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

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