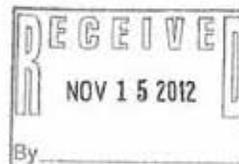


APPENDIX G

LETTERS FROM ALASKA

DONALD C. MITCHELL
Attorney at Law
1335 F Street
Anchorage, Alaska 99501
(907) 276-1681 dcraigm@aol.com

November 13, 2012



Carole Goldberg
UCLA School of Law
1242 Law Building
385 Charles E. Young Drive
Los Angeles, California 90095

Dear Carole Goldberg:

Last night Alaska News Nightly, which the Alaska Public Radio Network (APRN) distributes to every public radio station in Alaska, broadcast a story entitled "Commission Says Alaskans Would Benefit From More Cooperation Between States, Tribes." The content thereof was so astounding that this morning I listened to the story again on APRN's website.

The story, which reported on a visit you and Troy Eid recently made to Alaska as members of the Indian Law and Order Commission, contains a snippet from an interview with you in which you lecture the listening audience (which includes thousands of Alaska Native residents of communities that in 1971 Congress designated as "Native villages" for the purposes of the Alaska Native Claims Settlement Act (ANCSA)) that: "There are lands, including Native allotments and townsites, that are federal lands in Alaska which count as Indian country under federal law. And as a result of that the tribes do have legal authority over those lands, whether they own them or not."

As you know, in 1948 the 80th Congress enacted a definition of the term "Indian country", codified at 18 U.S.C. 1151, that designates three categories of land as "Indian country". Those categories do not include parcels of land in Native villages that have been conveyed into private ownership with restricted titles pursuant to the Alaska Native Townsite Act. For that reason, I have no idea why you would assert that those parcels are "Indian country".

Of equal importance, 18 U.S.C. 1151 defines the three categories of land that are "Indian country" as 1) land within the limits of any Indian reservation", 2) "dependent Indian communities", and 3) "all Indian allotments, the Indian titles to which have not been extinguished . . ." (emphasis added).

Carole Goldberg
November 13, 2012
Page 2

Assuming arguendo that there presently are more than two hundred "federally recognized tribes" in Alaska because in 1993 then Assistant Secretary of the Interior for Indian Affairs Ada Deer decided that there should be, and assuming further arguendo that in 1948 the 80th Congress intended the term "Indian allotments" in 18 U.S.C. 1151 to include within its purview allotments that the Secretary of the Interior has issued to Alaska Natives pursuant to the Alaska Native Allotment Act (which the 80th Congress did not), 18 U.S.C. 1151 states that "Indian allotments" are "Indian country" only if the "Indian titles" to the land that has been allotted have not been extinguished.

But in 1971 Congress did exactly that in section 4(b) of ANCSA, which extinguished "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy" For that reason, I am astounded that a law professor of reputation would suggest as authoritatively as you did in the radio broadcast whose content has engendered this letter that post-ANCSA there is "Indian country" anywhere in Alaska (including, although the subject is too historically and legally convoluted to detail here, on Annette Island).

Whether Congress has intended for there to be "federally recognized tribes" and "Indian country" in Alaska is a question that remains a controversy which has significant policy consequences for the future of Alaska as a cohesive polity of which the Alaska Native community was a part until the early 1980s when the Native sovereignty movement was invented because of comments such as those you made in the story APRN broadcast last evening. For that reason, as the work of the Indian Law and Order Commission proceeds I certainly hope you will attempt to be more attentive to what the law is - rather than what you might like it to be - than you were during your and Commissioner Eid's trip to Alaska.

Sincerely,



Don Mitchell

cc: Michael Geraghty - Alaska Attorney General
Troy Eid - Indian Law and Order Commission



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Law

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November 14, 2012

By Email to eidt@gtlaw.com

Troy A. Eid
Greenberg Traurig, LLP
Tabor Center
1200 17th Street, Suite 2400
Denver, CO 80202

Re: *Indian Law & Order Commission*

Dear Chairman Eid:

I want to thank you and Professor Goldberg again for meeting with Commissioner Masters and me on November 1st to discuss the ongoing work of the Indian Law & Order Commission and your research here in Alaska.

On November 5, a local reporter with KNBA contacted my office for a response to comments you had made during an earlier interview. During that interview, you stated that there is less respect and less cooperation between governments in Alaska than in other states, that the State does not have any grounds for disputing tribal jurisdiction within Alaska, and that it is "absurd" for the State to not respect or honor tribal jurisdiction.

I must say I am disappointed that you have, for all intents and purposes, pre-judged some of the issues that you raised at our meeting. At the time, there appeared to be genuine interest on your part in considering the State's views on this complex subject.

I have learned in over thirty-three years of private practice that, notwithstanding the merits of my clients' claims, there was invariably another side to the story and things were rarely as "absurd" as I might have believed. I am sure your remarks will receive widespread distribution here in Alaska and serve as a catalyst for tribal advocates – and perhaps that was your intention.

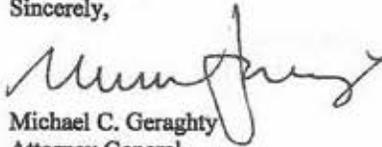
You requested some information regarding recent court rulings in Alaska on the complex subject of tribal court jurisdiction. I've attached a set of materials for your consideration.

Chairman Troy A. Eid
Re: Indian Law & Order Commission

November 14, 2012
Page 2

Thank you for your attention.

Sincerely,



Michael C. Geraghty
Attorney General

Enclosures

cc: Prof. Carole Goldberg w/encls. to cgoldberg@conet.ucla.edu
Joseph Masters, Commissioner, Dept. of Public Safety, SOA, w/o encls.
Kip Knudson, Director, State/Federal Relations, Office of the Governor, SOA, w/o encls.

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November 29, 2012

Carole Goldberg
UCLA School of Law
1242 Law Building
385 Charles E. Young Drive
Los Angeles, California 90095

Dear Carole Goldberg:

Thank you for your letter dated November 20, 2012.

If I understand the content thereof correctly, the statements you made on Alaska public radio regarding "Indian country" in Alaska were correct. First, because the 80th Congress did not intend the term "Indian titles" in 18 U.S.C. 1151(c) to mean "Indian titles", but instead intended the term to mean "the restricted or trust title distinctive to Indian allotments." And second, because the 80th Congress intended the approximately 3,800 house lots that the Secretary of the Interior has conveyed with a restricted title to Alaska Natives pursuant to the Alaska Native Townsite Act to be included within the purview of the term "Indian allotments" in 18 U.S.C. 1151(c).

In support of those inventive interpretations of the intent of the 80th Congress, you cite not a single snippet of legislative history that supports those interpretations. However, since there are no such snippets, that omission is not surprising.

Instead, you direct me to a paragraph in the 2012 edition of Cohen's Handbook of Federal Indian Law. However, in that paragraph the anonymous author thereof makes no mention of - much less does he or she purport to interpret the intent of the 80th Congress embodied in - the phrase "the Indian titles to which have not been extinguished" in 18 U.S.C. 1151(c). Instead, the author first implies that each house lot the Secretary of the Interior has conveyed pursuant to the Alaska Native Townsite Act is a "dependent Indian community" for the purposes of 18 U.S.C. 1151(b) because each lot purportedly is "under the direct superintendence of the Secretary of the Interior." But then in his or her next sentence the author abandons that theory and suggests that townsite lots are "Indian country" because they are "the functional equivalent of Native allotments."

Carole Goldberg
November 29, 2012
Page 2

In addition to the 2012 edition of the Handbook you also direct me to a sentence in the 2012 edition of Alaska Natives and American Laws that baldly asserts that the "plain meaning" of the term "Indian country" (presumably the 18 U.S.C. 1151 definition of that term) "incorporates Native allotments and Native townsites."

Insofar as the authoritative nature of the 2012 edition of the Handbook is concerned, I am incapable of refraining from noting that since you were an executive editor of the 2012 edition it takes considerable chutzpah to cite yourself as your own authority. But more importantly, you also were an editor of the 1982 edition of the Handbook, which at page 766 suggested that the land around each Native village that the Secretary of the Interior has conveyed to village and regional corporations in fee pursuant to the Alaska Native Claims Settlement Act was a "dependent Indian community" and hence 18 U.S.C. 1151(b) "Indian country".

We are aware of how that interpretation of the intent of the 80th Congress embodied in the term "dependent Indian community" turned out.

Finally, a word about the 2012 edition of Alaska Natives and American Laws. Unlike the paragraph in the 2012 edition of the Handbook on which you rely, we know who the author is of the sentence in Alaska Natives and American Laws that you believe is authoritative: my old and good friend David Case, who prior to expatriating to Kona to hoe weeds on the coffee plantation of a mutual friend of ours was for thirty years a leading political ideologue in the Alaska Native sovereignty bar.

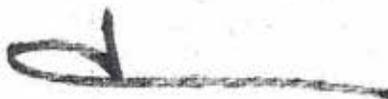
In that regard, it merits mention that, while you rely on the 2012 edition of Alaska Natives and American Laws, at pages 457-458 of the 1984 edition (which David wrote when he was just beginning his career as a founder of the then nascent Alaska Native sovereignty movement) David, like you and the other authors of the 1982 edition of the Handbook, suggested that the land around each Native village that the Secretary of the Interior has conveyed to village and regional corporations in fee pursuant to the Alaska Native Claims Settlement Act was a "dependent Indian community" and hence 18 U.S.C. 1151(b) "Indian country".

Carole Goldberg
November 29, 2012
Page 3

In 1998 when the U.S. Supreme Court issued its decision in Alaska v. Native Village of Venetie Tribal Government - an appeal in which you and all of the other editors of the 1982 edition of the Handbook appeared as amici to assert an interpretation of the intent of the 80th Congress embodied in the term "dependent Indian community" that the Court rejected by a vote of 9 to 0 - I had hoped that the Court's instruction regarding the difference between what the law is and what you and others might want the law to be would have been sufficiently professionally embarrassing to motivate legal intellectuals such as you and David to end your efforts to cloak your commitment to the advancement of the ideology of tribal sovereignty with the veneer of ersatz scholarly analysis.

Regrettably, your comments on Alaska public radio and your letter dated November 20, 2012 are evidence that my optimism in 1998 was misplaced.

Regards,

A handwritten signature in black ink, appearing to read "Don Mitchell". The signature is stylized with a large, sweeping initial "D" and a long horizontal stroke extending to the right.

Don Mitchell

cc: Michael Geraghty - Alaska Attorney General
Troy Eid - Indian Law and Order Commission



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

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February 1, 2013

By Email to eidt@gtlaw.com & 1st Class Mail

Troy Eid
Chairman, Indian Law and Order Commission
Greenberg Traurig, LLP
Tabor Center
1200 17th Street, Suite 2400
Denver, CO 80202



Re: Additional information for the Indian Law and Order Commission
("Commission")

Dear Chairman Eid:

The State of Alaska provides the following comments on some of the complex jurisdictional and policy issues facing the Commission that pertain to Alaska. We trust that this information will prove helpful to the Commission in developing recommendations for the White House and Capitol Hill.

As the Commission develops its findings, conclusions, and recommendations to "help with the greatest challenges to securing equal justice for Native Americans living and working on Indian lands,"¹ we respectfully request that the Commission consider Alaska's uniqueness. Alaska has 229 tribes and only one reservation; Alaska's tribes, with one exception, lack territorial jurisdiction.² Recommendations to address criminal justice issues "on Indian lands," which are intended to address problems endemic to the traditional reservation structure in most states, may conflict with Alaska's history and case law.

¹ Indian Law and Order Commission website,
<http://www.indianlawandordercommission.com> (last visited February 1, 2013).

² The one reservation in Alaska is the Annette Islands Reserve occupied by the Metlakatla Indian Community.

Limited existence of Indian Country in Alaska

18 U.S.C. § 1151 defines “Indian country” as (a) all land within the limits of any Indian reservation, (b) all dependent Indian communities within the borders of the United States, and (c) all Indian allotments, the Indian titles to which have not been extinguished. The term “Indian title” as used in 18 U.S.C. § 1151(c) means aboriginal title.³ Aboriginal title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of the land.⁴ The right to extinguish original Indian title rests exclusively with Congress irrespective of who holds the underlying fee title in the land.⁵ Courts require a showing of clear and specific congressional intent to extinguish Indian title.⁶

Congress made such a clear statement of intent to extinguish Indian title in passing the Alaska Native Claims Settlement Act (ANCSA).⁷ ANCSA authorized the transfer of \$962.5 million and 44 million acres of land in exchange for the extinguishment of aboriginal title and any claims based on aboriginal title.⁸ Claims that Alaska Native allotments or Alaska Native townsites are Indian country are claims based on aboriginal title. Because ANCSA extinguished aboriginal title in Alaska, any claim that Alaska Native allotments or Alaska Native townsites are Indian country is meritless.

During the process of enacting ANCSA, Alaska Natives, represented by the Alaska Federation of Natives, made clear that they “very vehemently” opposed any settlement based on the reservation concept.⁹ This was not surprising, since “there was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other states, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation.”¹⁰ As a result, Alaska Native allotments and Alaska Native townsites were not created from former tribal reservation lands, are not within reservations, and lack any nexus between the land and tribal governance.

³ *Blatchford v. Gonzalez*, 670 P.2d 944, 947-48 (N.M. 1983), *cert. denied*, 464 U.S. 1022 (1984). Some treatises presume that the term “Indian country” merely means land the title to which has not been removed from trust or restricted title. *See, e.g.*, Nell Jessup Newton et al., *Cohen’s Handbook of Federal Indian Law* (2012 ed.). However, no controlling case law has adopted this view.

⁴ *Johnson and Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); *accord United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

⁵ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974).

⁶ *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339; *Tee-Hit Ton Indians v. United States*, 348 U.S. 272, 277 (1955).

⁷ 43 U.S.C. §§ 1603(c), 1605, 1611.

⁸ *Id.*

⁹ *Alaska Native Land Claims: Hearings on S. 2906 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 89 (1968).

¹⁰ *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51 (1962).

Alaska Native allotments were granted under the Alaska Native Allotment Act,¹¹ after Congress determined that the original General Allotment Act¹² did not apply to Alaska.¹³ The Alaska Native Allotment Act authorized the Secretary of the Interior to allot parcels as homesteads to individual Alaska Natives, with the land held in restricted fee status by the allottee rather than in trust by the United States.¹⁴ Because the definition of “Indian country” in 18 U.S.C. § 1151 specifically refers to Indian allotments, but omits any mention of Alaska Native allotments, and federal regulations found in 43 C.F.R. §§ 2530-2533 do not apply to Alaska Native Allotments, it is unlikely that Congress meant for Alaska Native Allotments to be considered “Indian country.”¹⁵

Similarly, the 1926 Alaska Native Townsite Act¹⁶ authorized the conveyance of townsite lots to individual Alaska Natives by way of restricted deeds, with the United States retaining neither legal nor equitable title. However, as the United States District Court for Alaska has indicated, the restricted status of Alaska Native townsite deeds does not automatically compel the conclusion that the townsites are “Indian country” under 18 U.S.C § 1151.¹⁷

Indian allotments in the Lower 48 states were carved from reservations, and the purpose of laws extending criminal jurisdiction on allotments to tribes or to the United States for the benefit of tribes was to prevent “checkerboard” pockets of state jurisdiction over former tribal lands.¹⁸ In stark contrast, a Congressional decision to extend tribal criminal jurisdiction over Alaska Native allotments would “create a checkerboard of small enclaves” of dual tribal and state jurisdiction where otherwise comprehensive state criminal jurisdiction would apply. In fact, the checkerboard analogy does not even fully capture the scattered geography of Alaska Native Allotments in Alaska, which by and large are individual hunting or fishing locations. Alaska tribes, with the exception of Metlakatla, do not have criminal jurisdiction over the lands near the Native Allotments such that an extension of tribal criminal jurisdiction to the Native Allotments would fill in the blanks. Accordingly, the concept of creating tribal criminal jurisdiction on these remote parcels does not make sense in the same way that it does on Indian allotments that are located within a reservation.¹⁹

¹¹ Act of May 17, 1906, 34 Stat. 197.

¹² Act of Feb. 8, 1887, 24 Stat. 288.

¹³ See *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976).

¹⁴ *Jones v. State*, 936 P.2d 1263, 1265 (Alaska App. 1997).

¹⁵ *Id.*

¹⁶ Act of May 25, 1926, 44 Stat. 629.

¹⁷ *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 876-78 (D. Alaska 1979) (noting that “[b]oth the courts and Congress have long been troubled in applying the term “Indian country” to Alaska.”).

¹⁸ See generally, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976).

¹⁹ See *Jones*, 936 P.2d at 1267.

The State therefore strongly objects to any recommendation by the Commission that Alaska Native allotments and town sites be considered Indian country for the purposes of expanding tribal jurisdiction. Such a recommendation would undermine the comprehensive settlement achieved by the passage of ANCSA.

State recognition of tribal jurisdiction

Under federal case law, which largely controls tribal jurisdiction issues,²⁰ tribal jurisdiction depends on the location of events (on or off-reservation), the parties affected (members or nonmembers), and the specific topic (domestic relations, membership, criminal law, etc.). Given this backdrop and Alaska's unique circumstances, the scope of tribal court jurisdiction in Alaska is a complex issue that does not easily lend itself to generalizations.

Despite the uncertainties inherent in this area, the State recognizes the jurisdiction of Alaska tribes in numerous contexts. For example, the State recognizes the authority of the tribes to determine tribal membership.²¹ The State recognizes a tribe's inherent authority over its members in cases of child custody disputes and child protection cases where both parents and the child are all tribal members or eligible for membership.²² In general, under these circumstances the dispute falls within the tribe's inherent power "to regulate domestic relations among members, and determine tribal membership."²³ The State has also recognized tribes' authority to initiate adoption cases where the child is a tribal member or eligible for membership.²⁴

However, while the State recognizes tribal jurisdiction in many contexts involving internal domestic relations in Alaska, at least one major legal issue remains unanswered—the scope of tribal jurisdiction over nonmembers.²⁵ The State's position²⁶ that tribes lack subject

²⁰ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) ("Indian law is uniquely federal in nature"); see also *John v. Baker*, 982 P.2d 738, 760 (Alaska 1999) ("we base our decision in this case on the decisions of Congress and the Supreme Court").

²¹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (holding tribes have the power to make their own substantive law in internal matters such as tribal membership and to enforce that law in their own forums); see also *Roff v. Burney*, 168 U.S. 218, 223 (1897).

²² See *Native Village of Tanana*, 249 P.3d 734, 751 (Alaska 2011) (holding that tribes have "concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country," but reserving issue about tribal jurisdiction over nonmember parents).

²³ *Montana v. United States*, 450 U.S. 544, 564-65 (1981).

²⁴ See *Kaltag Tribal Council v. Jackson*, Order, 3:06-cv-00211-TMB, Order (D. Alaska Feb. 22, 2001), *aff'd*, 344 Fed.Appx. 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010).

²⁵ *Native Village of Tanana*, 249 P.3d at 751-52. In *Tanana*, the Alaska Supreme Court highlighted that it was not making any decision about "the extent of tribal jurisdiction over non-member parents of Indian children." *Id.* at 752.

matter jurisdiction²⁷ over nonmembers in this context is firmly supported by Indian law jurisprudence.²⁸

The general absence of reservation land in Alaska is also a key factor as to the scope of tribal civil jurisdiction in Alaska. “[W]ith only ‘one minor exception, [the United States Supreme Court] ha[s] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.’”²⁹ In 2001, the United States Supreme Court explained that *Montana* was a rejection of “tribal authority to regulate nonmembers’ activities on land over which the tribe could not assert a landowner’s right to occupy and exclude,”³⁰ and, “the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.”³¹

In sum, Alaska offers a jurisdictional landscape quite unlike that found in the Lower 48, largely because of the lack of Indian country and the Alaska-specific jurisprudence that has evolved since the passage of ANCSA. Therefore, before the Commission recommends that Alaska Natives be offered the same programs designed for Native Americans on reservations in the Lower 48, where land-based jurisdiction is undisputed, the Commission should consider carefully the sweeping consequences of offering these programs outside of Indian country.

²⁶ The State is currently litigating the issue of the extent of tribal jurisdiction over nonmembers in a pending Alaska Supreme Court case, *Simmonds v. Parks*, Supreme Court No. S-14103.

²⁷ Tribal jurisdiction over nonmembers is a question of subject matter jurisdiction, not personal jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 368 n.8 (2001).

²⁸ “[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are ‘presumptively invalid.’” *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001)). “Tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two *Montana* exceptions (narrowly construed) applies.” William C. Canby, *American Indian Law in a Nutshell* 91 (5th ed. 2009); see also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 814-15 (1996) (“Tribal powers over nonmembers are held to be destroyed whenever Congress has broadly opened land to non-Indians, regardless of its purpose.”). The first *Montana* exception allows tribal jurisdiction over a nonmember who enters into “consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.” Under the second exception, a tribe may have jurisdiction where nonmember conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 565-66.

²⁹ *Plains Commerce Bank*, 554 U.S. at 333 (quoting *Hicks*, 533 U.S. at 360).

³⁰ *Hicks*, 533 U.S. at 359 (internal citations omitted).

³¹ *Id.* at 360; see also *Atkinson Trading*, 532 U.S. at 653 (“An Indian tribe’s sovereign power to tax . . . reaches no further than tribal land.”).

Alaska tribes lack off-reservation criminal jurisdiction

While, as discussed, the State does recognize tribal civil authority off-reservation in certain scenarios, the State's position is that tribes do not possess any off-reservation criminal jurisdiction—either over members *or* nonmembers, as discussed below. Despite the lack of tribal criminal jurisdiction in Alaska, the State fully supports the Commission's goal of addressing violent crime and other chronic criminal issues affecting Native populations. On the other hand, the State strongly objects to any attempts to expand tribal criminal jurisdiction off reservation. Any such expansion will create more problems than it will solve.

First, recommending that tribal criminal jurisdiction be expanded outside of Indian country would mark a fundamental shift in Indian law jurisprudence that should not be taken lightly. "The jurisdiction of a tribe is generally confined to crimes committed within the geographical limits of its reservation and, presumably, any of its dependent Indian communities."³² The geographical location where the crime occurred is one of the key factors that determines which sovereign has jurisdiction over the crime.³³ For example, in general, an arrest must be made within the arresting authority's territorial jurisdiction in order to be valid.³⁴ Land status is particularly important because Tribal authority "*centers on the land held by the tribe and on tribal members within the reservation.*"³⁵

Under Public Law 280 ("P.L. 280"), the State's criminal authority extends to all Alaska territory, including Indian country, and federal criminal jurisdiction is mostly or entirely missing.³⁶ Alaska, a mandatory P.L. 280 state, has exclusive jurisdiction over offenses covered

³² William C. Canby, *American Indian Law in a Nutshell* 192 (5th ed. 2009); *see also*, *State v. Eriksen*, 259 P.3d 1079, 1084 (Wash. 2011) (holding that tribe's inherent sovereign powers do not include authority to stop and detain parties outside tribe's territorial jurisdiction for traffic infraction).

³³ *See Application of De Marrias*, 91 N.W.2d 480, 481 (S.D. 1958) (describing how "jurisdiction in a particular case is dependent upon the following variable factors: (1) locus of the crime, (2) status of the Indian, and (3) nature or degree of the crime.")

³⁴ Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* 73 (2012 ed.).

³⁵ *Plains Commerce*, 554 U.S. at 327 (emphasis added); *Atkinson Trading*, 532 U.S. at 653 ("An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land."); *id.* at 655 ("territorial restriction upon tribal power"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("right of *reservation* Indians to make their own laws and be ruled by them") (emphasis added).

³⁶ Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162). PL 280 specifically clarified that the Metlakatla Indian Community still enjoyed concurrent jurisdiction on its reservation, stating that it "may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended." 18 U.S.C. § 1162.

by the Indian Country Crimes Act³⁷ and the Indian Major Crimes Act³⁸ (once under the jurisdiction of the federal government).³⁹

Federal law also limits tribal criminal jurisdiction in several significant ways: for example, a tribe's criminal jurisdiction does not extend to non-Indians, even if the non-Indian commits a crime in Indian country.⁴⁰ Moreover, the Indian Civil Rights Act ("ICRA") provides limits on the maximum penalties that tribal courts can impose.⁴¹ In the Tribal Law and Order Act of 2010, Congress raised these limits to three years' imprisonment or a fine of \$15,000 for any one offense (if certain other conditions are met), and it prohibited tribal courts from imposing a total criminal punishment greater than imprisonment for nine years.⁴²

The Commission should decline to issue recommendations that would encourage lawmakers to completely disregard this existing legal framework by creating administrative spheres of jurisdiction that approximate Indian country in Alaska. Given ANCSA's extinguishment of Indian title, a backdoor attempt like this to redefine "Indian country" to include Alaska should be avoided.

In addition, empowering over two hundred separate sovereign entities with criminal jurisdiction would have serious consequences both for the State and its citizens. Such a change

³⁷ 18 U.S.C. § 1151.

³⁸ Act of Mar. 3, 1885, §9. 23 Stat.362 (codified as amended at 18 U.S.C. §§ 1153, 3242). The Major Crimes Act provides for federal jurisdiction over a list of major crimes committed by Indians in Indian country (e.g. felony sexual abuse, incest, rape, murder, manslaughter, kidnapping, maiming, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, felony child abuse or neglect, assault against an individual who has not attained the age of 16 years, arson, burglary, and robbery). 18 U.S.C. § 1153(a).

³⁹ Pub. L. No. 91-523, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(c)).

⁴⁰ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203, n.14 (1978) (holding tribe lacked criminal jurisdiction over offenses committed by non-Indians within reservation's borders). However, note that the Supreme Court has clarified that tribes can prosecute non-member *Indians* for crimes committed on a reservation. See *United States v. Lara*, 541 U.S. 193, 198-99 (2004) (holding Congress had power to enlarge tribes' powers of self-government by statute to include inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, including nonmembers.).

⁴¹ 25 U.S.C. § 1302(7); see *Oliphant*, 435 U.S. at 203 n.14 (question whether federal government has exclusive jurisdiction over major crimes "was mooted for all practical purposes by the passage of [ICRA] which limits the punishment that can be imposed by Indian tribal courts").

⁴² 25 U.S.C.A. § 1302(a). Metlakatla Indian Community's criminal code does not exercise the maximum allowable authority and instead cedes jurisdiction to the State over most major crimes, and none of the tribal criminal offenses are punishable by more than 1 year of imprisonment. See Law & Order Code of the Metlakatla Indian Community, Title One (2011).

would create a confusing patchwork quilt of jurisdiction,⁴³ undermine the clarity of the current system, and complicate the State's ability to police its own territory. Conflicts will arise when a tribe seeks state recognition or enforcement of a criminal order that conflicts with Alaska law, such as a tribal court banishment order issued pursuant to tribal law. There is also currently no double jeopardy prohibition in Alaska law which would prevent the State from re-trying an offender whose crime has been adjudicated in tribal court. Without years of advance planning and coordination with the State, significant issues are also likely to arise given that many of Alaska's 228 off-reservation tribes currently lack criminal justice infrastructure such as written codes, courtrooms or jails.

Many of the costs of suddenly empowering over two hundred separate criminal jurisdictions will ultimately be borne by the individuals subjected to tribal jurisdiction. In the event that individuals experience violations of their state and federal constitutional rights in tribal court, they would likely lack a remedy outside the tribal context.⁴⁴ Furthermore, unlike on reservation land in the lower 48, where signs and borders make it clear that one has entered tribal territory, individuals would have no clear signal that their actions on a particular piece of land or in a particular Alaska town will be subject to tribal jurisdiction. Accordingly, individuals would be subjected to tribal criminal prosecution and significantly different due process standards without any notice or consent.⁴⁵ In addition, while some villages are mostly comprised of Alaska Natives, many villages have large non-Native populations as well. The result would be to create a community where offenders receive different treatment of their criminal offenses⁴⁶ depending on tribal membership status, which correlates to the individual's race.

In sum, "[e]fforts at . . . tribal self-government are encouraged, but not at the expense of the states in which they reside and in disregard of those laws that protect both Indian and non-Indian citizens."⁴⁷ The State requests that the Commission refrain from recommending that

⁴³ See *Jones v. State*, 936 P.2d at 1267.

⁴⁴ ICRA violations by a tribal court cannot be adjudicated in the federal courts: plaintiffs must seek to vindicate ICRA rights in tribal court. The one exception is for habeas corpus claims. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

⁴⁵ Tribes are not bound by the same due process standards as the state; in particular, criminal defendants have no *Miranda* rights and no right to appointed counsel for crimes with a total term of imprisonment of less than one year. See 25 U.S.C. §§ 1301-1303.

⁴⁶ One frequently repeated concern in Alaska's villages is that alcohol-related and domestic violence-related convictions result in state criminal records that can hinder employment prospects. It would not be unreasonable to expect that a tribal criminal system would avoid criminal convictions and result in tribal offenders receiving much less serious sanctions than they would receive under Alaska law, creating a two-tiered justice system in the state.

⁴⁷ *State of Oklahoma ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 91 (OK 1986).

policies drafted at the national level to address criminal justice issues “on Indian lands,” which are targeted at the traditional reservation structure in most states, be applied to Alaska.

Cooperation between the State and tribal governments

We would also like to take this opportunity to describe some of the most significant examples of cooperation between the State and tribal governments in Alaska. As partners, the State and its tribes may not always agree on every point, particularly regarding sovereignty issues: however, we have jointly made significant strides at achieving our shared goal of creating a better future for Alaskans.

To point out just some of the initiatives the State has recently undertaken in cooperation with tribes:

- **Public Safety and the Department of Corrections**
 - The Department of Corrections has made concerted efforts over the years to develop a strong and positive relationship with the Native community in Alaska. The State has contributed significant funding for training, housing, and pay raises for Village Public Safety Officers (“VPSOs”) that serve the rural communities where many tribes are located. In Alaska, under AS 18.65.670 and its accompanying regulations, VPSOs are hired by regional native corporations but trained by the State and supervised by the Alaska State Troopers. They assist local villages in the protection of life and property. These officers attend public safety training at the state police academy in Sitka, and they enforce state law.
 - The State created new trooper posts in Emmonak and Selawik, and increased VPSO oversight by adding three support troopers for Bethel, Fairbanks, and Kotzebue. The cost of establishing and operating those additional posts since 2009 is approximately \$2.1 million. The number of filled VPSO positions doubled from 47 in 2008 to 96 in January of 2012. Five rural communities also received low interest loans for VPSO housing.
 - Governor Parnell has put forward the “Choose Respect” initiative to fight the high levels of domestic violence and substance abuse in Alaska, including the predominantly Native communities. The Choose Respect initiative includes programs specifically designed to reach Alaska Native communities and people in culturally relevant ways.
 - The Drug Abuse Resistance Education (D.A.R.E.) program trains police officers and VPSOs across Alaska to teach a 10-week drug abuse resistance program to elementary, middle school, and high school students in their communities. D.A.R.E. Officers teach children to make healthy decisions, and are viewed as role models in their communities. As part of the D.A.R.E. program, the Department of Public Safety and the Northwest Arctic Borough School District teamed up to provide Safety and Security assessment to all 10 village schools surrounding Kotzebue.

- In 2010, the Iḷisagvik Tribal College in Barrow, Alaska contacted the Alaska State Troopers requesting the possible establishment of a Public Safety summer camp for their regional youth. In 2011, the Alaska State Troopers, U.S. Marshal's Service, State Crime Lab, and State Fire Service developed the first Alaska Youth Academy. They initiated a trial program focusing on at-risk Native Alaskan young adults in an effort to steer them away from alcoholism, drug abuse and domestic violence plaguing their communities and towards a crime-free life of public service. The Barrow camp was very successful and the College invited the group of instructors back the following year. The agencies felt the academy concept was a valuable tool to approach the problem of finding qualified applicants for the many law enforcement and public safety jobs available in Alaska. In 2012, two camps were established, one in Bethel and one in Barrow. The camps were well attended, and the State hopes to expand the program.
- The State is working on several initiatives to improve the justice system in rural Alaska. For example, due to overcrowding and court-enforced population capacities, the Department of Corrections had to contract with private prisons in the Lower 48 to house overflow prisoners starting in the mid-1990s. The Department of Corrections currently has about 1100 prisoners at a prison facility in Hudson, Colorado. A new 1500-bed prison, Goose Creek Correctional Center, was recently completed near Pt. MacKenzie, and the Department of Corrections is in the process of making it operational. All prisoners at the Colorado facility are expected to be back at Alaska facilities by the fall of 2013. Keeping the prison population local will help facilitate Alaska Native prisoner access to their families and Native elders, and their reintroduction into their communities.
- One of the largest events coordinated by the Department of Corrections is the potlatch at the Hudson Correctional Center in Colorado. This event allows inmates to receive mentoring from Alaska Native community leaders, participate in cultural activities (such as traditional dancing and preparation of the meal), and eat traditional foods. This event has become extremely important to those who participate and offers the inmates an opportunity to reconnect with their culture.
- The Department of Corrections has worked with Tanana Chiefs Conference in Fairbanks to establish video visitation which gives inmates the opportunity to connect with family members and elders in their communities.
- The Department of Corrections has participated in roundtable-type discussions with Native leaders in the Northern regions of the state for several years and is working to set up similar meetings with various other Alaska Native groups. These productive and positive meetings have focused efforts on ensuring more effective reentry into their traditional communities for our Alaska Native inmates. In addition to these roundtable meetings, the Department of Corrections has issued letters to various Alaska Native groups throughout the state to request guidance and assistance in better preparing our Alaska Native inmates to reenter our communities.

- The Department of Corrections has also hired three additional probation officers, stationed in Anchorage, Fairbanks, and Bethel, whose focus is the supervision of rural/remote probationers and parolees and assisting them with reintegration into their communities.
- Additionally, the Department of Corrections offers many reentry and rehabilitation programs (both inside and outside of our facilities), which help prepare inmates to become productive community members. Each of these programs is administered with an eye towards cultural sensitivity and tailored to meet the unique needs of each one of our inmates.

- **Department of Health and Social Services**

- The Department of Health & Social Services meets with the Alaska Native Health Board twice a year in a forum called the MEGA meeting. The purpose of the meeting is for the Department of Health & Social Services Division Directors and Tribal leaders to get together to discuss federal and state legislative priorities and initiatives. The MEGA meeting designated a subgroup, the State/Tribal Medicaid Task Force, to focus specifically on programmatic and financial issues. The Medicaid Task Force is an effective alliance in which the State and tribes collaborate to resolve issues and discuss initiatives. The success of these quarterly meetings is due to good working relationships built on trust and mutual interest. Attendees commonly include tribal chief financial officers, finance and operations staff, and State Medicaid operations and policy staff. These meetings focus on the Medicaid funding that is essential to the health care of Alaska Natives and the tribal health care system. The State Medicaid staff also use these meetings to supplement the formal written tribal consultation process for Medicaid State Plan Amendments through informal briefings and discussions on upcoming amendments.
- The Indian Child Welfare Act liaison help desk at the Office of Children's Services is staffed with employees of tribes or native organizations who serve as invaluable resources for state social workers conducting relative searches.⁴⁸
- The Office of Children's Services participates in joint State/tribal training to educate staff on the history of Alaska Natives and tribal cultural practices.
- The Office of Children's Services has undertaken a pilot program with Tanana Chiefs Conference to develop Alaska's first pass-through agreement for federal IV-E maintenance funds to pay for foster care in tribally licensed foster homes.

⁴⁸ <http://hss.state.ak.us/ocs/ICWA/helpdesk.htm> (last visited February 1, 2013). Scholars studying this issue nationwide have recognized the Office of Children's Services for its innovative approach to improving the search for ICWA preferred placements. See Aaron F. Arnold, Sarah Cumbie Reckess, Robert V. Wolf, *State and Tribal Courts: Strategies for Bridging the Divide*, 1, 19 (2011), available at <http://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf>.

- The State requests the participation of tribal representatives in the recruitment and hiring process for key Office of Children's Services leadership positions.

- **Division of Juvenile Justice**

- The State works with tribes on programs funded through federal grants related to delinquency prevention, mentoring, life skills and family involvement, youth courts and community panels, and enforcing underage drinking laws.
- The State conducts regional "mini-conferences" in collaboration with Alaska Native partners to discuss juvenile justice and community issues
- The Department of Health and Social Services has established a "Bring the Kids Home" Project. This Project was created to return children being served in out-of-state facilities, including children from tribal communities, back to in-state residential or community-based care. The Project intends to reinvest funding now going to out-of-state care to in-state services and develop the capacity to serve children closer to home.
- Three times a year, the Tribal/State Collaboration Group meets to evaluate the Alaska child welfare delivery system; to enhance or change services to better fit the needs of families in Alaskan communities; to advocate for a continuum of services that are culturally relevant, coordinated, integrated and family focused; to maximize the programs and services for children supported by federal dollars in Alaska; to increase positive communication; and to generally develop effective collaboration between Tribes and Office of Children's Services' staff.

- **Division of Public Assistance**

- Twelve Tribal Organizations receive federal block grants to provide home heating assistance to low-income households. In State fiscal year 2012, over \$19 million in State general funds augmented the federal block grants and allowed 9 of these organizations to additionally provide Alaska Affordable Heating Assistance Program benefits to eligible households. These tribal organizations helped keep over 7,000 households in 75 largely rural communities warm last winter. These tribally-administered benefits go to all community members.
- The State provides grants to 9 tribal health and regional non-profit organizations through the Alaska's Women Infants & Children program. These grants allow the tribal organizations to operate WIC clinics that help ensure women, infants and children in their communities receive supplemental nutrition services and benefits.
- Temporary Assistance to Needy Families (TANF) - In State fiscal year 2012, the State provided \$13M to 7 Alaska Native Regional non-profit organizations to supplement their TANF block grant. The money helps pay cash assistance benefits and supportive services for families participating in work activities.

- The State has provided \$336M over three years to tribal medical facilities including Maniilaq Elder Care, the Wrangell Nursing Home, Norton Sound Long-term Care Facility, Copper River Health Center, Dena'ina Health Center, and many others.
- The State has contributed over \$1.6M since 2011 to RurAL CAP, a private, statewide, nonprofit organization with tribal partners that works to improve the quality of life for low-income and rural Alaskans.

- **Department of Labor and Wage Determinations**

- The Department of Labor & Workforce Development collaborates with the Cook Inlet Tribal Council to house a state “affiliated” job center (“Alaska’s People Career Development Center”) at the Tribal Council.
- Alaska’s Institute of Technology has partnered with the Chenega Corporation to provide student career experiences and post-secondary vocational technical training at both the Institute and at Chenega schools and villages. The program was supported by tax credits to Alaska’s Institute of Technology – \$100,000 each year in 2010, 2011 and 2012. Alaska’s Institute of Technology partners with CITC Healthcare and Nursing to offer a Healthcare Training program which provides training and education opportunities to become a Certified Nursing Assistant, Licensed Practical Nurse or Registered Nurse. The program also provides training opportunities in medical billing and coding.
- The Department of Labor & Workforce Development shares and coordinates resources with the Aleutian Pribilof Islands Association, the federally recognized tribal organization of the Aleut people in Alaska. The Association provides a broad spectrum of services to tribal communities throughout the region including health, education, social, psychological, employment, vocational training, and public safety services.
- The Alaska Workforce Investment Board entered into a Memorandum of Understanding with Alaska Native Sec. 166 grantees to support training and employment activities.
- The State entered into a Memorandum of Understanding with the Ketchikan Indian Community to further the Alaska Career Ready Program.

- **Education**

- The State has sponsored the funding for new schools, school renovations, major school maintenance projects, and school energy costs in tribal communities. Since taking office, Governor Parnell has created the Rural School Construction Fund and funded construction of rural schools. For example, \$33 million in the Governor’s FY14 budget is slated for funding construction of the Nightmute School and \$13 million for construction of the Quinhagak school. Over the four year period (FY11 – FY14) construction funding totals \$297,423,193 in new schools and renovations for rural, primarily Alaska Native, villages. This

represents an average of \$75 million a year to support rural, Alaska Native students. There is also \$25 million in the Governor's FY14 budget to help ALL school districts cover increased energy costs.

- The Alaska Native Language Preservation and Advisory Council was established in 2012 (through Senate Bill 130) to preserve, restore, and revitalize Alaska Native languages, and to advise both the Governor and the Legislature (through reports issued every other year) on programs, policies, and projects to accomplish these purposes. The Council includes five voting members who are professional language experts and who represent diverse regions of the state. The first report is due on or before July 1, 2014.

- **Alaska Energy Authority**

- **Renewable Energy Funding:** The Alaska Energy Authority estimates that by the end of 2013, 44 Renewable Energy Fund projects will be complete and saving more than ten million gallons of diesel fuel or equivalent annually. Throughout rural Alaska, the Alaska Energy Authority has completed 71 of 107 Bulk Fuel Upgrade projects and 51 of 110 Rural Power System Upgrade projects. Since 2000, in partnership with the Denali Commission (a federal-state organization of which Alaska Federation of Natives President Julie Kitka is a Commissioner), the Alaska Energy Authority has completed \$304 million in Rural Bulk Fuel and Rural Power System Upgrade projects.
- **Weatherization Funding:** Many Alaskan villages benefit from the Energy Efficiency and Conservation program, which focuses on achieving Alaska's goal of a 15 percent increase in energy efficiency through whole-building energy audits; energy efficiency measures in public buildings and facilities, commercial buildings and small industrial buildings; and through public education. Current initiatives include Energy Efficiency and Conservation Block Grants, the Village Energy Efficiency Program, whole village retrofits, industrial energy audits, a statewide public education and outreach program, and assistance with regional energy efficiency planning and implementation.
- **Power Cost Equalization:** The goal is to provide economic assistance to customers in rural areas of Alaska where the kilowatt-hour charge for electricity can be three to five times higher than the charge in more urban areas of the state. Power Cost Equalization pays a portion of approximately 30% of all kilowatt-hours sold by the participating utilities. This program fundamentally improves Alaska's standard of living by helping small rural areas maintain the availability of communications and the operation of basic infrastructure and systems, including water and sewer, incinerators, heat and light. Power Cost Equalization is a core element underlying the financial viability of centralized power generation in rural communities where many tribes are located.

- The Governor is a strong supporter of major maintenance capital improvement projects in rural Alaska. The major maintenance grant funding over the last four years totaled \$90,883, 954. This funding provided for 48 projects across Alaska, many in rural, primarily Alaska Native, villages. The rural projects included roof repairs and replacement, water service and boiler replacement, school maintenance, electrical repairs, soil remediation, generator and fuel tank replacement, sprinkler systems upgrades, and mechanical repairs.

Conclusion

The State agrees that additional funding is necessary to improve tribal courts and justice in rural Alaska. The State fully supports initiatives that provide assistance and training to tribes, and also supports active tribal participation in grant programs and advisory committees. However, the State does not believe that expanding tribal jurisdiction is necessary in order to achieve the positive outcomes sought by the Commission. State, tribal, regional corporation, and nonprofit entities are all diligently working to improve the justice system and public safety in tribal communities. Proffering solutions that fundamentally change the nature of ANCSA and the law regarding tribal jurisdiction in Alaska will only create uncertainty and give rise to expensive litigation that will distract from the work that needs to be done. The existing tribal-State initiatives are well positioned to improve the lives of tribal member residents, and their capacity and reach will continue to expand if funding for these programs remains intact.

Thank you for taking the time to review the State's input on the complex matters under review by the Commission. If you have any questions, please do not hesitate to ask.

Sincerely,



Michael C. Geraghty
Attorney General

cc: Wilson Justin, Alaska Tribal Advisory Committee Member to the Commission
Georgianna Lincoln, Alaska Tribal Advisory Committee Member to the Commission
Senator Mark Begich
Senator Lisa Murkowski
Representative Don Young