

# Alaska Legal Services Corporation

with the support of the Alaska Bar Association  
Law Related Education Committee

TRIBAL JURISDICTION IN ALASKA

**TRIBAL JURISDICTION IN ALASKA:** Child  
Protection, Adoption, Juvenile Justice,  
Family Violence and Community Safety

Revised Edition  
WINTER 2012

Eight years have passed since the Alaska Inter-Tribal Council published the first edition of this booklet, and it has been a busy eight years in the field of tribal jurisdiction.

In October 2004, just before the last edition was published, another round of litigation over child custody jurisdiction was beginning. In the past two years, this has resulted in two new major decisions on tribal jurisdiction in Alaska: the *Kaltag* case, in federal court, reaffirming tribal jurisdiction over adoptions, and the *Tanana* case before the Alaska Supreme Court, reaffirming tribal jurisdiction to initiate child protection cases.

Federal support of tribal courts in Alaska has also seen marked growth in the past eight years. Thanks to the efforts of the Bureau of Justice Assistance, the Administration for Native Americans, and the National American Indian Court Judges Association, tribal courts are working with expanded resources for training, technical assistance, and innovation. Strong coordinated efforts for regional tribal court improvement have come from the tribal justice divisions of the Tanana Chiefs Conference, Bristol Bay Native Association, and the Association for Village Council Presidents. These efforts are increasing access to justice for tribal members across the State of Alaska.

The Alaska State Court System should also be recognized for the efforts it has been making to be more inclusive of the tribal judicial systems in our state. One example of this is incorporating entire villages into state criminal proceedings through Circle Sentencing, and exploring other ways to incorporate community justice concerns.

Special thanks are owed to Andy Harrington, who was indispensable to the original edition of this booklet. To Heather Kendall-Miller, Natalie Landreth, and Erin Dougherty of NARF, who are personally responsible for much of the tribal court jurisprudence in Alaska today. To the Alaska Bar Association's Law Related Education Committee, which provided financial support for this project. And finally to all of the volunteer tribal judges and tribal court staff who work toward justice in their communities every day.

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**ALASKA BAR ASSOCIATION**

# A BRIEF HISTORY OF TRIBAL COURT JURISDICTION IN ALASKA

*Second Edition, Winter 2012*

Alaska Native tribal jurisdiction has in many respects paralleled tribal jurisdiction in the contiguous 48 states, but the parallel has not been exact. Like a footpath along a riverbank which is at stages closer to or further from the riverbed, developments in Alaska have at times diverged from, and at other times converged with, Federal Indian law in the lower 48.

The riverbed, itself, has changed course from time to time, as Federal Indian law has not been static. There are the high-water marks during periods when Federal policy has promoted tribal self-government and self-determination, and the dry spells when Federal policy has promoted the assimilation of Native peoples into “mainstream” society through the dismantling of tribal governments and structures.<sup>1</sup>

The status of Alaska’s Native tribes as federally recognized tribes was contested until 1993, when federal recognition was made unequivocal (although there are some who would still seek to debate that point). The “Indian country” status of Alaska Native Claims Settlement Act lands was contested until 1998, when the United States Supreme Court issued its ruling in the *Venetie* tax case (and the “Indian country” status of certain other categories of Native land holdings in Alaska continues to be hotly contested).

Generally, the comparison between tribes in Alaska and tribes in the lower 48 is fairly close with respect to issues of tribal status and tribal authority over members; with respect to tribal lands and territorial jurisdiction, the differences have become more important. This generalization somewhat oversimplifies the situation, and the development of tribal jurisdiction in Alaska has been anything but a straight-line trend.

## **The Era of “no particular notice,” 1867-1900**

As Willie Hensley put it in his 1960s paper on Native land rights, much of Alaska had never been occupied by non-Natives, especially before 1900. Based on archeological findings 11,500 years old in the Tanana Valley, there would have been at least 400 human generations of Alaska Natives living in organized societies — with distinct cultures and justice systems — by the time Europeans landed on Alaskan shores.

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<sup>1</sup> “Current issues in Indian Law, including the interpretation of P.L. 83-280, should be viewed in the historical context of the vacillation of federal policy between total assimilation and preservation of Indian cultures. This polarity in federal policy has contributed greatly to the confusion in the judicial treatment of the tribes and has inspired many of the theories and canons of construction used by the courts.” *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1976). The eras promoting tribal self-government are generally identified as the treaty era (1789–1871), the IRA era (1934-1952), and the self-determination era (1968 to date); those favoring assimilation of Natives are generally identified as the allotment era (1886-1934) and the termination era (1952-1968).

The Treaty of Cession, by which the United States bought Alaska from Russia in 1867, was quite clear that the “uncivilized tribes” in Alaska were to be legally the equivalent of Native Indian tribes in the contiguous United States. But the federal government in those earliest years neither implemented nor contradicted this policy; it simply procrastinated, passing “stopgap” statutes stating that existing land uses by Natives were not to be disturbed, but that measures for obtaining title to those lands were to be left for resolution by future Congresses.<sup>2</sup>

Alaska’s vast area meant that the limited white incursions into Native areas did not present the pressing problems they had presented “outside,” and even if the treaty era had not ended in 1871, it is not clear that the federal government would have felt the need to negotiate treaties with Alaska tribes during this era. Simply put, there was plenty of room:

In the beginning, and for a long time after the cession of this Territory, Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently.<sup>3</sup>

This led some to conclude that Alaska Natives were legally in a different status than American Indians; the Solicitor’s Office of the Department of the Interior issued an opinion in 1894 so stating, based in large part on the fact that much of the federal contact with Alaska Natives was through the federal Bureau of Education, not the Indian Bureau.<sup>4</sup>

### **Federal Indian Law arrives in Alaska, 1900-1932**

Starting in about 1900, however, a series of decisions by all three branches of the federal government came to recognize the original premise of the Treaty of Cession. Establishment of reindeer reserves starting in 1901; establishment of executive reserves starting in 1905; court cases in 1904 and 1905 that applied federal Indian law rules to Alaska cases;<sup>5</sup> and enactment by Congress of the Nelson Act of 1905,<sup>6</sup> the Alaska Native Allotment Act of 1906,<sup>7</sup> and the Alaska Native Townsite Act of 1926,<sup>8</sup> all set a pattern of recognizing that the federal government had a relationship to Alaska Natives that paralleled its relationship to Indians in the contiguous states. By 1923, the Solicitor’s Office

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<sup>2</sup> Section 8 of Act of May 17, 1884, c. 54 (“District Organic Act”), 23 Stat. 24.

<sup>3</sup> “Leasing of Lands Within Reservations in Alaska,” 49 L.D. 592 (1923).

<sup>4</sup> “Alaska – Legal Status of Natives,” 19 L.D. 323 (1894).

<sup>5</sup> *In Re Minoak*, 2 Alaska 200 (D. Alaska 1904); *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1904).

<sup>6</sup> Act of Jan. 27, 1905, 33 Stat. 617.

<sup>7</sup> Act of May 17, 1906, ch. 2469, 34 Stat. 197, formerly codified at 43 U.S.C. §§ 270-1 to 270-3, repealed with a savings clause for pending applications by ANCSA, Pub.L. 92-203, §18, 85 Stat. 710, codified as amended at 43 U.S.C. §1617.

<sup>8</sup> Act of May 25, 1926, ch. 379, 44 Stat. 629, formerly codified at 43 U.S.C. §§ 733-736, repealed as part of Federal Land Policy and Management Act of 1976, Pub. L. 94-579, §703, 90 Stat. 2743, 2790

recognized that “these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians.”<sup>9</sup> Responsibility for Alaska Native affairs was transferred from the Bureau of Education to the BIA in 1931. By 1932, a Solicitor’s opinion stated that “no distinction has been or can be made between the Indians and other Natives of Alaska so far as the laws and relations of the United States are concerned ... their status is in material respects similar to that of the Indians of the United States.”<sup>10</sup>

Most significantly for tribal law issues, a second opinion issued later in 1932 ruled not only that “it must now be regarded as established that the native tribes of Alaska occupy substantially the same relation to the Federal Government as their American neighbors” but also that, as such, Alaska’s tribes were encompassed within the rule that “the relations of the Indians among themselves are to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise,” and thus marriages by tribal custom were to be recognized even though the territory had its own marital relations laws.<sup>11</sup>

### **The IRA and P.L. 280 come to Alaska, 1932-1968**

The analogy between tribal authority in Alaska and in the lower 48 was strengthened by Congressional decisions in 1936 and 1952 to extend to Alaska the two most significant pieces of Indian legislation in the middle third of the twentieth century, the IRA and P.L. 280.

The Indian Reorganization Act of 1934 marked a federal commitment to encourage self-determination, tribal government, and economic development among Indian tribes generally. In 1936, Congress extended the IRA to Alaska, and authorized the Secretary of the Interior to create new reservations for Alaska villages re-organizing under the IRA, although there was considerable political opposition within Alaska to the Secretary’s actions creating such reservations.<sup>12</sup>

Public Law 280, enacted in 1953, promoted state authority within Indian country (which Congress had re-defined in 1948 to include reservations, Indian allotments, and “dependent Indian communities”). States had no legal authority within “Indian country” without a specific grant of authority by Congress. P.L. 280 eliminated the barriers to state court jurisdiction around Indian country, so that state criminal and civil laws could be

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<sup>9</sup> “Leasing of Lands Within Reservations in Alaska,” 49 L.D. 592 (1923).

<sup>10</sup> “Status of Alaskan Natives,” 53 Int. Dec. 593 (Feb. 24, 1932).

<sup>11</sup> “Customary Marriage – Alaska Natives,” 54 Interior Decisions 39 (September 3, 1932)

<sup>12</sup> Some have read the IRA and the constitutions promulgated under it as implying that tribal governmental authority could only exist within reserves set aside by the federal government, and thus argued that Alaska’s Villages without reservations had no governmental authority. See, for example, *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32, 39-42 (Alaska 1988) (superseded by *John v. Baker*, 982 P.2d 738 (Alaska 1999) and *Runyon v. AVCP*, 84 P.3d 437 (Alaska 2004).)

enforced within Indian country. Five states were required to exercise this jurisdiction; other states could choose to exercise it. Alaska was not on the original list of five states, but in 1957, a court decision noted that the Tyonek Reservation was “Indian country” and therefore Alaska Territorial laws could not be enforced within Tyonek.<sup>13</sup> Congress in 1958 responded by making Alaska a “mandatory” P.L. 280 jurisdiction, so that Alaska laws could be enforced within Alaska’s “Indian country.” P.L. 280 generated in later years a large debate over whether its passage had been designed only to open state courthouse doors to people within Indian country, or also to close tribal courthouse doors to those same persons.<sup>14</sup>

Besides the two pieces of legislation, parallels between Alaska tribes and Outside tribes were further cemented by the 1955 Supreme Court ruling which, although denying compensation to the Tee-Hit-Ton Indians for the taking of their lands, reached that result by classifying the Alaska tribes’ rights to the land using aboriginal title doctrines applicable to Outside tribes.<sup>15</sup>

### **Self-determination and ANCSA, 1968-1978**

On the national level, just as the pro-tribal policies of the IRA had given way to the assimilationist policies of P.L. 280, those policies in turn gave way to the new “self-determination” era. The year 1968 is used as the starting point because that was when Congress radically amended P.L. 280, mandating that any further extensions of state authority under P.L. 280 would require the consent of the affected tribe, and further allowing any state to “retrocede” or give back any authority it had received under P.L. 280. Subsequent Congressional enactments that emphasized tribal self-determination included the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978, and the Indian Tribal Tax Status Act of 1986. All included Alaska Native Villages within the definition of tribe.<sup>16</sup>

Among the Congressional enactments passed during the earliest stages of this self-determination era was the Alaska Native Claims Settlement Act, passed in 1971. ANCSA extinguished aboriginal title in Alaska; terminated all reservations in Alaska except for Metlakatla; called for the establishment of village corporations for each tribal community and twelve “regional” corporations within Alaska, with stock to be issued to Alaska Natives alive as of 1971, and lands and moneys to be transferred from the federal government to the corporations.

ANCSA’s original policies emphasized:

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<sup>13</sup> *In re McCord*, 17 Alaska 152, 115 F.Supp. 132 (D. Alaska 1957).

<sup>14</sup> Initially, the Interior Department took the position that P.L. 280 had extinguished tribal authority within reservations, a position it later repudiated.

<sup>15</sup> *Tee-Hit-Ton Band of Indians v. United States*, 348 U.S. 272 (1955).

<sup>16</sup> Indian Financing Act of 1974, 25 U.S.C. §1452(c); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450b(e); Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(3); Indian Tribal Tax Status Act of 1986, 26 U.S.C. §§ 7701(40), 7871.

The settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

ANCSA has been amended several times since 1971, and the general direction of those amendments has been away from those aspects of ANCSA's original policies that reflected an assimilationist view. For example, ANCSA lands were not to be held in trust; yet subsequently Congress created a "land bank" under which undeveloped ANCSA lands are automatically subject to certain protections.<sup>17</sup> ANCSA stock was to be inalienable (i.e., not bought and sold) for a period of 25 years, but subsequently Congress allowed corporations to keep the inalienability permanent, which corporations have done.<sup>18</sup>

Following enactment of ANCSA, Alaska's tribes, in the course of exercising their "maximum participation in decisions affecting their rights and property," increasingly chose to exercise not only their new-found economic power through their corporations, but also their long-standing inherent governmental authority through their councils. Although there were some who argued that tribal self-determination was inconsistent with the avoidance of "permanent racially defined institutions, rights, privileges, or obligations," a "tribe" is legally not a "racially defined institution" but rather a pre-existing political community, entitled to determine the structure of its own government and rules for its own membership.

The Alaska Supreme Court in 1976 issued three decisions which demonstrated a respectful treatment of distinctive Native institutions and cultural practices. The first was a suit filed over a membership dispute in the Native Village of Tyonek. The Alaska Supreme Court held that Alaska state courts did not have the authority to resolve the dispute, since it entailed tribal property rights, which Congress had placed beyond state court authority in a particular subsection of P.L. 280. In a footnote, the court also implied that, were the village to set up its own court system, the village court would be able to hear and resolve the case, although the village and most other Alaska villages had not done so.<sup>19</sup> The second case involved a dispute over inheritance of ANCSA stock, where the deceased had adopted a child under the customs and traditions of the villages, but not under state law; the court held that, in light of the "existence of various Native cultures which remain today much as they were prior to the infusion of Anglo-American culture," state courts could nonetheless recognize the validity of such an adoption for inheritance purposes.<sup>20</sup> The third case was a

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<sup>17</sup> 43 USC §1636.

<sup>18</sup> 43 USC §1629c.

<sup>19</sup> *Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 34 n. 4 (Alaska 1977).

<sup>20</sup> *Calista Corporation v. Mann*, 564 P.2d 53, 61 (Alaska 1976).

suit filed against the Village of Metlakatla stemming from a vehicle accident; the court held that Metlakatla had “sovereign immunity” and could not be sued in state court unless it consented to such a lawsuit.<sup>21</sup>

A major decision was issued by the federal district court in 1978, concerning a dispute over tribal artifacts in the former Klukwan Reservation, governed by the Chilkat Village Council.<sup>22</sup> A former resident of the Village who had moved to Arizona claimed to own the artifacts and tried to sell them to a corporation in Washington State. When the Village Council acted to block the removal of the artifacts, the former resident sued the Council. The Village Council claimed sovereign immunity from suit (as had Metlakatla in state court) and also had actually enacted a tribal court ordinance (unlike Tyonek in its state court case). The federal district court ruled that the Chilkat Village Council had sovereign immunity from being sued; and the dispute would be resolved best in the tribal court that the Chilkat Village Council had recently established.

Thus, as of 1978, federal and state courts had issued opinions consistent with each other on the issue of sovereign immunity of Alaska tribes and on the, at least potential, jurisdiction of tribal courts.

### **ICWA and the conflict between the state and federal courts, 1978-1993**

The year 1978 also saw enactment of the Indian Child Welfare Act (“ICWA”), as noted above. Following this, the legal issues surrounding tribal self-government were most often litigated in cases filed under the Indian Child Welfare Act, both in state and federal court, as more and more villages tried to get cases involving tribal children heard in tribal courts rather than state courts.

At first, it seemed likely that both federal and state courts might agree that Alaska Native tribes had jurisdiction over issues involving tribal children.

In federal court, a dispute arose in 1985 over a tribal adoption. In 1982, a tribal member with a severe alcohol problem had given birth to a child who suffered from Fetal Alcohol Syndrome and meningitis. When the mother failed to pick up the child from the hospital, the Northway Village Council designated the child’s paternal aunt and uncle to take charge of the child. Since the hospital would not release the child to the aunt and uncle, the state Division of Family and Youth Services (DFYS) was approached, and a child protection case was filed in state court. After several years, the mother regained control over her life, and requested the return of her child. In a turnabout from the normal stances of the village and the DFYS, the Village concluded that the child should remain with the aunt and uncle. The Village granted an adoption to the aunt and uncle in 1985 (although explicitly refraining from terminating the mother’s parental rights), and the DFYS was pushing for the return of the child to the mother. The aunt and uncle brought suit in federal

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<sup>21</sup> *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1976).

<sup>22</sup> *Johnson v. Chilkat Indian Village*, 457 F.Supp. 384 (D. Alaska 1978).

court, and the federal court granted a preliminary injunction in 1985 forbidding the DFYS from taking any action inconsistent with the tribal court order.<sup>23</sup>

At first, it seemed that the Alaska Supreme Court too was recognizing tribal court jurisdiction over tribal children: in a 1986 case called *J.M.*<sup>24</sup> The child protection case, similar to the Northway case, started when the child's mother failed to pick up her two-month-old child following the child's two-week hospital stay in Fairbanks. The Kaltag Village Council learned of the situation and issued a written order assuming custody of J.M. At the Council's direction, J.M. was released from the hospital and placed in a foster home in Galena. A few weeks later, the Kaltag Village Chief contacted a state social worker to request state foster care payments for the child; the social worker responded that foster care payments would only be provided if the child were in state foster care; and the chief told the social worker to do what was necessary to establish the child's right to the payments, following it up with a letter specifying that the child should "remain in the custody of the State." The social worker then started a state court child protection case, in which Kaltag intervened. However, when the state court case moved in the direction of termination of parental rights, Kaltag objected and claimed that the village had exclusive jurisdiction under a provision of the Indian Child Welfare Act, 25 U.S.C. 1911(a).<sup>25</sup> The state trial court ruled against Kaltag's motion to dismiss, finding that Kaltag had given custody of J.M. to the State of Alaska.<sup>26</sup> Kaltag appealed this to the Alaska Supreme Court, which held that the Chief's actions had not been a clear enough waiver of the tribe's authority, and ordered the superior court to send the case back to the Kaltag Tribal Court.<sup>27</sup>

Thus, as of early 1986, it looked as though both state and federal courts were willing to recognize Alaska Native tribal authority over issues involving tribal children.

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<sup>23</sup> The federal district court decision was unpublished, but the facts were outlined in a related state court case, *Matter of A.S.*, 740 P.2d 432 (Alaska 1987), which upheld continuation of the state court case over Northway's objection. Eventually, a different federal district court judge issued a ruling favoring the DFYS over the adoptive parents; but this was appealed to the Ninth Circuit, which reversed the federal district court. The decision was unpublished, but was included in the Indian Law Reporter. *Graybeal v. State*, 17 Indian Law Reporter 2206 (9<sup>th</sup> Cir. 1990). The Ninth Circuit found that the state court case had proceeded in violation of ICWA by not recognizing the status of the aunt and uncle as "Indian custodians"; it did not reach the issue of the validity of the tribal court adoption. Following the decision, the federal district court set aside the state court child protection proceedings. The state did not appeal, and thus the adoption, although not ratified by the federal courts, was essentially the controlling legal decision regarding the child's future.

<sup>24</sup> 718 P.2d 150 (Alaska 1978).

<sup>25</sup> 25 U.S.C. 1911(a) reads:

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

It was the second sentence of this upon which Kaltag relied for its exclusive jurisdiction argument, as the child had been made a ward of the tribal court prior to state court action.

<sup>26</sup> 718 P.2d at 152.

<sup>27</sup> *Id.* at 154-55.

Only a few weeks after the *J.M.* decision, however, the Alaska Supreme Court charted a quite different course, creating a conflict between state and federal court rulings on issues of tribal court jurisdiction that characterized the field for the next thirteen years, and an unfortunate atmosphere of jurisdictional confusion and conflict.

In *Native Village of Nenana v. State Department of Health and Social Services*,<sup>28</sup> the child protection case had started in state court, rather than tribal court as had been the case in *J.M.*, and the state court had denied the motion of the Village to have the case transferred to the tribe under ICWA section 1911(b).<sup>29</sup> The Alaska Supreme Court upheld this, reading ICWA section 1918(a)<sup>30</sup> as requiring that the Village obtain approval by the Secretary of the Interior of a petition for reassumption of jurisdiction before it could require transfer of the case under 1911(b).

In the meantime, two separate cases involving the Native Village of Venetie were moving forward in federal court.

The first case, called the “Venetie tax case,” had its roots in 1978, when Venetie’s IRA Council had passed an ordinance imposing a tax on business operations conducted on Venetie lands. Venetie had had a reservation, and had utilized its option under ANCSA to have its former reservation lands become its village selection, with no sharing of title with, or joint ownership of stock in, the regional corporation. Venetie’s village corporation had signed the land back over to the Venetie IRA Council, and the corporation subsequently was dissolved. When a 1986 school construction project provided the first opportunity to enforce the tax, the State of Alaska sued to challenge the tax. The federal district court issued a preliminary (not final) order in 1987 precluding Venetie from collecting the tax; that order was appealed to the Ninth Circuit, which in 1988 upheld the preliminary order and sent the case back down for a final determination.<sup>31</sup>

The second case, sometimes called the “Venetie adoption case,” was filed in 1986 by the Native Villages of Venetie and Fort Yukon against the State. Both villages had granted adoptions over tribal children, but the State of Alaska had refused to issue new birth

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<sup>28</sup> 722 P.2d 219 (Alaska 1986).

<sup>29</sup> 25 U.S.C. §1911(b) reads:

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

<sup>30</sup> 25 U.S.C. §1918(a) reads:

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

<sup>31</sup> *State ex rel. Yukon Flats School District*, 856 F.2d 1384 (9<sup>th</sup> Cir. 1988).

certificates as it would for state court adoptions. The adoptive parents and the two villages brought suit to require the State to recognize tribally-granted adoptions. In a 1988 decision, the federal district court sided with the Alaska Supreme Court's *Nenana* ruling and held that Alaska Villages had no authority to grant adoptions without filing a petition for reassumption of jurisdiction with the Secretary of the Interior.<sup>32</sup> The tribes appealed; the Ninth Circuit reversed the federal district court in 1991, holding that the lower court had incorrectly interpreted ICWA, and that a petition for reassumption would not be necessary for tribes to grant adoptions. However, the Ninth Circuit ruled that Venetie and Fort Yukon, to exercise their authority, would have to prove that they were the modern-day successors to historically recognized tribal entities, and the case went back down to the federal district court to provide that opportunity.<sup>33</sup>

With both the Venetie tax case and the Venetie/Fort Yukon adoption case back before it, the federal district court then separated the Venetie adoption case from the Fort Yukon adoption case, put the Venetie adoption case together with the Venetie tax case, and scheduled a week-long trial between Venetie and the state to determine (1) if Venetie was the modern-day successor to an historical tribe and (2) whether Venetie's lands were "Indian country." The trial was scheduled for November 1993.

In the meantime, the Alaska Supreme Court's rulings had gone from bad to worse for tribes in Alaska. In 1987, the Alaska Supreme Court was urged to overrule *Nenana*'s holding (that transfers of child protection cases from state to tribal court required approval of a reassumption petition under ICWA) in a case arising out of the Native Village of Tanana in which the state superior court had granted the transfer. The Alaska Supreme Court overturned the superior court and stood by *Nenana*.<sup>34</sup> In 1988, the Alaska Supreme Court decided, in a contract damages case, that Stevens Village was not entitled to the sovereign immunity that the Court had recognized protected Metlakata in 1986; the opinion implied that Metlakatla was likely to be the only Native Village with sovereign immunity (thus implicitly taking issue with the federal district court's 1978 decision in *Chilkat*).<sup>35</sup>

Alaska's tribes made a second attempt, in a transfer case involving the Native Village of Circle, to get the Alaska Supreme Court to overrule *Nenana* in light of the 1991 Ninth Circuit ruling in the *Venetie* adoption case. The result, the December 1992 decision in *F.P.*, proved to be the low point in state court rulings on tribal jurisdiction. Not only did the Alaska Supreme Court again re-affirm *Nenana*, but the opinion argued that the Ninth Circuit had been incorrect in ruling that Venetie and Fort Yukon should have the opportunity to prove themselves to be the modern-day successors of historical tribes. The Alaska Supreme Court characterized its *Stevens Village* opinion of 1988 as having held that Metlakatla was the only federally recognized tribe in Alaska.<sup>36</sup> Thus, as of the end of 1992, the split between state courts and federal courts on issues of tribal jurisdiction was at its widest.

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<sup>32</sup> *Native Village of Venetie IRA Council v. State of Alaska*, 687 F.Supp. 1380 (D. Alaska 1988).

<sup>33</sup> *Native Village of Venetie IRA Council v. State of Alaska*, 944 F.2d 548 (Alaska 1991).

<sup>34</sup> *In re K.E.*, 744 P.2d 1173, 1173 (Alaska 1987) (per curiam).

<sup>35</sup> *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32 (Alaska 1988).

<sup>36</sup> *In the Matter of F.P.*, 843 P.2d 1214 (Alaska 1992).

## Gaining federal recognition and losing Indian country, 1993-1998

This conflict between the state and federal courts led the Department of the Interior to launch its own extensive review of federal/tribal relations in Alaska. In early 1993, in the last few days of the first Bush Administration, a lengthy Solicitor's opinion was issued (called the Sansonetti opinion). That opinion disagreed with the Alaska Supreme Court's historical analysis in *Stevens Village*, and concluded that there were indeed federally recognized tribes in Alaska, with authority over tribal members. However the opinion also indicated that the tribes' authority over lands and non-members was quite limited because ANCSA lands were not "Indian country." The opinion did not specify which villages in Alaska were "federally recognized tribes" and which were not; that was postponed for future determination.<sup>37</sup>

That future resolution of which villages were tribes turned out to be not too far away. In October of 1993, about nine months after the Sansonetti opinion was issued, the Department of the Interior issued its list of federally recognized tribes in Alaska, with a preamble that made it absolutely clear that these tribes were recognized as having all the prerogatives of tribes in the contiguous United States.<sup>38</sup> Issuance of the list was a major development in the ongoing development of the law of tribal jurisdiction.

Congress followed up the 1993 list by passing two related laws in 1994. One ratified the Secretary's authority to issue the list, and called for the Secretary to update the list annually.<sup>39</sup> The second law rejected the Secretary's decision to exclude the Central Council of Tlingit and Haida Indians from the October 1993 list, and re-affirmed Congressional recognition of that entity as a federally recognized tribe.<sup>40</sup> By confirming Secretarial authority to issue the list and taking issue with the list's content solely with respect to the exclusion of Tlingit and Haida, Congress effectively ratified the federally recognized status of all the Alaska Native tribes included in the list. A third new federal law, not directly related to the list but nonetheless important, specifically prohibited the Secretary from drawing distinctions as to the privileges and immunities of different categories of federally recognized tribes.<sup>41</sup> This limitation indicated that any future distinctions between Alaska Native tribes and other federally recognized tribes could be made only by Congress itself, not the executive branch. Thus, by 1994, the validity of the October 1993 list was effectively ratified by Congress.

It took the courts some time to absorb what the 1993 list and the 1994 legislation meant for Alaska's tribes.

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<sup>37</sup> "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," Op. No. M-36975, Jan. 11, 1993).

<sup>38</sup> 58 Fed. Reg. 54364, 54369 (October 21, 1993).

<sup>39</sup> Federally Recognized Indian Tribe List Act of 1994, Title I of Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994), codified at 25 U.S.C. 479a et seq.

<sup>40</sup> Tlingit and Haida Status Clarification Act, Title II of Pub. L. No. 103-454, 108 Stat. 4792 (1994), codified at 25 U.S.C. 1212 et seq.

<sup>41</sup> Pub. L. No. 103-263, § 5(b), 108 Stat. 709 (1994), adding subsecs. (f) and (g) to 25 U.S.C. §476 of Indian Reorganization Act.

It turned out that the list did not play a large role in the consolidated Venetie tax and adoption cases trial held about two weeks after the list was issued. The State argued that the list exceeded the Secretary's authority (an argument the court rejected) and tribes argued that the list did not change the law but only confirmed a pre-existing federal recognition, a position which the court thought meant that it had to examine the correctness of that pre-existing recognition. The court found that the facts proven at trial showed that Venetie had been federally recognized as a tribe prior to issuance of the list, and therefore held that Venetie's adoption decree was entitled to full faith and credit.<sup>42</sup>

After issuing that decision, the federal district court separated the Venetie adoption and Venetie tax cases again, since the question of whether Venetie occupied Indian country was relevant to Venetie's authority to impose taxes, but not important to Venetie's authority to grant adoptions.<sup>43</sup> Following that, the Venetie adoption and Venetie tax cases followed their own independent courses.

In the *Venetie* tax case, the district court issued its decision in 1995, concluding that Venetie did not occupy Indian country, and thus could not impose the tax.<sup>44</sup> Venetie appealed that ruling to the Ninth Circuit, which reversed the federal district court, found the former Venetie reserve to be "Indian country," and upheld the tax.<sup>45</sup> The State of Alaska persuaded the United States Supreme Court to take the case and this led to the 1998 final decision in the Venetie tax case, concluding that ANCSA lands (including Venetie's former reserve) could not meet the definition of "Indian country."<sup>46</sup>

### **Recognizing Jurisdiction Outside Indian Country, 1999-2004**

While the Venetie tax case made its way up the appellate ladder, the Venetie adoption case was re-combined with Venetie's original co-plaintiff Fort Yukon, and the court's attention turned to whether Fort Yukon was a federally recognized tribe. Fort Yukon had appeared on the October 1993 list of federally recognized tribes, and Fort Yukon's lawyers argued that this answered the question. The federal district court, though, was troubled by whether this recognition in 1993 could reach back in time to the adoption granted by Fort Yukon back in 1986 and ruled that the trial on Fort Yukon's tribal status should still be held.<sup>47</sup> At that point, however, the State of Alaska chose to agree that, if there were a trial, Fort Yukon would be able to prove its status as a federally recognized tribe.<sup>48</sup>

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<sup>42</sup> *Native Village of Venetie IRA Council v. State* (Decision – Tribal Status), 1994 WL 730893 (D. Alaska 1994).

<sup>43</sup> *Native Village of Venetie IRA Council v. State* (Case status – adoption case), 1994 WL 730887 (D. Alaska 1994).

<sup>44</sup> *State of Alaska ex rel. Yukon Flats Sch. Dist.*, (Decision – Indian Country), 1995 WL 462232 (D. Alaska 1995).

<sup>45</sup> *State of Alaska ex rel. Yukon Flats Sch. Dist.*, 101 F.3d 1286 (9th Cir. 1996).

<sup>46</sup> *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520 (1998).

<sup>47</sup> *Native Village of Venetie IRA Council v. State*, No. F-86-0075 CIV (HRH), Partial Motion for Summary Judgment – Tribal Status (D.Alaska, Sep. 20, 1995).

<sup>48</sup> *Native Village of Venetie IRA Council v. State*, No. F-86-0075 CIV (HRH), Order – Motions for Reconsideration (D. Alaska, Dec. 13, 1995).

With that, the adoption case was effectively over (except for arguments over attorney fees), with both Venetie and Fort Yukon having established their authority, and the authority of any other federally recognized tribe in Alaska, to grant adoptions of tribal children.

Subsequently, the federal district court cleared up the remaining issue regarding the list that had temporarily perplexed it in the Venetie and Fort Yukon adoption cases, i.e., whether the list meant that federal recognition of Alaska tribes was “new” as of 1993, or whether it confirmed federal recognition that had already existed before 1993. *Native Village of Tyonek v. Puckett* was a case that had started in 1982 when the village filed suit to evict certain renters, under a tribal ordinance prohibiting the leasing of village houses to non-members; the renters argued that the ordinance was invalid, to which the village raised a defense of sovereign immunity. The renters had long ago moved out of the village, but the questions about the ordinance and sovereign immunity were still around. The case thus raised the same issue that had troubled the court in the Venetie and Fort Yukon adoption cases, i.e., whether the 1993 list should be read as having recognized tribal status during periods prior to 1993. The court concluded that the “BIA acknowledgement constitutes a recognition of that which has existed in the past” and concluded that Tyonek had sovereign immunity.<sup>49</sup>

The state courts, in the meantime, began to heal the rift that had developed between their rulings and the federal court rulings. The first opportunity the Alaska Supreme Court had to assess the impact of the list was in *Hernandez v. Lambert*, a tribal adoption case out of the Native Village of Tanana.<sup>50</sup> The court was urged to assess the impact of the 1993 list, but found that it did not have to do so. The Native Village of Tanana had approved an adoption of a tribal child, even though the biological mother had declined to reveal the identity of the biological father. Tanana, after approving the adoption, had supplied the necessary paperwork to the State Bureau of Vital Statistics (BVS) and requested issuance of a new birth certificate, which the Bureau was allowed to do under a regulation that the State had enacted while the Venetie adoption litigation was ongoing. The new birth certificate was issued in November 1990. In 1995, a man claiming to be the child’s biological father filed a case in state court seeking to establish paternity; he indicated that the biological mother had told him about the child in 1993. The state trial court found that the Tanana adoption was entitled to full faith and credit under ICWA, and that the *Nenana* line of cases was no longer important after the 1993 list. The paternity claimant appealed this to the Alaska Supreme Court. Although the court was urged to adopt the superior court’s analysis of the effect of the list, it found it did not have to do so; a state regulation protected the child’s adoptive placement from such attacks after one year, and the delay of over a year before the paternity claimant had filed his suit meant that the adoption should stand, regardless of the *Nenana* cases. Thus, although it was left unclear whether the Alaska Supreme Court thought that the list had accomplished tribal recognition, or whether *Nenana* was still good law, the tribal adoption was vindicated in that case, indicating at the very least a greater degree of respect for tribal court proceedings.

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<sup>49</sup> *Native Village of Tyonek v. Puckett*, No. A82-0369-CV (HRH), “Order: Tribal Status/Sovereign Immunity” (D. Alaska, Oct 29, 1996).

<sup>50</sup> *Hernandez v. Lambert*, 951 P.2d 436 (Alaska 1998).

The list issue the court had not resolved in *Hernandez v. Lambert* next arose in a case called *John v. Baker*, which involved a custody dispute between a father from Northway and a mother from Mentasta.<sup>51</sup> The father had filed a custody suit before the Northway Tribal Court and then, dissatisfied with the Northway Tribal Court's temporary custody order, filed the same custody suit in state court. The state court denied the mother's motion to dismiss, and she appealed. While the case was before the Alaska Supreme Court, the 1998 U.S. Supreme Court decision in the *Venetie* tax case came out, and the Alaska Supreme Court called for additional briefing to assess the impact of that case.

The *John v. Baker* decision issued in late 1999. It held that the federal government had recognized Alaska Native Villages as tribes through the 1993 list, and that the state courts' role was to accept that federal determination. The court also held that Northway had inherent jurisdiction over the internal domestic relations of tribal members, including custody disputes over children eligible for tribal membership, regardless of whether Northway occupied "Indian country." Finally, the court indicated that state courts should use the doctrine of "comity" (respect) to determine whether or not to defer to already-ongoing tribal court proceedings. The recognition of the impact of the list in *John v. Baker* effectively meant that the analysis in the *Stevens Village* case, which had concluded that Alaska Native Villages were not "tribes," was superseded. However, the court did not decide whether the *Nenana* line of cases should be overruled (since those cases were ICWA child protection cases and *John v. Baker* was a custody dispute between parents outside the scope of ICWA). Also, the court ruled that it need not decide whether P.L. 280 had deprived Alaska's tribes of jurisdiction within whatever Indian country remained in Alaska following the *Venetie* tax ruling; there was no showing that Northway occupied Indian country, and P.L. 280 had no bearing on cases outside Indian country.

One of the issues left open by *John v. Baker* was finally resolved in 2001 in the case of *C.R.H.*,<sup>52</sup> which (unlike *John v. Baker*) squarely presented the issue of an ICWA 1911(b) transfer of a state court case to tribal court. *C.R.H.* placed the continued validity of the *Nenana* line of cases directly before the court. In its brief, the Alaska Attorney General's Office urged the Alaska Supreme Court to overrule the *Nenana* line of cases. After some discussion, the court agreed and unanimously overruled *Nenana* and its following cases (*K.E.* and *F.P.*). The court still refrained from analyzing whether P.L. 280 had deprived Alaska tribes of jurisdiction within Indian country, since, again, there was no showing that the village occupied Indian country.

Progress in state-tribal relations was on the rise around the time of *C.R.H.* In addition to its *C.R.H.* brief, the state entered into a "Millennium Agreement" with Alaska Native tribes. This agreement was meant to be "a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties." In 2002, the State of Alaska Attorney General's Office directed the Office of Children's Services and the Bureau of Vital Statistics to enact policies

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<sup>51</sup> *John v. Baker*, 982 P.2d 738 (Alaska 1999).

<sup>52</sup> *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

and procedures consistent with *John v. Baker* and *C.R.H.* The Attorney General's Office recognized the concurrent jurisdiction of the State of Alaska and Alaska Native Tribes to initiate child protection proceedings when no related court proceedings were pending in another forum.<sup>53</sup> Also in 2002, the state entered into a settlement in a case brought by the Sitka Tribe of Alaska recognizing the Tribe's jurisdiction over child custody cases arising under ICWA – including adoptions – despite the fact that Sitka had not petitioned for exclusive jurisdiction under 25 U.S.C. § 1918.<sup>54</sup>

*John v. Baker* and *C.R.H.* un-did a lot of the damage that had been done during the thirteen-year period when the Alaska Supreme Court had erected a barrier to state/tribal cooperation and opened a wide gap between its rulings and those of the federal courts. However, this did not mean that all tribal court actions would be unquestioningly accepted by the state courts. The opinion in *John v. Baker* had emphasized that the presumptive validity of tribal court orders could be questioned if a tribal court acted outside of its subject matter and personal jurisdiction, or did not provide due process. That the Alaska Supreme Court meant what it said in this regard was made clear in 2003 in the case of *Evans v. Selawik*.<sup>55</sup> That was a tribal adoption case in which the tribal council, although apparently aware of the identity of the biological father, did not give him notice of the adoption proceedings, and did not file the adoption certification paperwork with the State of Alaska at the time the tribe granted the adoption. The father then brought a custody suit in state court, before the tribe finalized the adoption. The Alaska Supreme Court rejected the argument that the adoption should be entitled to recognition in state court, finding that the tribe had finalized the adoption in violation of the biological father's due process rights to notice and an opportunity to be heard.<sup>56</sup>

### **The Renkes Opinion: Renewed Resistance to Tribal Jurisdiction Outside Indian Country, 2004-2012**

On October 1, 2004, then-Attorney General Greg Renkes issued an opinion reversing course on tribal jurisdiction.<sup>57</sup> The opinion asserted that no Alaska tribe could initiate ICWA child custody proceedings unless it had first petitioned the Secretary of the Interior to reassume jurisdiction under ICWA §1918.<sup>58</sup> The opinion directed the Office of Children's Services to retract all the policies and procedures established just two years prior. Thus,

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<sup>53</sup> Memorandum from Assistant Att'y Gen. Donna Goldsmith for Jay Livey, Dep't of Health & Soc. Srvs. Comm'r (Mar. 29, 2002) (No. 441-00-0005).

<sup>54</sup> *Sitka Tribe of Alaska v. State*, No. 1SI-01-61 CI (Apr. 1, 2002) (agreeing that the DHSS Bureau of Vital Statistics would issue new birth certificates to honor tribal-court adoptions).

<sup>55</sup> *Evans v. Native Village of Selawik IRA Council*, 65 P.3d 58 (Alaska 2003).

<sup>56</sup> Similarly in *Starr v. George*, the Alaska Supreme Court held that full faith and credit was not due to a tribal court adoption done without any notice to the father's side of the family. The adoptive parents had been in a pre-existing custody battle with the paternal family for years. 175 P.3d 50 (Alaska 2008).

<sup>57</sup> Office Of The Attorney General, A.G. File No. 661-04-0467, *Jurisdiction Of State And Tribal Courts In Child Protection Matters* (2004).

<sup>58</sup> The opinion excepted Metlakatla, because of its continued reservation status, and Barrow and Chevak – which had both filed petitions to reassume exclusive jurisdiction under ICWA.

while the State would continue to recognize the ability of tribal courts to have a child-in-need-of-aid case transferred from state court, the State would not recognize the ability for tribal courts to initiate their own cases.

The Renkes opinion also changed course on adoptions, abandoning the settlement in the Sitka Tribe case. The opinion denied the inherent authority of tribal courts to decide adoption cases, and directed the Bureau of Vital Statistics to reject requests for new birth certificates from tribal courts other than Barrow, Chevak and Metlakatla.

On October 28, 2004, six tribes sued in state court to invalidate the Renkes opinion and stop the State from acting upon it: Tanana, Nulato, Kalskag, Akiak, Lower Kalskag, and Kenaitze. This case, known as the *Tanana* case, would take seven years to wind through the system. While it was pending, state agencies operated under this new policy of denying recognition to child protection cases initiated in tribal court.

In the midst of this setback, two foster parents of a child from Kaltag asked the Kaltag Tribal Court for an adoption decree. The tribal court considered the request, issued the order and forwarded it to the Bureau of Vital Statistics. The Bureau refused to grant the new birth certificate because it would not recognize the tribal court's authority to make adoption decisions. The Kaltag Tribal Council and the foster parents sued the State in federal court.<sup>59</sup> This case became known as the *Kaltag* case.

The State of Alaska also adopted the position that Alaska tribes' inherent authority over domestic relations does not include authority to determine child support. The Central Council of Tlingit and Haida Indian Tribes opened a tribal child support agency in 2007, with federal funding akin to what the State Child Support Services Division receives. The State refused to recognize child support orders issued from the tribal court, and Central Council successfully filed suit in January 2010.<sup>60</sup> In its briefing, the State urged the court to roll back major tenets of the *John v Baker* decision, and to decide that Tribes cannot hear child support cases outside Indian Country.

This was not a productive time for tribal-state relations. Efforts to pass a state court Child In Need of Aid rule for recognizing and enforcing tribal child protection orders were stymied by the Renkes Opinion. The Rural Justice and Law Enforcement Commission faced challenges creating a Memorandum of Understanding to enhance tribal-state cooperation under ICWA. In 2007, then-Alaska Senate President Lyda Green and House Speaker John Harris asked the Secretary of the Interior to reverse course and cease recognition of tribal governments in Alaska altogether.

Ultimately, though, these political efforts to turn the clock back failed. Instead, the *Kaltag* and *Tanana* cases established some of the strongest decisions on tribal jurisdiction to date. In August 2009, the Ninth Circuit issued a Memorandum Opinion in *Kaltag*, holding that the Kaltag adoption order was entitled to full faith and credit. The Ninth Circuit

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<sup>59</sup> Order, *Kaltag Tribal Council v. Jackson*, Case No. 3:06-cv-211 TMB, at 10 (D. Alaska, February 22, 2008), *aff'd* 344 Fed. Appx. 324 (9th Cir 2009), *cert. denied* (Oct. 4, 2010).

<sup>60</sup> *CCTHITA v. State*, 1JU-10-376 CI (Juneau. Sup. Ct. 2010).

summarily rejected the arguments of the state, noting that they were resolved back in 1991 by the *Venetie* adoption case. The state asked the United State Supreme Court to grant another level of appeal. The high court turned down the petition for certiorari in October 2010.

In March 2011, the Alaska Supreme Court ruled in favor of the tribes in the *Tanana* case.<sup>61</sup> The court carefully reconstructed the history of Alaska tribal jurisprudence and found that the 2004 Renkes opinion was wrong. The Court held that Alaska Native Tribes have retained their inherent sovereign jurisdiction, concurrent with the state, to initiate ICWA-defined child custody proceedings both inside and outside of Indian Country. After years of avoiding the issue, the Court finally overruled what was arguably left of *Nenana*. It stated unambiguously that Public Law 280 did not take away tribal jurisdiction but rather maintained the system of tribal-state concurrent jurisdiction. The Court also decided that it was premature to address various hypothetical situations, including tribal jurisdiction over non-member parents of Indian children or Indian children who have limited contact with the tribe. The Court said it would wait to hear about specific cases as they arise.

### **Tribal Jurisdiction Today**

It did not take long for a follow-up case to make it to the Alaska Supreme Court. At the time this update was written, a case concerning one tribe's jurisdiction over a father connected to a different tribe just made it up to the Alaska Supreme Court. In this case, *Simmonds v. Parks*, the Minto tribal court took emergency custody of a child in 2008.<sup>62</sup> The child and mother are Minto tribal members. The child's father is half-Athabascan and a member of a neighboring village. In 2009, the tribal court terminated that father's parental rights due to ongoing family violence, over the father's objection that the tribal court had "no legal jurisdiction of any kind to invent its own child custody proceedings." The Superior Court denied full faith and credit to the tribal court order, finding that the tribal court's rules on attorney participation denied the father due process. On appeal, the Alaska Supreme Court will consider a slew of questions, including whether the tribal court had subject matter and personal jurisdiction to terminate the father's parental rights. It may take another year or two before the Alaska Supreme Court issues a final decision.

In the wake of a 2011 Juneau Superior Court decision recognizing Central Council's jurisdiction to issue child support orders for tribal member children, the State of Alaska has also asked the Alaska Supreme Court to weigh in on tribal jurisdiction over child support matters.<sup>63</sup>

On the ground statewide, tribal court activity is increasing. Tanana Chiefs Conference had its most widely attended annual conference to date in 2012. The Association of Village Council Presidents, serving the Yukon Kuskokwim region, hosted its own tribal courts conference in 2012 and has been actively supporting tribal court activity in Western Alaska. Bristol Bay Native Association also has a new tribal court enhancement

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<sup>61</sup> *State v. Native Vill. of Tanana*, 249 P.3d 734 (Alaska 2011).

<sup>62</sup> Supreme Court No. S-14103; Trial Court Case 4FA-09-2508 CI.

<sup>63</sup> *State v. Central Council*, Supreme Court No. 3-14935.

program manager who is leading several initiatives to support tribal justice systems in the Southwest. Alaska Legal Services conducted a statewide tribal court survey in 2011 and published results this year. Currently, the United States Department of Justice is working on its own survey of Alaska tribal courts, which should take place in 2013.

Tribal courts in Alaska are likely to continue exercising authority based primarily on tribal membership, rather than on tribal territory. The 1998 Venetie tax ruling removed ANCSA lands from the definition of Indian country. Other narrower categories of Indian country remain in Alaska. The Metlakatla Reservation is indisputably Indian country. Alaska Native Allotments and Alaska Native Townsites are likely candidates for Indian country, though no definitive ruling on that has yet been issued.

Under specific circumstances, however, tribal courts in Alaska may have territorial jurisdiction outside Indian country, such as when Congress has enacted a statute recognizing such jurisdiction. Examples of this include the Indian Child Welfare Act and the Violence Against Women Act.<sup>64</sup> Tribal courts in Alaska may also have jurisdiction outside Indian country if the tribal government, through ownership of lands or through delegation of authority from the owner, has the “power to exclude” persons from the land, which may encompass lesser-included powers as well.<sup>65</sup>

The Alaska Rural Justice and Law Enforcement Commission’s Alcohol Interdiction and Jurisdiction Work Group has recommended the establishment of “Alaska Native Village Alcohol and Controlled Substance Interdiction Zones,” which would create protection zones within which villages could impose their own culturally appropriate rules to combat bootlegging. The Work Group recommends a complementary system of “Village Circuit Courts,” with limited subject matter jurisdiction over alcohol offenses. Three-judge panels would preside over these courts, and be comprised of a state court magistrate and two village council appointees. This combined state-tribal proposal offers a glimpse of the types of effective local justice systems that could help bush Alaska in the future, if government representatives continue to engage in dialogue and coordination.

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<sup>64</sup> ICWA’s definition of “reservation” is broader than Indian country: “‘Reservation’ means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.” 25 U.S.C. 1903(10). Further, ICWA allows the Secretary to approve a petition for reassumption of jurisdiction “without regard for the reservation status of the area affected,” 25 U.S.C. 1918(d).

VAWA states “For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including ... exclusion of violators from *Indian lands* ... in matters arising within the authority of the tribe.” 18 U.S.C. 2265 (emphasis added). The use of the term “Indian lands” rather than “Indian country” is presumably not inadvertent, as “Indian country” is used elsewhere in VAWA, see 18 USC 2262(a), 2266(4).

<sup>65</sup> *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 144-45 (1982).

# TYPES OF TRIBAL COURT JURISDICTION IN ALASKA

## TRIBAL COURTS AND THE INDIAN CIVIL RIGHTS ACT

All tribal courts are bound by federal law to comply with the requirements of the Indian Civil Rights Act.<sup>66</sup> The ICRA places obligations on tribal governments that are parallel to, but not identical to, the rights that all citizens have with respect to state and federal governments under the Bill of Rights. In some respects, ICRA rights are more extensive than those in the Bill of Rights; in addition to barring cruel and unusual punishments, the ICRA bars sentences more than one year and fines of more than \$5,000.<sup>67</sup> But in other respects, ICRA rights are less extensive than those in the Bill of Rights; defendants are entitled to counsel at their own expense, but not to a free lawyer.

Many of the provisions of the Act apply to criminal and not civil proceedings, but the due process clause applies to both civil and criminal proceedings. As described above, a tribal court that issues a decision without complying with the requirements of due process is likely to find that its decision will not be respected by state or federal courts, or by the parties themselves. ICRA also imposes restrictions on tribal police conducting searches and seizing evidence that are similar to the protections created by the Fourth Amendment to the United States Constitution. However, when tribal police are searching for alcohol in villages for the purpose of destroying it – as opposed to collecting it as evidence for criminal prosecution – there may be few judicial remedies for challenging those searches under ICRA.<sup>68</sup>

## TRIBAL COURT JURISDICTION OVER INTER-FAMILY DOMESTIC RELATIONS CASES

Federal law has long recognized tribal jurisdiction in the area of domestic relations. As sovereigns, Indian tribes possess the “inherent power to determine tribal membership, to *regulate domestic relations among members*, and to prescribe rules of inheritance for members.”<sup>69</sup> “If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships.”<sup>70</sup> In addition to tribal sovereignty over

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<sup>66</sup> 25 U.S.C. 1301 and following sections.

<sup>67</sup> Congress created some exceptions to tribal court sentencing limitations in the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of the U.S. Code). At this time, however, no Alaska tribes are exercising the enhanced sentencing authority under the Tribal Law and Order Act.

<sup>68</sup> See, e.g. Pat Hanley, *Warrantless Searches for Alcohol by Native Alaska Villages: A Permissible Exercise of Sovereign Rights or an Assault on Civil Liberties?*, 14 Alaska L. Rev. 471 (1997).

<sup>69</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added).

<sup>70</sup> *Powers of Indian Tribes*, 55 Interior Dec. 14, 56 (1934). See also, *Fisher v. District Court*, 424 U.S. 382 (1976); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988).

marriage and divorce, therefore, courts have recognized tribal sovereignty over custody,<sup>71</sup> paternity,<sup>72</sup> and child support.<sup>73</sup>

Under Alaska case law, state and tribal courts share concurrent jurisdiction over domestic relations, so either state or tribal courts may hear cases involving tribal members.<sup>74</sup> Concurrent jurisdiction is the concept that either court (state or tribal) has the authority to hear and make decisions regarding the same case.

*John v. Baker* held that sovereign tribes exist in Alaska, and that tribal courts have jurisdiction over their members in a variety of internal domestic issues.. *John v. Baker*<sup>75</sup> involved a challenge to the validity of a tribal court order issued in a custody case between parents. The court reasoned that a tribe's concurrent jurisdiction over child custody matters is grounded in its inherent power as a sovereign entity. As a sovereign entity, the tribe has the authority "to adjudicate internal domestic custody matters" concerning its members.<sup>76</sup> The court recognized that a tribal court order should be afforded the same recognition as a state court order as a matter of comity (respect for that court's decision-making authority). In *John v. Baker* the court also noted that concurrent jurisdiction was essential to ensure that members of rural villages have meaningful access to a justice system that appropriately addresses cultural differences that exist in Alaska.

*John v. Baker* gave comity recognition to a tribal court custody order between one parent who was a tribal member and another parent who was not, but who consented to tribal jurisdiction – at least until the tribal court ruled against him. It would therefore be consistent with *John v. Baker* for tribal courts in inter-family cases to have personal jurisdiction over non-members by virtue of the nonmember's consent to jurisdiction.<sup>77</sup> Non-members choosing to participate in tribal court is relatively common in Alaska.

## TRIBAL COURT JURISDICTION OVER ADOPTIONS

Under general federal Indian law, adoptions are a type of domestic relations case and Indian tribes have the power to regulate adoptions of tribal members.<sup>78</sup> Alaskan tribes also have inherent authority to decide domestic relations cases involving their members.<sup>79</sup>

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<sup>71</sup> See, e.g., *John v. Baker*, 982 P.2d at 748.

<sup>72</sup> See, e.g. *U.S. v. Keys*, 103 F.3d 758, 760 (9<sup>th</sup> Cir. 1996) (father establishes paternity and obtains legal custody of child in Colorado River tribal court); *Dennis v. State*, 1JU-07-983 CI (Juneau Sup. Ct.)

<sup>73</sup> See, e.g. *Jackson County ex rel Smoker v. Smoker*, 459 S.E.2d 789 (N.C. 1995); *CCTHITA v. State*, 1JU-10-376 CI (Juneau. Sup. Ct. 2010).

<sup>74</sup> See generally, *State v. Native Vill. Of Tanana*, 249 P.3d 734 (Alaska 2011).

<sup>75</sup> *John v. Baker*, 982 P.2d 738 (Alaska 1999).

<sup>76</sup> *Id.* at 754.

<sup>77</sup> In ICWA cases, it is not necessarily the case that a parent must consent to tribal court jurisdiction. This is due to jurisdiction being established through the membership of the child. See 25 U.S.C. § 1911; *John v. Baker*, 982 P.2d at 748; *S.B. v. State, Dep't of Health & Social Serv's, DFYS*, 61 P.3d 6 (Alaska 2002).

<sup>78</sup> Powers of Indian Tribes, 55 Interior Decisions 14 (October 25, 1934).

<sup>79</sup> *John v. Baker*, 982 P.2d 738 (Alaska 1999); *Native Village of Venetie v. State of Alaska*, No. F86-0075 CV (HRH) (D. Alaska); see 944 P.2d 548 (9<sup>th</sup> Cir. 1991).

The Indian Child Welfare Act requires the State to give full faith and credit to tribally-issued adoptions.<sup>80</sup>

Tribal authority over adoptions includes the authority to protect and promote a relationship that in some cases differs from adoptions among non-Native people. Among some Native cultures, adoptions do not end a child's relationship with his or her natural parents; instead, adoption ensures that a child will have several parental figures to look up to.<sup>81</sup> Historically, in times of disease and famine, families have used adoptions to revive family units by making new connections or reinforcing connections that might otherwise have fallen apart.<sup>82</sup>

There are two primary ways for Tribes to grant adoptions. First, tribal courts may issue adoption orders for children who are members of the Tribe or eligible for membership in the Tribe.<sup>83</sup> The tribal court must provide due process to the biological parents and, like state court, attempt to identify unknown fathers to the extent possible. Once the case is final, the tribal court can send a certified copy of the adoption order to the Alaska Bureau of Vital Statistics, complete the required forms, and a new Alaska birth certificate should be issued.

Second, tribal councils may grant cultural adoptions by resolution. These are recognized by the State of Alaska, and the state has specific forms to accomplish this. CSSD has regulations specifying that a cultural adoption, recognized by the tribe and by the Bureau of Vital Statistics, cuts off a natural parent's child support responsibilities.<sup>84</sup> The Department of Health and Social Services also has regulations that allow it to recognize tribal cultural adoptions and to issue revised birth certificates based on them, when the adoptions are uncontested.<sup>85</sup> The forms ask a tribal official to certify what has happened, and ask for consents from the mother and from the father, if he is known and can be located.<sup>86</sup>

When an adoption affects who should inherit BIA-restricted property, such as a restricted townsite lot or a restricted Native Allotment, a tribal adoption is supposed to be honored. Under a federal statute,<sup>87</sup> a BIA probate judge recognizes heirs by adoption when an adoption has been established through a state court order or a tribal court order.<sup>88</sup>

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<sup>80</sup> 25 U.S.C. § 1911(d); .

<sup>81</sup> Ernest S. Burch, Jr., *Eskimo Kinsmen* (1975), pp. 129, 52.

<sup>82</sup> Burch, p. 166.

<sup>83</sup> *Native Village of Venetie v. State*, No. F86-0075 CV (HRH) (Order, September 20, 1995); *Sitka Tribe v. State*, No. 1SI-01-61 CI (Alaska Superior Court, First Judicial District, March 29, 2002); Order, *Kaltag Tribal Council v. Jackson*, Case No. 3:06-cv-211 TMB, at 10 (D. Alaska, February 22, 2008), *aff'd* 344 Fed. Appx. 324 (9th Cir 2009), *cert. denied* (Oct. 4, 2010).

<sup>84</sup> 15 Alaska Administrative Code sec. 125.845.

<sup>85</sup> See 7 Alaska Administrative Code sec. 05.700.

<sup>86</sup> These forms are available on the Internet as an "Adoption Packet" at <http://www.hss.state.ak.us/dph/bvs/adopt.htm>

<sup>87</sup> 25 U.S.C. § 372a.

<sup>88</sup> See *Estate of Jacob William Nicholai*, Dept. of Interior, 29 IBIA 157, 1996 I.D. LEXIS 37 (1996).

There is one situation where a state court will honor a cultural adoption even though the tribe has not recognized it. There is a concept under Alaska state law called “equitable adoption.” This principle becomes important when someone who owns ANCSA shares dies without a will, there is a person who had been adopted culturally who may inherit the shares, and the tribe never issued a decision about the adoption. Such an adoption may amount to an “equitable adoption” under state law. This rule comes from *Calista Corporation v. Mann*,<sup>89</sup> a case involving adopted children of shareholders of three ANCSA corporations.

*Calista v. Mann* held that equitable adoptions involve implied promises: the adoptive parents promise to raise a child and treat him or her as their own, and the child promises to give “filial affection, devotion, association and obedience” to the parents. This set of mutual promises is enough for courts to treat the surviving child as the deceased adult’s child for inheritance purposes. It is not certain that this rule applies to inheritance of property other than ANCSA shares, although it probably does.

### **TRIBAL COURT JURISDICTION OVER CHILD PROTECTION CASES (ICWA)**

Traditionally, tribes throughout Alaska have handled their child protection matters both independently, through their own tribal leaders and (more recently) social service departments and tribal courts, and in cooperation with the state, through the state’s Office of Children’s Services and state courts. There are three ways in which a tribe may become involved in a child protection or child in need of aid (CINA) matter:

First, tribal courts may (and often do) initiate child protection cases on their own, issuing orders regarding their member children without state assistance or intervention. The *Tanana* case affirms that Alaska Native tribes have retained their inherent sovereignty to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Section 1911(d) of ICWA requires the state to give full faith and credit to a tribe’s ICWA-defined child custody order, to the same extent as it would give full faith and credit to other states’ orders and foreign orders. The full faith and credit requirements of this federal provision obligate a state court to honor the decisions of the tribal court. Under Section 1911(a) of ICWA, tribes can even petition for exclusive child protection jurisdiction, meaning that only the tribe and not the state could take legal custody of children from that tribe.

Second, tribes may become involved in state court cases involving children who are members of or eligible for membership in their tribe by intervening in a state court case, and making recommendations within the state court proceeding. State court cases are governed by ICWA, which defines “child custody proceedings” as foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. ICWA promotes tribal integrity by establishing procedural and substantive protections to govern state court child protection matters involving American Indian and Alaska Native children.

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<sup>89</sup> 564 P.2d 53 (Alaska 1977)

Third, tribes that have properly intervened in a state court CINA case may petition the state court to transfer the case to tribal court. Section 1911(b) of the ICWA provides that even if child protection proceedings involving an American Indian or Alaska Native child are initiated in state court, the tribe, the child or the parents may petition the state court to transfer the proceedings to tribal court. The state court must transfer a proceeding to tribal court if petitioned to do so unless a parent objects, the tribe objects, the tribal court declines the case, or good cause exists not to transfer the case. The burden to establish the existence of “good cause” not to transfer jurisdiction falls on the party who opposes the transfer to tribal court. There is a strong presumption in favor of transferring matters to tribal court.

As a general rule, when a tribe exercises jurisdiction over child protection, its subject matter jurisdiction turns on the tribal membership of the child. Congress wrote ICWA to focus on the membership of the child, without exceptions for children with parents from different tribes, or non-Native parents. Typically, when any court acts to protect the welfare of the child, the court has “status jurisdiction” over the parents, even if a parent lives in another jurisdiction. In the *Parks* case pending before the Alaska Supreme Court, a ruling should issue soon on how status jurisdiction applies to tribal courts.

## **TRIBAL COURT JURISDICTION OVER FAMILY VIOLENCE CASES**

Family violence and sexual assault occur too frequently in all communities throughout the state, and the country. In Alaska’s rural communities where isolation and the absence of sufficient law enforcement allow abuse to run rampant, vulnerable populations – women, children, the elderly – are regularly preyed upon. Alaska Native women are killed by an intimate partner at a rate 4.5 times greater than the national average.<sup>90</sup> The Violence Against Women Act of 1994 was enacted by Congress to combat all forms of violence against women.<sup>91</sup>

Tribes may have unwritten laws or customs concerning family violence. Many tribes have already passed written domestic violence codes.<sup>92</sup> Model tribal domestic violence codes are available.<sup>93</sup>

### **Family Violence in Domestic Relations**

In 2003, it became clear that family violence cases fall within the internal domestic matters over which tribal courts may exercise their inherent authority, as contemplated by the Supreme Court in *John v. Baker*. In a case known as *Native Village of Perryville v.*

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<sup>90</sup> Alaska Network Domestic Violence and Sexual Assault Advocate Curriculum, 2004.

<sup>91</sup> The Violence Against Women Act of 1994, Pub. L.No. 133-322, 108 Stat. 1902.

<sup>92</sup> Some examples are the Native Villages of Barrow, Chinik and Tetlin, and the Sitka Tribe of Alaska.

<sup>93</sup> See, for example, the website <http://www.naicja.org/vawa/sample.htm>. The Tribal Government Specialist at Tanana Chiefs Conference, Inc. has a sample domestic violence ordinance and sample protective order forms.

*Tague*,<sup>94</sup> the village had issued an order of banishment against a tribal member for multiple acts of violence. The village filed its order with the state court, giving notice to the individual, and after the individual failed to respond, the state court entered an injunction enforcing the village order. Afterwards, the Attorney General's Office wrote a letter to the state court judge, seeking to persuade the judge that the banishment order could not be enforced by Alaska State Troopers.

Among the concerns that led the Attorney General's Office to write to the state court judge were a mistaken belief that the individual was not a tribal member, and a hypothetical concern that jurisdiction based on tribal membership rather than tribal territory would enable a village to banish an individual from Anchorage or Fairbanks or Seattle. The judge issued an order calling for briefing on the issue; and after reviewing the briefing, the court, citing *John v. Baker*,<sup>95</sup> declined to dissolve the judgment issued by the Native Village of Perryville. The state court judge noted that the remedy sought by the tribal court was specific and narrow, barring the individual from the Village of Perryville – and nowhere else. Perryville is a remote coastal village accessible only by air or sea, more than 200 miles from the nearest Alaska State Trooper in King Salmon.

Neither the state nor the individual chose to appeal the superior court's ruling. The importance of this ruling for victims of domestic violence in rural villages cannot be overstated. A protective order which leaves the perpetrator in the same isolated village as the victim may be worse than no protective order at all. Thus, this case, which recognizes tribal authority to issue a culturally appropriate order, and the duty of the Alaska State Troopers to help enforce that tribal order, is a very important step toward providing rural domestic violence victims with meaningful protection.

Whether tribes have personal jurisdiction over the parties in a family violence case may depend on the tribal membership status of the parties. If both parties are members, the tribe will have jurisdiction over the parties. If the defendant is a member, and the plaintiff is not a member, the tribe will have personal jurisdiction over the plaintiff who submitted to the tribe's jurisdiction by filing the case in tribal court. If the plaintiff is a member and the defendant is not, the tribe will have jurisdiction if the defendant consents. If not, there may tribal jurisdiction if the violence directly impacts the health or welfare of the tribe."<sup>96</sup> If neither party is a member, the tribe could have jurisdiction only if the incident has a significant connection to the tribe, for example, if the incident involved a

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<sup>94</sup> *Native Village of Perryville v. Tague*, No. 3AN-00-12445 CI (Order of Nov. 19, 2003). The opinion is available at <http://www.alaskabar.org/opinions/ACFB12.htm>.

<sup>95</sup> *John v. Baker*, 982 P 2d. at 759.

<sup>96</sup> The United State Supreme Court has laid out factors, known as the "Montana factors" for determining the bounds of tribal jurisdiction over non-members in certain types of non-family-related civil disputes on reservation lands. *Montana v. United States*, 450 U.S. 54 (1981). There is no clear indication from any Alaska court to date that these factors proscribe the boundaries of tribal jurisdiction over non-members in the context of domestic relations. A recent Ninth Circuit Case appears to limit the application of *Montana* when considering a Tribe's inherent authority to exclude. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 804–05 (9<sup>th</sup> Cir. 2011).

tribal child and there is a consensual relationship between the parties and the Tribe, and/or the incident threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>97</sup>

### **Full Faith and Credit For Protective Orders Under The Violence Against Women Act**

In addition to tribes' inherent authority over domestic relations, Congress in the 2000 amendments to the Violence Against Women Act (VAWA) stated that "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."<sup>98</sup> Unlike other federal statutes dealing with tribal jurisdiction, the VAWA amendments are not restricted to tribal courts in Indian Country. Rather, VAWA encompasses the tribal courts of all federally-recognized tribes.

One of the most important parts of VAWA is its requirement of full faith and credit for tribal protective orders. Full faith and credit means that a court of one jurisdiction must give the same force and effect to a court judgment by another jurisdiction that the court judgment would have in its own jurisdiction. This means, for example, that a state court must enforce a tribal court protective order as though it were a state-issued protective order. When enforcing another jurisdiction's protective order, the enforcing jurisdiction enforces the terms of the order as written by the other jurisdiction even if the enforcing jurisdiction would not have the authority to order such terms. For instance, if under tribal law, the tribal court may issue a two year protective order, the state court must enforce that order even if under state law that same state court could only issue a one-year protective order.

Under VAWA, any state or tribal protective order issued that meets certain requirements must be given full faith and credit by the court of another state or Indian tribe. Under VAWA, a protective order is an order issued for the purpose of preventing violent or threatening acts of harassment against, or contact or communication with or physical proximity to, another person. The requirements that must be met for a protective order issued by a tribe or state to receive full faith and credit are as follows: first, the state or tribe must have jurisdiction over the parties and matter under the law of the state or tribe; second, reasonable notice and opportunity to be heard must be given to the person against whom the order is sought so that the person's due process rights are protected. For *ex parte* orders, notice and opportunity to be heard must be provided in the time required by state or tribal law, which must be a reasonable amount of time to challenge a temporary order. A Full Faith and Credit Judge's Bench Card is available as a resource.<sup>99</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> 18 U.S.C. § 2265(e).

<sup>99</sup> Violence Against Women Online Resources, <http://www.vaw.umn.edu>. Go to the document library, choose "criminal justice." The Full Faith and Credit Judge's Bench Card is the first choice under "criminal justice."

How does this work in practice?

1. The tribal court protective order is brought to a state court clerk.
2. The clerk of court (or magistrate in locations lacking a clerk) accepts foreign orders for filing.
3. When presented with a foreign order, the clerk reviews it to determine that it is a certified copy and that it appears on its face to be unexpired. As a matter of policy, the clerk will not contact the issuing jurisdiction for information about the details of the case, other than verifying that the order submitted is current.
4. The clerk will file stamp the order and assign it an Alaska Court System civil order number.
5. The order will be provided to the appropriate local law agency for service on the respondent and entry into the Central Registry (the same distribution used for Alaska protective orders).
6. The registered order is enforceable in the same manner as a state protective order, and a person violating a registered protective order may be arrested by state law enforcement and charged with the state crime of violating a protective order.

### **Possible Amendments to VAWA**

Congress renewed VAWA in 2005 with little fanfare, authorizing new community programs and building on prior successes under the original version of VAWA. In 2012, there has been a much more public, heated battle over a Senate Bill that offers enhanced protection to immigrating victims of trafficking and violence and LGBT victims, and that recognizes tribal criminal jurisdiction over non-Native domestic violence offenders in Indian Country.<sup>100</sup> The Senate bill includes language intended to make clear that the enhanced criminal jurisdiction provisions do not apply anywhere in Alaska, except Metlakatla. There is concern among some that the extra provisions for Alaska could cause unnecessary confusion about Alaska Native tribes' civil jurisdiction over domestic violence. At the moment, though, the companion bill in the House does not contain any of these additional provisions or any special language regarding Alaska.<sup>101</sup> There are no current indications of the impasse between the Senate and the House breaking, and time is running out on this Congress. Failure to pass the reauthorization would leave the current version of VAWA in place *status quo*.

### **TRIBAL COURT JURISDICTION OVER JUVENILE JUSTICE CASES**

Juvenile proceedings, like family violence matters, share some characteristics of criminal law as well as some characteristics of children's cases. As such, tribal jurisdiction over juvenile offenders draws both on the "sovereign power of a tribe to prosecute its

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<sup>100</sup> S. 1925, VAWA Reauthorization Act of 2011.

<sup>101</sup> H.R. 4970, VAWA Reauthorization Act of 2012

members for tribal offenses”<sup>102</sup> and on the recognition that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”<sup>103</sup>

Still, the distinction between adult and juvenile justice is important in discussing tribal court jurisdiction. Because juvenile justice is civil in nature, tribal court jurisdiction in this area is based on civil law. The reason for the civil classification is based on the doctrine of *parens patriae*: the court acting the part of the child's parent for the child's good. Rehabilitation, rather than punishment, is the goal of juvenile justice.

Tribal court jurisdiction in this area is primarily membership-based, premised on the membership or eligibility for membership of the particular juvenile(s) involved. This jurisdiction is similar to child custody disputes between members, in which the tribal court may exercise jurisdiction over minor children who are members of, or eligible for membership in, the tribe.<sup>104</sup> Although the tribe might, under some circumstances, have jurisdiction over nonmember juveniles,<sup>105</sup> the primary focus of Alaska Native tribes has been, and is likely to continue to be, on juvenile tribal members.

The *parens patriae* interest that a tribe has in its juvenile members is further recognized in the Federal Juvenile Delinquency Act (FJDA).<sup>106</sup> That Act pertains to juvenile proceedings in federal courts rather than tribal courts, but it does recognize the tribes' interests when the juveniles are tribal members. The Act sets a general age limit below which children cannot be prosecuted as adults; but for certain categories of criminal offenses, there is an exception allowing younger-age juveniles to be tried as adults. However, where prosecutions are brought within Indian country, those lower age limits can only apply if the tribe has consented to them. Thus, the tribe can essentially determine whether to give the federal government the option of prosecuting as adults those younger offenders falling within that age bracket. Again, the statute does not recognize tribal court jurisdiction as such, but it does recognize the tribes' interest in juvenile justice matters over its members, implicitly providing support for the tribe's jurisdiction over juvenile offenders based on the tribe's *parens patriae* interest in its juvenile members.

Several federal actions support the exercise of tribal court jurisdiction over Alaska Native juveniles.<sup>107</sup> Strong support comes from the Indian Child Welfare Act (ICWA).<sup>108</sup> Even though the definition of “child custody proceedings” under the Act does “not include a

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<sup>102</sup> *United States v. Wheeler*, 435 U.S. 313, 326 (1978)

<sup>103</sup> 25 U.S.C. 1901(3).

<sup>104</sup> *John v. Baker*, 982 P.2d at 748-49.

<sup>105</sup> It is unsettled whether tribal jurisdiction over non-members in Alaska is limited to the two categories described in *Montana v. United States*, 450 U.S. 544 (1981). If *Montana* is applicable, it could support jurisdiction over juveniles who enter into consensual relations with the tribe or its members, or whose actions have a direct impact on the tribe's political integrity, economic security, or health and welfare.

<sup>106</sup> 18 U.S.C. 5031 and following.

<sup>107</sup> Polashuk, Stacie, *Note: Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents*, 69 So. Cal. L. Rev. 1191 (1996).

<sup>108</sup> 25 U.S.C. 1901 and following.

placement based upon an act which, if committed by an adult, would be deemed a crime,”<sup>109</sup> this might still mean that placements based upon acts which would *not* be deemed a crime if committed by an adult (for example, prohibitions against minors consuming alcohol, or truancy rules) should fall within ICWA’s definition. An interesting issue could be presented if a tribe were to file a motion in state court under 1911(b) to transfer to tribal court a “minor consuming” case where placement outside the home is a possibility. Regardless, ICWA unequivocally stands for federal recognition of the tribes’ interest in their children, and it has been proposed as a model for structuring tribal court jurisdiction over juvenile cases as well.<sup>110</sup>

## TRIBAL COURT JURISDICTION OVER OFFENDERS

In Alaska, cases typically thought of as criminal cases are actually handled as civil cases (or “quasi-criminal” cases) in tribal court. These may include driving under the influence, alcohol importation, and vandalism.

Although many Alaska tribes have “law and order” codes, they do not formally prosecute and imprison individuals for offenses. The Indian Civil Rights Act sets strict requirements on the length of sentences a tribe can impose, and requires tribes to provide appointed counsel in certain cases. Most tribes lack the resources to consider funding a full western-style system of incarceration, with correctional centers, prosecutors, and public defenders. More importantly, the western system of incarceration and punishment generally does not mesh well with traditional tribal justice. Punishment of offenders has generally not been the primary focus of Alaska tribes establishing tribal courts. Rather, the focus is on healing, and offenders coming before tribal courts face the possibility of only civil penalties, including fines, community service, restitution, and more traditional responses to anti-social behavior.

There are other reasons for Alaska tribes to address offenses through civil rather than criminal proceedings. There is a clear rule from the U.S. Supreme Court that tribal courts cannot exercise criminal jurisdiction over non-Indians, absent specific Congressional authorization.<sup>111</sup> There may be broader authority for tribal courts to address non-member offenders through civil proceedings. However, there has not yet been a case in Alaska considering the quasi-criminal jurisdiction of Alaska tribes over an individual who is not a tribal member.

Because of the unique conditions in Alaska, Alaska’s tribes can and do serve as models for restorative justice and alternative dispute resolution. In some form or other, restorative justice is the most common traditional method of dispute resolution used by indigenous peoples throughout the United States, and by Alaska Native communities in

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<sup>109</sup> 25 U.S.C. 1903(1).

<sup>110</sup> See Polashuk, *infra* n.108.

<sup>111</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Although the Supreme Court held in 1990 that tribes also could not exercise criminal jurisdiction over other non-member Indians, Congress overruled that decision quickly; see discussion in *United States v. Lara*, 124 S.Ct. 1628 (2004).

particular. Historically, community consensus was used in Alaska to address offending behavior. The community and councils openly discussed the offender's behavior, and reached a consensus that resulted in the offender being invited to appear before one of the traditional councils in the community, such as a clan gathering, a tribal council, Elders Council or other group with community significance and respect. Traditional councils focused on healing the offender and identifying a path back into society. The councils typically discussed the offender's positive, respectable qualities and offered support and encouragement to the offender.

Shaming was another form of justice reserved for older offenders and repeat offenders. Shaming was generally conducted in community meetings after more positive methods had failed and a sufficient community consensus had been reached regarding the disrespectful behavior of the offender. Storytelling and other means would be used to demonstrate the broad community displeasure with the offender, and the community would encourage the offender to leave through termination of subsistence sharing, ostracism or banishment.

To varying degrees, traditional councils still address civil matters in many rural Alaska Native villages. Many communities have realized that there are substantial benefits to using traditional tribal justice models that reflect more respectful, healing approaches to behavior modification.

For example, Kake Circle Peacemaking is one traditional model that is based on self-determinative principles, and upon Tlingit traditions that focus on repairing disruptions in community life and assisting individuals in their quest for healing. Circle Peacemaking brings together individuals and groups who rarely come together under the western system: the offender, the victim, families, friends, church representatives, police, substance abuse counselors, and concerned or affected community members.<sup>112</sup> These individuals are involved so that sentences will be more meaningful to community members, so that community interests will be protected, and to increase the likelihood that victims and offenders will re-establish positive relationships.<sup>113</sup> Each participant is given several opportunities to speak without interruption, and negative comments are strictly forbidden. Discussions are kept confidential, and circle participants are responsible for ensuring that offenders adhere to the guidelines of their sentences.<sup>114</sup>

Kake Circle Peacemaking has experienced undeniable success. During the first four years of implementation, only two offenders out of eighty rejected the sentence and went back to the state court for sentencing.<sup>115</sup> All of the juveniles charged with underage drinking successfully completed the terms of their sentences.

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<sup>112</sup> Harvard Kennedy School, ASH Center for Democratic Governance and Innovation, *Kake Circle Peacemaking*, [www.innovations.harvard.edu/awards.html?id=6164](http://www.innovations.harvard.edu/awards.html?id=6164), (accessed Sept. 15, 2012).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Additionally, many participants enroll in substance abuse recovery programs or educational programs, or take part in volunteer support circles aimed at prevention. During the initial four year period, Kake Circle Peacemaking experienced a 97.5 percent success rate in sentence fulfillment: in comparison, the Alaska state court system's success rate is 22 percent.<sup>116</sup> In 2003, the program received High Honors from the Harvard Kennedy School's ASH Center for Democratic Governance and Innovation.

Perhaps most importantly, Circle Peacemaking promotes the health of Kake's Tlingit people and culture. "The Kake Circle Peacemaking is a revival of something that has lain dormant in the community since people began to try to assimilate to mainstream western ways."<sup>117</sup>

The overall success of Circle Peacemaking in reducing recidivism and promoting rehabilitation has prompted the Alaska state court system to adopt circle sentencing in some state court criminal cases. For example, Galena Magistrate Chris McLain, in partnership with Tanana Chiefs Conference and individual villages, conducts sentencing circles in juvenile and adult misdemeanor state court cases. These circles take place in the village where the offender is from, and the village acts as host. The District Attorneys and Public Defenders participate in the circles, and advise the state court on whether to accept the circle's sentencing recommendations. The state court judge is then responsible for imposing the sentence.

Circle sentencing is also being used in felony cases.<sup>118</sup> Superior Court Judge Douglas Blankenship, the Fourth District's Presiding Judge, commented that "we are taking baby steps, but there is a great potential in taking as much as we can to where defendants reside. The rehabilitative aspects out there are much greater."<sup>119</sup> Given this potential, communities are also considering the use of circle peacemaking to address individuals who are incarcerated or who are re-entering the community after incarceration. As these examples suggest, talking circles can be used as a powerful forum to build respect between state agencies and rural village communities.<sup>120</sup>

In years to come, the trend in Alaska appears to be moving toward increased collaboration between the State, tribes, and their respective courts. The two systems have much to share with each other. Ultimately, the more access to justice Alaska's tribal members have – especially in the remote villages – the better for our State's health and safety overall.

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<sup>116</sup> *Id.*

<sup>117</sup> Reiger, Lisa, *Circle Peacemaking*, Alaska Justice Forum 17(4): 1, 6-7, (Winter 2001) [http://justice.uaa.alaska.edu/forum/17/4winter2001/a\\_circle.html](http://justice.uaa.alaska.edu/forum/17/4winter2001/a_circle.html), (accessed Sept. 15, 2012).

<sup>118</sup> Austin Baird, *Alaska Courts Take New Approach to Rural Justice*, Anchorage Daily News, (March 17, 2012) <http://www.adn.com/2012/03/17/2377233/alaska-courts-take-new-approach.html>.

<sup>119</sup> *Id.*

<sup>120</sup> Magistrate Christopher McLain, *Circle Sentencing and Community Outreach Efforts* (2012).

# Recognition of Tribal Court Orders

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<b>Domestic Violence Violence Against Women Act (VAWA)</b>	
All parties are tribal members	Full faith and credit required.
Victim is a non-member Offender is a member	Untested in Alaska. Full faith and credit <i>should</i> be given where victim has filed the petition.
Victim is a member Offender is a non-member	Untested in Alaska. Full faith and credit <i>may</i> be given where violence impacts the tribe.
Neither party is a member	Untested in Alaska. Full faith and credit is unlikely unless there is an exceptional case where the violence has a strong tribal connection (i.e., violence impacting a tribal child).
On tribal land/Indian Country (allotment, townsite, other)	Untested in Alaska.
<p><b>Community Protection Order (Banishment)</b></p> <p><i>Perryville:</i> Troopers allowed to enforce tribal banishment order because the order was clear as to reason for issuance, offender had notice and an opportunity to be heard <i>before</i> the order was issued, the order was clearly limited to one village, and it had a set expiration date.</p>	

## Child Abuse/Neglect (ICWA)

All parties are tribal members	Full faith and credit required.
Child is a member One parent is a non-member	Full faith and credit <i>should</i> be given based on tribal status of child. The AK Supreme Court is considering this now in <i>Simmonds v. Parks</i> , S-14103.
No parties are members	Untested in Alaska. Full faith and credit is unlikely unless there is an exceptional case with proper delegation of authority and consent to jurisdiction.

## Adoption (ICWA)

All parties are tribal members	Full faith and credit required.
All parties members except adoptive parents	Full faith and credit required. Petition by adoptive parents shows consent to jurisdiction.
Child is a member Parents rights have been terminated	Full faith and credit should be given unless termination order was issued without jurisdiction and due process.
Child is a member Parents rights have not been terminated Non-member parent objects	Untested in Alaska.

<b>Child Custody (between parents), Divorce, Paternity (John v. Baker)</b>	
All parties are tribal members	Entitled to comity recognition.
One parent is non-member but consents to jurisdiction	Entitled to comity recognition.
One parent is non-member but does not consent to jurisdiction	Untested in Alaska.
<p>Tribal child support orders are recognized through the process outlined in the Uniform Interstate Family Support Act, AS 25.25., rather than the comity process. The Alaska Supreme Court is considering the State's challenge to tribal child support jurisdiction now in <i>State v. Central Council</i>, S-14935.</p>	

<b>Alcohol and Drug Offenses Other Offenses Juvenile Offenses (Comity)</b>	
Offender is a tribal member	Civil (non-jail) penalty or decision should be entitled to comity recognition (e.g. forfeiture of alcohol, fine, traditional resolution)
Offender is a non-member	U.S. Supreme Court ( <i>Oliphant</i> ): No criminal jurisdiction over non-Indians.  Untested for civil jurisdiction. The offender's contacts with the Tribe may be considered

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THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, JOEL )  
GILBERTSON in his official capacity )  
as Alaska Commissioner of Health & )  
Social Services, MARCIA KENNAI, in )  
her official capacity as Deputy )  
Commissioner of the Office of Children’s )  
Services, PHILLIP MITCHELL, in his )  
official capacity as Chief of the Alaska )  
Bureau of Vital Statistics, and GREGG )  
RENKES, in his official capacity as )  
Attorney General, )

Appellants, )

v. )

NATIVE VILLAGE OF TANANA, )  
DAN SCHWIETERT, THERESA )  
SCHWIETERT, NULATO VILLAGE, )  
VILLAGE OF KALSKAG, AKIAK )  
NATIVE COMMUNITY, VILLAGE OF )  
LOWER KALSKAG, and KENAITZE )  
INDIAN TRIBE, )

Appellees. )

Supreme Court No. S-13332

Superior Court No. 3AN-04-12194 CI

OPINION

No. 6542 - March 4, 2011

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Appeal from the Superior Court of the State of Alaska, Third  
Judicial District, Anchorage, John Suddock and Sen K. Tan,  
Judges.

Appearances: Peter K. Putzier, Assistant Attorney General,  
Anchorage, Talis J. Colberg, Attorney General, Juneau, for

Appellants. Heather Kendall-Miller, Native American Rights Fund, Anchorage, Lloyd B. Miller, Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, and Andy Harrington, Alaska Legal Services Corporation, Fairbanks, for Appellees.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Stowers, Justice, not participating.]

WINFREE, Justice.

## I. INTRODUCTION

In this case we revisit ripeness and tribal sovereignty decisions intersecting in a dispute between the State of Alaska and a number of Alaska Native tribes. Procedurally, we are asked whether the narrowed view of ripeness announced in *Brause v. State, Department of Health & Social Services*<sup>1</sup> and recently applied in *State v. ACLU of Alaska*<sup>2</sup> requires dismissal of this case without reaching its merits. Substantively, we are asked (1) whether the inherent sovereign jurisdiction of Alaska Native tribes recognized over a decade ago in *John v. Baker*<sup>3</sup> includes the initiation of “child custody proceedings” as that term is used in the Indian Child Welfare Act (ICWA), and (2) if so, whether tribal court judgments in those proceedings are entitled to full faith and credit by the State.

We conclude that this dispute is ripe for a limited decision, acknowledging that further refinements and qualifications must arise from future adjudications based on specific factual scenarios. Today we decide that (1) federally recognized Alaska Native tribes are not necessarily precluded from exercising inherent sovereign jurisdiction to

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<sup>1</sup> 21 P.3d 357 (Alaska 2001).

<sup>2</sup> 204 P.3d 364 (Alaska 2009).

<sup>3</sup> 982 P.2d 738 (Alaska 1999).

initiate “child custody proceedings” as ICWA defines that term, and (2) judgments issued in those proceedings may be entitled to full faith and credit by the State under ICWA. But lack of specific facts precludes us from defining the extent of any individual Alaska Native tribe’s inherent sovereign jurisdiction to initiate “child custody proceedings” or the standards for determining which judgments would be entitled to full faith and credit by the State.

## **II. PROCEEDINGS**

Native Village of Tanana (Tanana), Nulato Village (Nulato), Akiak Native Community (Akiak), Village of Kalskag (Kalskag), Village of Lower Kalskag (Lower Kalskag), and Kenaitze Indian Tribe (Kenaitze) are recognized as Indian tribes by the United States Department of the Interior,<sup>4</sup> and all but Kenaitze are listed as “Alaska Native villages” under the Alaska Native Claims Settlement Act (ANCSA).<sup>5</sup> In this opinion, we refer to the tribal appellees collectively as “the Tribes.”<sup>6</sup>

The Tanana Tribal Court, the Nulato Tribal Council, and the Kenaitze Tribal Court all hear children’s proceedings initiated by their tribes or transferred from state court, and they issue decrees establishing protection, guardianship, and custody of

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<sup>4</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993) (listing federally recognized tribes); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,183-84 (Dec. 5, 2003) (same).

<sup>5</sup> 43 U.S.C. §§ 1602(c), 1610(b) (2000).

<sup>6</sup> The individual appellees, Dan and Theresa Schwietert, adopted a special-needs Alaska Native child through the Tanana Tribal Court in June 2004 and received a birth certificate from the State. Although plaintiffs below, the Schwieterts participated in the litigation in a collateral supporting role to the Tribes, and the final judgment does not mention the Schwieterts.

children.<sup>7</sup> Akiak’s Quanerceraarviat Tribal Court hears children’s cases, including tribally initiated child protection cases, and issues orders and adoption decrees. The Kalskag Traditional Council initiates child protection proceedings. The Lower Kalskag Tribal Court hears matters involving allegations of child abuse or neglect.

In late October 2004 the Tribes<sup>8</sup> sued the State of Alaska and — in their official capacities — the Attorney General and heads of the Office of Children’s Services (OCS), Bureau of Vital Statistics (BVS), and Department of Health and Social Services (DHSS), collectively “the State.” The Tribes alleged that based on an October 1, 2004 opinion letter from then-Attorney General Gregg Renkes (2004 Attorney General Opinion), the State adopted a policy and began taking official action to interfere with tribal rights under ICWA and to deny full faith and credit to tribal adoption decrees and orders issued in tribally initiated child protection cases. The Tribes sought declaratory relief recognizing that Alaska Native tribes “possess inherent and concurrent jurisdiction to adjudicate children’s proceedings and issue tribal court decrees” and injunctive relief forcing “the [S]tate and its agencies to grant full faith and credit to tribal court decrees as required by law.”

In late December 2004 the State moved to dismiss the suit on ripeness grounds. In response the Tribes moved for leave to file an amended complaint in early January 2005, which the State opposed on ripeness and futility grounds. The superior court granted the Tribes’ motion in early March 2005 and accepted the amended

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<sup>7</sup> ICWA defines “tribal court” in relevant part as “a court with jurisdiction over child custody proceedings and which is . . . established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.” 25 U.S.C. § 1903(12) (2000).

<sup>8</sup> The original five plaintiff tribes were Tanana, Nulato, Kalskag, Akiak, and Lower Kalskag. The Tribes amended their complaint twice to add plaintiffs: first to add the Schweiterts and second to add Kenaitze.

complaint. After oral argument Superior Court Judge John Suddock subsequently denied the State's dismissal motion from the bench, stating in part:

[A]s the pleading[] says, the tribal courts are behaving as if they have original jurisdiction in these matters. They are actually adjudicating them and they are placing children based on them and the [S]tate is here saying . . . [“]that's void. Those courts are [a] nullity. Any of those parents could go get those children back and not be in violation of a binding court order because it's void ab initio.[”] Strikes me that that's a bad situation, that there is a very ripe question for a review: whether or not the Attorney General ever put pencil to paper . . . there is a network of tribal courts out there that has assumed a jurisdiction beyond . . . what the [S]tate contends is proper. Ordinary citizens are being affected. Children are being affected. It seems to me that there is a ripe question for declaratory judgment.

In November 2005 the Tribes moved for partial summary judgment on the legal issue of Alaska Native tribes' “inherent sovereign authority . . . to adjudicate children's proceedings.” The State opposed the Tribes' motion and cross-moved for summary judgment, arguing that the 2004 Attorney General Opinion accurately interpreted existing Alaska case law and that the Tribes “do not possess the inherent authority to initiate child protection cases.”

Superior Court Judge Sen K. Tan granted the Tribes' motion for partial summary judgment in May 2007, ruling that “tribes retain concurrent jurisdiction to legislate, to initiate, and to adjudicate [child in need of aid] cases in tribal courts.” Upon the State's urging that the partial summary judgment granted the Tribes all the relief requested in their amended complaint, Judge Tan issued a final judgment on August 26, 2008.

The relevant language from the declaratory judgment portion of the final judgment is as follows:

1. [The Tribes] possess inherent [sovereign] jurisdiction to initiate child custody proceedings. . . . The [Tribes] share concurrent jurisdiction with the State . . . over child custody proceedings as the term is defined by the ICWA[,] 25 U.S.C. § 1903.
2. [The Tribes] are entitled to access . . . confidential reports and other documents in the possession of [OCS] concerning their member children.
3. [The Tribes] are entitled to full faith and credit under 25 U.S.C. § 1911(d) for their public acts, records, and judicial proceedings to the same extent that the State . . . gives full faith and credit to the public acts, records[,] and judicial proceedings of any other [s]tate.

The final judgment also enjoined the State from: (1) implementing the 2004 Attorney General Opinion by adopting policies or regulations; (2) relying on, enforcing, or carrying out any mandate based on the 2004 Attorney General Opinion that is contrary to the superior court's decision; (3) denying full faith and credit to the Tribes' determinations in ICWA-defined child custody proceedings; (4) refusing to notify the Tribes of reports of harm and provide such reports of harm for investigation; and (5) denying the Tribes information they otherwise are entitled to receive under ICWA.

The State appeals.

### **III. STANDARD OF REVIEW**

We evaluate de novo the issue of ripeness.<sup>9</sup> We evaluate de novo the scope of tribal jurisdiction and the meaning of federal statutes.<sup>10</sup> Under de novo review, we

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<sup>9</sup> *ACLU of Alaska*, 204 P.3d at 367-68 (clarifying standard of review and rejecting abuse of discretion standard suggested in earlier decisions).

<sup>10</sup> *John v. Baker*, 982 P.2d at 744.

apply “the rule of law that is most persuasive in light of precedent, reason, and policy.”<sup>11</sup>

#### **IV. DISCUSSION**

Today’s decision requires a review of: ICWA; Alaska and federal decisions regarding Alaska Native tribal sovereignty over ICWA-defined “child custody proceedings”; *John v. Baker*; and the State’s reaction to *John v. Baker* both prior to and after October 1, 2004. This backdrop provides the necessary context for us to address both the procedural ripeness and substantive sovereignty questions before us.

##### **A. ICWA And Relevant Authorities**

###### **1. Relevant ICWA provisions**

In 1978 Congress enacted ICWA with the goal of:

protect[ing] the best interests of Indian children and . . .  
promot[ing] the stability and security of Indian tribes and  
families by the establishment of minimum Federal standards  
for the removal of Indian children from their families and the  
placement of such children in foster or adoptive homes which  
will reflect the unique values of Indian culture, and by  
providing for assistance to Indian tribes in the operation of  
child and family service programs.<sup>12]</sup>

Congress found “that there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children”<sup>13</sup> and “that an alarmingly high percentage

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<sup>11</sup> *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001) (quoting *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1266 (Alaska 1999)).

<sup>12</sup> Indian Child Welfare Act, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902 (2000)); *accord A.B.M. v. M.H.*, 651 P.2d 1170, 1172 (Alaska 1982).

<sup>13</sup> 25 U.S.C. § 1901(3) (2000); *see also John v. Baker*, 982 P.2d at 747 (“[T]he statute ‘seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.’ ” (quoting H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546)).

of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”<sup>14</sup> Congress further found that when “exercising their recognized jurisdiction over Indian child custody proceedings” states “have often failed to recognize the essential tribal relations of Indian people and [their] cultural and social standards.”<sup>15</sup>

In short, ICWA “constructs a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes.”<sup>16</sup> “Its most important procedural elements include establishing tribal courts as the required or preferred forum for adjudication of Indian child custody proceedings.”<sup>17</sup> The United States Supreme Court declared over 20 years ago that “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, [ICWA’s] purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings.”<sup>18</sup>

ICWA § 1911, titled “Indian tribe jurisdiction over Indian child custody

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<sup>14</sup> 25 U.S.C. § 1901(4); *accord John v. Baker*, 982 P.2d at 746.

<sup>15</sup> 25 U.S.C. § 1901(5).

<sup>16</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 11.01[1], at 820 (Nell Jessup Newton ed., 2005 ed.) (hereinafter COHEN’S HANDBOOK).

<sup>17</sup> CONFERENCE OF W. ATT’YS GEN., AMERICAN INDIAN LAW DESKBOOK 571 (4th ed. 2008) (hereinafter INDIAN LAW DESKBOOK); *see also* B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, THE INDIAN CHILD WELFARE ACT HANDBOOK 5 (2d ed. 2008) (hereinafter ICWA HANDBOOK) (identifying one of ICWA’s primary objectives as “encourag[ing] tribal court adjudication of child custody proceedings involving Indian children”).

<sup>18</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (emphasis in original) (footnote omitted).

proceedings,” limits state jurisdiction over ICWA-defined child custody proceedings in two ways.<sup>19</sup> First, § 1911(a) provides that Indian tribes have exclusive jurisdiction of child custody proceedings involving Indian children residing or domiciled in Indian country, unless federal law otherwise vests jurisdiction in the state.<sup>20</sup> Tribes also retain exclusive jurisdiction over tribal court wards regardless of residence or domicile.<sup>21</sup>

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<sup>19</sup> 25 U.S.C. § 1911 (2000). For ICWA’s purposes, “child custody proceeding” means and includes foster care placements, actions to terminate parental rights, preadoptive placements, and adoptive placements. 25 U.S.C. § 1903(1). ICWA generally does not apply to divorce or divorce-like child custody proceedings. *See id.*; *John v. Baker*, 982 P.2d at 746-47; INDIAN LAW DESKBOOK, note 17, above, at 574-75; ICWA HANDBOOK, note 17, above, at 27-28.

<sup>20</sup> “Indian child” means “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4).

An “Indian tribe” is “any Indian tribe . . . recognized as eligible for the services provided to Indians by the [Secretary of the Interior],” including “any Alaska Native village” defined in 43 U.S.C. § 1602(c) of ANCSA. *Id.* § 1903(8), (11).

The term “reservation” in ICWA means, in pertinent part, “Indian country” as defined in 18 U.S.C. § 1151. 25 U.S.C. § 1903(10). “Indian country” is defined as “(a) all lands within the limits of any Indian reservation . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151 (2000).

<sup>21</sup> 25 U.S.C. § 1911(a). Although “ward” is not defined in ICWA, and there is very little guidance in the legislative history or [Bureau of Indian Affairs] guidelines as to its import[,]. . . [t]he most commonly accepted understanding of wardship is that when a tribal court, or a tribal governing council, has exercised legitimate jurisdiction over an Indian child in a child custody proceeding and continues to exercise that jurisdiction, a state court’s exercise of jurisdiction is precluded, except, of course, on an emergency basis.

(continued...)

Second, § 1911(b) provides that state courts must transfer foster care placement and parental right termination proceedings involving Indian children not residing or domiciled within Indian country to tribal courts upon petition, except in specific circumstances.<sup>22</sup>

ICWA § 1918(a) provides that “[a]ny Indian tribe which became subject to [s]tate jurisdiction pursuant to the provisions of . . . any . . . [f]ederal law, may reassume jurisdiction over child custody proceedings.”<sup>23</sup> To reassume jurisdiction, a tribe must petition the Secretary of the Interior and provide a suitable plan for exercising jurisdiction.<sup>24</sup>

ICWA § 1911(d) provides that states “shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian

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<sup>21</sup> (...continued)

ICWA HANDBOOK, note 17, above, at 58 (footnote omitted).

<sup>22</sup> 25 U.S.C. § 1911(b). Section 1911(b) “creates three checks on tribal transfer jurisdiction”: (1) either parent’s objection; (2) the tribe’s declination of jurisdiction; and (3) the state court’s finding of good cause to deny transfer. *In re C.R.H.*, 29 P.3d 849, 853 (Alaska 2001); *see generally* ICWA HANDBOOK, note 17, above, at 59-69. ICWA does not address tribes’ power to receive adoptive or preadoptive cases, “nor is there much discussion of this apparent discrepancy in case law.” *Id.* at 60.

<sup>23</sup> 25 U.S.C. § 1918(a) (2000).

<sup>24</sup> 25 U.S.C. §§ 1903(11), 1918(a). Of Alaska’s approximately 230 federally recognized tribes, only two have successfully petitioned to reassume jurisdiction: Native Village of Barrow and Native Village of Chevak both reassumed exclusive jurisdiction over child custody proceedings involving member children residing or domiciled within their respective villages by petition in 1999. Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Chevak, 64 Fed. Reg. 36,391 (July 6, 1999); Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Barrow, 64 Fed. Reg. 36,391 (July 6, 1999); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,556-57 (Apr. 4, 2008).

child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.”<sup>25</sup>

## **2. Early Alaska precedent regarding ICWA and Alaska Native tribal sovereignty**

In our 1986 decision *Native Village of Nenana v. State, Department of Health & Social Services*, we held that Public Law 280 (P.L. 280) divested Alaska Native tribes of any jurisdiction under ICWA § 1911(a) and (b).<sup>26</sup> *Nenana* concerned a superior court’s denial of Native Village of Nenana’s petition for transfer of a child protection proceeding to its jurisdiction.<sup>27</sup> Because ICWA § 1918(a) specifically mentions P.L. 280 as a federal law that extends state jurisdiction over some Indian tribes, we concluded that “Congress intended that [P.L.] 280 give certain states, including Alaska, exclusive [rather than concurrent] jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction . . . and the Secretary of the Interior approves [the] tribe’s petition.”<sup>28</sup> We also noted that § 1911(b) transfer jurisdiction “may actually grant Indian tribes greater authority than they had prior to the Act” because “[r]egardless of whether [P.L.] 280 vests exclusive or concurrent jurisdiction in the applicable states, *prior* to [ICWA], Indian tribes may not have had jurisdiction over custody proceedings . . . where the child

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<sup>25</sup> 25 U.S.C. § 1911(d).

<sup>26</sup> 722 P.2d 219, 221 (Alaska 1986). Provisions of P.L. 280 give enumerated states both criminal and civil jurisdiction in Indian country, with the exception of specified reservations. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (codified at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000), respectively). Alaska has been enumerated as a state under P.L. 280 since 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

<sup>27</sup> 722 P.2d at 220.

<sup>28</sup> *Id.* at 221.

was domiciled off the reservation.”<sup>29</sup>

In 1987<sup>30</sup> and again in 1992<sup>31</sup> we confirmed *Nenana*’s holding that Alaska Native tribes could not exercise jurisdiction under ICWA § 1911(a) or (b) until they had successfully petitioned for reassumption.

Our 1987 decision *In re K.E.* concerned the superior court’s denial of a tribe’s request for § 1911(b) transfer of a parental rights termination proceeding from state court to tribal court.<sup>32</sup> The tribe argued it had exclusive § 1911(a) jurisdiction based on the child’s domicile “within the dependent [I]ndian community of Nenana,”<sup>33</sup> a reference to “Indian country.”<sup>34</sup> We recognized *Nenana* as “controlling authority” and held that regardless of whether an Indian child resides or is domiciled in Indian country, the tribe must successfully petition to reassume jurisdiction over child custody proceedings before it can exercise § 1911(a) or § 1911(b) jurisdiction.<sup>35</sup>

Our 1992 decision *In re F.P.* concerned tribal jurisdiction under § 1911(a).<sup>36</sup> After DHSS took emergency protective custody of three Indian children, Native Village of Circle unsuccessfully argued to the superior court that the state court proceeding should be dismissed in light of the tribe’s exclusive § 1911(a) jurisdiction over the

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<sup>29</sup> *Id.* (emphasis in original).

<sup>30</sup> *In re K.E.*, 744 P.2d 1173 (Alaska 1987).

<sup>31</sup> *In re F.P.*, 843 P.2d 1214 (Alaska 1992).

<sup>32</sup> 744 P.2d at 1173.

<sup>33</sup> *Id.* at 1174.

<sup>34</sup> *See* note 20, above.

<sup>35</sup> *In re K.E.*, 744 P.2d at 1174-75.

<sup>36</sup> *See* 843 P.2d at 1215 (noting tribe claimed exclusive jurisdiction).

children as tribal court wards.<sup>37</sup> On appeal Circle asked us to review *Nenana* and *K.E.* in light of then-recent Ninth Circuit Court of Appeals cases, particularly one in which the Ninth Circuit concluded that if the two Alaska Native villages involved “were ‘modern day successors to sovereign historical bands of [N]atives,’ ” then those villages had concurrent jurisdiction in child custody matters because they were “entitled to ‘the same rights and responsibilities as . . . sovereign bands of [N]ative Americans in the continental United States.’ ”<sup>38</sup> We concluded the Ninth Circuit opinion was contrary to our prior holding that “Congress intended that most Alaska Native groups not be treated as sovereigns” and held that *F.P.* was controlled by *Nenana*.<sup>39</sup> We reiterated *Nenana*’s holding that ICWA § 1918(a) indicated Congress intended P.L. 280 to give Alaska and certain other states exclusive and not concurrent jurisdiction over matters involving custody of Indian children, unless tribes successfully petitioned to reassume jurisdiction.<sup>40</sup> Chief Justice Rabinowitz was persuaded by the Ninth Circuit’s analysis and dissented, asserting that *Nenana* and *K.E.* should be overruled because P.L. 280 is not a divestiture statute, but rather an extension of states’ jurisdiction to be exercised concurrently with tribes.<sup>41</sup>

### **3. Federal precedent regarding ICWA and Alaska Native tribal**

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<sup>37</sup> *Id.*; Brief of Appellee at 2, *In re F.P.*, 843 P.2d 1214 (No. S-04742), 1991 WL 11666111, at \*2.

<sup>38</sup> *In re F.P.*, 843 P.2d at 1215 (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska (Venetie)*, 944 F.2d 548, 558-59 (9th Cir. 1991)).

<sup>39</sup> *Id.* (quoting *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 34 (Alaska 1988)).

<sup>40</sup> *Id.* at 1215-16.

<sup>41</sup> *Id.* at 1216, 1218-19 (Rabinowitz, C.J., dissenting) (quoting *Venetie*, 944 F.2d at 560-62).

## sovereignty

As we observed in *F.P.*, Ninth Circuit case law has held that Alaska Native tribes can have inherent sovereign jurisdiction concurrent with the State in ICWA-defined child custody matters.<sup>42</sup> The 1991 decision *Native Village of Venetie I.R.A. Council v. Alaska* concerned the State's refusal to recognize two adoption decrees issued by Native Villages of Venetie and Fort Yukon.<sup>43</sup> The Ninth Circuit analyzed two substantive issues in resolving the dispute: "whether the [N]ative [V]illages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned"; and, if so, "whether Congress has stripped the [V]illages of that aspect of sovereign authority which encompasses child-custody determinations."<sup>44</sup> As to inherent sovereignty, the Ninth Circuit determined "to the extent that Alaska's [N]atives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare," then "modern-day successors to [those] sovereign historical bands of [N]atives . . . are to be afforded the same rights and responsibilities as are sovereign bands of [N]ative Americans in the continental United States."<sup>45</sup> As to whether Congress stripped Alaska Native tribes of their inherent sovereignty over domestic relations and child-custody issues, the Ninth Circuit rejected the divestiture interpretation of P.L. 280 and held neither ICWA nor P.L. 280 "prevent[ed] [sovereign Alaska Native villages] from exercising concurrent jurisdiction."<sup>46</sup>

The Ninth Circuit directed that if on remand the district court determined

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<sup>42</sup> *Venetie*, 944 F.2d at 558-59, cited in *In re F.P.*, 843 P.2d at 1215.

<sup>43</sup> *Id.* at 550-51.

<sup>44</sup> *Id.* at 556.

<sup>45</sup> *Id.* at 558-59.

<sup>46</sup> *Id.* at 559-62.

either Native Village was “the modern-day successor[] to an historical sovereign band of [N]ative Americans,” then the State of Alaska must afford “full faith and credit to adoption decrees issued by [that Native Village’s] tribal courts.”<sup>47</sup> On remand the District Court for the District of Alaska determined that Venetie was “a sovereign tribe as a matter of law” exercising adoption authority over its members, and accordingly that “the State of Alaska must afford full faith and credit to adoption decrees issued by [its]

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<sup>47</sup> *Id.* at 562. The Ninth Circuit recently relied on *Venetie*’s holding in *Kaltag Tribal Council v. Jackson*, an unpublished opinion. 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010). There the Ninth Circuit relied on *Venetie* in affirming that under ICWA § 1911(d) the State must accord full faith and credit to an adoption decree issued by the Native Village of Kaltag’s tribal court. *Id.* at 325. The Ninth Circuit stated that “[r]eservation status is not a requirement of jurisdiction because ‘[a] [t]ribe’s authority over its reservation or Indian country is incidental to its authority over its members.’ ” *Id.* (quoting *Venetie*, 944 F.2d at 559 n.12). The Ninth Circuit further held that “neither the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction.” *Id.*

Even more recently, the District Court for the District of Alaska treated *Venetie* as persuasive authority. In *S.P. v. Native Village of Minto*, the district court concluded P.L. 280 did not divest Native Village of Minto’s concurrent inherent sovereign jurisdiction to make a former village resident’s child a tribal court ward and to terminate the parents’ rights. No. 3:09-cv-0092-HRH, slip op. at 4-5, 12, 14 (D. Alaska Dec. 2, 2009) (“The Native Village of Minto has never petitioned the Secretary to reassume exclusive jurisdiction over Indian child custody proceedings; but the fact that the Native Village . . . does not have exclusive jurisdiction over child custody matters of Indian children who are wards of the tribe does not preclude concurrent jurisdiction with the [S]tate.”). The district court relied on *Venetie* and the *Kaltag Tribal Council* district court order in reaching this conclusion. *Id.* at 12-14 (discussing *Venetie*, 944 F.2d at 550, 555-56, 561-62; *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-0211-TMB, slip op. at 10-11 (D. Alaska Feb. 22, 2008)). The district court expressly rejected the argument that tribal courts cannot initiate child custody proceedings as ICWA uses that term. *Id.* at 14-16 (relying in part on *Kaltag Tribal Council*, No. 3:06-cv-0211-TMB, at 7-8). Based in part on its jurisdiction ruling, the district court ultimately dismissed the case on abstention grounds. *Id.* at 16-18.

tribal courts.”<sup>48</sup> According to a subsequent Ninth Circuit opinion, the State “later stipulated that Fort Yukon could also meet the requirements for tribal status.”<sup>49</sup>

## **B. *John v. Baker* And Its Aftermath**

### **1. *John v. Baker***

In our September 1999 *John v. Baker* decision, issued when *Nenana, F.P.*, and *K.E.* still controlled, we recognized concurrent inherent tribal jurisdiction outside the confines of Indian country to adjudicate non-ICWA child custody disputes between tribal members.<sup>50</sup> In *John v. Baker* a Northway Village member unsuccessfully sought sole custody of his children in the Northway Tribal Court before bringing an identical custody suit in superior court.<sup>51</sup> The children’s mother moved to dismiss the superior court case based on the tribal court proceeding, but the superior court awarded the father primary custody of the children.<sup>52</sup> In an amicus brief filed in the ensuing appeal, the State urged us to hold that “Alaska tribes retained concurrent jurisdiction with the [S]tate over civil matters involving the domestic relations of their members” even after the enactment of P.L. 280.<sup>53</sup> The State expressed an interest in “cooperat[ing] more closely with tribes, avoiding duplicative programs and stretching . . . combined resources further than . . .

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<sup>48</sup> *Native Vill. of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 CIV (HRH) & F87-0051 CIV (HRH), 1994 WL 730893, at \*21-22 (D. Alaska Dec. 23, 1994).

<sup>49</sup> *Native Vill. of Venetie I.R.A. Council v. Alaska*, 155 F.3d 1150, 1151 (9th Cir. 1998).

<sup>50</sup> *John v. Baker*, 982 P.2d at 748-49, 759.

<sup>51</sup> *Id.* at 743. The children’s mother was a member of Mentasta Village, but consented to the Northway Tribal Court’s jurisdiction. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Amicus Brief of the State of Alaska at 45, *John v. Baker*, 982 P.2d 738 (No. S-8099), 1998 WL 35180190, at \*45.

could [be] manage[d] separately, particularly in the under-served regions of Alaska.”<sup>54</sup>

We examined the Department of the Interior’s 1993 list of federally recognized tribes, which “included Northway Village and most of the other Native villages in Alaska,” and the list’s preamble that the “villages and regional tribes listed . . . have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.”<sup>55</sup> We also looked to the Federally Recognized Tribe List Act of 1994, which directs the Department to publish annual lists of tribes eligible for special programs and services because of their status as Indians,<sup>56</sup> and to the recognition in that act’s text and legislative history of these tribes’ “sovereignty,”<sup>57</sup> “quasi-sovereign status,”<sup>58</sup> and “government-to-government relationship [with] the United States . . . as . . . domestic dependent nation[s].”<sup>59</sup> We noted the Department lists published for 1995 through 1998 all included Alaska Native villages such as Northway.<sup>60</sup> In deference to recognition by Congress and the Executive Branch that particular Native American groups are sovereign tribes, we recognized that “Alaska Native tribes, by virtue of their

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<sup>54</sup> *Id.* at 1.

<sup>55</sup> *John v. Baker*, 982 P.2d at 749-50 (emphasis omitted) (citing and quoting Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,365-66).

<sup>56</sup> *Id.* at 750 (citing 25 U.S.C. § 479a, 479a-1).

<sup>57</sup> *Id.* (citing Pub. L. No. 103-454, § 103, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a note (2000))).

<sup>58</sup> *Id.* (quoting H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768, 3769).

<sup>59</sup> *Id.* (quoting H.R. Rep. No. 103-781, at 2).

<sup>60</sup> *Id.*

inherent powers as sovereign nations,” possess “inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members.”<sup>61</sup> Because “villages like Northway presumably do not occupy Indian country,” we held “Northway’s jurisdiction to adjudicate child custody disputes between village members” was concurrent with that of state courts.<sup>62</sup>

Although ANCSA extinguished all aboriginal title and claims to Alaska land and revoked all existing Indian reservations except for that of the Metlakatla Indian Community on the Annette Islands,<sup>63</sup> we held that ANCSA’s elimination of nearly all Indian country in Alaska did not divest Alaska Native villages of their sovereign powers to adjudicate child custody disputes between village members.<sup>64</sup> We employed “the established principle under federal law that ‘Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe’s dependent status.’ ”<sup>65</sup> We then noted that “internal functions involving tribal membership and domestic affairs” are within the “core set of sovereign powers that remain intact even though Indian nations are dependent under federal law.”<sup>66</sup>

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<sup>61</sup> *Id.* at 748-49.

<sup>62</sup> *Id.* at 759.

<sup>63</sup> *Id.* at 747-48 & n.43 (citing 18 U.S.C. § 1151; *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530-33 (1998)).

<sup>64</sup> *Id.* at 748-59.

<sup>65</sup> *Id.* at 751 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982)).

<sup>66</sup> *Id.* (citing *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded on other grounds by* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 *and* Act of Oct. 28, (continued...)

We acknowledged that “the character of the power that the tribe seeks to exercise, not merely the location of events,” determines “whether tribes retain their sovereign powers.”<sup>67</sup> We determined that ANCSA did not “express any intent to force Alaska Natives to abandon their sovereignty,” particularly “their powers to adjudicate domestic disputes between members,”<sup>68</sup> and that post-ANCSA congressional actions, including passage of ICWA seven years later, indicated Congress did not intend ANCSA to prevent Alaska Natives from continuing to regulate their internal affairs.<sup>69</sup> We concluded that “federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.”<sup>70</sup>

Because we concluded that neither ICWA nor P.L. 280 applied,<sup>71</sup> we

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<sup>66</sup> (...continued)  
1991, Pub. L. No. 102-137, § 1, 105 Stat. 646).

<sup>67</sup> *Id.* at 752.

<sup>68</sup> *Id.* at 753.

<sup>69</sup> *Id.* at 753-54 (discussing Federally Recognized Tribe List Act of 1994; ICWA; and Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-31)).

<sup>70</sup> *Id.* at 754; *see also id.* at 748-49.

<sup>71</sup> We held ICWA did not apply because child custody disputes between parents fall under ICWA’s divorce exception, even if the parents never married. *Id.* at 746-47; *see* note 19, above.

We held rulings interpreting P.L. 280 did not apply because P.L. 280’s text states that it applies only to Indian country and because Northway Village, like most Alaska Native land, ceased to qualify for the “dependent Indian community” definition of Indian country after ANCSA extinguished most Indian country in Alaska. *John v. Baker*, 982 P.2d at 747-48 (quoting 18 U.S.C. § 1151 and citing *Native Vill. of Venetie* (continued...))

determined it was “neither necessary nor appropriate . . . to reach the question of whether *Nenana* and its progeny were wrongly decided.”<sup>72</sup> Although we recognized that “generally, Indian nations possess greater powers in Indian country than they do outside it” and that we would “create[] a disjunction in Indian law jurisprudence” by recognizing that Northway had greater powers outside Indian country than the tribal community inside Alaska’s only reservation, we concluded “this inconsistency d[id] not create a justification to address issues . . . not squarely before us.”<sup>73</sup>

Chief Justice Matthews, joined by Justice Compton, dissented, concluding that “inherent tribal jurisdiction over custody applies only to cases arising within Indian country.”<sup>74</sup> Chief Justice Matthews looked to what he termed the “allocative principle”<sup>75</sup> and *Nenana* and *F.P.* in concluding that “if Alaska has exclusive jurisdiction to decide private custody cases which arise in Indian country, it has, by necessary implication, exclusive jurisdiction to decide private custody cases which arise outside of Indian country.”<sup>76</sup>

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<sup>71</sup> (...continued)  
*Tribal Gov’t*, 522 U.S. at 530-33).

<sup>72</sup> *Id.* at 748.

<sup>73</sup> *Id.* at 748 n.46.

<sup>74</sup> *Id.* at 766 (Matthews, C.J., dissenting).

<sup>75</sup> The chief justice explained that under the allocative principle, unless Congress clearly provides otherwise, (1) state laws generally do not apply to tribal Indians within Indian country and (2) tribal authority does not apply outside of Indian country. *Id.* at 772 (citing *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995)).

<sup>76</sup> *Id.* at 767-68 (citing *In re F.P.*, 843 P.2d at 1215-16; *Nenana*, 722 P.2d at 221). Chief Justice Matthews determined the United States Supreme Court used  
(continued...)

## 2. The State's initial position after *John v. Baker; In re C.R.H.*

In September 2000, then-Governor Tony Knowles issued an administrative order “acknowledg[ing] the legal and political existence of the federally recognized [t]ribes within the boundaries of Alaska.”<sup>77</sup> In addition to expressing “recogni[tion] and respect[.]” for the tribes’ “governmental status,” the governor articulated a policy of “acknowledg[ing] any additional [t]ribes in Alaska that may be recognized by the federal

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<sup>76</sup> (...continued)

language indicating that P.L. 280 gave certain states full jurisdiction over Indian country to the exclusion of tribal jurisdiction. *Id.* at 808-09 (discussing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 488-89 n.32, 498 (1979); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383 (1976); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 74 (1962)). He also determined that the 1970 amendment to § 2 of P.L. 280, which the House Report explained was intended to “permit[] the Metlakatla Indian [C]ommunity on the Annette Islands in Alaska to exercise jurisdiction over minor offenses concurrent with . . . Alaska,” indicated that prior to 1970 the State exercised criminal jurisdiction exclusive of tribal jurisdiction in all Indian country in Alaska. *Id.* at 808, 810 (quoting H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4783). The chief justice noted that the 1970 amendment also added language to § 2(c) of P.L. 280 referring to the § 2(a) areas of Indian country as “areas over which the several States have *exclusive jurisdiction.*” *Id.* at 810 (emphasis added in dissenting opinion). The chief justice concluded that the amendment demonstrated the 91st Congress’s belief that P.L. 280 granted states exclusive jurisdiction. *Id.* at 810-11. Based on parallel language in §§ 2 and 4 of P.L. 280, the chief justice extended the divestiture determination to the civil realm, stating “it is impossible to conclude that Congress intended to confer on the states exclusive criminal jurisdiction, but only concurrent civil jurisdiction.” *Id.* at 810.

<sup>77</sup> Administrative Order No. 186 (Sept. 29, 2000); *see generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 430-31 & n.409 (2d ed. 2002) (hereinafter CASE & VOLUCK) (describing Governor Knowles’s actions and noting change from former Governor Walter J. Hickel’s Administrative Order No. 125 (Aug. 16, 1991), generally opposing tribal sovereignty expansion, which in turn had overturned former Governor Steve Cowper’s Administrative Order No. 123 (Sept. 10, 1990), recognizing existence of Alaska Native tribes).

government in the future”<sup>78</sup> and “foster[ing] a constructive and harmonious relationship between the [t]ribal and State governments.”<sup>79</sup> He acknowledged the value of the “services that Alaska’s [t]ribes contribute to the state’s economic and social well-being by virtue of their direct [t]ribal authority and responsibility for the delivery of social, economic, cultural, and other programs and services.”<sup>80</sup> The governor explained that in December 1999 he had invited Alaska Native tribes “to enter into a government-to-government dialogue with the State for the purpose of establishing a framework for ongoing State-[t]ribal relations.”<sup>81</sup> In furtherance of the “promot[ion] and enhance[ment] [of] [t]ribal self-government . . . and social, cultural, spiritual, and racial diversity,” among other things, Governor Knowles committed the State “to working with [t]ribes to further strengthen Alaska’s ability to meet the needs of Alaska’s communities and families.”<sup>82</sup>

In April 2001 Governor Knowles and various federally recognized Alaska Native tribes signed the Millennium Agreement, “a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties.”<sup>83</sup> This agreement reflects the State’s recognition that

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<sup>78</sup> Administrative Order No. 186.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska ¶ 2, Apr. 11, 2001. Although the Millennium Agreement did not address substantive issues, *id.* at ¶ 10, ICWA authorizes agreements  
(continued...)

“[e]ach [signatory] [t]ribe has its own independent form of government and exercises inherent sovereign authority.”<sup>84</sup> In turn, the signatory tribes acknowledged that “[t]he State of Alaska has a major responsibility to provide for the health, safety, and welfare of all Alaskans.”<sup>85</sup>

In August 2001, two years after our *John v. Baker* decision, we decided *In re C.R.H.*<sup>86</sup> That case concerned the denial of a request by Native Village of Nikolai to transfer a child protection proceeding from superior court to tribal court.<sup>87</sup> The State, while defending against Native Village of Nikolai’s appeal in *C.R.H.*, urged us to overturn *Nenana* and its progeny.<sup>88</sup> The State pointed to the conflict between (1) the Ninth Circuit’s *Venetie* holding that some Alaska Native tribes have concurrent inherent authority over child protection matters affecting their members, undivested by P.L. 280, and (2) our *Nenana* holding that Alaska Native tribes may not assert jurisdiction over child protection matters unless they formally reassume jurisdiction over those matters

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<sup>83</sup> (...continued)

between states and Indian tribes “respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements . . . for orderly transfer of jurisdiction on a case-by-case basis and . . . for concurrent jurisdiction between States and Indian tribes.” 25 U.S.C. § 1919(a) (2000).

<sup>84</sup> Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska, note 83, above, at ¶ 12(a).

<sup>85</sup> *Id.* at ¶ 13(b).

<sup>86</sup> 29 P.3d 849 (Alaska 2001).

<sup>87</sup> *Id.* at 850-51.

<sup>88</sup> Appellee State of Alaska’s Brief at 6, 41, *In re C.R.H.*, 29 P.3d 849 (No. S-9677).

under ICWA § 1918(a) because they were divested of it by P.L. 280.<sup>89</sup> The State explained that it “felt compelled” to oppose the tribe’s request for transfer because of *Nenana* and its progeny, but it was “in an untenable position” because *Nenana* and *Venetie* were irreconcilable.<sup>90</sup> The State argued in part that we should reexamine and overrule *Nenana* in light of *John v. Baker*’s holdings that Alaska’s federally recognized tribes have “ ‘inherent power [to] regulat[e] their internal and social relations,’ including adjudicatory authority over child custody matters” and that P.L. 280 did not divest that authority outside of Indian country.<sup>91</sup>

We compared ICWA § 1911(a), which provides that tribes lack exclusive Indian country and wardship jurisdiction “where such jurisdiction is otherwise vested in the State by existing Federal law,” with § 1911(b), which does not contain a parallel limiting provision for transfer jurisdiction.<sup>92</sup> We concluded that “Congress intended P.L. 280 to affect tribes’ exclusive jurisdiction under subsection 1911(a), but did not intend P.L. 280 to affect transfer jurisdiction under subsection 1911(b).”<sup>93</sup> We therefore held that federally recognized tribes in Alaska may accept transfer of ICWA cases under § 1911(b) without formal reassumption of jurisdiction, and we overruled *Nenana*, *F.P.*, and *K.E.* to the extent they were inconsistent with that holding.<sup>94</sup> But having concluded that Congress gave tribes § 1911(b) transfer jurisdiction regardless of their P.L. 280

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<sup>89</sup> *Id.* at 5.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 13, 25 (quoting *John v. Baker*, 982 P.2d at 754-55).

<sup>92</sup> *In re C.R.H.*, 29 P.3d at 852.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 850-52.

status, we found it unnecessary to reconsider whether Alaska Native tribes affected by P.L. 280 retained initiating jurisdiction under § 1911(a) concurrent with the State.<sup>95</sup>

DHSS subsequently requested an opinion from then-Attorney General Bruce Botelho on *C.R.H.*'s effect.<sup>96</sup> In the responsive memorandum, the Attorney General's office acknowledged that "no tribe in Alaska [could] exercise exclusive jurisdiction over its children based on either residency or domicile within the tribe's reservation" because the only tribe occupying a reservation, Metlakatla Indian Community, exercises concurrent jurisdiction.<sup>97</sup> The memorandum also acknowledged Native Village of Barrow's and Native Village of Chevak's successful petitions to reassume exclusive jurisdiction over matters involving their children.<sup>98</sup> As to Alaska's other tribes, the memorandum stated that before a child custody proceeding's initiation, a tribe and the State shared concurrent jurisdiction and either could take steps to protect a member child or membership-eligible child.<sup>99</sup> The memorandum explained that a tribe could exercise exclusive jurisdiction over a child either by (1) initiating a tribal court proceeding regarding an Indian child not already within the State's custody and declaring

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<sup>95</sup> *Id.* at 852. One early commentator noted that "[r]ead together with *John v. Baker, C.R.H.* confirms tribal concurrent ICWA jurisdiction as well." CASE & VOLUCK, note 77, above, at 430 n.406.

<sup>96</sup> Memorandum from Assistant Att'y Gen. Donna Goldsmith for Jay Livey, Dep't of Health & Soc. Srvs. Comm'r (Mar. 29, 2002) (No. 441-00-0005) *revoked by* 2004 FORMAL OP. ATT'Y GEN. 135.

<sup>97</sup> *Id.* at 3; *see John v. Baker*, 982 P.2d at 748 n.43 (noting Metlakatla Reservation on Annette Islands is Alaska's only post-ANSCA Indian reservation).

<sup>98</sup> Memorandum From Assistant Att'y Gen. Donna Goldsmith, note 96, above, at 3.

<sup>99</sup> *Id.* at 2.

the child a tribal court ward or (2) receiving transfer of a case initiated in state court.<sup>100</sup> According to the memorandum, the State lacked authority to investigate a report of harm concerning an Indian child it knew was a tribal court ward, but the State could forward risk of harm information to the tribe.<sup>101</sup> Finally, the memorandum advised DHSS that in addition to recognizing cultural adoptions under ICWA § 1911(d), the State was required to “recognize tribal court adoption orders to the extent that it recognize[d] such orders from sister states and other foreign orders” because “*C.R.H.* removed all impediments that historically prevented [recognition of] tribal court adoptions.”<sup>102</sup>

### **3. The State’s position after October 1, 2004**

On October 1, 2004, then-Attorney General Gregg Renkes issued a direction-changing advisory opinion regarding tribal jurisdiction and ICWA-defined child custody proceedings.<sup>103</sup> The 2004 Attorney General Opinion, based on *C.R.H.* and the *Nenana* remnants left in place after *C.R.H.*, and without acknowledging *John v. Baker*’s implications, concluded that:

Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children unless (1) the child’s tribe has successfully petitioned the Department of Interior to reassume exclusive or concurrent jurisdiction under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction of the child’s case to a tribal court in accordance

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<sup>100</sup> *Id.* at 2, 4 n.7.

<sup>101</sup> *Id.* at 4.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> 2004 FORMAL OP. ATT’Y GEN. 135.

with 25 U.S.C. § 1911(b) and the tribal court is exercising its jurisdiction.<sup>[104]</sup>

OCS then revised its Policy and Procedure Manual, citing the 2004 Attorney General Opinion as authority. The manual still recognizes Native Village of Barrow, Native Village of Chevak, and Metlakatla Indian Community as having exclusive or concurrent ICWA jurisdiction in their specified territories. But the manual redefines the meaning of “concurrent” jurisdiction exercisable by the remaining tribes: the 2002 edition states that until a child custody proceeding is initiated, “the tribe and the [S]tate simultaneously share authority and either government may take the steps necessary to protect a child who may be at risk”; the 2004 edition removed that provision and otherwise limited concurrent jurisdiction to cases transferred from state court.

OCS also changed the way it shared information with tribes. Before 2004 OCS contacted a child’s tribe “[a]s soon as possible, and if possible prior to the assignment for investigation” to ascertain whether the tribe already had custody of the child or wanted to take jurisdiction over a child protection proceeding. The 2004 Attorney General Opinion advised that OCS was authorized “to release information concerning minor children for whom state court proceedings have not been initiated” to a “tribe properly exercising jurisdiction over a child protection proceeding involving the tribe’s member child,” but that “OCS must promulgate regulations governing the release of this information.” On March 21, 2005, OCS proposed new regulations for releasing information to tribes “if such a release is in the best interests of the child . . . and the child is not [the subject of a child in need of aid] case where the child’s tribe is not a party” or “to assist in an investigation of a report of harm.”

One OCS supervisor described actual changes in OCS policy following the 2004 Attorney General Opinion as follows:

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<sup>104</sup> *Id.* at 3.

Policies have changed recently regarding when we contact the tribe in investigations. . . . [W]e don't share information regarding investigations unless the investigation is underway. In other words, . . . the tribe can't have access to allegations that are made unless I have releases from my clients. They can't get copies of Reports of Harm unless . . . the parent in the Report of Harm has signed a release. Until [the tribes] have intervened legally in a [child in need of aid] case. In which case, then, they get all that.

BVS also changed its policies based on the 2004 Attorney General Opinion. The 2004 Attorney General Opinion stated that “the [S]tate retains exclusive jurisdiction over Alaska Native adoption proceedings unless a tribe has reassumed jurisdiction” but the State’s “longstanding policy” of “ratif[ying] Indian adoptions that occur under tribal custom as a matter of equity under state law” is unchanged. According to a letter from BVS to the Kaltag Tribal Council, BVS began refusing to accept tribal court adoption paperwork in October 2005 unless it was from Native Village of Barrow, Native Village of Chevak, or Metlakatla Indian Community, and began processing only cultural adoptions for the remaining tribes.

### **C. Ripeness Analysis For This Case**

As noted earlier, the State moved to dismiss the Tribes’ suit on ripeness grounds. It contended the Tribes had alleged no actual harm, but rather presented nothing more than an abstract disagreement with an opinion by the Attorney General. The State pointed out the lawsuit was filed shortly after the 2004 Attorney General Opinion was issued and no actual controversy regarding implementation had yet arisen. Relying primarily on our 2001 decision *Brause v. State, Department of Health & Social Services*,<sup>105</sup> the State argued that in the absence of specific facts regarding actual

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<sup>105</sup> 21 P.3d at 358-60 (discussing federal law and affirming, under abuse of discretion standard, superior court’s dismissal on ripeness grounds of action for (continued...))

governmental action to provide context, the case was not ripe and there was no need for the superior court to act.

The Tribes opposed the State’s dismissal motion, arguing that (1) the State had taken action well beyond the mere issuance of an Attorney General’s opinion, including changes in department manuals and actual dealings with tribes, and (2) then-existing Alaska case law on standing, including the concept of ripeness, required only the threat of future injury. Judge Suddock agreed with the Tribes.

During the briefing for this appeal we issued our decision in *State v. ACLU of Alaska*.<sup>106</sup> In that case we continued *Brause*’s new emphasis on federal ripeness law with respect to a narrow line of cases — those involving pre-enforcement constitutional challenges to statutes.<sup>107</sup> We stated that “the constitutionality of a statute generally may not be challenged as an abstract proposition” and looked to see if the plaintiffs had presented the basis for an exception to that general rule.<sup>108</sup> We then noted the similarity of our earlier cases warning against advisory opinions and resolving abstract questions of law to the Ninth Circuit’s recent decision in *Alaska Right to Life Political Action*

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<sup>105</sup> (...continued)  
declaratory relief in connection with constitutional challenge to statute precluding same-sex marriage because plaintiffs had not alleged any specific denial of rights associated with marriage).

<sup>106</sup> 204 P.3d 364 (Alaska 2009).

<sup>107</sup> *See id.* at 366 (concerning “pre-enforcement challenge to a newly amended statute that prohibits the possession and use of marijuana”); *id.* at 368 (looking to federal law); *see also Brause*, 21 P.3d at 358 (concerning request for declaration that statute denying same-sex marriages recognition is unconstitutional where challengers did not allege they had been denied any specific benefits); *id.* at 358-60 (relying in part on 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 112, 114-15 (2d ed. 1984)).

<sup>108</sup> *ACLU of Alaska*, 204 P.3d at 366.

*Committee v. Feldman*.<sup>109</sup> We stated: “While pure legal questions that require little factual development are more likely to be ripe, a party bringing a pre[-]enforcement challenge must nonetheless present a concrete factual situation.”<sup>110</sup> Looking back to *Brause* and its reliance on federal law, we reiterated the practical formulation for ripeness of pre-enforcement constitutional challenges to statutes: balancing the need for decision against the risks of decision.<sup>111</sup>

The plaintiffs in *ACLU of Alaska* had challenged a newly enacted statute criminalizing the possession of small amounts of marijuana, arguing that the statute was unconstitutional under *Ravin v. State*.<sup>112</sup> We first determined that because the plaintiffs faced federal prosecution for marijuana possession regardless of state law, the threat of the new law did not really create a hardship to them.<sup>113</sup> We then determined that concrete facts regarding the State’s enforcement of the new statute might aid in our decision.<sup>114</sup> We also considered the litigation’s high-profile nature, with interest by both the legislative and executive branches, and that deference to the legislative branch prohibits us from declaring statutes unconstitutional unless “squarely faced with the need to do

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<sup>109</sup> *Id.* at 368-69; *see Feldman*, 504 F.3d 840 (9th Cir. 2007).

<sup>110</sup> *ACLU of Alaska*, 204 P.3d at 368 (quoting *Feldman*, 504 F.3d at 849) (internal quotation marks omitted).

<sup>111</sup> *Id.* at 369.

<sup>112</sup> *Id.* at 366; *see Ravin*, 537 P.2d 494, 504, 511 (Alaska 1975) (holding Alaskans have fundamental right to privacy in their homes and allowing possession of small amounts of marijuana in home by adults for personal and private use).

<sup>113</sup> *ACLU of Alaska*, 204 P.3d at 369-70.

<sup>114</sup> *Id.* at 372-73.

so.”<sup>115</sup> Because of these factors, we concluded that the decisional risks outweighed the need for decision and that the plaintiffs therefore were not entitled to an exception from the general rule against pre-enforcement constitutional challenges to statutes.<sup>116</sup> We vacated the superior court’s judgment in the plaintiffs’ favor and dismissed the proceedings.<sup>117</sup>

The State and the Tribes disagree on *ACLU of Alaska*’s application here. The State implicitly characterizes this case as a pre-enforcement challenge to the 2004 Attorney General Opinion and asserts that the Tribes are asking “for a sweeping decision” despite the “factual vacuum of this case.” The State argues the Tribes have not demonstrated a need for a decision, but the risk of decision is high because “jurisdictional analysis depends on [a variety of different] factual circumstances.” The State points to a number of hypothetical fact patterns raising difficult questions and leading to differing results in the jurisdictional analysis, including if only one parent is a tribal member, if the parents are members of different tribes, and if one or both of the parents do not consent to tribal jurisdiction. It concludes that considering the tribal jurisdiction question raised here in the absence of concrete facts “invites an inaccurate[,] broad[,] and unqualified jurisdictional ruling.”

The Tribes respond that the State’s argument rings hollow because the State contends that no Alaska Native tribe possesses *any* jurisdiction to initiate ICWA-defined child custody proceedings unless the tribe has reassumed jurisdiction under ICWA § 1918. The Tribes assert that this case does not raise an issue about tribal jurisdiction and authority over non-members and expressly ask us to refrain from addressing that issue.

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<sup>115</sup> *Id.* at 373.

<sup>116</sup> *Id.* at 371-74.

<sup>117</sup> *Id.* at 374.

The Tribes point to the existence of tribal court systems and specific examples of the 2004 Attorney General Opinion’s effect on tribal jurisdiction and powers,<sup>118</sup> and argue that there is a real case and controversy ripe for decision.

The Tribes distinguish *ACLU of Alaska* by observing that “the [c]ourt in *ACLU* was most influenced by the fact that the actions the plaintiffs sought to engage in, even if protected from criminalization under Alaska law, still remained criminal under federal law” and “[n]o analogue is present here.” The Tribes also point out that “the [c]ourt in *ACLU* found that the plaintiffs’ declarations did not indicate that the statute at issue would [a]ffect their conduct, or that they would be the subjects of enforcement,” while “[h]ere, it is clear . . . that the State is enforcing its new policies vigorously.” The Tribes further note that “in *ACLU* a ‘narrowing construction’ of the new marijuana statute was possible, thus making adjudication of individual cases more appropriate; here, by contrast, the State’s position is monolithic, barring *all* child protection proceedings from being initiated in tribal courts absent . . . reassumption . . . and barring [recognition of] *all* tribal court adoption proceedings.” (Emphasis in original.) The final distinction drawn by the Tribes is that “in *ACLU* due respect for the legislative branch required some hesitation on the [c]ourt’s part before declaring an enacted statute unconstitutional,” but “[h]ere, in contrast, state officials are taking actions based upon their interpretation of

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<sup>118</sup> The Tribes point out that based on the 2004 Attorney General Opinion, OCS changed its policy on recognizing existing tribal child custody proceedings, and that the record reflects one application of the new policy involving a member child of the Kenaitze Tribe. The child had been: (1) the subject of several emergency petitions before the Tribe; (2) the subject of multiple reports of harm OCS had transferred to the Tribe for follow-up; and (3) held by a state court to be under the tribal court’s jurisdiction. OCS disregarded this previous activity and reopened its investigation, requesting a state court order compelling the child’s attendance at an interview regarding allegations the Tribe had already investigated and found unsubstantiated. The Tribes also point out that BVS stopped issuing birth certificates for children adopted in tribal courts shortly after the 2004 Attorney General Opinion was issued.

Alaska Supreme Court case law — a subject on which this [c]ourt is in the best position, and has an obligation, to decide.”

The Tribes have the better argument. The State’s actions in response to the 2004 Attorney General Opinion go beyond enacting a statute that might be challenged as facially unconstitutional. Indian children may be at risk of harm because of the State’s refusal to coordinate and cooperate with tribes regarding reports of harm; Indian children, as well as their natural and putative adoptive parents, may be held in legal limbo by the State’s refusal to give full faith and credit to tribal adoption decrees; and both the State and tribal courts need to understand the extent to which tribal court orders in “child custody proceedings,” as that term is defined in ICWA, are entitled to full faith and credit. We agree with Judge Suddock: families and children are being affected; State and tribal relations are being affected; the State and Alaska Native tribes, as well as State and tribal courts, are being affected. Under our approach to ripeness in cases not involving pre-enforcement constitutional challenges to statutes, the Tribes have readily established the injury and threat of injury necessary to support this suit.<sup>119</sup>

We conclude that the legal issue before us has been sufficiently narrowed by our previous cases and the conflicting Ninth Circuit cases. There are enough facts before us to resolve the parties’ fundamental jurisdictional dispute in limited fashion: We will decide whether — absent formal reassumption of jurisdiction under ICWA § 1918 — Alaska Native tribes have inherent sovereign jurisdiction, concurrent with the

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<sup>119</sup> See generally *ACLU of Alaska*, 204 P.3d at 375-76 (Carpeneti, J., dissenting) (“We interpret standing, and by extension ripeness, leniently in order to facilitate access to the courts: ‘The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle.’” (quoting *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001))); *Brause*, 21 P.3d at 360-61 (Bryner, J., dissenting) (“This court’s standing jurisprudence indicates a willingness to adjudicate claims where the injury claimed is but ‘an identifiable trifle.’” (quoting *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1998))).

State, to initiate ICWA-defined child custody proceedings. We therefore affirm Judge Suddock's decision denying the State's motion to dismiss the Tribe's suit and we decline to vacate the superior court judgment and dismiss this appeal on ripeness grounds.

**D. Today's Holding Regarding Alaska Native Tribal Sovereignty And ICWA**

*John v. Baker* is foundational Alaska authority regarding Alaska Native tribal jurisdiction over the welfare of Indian children, notwithstanding the sharpness of the debate or the division of the court in reaching its ultimate conclusion.<sup>120</sup> Notably, the State does not ask that *John v. Baker* be overruled.

Having thoroughly outlined *John v. Baker*'s tribal jurisdiction analysis, we reiterate only the following four points from that decision to set the stage for our consideration of the State's arguments here. First, unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.<sup>121</sup> Second, ANCSA's elimination of nearly all Indian country in Alaska did not divest federally recognized sovereign Alaska Native tribes of their

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<sup>120</sup> The debate continued among commentators after the decision. *See, e.g.*, David M. Blurton, *John v. Baker and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 ALASKA L. REV. 1, 26 (2003) (criticizing *John v. Baker*'s holding and interpreting United States Supreme Court cases to be "highly indicative . . . that tribes, without Indian country, do not have inherent sovereign powers and lack criminal, civil adjudicatory, and regulatory authority"); Andy Harrington, *Exclusive of What? The Historical Context of the 1970 "Metlakatla" Amendment to PL 280*, 23 ALASKA L. REV. 1, 7-9, 30-32, 38-49 (2006) (criticizing *John v. Baker* dissent's conclusion that 1970 amendment indicates P.L. 280 divested Alaska Native tribes of jurisdiction and taking position that (1) amendment was intended to supercede federal case law holding Metlakatla Reservation was not in Indian country and (2) "exclusive" in P.L. 280 § 2(c) does not mean exclusive of tribal jurisdiction, but instead means exclusive of federal jurisdiction under the General Crimes and Major Crimes Acts, 18 U.S.C. §§ 1152, 1153).

<sup>121</sup> *John v. Baker*, 982 P.2d at 751.

authority to regulate internal domestic relations among their members.<sup>122</sup> Third, we “must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans” and “we will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.”<sup>123</sup> Fourth, “Congress’s purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes” and “ICWA’s very structure presumes both that the tribes . . . are capable of adjudicating child custody matters . . . and that tribal justice systems are appropriate forums for resolution of child custody disputes.”<sup>124</sup>

The State contends that ICWA § 1911 constitutes a “complete jurisdictional scheme” limiting a tribe’s initiating jurisdiction to child custody proceedings in Indian country under § 1911(a), but allowing, under certain conditions, transfer jurisdiction for those proceedings outside of Indian country under § 1911(b). According to the State, this scheme “reflects Congress’[s] reasonable balancing of tribal rights, parental rights off-reservation, and state rights off-reservation.” The State argues that the superior court’s acknowledgment of inherent sovereign jurisdiction to initiate child custody proceedings: (1) “fundamentally upend[s] ICWA’s delicate balance of parental, state, and tribal interests”; (2) circumvents transfer jurisdiction limitations; (3) allows tribes to exercise jurisdiction over non-members; and (4) magnifies the disjunction in Indian law that P.L. 280 may have divested Alaska Native tribal powers inside Indian country but not outside

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<sup>122</sup> *Id.* at 753.

<sup>123</sup> *Id.* at 752-53 (citing *In re F.P.*, 843 P.2d at 1219).

<sup>124</sup> *Id.* at 753-54 (citing 25 U.S.C. § 1911).

it — as noted in *John v. Baker*, “generally, Indian nations possess greater powers in Indian country than they do outside it.”<sup>125</sup>

The Tribes respond that: (1) ICWA was intended to give tribes more, not less, power and authority to protect the best interests of their children; (2) this case does not present the issues the State raises concerning tribal jurisdiction over non-members; and (3) the remaining vestige of *Nenana*’s divestiture interpretation of P.L. 280 should be overruled, thereby eliminating the alleged jurisdictional disjunction.

We agree with the Tribes. ICWA creates limitations on states’ jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes’ jurisdiction over those proceedings.<sup>126</sup> And we acknowledge that in the nearly 25 years since our *Nenana* decision, our view of P.L. 280’s impact on tribal jurisdiction has become the minority view — other courts and commentators have instead concluded that P.L. 280 merely gives states concurrent jurisdiction with tribes in Indian country.<sup>127</sup> What remains of

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<sup>125</sup> *Id.* at 748 n.46.

<sup>126</sup> *See Holyfield*, 490 U.S. at 44-45 (stating ICWA’s purpose was “to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings” because “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities” (emphasis in original)); COHEN’S HANDBOOK, note 16, above, at § 11.01[1], 820 n.2 (“This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority.”); ICWA HANDBOOK, note 17, above, at 5 (observing ICWA was intended, in part, “to encourage tribal adjudication of child custody proceedings involving Indian children”).

<sup>127</sup> *See Kaltag Tribal Council*, 344 Fed. Appx. at 325 (“[N]either the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction.”); COHEN’S HANDBOOK, note 16, above, §6.04[3][c], at 560-61 (“The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor’s Office for the Department of the Interior, and legal scholars, is that [P.L.] 280 left the inherent civil and criminal jurisdiction of Indian nations untouched.” (footnotes omitted)); ICWA HANDBOOK, note 17, above, at 34 (“It has become clear . . . that the  
(continued...)”)

*Nenana* must now be overruled. We adopt the view that P.L. 280 did not divest tribes of all jurisdiction under § 1911(a), but rather created concurrent jurisdiction with the State.

Accordingly, in light of our foundational decision *John v. Baker*, ICWA, federal case law regarding Alaska Native tribal sovereignty, and the absence of express contrary Congressional intent, we hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states<sup>128</sup> and § 1911(d) full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.<sup>129</sup>

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<sup>127</sup> (...continued)

retrocession provisions . . . permit Indian tribes to reassume exclusive jurisdiction over their children domiciled in Indian country, but these tribes can exercise concurrent jurisdiction over their children along with state courts and can exercise transfer jurisdiction under § 1911(b) . . . .”); CASE & VOLUCK, note 77, above, at 394 (“[I]t is now generally agreed that [P.L. 280] does not deprive tribes of concurrent jurisdiction.”); *id.* at 390 n.134 (“Retrocession does not seem to be required for tribal courts to exercise concurrent jurisdiction over child custody matters, because such jurisdiction was not surrendered to the state under P.L. 280.”).

<sup>128</sup> See, e.g., 25 U.S.C. § 1912(a) (2000) (requiring notice to Indian tribes); 25 U.S.C. § 1911(b) (providing Indian tribes with right to petition for transfer to tribal court); *id.* at § 1911(c) (providing Indian tribes with right to intervene); see generally ICWA HANDBOOK, note 17, above, at 83-111.

<sup>129</sup> See *John v. Baker*, 982 P.2d at 761-62 (“ICWA requires courts to extend full faith and credit to tribal court decisions involving ‘child custody proceedings’ as that term is defined by [ICWA].”). This case does not present a specific full faith and credit dispute and we do not need to discuss potential limitations on § 1911(d) full faith and  
(continued...)

We do not have before us sufficient facts to make determinations about specific limitations on inherent tribal jurisdiction over ICWA-defined child custody proceedings. The nature and extent of tribal jurisdiction in any particular case will depend upon a number of factors, including but not limited to: (1) the extent of the federal recognition of a particular tribe as a sovereign; (2) the extent of the tribe's authority under its organic laws; (3) the tribe's delegation of authority to its tribal court; and (4) the proper exercise of subject matter and personal jurisdiction. Among the many issues we are not deciding today are: (1) whether, parallel to ICWA § 1911(b) transfer jurisdiction limitations, parents of Indian children might have the right to object to tribal jurisdiction; (2) the extent of tribal jurisdiction over non-member parents of Indian children; and (3) the extent of tribal jurisdiction over Indian children or member parents who have limited or no contact with the tribe. We therefore do not need to address the varied hypothetical situations posited by the State as creating difficult jurisdictional questions — we leave those for later determinations under specific factual circumstances.

**E. Our Decision's Impact On The Judgment For Declaratory And Injunctive Relief**

Our ruling is more limited than the declaratory relief entered by Judge Tan, and we therefore vacate that portion of the declaratory judgment going beyond today's decision. Today's decision should clarify any confusion about jurisdiction that may be held by federally recognized Alaska Native tribes to initiate ICWA-defined child custody proceedings. We are confident the State's agencies will follow our clarifying ruling without the need for further injunctive relief, and out of respect for the executive branch

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<sup>129</sup> (...continued)

credit. *See, e.g., Starr v. George*, 175 P.3d 50, 55-58 (Alaska 2008) (discussing due process requirement for orders afforded § 1911(d) full faith and credit).

we therefore vacate that portion of the judgment entering such relief (but without prejudice to the right of the Tribes to seek future relief if deemed necessary).

**V. CONCLUSION**

The superior court's judgment is AFFIRMED in part and VACATED in part, as set forth above.

FILED

AUG 28 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KALTAG TRIBAL COUNCIL; HUDSON  
SAM; SALINA SAM,

Plaintiffs - Appellees ,

v.

KARLEEN JACKSON, in her official  
capacity as Commissioner of Alaska  
Department of Health and Social Services;  
BILL HOGAN, in his official capacity as  
Deputy Commissioner of Alaska  
Department of Health and Social Services;  
and PHILLIP MITCHELL, in his official  
capacity as Section Chief of the Alaska  
Bureau of Vital Statistics,

Defendants - Appellants.

No. 08-35343

D.C. No. CV-06-211-TMB

MEMORANDUM \*

Appeal from the United States District Court  
for the District of Alaska  
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted August 5, 2009  
Anchorage, Alaska

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Plaintiffs-Appellees Kaltag Tribal Council (“Kaltag”), Selina Sam and Hudson Sam (collectively, “Kaltag plaintiffs”) filed this case in district court against Karleen Jackson, Bill Hogan, and Phillip Mitchell, employees of the State of Alaska, Department of Health and Human Services. The Kaltag plaintiffs alleged that an adoption judgment issued by the Kaltag court is entitled to full faith and credit under § 1911(d) of the Indian Child Welfare Act (“ICWA”), and that the Alaska employees were required to grant the request for a new birth certificate. The district court granted the Kaltag plaintiffs’ motion for summary judgment and denied the Alaska employees’ summary judgment motion. The Alaska employees appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The district court’s decision that full faith and credit be given to the Kaltag court’s adoption judgment is compelled by this circuit’s binding precedent. *See Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). The district court correctly found that neither the ICWA nor Public Law 280 prevented the Kaltag court from exercising jurisdiction. Reservation status is not a requirement of jurisdiction because “[a] Tribe’s authority over its reservation or Indian country is incidental to its authority over its members.” *Venetie*, 944 F.2d at 559 n.12 (citations omitted).

The Eleventh Amendment does not bar the relief sought by the Kaltag plaintiffs. *Id.* at 552.

**AFFIRMED.**