



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

RC 020

**Department of Law**

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Kathy Cline, Acting Regional Director  
Bureau of Indian Affairs  
Alaska Region  
3601 C. Street, Ste. 1100  
Anchorage, Alaska 99503-5947

*Re: State of Alaska's Comments on the Craig Tribal Association's Trust Land  
Acquisition Application*

Dear Acting Director Cline:

Thank you for the opportunity to offer comments on the application by the Craig Tribal Association (the Tribe) to place land into trust. Because this application is the first of its kind in Alaska, we ask that the Bureau of Indian Affairs (BIA) proceed thoughtfully with an eye to special circumstances that may exist here.<sup>1</sup> Also, we hope that BIA can use this as an opportunity to clarify its interpretation of the law governing a variety of issues.

Each application to place land into trust is unique and may raise different concerns for the State and other third parties. The parcel at issue here is a 1.08-acre lot in the downtown area of the City of Craig that includes a building and parking area currently housing the Tribe's administration offices, the Craig Tribal Association Hall, a local head

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<sup>1</sup> Alaska and Alaska Natives have a unique history. For example, in 1971 the Alaska Native Claims Settlement Act (ANCSA) settled all Alaska Native land claims in the State, conveying 44 million acres of land and \$926.5 million to Alaska Native village and regional corporations. 43 U.S.C. §§ 1603, 1605-1607, 1611-1613, 1618. While only the Annette Island Reserve, set aside for the Metlakatla Indians, remained as a reservation under tribal jurisdiction, Alaska Natives are shareholders in their respective land-owning, for-profit corporations.

start preschool program, and commercial space.<sup>2</sup> The Craig Tribal Association does not currently contemplate any change in land use. Based on our understanding of the law, representations in the application, and an expectation of future opportunities to discuss issues as they arise, the State does not object to placing this particular parcel into trust.

**A. Under Public Law 280, the State and City will continue to exercise criminal and some regulatory jurisdiction over the parcel.**

We understand that, if taken in trust, the Craig Tribal Association could choose to assume some limited law enforcement or regulatory authority on the parcel. But this authority would not be exclusive. Rather, as a Public Law 280 state, the State of Alaska and the City will continue to hold criminal and civil prohibitory and adjudicatory authority.<sup>3</sup> To ensure all parties are on the same page—the Tribe, the City, the State, and the federal government—we note a few potential jurisdictional issues here and seek confirmation on these issues from the BIA. But we also expect that the Tribe and the State will be able to work together successfully to resolve any challenges as they arise.

Should the Tribe choose to exercise law enforcement authority, it is important to provide notice of tribal jurisdiction to the public and the State. First, tribal authority

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<sup>2</sup> Craig is a first-class city under the laws of Alaska. The 2010 census reflected a population of 1,201. The property description is Lot Q-3, subdivision of the unsubdivided remainder of Tract Q, U.S. Survey 2327, according to the plat filed December 7, 1988, as plat No. 88-39, Ketchikan Recording District, State of Alaska, containing 1.08 acres.

<sup>3</sup> 18 U.S.C. § 1162; 28 U.S.C. § 1360. Currently, there is an Alaska State Trooper outpost on Prince of Wales Island and the City of Craig has a police department. Given the law enforcement services already available, it is unlikely that trust acquisition would impact public safety.

operates in a different constitutional framework.<sup>4</sup> The differences could be fairly concrete for individuals subject to tribal jurisdiction; for example, defendants in tribal misdemeanor prosecutions do not have a guaranteed right to counsel.<sup>5</sup> Second, tribal authorities can establish and enforce laws that are different than elsewhere in the state. For example, tribes could criminalize possession of alcohol or small amounts of marijuana—conduct that is otherwise permissible under state or local law. Finally, tribes might assert authority to briefly detain, investigate, and exclude non-tribal members from the parcel.<sup>6</sup> Should the Craig Tribal Association choose to exercise law enforcement authority, we believe it is in the best interest of the public and the Tribe to avoid unnecessary confusion and request that the property be clearly marked and the tribal laws explained to provide appropriate public notice. This is especially important for this parcel because it includes commercial space open to the public.

State authority on trust land clearly extends to alcohol regulation, including licensing alcohol businesses.<sup>7</sup> Although the Tribe may have concurrent authority to regulate alcohol, it is our understanding that the Tribe cannot disregard state law. Thus, should alcohol businesses open on the parcel, such activity would be conducted within

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<sup>4</sup> The Craig Tribal Association's prosecuting authority would generally be limited to offenses by Alaska Natives or Native Americans—though they do not need to be members of the Craig Tribal Association itself. 25 U.S.C. § 1301(2); *see also United States v. Lara*, 541 U.S. 193, 210 (2004) (upholding Congress's authorization of tribes to exercise inherent authority to prosecute people who are not members of any tribe). *But see* 25 U.S.C. § 1304 (allowing tribes to enforce special domestic violence crimes in Indian country against non-Indians). Prosecutions for tribal law crimes must comply with the Indian Civil Rights Act, but not the federal or state constitutions. *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005) (“[T]he constitution does not directly apply to the conduct of tribal governments . . .”). However, the Indian Civil Rights Act does incorporate important elements of the Bill of Rights, including the 1st, 4th, 5th, 6th, 8th, and 14th amendments. 25 U.S.C. § 1302.

<sup>5</sup> 25 U.S.C. § 1302.

<sup>6</sup> *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) (“Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers.”).

<sup>7</sup> 18 U.S.C. § 1161; *Rice v. Rehner*, 463 U.S. 713, 726 (1983); *see* AS 04.11.010(a) (requiring licenses for sellers); AS 04.11.020 (setting out exceptions for sales made under foreclosure, bankruptcy, or board or court order and for sales at certain gatherings).

the strictures of state law, in addition to any requirements the Tribe may impose that do not conflict with state regulation.

We understand the rules governing marijuana are less clear. While the State arguably can regulate marijuana on the parcel similar to alcohol, marijuana remains criminalized under the federal Controlled Substances Act, including within Indian country.<sup>8</sup> The federal government has outlined enforcement priorities for marijuana and explained that threats to those priorities can be prevented by a “strong and effective state regulatory system,” including measures to prevent diversion outside of the regulated system and to create a tightly regulated system for tracking sales.<sup>9</sup> Still, the law surrounding tribal marijuana businesses on trust parcels, and in Public Law 280 states in particular, remains undeveloped.<sup>10</sup> If BIA were to allow marijuana businesses to operate on a trust parcel, we assume the business must operate within the state’s regulatory framework (and accept state enforcement jurisdiction) but the Tribe may impose additional requirements that do not conflict with state regulation.

While the State will maintain authority to implement criminal and prohibitory laws, the State’s authority might not encompass entire programs as they currently operate. As an example of the State’s broad regulatory programs, the State’s environmental laws address hazardous waste reporting and cleanup, natural resource

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<sup>8</sup> See 21 U.S.C. § 812, Schedule I(c)(10), (17); 21 U.S.C. §§ 841-844.

<sup>9</sup> Federal enforcement priorities include preventing distribution to minors, revenue to criminal enterprises, diversion to states where marijuana is illegal, and marijuana possession or use on federal property. See U.S. Dep’t of Justice, James M. Cole, *Guidance on Marijuana Enforcement* (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; U.S. Dep’t of Justice, Monty Wilkinson, *Policy Statement Regarding Marijuana Issues in Indian Country* (Oct. 28, 2014), <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.

<sup>10</sup> Consistent with federal guidance, when the State legalized marijuana sales, it established a robust regulatory framework to prevent sales to minors, to prevent engagement by criminal enterprises, and to inform and protect consumers. AS 17.38.010. State regulatory requirements include licensing, testing, and taxing. See AS 17.38.010-.900; AS 43.61.010, .020, .030. Selling marijuana outside of the state regulatory system remains a crime under state law. AS 11.71.050(a); see also AS 17.38.020(3); AS 17.38.070(a).



damages to public resources such as groundwater, water pollution discharge, air pollution, solid waste, safe drinking water, and food safety. Existing activity on the property holds some potential for environmental or public health hazards (such as fuel leaks or stormwater runoff). Future uses of the property may present different, more significant challenges. Absence of appropriate environmental controls can pose risks for neighboring properties, particularly in the case of small parcels. We hope to work through these questions with BIA and the Tribe. The State will also work cooperatively with the Tribe on how best to protect the environment on and surrounding the parcel.

**B. Trust status of the surface estate will not affect subsurface mineral rights.**

This parcel is a split estate. In 1962, it was selected by and patented to the State.<sup>11</sup> When the State later conveyed the parcel, it reserved an interest in all subsurface resources on the parcel, including oils, gases, coal, ores, minerals, fissionable minerals, geothermal resources, and fossils, and a right to enter and explore the land for those resources.<sup>12</sup> We understand that the trust acquisition applies only to the surface estate, which is subject to the State's reservations, and that it will not impact the State's mineral estate.

The State's subsurface estate remains dominant. Thus, conveying the parcel in trust would not, for example, create a right for the Craig Tribal Association to receive an interest in the State's revenues from its mineral resources. Moreover, the Craig Tribal Association and the federal government cannot place additional restrictions on access, exploration, or development of that dominant mineral estate (including, but not limited to, taxes or regulatory requirements relating to the extraction of minerals).

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<sup>11</sup> U.S. Patent 1226370 (Apr. 16, 1962), Ketchikan Recording Dist. Book 28, Page 264, *available in* Craig Tribal Association Proposed Land Into Trust Application, at \*59-60 (on file with State).

<sup>12</sup> State of Alaska Patent No. 5818 (July 6, 1981), Ketchikan Recording Dist. Book 93, Page 930-31, *available in* Craig Tribal Association Proposed Land Into Trust Application, at \*61-62 (on file with State); *see also* AS 38.05.125(a) (providing that deeds of state land reserve mineral rights, including right to enter); AS 38.05.130 (requiring state to pay owner of land for damages caused by state entry, but also allowing surety bond and legal proceedings to determine damages to owner).

**C. Future right-of-way expansions or additions will require tribal collaboration.**

The parcel is currently subject to a utility easement and a water line easement.<sup>13</sup> Because the parcel is in downtown Craig and adjacent to a road, there will likely be a future need to expand existing or establish new easements.

Trust lands are not subject to state or municipal powers of eminent domain. So, while the parcel will continue to be subject to the existing easements, a future right-of-way expansion or acquisition cannot occur without collaboration with the Tribe.<sup>14</sup> Improvements requiring an expanded or new right-of-way would likely benefit the parcel, however. Based on initial conversations, the State is hopeful that the Craig Tribal Association will work through these issues in a formal memorandum of agreement with the State. Thus, while we note the change brought by trust status, we do not believe that it is a basis to object to the application in this instance.

**D. Conclusion**

Based on the Craig Tribal Association's application, many of the concerns raised in this letter may never become issues for this particular parcel. But if they do, we expect to work with the Tribe to find mutually acceptable pathways forward. We also expect that BIA will ensure appropriate opportunities for public process as any new issues develop. Finally, in hopes of avoiding confusion in the future, the State requests that BIA confirm or clarify our understanding of the law as summarized here. In particular, the State seeks confirmation on the issue of subsurface rights. Although this issue may not greatly impact the parcel in Craig, it is an important issue moving forward, and all parties would benefit from further clarification in this area.

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<sup>13</sup> Notice of (Non-Gaming) Trust Land Acquisition Application, Attached Subdivision Plat Map; *see also* State of Alaska Patent No. 5818 (July 6, 1981), Ketchikan Recording Dist. Book 93, Page 931 (ADL 34840 right-of-way for water line), *available in* Craig Tribal Association Proposed Land Into Trust Application, at \*62 (on file with State).

<sup>14</sup> New rights-of-way on trust land must be acquired through a voluntary easement with consent of the Secretary of Interior. *See* 25 U.S.C. §§ 311, 323-28; 25 C.F.R. pt. 169.

We emphasize that every parcel is unique. A number of potential issues around trust acquisitions are not raised here because we do not believe they are sufficiently implicated by this particular application, including tax impacts, gaming concerns,<sup>15</sup> and education funding. Future applications may present different facts and the State may take a different position.

Sincerely,



Jahna Lindemuth  
Attorney General

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<sup>15</sup> The State's comments do not address tribal gaming concerns as this application is expressly designated as a "non-gaming" application. Should there be any movement towards gaming in the future, as with other matters, the State expects that there will be additional opportunities to engage in a dialogue with the Tribe and BIA.