David W. DeBruin
Tel (202) 639-6015
Fax (202) 639-6066
ddebruin@jenner.com

February 22, 2020

VIA HAND DELIVERY
AND ELECTRONIC MAIL (speenstra@senecafallspd.net)

Stuart W. Peenstra
Chief of Police
Town of Seneca Falls Police Department
130 Ovid Street
Seneca Falls, New York 13148

Re: Cayuga Nation Police Authority

Dear Chief Peenstra:

My firm is legal counsel to the Cayuga Nation. In light of actions taken today, I write to set forth again the legal authority of the Cayuga Nation Police to take those actions. I would be pleased to address any questions you may have.

The United States Department of the Interior, which has statutory authority over "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, has determined that Cayuga Nation citizens have selected a Cayuga Nation Council led by Clint Halftown "as the Nation's governing body without qualification" and "the Nation's government for all purposes." Letter of Tara Sweeney, Assistant Secretary–Indian Affairs, United States Department of the Interior (Nov. 14, 2019) (copy enclosed).

In addition, as you know, the Department of the Interior also has made clear that the Cayuga Nation has "inherent sovereign authority to enforce its own laws inside the Cayuga Indian Nation Reservation boundaries through a law enforcement program" and that "the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation." Letter of Darryl LaCounte, Director, Bureau of Indian Affairs, United States Department of the Interior, to Stuart Peenstra, Chief of Police, Town of Seneca Falls Police Department (June 17, 2019) (copy enclosed).

These determinations by the Department of the Interior are firmly grounded in well-established federal law.

Cayuga Nation Police Authority Regarding Cayuga Members

The Cayuga Nation has unquestioned authority to enforce its own criminal laws against its members.

The Supreme Court declared in *United States v. Wheeler*, 435 U.S. 313, 322 (1978): "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members."

The Court explained: "Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Id*.

The Court further emphasized: "Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Id*. at 326.

Cayuga Nation Police Authority Regarding Non-Cayuga Indians

The authority of the Cayuga Nation Police to enforce Cayuga Nation laws against Cayuga members also extends to Non-Cayuga Native Americans.

This is established by a federal statute, 25 U.S.C. § 1301(2), which provides that the "powers of self-government" of an Indian tribe "includes . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction *over all Indians*" (emphasis supplied).

This federal protection of the power of an Indian nation to exercise criminal jurisdiction over all Indians has been upheld by the Supreme Court, which ruled: "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do." *United States v. Lara*, 541 U.S. 193, 200 (2004).

The Supreme Court emphasized that this tribal criminal jurisdiction over all Indians was not a significant extension of tribal authority: "It concerns a power similar in some respects to the power to prosecute a tribe's own members—a power that this Court has called 'inherent.' *Wheeler*, 435 U.S. at 322–323. In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. *See United States v. Mazurie*, 419 U.S. 544, 557 ('Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and *their territory*'

(emphasis added)); *see also, e.g.*, S. Rep. No. 102–168, at 21 (remarks of P. Hugent). And the tribes' possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations.' *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831); see also *id.*, at 16 (describing tribe as 'a distinct political society, separated from others, capable of managing its own affairs and governing itself')." *Lara*, 541 U.S. at 204-05.

Cayuga Nation Police Authority Regarding Non-Indians

In general, and with certain exceptions, an Indian nation may not prosecute a non-Indian for criminal offenses. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

However, "tribal police have the authority to detain non-Indians who commit crimes within Indian country until they can be turned over to the appropriate state or federal authorities." *United States v. Santistevan*, 2019 WL 1915791 (Apr. 30, 2019 U.S.D.C. S. Dak.).

The Supreme Court has held: "Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them." *Duro v. Reina*, 495 U.S. 676, 697 (1990), *superseded by statute on other grounds*, Pub. L. 101-511, 104 Stat. 1856, *as recognized in United States v. Lara*, 541 U.S. 193, 194 (2004).

The Supreme Court further stated: "Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id*.

The Supreme Court underscored, even more broadly: "The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Id*. at 696.

Numerous other cases have recognized the authority of tribal police to arrest and detain non-Indians for crimes committed within Indian country, until they can be turned over to appropriate state or federal authorities. *See, e.g.*:

- *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975). In *Ortiz-Barraza*, the court ruled that the inability of an Indian nation to exercise criminal jurisdiction over non-Indians does not diminish "the sovereign power of tribal authorities to exclude trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities." *Id*. at 1179. The court concluded that "we have little difficulty in concluding that an Indian tribe may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power," and that tribal power includes the authority "to investigate any on-reservation violations of

state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated." *Id*. at 1179, 1180. The court explained: "The power of the Papago to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power." *Id*. at 1180.

- *State v. Haskins*, 887 P.2d 1189, 1194 (Mont. 1994) ("Haskins maintains that where the Indian tribe lacks criminal jurisdiction to prosecute a person for a criminal offense committed within the exterior boundaries of the reservation, the tribal police officers only have the power to detain and to promptly eject the offender and do not have the power to undertake a lengthy criminal investigation. We disagree.")

- *United States v. Terry*, 400 F.3d 575 (8th Cir. 2005). In *Terry*, the court again held that despite the inability of an Indian nation to exercise criminal jurisdiction over non-Indians, "tribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation." *Id.* at 579. The court reiterated: "Because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power." *Id*. at 579-80.

- *Collyer v. State*, 203 P.3d 1104 (Wyo. 2009) (holding that "the law is clear" that even though "appellant could not have been arrested and prosecuted within the tribal court system because he was not a tribal member," a reservation police officer had authority "to detain the appellant" for violation of state law).

- *United States v. Peters*, 2017 WL 1383676, *2 (U.S.D.C. S. Dak. Apr. 13, 2017) ("tribal police have the authority to detain non–Indians who commit crimes within Indian country until they can be turned over to the appropriate state or federal authorities").

Definition of "Indian Country"

The definition of "Indian country" as referenced in the *Santistevan* case and other cases has been defined by Congress to include "all land within the limits of any Indian reservation . . . including rights-of-way running through the reservation." 18 U.S.C. § 1151(a).

The Supreme Court has emphasized: "Nothing can more appropriately be deemed 'Indian country,' within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a track of land that, being a part of

the public domain, is lawfully set apart as an Indian reservation." *Donnelly v. United States*, 228 U.S. 243, 269 (1913).

In *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 640 (2010), the New York Court of Appeals held: "[T]he United States government continues to recognize the existence of a Cayuga reservation in New York, as noted in the amicus brief submitted by the United States in support of the Nation's position. In the absence of contrary federal authority, we necessarily must conclude that the convenience store properties in this case meet the definition of a 'qualified reservation' under Tax Law § 470 (16) (a)."

The Court in *Gould* further held: "Although *City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties for the purpose of avoiding real property taxes, the decision simply does not establish that the convenience stores are not located on a reservation recognized by the United States government." *Id*. at 642-43.

Thus, even with regard to non-Indians, Cayuga Nation Police have authority to detain any individual who commits crimes on Nation property within the boundaries of the Cayuga reservation until they can be turned over to the appropriate state or federal authorities, to restrain any person who disturbs public order on the reservation and to eject them, and to exclude any person whom the Cayuga Nation deems to be undesirable from tribal lands.

Crimes Subject To Principles Set Forth Above

The Cayuga Nation has promulgated a comprehensive criminal code, which may be enforced by Cayuga Nation Police against Cayuga members and other Indians within the boundaries of the Cayuga Reservation. Violations of these laws will be enforced in Cayuga Nation courts.

Cayuga Nation Police also may detain any person, until such person can be turned over to appropriate state or federal authorities, for violation of the following federal and state criminal offenses within the boundaries of the Cayuga Reservation:

- 18 U.S.C. § 1163 makes it a federal offense to embezzle, steal, or misappropriate any money or other property belonging to any Indian tribal organization.

- The General Crimes Act, 18 U.S.C. § 1152 provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

- In addition, the New York state criminal code applies to the conduct of non-Indians on Indian reservation land in New York. 25 U.S.C. § 232 ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State").

Right To Non-Interference With Cayuga Nation Law Enforcement Authority

In *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144 (9th Cir. 2017), the court ruled that a federal complaint brought against Inyo County California, County Sheriff William Lutze, and County District Attorney Thomas Hardy stated a valid claim for relief and could proceed. The case was brought by the Bishop Paiute Tribe and sought a declaration that the Tribe had the right to "investigate violations of tribal, state, and federal law, detain, and transport or deliver a non-Indian violator [encountered on the reservation] to the proper authorities." *Id*. at 1147-48 (addition in original). The complaint alleged interference with that right by the County Sheriff and District Attorney, who had arrested and brought charges against a tribal police officer for detaining a non-Indian for violating tribal and state court protective orders, and tribal nuisance and trespass ordinances. In allowing the Tribe's federal complaint to proceed, the court emphasized that the Tribe had pleaded a valid claim against the County, the Sheriff, and the District Attorney based on "a long list of Supreme Court and other relevant case law regarding the Tribe's alleged inherent authority to exercise jurisdiction over non-Indians on a reservation." *Id*. at 1152.

These principles were developed further in a decision of the District Court on remand. *Bishop Paiute Tribe v. Inyo County*, 2018 WL 347797 (U.S.D.C. E.D. Cal. Jan. 10, 2018). The court reiterated that "Because tribal authorities have the power to exclude from the reservation those who violate state or federal law, they necessarily also possess the power to investigate whether those laws have been violated." *Id.* at *4. The court ruled that a tribal police officer, "by virtue of his status as a duly sworn officer of the Bishop Paiute Tribe, possessed the inherent authority to detain the suspect in the course of investigating whether she had violated the state court issued protective order," and that "No affirmative grant of state or federal authority to the Tribe is required in the present context." *Id.* at *5. The court also rejected arguments that the District Attorney could not be sued regarding his prosecutorial decisions, holding that "When acting in an enforcement capacity, prosecutors are not immune from suits seeking injunctive or declaratory relief." *Id*. at *8. Because the Tribe's complaint "alleges an ongoing violation of federal law by defendant Hardy," the Tribe was entitled to proceed against the District Attorney as well as the County and the Sheriff.

In addition to declaratory and injunctive relief, the Bishop Paiute Tribe complaint also sought an award of attorneys' fees. The case ultimately settled.

Thank you for your consideration of this letter. I would be happy to discuss anything set forth in this letter further, at your convenience.

Very truly yours,

David DeBruin

cc: JP Kennedy
United States Attorney, Western District of New York

Grant Jaquith
United States Attorney, Northern District of New York

Tracy Toulou
Director, Office of Tribal Justice, Department of Justice

Samuel Ennis
Office of the Solicitor, United States Department of Interior

Mark Sinkiewicz
District Attorney, Seneca County

W. Timothy Luce
Sheriff, Seneca County

Jon E. Budelmann
District Attorney, Cayuga County

Brian P. Schenck
Sheriff, Cayuga County

Clint Halftown
Chair, Cayuga Nation Council, and Cayuga Nation Federal Representative

Colonel Mark Lincoln
Superintendent, Cayuga Nation Police Department

Daniel J. French
Gabriel M. Nugent
Barclay Damon LLP