LETTER OPINION
94-L-174

July 1, 1994

Mr. Henry C. "Bud" Wessman
Executive Director
Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505

RE: Trenton Indian Service Area

Dear Mr. Wessman:

Thank you for your letter asking several questions about the jurisdiction of the Trenton Indian Service Area (TISA) over daycare facilities that serve Indians. These questions, and a brief answer to each, follow:

I. Does TISA have the authority to investigate and inspect all early childhood daycare facilities that provide services to Native Americans in each county that is within the designated boundaries of the service area?

Answer: No, but under certain circumstances TISA may have authority to inspect some of these facilities.

II. If TISA does have authority to investigate early childcare facilities, does its authority extend past Child Care and Development Block Grant funded facilities?

Answer: Yes, because any such authority TISA holds is not founded on these federal programs, but upon the concept of tribal self-government.

III. If TISA does have the authority to inspect facilities, is TISA empowered to investigate and inspect all facilities within its boundaries that provide services to Native Americans, including public and private schools, foster homes, and group foster homes?

Answer: No, but just as with daycare facilities, it is possible that under certain circumstances TISA may have the authority to inspect some of these facilities.

IV. If TISA does have the power and authority to inspect facilities, does its authority preclude any concurrent jurisdiction by the county where the investigated and

inspected facility physically resides?

Answer: No, not necessarily. Depending upon the facts regarding each facility, TISA's authority may be concurrent with state authority.

It is unfortunate that I cannot give conclusive answers to your questions. The demarcation between state and tribal jurisdiction is an issue on which neither Congress nor the courts provide simple answers. Here, the already complicated jurisdictional issues are complicated by the uniqueness of TISA and the history behind the Indians' move to the Trenton area.

Most of the Indians who reside in the Trenton area are enrolled members of the Turtle Mountain Band of Chippewa Indians. Trenton is in Williams County, about 200 miles from the Turtle Mountain Reservation. A number of sources explain the history of the separation, including M.J. Schneider, North Dakota's Indian Heritage 129 (1990); E. Robinson, History of North Dakota 147-48 (1966); Murray, "The Turtle Mountain Chippewa, 1882-1905," 51 N.D. History 14 (No. 1 1984); and Hesketh, "History of the Turtle Mountain Chippewa," V Collections of the North Dakota Historical Society 85, 112-14 (1923). I shall summarize the history.

In 1884 President Chester Arthur issued an executive order creating a small reservation of two townships in Rolette County for the Turtle Mountain Band of Chippewa. But the reservation was too small to support all members of the Band. For this reason and others, in August of 1890 Congress established a commission to deal with the overall situation of the Band. The commission failed. In 1892 a second commission and representatives of the Band signed an agreement. Congress ratified the agreement in 1904 with only minor changes. Article VI of the agreement states:

> All members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon the reservation above ceded may take homesteads upon any vacant land belonging to the United States without charge, and shall continue to hold and be entitled to such share in all tribal funds, annuities, or other property, the same as if located on the reservation . . . .

Act of April 21, 1904, ch. 1402, 33 Stat. 189, 195 (1904).

Subsequently, 390 families moved to the Trenton area. Murray, supra at 32. Others located near Devils Lake, near the cities of Great Falls and Lewistown in Montana, and near the Turtle Mountain Reservation itself.

The Trenton group was allotted 131,000 acres in Williams County. Fort Buford Indian Development Corporation Area, "The Overall Economic Development Program for the Fort

Berthold Indian Development Corporation" 1 (undated). Apparently, these Indians had difficulty adjusting to an agricultural lifestyle. Id. "Most families had to sell their land to cover bills accumulated at local trading posts." Id. By the early 1970s the Indians owned only about 22,000 acres. Id. In decades following their arrival, the Trenton Indians' basic needs were not met. Id. Although Article VI of the agreement referred to above states that tribal members were to be entitled to "all tribal funds, annuities or other property the same as if located on the reservation," the Trenton Indians did not, in fact, receive adequate assistance. See, e.g., id. "For the past 70 years, the Chippewa of Williams County have been a forgotten people." Id.

Consequently, in the early 1970s an effort was made to ensure that the Trenton Indians would receive funding directly from the federal government, rather than through the tribal government on the Turtle Mountain Reservation. Before the federal government could directly disburse money to the Trenton Indians, a law or administrative regulation or policy -- it is unclear which -- required that a "service area" be established. In 1973 North Dakota's congressional delegation proposed "that the land remaining to the Trenton enrollees be designated a Federal Service Area which would be eligible for federal assistance on the same basis as established reservations." Letter from Sen. Burdick, Sen. Young and Rep. Andrews to Sec. of Interior Rogers Morton (Oct. 31, 1973). Also in 1973 Governor Arthur Link asked the Secretary of Interior to designate "the Fort Buford vicinity as a Federal Service Area, which would make that area's Indian population eligible for federal services." Letter from Gov. Link to Sec. of Interior Rogers Morton (Nov. 15, 1973).

A July 6, 1973, resolution of the Turtle Mountain Tribal Council, Resolution No. 744-07-73, states that the tribal members in Trenton and eastern Montana area "are interested in having a service area set up for them so that they may be eligible for services from the U.S. Government such as health care, housing, etc." The resolution goes on to support the establishment of a service area for the Trenton area so long as doing so does not reduce funding for the Turtle Mountain Reservation.

In 1973 the United States Treasury Department confirmed the need for a service area. It stated that to be eligible for BIA funding an Indian group must have an "organized government which performs substantial governmental functions." Letter from Arthur Hauser, Office of the Sec. of the Treasury, to Earl Azure, N.D. Indian Affairs Comm'n (Aug. 1, 1973). Because the Trenton Indians reside so far from the Turtle Mountain Reservation "it has been determined that the Turtle Mountain tribe does not perform substantial governmental functions for the Fort Buford Indians. Therefore, the Turtle Mountain tribe's population does not include any of the Fort Buford Indians." Id.

Because the Trenton Indians did not themselves have an organized government performing substantial governmental functions, the Trenton Indians were ineligible to receive aid directly from the federal government.

Later efforts to obtain direct federal assistance were successful. The Senate Appropriations Committee directed the BIA to provide adequate services to the Trenton Indians. See Memorandum from Morris Thompson, Comm'r of Indian Affairs, to BIA Asst. Sec. for Management (July 9, 1976). The BIA, with the Department of Interior's consent, acknowledged that TISA was a governing entity entitled to receive federal funds. See id.; Memorandum from Harold D. Cox, Chief, BIA Div. of Management, Research, and Evaluation, to BIA Aberdeen Area Director (Aug. 10, 1976).

TISA is a tribal entity. It was established on March 25, 1975, by Ordinance 28 of the Turtle Mountain Tribal Council and reauthorized in 1987 by Ordinance 28-A. Ordinance 28-A notes that many allotments were made in the Williams, Divide, and McKenzie Counties in North Dakota, and in Sheridan, Roosevelt, and Richland Counties in Montana "resulting in a high population of tribal members presently residing in the area of these counties, forming an Indian community centered at Trenton, North Dakota." Ordinance 28-A, § 1(a). The ordinance does not define the "Trenton Indian Service Area" in a strictly geographic way, but rather defines it as the tribal members who reside in the six counties. Id. § 3(e). A seven-member board of directors is TISA's governing body. Id. at § 4.

To address your jurisdictional questions, it is first necessary to discuss the nature of the area in which the daycare facilities are located. It is necessary to determine whether the facilities are within Indian country, because it is only in Indian country that a Tribe can exercise powers of self-government.

A reservation is, of course, Indian country. A reservation has not been established in the Trenton area. It is, however, possible for non-reservation land to constitute Indian country. "Indian country" is defined by 18 U.S.C.A. § 1151:

> [T]he 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.

This definition is ostensibly confined to questions of federal criminal jurisdiction. However, whether it also applies to questions of civil jurisdiction is an unresolved issue. While the Supreme Court has stated that the definition applies to civil jurisdiction, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987), DeCoteau v. District County Court, 420 U.S. 425, 427 n.2, reh'g denied, 421 U.S. 939, (1975), its statements doing so are dicta and the cases it relies on do not, in fact, support the Court's conclusion.

Other courts have rejected the Supreme Court's dicta and ruled that Section 1151's definition of Indian country is confined to matters of criminal jurisdiction. General Motors Acceptance Corp. v. Chischilly, 628 P.2d 683, 685 (N.M. 1981); Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098, 1105 (Okla. 1990)(dissenting opinion); Confederated Tribes and Bands of the Yakima Nation v. County of Yakima, 903 F.2d 1207, 1217 (9th Cir. 1990), aff'd and remanded 502 U.S. ____, 116 L.Ed.2d 687 (1992), vacated on other grounds 960 F.2d 793 (9th Cir. 1992).

Recently, in a jurisdictional dispute over the Wahpeton Indian School, the district court ruled that it is unlikely Section 1151 applies to civil issues. Allery et al. v. Hall et al., Civil No. 93-280, Memo Opin. at 7-8 (March 10, 1994). While this is the only North Dakota decision on the issue, it is not definitive. Questions remain about the application of Section 1151. To fully discuss your questions I will assume the section applies to questions of civil jurisdiction.

Section 1151 includes three definitions of "Indian country." Paragraph (a) provides that land within a reservation is "Indian country." As mentioned, there is not a reservation in the Trenton area.

Paragraph (c) states that "all Indian allotments" are Indian country. Indian allotments are lands held by the United States in trust for Indians or tribes, or lands owned by Indians subject to a statutory restriction against alienation. Felix S. 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).

Whether daycare facilities within the Trenton Service Area are located on Indian allotments is a factual question I cannot answer. The answer requires a review of state, federal, or perhaps tribal property records. I would, however, be surprised if Indian allotments were located anywhere other than close to the town of Trenton.

Paragraph (b) of Section 1151 provides that "dependent Indian communities" are another category of land that constitute Indian country. Determining whether an area 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).

I will not discuss in this letter the many decisions that have analyzed and applied these factors and otherwise considered the issue of what is a "dependent Indian community." Such an analysis is contained in my February 17, 1994, letter to Rolette County State's Attorney Mary O'Donnell at pages 2-5. A copy of that letter is attached.

Whether a "dependent Indian community" exists within the Trenton Service Area is a question of fact. I do not know enough about the area to confidently conclude whether Trenton or any other area constitutes a "dependent Indian community." However, if a "dependent Indian community" is found, it would likely be confined to the town of Trenton and its immediate vicinity. Again, it would be unusual to find a "dependent Indian community" anywhere else in the three-county area.

Even if not found to be "Indian country" under 18 U.S.C.A. § 1151, the Trenton area could be considered Indian country under another theory, that is, the "de facto reservation" theory.

In United States v. Azure, 801 F.2d 336 (8th Cir. 1986), the court found that the land in question there "can be classified as a de facto reservation." 801 F.2d at 339. Recently, the U.S. District Court for North Dakota ruled, in dicta, that the federal government has criminal jurisdiction over a crime committed in New Town, even if New Town were not within the Fort Berthold Reservation because the New Town area could be considered a de facto reservation. United States v. Standish, C4-92-22-02, Memorandum and Order at 3 (N.W.D. N.D. Oct. 29, 1992), aff'd on other grounds, 3 F.3d 1207 (1993).

While these decisions point out that the concept of a de facto reservation exists, I have examined the origin of the concept and find little authority for anything but a limited application of it. My analysis on this subject can be found in the attached February 17th letter to Mary O'Donnell at pages 7-11.

Again, whether there is a de facto reservation is also a factual question on which I have insufficient facts to offer an opinion. Even so, if any part of the area in question is a de facto reservation, the reservation would be confined to the town of Trenton and its immediate vicinity.

This discussion of whether the daycare facilities are located within Indian country is crucial in answering your questions about jurisdiction. Tribal governmental authority has a "significant geographical component." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). In general, tribal jurisdiction is confined to Indian country. E.g., South Dakota v. Bourland, 508 U.S. _____, 124 L.Ed.2d 606, 621 (1993); General Motors Acceptance Corp. v. Chischilly, 628 P.2d 683, 685 (N.M. 1981). Indians outside of Indian country are subject to all state laws. E.g., Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973); U.S. Department of Interior, Federal Indian Law 510-11 (1958).

To fully answer your question, I will assume Indian country does exist in the Trenton area and that daycare centers are located within Indian country. With this assumption we are faced with "[t]he most difficult and recurring issues in Indian law," the scope of state and tribal regulatory jurisdiction in Indian country. Conference of Western Attorneys General, American Indian Law Deskbook 98 (1993).

Congress possesses plenary authority over tribes. It has the power "to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). See also South Dakota v. Bourland, 508 U.S. ____, 124 L.Ed.2d 606, 618 (1993); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); United States v. Wheeler, 435 U.S. 313, 323 (1978). Thus, it is possible that a federal statute or agreement or treaty may resolve the jurisdictional questions you asked. I was, however, unable to locate any such federal authority that provides a simple answer to your questions. We must, therefore, apply court decisions regarding tribal/state jurisdiction.

Within Indian country a tribe may regulate the activities of its members. E.g., United States v. Wheeler, 435 U.S. at 322-23. Therefore, if a daycare center is operated by a tribal member in Indian country, TISA may inspect it. If, however, the facility is operated by a non-Indian on fee land, even though it is located within Indian country, the tribe probably does not have the authority to inspect it pursuant to the decisions of Montana v. United States, 450 U.S. 544 (1981) and South Dakota v. Bourland, 508 U.S. ____, 124 L.Ed.2d 606 (1993).

Montana involved a claim of tribal authority to regulate hunting and fishing by non-Indians on non-Indian land within a reservation. In denying the tribe's claim, the Court set out the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565.

Bourland involved a claim of tribal authority to regulate hunting and fishing by non-Indians on lands and overlying waters acquired by the United States for a Missouri River dam project. The Court rejected the claim of tribal jurisdiction. "General principles of 'inherent sovereignty' . . . do not enable the Tribe to regulate non-Indian hunting and fishing in the

taken area." 124 L.Ed.2d at 623. It added that tribal jurisdiction over nonmembers requires express congressional delegation. Id. at 623 n.15.

Both Montana and Bourland express the general rule that tribes lack regulatory authority over non-Indians on non-Indian land located within Indian country. Montana, however, also set forth two possible exceptions to this principle. The Court in that case stated that a "tribe may regulate . . . the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. It also stated that a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

Each Montana exception could apply to a daycare center operated by non-Indians but serving Indian children. The Indian children are there, I assume, as the result of a contract between the daycare center and the children's parents. Thus, the first Montana exception could apply. The second exception allows tribal regulation when an activity threatens the tribe's welfare. TISA could assert that it has a special interest in overseeing the care given Indian children and upon such an argument seek application of the second exception.

While Montana/Bourland provide the analytical framework for questions about tribal jurisdiction over the activities of non-Indians in Indian country, a different analytical standard applies when considering the scope of state jurisdiction within Indian country. When the activity involves only non-Indians, the state can regulate it. See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. ____, 116 L.Ed.2d 687, 697 (1992). However, when the activity involves only Indians, "state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mountain Apache Tribe, 448 U.S. at 144. See Conference of Western Attorneys General, American Indian Law Deskbook 114 (1993). Thus, within Indian country, a daycare center operated by tribal members and serving only tribal members may be beyond the scope of state jurisdiction. An Indian-operated facility that serves non-Indians may also be subject to either exclusive tribal jurisdiction or concurrent state and tribal jurisdiction. For example, if TISA did not have a regulatory program, presumably, the state could step in and fill the jurisdictional void.

With respect to state regulation of a non-Indian operated daycare center, where the state asserts authority over the on-reservation activities of non-Indians, the courts engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." White Mountain Apache Tribe, 448 U.S. at 145. This scenario is similar to one now in litigation. The Devils Lake Sioux Tribe has sued the North Dakota Public Service Commission contending the PSC cannot regulate, among other things, utility companies that provide electricity to tribal members living on the reservation. Devils Lake Sioux Tribe

v. North Dakota Public Service Commission, A1-90-179 (D.N.D.).

In summary, if there is no Indian country in the Trenton Service Area, then I doubt TISA has authority to regulate daycare centers or similar facilities. If Indian country does exist in the area, which is possible, such area is most likely limited to the town and vicinity of Trenton.

Assuming there is Indian country, TISA may have authority to inspect daycare facilities. It surely has such authority over a facility operated by a tribal member and serving tribal members. It probably also has such authority over a facility operated by a tribal member even if it serves non-tribal members since it is the operator who is being regulated by TISA, not the clients. TISA does not have jurisdiction over a daycare facility in Indian country operated by a non-tribal member and serving only non-tribal members. As for a daycare center operated by a non-Tribal member but serving tribal children, either one of the Montana exceptions may give the tribe jurisdiction. Supra pp. 17-18.

Again assuming there is Indian country in the Trenton area, state regulatory authority is not necessarily precluded. The state retains full jurisdiction over a facility operated by non-tribal members and serving non-tribal members. On the other hand, the state probably does not have jurisdiction over an Indian-operated facility serving only tribal members. There may be exceptions to this general rule, however. For example, if the state provides financial assistance to the facility, that may be sufficient to allow for state regulation. 1990 N.D. Op. Att'y Gen. 25 (concluding that while the Turtle Mountain Band of Chippewa need not obtain a state certificate of need to establish a nursing home on its reservation, the tribe must comply with state law if it seeks payments through the state medicaid program). Regarding "mixed" facilities, that is, Indian-operated facilities serving non-Indians and non-Indian facilities serving Indians, the role of state jurisdiction is less clear. Depending upon a balancing of state, federal, and tribal interests, the state may be able to regulate a facility that is operated by non-Indians but serves tribal members. It is less likely to be able to regulate an Indian-operated facility that serves non-Indians.

The following table summarizes my discussion of TISA and state jurisdiction over the four kinds of facilities that could exist. The table assumes the facilities are located within Indian country.

	TISA Jurisdiction	STATE Jurisdiction
Indian facility serving Indians	Yes	Probably Not
Non-Indian facility serving non-Indians	No	Yes
Indian facility serving non-Indians	Yes	Probably Not
Non-Indian facility serving Indians	Yes, if a Montana exception applies	Yes

I recognize that I have not given you clear guidelines to follow, but such is the nature of Indian law. I hope, however, that I have given you enough information so you have a general understanding of the law as it pertains to the jurisdictional questions you asked.

Because these issues cannot be addressed as ones of abstract law, if a jurisdictional dispute between TISA and the state arises regarding a specific facility, I advise you to seek the advice of this office. The answers to questions about state and tribal jurisdiction are often dependent on the facts, and the facts often vary from case to case.

Finally, since the kind of governmental regulation at issue seeks to protect children, I would hope that TISA and the state agree upon ways to ensure the best possible protection and services and not allow questions of jurisdiction to distract them from their mission.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

CMC/dfm
Attachment

OFFICE OF ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Heidi Heitkamp
ATTORNEY GENERAL

CAPITOL TOWER
State Capitol
600 East Boulevard
Bismarck, ND 58505-0040
701-224-2210
FAX 701-224-2226

Consumer Protection and Antitrust Section
701-224-3404 (V/TDD)
800-472-2600 (V/TDD)
Toll Free in North Dakota
FAX 701-224-3535

Gaming Section
701-224-4848
FAX 701-224-3535

Licensing Section
701-224-2210
FAX 701-224-2226

Racing Commission
701-224-4290
FAX 701-224-3535

CAPITOL COMPLEX
State Office Building
900 East Boulevard
Bismarck, ND 58505-0041
FAX 701-224-4300

Civil Litigation
701-224-3640

Natural Resources
701-224-3640

Bureau of Criminal Investigation
P.O. Box 1054
Bismarck, ND 58502-1054
701-221-5500
800-472-2185
Toll Free in North Dakota
FAX 701-221-5510

Fire Marshal
Northbrook Mall
1929 N. Washington
Bismarck, ND 58501-1616
701-221-5470
FAX 701-221-5474

Fargo Office
P.O. Box 7429
Fargo, ND 58109-7429
701-239-7126
FAX 701-239-7129

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,

Heidi Heitkamp
ATTORNEY GENERAL

CMC/dfm
Enclosure