



United States Department of the Interior
OFFICE OF THE SOLICITOR
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M-37079

Memorandum

To: Secretary

From: Solicitor

Subject: Partial Withdrawal of Solicitor's Opinion M-36975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, and Clarification of Tribal Jurisdiction Over Alaska Native Allotments

This memorandum addresses whether, and to what extent, federally recognized Indian tribes in Alaska can assert jurisdiction over Alaska Native allotments.¹ The Solicitor previously addressed this issue in Opinion M-36975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*,² issued by Solicitor Thomas Sansonetti ("Sansonetti Opinion" or "Opinion"). Solicitor Sansonetti concluded that although Alaska Native allotments constitute Indian country,³ there is "little or no basis for an Alaska village claiming territorial jurisdiction over an Alaska Native allotment."⁴

The Sansonetti Opinion made three key findings: (1) the Alaska Native Allotment Act ("ANAA")⁵ did not make tribal membership a necessary criteria for receiving an allotment; (2) Native Allotments were not carved out of a reservation; and (3) the ANAA stated that an allotment "shall be deemed the homestead of the allottee and his heirs."⁶ The Opinion also concluded that the absence of a tribal territorial base, such as a reservation in the lower 48 states,

¹ This memorandum examines the Sansonetti Opinion's analysis of the Alaska Native Allotment Act ("ANAA") and the allotments issued thereunder. Accordingly, the terms "Native Allotment[s]" and "ANAA Allotment[s]," as used in this memorandum, refer to allotments issued pursuant to the Alaska Native Allotment Act. As noted by Solicitor Sansonetti, "[m]ost allotments in Alaska have been issued pursuant to the Alaska Native Allotment Act, although there are a few allotments issued under the General Allotment Act." Thomas L. Sansonetti, Solicitor Opinion M-36975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers* at 128 (Jan. 11, 1993) [hereinafter Sansonetti Opinion]. Except as noted, the jurisdictional status of allotments issued under the General Allotment Act or any other allotment act is outside the scope of this memorandum.

² See Sansonetti Opinion at 124-29.

³ Alaska Native allotments are Indian country as defined in 18 U.S.C. § 1151(c). See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][d][ii] (Neil Jessup Newton ed., 2012).

⁴ Sansonetti Opinion at 127.

⁵ Alaska Native Allotment Act, Act of May 17, 1906, Pub. L. No. 59-171, 34 Stat. 197, amended by Act of Aug. 2, 1956, Pub. L. No. 84-931, 70 Stat. 954, repealed by Alaska Native Claims Settlement Act, § 18(a), 43 U.S.C. § 1617(a).

⁶ Sansonetti Opinion at 129.

makes it particularly unlikely that an Alaska Native village can exercise jurisdiction over a Native Allotment.

As discussed below, the Opinion’s conclusion concerning tribal⁷ jurisdiction over Native Allotments is unpersuasive on the merits and cannot be reconciled with subsequent case law and administrative developments. First, the Opinion’s interpretation of the ANAA is neither compelled by the text of the ANAA nor by any indication of congressional intent. Both the text of the ANAA and its legislative history make clear that Congress intended allotments issued under the ANAA be treated similarly to those issued under the General Allotment Act (“GAA”),⁸ which the Department of the Interior (“Department”) has determined are subject to tribal jurisdiction.

Second, the questions of whether an allotment was established from public domain lands, instead of a preexisting Indian reservation, or whether the tribe at issue in Alaska currently has a territorial land base, are irrelevant to the question of tribal jurisdiction. Since the issuance of the Sansonetti Opinion, courts have affirmed that tribes exercise jurisdiction over their members and territory regardless of past or current reservation status. In addition, the Department has since examined the issue of tribal jurisdiction over non-reservation Indian country and recognizes a presumption in favor of tribal jurisdiction over off-reservation public domain allotments.

Third, the Opinion’s interpretation of the ANAA, and related conclusions, have largely been superseded by subsequent acts of Congress. In the Violence Against Women Reauthorization Act of 2022 (“VAWA 2022”),⁹ Congress formally recognized the inherent authority of Alaska tribes to assert territorial jurisdiction within Alaska Native village boundaries, and the Privileges and Immunities Amendment of 1994, discussed in Section II.1.C.i below, precludes the distinction drawn in the Sansonetti Opinion.

For these and the reasons discussed below, I hereby withdraw the portions of the Opinion addressing the existence or extent of tribal jurisdiction over Native Allotments, and clarify that Native Allotments are subject to the same legal principles governing allotments in the lower 48 states. Under those principles, there is a presumption of tribal jurisdiction within Indian country, which may only be abrogated by express congressional action. No such congressional abrogation exists with respect to Native Allotments.

Accordingly, tribes in Alaska are presumed to have jurisdiction over Native allotments, subject only to the two exceptions identified by the Department for off-reservation allotments: (1) when the Native Allotment is owned by a non-tribal member; or (2) when the Native Allotment is geographically removed from the tribal community.¹⁰ Unless one of the two exceptions applies, the presumption is un rebutted, and tribal jurisdiction over a Native Allotment is undisturbed.

⁷ In this memorandum, references to “tribes in Alaska,” “tribes,” or “tribes in the lower 48” only include federally recognized Indian tribes identified in the annual list published in the *Federal Register* by the Bureau of Indian Affairs pursuant to the Federally Recognized Indian Tribe List Act of 1994.

⁸ General Allotment Act, Pub. L. No. 49-105, § 1, 24 Stat. 388, 388 (1887).

⁹ Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-113, 136 Stat. 840.

¹⁰ As discussed below, for purposes here, the term “tribal community” refers to either the area surrounding a tribe’s headquarters or village, or the lands customarily and traditionally used by tribal members for hunting, fishing, gathering, and other subsistence activities. *See infra* Section II.2.b.

I. Background.

1. The Alaska Native Allotment Act.

In 1906, Congress passed the ANAA to clarify the rights of Alaska Natives to apply for allotments of unappropriated, vacant, and unreserved nonmineral land in Alaska.¹¹ The ANAA gave the Secretary of the Interior (“Secretary”), “in his discretion and under such rules as he may prescribe,” the authority to:

[A]llot not to exceed one hundred and sixty acres of nonmineral land . . . to any Indian or Eskimo of full or mixed blood who resides in and is a native of [the district of Alaska] . . . and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress.¹²

In 1956, Congress amended the ANAA to require a showing of “substantially continuous use and occupancy of the land for a period of five years” prior to the date the land was withdrawn from the public domain.¹³ Under the Department’s implementing regulations, the term “substantially continuous use and occupancy” means “the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family.”¹⁴ Alaska Natives maintained aboriginal title to much of Alaska at the time the ANAA and the 1956 amendment were enacted.¹⁵

2. The Sansonetti Opinion.

In 1993, Solicitor Sansonetti issued the Opinion, which provided an extensive historical review of Alaska Native groups and their status under federal law, including a review of federal laws and policies concerning the sovereignty and powers of Alaska Natives. The primary focus of the Opinion was on the legal status of tribes in Alaska and “whether Congress has imposed limitations on the sovereign authority of [tribes in Alaska] to exercise tribal powers within . . . Indian country.”¹⁶

Noting that the federal government and tribes generally have primary authority in Indian country, the Opinion asserted that whether land is Indian country is only the starting point of the analysis, which must then proceed from “*general* principles concerning tribal, federal, and state jurisdiction to the *specific* facts and law applicable to the particular situation to determine whether Congress has acted to alter the general principles.”¹⁷ The Opinion found that while Native Allotments “do fall within the statutory definition of Indian country,” they “appear to be

¹¹ See Alaska Native Allotment Act, Act of May 17, 1906, PUB. L. NO. 59-171, 34 Stat. 197.

¹² *Id.*

¹³ Act of Aug. 2, 1956, Pub. L. No. 84-931, 70 Stat. 954.

¹⁴ 43 C.F.R. § 2561.0-5(a).

¹⁵ See DAVID S. CASE AND DAVID A. VOLUCK, ALASKA NATIVE AND AMERICAN LAWS 61-80 (2013); COHEN, *supra* note 3, at § 4.07[3][b][i].

¹⁶ Sansonetti Opinion at 109.

¹⁷ *Id.* at 110 (emphasis in original).

an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands.”¹⁸

The Opinion explained that while the Indian country status of allotments provided the statutory basis for the exercise of *federal* jurisdiction, it did not necessarily follow that all allotments were also subject to *tribal* jurisdiction.¹⁹ Given the “distinct history of certain off-reservation allotments,” the question of “whether an individual allotment is subject to tribal jurisdiction depends upon a particularized inquiry into the relevant statutes and circumstances surrounding the creation of the allotment.”²⁰

Before turning to the specific history of Native Allotments, the Opinion examined other allotment acts in the lower 48 states for indications of congressional intent to permit tribal jurisdiction over allotted lands. Solicitor Sansonetti first considered homestead allotment acts²¹ that either required allottees to abandon tribal relations prior to obtaining a homestead²² or imposed generally applicable homestead laws.²³ The Solicitor concluded that “[i]n such a case, it seems unlikely that there would be any indication of congressional intent to permit [tribal] jurisdiction” because “there would be no original tribal nexus to support such jurisdiction over the allotment.”²⁴

Next, the Solicitor considered public-domain allotments issued pursuant to Section 4 of the GAA and distinguished them from homestead-allotments because “Indians applying for such [public domain] allotments must demonstrate membership or entitlement to membership in a recognized Indian tribe.”²⁵ The Opinion concluded that “allotments issued pursuant to the [ANAA] are more similar to homestead act allotments rather than tribal-affiliation public domain allotments.”²⁶

The Opinion then turned to the particular history and circumstances surrounding the creation of Native Allotments. The Opinion identified three facts in particular that purportedly distinguish ANAA Allotments from those issued under Section 4 of the GAA or other tribe-specific allotment acts in the lower 48 states.²⁷

¹⁸ *Id.* at 124.

¹⁹ *Id.* at 126.

²⁰ *Id.* at 126-27.

²¹ During the allotment era, Congress enacted “various statutes . . . permitt[ing] certain Indians to acquire homesteads on the public lands” that were open to entry under general homestead laws. Sansonetti Opinion at 127. These “homestead allotment” statutes were consistent with Congress’s policies at the time “of encouraging individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life.” *Oakes v. United States*, 172 F. 305 (8th Cir. 1909). The specific requirements of homestead allotment acts varied according to the particular situations for which they were enacted, but, in general, they included severing tribal ties and subjecting the land to homestead laws applicable to non-Indians.

²² See Act of March 3, 1875, § 15, 18 Stat. 402, 420.

²³ See Act of July 4, 1884, 23 Stat. 76, 96.

²⁴ Sansonetti Opinion at 127.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 128-29.

First, the ANAA did not require applicants to be enrolled tribal members in order to be eligible for a Native Allotment.²⁸ The Opinion suggested that Congress was not considering Native Allotments in a tribal context when it enacted the ANAA, and found that the absence of a tribal membership requirement “ma[de] Alaska Native allotments more like Indian homestead allotments, rather than those issued pursuant to the General Allotment Act or other tribe-specific allotment act.”²⁹ Second, the Solicitor noted the fact that “Alaska Native allotments were not carved out of any reservation . . . [had at] least some significance in determining questions of *tribal* jurisdiction.”³⁰ Third, the Opinion pointed to the fact that the ANAA expressly provided that allotments “shall be deemed the homestead of the allottee and his heirs.”³¹ The Opinion found that “while not a controlling factor as such,” this fact “makes the Alaska Native Allotment Act appear more similar to a general Indian homestead act rather than a tribal or reservation related allotment act.”³²

Having examined the relevant legislation and specific circumstances relating to Native Allotments, Solicitor Sansonetti concluded he was “not convinced that any specific villages or groups can claim jurisdictional authority over allotment parcels.”³³ The Solicitor additionally concluded that “particularly in the absence of a tribal territorial base (e.g., a reservation), there is little or no basis for an Alaska village claiming *territorial* jurisdiction over an Alaska Native allotment.”³⁴

II. Discussion.

1. The Sansonetti Opinion’s conclusions regarding Native allotments are unsupported by the statutory text and inconsistent with current law.

The Sansonetti Opinion’s conclusion that Native Allotments are Indian country, but not subject to “territorial jurisdiction,” was in error for three reasons.³⁵

First, the Opinion’s interpretation of the ANAA is not based on the statutory text but on a misreading of the ANAA, GAA, and homestead allotment acts. Second, the Opinion’s analysis relies on the mistaken premise that tribal jurisdiction over off-reservation allotments depends on past or current reservation status. Third, the Opinion’s analysis of allotment jurisdiction in Alaska cannot be reconciled with subsequent congressional enactments, including the 1994 amendment to the Indian Reorganization Act (“IRA”) prohibiting the United States from treating tribes differently absent an act of Congress, and the VAWA 2022. I consider each reason in turn.

²⁸ *Id.* at 128.

²⁹ *Id.*

³⁰ *Id.* at 120, 129 (emphasis in original).

³¹ *Id.* at 129.

³² *Id.*

³³ *Id.*

³⁴ *Id.* (emphasis in original).

³⁵ *Id.* at 127.

a. The Sansonetti Opinion’s interpretation is not supported by the text of the ANAA.

In concluding that “there is little or no basis for” a tribe to claim territorial jurisdiction over an allotment issued under the ANAA, the Sansonetti Opinion identified two characteristics of the statute to support its conclusion. First, the ANAA did not require tribal membership to be eligible for ANAA Allotments. Second, the ANAA expressly referred to Native Allotments as “the homestead of the allottee and his heirs.” Neither of these reasons provides a defensible explanation for precluding tribal jurisdiction over Native Allotments.

i. The absence of a tribal membership requirement in the ANAA cannot be read as evincing an intent to limit tribal jurisdiction.

The Sansonetti Opinion begins its analysis of the ANAA by distinguishing the ANAA from the GAA and other tribe-specific allotment acts on the basis that “the [ANAA] does not make tribal membership a criteria for receiving an allotment.”³⁶ In a footnote, the Opinion notes that unlike Native Allotments, public-domain allotments issued under Section 4 of the GAA “require tribal affiliation, which conceivably provides a basis for tribal jurisdiction.”³⁷ The Opinion then suggests that Congress did not include a tribal membership requirement in the ANAA because it was “not considering the Alaska Native allotments in a tribal context” when it passed the ANAA.³⁸

The Opinion’s interpretation is not based on the text of the ANAA. Instead, it rests on an inference about congressional intent that, in turn, is based on a comparison of the ANAA and the GAA. The Opinion infers that, by not including a tribal membership requirement in the ANAA, Congress intended to draw a distinction between the ANAA and GAA and create a separate jurisdictional category for Alaska Native allotments. But such intent is not apparent in the plain language of the ANAA.

The Opinion first notes that the ANAA does not require tribal membership, then relies on the GAA as a contrasting example of a statute that does. But contrary to the Opinion’s assertions, Congress did not explicitly require tribal affiliation or membership (however those concepts were understood at the time) in the GAA. Rather, in Section 1 of the GAA, Congress authorized the President of the United States “to allot the lands in [a] reservation in severalty to *any Indian* located thereon,” and in Section 4 of the GAA, authorized off-reservation allotments to “*any Indian* not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order.”³⁹ In this respect, the GAA is nearly identical to the ANAA, which authorized allotments to “*any Indian* or Eskimo . . . who resides in and is a native of [Alaska].”⁴⁰ It was the Department, not Congress, that made tribal membership a criterion for

³⁶ *Id.* at 128.

³⁷ *Id.* at 129 n.305.

³⁸ *Id.* at 128.

³⁹ General Allotment Act, Pub. L. No. 49-105, §§ 1, 4, 24 Stat. 388, 389 (1887).

⁴⁰ Alaska Native Allotment Act, Act of May 17, 1906, Pub. L. No. 59-171, 34 Stat. 197 (emphasis added).

receiving a GAA allotment.⁴¹ The two statutes are not distinguishable as the Opinion suggests, and there is no textual support in either statute for inferring an intent to treat Alaska Native allotments differently from GAA allotments for purposes of tribal jurisdiction.

The Opinion next suggests that the Congress did not make tribal membership a criterion in the ANAA because Congress was not considering Alaska Native allotments in a tribal context at that time.⁴² This also lacks support in the statutory text. In fact, the purpose of the ANAA suggests the opposite—that Congress was considering ANAA Allotments in the same tribal context in which GAA allotments were designed. One of the primary purposes of the ANAA was to eliminate confusion existing at the time about whether the GAA applied to Alaska Natives⁴³ due to “the fact that the Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United States.”⁴⁴ Congress enacted the ANAA as a separate allotment act to “plug[] a supposed hole in the coverage of the [GAA]” and give Alaska Natives the right to obtain allotments on the same basis as Indians in the lower 48 states.⁴⁵ The ANAA thus reflects Congress’s intent to extend the same *tribal* benefits and privileges of the GAA to Alaska Natives.

The suggestion that Congress was not considering Native Allotments in a tribal context does not account for the government’s contemporary interactions with tribes in Alaska. For example, in ratifying the Treaty of Cession with Russia, the U.S. Senate consented to the provision that “[t]he uncivilized *tribes* will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal *tribes* of that country.”⁴⁶ Also, in 1904, two years before the ANAA was enacted, the District of Alaska decided *In re Naturalization of Minook*, concluding that the Treaty of Cession “gave the Indian *tribes* of Alaska the same status before the law as those of the United States.”⁴⁷ It would have been curious for Congress, two years later, to enact legislation for the benefit of Alaska Natives in anything other than a tribal context (i.e., to the benefit of presumably unaffiliated individual Alaska Natives, rather than entities associated with Alaska Natives, however understood in the Alaska context).⁴⁸

Indeed, had Congress intended to enact the ANAA in a non-tribal context, it could have easily done so by explicitly requiring allottees to abandon tribal relations prior to receiving an

⁴¹ 43 C.F.R. § 2531.1. The tribal membership requirement for GAA allotments appeared for the first time in 1928 as part of the Departmental regulations implementing Section 4 of the GAA. Under those regulations, “[a]n applicant for an allotment . . . [wa]s required to show that he is a recognized member of an Indian tribe or [wa]s entitled to be so recognized.” Reg. Feb. 1, 1928, 52 L.D. 384.

⁴² Sansonetti Opinion at 128.

⁴³ See *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976) (explaining that the ANAA was passed “because a number of lower courts found that Alaska Natives were not within the definition of ‘Indian’ [and so] there was doubt whether the General Allotment act did apply to them”).

⁴⁴ H.R. Rep. No. 59-3295, at 1 (1906).

⁴⁵ *Pence*, 529 F.2d at 140.

⁴⁶ Treaty of Cession, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539, 542 (emphasis added).

⁴⁷ *In re Naturalization of Minook*, 2 Alaska 200, 221 (D. Alaska 1904) (emphasis added).

⁴⁸ See, e.g., *Neder v. United States*, 527 U.S. 1, 21 (1999) (relying on the presumption that Congress incorporates established meanings of terms); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)) (“Legislation dealing with Indian affairs ‘cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].’”).

allotment, as it did with the homestead allotment acts referenced in the Opinion.⁴⁹ As evidenced by these acts, and as discussed below, Congress knew how to enact legislation breaking from tribal relations by explicitly using language to that effect. But no such language can be found in the ANAA and there is nothing in the legislative history to suggest such intent.

Thus, the absence of an explicit tribal membership requirement in the ANAA is not persuasive evidence against the notion of tribal jurisdiction over Native Allotments.

ii. The statutory text does not support the Opinion’s analogy to homestead allotment acts.

Next, Solicitor Sansonetti attempts to analogize the ANAA to homestead allotment acts. The Sansonetti Opinion points to language from the ANAA providing that the Native Allotment “shall be deemed the homestead of the allottee and his heirs,”⁵⁰ and concludes that such “language makes the Alaska Native Allotment Act appear more similar to a general Indian homestead act rather than a tribal or reservation related allotment act.”⁵¹

The attempted analogy is unpersuasive and not supported by the statutory text. The homestead acts referenced by Solicitor Sansonetti allowed Indians to receive allotments under general (non-Indian) allotment statutes.⁵² The ANAA, however, does not reference homestead laws or suggest any intent to bring ANAA allotments within the distinct legal framework governing homesteads. The mere use of the word “homestead” is not enough to overcome the plain meaning of the ANAA.

The Solicitor’s Office confirmed as much in a 1964 M-opinion on the “Allotment of Land to Alaska Natives.”⁵³ In that opinion, Acting Solicitor Edward Weinberg considered the same ANAA provision stating that land allotted “shall be deemed the homestead of the allottee” to determine whether such language subjected ANAA allottees to general homestead laws.⁵⁴ He concluded that “[t]he use of the word ‘homestead’ in the Alaska statute is not necessarily indicative of an intention to superimpose the requirements of the general homestead laws on the express requirements of the Alaska Allotment Act.”⁵⁵ Citing to various Indian allotment acts passed in 1898, 1906, 1919, and 1920, Acting Solicitor Weinberg observed that “Congress has frequently used the word ‘homestead’ in connection with the allotment of land to Indians to indicate merely that the land allotted was to be subject to special status.”⁵⁶

The Sansonetti Opinion’s reading of the homestead language in the ANAA thus goes beyond both the statutory text and the intent of Congress. As support, the Sansonetti Opinion provides

⁴⁹ Sansonetti Opinion at 127.

⁵⁰ Pub. L. No. 59-171, 34 Stat. 197.

⁵¹ Sansonetti Opinion at 129.

⁵² *Id.* at 127.

⁵³ Office of the Solicitor, *Allotment of Land to Alaska Natives*, Opinion M-36662, at 6 (Sept. 21, 1964) [hereinafter Opinion M-36662].

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

⁵⁶ *Id.*

two examples of homestead acts: (1) the Act of March 3, 1875 (“1875 Act”);⁵⁷ and (2) the Indian Homestead Act of 1884 (“1884 Act”).⁵⁸ Neither act is comparable.

First, the 1875 Act granted homesteads to any Indian born in the United States “who has abandoned, or may hereafter abandon, his tribal relations.”⁵⁹ This abandoned-tribal-relations requirement is entirely distinguishable from the provisions of the ANAA that authorize allotments to “any Indian or Eskimo.”⁶⁰ In the former instance, the homesteader has affirmatively chosen to separate himself or herself from the political community of his or her tribe. In the latter, Congress “develop[e]d a program for the allotment of land to the natives of Alaska according to the particular needs of *each group*.”⁶¹ The ANAA does not require Alaska Natives to sever tribal relations in order to receive an allotment and is accordingly distinguishable from a general homesteading act (either in the abstract or which requires severance of tribal affiliation).

The 1884 Act is also distinguishable, most notably because it contemplates the application of general homestead laws, rather than those specific to tribally affiliated Indians.⁶² The 1884 Act provides that “such Indians as may now be located on public lands . . . may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States.”⁶³ The 1875 Act similarly contemplates that allotments made thereunder will be subject to general homestead laws.⁶⁴ In both homestead acts, Congress clearly intended for the generally applicable, non-Indian specific homestead laws to govern the allotment process and simply sought to clarify that Indians were eligible to participate.

By contrast, the ANAA does not subject allotments to generally applicable homestead laws. Congress’s intent in enacting the ANAA was to eliminate confusion as to the applicability of the GAA to Alaska Natives.⁶⁵ Congress recognized “that Indians in Alaska are not confined to reservations as they are in the several States,”⁶⁶ leaving them “in an anomalous position” outside the scope of the GAA, “which applied to Indian tribes of other parts of the United States.”⁶⁷ The ANAA was intended to “‘plu[g] a hole’ in the General Allotment Act’s failure to address Alaska Natives” and extend the same benefits of the GAA to Alaska Natives, as noted above.⁶⁸ For this reason, “the Alaska Native Allotment Act [is] legislation which is interpreted similarly to the General Allotment Act.”⁶⁹

⁵⁷ 18 Stat. 402.

⁵⁸ 23 Stat. 76.

⁵⁹ § 15, 18 Stat. 402, 420.

⁶⁰ 43 U.S.C. § 270-1.

⁶¹ Opinion M-36662 at 24 (emphasis added).

⁶² See 23 Stat. 76, 96.

⁶³ *Id.*

⁶⁴ See § 16, 18 Stat. 402, 420 (“That in all cases in which Indians have heretofore entered public lands *under the homestead-law* . . . the entries so allowed are hereby confirmed, and patents shall be issued thereon. . . .”) (emphasis added).

⁶⁵ See *Pence*, 529 F.2d at 140 (noting that the ANAA was passed “because a number of lower courts found that Alaska Natives were not within the definition of ‘Indian,’ [and so] there was doubt whether the General Allotment Act did apply to them”).

⁶⁶ H.R. Rep. No. 59-3295, at 1 (1906).

⁶⁷ S. Rep. No. 92-405, at 90-91 (1971).

⁶⁸ *Masayeva v. Zah*, 792 F. Supp. 1160, 1163 n.6 (D. Ariz. 1992).

⁶⁹ *Id.* at 1163 (citing *Pence*, 529 F.2d at 141).

The Sansonetti Opinion’s attempt to equate the ANAA with homestead acts is thus unavailing. The ANAA is legally distinguishable from the homesteading acts that required allottees to abandon their tribal relations or explicitly provided for the application of general homestead laws. The mere use of the word “homestead” cannot overcome Congress’s intent to treat ANAA Allotments similarly to allotments issued under the GAA.

b. Tribal jurisdiction over Native Allotments does not depend on past or current reservation status.

In concluding there was “little or no basis” for an Alaska tribe to exercise jurisdiction over an allotment, the Sansonetti Opinion found significant two circumstances pertaining to reservation status: (1) allotments under the ANAA were not carved out of any reservation; and (2) the absence of tribal territorial bases such as reservations in Alaska meant it was particularly unlikely that an Alaska village could claim territorial jurisdiction over a Native Allotment. Neither circumstance constitutes a basis for limiting tribal jurisdiction over Native Allotments. As the precedents discussed below demonstrate, tribes have jurisdiction over Indian country allotments regardless of whether they were carved out of reservations or out of the public domain and regardless of present-day reservation status.

i. Whether an allotment was carved out of a reservation is not relevant to determining questions of tribal jurisdiction.

First, Solicitor Sansonetti noted that allotments under the ANAA were not carved out of any reservation.⁷⁰ In a footnote, the Solicitor acknowledged that public-domain allotments, which were likewise not carved out of reservation, “are indeed analogous in many respects” to ANAA Allotments, but explicitly disclaimed any opinion on the possible scope of tribal jurisdiction over such allotments.⁷¹

The Solicitor’s Office has since clarified its view on tribal jurisdiction over public-domain allotments, which by their very definition—Section 4 of the GAA—are outside of a reservation. In two separate opinions, the Solicitor’s Office concluded that tribes can and do exercise jurisdiction over public domain allotments.

In a 1996 Solicitor’s Office opinion (“1996 Opinion”), the Associate Solicitor relied on the “presumption in favor of tribal jurisdiction” over lands considered Indian country to find that a public-domain allotment held in trust for Quinault tribal members was subject to the jurisdiction of the Quinault Indian Nation. The fact that the allotment had been carved out of the public domain and not out of a reservation did not factor into the analysis. Instead, the 1996 Opinion focused on the Indian country status of the land, and recognized that tribes possess jurisdiction over public-domain allotments unless “the land in question is not owned or occupied by tribal members and is far removed from the tribal community.”⁷²

⁷⁰ Sansonetti Opinion at 128-29.

⁷¹ *Id.* at 128-29 n.305.

⁷² Memorandum from Robert T. Anderson, Associate Solicitor, Indian Affairs, to Director, Indian Gaming Management Staff (Sept. 25, 1996) [hereinafter 1996 Opinion].

Next, in 2006, the Solicitor’s Office issued a memorandum (“2006 Memorandum”) concluding that the Washoe Tribe had jurisdiction over public-domain allotments held by tribal members.⁷³ Noting the “scant attention” to the question of tribal jurisdiction over public-domain allotments, the Solicitor’s Office found that:

[T]here appears to be nothing in Federal law at this time that would either (i) preclude a tribe’s express assertion and exercise of its sovereign powers and jurisdiction over extra-territorial public domain allotments, *assuming some nexus of tribal member ownership with those public domain allotments* or (ii) authorize a tribe’s express assertion and exercise of its sovereign powers and jurisdiction over extra-territorial public domain allotments.⁷⁴

In the absence of such federal authority, the Solicitor’s Office reasoned that “the presumption should favor the Washoe Tribe’s assertion of its sovereign powers and jurisdiction over those public domain allotments.”⁷⁵ As with the 1996 Opinion, the 2006 Memorandum did not deem relevant whether the allotment was created out of prior reservation lands.

These precedents clarify that whether an allotment has been created from prior reservation lands is not dispositive of the question of tribal jurisdiction. Tribes retain jurisdiction over allotments regardless of whether they were carved out of a reservation or from the public domain, as long as there is a tribal nexus or political relationship between the tribe claiming jurisdiction and the allotment owner.⁷⁶ Given the similarities of the ANAA and Section 4 of the GAA’s public-domain allotment schemes, these Solicitor’s Office precedents are instructive and persuasive in determining whether tribes in Alaska can exercise jurisdiction over Native Allotments.

ii. Tribes have jurisdiction over allotments even in the absence of a tribal territorial base.

Second, after reviewing the ANAA, the Sansonetti Opinion concluded that “particularly in the absence of a tribal territorial base (e.g., a reservation), there is little or no basis for an Alaska village claiming territorial jurisdiction over an Alaska Native allotment.”⁷⁷ However, subsequent case law supports the presumption that tribes possess jurisdiction over all Indian country, including over tribal member allotments.

In *Oklahoma Tax Commission v. Sac & Fox Nation*, which was decided just four months after the Sansonetti Opinion was issued, the United States Supreme Court (“Court”) rejected Oklahoma’s attempt to draw jurisdictional distinctions between the various forms of Indian country, explaining that its cases “make clear that a tribal member need not live on a formal reservation to be outside the State’s taxing jurisdiction; *it is enough* that the member live in

⁷³ Memorandum from Office of the Solicitor, Phoenix Field Office, to Robert Hunter, BIA Superintendent – Western Nevada Agency (Apr. 7, 2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See 1996 Opinion.

⁷⁷ Sansonetti Opinion at 129.

‘Indian country.’”⁷⁸ After pointing out that “Congress has defined Indian country broadly to include . . . Indian allotments, whether restricted or held in trust,” the Court concluded that tribal members living in “Indian country” of any type would be exempt from state taxation unless Congress expressly authorized such taxing jurisdiction.⁷⁹ In other words, the Court found that the state has no more jurisdiction to impose taxes on tribal members residing on off-reservation Indian country than it does to impose taxes on tribal members living on reservations.

Then, in 1998, the Court decided *Alaska v. Native Village of Venetie Tribal Government*, which involved an Alaska tribe’s authority to tax nonmember conduct on its former reservation lands. The Court considered whether the former Venetie reservation, which had been extinguished by the Alaska Native Claims Settlement Act (ANCSA), and then conveyed in fee to the Native Village of Venetie Tribal Government, constituted Indian country under the “dependent Indian community” clause of 18 U.S.C. § 1151(b). The Court held that the land was not Indian country because it did not satisfy the Court’s test for a dependent Indian community.⁸⁰ However, the Court recognized that “[o]ther Indian country exists in Alaska post ANCSA . . . if [the land in question] constitutes ‘allotments’ under § 1151(c).”⁸¹

As relevant here, the *Venetie* Court observed in a footnote that “[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”⁸² The Court did not qualify this conclusion with a requirement of a present-day reservation of the type seemingly envisioned by the Opinion, a fact particularly telling given the post-ANCSA context in which *Venetie* was decided. The Court noted that, except for the Annette Island Reserve, there were no reservations in Alaska.⁸³ Had the Court considered the absence of reservations relevant to the question of tribal jurisdiction in Alaska, it could have so indicated. Instead, the *Venetie* Court affirmed the longstanding principle “that Indian tribes retain ‘attributes of sovereignty over both their members and their territory,’”⁸⁴ and that such territory generally extends to any lands constituting Indian country.

At least two federal courts of appeals have gone further in supporting a presumption of tribal jurisdiction in Indian country, regardless of formal reservation status. In *Mustang Production Company v. Harrison*, the United States Court of Appeals for the Tenth Circuit (“Tenth Circuit”) rejected Oklahoma’s argument that the Cheyenne-Arapaho Tribes of Oklahoma lost jurisdiction over certain allotted lands when the tribe’s reservation was disestablished.⁸⁵ The Tenth Circuit held that “disestablishment of the reservation is not dispositive of the question of tribal jurisdiction,” and that “[i]n order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country.”⁸⁶

⁷⁸ *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (emphasis added).

⁷⁹ *Id.* at 126.

⁸⁰ *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 532 (1998).

⁸¹ *Id.* at n. 2.

⁸² *Id.* at n. 1.

⁸³ *Id.* at 524 (“To this end, ANCSA revoked ‘the various reserves set aside . . . for Native use’ by legislative or executive action, except for the Annette Island Reserve inhabited by the Metlakatla Indians. . .”).

⁸⁴ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)) (emphasis added).

⁸⁵ *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996).

⁸⁶ *Id.* at 1385 (citing *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987)).

Likewise, in *Citizens Against Casino Gambling v. Chaudhuri*, the United States Court of Appeals for the Second Circuit (“Second Circuit”) considered whether the Seneca Nation had jurisdiction over a parcel of land. As part of its analysis, the Second Circuit defined “‘tribal jurisdiction’ [a]s a combination of tribal and federal jurisdiction over land, to the exclusion of the jurisdiction of the state.”⁸⁷ Citing to *Venetie*, the Second Circuit also observed that “[l]ands subject to federal and tribal jurisdiction have historically been referred to as ‘Indian country.’”⁸⁸

Taken together, these cases confirm the principle that Indian country status, not the existence of a formal reservation, “is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.”⁸⁹ This aligns with the Solicitor’s Office opinions discussed above, which similarly invoked a presumption in favor of tribal jurisdiction over Indian country regardless of past or current reservation status.

c. The Sansonetti Opinion’s conclusion on Native Allotment jurisdiction is at odds with subsequent acts of Congress.

In addition to the judicial and Departmental precedents discussed above, there are two intervening acts of Congress that undercut the Opinion’s analysis of tribal jurisdiction over Native Allotments. First, in 1994, Congress added two sections to the IRA addressing the privileges and immunities available to federally recognized Indian tribes. Second, in 2022, Congress passed VAWA 2022, which “recognizes and affirms the inherent authority of any Indian tribe occupying a Village in the State to exercise criminal and civil jurisdiction over all Indians present in the Village.”⁹⁰

These statutes cast further doubt on the Opinion’s conclusions about tribal jurisdiction over Native Allotments.

i. The Sansonetti Opinion’s interpretation of the ANAA cannot be reconciled with the IRA’s Privileges and Immunities clause.

In 1994 Congress amended the IRA to include two sections addressing tribal privileges and immunities (“Privileges and Immunities Amendment”).⁹¹ The first provision states:

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA], or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.⁹²

⁸⁷ *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 279-80 (2d Cir. 2015).

⁸⁸ *Id.*

⁸⁹ *Indian Country U.S.A.*, 829 F.2d at 973 (collecting cases).

⁹⁰ Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-113, 136 Stat. 840 (codified at 18 U.S.C. § 1305(a)).

⁹¹ Act of May 31, 1994, Pub. L. No. 103-263, 108 Stat. 709 (codified at 25 U.S.C. § 5123(f), (g)). This provision was formerly codified at 25 U.S.C. § 476(f), (g).

⁹² 25 U.S.C. § 5123(f).

The second, corollary provision invalidates any regulation, decision, or determination that as of 1994 “classifies, enhances, or diminishes the privileges and immunities of a federally recognized Indian tribe relative to [...] other federally recognized tribes by virtue of their status as Indian tribes.”⁹³

One purpose and effect of the Privileges and Immunities Amendment was to eliminate the distinction between “created” and “historic” tribes, which the Department had administratively applied since 1936 and which resulted in diminished tribal authority for those tribes deemed “created.”⁹⁴ But the Privileges and Immunities Amendment reached further, to encompass any regulation, decision, or determination of the Department made pursuant to any provision of the IRA “or any other Act of Congress.”⁹⁵ This was meant to capture the understanding of Congress that “it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government.”⁹⁶

The Privileges and Immunities Amendment has received varied treatment by federal courts. Most commonly, the Privileges and Immunities Amendment has been described as “prohibit[ing] disparate treatment between similarly situated recognized tribes.”⁹⁷ At the same time, courts have recognized that the amendment does not apply to classifications of tribes that are rooted in federal statute.⁹⁸ Congress has from time to time created classifications of federally recognized tribes with privileges and immunities different than other similarly situated tribes.⁹⁹ And it is widely accepted that the privileges and immunities enjoyed by individual tribes or groups of tribes may be limited by treaty, although such limitations must be clear and unambiguous.¹⁰⁰

In this way, the Privileges and Immunities Amendment creates a natural tension. On the one hand, the Department is obligated to give effect to the tribal classifications created by Congress.

⁹³ 25 U.S.C. § 5123(g).

⁹⁴ *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 993 (9th Cir. 2020).

⁹⁵ 25 U.S.C. § 5123(f).

⁹⁶ 140 Cong. Rec. S6147 (statement of Sen. Inouye).

⁹⁷ *Koi Nation of N. Cal. v. U.S. Dep’t of the Interior*, 361 F. Supp. 3d 14, 54 (D.D.C. 2019); see also *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att’y for W. Dist. of Michigan*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002). But see *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1, 5 (D.D.C. 2013) (“[T]here is no requirement that tribes be ‘similarly situated’ for the anti-discrimination provision to apply.”), *vacated as moot sub nom. Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100 (D.C. Cir. 2016).

⁹⁸ *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56 (1st Cir. 2007). Additionally, the Department may apply certain facially neutral criteria, so long as the Department “appl[ies] the same legal rule in the same manner.” *Native Village of Eklutna v. U.S. Dep’t of the Interior*, No. 19-cv-2388, 2021 LEXIS 180474, at *7 (D.D.C. Sept. 22, 2021); see also *Scotts Valley Band of Pomo Indians v. U.S. Dep’t of the Interior*, No. 19-1544, 2022 LEXIS 179819, at *18 (D.D.C. Sept. 30, 2022) (permitting a regulation requiring tribes to demonstrate a historical connection to a parcel for land to be considered “restored lands” under the Indian Gaming Regulatory Act (IGRA)). At the same time, other facially neutral criteria, such as organization of a tribe based on residence, violate the amendment. *Jamul Action Comm.*, 974 F.3d at 993 (rejecting distinction between “historic” and “created” tribes); *Wolfchild v. Redwood County*, 91 F. Supp. 3d 1093, 1100 (D. Minn. 2015) (rejecting distinction for tribes organized on the basis of residence upon reserved lands). This memorandum does not attempt to distinguish between such permissible and impermissible criteria.

⁹⁹ See, e.g., Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 (1980) (formerly codified at 25 U.S.C. § 1724(e)) (restricting the authority of the Secretary to take land into trust for Maine tribes). See generally 25 U.S.C. ch. 19 (formerly codifying various Indian land claims settlements).

¹⁰⁰ See COHEN, *supra* note 3, at § 4.02(2).

On the other, the Department is prohibited from creating such classifications by regulation, policy, or practice. This tension is eliminated by applying a rule of construction that binds the Department in its interpretation of Indian statutes.¹⁰¹ If a statute purports to create a classification of tribes and assigns some tribes different privileges and immunities from other tribes, that classification must be unambiguous on its face. If the statute is ambiguous, or simply does not treat tribes differently in any way, the Department must presume that Congress has not created a classification and must treat like tribes alike to avoid creating a prohibited administrative classification.

The Department has applied the Privileges and Immunities Amendment in just this way. In a 1997 opinion,¹⁰² then-Solicitor John Leshy interpreted the Pokagon Restoration Act¹⁰³ as “return[ing] the [Pokagon Band of Potawatomi Indians] to its previous status as a federally recognized tribe,” which Solicitor Leshy reasoned was “sufficient to bring the tribe within” the restored tribe provision of IGRA.¹⁰⁴ Although Solicitor Leshy found the statute “clear on its face,” he nevertheless buttressed his argument by explaining that the Privileges and Immunities Amendment would resolve any ambiguity in favor of his rights-equalizing interpretation.¹⁰⁵ The Privileges and Immunities Amendment, Solicitor Leshy wrote, “counsels against straining to find distinctions among tribes where legislation does not *clearly* create such distributions.”¹⁰⁶

The Privileges and Immunities Amendment thus constrains the Department’s interpretation of Indian statutes in a way that the Sansonetti Opinion does not address. Whereas Solicitor Sansonetti considered the “distinct history” of Native Allotments and engaged in a “particularized inquiry” into “circumstances surrounding the creation” of Native Allotments,¹⁰⁷ the Privileges and Immunities Amendment insists on clear statutory directives to justify disparate treatment of otherwise similarly situated tribes. Solicitor Sansonetti sought clear evidence that “Congress intended Alaska Native villages to exercise” jurisdiction over lands,¹⁰⁸ but the Privileges and Immunities Amendment reverses the inquiry. Instead of requiring clear evidence that Congress intended to *vest* tribes in Alaska with jurisdiction, the Privileges and Immunities Amendment requires clear evidence that Congress intended to—and indeed did—*restrict* tribes in Alaska from exercising such jurisdiction.

The United States District Court for the District of Columbia’s decision in *Native Village of Eklutna v. Department of the Interior*,¹⁰⁹ does not change the analysis. The district court there rejected the Native Village of Eklutna’s (“Eklutna”) argument that the Privileges and Immunities Amendment invalidated the Sansonetti Opinion’s legal reasoning. The district court acknowledged the different outcome for Eklutna relative to the Indian lands opinions of other tribes in the lower 48 states, but concluded that “Eklutna fails to grapple with the requirement

¹⁰¹ See *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att’y for W. Dist. of Michigan*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002).

¹⁰² Office of the Solicitor, *Pokagon Band of Potawatomi Indians*, Opinion M-36991, at *7 (Sept. 19, 1997) [hereinafter Opinion M-36991].

¹⁰³ Act of Sept. 21, 1994, Pub. L. No. 103-323, § 2, 108 Stat. 2152, 2153 (formerly codified at 25 U.S.C. § 1300j-1).

¹⁰⁴ Opinion M-36991 at *7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ Sansonetti Opinion at 126–27.

¹⁰⁸ *Id.* at 124.

¹⁰⁹ *Eklutna*, 2021 LEXIS 180474, at *7.

that its different treatment be arbitrary,”¹¹⁰ and that “[n]othing in the Sansonetti Opinion amounts to arbitrary discrimination on behalf of Interior.”¹¹¹ The district court’s conclusion was based on the fact that “[t]he Solicitor applied the same legal test that determined tribal territorial jurisdiction across the United States,” and that [t]his legal test remains the appropriate legal standard even after the passage of legislation, including the ‘privileges-and-immunities’ amendment to the [IRA].”¹¹²

For the purposes of the current consideration, I conclude that the *Eklutna* court erred in both its reasoning and its ultimate conclusion. As discussed above, the test in Privileges and Immunities Amendment cases is whether a federal statute unambiguously directs the Department to treat similarly situated tribes differently. This necessarily requires an interpretation of the relevant statute to determine whether it clearly creates such distinctions.¹¹³ Instead of interpreting the ANAA in light of the Privileges and Immunities Amendment, the district court simply adopted the Sansonetti Opinion’s interpretation and reached its conclusion based on the “legal test” employed in the Opinion rather than an interpretation of the ANAA.¹¹⁴

The district court also erred in applying a standard of arbitrariness to reach its conclusion.¹¹⁵ The test advanced by the district court—that a classification must be arbitrary to violate the Privileges and Immunities Amendment—has no basis in precedent or statute. The Department violates the Privileges and Immunities Amendment if it treats like tribes differently without an explicit statutory mandate, even if the Department’s action is based on a reasonable interpretation; the test is whether such a distinction is *clearly mandated* by statute.

For all of these reasons, the *Eklutna* decision erred in its analysis of the Privilege and Immunities Amendment issue and is not an independent basis for upholding the Opinion’s conclusion on Native Allotments.

ii. The Violence Against Women Reauthorization Act of 2022 calls into question the Sansonetti Opinion’s legal foundation.

As noted, the Sansonetti Opinion’s conclusion that “there is little or no basis for an Alaska village claiming territorial jurisdiction” rested on the premise that there are no “tribal territorial bases” such as reservations in Alaska.¹¹⁶ That premise is not correct. In 2022, Congress passed

¹¹⁰ *Id.* at *22.

¹¹¹ *Id.* at *25.

¹¹² *Id.*

¹¹³ *See, e.g.*, Office of the Solicitor, Pokagon Band of Potawatomi Indians, M-36991, at *7 (Sept. 19, 1997); Letter from Kevin Washburn, General Counsel, National Indian Gaming Commission, to the Hon. Douglas W. Hillman, Senior U.S. District Judge, U.S. District Court for the Western District of Michigan, at 14 n.11, 18 n.14 (Aug. 31, 2001).

¹¹⁴ *Eklutna*, 2021 LEXIS 180474, at *22-23.

¹¹⁵ *Id.* at *22 (upholding the Sansonetti Opinion’s legal foundation because “*Eklutna* fails to grapple with the requirement that its different treatment be arbitrary”).

¹¹⁶ Sansonetti Opinion at 127.

the Violence Against Women Reauthorization Act of 2022,¹¹⁷ which, in effect, treats the land within an Alaska Native village as a tribal territorial base for criminal jurisdiction purposes.¹¹⁸

VAWA, which was originally enacted in 1994, is widely considered Congress’s formal recognition of “tribes’ inherent sovereign authority to prosecute crimes occurring on their lands or against their people.”¹¹⁹ It has been reauthorized by Congress four times since its original enactment.¹²⁰ Most recently, Congress passed VAWA 2022 with the stated purpose of “empower[ing] Indian tribes to effectively respond to cases of domestic violence, dating violence, stalking, sex trafficking, sexual violence, and missing or murdered Alaska Natives through the exercise of special Tribal criminal jurisdiction.”¹²¹

As relevant here, VAWA 2022 provides an explicit statutory basis for Alaska tribes without Indian country to exercise territorial jurisdiction. It expands the jurisdictional reach of Alaska tribes, which have historically been unable to take advantage of VAWA’s special criminal jurisdictional provisions due to the relatively small patchwork of Indian country in Alaska.¹²² VAWA 2022 attempts to address this gap by affirming the jurisdiction of Alaska tribes to a tribe’s occupancy of an “Alaska Native village” rather than “Indian country” as defined in 18 U.S.C. § 1151.

To that end, VAWA 2022 expressly recognizes and affirms “the inherent authority of any Indian tribe occupying a Village in [Alaska] to exercise criminal and civil jurisdiction over all Indians present in the Village,” subject to the Indian Civil Rights Act.¹²³ It also establishes a program enabling certain tribes in Alaska to assert their criminal jurisdiction over non-Indian defendants within the boundaries of their Village.¹²⁴

The term “Village” is defined in VAWA 2022 as “the Alaska Native Village Statistical Area covering all or any portion of a Native village (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602)), as depicted in the applicable Tribal Statistical Area Program Verification Map of the Bureau of the Census.”¹²⁵ This definition is significant because

¹¹⁷ VAWA was originally enacted on September 13, 1994, and has been reauthorized by Congress four times.

¹¹⁸ See generally 25 U.S.C. §§ 1305, 1305 note (defining “Village” as the “Alaska Native Village Statistical Area covering all or any portion of a Native village (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), as depicted on the applicable Tribal Statistical Area Program Verification map of the Bureau of the Census.”).

¹¹⁹ Danika Watson, *Issues in Implementing Special Domestic Violence Criminal Jurisdiction in Alaska’s Tribal Courts*, 40 ALASKA L. REV. 2, 3 (2023).

¹²⁰ Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-113, 136 Stat. 840; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Violence Against Women Reauthorization Act of 2006, Pub. L. No. 109-162, 119 Stat. 2960; Victims of Trafficking and Violence Protection Act of 2000 (Violence Against Women Reauthorization Act of 2000), Pub. L. No. 106-386, 114 Stat. 1464; Violent Crime Control and Law Enforcement Act of 1994 (Violence Against Women Act of 1994), Pub. L. No. 103-322, 108 Stat. 1796.

¹²¹ 25 U.S.C. § 1305 note.

¹²² See Watson, *supra* note 119, at 13; *Restoring Justice: Addressing Violence in Native Communities Through VAWA Title IX Special Jurisdiction Before the S. Comm. On Indian Affairs*, 117th Cong. 43 (2021) (statement of Michelle Demmert, Director, Law and Policy Center, Alaska Native Women’s Resource Center).

¹²³ 25 U.S.C. § 1305(a).

¹²⁴ 25 U.S.C. § 1305(d).

¹²⁵ 25 U.S.C. § 1305 note.

it defines the territorial jurisdictional boundaries of Alaska Native villages, and in turn, recognizes the right of Alaska tribes to exercise land-based sovereignty within their villages. It relies on specific geographic areas with clearly marked boundaries to define the land base subject to tribal jurisdiction in each Alaska Native village.¹²⁶ When read together with the rest of VAWA 2022, this definition reflects Congress’s intent that Alaska Native villages function as a tribal territorial base from which an Alaska tribe can assert its inherent criminal and civil jurisdiction—much like a reservation in the lower 48 states.

These VAWA 2022 provisions undermine the Sansonetti Opinion’s expression of doubt regarding the exercise of territorial jurisdiction by an Alaska village over allotted lands and its underlying premise that there are no tribal territorial bases in Alaska. Prior to VAWA 2022, there were no recognized *tribal* territorial bases in Alaska, except the Annette Islands Reserve for the Metlakatla Indian Community, and a few trust parcels in Southeast Alaska. According to Solicitor Sansonetti, this meant that ANAA allotments lacked the key connection to a tribal land base from which tribal territorial jurisdiction could spring.

VAWA 2022, however, supplies that connection by recognizing Alaska Native Village Statistical Areas as tribal territorial bases from which tribes in Alaska can assert their inherent jurisdiction. The Department must apply this understanding of territorial jurisdiction in Alaska—not articulated in the Sansonetti Opinion—to any determination of what powers tribes in Alaska hold. Moreover, and as shown in the next section, the premise that a reservation territorial base is necessary for the exercise of tribal jurisdiction over other categories of Indian country is simply incorrect.

2. Tribes in Alaska are presumed to have jurisdiction over Native Allotments.

In light of the foregoing, there is no basis for concluding that Native Allotments “appear to be an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands.”¹²⁷ Rather, the presumption in favor of tribal jurisdiction over all Indian country controls the jurisdictional analysis for Native Allotments in the same way that it does for public-domain allotments issued pursuant to Section 4 of the GAA in the lower 48 states.

This presumption has its source in foundational principles of law applicable to tribes. Under those principles, as expressed in federal statutes and articulated in decisions of the Court, “Indian tribes retain ‘attributes of sovereignty over both their members and their territory.’”¹²⁸ As sovereign entities, tribes are “invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that

¹²⁶ *Id.*; 2020 Census Participant Statistical Areas Program, Quick Reference: Alaska Native Village Statistical Areas, CENSUS.GOV, <https://www2.census.gov/geo/pdfs/partnerships/psap/G-622.pdf> (last visited Nov. 17, 2023); 2010 Census Tribal Statistical Areas Program Verification Maps for the Alaska Native Village Statistical Areas, CENSUS.GOV, <https://www.census.gov/geographies/reference-maps/2010/geo/tsap-verification-maps.html> (last visited Nov. 17, 2023).

¹²⁷ Sansonetti Opinion at 124.

¹²⁸ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Mazurie*, 419 U.S. at 557).

jurisdiction has been restrained and abridged by treaty or act of Congress.”¹²⁹ The “territory” over which tribes are generally understood to be invested with jurisdiction is referred to as “Indian country” as that term is defined in 18 U.S.C. § 1151, and includes reservations, dependent Indian communities, and allotments.¹³⁰

This presumption of tribal jurisdiction over lands that are Indian country applies equally to all tribes, including tribes in Alaska, who possess sovereignty on the same terms as tribes in the lower 48 states.¹³¹ To the extent there was doubt at the time of the Sansonetti Opinion as to the inherent and continuing sovereign powers of tribes in Alaska, Congress, the courts, and the Department have made clear that tribes in Alaska “have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes,” and “the same right . . . to exercise the same inherent and delegated authorities available to other tribes.”¹³² Thus, tribes in Alaska enjoy the same sovereign status as tribes in the lower 48 states and hold the same rights as other tribes, including the right to assert jurisdiction over land that is Indian country.¹³³

a. Congress did not abrogate tribal jurisdiction in the ANAA.

The Sansonetti Opinion acknowledged these general principles and the “general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands.”¹³⁴ But, as the Opinion properly recognized, that is not the end of the tribal-jurisdiction inquiry. For lands that are Indian country, the analysis proceeds from “general principles concerning tribal, federal, and state jurisdiction to the specific facts and law applicable to the particular situation to

¹²⁹ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting S. Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879)).

¹³⁰ See, e.g., *Venetie*, 522 U.S. at 527 n.1 (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal government and the Indian tribe inhabiting it, and not with the States.”); *Okla. Tax Comm’n*, 508 U.S. at 128 (“Absent explicit congressional direction to the contrary, we presume against a State’s having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.”); see also *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 280 (2d Cir. 2015) (“Lands subject to federal and tribal jurisdiction have historically been referred to as ‘Indian country.’”); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. 2010) (noting that “as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the States”); *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996) (noting that “the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands”) (quoting *Indian Country U.S.A.*, 829 F.2d at 973; *Harrison*, 94 F.3d at 1385) (recognizing that “[i]n order to determine whether the Tribes have [tribal] jurisdiction [over a specific parcel of land] we must . . . look to whether the land in question is Indian country”); COHEN *supra* note 3 at 27 (Rennard Strickland ed., 1982) (“For most jurisdictional purposes the governing legal term is ‘Indian country’”).

¹³¹ *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 558-59 (9th Cir. 1991) (affirming that “Indian sovereignty flows from the historic roots of the Indian tribe,” and that “the villages [of Venetie and Fort Yukon] are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States”).

¹³² See 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993); Pub. L. No. 103-454, tit. 1, 108 Stat. 4791 (recognizing the sovereign status of listed tribes). See also *John v. Baker*, 982 P.2d 738 (Alaska 1999) (judicial confirmation of tribal sovereign status and powers of listed tribes).

¹³³ COHEN, *supra* note 3, at § 4.07[3][d][i].

¹³⁴ Sansonetti Opinion at 124.

determine whether Congress has acted to alter the general principles.”¹³⁵ If Congress has not altered the general principles, the general rule applies and tribal jurisdiction is undisturbed.

The Sansonetti Opinion examined the ANAA and the circumstances surrounding the creation of Native Allotments, and concluded that “Alaska Native allotments appear to be an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands.” That conclusion was in error. Contrary to the Sansonetti Opinion, Congress did not “act[] to alter the general principles” governing tribal jurisdiction when it enacted the ANAA.¹³⁶

Under well-settled law, Congress must clearly express its intent to divest a tribe’s sovereignty or inherent powers.¹³⁷ With respect to the ANAA, there is no indication of congressional intent to divest tribes of jurisdiction over Alaska Native allotments,¹³⁸ nor is there any indication that Congress intended to distinguish Native Allotments from those held by tribal member allottees in the lower 48 states, over which courts and the Department have found tribal jurisdiction exists. To the contrary, and as discussed above, congressional intent points to ANAA Allotments being treated similarly to Section 4 of the GAA’s public-domain allotments respecting the exercise of tribal jurisdiction over them.¹³⁹

Moreover, none of the reasons cited by the Opinion for distinguishing Native Allotments from those in the lower 48 states is persuasive, and the Opinion’s rationale for doubting tribal jurisdiction has largely been superseded. Therefore, there are no “specific facts and law applicable to” the creation of Native Allotments to support a finding of congressional intent to abrogate tribal jurisdiction in the ANAA.¹⁴⁰

In the absence of any evidence that “Congress has acted to alter the general principles” governing tribal jurisdiction over Native Allotments, I find that Congress did not divest tribes in Alaska of their inherent sovereign powers in enacting the ANAA. Accordingly, Alaska Native allotments are not “an exception to the general rule,” but subject to the same legal principles governing other allotments in the lower 48 states. Under those principles, tribes in Alaska are presumed to have jurisdiction over lands that are Indian country, including ANAA Allotments.

¹³⁵ *Id.* at 110.

¹³⁶ *Id.*

¹³⁷ See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (explaining that “until Congress acts, the tribes retain their existing sovereign powers”); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941) (noting that even where Congress has power to extinguish tribal territorial rights, such “extinguishment cannot be lightly implied”); *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986) (“Only Congress can modify or abrogate Indian tribal rights; it will be held to have done so only when its intention to do so has been made absolutely clear.”).

¹³⁸ Although ANCSA revoked the ANAA and effectively ended the allotment era in Alaska, ANCSA did not divest federally recognized tribes in Alaska of their jurisdiction over their members’ allotments issued pursuant to the ANAA. See *Venetie*, 522 U.S. at 534 n.2 (“Other Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a ‘dependent Indian community’ . . . or if it constitutes ‘allotments’ under § 1151(c).”) See also *Baker*, 982 P.2d at 753 (“Ample evidence exists that Congress did not intend for ANCSA to divest tribes of their powers to adjudicate domestic disputes between members.”).

¹³⁹ See *supra* Section II.1.a.ii.

¹⁴⁰ Sansonetti Opinion at 108.

b. Alaska Native allotments are subject to a rebuttable presumption of tribal jurisdiction.

Under Department precedent, off-reservation allotments qualifying as Indian country are subject to a rebuttable presumption in favor of tribal jurisdiction. In the 1996 Opinion discussed above, the Solicitor’s Office relied on the “presumption in favor of tribal jurisdiction” within Indian country to find that an off-reservation public domain allotment was subject to the jurisdiction of the Quinault Indian Nation. As part of its analysis, the 1996 Opinion identified two circumstances in which tribal jurisdiction over an off-reservation public domain allotment would be lacking: (1) when the allotment is owned or occupied by a non-tribal member; or (2) when the allotment is far removed from the tribal community.¹⁴¹ Citing to *Mustang Production Company v. Harrison*, which similarly relied on a presumption of tribal jurisdiction over Indian country lands, the 1996 Opinion observed that tribal jurisdiction “has been recognized when there is a tribal nexus to the lands or a political relationship with the owners of the land.”¹⁴²

Native Allotments are analogous to Section 4 of the GAA, public-domain allotments¹⁴³ and were similarly established outside of formal reservations. Accordingly, the rule that the Department applied for public-domain allotments in the 1996 Opinion is instructive and applies to Native Allotments. Under that rule, tribes are presumed to have jurisdiction over public-domain allotments, which by their very definition are off-reservation, but this presumption can be rebutted in two ways. If neither of the exceptions applies, the presumption is unrebutted, and tribal jurisdiction is undisturbed.

One way that the presumption may be rebutted is by evidence that the allotment is owned by a non-tribal member. The membership of the allottee in the tribe claiming jurisdiction is critical to determining tribal jurisdiction because it is indicative of a “meaningful . . . political relationship” between the tribe and the owner of the allottee.¹⁴⁴ An Indian tribe’s jurisdiction over its members arises from both its retained sovereignty and the consent of its members who maintain a “meaningful political relationship” with their tribe.¹⁴⁵

Another way that the presumption may be rebutted is if there is no clear nexus between the allotted lands and the tribe claiming jurisdiction. This rebuttal factor looks to whether the allotment is in close geographic proximity to the “tribal community,” which, for purposes here, refers to either (1) the area surrounding a tribe’s governmental headquarters; or (2) the lands customarily and traditionally used by tribal members for hunting, fishing, gathering, and other subsistence activities. While the political relationship between the allotment owner and the tribe claiming jurisdiction is critical, it is not sufficient to establish tribal *territorial* jurisdiction. The

¹⁴¹ 1996 Opinion.

¹⁴² *Id.* (citing *Harrison*, 94 F.3d at 1382).

¹⁴³ See *supra* Section II.1.b.i. The Sansonetti Opinion recognized that Section 4 GAA public-domain allotments are “indeed analogous in many respects,” but pointed out that unlike ANAA Allotments, Section 4 GAA public-domain allotments “did require tribal affiliation, which conceivably provides a basis for tribal jurisdiction.” Sansonetti Opinion at 128-29. However, as discussed in *supra* Section II.1.a.i., tribal affiliation is not a proper basis for distinguishing between Section 4 of GAA and the ANAA because Section 4 of GAA did not explicitly require tribal membership or affiliation and, in fact, uses similar terminology as the ANAA in its eligibility criteria.

¹⁴⁴ *Zah*, 792 F. Supp. at 1181.

¹⁴⁵ *Duro v. Reina*, 495 U.S. 676, 693 (1990).

allotment must also be clearly identifiable with a particular tribal community. Otherwise, it cannot “provide an adequate fulcrum for tribal affairs” over which there is “exclusive tribal and federal jurisdiction.”¹⁴⁶

In sum, tribes in Alaska can exercise tribal jurisdiction over ANAA Allotments where (a) their tribal members own the ANAA Allotment and continue to maintain a political relationship with the tribe and (b) the ANAA Allotment is in close geographic proximity to the tribal community.

III. Conclusion.

Based on the foregoing analysis, I withdraw the portions of the Sansonetti Opinion addressing tribal jurisdiction over Native Allotments. This partial withdrawal is based on the finding that the portions in question were then, and remain, unsupported. I also clarify that Native Allotments are subject to the same legal principles governing public-domain allotments in the lower 48 states, which support a presumption of tribal jurisdiction over such allotments.



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¹⁴⁶ *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975) (noting that the remaining allotments of the disestablished Sisseton-Wahpeton Reservation “provide an adequate fulcrum for tribal affairs” and that “exclusive tribal and federal jurisdiction is limited to the retained allotments”).