d 336 (8th Cir. 1986) (house and township near the Turtle Mountain Reservation); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979) (tribal housing project in Eagle Butte); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (tribal housing project in Sisseton); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (the town of Wagner, S.D.); Youngbear v. Brewer, 415 F. Supp. 807 (D. Iowa 1976), aff'd 549 F.2d 74 (8th Cir. 1977) (the "Sac and Fox Indian Settlement").

These cases not only provide instruction as to the kind of factors to be considered in deciding whether the Turtle Mountain Housing Authority tracts are dependent Indian communities, they also set forth some general rules. You may find these useful in your analysis.

The Eighth Circuit, in finding a housing project to be a dependent Indian community, cautioned that it was "not expanding the definition of a dependent Indian community to include a particular locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance." United States v. South Dakota, 665 F.2d at 843. The Tenth Circuit has also stated that the mere presence of a group Indians in an area "would undoubtedly not suffice" to establish a dependent Indian community. United States v. Martine, 442 F.2d 1022, 1024 (10th Cir. 1971). This is so even if

Indians constitute the bulk of the area's population and give it a distinctly Indian character. Blatchford v. Sullivan, 904 F.2d at 549. On the other hand, the fact non-Indians live in the area does not necessarily mean it is not a dependant Indian community. United States v. Mound, 477 F. Supp. at 160.

In deciding Azure, which concerned land in Rolette County, the Court of Appeals commented on the "element of cohesiveness" that is to be applied. It found that the township's sparse population makes a finding of cohesiveness less likely. United States v. Azure, 801 F.2d at 339.

Because a finding of a dependent Indian community is factually specific, the fact a court finds one house built by a tribal housing authority to be a dependent Indian community, does not mean that all houses built by that authority have the same status. Housing Authority v. Harjo, 790 P.2d at 1104. Furthermore, an area that is Indian Country can later lose that status. Id.

Of all the decisions concerning section 1151's reference to dependent Indian communities, United States v. Azure is the one that a court, at least initially, would closely study to determine if the Turtle Mountain Housing Authority's tracts are dependent Indian communities. Azure concerns land near St. John, North Dakota, just beyond the boundary of the Turtle Mountain Reservation. The court found the township in which the house is located to be a dependent Indian community. 801 F.2d at 339. In doing so, it reviewed the factual basis for this finding in two paragraphs. It noted that the United States owns the land, the BIA exercises certain criminal jurisdiction over Indians in the township, the land is leased only to Indians, the BIA services the roads, and the federal government recognizes the area as a dependent Indian community. Id.

Not all of these factors are present in the situation you pose. The United States does not own the land, the Housing Authority does. According to your letter, the county, not the BIA, has traditionally exercised criminal jurisdiction in the area. I don't know if the BIA services the roads or what the federal government thinks about the status of this land. At any rate, Azure is not necessarily precedent for finding all the Housing Authority's tracts dependent Indian community.

An issue regarding a dependent Indian community that has not been directly resolved by courts is the appropriate area of review within which the analysis should be conducted. That is, should consideration of the four factors set forth above be limited to the 2½ acre tracts or should the examination include the surrounding area?

This question is before the Richland County District Court in the civil action of Allery, et al. v. Hall, et al., (Civ. No. 93-280). The plaintiffs are employees of the Wahpeton Indian School. The defendants are the school board and the school's administrator. The defendants have asked the court to dismiss the action on the grounds that the court is without jurisdiction because the Wahpeton Indian School is a dependent Indian community and is, thus, Indian Country. The plaintiffs, as well as the State in its amicus briefs, argue that the school is not Indian Country and that the court should not confine its analysis of this question to the school's campus, but should include the entire town of Wahpeton in deciding whether the school is a dependant Indian community.

I won't repeat the arguments made for the broader area of review, but believe they are well founded and are supported implicitly by a number of decisions. Enclosed are copies of the state's amicus briefs in Allery. The discussion of the appropriate area of review is at pages 11-17 in our initial brief and at pages 4-5 in our reply brief. (These briefs neglected the cite Housing Authority v. Harjo, another case in which the court implicitly approved of the broader scope of review by analyzing circumstances well beyond the immediate tract in question. 790 P.2d at 1102.) The term "community" implies a group of people. I assume that just a single family resides on each of the 2½ acre tracts in question. A single family would not seem to constitute a "community."

I should note that because I am unfamiliar with the area in which the Housing Authority's tracts are located, I don't know if the broader scope of review is more or less likely to lead to a finding of a dependent Indian community.

Also in Allery, the State argued it cannot lose jurisdiction over land outside a reservation simply because the United States buys the land and uses it to benefit Indians. That argument is just as valid, if not

more so, where a tribe buys land beyond its reservation. Such action should not oust state jurisdiction that had been historically exercised prior to the purchase. Our argument on this point is at pages 8-11 of our initial amicus brief in Allery.

In summary, I don't know enough about the area in which the Turtle Mountain Housing Authority tracts are located to conclude whether or not they are dependent Indian communities. I trust, however, that I have supplied sufficient information to facilitate your analysis.

As mentioned, 18 U.S.C.A. § 1151 contains a third category that can be relied on to find Indian Country, that is, reservations constitute Indian Country. While the Housing Authority's tracts are not within the Turtle Mountain Reservation, the issue of de facto reservations needs to be addressed.

The court's finding of Indian Country in Azure rests not only on a finding of a dependent Indian community, but also on its conclusion that the land "can be classified as a de facto reservation." 801 F.2d at 339. Recently, Judge Conmy ruled that the federal government has criminal jurisdiction over a crime committed in New Town even if New Town is no longer within the Fort Berthold Reservation because it would still be considered within a de facto reservation. United States v. Standish, C4-92-22-02, Memo and Order at 3 (N.W.D. N.D. Oct. 29, 1992). These decisions point out that the concept of a de facto reservation exists and has been applied in North Dakota.

One of the first United States Supreme Court decisions on de facto reservations is Minnesota v. Hitchcock, 185 U.S. 373 (1902), which concerned the Red Lake Reservation in Minnesota. The Court stated that to create a reservation "a formal cession or a formal act setting apart a particular tract" is unnecessary. Id. at 390. "It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract." Id. See also id. at 389.

Significantly, in Hitchcock it was a treaty that gave rise to the reservation. The Turtle Mountain Housing Authority land has nothing to do with a treaty. Furthermore, that part of the Hitchcock decision discussing de facto reservations is dicta. Id. at 389.

The Court even said that to answer the question posed before it, the issue of whether or not a reservation existed, was "a matter of little moment." Id.

The earlier case of Spalding v. Chandler, 160 U.S. 394 (1895), also has language that could be relied upon for the de facto reservation concept. But the finding of a reservation in Spalding, like that in Hitchcock, was based on a treaty. Id. at 403-04.

Another relevant factor regarding these two decisions is that if the Court had not found the land to be a reservation, the tribes in question would not have had a homeland. Neither case concerned land which would give the tribe a second reservation or an expanded reservation. The de facto reservation analysis could be influenced by consideration of a tribe's need for a homeland. Since the Turtle Mountain Band of Chippewa has a reservation, its Housing Authority tracts are irrelevant to the existence of a homeland for the tribe.

Mattz v. Arnett, 412 U.S. 481 (1973), is another de facto reservation opinion by the Supreme Court. Mattz concerned the Yurok Indians in California and whether California had criminal jurisdiction over their fishing activities. The answer turned on whether the activity occurred within a reservation. In 1864 Congress stated that the Yuroks' Klamath River Reservation "should not be retained." Id. at 489. This somewhat ambiguous language may have meant immediate disestablishment of the reservation or it may have contemplated future disestablishment. At any rate, the executive branch took no formal action to disestablish the reservation, nor, however, did Congress re-establish it. The Court said the reservation continued in de facto existence because the Indians remained on the land and the federal government treated as a reservation. Id. at 491. In 1891 the President made the land a part of the Hoopa Valley Reservation. Id. at 493. This made the question of the land's status under the 1864 legislation moot. Id. Thus, Mattz's discussion of a de facto reservation is dicta. Furthermore, the element of a tribal homeland is present and the facts in Mattz are much different than those presented by land owned by the Turtle Mountain Housing Authority.

The final Supreme Court decision is United States v. John, 437 U.S. 634 (1978). The Court stated that when the land in question was purchased by the United States

for the benefit of Indians there is no apparent reason why it did not become a reservation, at least for purposes of federal criminal jurisdiction. Id. at 649. This ruling, however, is dicta since in 1944 the federal government formally declared the land to be a reservation. Id. Also, the purchase was to establish a homeland for the tribe.

A handful of lower court decisions address de facto reservations. In Langley v. Ryder, 602 F. Supp. 335 (W.D. La.), aff'd 778 F.2d 1092 (5th Cir. 1985), the court ruled that the mere holding of land in trust may be the "critical fact for achieving reservation status under section 1151(a)." Id. at 340. But it noted that this ruling is dicta. Id. at 341 n.6.

In Sac and Fox Tribe v. Licklider, 576 F.2d 145 (8th Cir.), cert. denied 439 U.S. 955 (1978), the court found a de facto reservation. It did so by examining the way in which the United States had treated the land and found that as early as 1865 the United States treated it as a reservation. Id. at 149. Also, had it not found a de facto reservation, the Sac and Fox Tribe would not have had a homeland. A similar analysis was made in United States v. Pend Oreille Pub. Utility Dist. No. 1, 926 F.2d 1502 (9th Cir.), cert. denied sub nom. Washington Dep't of Natural Resources v. United States, 112 S. Ct. 415 (1991). The court examined such matters as federal services to the area, the tribe's historic dependence on the area, and the United States' exclusion of non-Indians. Id. at 1509. The Azure court in finding a de facto reservation also looked primarily at how the federal government treated the area. 801 F.2d at 338-39.

In Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied sub nom. Navajo Tax Comm'n v. Pittsburg & Midway Coal Mining Co., 111 S. Ct. 581 (1990), the court reviewed congressional acts and executive orders that diminished the size of the Navajo Reservation. Id. at 1419, 1422. It then examined the area's subsequent history and found a number of circumstances that pointed to a reservation-like status. Id. at 1419-20. Nonetheless, the court declined to "'remake history' and declare a de facto reservation in face of clear congressional intent to the contrary." Id. at 1420.

The last decision of note is Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680 (E.D. Wis. 1992), aff'd

DN 92-3920, 1994 WL (7th Cir.). The court began its discussion by seeming to say that de facto reservations have only "limited existence." Id. at 698. It then set forth general criteria required for a showing of such a reservation. The United States must have "affirmatively intend[ed]" to treat the land as a reservation "and must have 'approved' the treatment of the land as a reservation." Id. This is not entirely clear, but it may mean that merely treating an area like a reservation does not make it a de facto reservation unless the treatment is coupled with an intent that the land indeed be a reservation. This emphasis on the actions and intent of the federal government are similar to a statement in the Azure decision.

> It is well established that the actions of the federal government in its treatment of Indian land can create a de facto reservation, even though the reservation was not created by a specific treaty, statute or executive order.

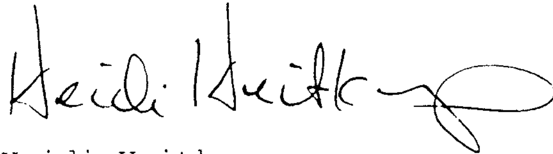
801 F.2d at 338. A key part of this statement is that de facto reservation status depends upon "actions of the federal government." A tribe cannot itself create a de facto reservation.

The Sokaogon court also stated that the governmental authority establishing a de facto reservation "must be competent." 805 F. Supp. at 698. "Indian Office employees and field agents are not competent to establish reservations without approval from a person with authority." Id. at n.18. Finally, the court stated that "the boundaries of such a reservation must be defined precisely by writing 'or by long continued and consented to occupation within well understood contours.'" Id. at 698.

In sum, section 1151(a)'s reference to reservations as Indian Country can include de facto reservations. Unfortunately, the law regarding the concept of de facto reservations is unclear because it is still evolving. It appears, however, that the federal government's actions are the key. Unlike a dependent Indian community analysis, the actions of the tribe and state are of less importance and under at least Sokaogon, the federal actions must be coupled with an intent to give the land reservation status. While the elements for the finding of a de facto reservation are stricter than those for a finding of a dependent Indian community, the analysis is

still a factual one. Because of this, I am unable to tell you whether or not the tracts, or any one of them, are a de facto reservation. Being unfamiliar with all the factual circumstances, it is inappropriate for me to state whether or not the tracts are a de facto reservation. Nonetheless, I trust that I have given you enough information to assist your analysis of whether the Turtle Mountain Housing Authority's land is Indian Country.

Sincerely,



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Enclosure