

# STATE OF ALASKA V. NATIVE VILLAGE OF TANANA: ENHANCING TRIBAL POWER BY AFFIRMING CONCURRENT TRIBAL JURISDICTION TO INITIATE ICWA- DEFINED CHILD CUSTODY PROCEEDINGS, BOTH INSIDE AND OUTSIDE OF INDIAN COUNTRY

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## ABSTRACT

*This Article provides an overview of the significant cases that have defined state-tribal relations in Alaska as related to Indian child proceedings and further discusses various policies that have been implemented over time. After outlining these cases and shifting policies, the Article examines the current state of the law in Alaska with a focus on State v. Native Village of Tanana, which clarified confusion regarding the inherent jurisdiction held by federally recognized Alaska Native tribes to initiate the Indian Child Welfare Act (ICWA)-defined child custody proceedings. Finally, the Article discusses those jurisdictional questions left unresolved by Tanana to be decided at a later time under specific factual circumstances.*

## INTRODUCTION

There are 229 federally recognized Alaska Native tribes<sup>1</sup> in Alaska, including the Native Village of Tanana.<sup>2</sup> Most of the lands in and

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around these villages were conveyed under the Alaska Native Claims Settlement Act (ANCSA).<sup>3</sup> In *Alaska v. Native Village of Venetie Tribal Government*,<sup>4</sup> the United States Supreme Court held that such ANCSA lands do not constitute “Indian country” within the meaning of 18 U.S.C. § 1151.<sup>5</sup> As a result, most of the land held by Alaska Native tribes is not within a “reservation” as that term is defined in ICWA.<sup>6</sup> Such tribes are, however, expressly included in ICWA’s definition of an “Indian tribe,”<sup>7</sup> and many operate their own tribal court systems, which typically carry a heavy docket of child-welfare cases.<sup>8</sup>

1. “The term ‘Indian tribe’ means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe.” 25 U.S.C. § 479a(2) (2006).

2. See 25 U.S.C. §§ 479a-1(a), 479a(2) (2006) (authorizing the Secretary of the Interior to publish a list of recognized tribes, including “Alaska Native tribe[s]”); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218, 40,219, 40,222 (Aug. 11, 2009) (listing the Native Village of Tanana as a federally recognized tribe that has “the immunities and privileges available to other federally acknowledged Indian tribes... as well as the responsibilities, powers, limitations and obligations of such tribes”); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993) (noting that Alaska Native tribes have the “right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes”).

3. See 43 U.S.C. §§ 1601, 1613 (2006); see also *Alaska Native Claim Settlement Act (ANCSA) Land Conveyances*, ALASKA DEPARTMENT OF FISH AND GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=habitatoversight.ancsa> (last visited Nov. 9, 2011).

4. 522 U.S. 520 (1998).

5. *Id.* at 532-34; see also DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 1-33 (2d ed. 2002) (discussing the history and background of the federal government’s relationship to Alaska Natives).

6. 25 U.S.C. § 1903(10) (2006); see Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 4, *Hogan v. Kaltag Tribal Council*, 131 S. Ct. 66 (2010) (No. 09-960).

7. See 25 U.S.C. § 1903(8) (2006).

8. See ALASKA JUDICIAL COUNCIL, *A DIRECTORY OF DISPUTE RESOLUTION IN ALASKA OUTSIDE FEDERAL AND STATE COURTS* 47 n.84 (1999). Tanana Chiefs provided the following statistics, which compare annual children’s cases handled by the region’s twenty-seven tribal courts and councils with state court cases from the same village during the period July 1, 1997 to June 30, 1998:

	<u>State</u>	<u>Tribal</u>
Children in custody	135	147
Adoptions finalized	4	9
Guardianships granted	2	4
Children returned home	25	86
Children in foster care to age	4	2
Average length of foster care	13 months	9 months

*Id.*

For many years the State of Alaska and Alaska Native tribes sought to work cooperatively in recognition of their shared jurisdiction over proceedings involving tribal children.<sup>9</sup> This cooperative effort was encouraged by the Alaska Supreme Court's decision in *John v. Baker*,<sup>10</sup> which held that Alaska tribes, by virtue of their inherent powers as sovereign nations, do possess non-territorial authority to resolve domestic disputes, and nothing in the ICWA or Public Law 280<sup>11</sup> (P.L. 280) diminishes this inherent authority.<sup>12</sup> Then, in 2004, out of the blue, a new Attorney General abruptly reversed course and declared that no Alaska tribes possess any original jurisdiction over any children's proceedings absent affirmative reassumption of that jurisdiction pursuant to the petitioning process set forth in ICWA § 1918.<sup>13</sup> The Attorney General buttressed this position by relying on a previous ruling, *Native Village of Nenana v. State, Department of Health & Social Services*,<sup>14</sup> which held that an ICWA proceeding could not be transferred from a state court to a tribal court under ICWA § 1911(b) without the tribe first processing a § 1918 petition.<sup>15</sup> The court in *Nenana* further observed that a state's jurisdiction under P.L. 280 is "exclusive" over matters involving the custody of Indian children.<sup>16</sup>

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9. See LISA JAEGER, TRIBAL COURT DEVELOPMENT: ALASKA TRIBES (3d ed. 2002), available at <http://thorpe.ou.edu/AKtribalct/index.html>.

10. 982 P.2d 738 (Alaska 1999).

11. Ch. 505, 67 Stat. 588 (1953) (codified in part as amended at 28 U.S.C. § 1360 (2006)). The text of P.L. 280 provides in pertinent part:

(a) Each of the [P.L. 280 States] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties *which arise in the areas of Indian country* [within the State] . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect *within such Indian country* as they have elsewhere within the State[.]

...

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C. § 1360 (emphasis added).

12. *John*, 982 P.2d at 747-48.

13. OFFICE OF THE ATTORNEY GENERAL, A.G. FILE NO. 661-04-0467, JURISDICTION OF STATE AND TRIBAL COURTS IN CHILD PROTECTION MATTERS (2004) [hereinafter RENKES OPINION].

14. 722 P.2d 219 (Alaska 1986), overruled by *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

15. *Id.* at 221-22; RENKES OPINION, *supra* note 13.

16. 722 P.2d at 221.

In the wake of the new Attorney General Opinion, the Office of Children's Services (OCS) and Bureau of Vital Statistics (BVS) ceased their cooperative practices and adopted new policies to implement the turnabout 2004 opinion.<sup>17</sup> Because the State's actions directly jeopardized the integrity of virtually all tribal court proceedings in Alaska involving tribal children, along with tribal members and others who depend upon those proceedings, a lawsuit was brought to confirm that Alaska tribes possess inherent original jurisdiction to initiate child protection and adoption proceedings in their own tribal courts. In *State v. Native Village of Tanana*,<sup>18</sup> the Alaska Supreme Court held that Alaska tribes possess inherent sovereign authority to initiate proceedings in their tribal courts to protect their tribal children, including adoption and child-in-need-of-aid (CINA) type proceedings, and they may exercise that inherent authority without first petitioning the Secretary of the Interior under § 1918 of ICWA.<sup>19</sup> In so ruling, the court expressly overruled *Nenana* and acknowledged:

[I]n 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. What remains of *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.<sup>20</sup>

With the express overruling of *Nenana*, the *Tanana* decision brings state law into conformity with federal pronouncements and removes any doubt that "Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states 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>21</sup>

Between 2004 and the 2011 *Tanana* decision, the State of Alaska disputed the existence of concurrent tribal jurisdiction over domestic relations matters impacting the welfare of tribal children.<sup>22</sup> The State's position relied upon unsettled state decisional law from the 1980s, even though those decisions had been reconsidered in the years preceding the

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17. See *State v. Native Vill. of Tanana*, 249 P.3d 734, 746–48 (Alaska 2011).

18. *Id.* at 734.

19. *Id.* at 751–52.

20. See *id.* at 751.

21. *Id.*

22. See *id.* at 746–48.

State's change of position in 2004.<sup>23</sup> This Article begins in Part I by discussing the two federal statutes that are of greatest relevance to Alaska's Indian child welfare jurisprudence and to the decision in *Tanana*. Then, in Parts II–IV the Article examines the history of confusion in Alaska surrounding questions of tribal jurisdiction over child custody matters. In Part V, the Article describes how Alaska's Attorney General changed its interpretation of the law and the effects of that change. With the historical context in place, the Article then explains the recent *Tanana* decision in Part VI and concludes by discussing remaining ambiguities in the law in Part VII.

## I. FEDERAL STATUTES

### A. The Indian Child Welfare Act

When Congress enacted ICWA in 1978, its goal was to establish federal standards that protect the interest of Indian children and ensure the stability and security of Indian tribes when Indian children are removed from their families.<sup>24</sup> It was Congress' intent that ICWA's provisions should "reflect the unique values of Indian culture."<sup>25</sup> Congress aimed to provide a framework to assist tribes with child and family service programs, not to strip tribes of their governance over child custody proceedings.<sup>26</sup>

When drafting ICWA, Congress noted that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."<sup>27</sup> Nevertheless, Congress found that non-tribal public and private agencies were breaking up Indian families by the often-unwarranted removal of their children at an alarmingly high rate.<sup>28</sup> Equally disturbing was the percentage of Indian children who were removed from their homes and placed in non-Indian foster and adoptive homes and institutions.<sup>29</sup> Congress also found that states, when exercising jurisdiction over Indian child custody proceedings, "have often failed to recognize the essential tribal relations of Indian people

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23. *Id.*

24. Indian Child Welfare Act, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902 (2006)).

25. 25 U.S.C. § 1902.

26. *See id.*

27. *See id.* § 1901(3).

28. *See id.* § 1901(4).

29. *Id.*

and the cultural and social standards prevailing in Indian communities and families.”<sup>30</sup>

Responding to these findings and to accomplish its goal, Congress established “tribal courts as the required or preferred forum for adjudication of Indian child custody proceedings.”<sup>31</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.”<sup>32</sup> Under ICWA, “child custody proceedings” include proceedings of foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement.<sup>33</sup> ICWA excludes child placements as a result of criminal behavior or divorce proceedings,<sup>34</sup> but generally it otherwise does not distinguish between voluntary and involuntary child custody proceedings.<sup>35</sup>

Establishing tribal courts as the preferred forum for Indian child custody proceedings, ICWA § 1911, titled “Indian Tribe Jurisdiction over Indian Child Custody Proceedings,” explicitly limits states’ jurisdiction over Indian child custody proceedings.<sup>36</sup> First, unless jurisdiction is otherwise vested in a state, ICWA § 1911(a) grants tribal courts exclusive jurisdiction over “any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.”<sup>37</sup> Further, ICWA § 1911(a) also provides that tribal courts “retain exclusive jurisdiction over tribal court wards regardless of residence or domicile.”<sup>38</sup> Although ICWA does not define the term “ward,” the court in *Tanana* stated:

[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

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30. *Id.* § 1901(5).

31. *See State v. Native Vill. of Tanana*, 249 P.3d 734, 738 (Alaska 2011) (quoting CONFERENCE OF W. ATT’YS GEN., AMERICAN INDIAN LAW DESKBOOK 571 (4th ed. 2008)).

32. 25 U.S.C. § 1903(12).

33. *Id.* § 1903(1).

34. *Id.*

35. *See Doe v. Mann*, 415 F.3d 1038, 1062 (9th Cir. 2005) (holding that ICWA-defined child custody proceedings “definitely encompass[] both voluntary and involuntary proceedings”). Some differences between voluntary and involuntary proceedings do exist, such as in ICWA’s notice requirements. *Id.* at 1062–63.

36. *See* 25 U.S.C. § 1911; *Tanana*, 249 P.3d at 738–39.

37. 25 U.S.C. § 1911(a).

38. *Tanana*, 249 P.3d at 739.

custody proceeding and continues to exercise that jurisdiction, a state court's exercise of jurisdiction is precluded, except, of course, on an emergency basis.<sup>39</sup>

Further limiting states' jurisdictional reach over Indian child custody proceedings, ICWA § 1911(b) requires state courts to transfer jurisdiction to tribal courts over proceedings involving foster care placement or termination of parental rights of an Indian child not domiciled or residing in Indian country.<sup>40</sup> This must occur upon the petition of either parent, the Indian custodian, or the Indian child's tribe, absent certain findings.<sup>41</sup> Likewise, ICWA § 1918, titled "Reassumption of Jurisdiction over Child Custody Proceedings," sets forth a process in which any tribe may petition the Secretary of the Interior to reassume tribal jurisdiction over child custody proceedings that may have been transferred to state court.<sup>42</sup> Validating tribal court orders and jurisdiction, ICWA § 1911(d) mandates that states "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian 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>43</sup>

These provisions regulate state-tribal relations in Alaska because ICWA expressly includes Alaska Natives within its definition of "Indians" and because Alaska Native villages are expressly recognized as "Indian tribes" within the meaning of the Act.<sup>44</sup> Almost all of the cases discussed below involve an interpretation of the key provisions of ICWA.

## B. Public Law No. 83-280

Public Law 280 (P.L. 280) was enacted in 1953, prior to ICWA. P.L. 280 transferred criminal and civil jurisdiction over Indian lands in five states from the federal government to the states and allowed for future

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39. *Id.* at 739 n.21 (quoting B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, *THE INDIAN CHILD WELFARE ACT HANDBOOK* 58 (2d ed. 2008)).

40. 25 U.S.C. § 1911(b).

41. *Id.* (transferring jurisdiction unless good cause to the contrary is shown, objection is raised by either parent, or the tribal court declines such a transfer).

42. *Id.* § 1918(a) ("Any Indian tribe which became subject to State jurisdiction . . . 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.").

43. *Id.* § 1911(d).

44. *Id.* § 1903(3), (8).

assumptions of jurisdictions by all other states.<sup>45</sup> Alaska was added to the list in 1958.<sup>46</sup> Congress passed P.L. 280 to address “the complete breakdown of law and order on many of the Indian reservations.”<sup>47</sup> The Act provided that tribal ordinances and customs not in conflict with state law be given “full force and effect” in civil causes of action.<sup>48</sup> In 1976 the Supreme Court held that, although P.L. 280 provided for substitution of state for federal judicial forums over some subjects, it did not confer state “general civil regulatory powers” over Indian lands.<sup>49</sup> As will be discussed more fully below, in 1986 the Alaska Supreme Court interpreted the grant of civil jurisdiction to the states in P.L. 280 as depriving tribal courts of concurrent jurisdiction.<sup>50</sup> In so holding, Alaska law was put on a direct collision course with federal law,<sup>51</sup> and they would remain at odds until the *Tanana* decision brought state law fully into conformity with federal law.

## II. HISTORY OF SIGNIFICANT CASES: CONFUSION IN THE MID-1980S

Throughout the mid-1980s, considerable confusion existed in Alaska surrounding the law governing state and tribal court jurisdiction over proceedings involving Alaska Native children. Federal and state courts were split, both on whether Alaska tribes were federally recognized and on whether they possessed inherent authority to adjudicate children’s proceedings.

The Alaska Supreme Court first considered the issue of tribal court jurisdiction over child custody proceedings in *In re J.M.*<sup>52</sup> There, a child

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45. Ch. 505, §§ 2, 4, 67 Stat. 588, 588–89 (1953) (codified as amended at 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006)). In extending state jurisdiction to Indian lands, P.L. 280 expressly exempted from state jurisdiction the alienation, encumbrance, or taxation of Indian trust property and the regulation of hunting, fishing, and trapping rights protected by treaty, statute, or agreement. *Id.*

46. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (amended by Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358) (codified as amended at 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006)).

47. *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235, and H.R. 3624 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 82d Cong. 16 (1952) (statement of Rep. D’Ewart, Member, H. Comm. on Interior and Insular Affairs).

48. § 4, 67 Stat. at 589 (codified at 28 U.S.C. § 1360 (2006)).

49. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 389–90 (1976).

50. *See Native Vill. of Nenana v. State, Dept. of Health & Soc. Servs.*, 722 P.2d 219, 221 (Alaska 1986), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001); *see also* discussion *infra* Part II.

51. *See Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559–62 (9th Cir. 1991).

52. 718 P.2d 150 (Alaska 1986).

protection proceeding was initiated in tribal court and was then transferred to state court based upon an oral, and subsequently written, approval by the Tribal Chief.<sup>53</sup> The Tribe later filed a motion to dismiss the state court proceeding, claiming that the Tribal Chief had acted without authority, that the Tribe had exclusive jurisdiction under § 1911(a) of ICWA,<sup>54</sup> and that its jurisdiction had not properly been relinquished to the State.<sup>55</sup> The Alaska Supreme Court agreed that the Chief's actions did not constitute a sufficiently clear waiver of tribal jurisdiction, and therefore, the court directed that the case be remanded to the tribal court.<sup>56</sup> The court noted that "[t]o imply a waiver of jurisdiction would be inconsistent with the ICWA objective of encouraging tribal control over custody decisions affecting Indian children."<sup>57</sup>

That same year, in *Native Village of Nenana v. State, Department of Health & Social Services*, the Alaska Supreme Court considered whether a state court may transfer jurisdiction over an Indian child custody proceeding involving an out-of-village child to the child's tribal court under ICWA § 1911(b).<sup>58</sup> Interpreting ICWA §§ 1911(b) and 1918(a), the court ruled against such transfers, suggesting that tribal courts in Alaska had no jurisdiction to adjudicate child custody proceedings.<sup>59</sup> In addressing this question, the Alaska Supreme Court construed ICWA and P.L. 280 and held that the latter effectively divested tribal jurisdiction and granted state courts exclusive jurisdiction in children's proceedings.<sup>60</sup> In so ruling, the court relied heavily on its reading of ICWA § 1918, which mentions P.L. 280. The court concluded that it was Congress' intent that P.L. 280 give states exclusive, rather than concurrent, jurisdiction over Indian child custody proceedings, unless and until a tribe petitioned the Secretary of the Interior to reassume exclusive jurisdiction and such petition was approved.<sup>61</sup> The court further held that an Alaska tribe could not exercise transfer jurisdiction over ICWA proceedings (securing transfer of cases from state courts

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53. *Id.* at 151.

54. *Id.* at 152. § 1911(a) states in relevant part: "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." 25 U.S.C. § 1911(a) (2006).

55. *J.M.*, 718 P.2d at 152.

56. *Id.* at 156.

57. *Id.* at 155.

58. 722 P.2d 219, 220 (Alaska 1986), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

59. *Id.* at 222.

60. *Id.* at 221.

61. *Id.*

under ICWA § 1911(b)) until it successfully petitioned the Secretary of the Interior for the right to “reassume” such jurisdiction under ICWA § 1918(a).<sup>62</sup>

In *In re K.E.*, the Alaska Supreme Court again addressed whether a tribe could exercise exclusive jurisdiction over child protection matters pursuant to § 1911(a).<sup>63</sup> The Tribe argued that *Nenana* did not govern the resolution of the case because the Tribe’s jurisdiction was being exercised pursuant to § 1911(a)’s provisions governing children domiciled *with* a tribe, rather than the state-to-tribe transfer provision of ICWA § 1911(b) at issue in *Nenana*.<sup>64</sup> The court rejected this argument, finding: (1) § 1918(a)’s reassumption provision “makes no distinction” between the two types of situations; (2) *Nenana* was the “controlling authority”; and (3) “in either case a tribe must present a petition to the Secretary” under ICWA § 1918.<sup>65</sup> The following year, in *Native Village of Stevens v. Alaska Management & Planning*, the Alaska Supreme Court went further and held that Alaska tribes were “not [to] be treated as sovereigns.”<sup>66</sup>

In the 1990s the Alaska Supreme Court was confronted with a growing body of contrary federal court rulings that prompted reconsideration of the *Nenana-K.E.* decisions. In *In re F.P.*, the court revisited its *Nenana* holding in light of the intervening Ninth Circuit decision in *Native Village of Venetie I.R.A. Council v. Alaska*.<sup>67</sup> In *Venetie*, the Ninth Circuit had held that tribal jurisdiction survived P.L. 280.<sup>68</sup> The Ninth Circuit explained that the reassumption provision in ICWA § 1918(a) was designed only to authorize a tribe to enlarge upon the inherent and concurrent jurisdiction that had survived P.L. 280, to either: (1) re-secure its pre-P.L. 280 exclusive jurisdiction or (2) avail itself of ICWA’s mandatory transfer jurisdiction.<sup>69</sup> So ruling, the Ninth Circuit had upheld the Venetie Tribe’s concurrent jurisdiction over child custody proceedings without the need to follow ICWA § 1918(a)’s petition procedures.<sup>70</sup>

In *In re F.P.*, the Alaska Supreme Court remained unconvinced that its *Nenana-K.E.* approach should be revisited. The court’s principal

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62. *Id.*

63. 744 P.2d 1173, 1173 (Alaska 1987) (per curiam), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

64. *Id.* at 1174.

65. *Id.* at 1174–75.

66. 757 P.2d 32, 34 (Alaska 1988).

67. 843 P.2d 1214, 1215–16 (Alaska 1992) (per curiam), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

68. 944 F.2d 548, 561–62 (9th Cir. 1991).

69. *Id.*; *see also supra* Part I.A and discussion *infra* Part IV.A.

70. *See Venetie*, 944 F.2d at 561–62.

reason for adhering to its prior decisions was that the court in *Stevens* had concluded that there were generally *no* federally recognized tribes in Alaska at all, making discussions about inherent jurisdiction academic.<sup>71</sup> Although the court was not yet prepared to revisit *Stevens*, Chief Justice Rabinowitz was persuaded by the Ninth Circuit's reasoning in *Venetie*.<sup>72</sup> In his dissent, he argued that *Nenana* and *K.E.* should be overruled based on the reasoning that P.L. 280 leaves tribal court jurisdiction intact, so that its extension of jurisdiction to states leaves tribes with concurrent adjudicatory jurisdiction.<sup>73</sup> Although the Chief Justice represented the minority view in *F.P.*, later developments vindicated his view.

### III. FEDERAL RECOGNITION OF ALASKA'S TRIBES

#### A. All Federal Branches Recognize Tribes in Alaska

*Nenana, K.E.*, and *Stevens* put pressure on the federal government to clarify the status of Alaska tribes. In the ensuing years the Executive Branch,<sup>74</sup> Congress,<sup>75</sup> and the federal courts<sup>76</sup> all expressly confirmed that Alaska's tribes are federally recognized sovereigns with inherent sovereign authority to adjudicate children's proceedings. This express recognition of Alaska tribes by the federal government put the State of Alaska in what it called an "untenable" position:

[T]he conflict between [the Alaska Supreme Court's] rulings in [*Nenana*] and its progeny, and the decision of the United States Court of Appeals for the Ninth Circuit in [*Venetie*] has left the

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71. 843 P.2d at 1215 ("Congress intended that most Alaska Native groups not be treated as sovereigns." (quoting *Stevens*, 757 P.2d at 34)).

72. See *id.* at 1216 (Rabinowitz, C.J., dissenting).

73. *Id.*

74. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,180-84 (Dec. 5, 2003) (listing federally recognized tribes); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,328-33 (July 12, 2002); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298, 13,299-302 (Mar. 13, 2000); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250, 9251-55 (Feb. 16, 1995); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366-69 (Oct. 21, 1993).

75. See Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a-1 (2006); see also *supra* note 2.

76. See, e.g., *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (holding Alaska Native Villages that are modern-day successors to sovereign historical bands of natives may grant adoptions of children).

*State in an untenable position.* On the one hand, it must abide by the law of this state as determined by this court; on the other, its failure to follow the Ninth Circuit's interpretation as it relates to any villages other than those involved in [*Venetie*] has resulted in repeated suits filed by tribes in federal court, challenging the State's inability to recognize tribal court orders. *These suits have tied up the lives of the affected persons, particularly delaying permanent placements for children, and have diverted state resources from necessary state services.* The State wants to cooperate more closely with tribes, avoiding duplicative programs and stretching our combined resources further than either could manage separately, particularly in the under-served regions of Alaska.<sup>77</sup>

The result was a dramatic shift in state court jurisprudence.

## **B. The Alaska Supreme Court Decision in *John v. Baker***

*John v. Baker* involved a custody dispute between two parents.<sup>78</sup> In its landmark decision in this case, the Alaska Supreme Court addressed whether tribal courts possess jurisdiction over non-ICWA child custody cases arising outside of Indian country.<sup>79</sup> Since the case did not involve ICWA, it was not controlled by the express "Alaska" provisions contained in ICWA's definitional sections. The case therefore squarely presented the question of whether inherent tribal sovereignty existed in Alaska at all, together with the question of whether Alaska tribes possess original jurisdiction to adjudicate child custody disputes in their own courts.<sup>80</sup> This time, the court was persuaded to follow federal law, accepting that Alaska tribes were federally recognized sovereign entities (thereby reversing *Stevens*) and embracing the core premise "that tribal sovereignty, with respect to issues of tribal self-governance, exists unless divested."<sup>81</sup> In its ensuing analysis, the court explained:

Congress has recognized that a tribe has a strong interest in "preserving and protecting the Indian family as the wellspring of its own future." Because [the] Village's status as a federally recognized tribe is undisputed and its adjudication of child custody disputes over member children is necessary "to protect

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77. Amicus Brief of the State of Alaska at 1, *John v. Baker*, 982 P.2d 738 (Alaska 1999) (No. S-8099), 1998 WL 35180190, at \*1 (emphasis added) (citations omitted).

78. 982 P.2d 738, 743 (Alaska 1999).

79. *Id.*

80. *Id.*

81. *Id.* at 752.

tribal self-government or to control internal relations," *its tribal courts require no express congressional delegation of the right to determine custody of tribal children.*<sup>82</sup>

The court then evaluated federal statutes affecting Alaska Natives, including both ICWA and P.L. 280, to determine whether Congress explicitly revoked the inherent sovereignty that Alaska Native tribes possess.<sup>83</sup> With respect to ICWA, the court observed that:

ICWA's goal was to increase tribal control over custody decisions involving tribal children. Congress viewed this increased control as vital to the continued sovereignty of the tribes. In the legislative history to ICWA, Congress cited with approval a decision stating that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children." Alaska Native villages are explicitly included within ICWA's scope.

ICWA's very structure presumes both that the tribes covered by the Act are capable of adjudicating child custody matters in their own courts and that tribal justice systems are appropriate forums for resolution of child custody disputes. Indeed, legislative history reveals that ICWA's jurisdictional framework was motivated by concerns over the "failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families . . ."<sup>84</sup>

Although the custody dispute in question in *John* fell outside of ICWA's scope, the court found significant that "Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes."<sup>85</sup>

With respect to P.L. 280, the court noted that this enactment only has relevance in "Indian country."<sup>86</sup> The court then reasoned that since there is little "Indian country" in Alaska after *Alaska v. Native Village of Venetie Tribal Government*,<sup>87</sup> P.L. 280 "has limited application in Alaska."<sup>88</sup> That is, if a village does not occupy "Indian country . . . P.L. 280 has no direct relevance" to its jurisdiction.<sup>89</sup> Although this statement

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82. *Id.* (emphasis added) (citations omitted).

83. *Id.* at 753.

84. *Id.* at 753–54 (citations omitted).

85. *Id.* at 754.

86. *Id.*

87. 522 U.S. 520 (1998) (holding that lands conveyed to Alaska Natives under ANCSA do not constitute Indian country).

88. *John*, 982 P.2d at 747.

89. *Id.* at 748.

appeared to overrule much of the court's earlier reasoning in *Nenana*, the court's failure to say so left *Nenana's* continuing vitality unknown.

The Alaska Supreme Court next assessed whether Alaska tribes retain non-territorial sovereignty that includes original jurisdiction over child custody disputes, given the absence of "Indian country" and the intervening ANSCA.<sup>90</sup> Carefully reviewing United States Supreme Court precedent, the court concluded that "the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land*."<sup>91</sup> The court reasoned that membership-based jurisdiction exists irrespective of a tribal territory (or "Indian country") and includes the power to adjudicate internal child custody disputes.<sup>92</sup>

After holding that tribal sovereign status, alone, includes the power to adjudicate matters involving the welfare of tribal children, the court affirmed tribal court jurisdiction and concluded that Alaska's state courts, correspondingly, retain concurrent (but not exclusive) jurisdiction over such matters.<sup>93</sup>

### C. The State's Response and Continued Confusion

In the year following the Alaska Supreme Court's holding in *John*, then-Governor Knowles issued Administrative Order 186.<sup>94</sup> Governor Knowles acknowledged the legal and political existence of Alaska's federally-recognized tribes, and he directed Alaska's Executive Branch to work thereafter on a government-to-government basis with Alaska's tribes as sovereigns.<sup>95</sup> In doing so, Governor Knowles "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>96</sup> The order further "committed the State

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90. *Id.* at 754.

91. *Id.* (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

92. *Id.* at 754. The court noted that federal case law supports the court's conclusion 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." *Id.*

93. *Id.* at 759-60.

94. Administrative Order No. 186, Sept. 29, 2000, <http://gov.state.ak.us/admin-orders/186.html>; see generally CASE & VOLUCK, *supra* note 5, at 430-31 & n.409 (describing Governor Knowles's actions and noting change from former policy).

95. Administrative Order No. 186, *supra* note 94.

96. *State v. Native Vill. of Tanana*, 249 P.3d 734, 744 (Alaska 2011) (alterations in original) (quoting Administrative Order No. 186, *supra* note 94).

'to working with [t]ribes to further strengthen Alaska's ability to meet the needs of Alaska's communities and families.'"<sup>97</sup>

Despite these developments, some confusion over Alaska's ability to coordinate with tribes continued to exist. Such confusion persisted primarily due to the fact that the Alaska Supreme Court in *John* never directly overruled *Nenana*: *Nenana* was an ICWA case, whereas the specific issue in *John* was whether the Tribe possessed inherent original jurisdiction to adjudicate inter-parental custody disputes and thus was not a "child custody proceeding."<sup>98</sup> Further, while P.L. 280 was central in *Nenana*, it was deemed irrelevant in *John*.<sup>99</sup>

#### IV. ALASKA SUPREME COURT OVERRULES *NENANA* IN *IN RE C.R.H.*

Two years later, in *In re C.R.H.*, the Alaska Supreme Court was squarely faced with its prior ICWA holdings.<sup>100</sup> There, the State opposed a motion made under ICWA § 1911(b) to transfer a child custody proceeding from state court to tribal court.<sup>101</sup> The State explained that its opposition to the transfer stemmed from the fact that, despite the State's own earlier request in *John* that the court overrule *Nenana* and similar cases, the court had not yet done so.<sup>102</sup> Therefore, the State argued, it was "constrained, as is this court, to follow [those cases] until the Alaska Supreme Court overrules these decisions."<sup>103</sup> The State then filed a brief urging the Alaska Supreme Court to confirm that Alaska tribes *could* hear cases transferred from state court to tribal court without the tribes first petitioning the Secretary to "reassume" such jurisdiction under ICWA § 1918.<sup>104</sup> The Alaska Supreme Court agreed.

##### A. The Alaska Supreme Court's Holding in *In re C.R.H.*

First, the court in *In re C.R.H.* explicitly overruled the actual holding of *Nenana* and its progeny and upheld the right of Alaska tribes to secure transfer jurisdiction under ICWA § 1911(b), irrespective of any

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97. *Id.* (alterations in original) (quoting Administrative Order No. 186, *supra* note 94).

98. *John*, 982 P.2d at 746.

99. *Id.* at 747.

100. 29 P.3d 849 (Alaska 2001).

101. *Id.*

102. *Id.* at 851.

103. *Id.*

104. Appellee State of Alaska's Brief at 8-32, *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (No. S-9677).

reassumption of jurisdiction under ICWA § 1918.<sup>105</sup> Second, the court in *C.R.H.* rejected *Nenana's* analytic linkage between P.L. 280 and a tribe's membership-based (and non-Indian country) concurrent jurisdiction over child custody cases.<sup>106</sup> Instead, the court held that ICWA § 1911(b) transfer jurisdiction, by its own terms, authorizes transfer of jurisdiction to tribal courts *regardless* of P.L. 280:

[ICWA's] language makes clear [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). Subsection 1911(a) grants tribes exclusive jurisdiction over cases involving children who reside on reservations "except where such jurisdiction is otherwise vested in the State by existing Federal law" such as P.L. 280. With this qualifying language, Congress recognized P.L. 280 as a limitation on exclusive tribal jurisdiction. By contrast, in subsection 1911(b), Congress did not articulate a P.L. 280 exception to tribal transfer jurisdiction. Rather, it provided that "in any State court proceeding . . . the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe." Subsection 1911(b) therefore authorizes transfer to tribal courts regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction.<sup>107</sup>

From this perspective, the court affirmed that the burden of establishing good cause to deny transfer jurisdiction rests on the party opposing the transfer, observing that:

The good cause exception—like the comity analysis discussed in *John v. Baker*—“is not an invitation for our courts to deny recognition to tribal [courts] based on paternalistic notions of proper procedure. . . . [S]uperior courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to recognize the practical limits experienced by smaller court systems.”<sup>108</sup>

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105. *C.R.H.*, 29 P.3d at 850 (“We overrule *Nenana* and subsequent decisions affirming its holding to the extent that those cases are inconsistent with today’s decision.”).

106. *Id.* at 852 (“The language and structure of section 1911 reflect congressional intent that all tribes, regardless of their P.L. 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts.”).

107. *Id.* at 852–53 (citations omitted).

108. *Id.* at 854 (alterations in original) (quoting *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999)).

In sum, *John* and *C.R.H.* upheld several fundamental propositions that directly overruled *Nenana* and its progeny: (1) Alaska tribes are inherent sovereigns possessed with original jurisdiction over their members;<sup>109</sup> (2) tribal status gives rise to membership-based jurisdiction that does not require tribal territory;<sup>110</sup> (3) the original jurisdiction of tribes over their members includes the power to adjudicate matters relating to their members;<sup>111</sup> (4) tribal authority over members continues unless explicitly extinguished by Congress (and such extinguishment did not occur in ANCSA or in ICWA);<sup>112</sup> (5) P.L. 280 extends only to “Indian country” within the state;<sup>113</sup> and (6) outside Indian country, which is to say in most of Alaska, state courts have concurrent, but not exclusive, jurisdiction with tribes over children’s proceedings involving tribal children.<sup>114</sup>

## B. The Effect of *In re C.R.H.*

Responding to these rapid developments in Alaska Supreme Court jurisprudence, Alaska’s Department of Health and Social Services (DHSS) requested an opinion from then-Attorney General Bruce Botelho regarding the effect of *C.R.H.*<sup>115</sup> Responding to this request, the Alaska Department of Law issued a memorandum explaining that *C.R.H.* had overruled *Nenana* and its progeny.<sup>116</sup> The Department of Law added: “Thus, state law now recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority.”<sup>117</sup> The memorandum explained that “the State was required to ‘recognize tribal court adoption orders to the

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109. *John*, 982 P.2d at 750–52; *C.R.H.*, 29 P.3d at 851 n.5.

110. *John*, 982 P.2d at 754–59 (holding Alaska Tribes retain fundamental, sovereign power to adjudicate “internal family law affairs” like “child custody”).

111. *Id.*

112. *Id.* at 753.

113. *Id.* at 747; *C.R.H.*, 29 P.3d at 851, 852 & n.9.

114. *John*, 982 P.2d at 759–61, 765. In terms of retained original tribal sovereignty, there is no meaningful distinction between custody contests as between parents, and jurisdiction over “child custody proceedings” such as those covered by ICWA; both categories of cases involve the welfare of member children and fall within tribal subject matter jurisdiction. In both situations, tribal jurisdiction is necessary “to protect tribal self-government or to control internal relations.” *Id.* at 752.

115. Memorandum from Assistant Att’y Gen. Donna Goldsmith for Jay Livey, Dep’t of Health & Soc. Servs. Comm’r 1 (Mar. 29, 2002) (No. 441-00-0005) [hereinafter Goldsmith Memorandum], *revoked by* RENKES OPINION, *supra* note 13.

116. *Id.* at 5.

117. *Id.* at 1–2.

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>118</sup>

Simultaneously, the State settled a lawsuit brought against it by the Sitka Tribe and two parents who had adopted a child in that tribe's court.<sup>119</sup> In the settlement's Conclusions of Law, the State stipulated in paragraph two that the Sitka Tribe "has jurisdiction over custody cases arising under the Indian Child Welfare Act despite the facts that the Tribe has not petitioned for reassumption of jurisdiction over Indian child custody proceedings under ICWA § 1918 and did not acquire the case by transfer from state court."<sup>120</sup> The State also acknowledged that "§ 1918 does not affect the obligation of the state to give full faith and credit to the judicial proceedings of an Indian tribe applicable to Indian child custody proceedings covered by the Indian Child Welfare Act."<sup>121</sup> Consistent with these developments, the DHSS Office of Children's Services (OCS) adopted a policy for sharing non-emergency reports of harm with a tribe when the tribe had an ongoing child protection case.<sup>122</sup>

## V. THE RENKES OPINION AND ITS ABRUPT SHIFT IN POLICY

In fall of 2004, DHSS policy and protocol abruptly changed. On October 1, 2004, the new Attorney General, Gregg Renkes, issued an opinion (Renkes Opinion) expressly revoking the 2002 Department of Law Memorandum.<sup>123</sup> Relying on *Nenana*, the Renkes Opinion concluded that, notwithstanding *C.R.H.*, Alaska state courts continue to exercise *exclusive* jurisdiction over child custody proceedings involving Alaska Native children and that Alaska Native tribes do not possess *any* jurisdiction to hear children's cases unless (1) the child's tribe has successfully petitioned the Secretary of the Interior to reassume jurisdiction under ICWA § 1918, or (2) an Alaska Superior Court judge has transferred jurisdiction over a child's case to a tribal court in accordance with ICWA § 1911(b).<sup>124</sup> Absent these circumstances, the

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118. *State v. Native Vill. of Tanana*, 249 P.3d 734, 746 (Alaska 2011) (alterations in original) (quoting Goldsmith Memorandum, *supra* note 115, at 5).

119. *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).

120. *Id.* at 5.

121. *Id.*

122. *Cf. Tanana*, 249 P.3d at 747 (describing the changes to previous OCS protocols).

123. See RENKES OPINION, *supra* note 13, at 2 n.3.

124. *Id.* The Renkes Opinion simply ignored the State's own contrary representations in its *John v. Baker* amicus brief and in the *Sitka Tribe* settlement,

Renkes Opinion concluded that tribal court decrees are not entitled to full faith and credit under ICWA: “full faith and credit is not due to tribal court adoption decrees because Alaska tribal courts have no subject matter jurisdiction over Indian child adoptions.”<sup>125</sup>

Continuing the about-face in state policy, the Renkes Opinion directed state social workers to stop sharing confidential information with tribes in children’s cases and to investigate all reports of harm the State received pertaining to Alaska Native children, irrespective of a tribe’s claim of exclusive jurisdiction under an established tribal court wardship order.<sup>126</sup> The Renkes Opinion cautioned that only two Alaska tribes (the Native Villages of Barrow and Chevak) were currently approved to exercise ICWA jurisdiction over child custody proceedings because they had submitted to the ICWA § 1918 reassumption petition process.<sup>127</sup> OCS was expressly instructed to obey the guidance provided in the Renkes Opinion and to draft regulations consistent with that opinion.<sup>128</sup>

Complying with these instructions, OCS deleted section 2.1.3 B of the OCS Policy and Procedure Manual, which governed the protocol for handling non-emergency reports of harm when a tribe has an ongoing child protection case. In contrast to the 2002 edition of the OCS Manual, which stated 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.”<sup>129</sup> Further, OCS altered the manner in which information was shared between the State and tribes. Prior to the Renkes Opinion, “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

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and it only hinted at the position the State took in the *C.R.H.* appeal. *Id.* at 6 (“Although urged to do so *by the parties*, the court in *C.R.H.* did *not* hold that tribes in Alaska retain concurrent jurisdiction with the state in child protection matters involving Indian children.” (first emphasis added)). Its single peripheral reference to *John v. Baker* failed to mention that case’s central holding about tribal inherent jurisdiction over tribal children. *Id.* at 28 n.75.

125. *Id.* at 30.

126. *Id.* at 5.

127. *Id.* at 11 n.23.

128. *Id.* at 31.

129. *State v. Native Vill. of Tanana*, 249 P.3d 734, 746–47 (Alaska 2011) (first alteration in original) (quoting the OCS Policy and Procedure Manual). When revising its manual, OCS cited the Renkes Opinion as authority. *Id.* at 746.

proceeding.”<sup>130</sup> After the Renkes Opinion, OCS only released information to a tribe if the tribe was considered to be properly exercising its jurisdiction and if state court proceedings had yet to be initiated.<sup>131</sup> The changes that took place were described by one OCS supervisor this way:

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.<sup>132</sup>

In addition to OCS, BVS also changed its policies and procedures to conform to the Renkes Opinion. For example:

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 it began processing only cultural adoptions for the remaining tribes.<sup>133</sup>

In the wake of the State’s abrupt reversal of policy, tribes and their individual members across Alaska suffered immediate impacts.<sup>134</sup> First, the changes created a cloud of uncertainty over numerous tribal court placements of children.<sup>135</sup> Second, the Renkes Opinion increased jurisdictional conflict among tribal and state authorities. This uncertainty was felt by all Indian children in child custody proceedings and their adoptive parents.<sup>136</sup> Typical was the case of one member child of the Kenaitze Tribe, as discussed by the Court in *Tanana*:

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.

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130. *Id.* at 747 (quoting the OCS Policy and Procedure Manual).

131. *Id.*

132. *Id.* (alterations in original).

133. *Id.*

134. *See id.* at 749.

135. *See id.*

136. *Id.*

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.<sup>137</sup>

Similarly, when tribal court workers requested birth certificates from BVS, they were told that the State no longer recognized tribal court jurisdiction, and therefore birth certificates would not be issued unless done pursuant to the procedures developed for cultural adoptions.<sup>138</sup> Furthermore, when tribal court administrators requested information from OCS personnel concerning certain children, the requests were denied on the basis that the State no longer recognizes tribal court authority in Alaska.<sup>139</sup>

## VI. KALTAG AND TANANA LITIGATION

### A. Federal and State Suits Challenging the Renkes Opinion and Its Policies

Shortly after the Renkes Opinion and its policy changes went into effect, a suit was brought in state court on behalf of the Native Village of Tanana, Nulato Village, the Village of Kalskag, the Akiak Native Community, the Village of Lower Kalskag, and the Kenaitze Indian Tribe.<sup>140</sup> Each of the Tribes have active tribal courts that exercise original jurisdiction over member children on the basis of their inherent sovereign authority, and none had petitioned the Secretary of the Interior to reassume exclusive jurisdiction pursuant to ICWA § 1918.<sup>141</sup> In addition to the Tribes, a suit was also brought on behalf of Dan and Theresa Schwietert (the Schwieterts), a non-Native couple who adopted

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137. *Id.* at 749 n.118 (referencing the Tribes' argument that there is a real case and controversy ripe for adjudication based on the facts that in response to the Renkes Opinion, OCS changed its policy, and the record reflects the application of the new policy).

138. *Id.*

139. *See id.* at 748 ("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 the term is defined in ICWA, are entitled to full faith and credit.").

140. *Id.* at 736.

141. *Id.* at 736, 739 n.24.

a special-needs Alaska Native child through the Tanana Tribal Court in June 2004 and who received a birth certificate from the State.<sup>142</sup>

The Tribes and the Schwieterts sought a declaratory judgment that Alaska tribes possess inherent sovereign authority over the domestic relations of their tribal members and therefore possess adjudicatory jurisdiction, concurrent with the State, over children's proceedings without first petitioning the Secretary of the Interior under ICWA § 1918.<sup>143</sup> In 2005, Superior Court Judge Suddock denied the State's motion to dismiss on ripeness grounds, stating:

[T]he 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 that there is a ripe question for declaratory judgment.<sup>144</sup>

On August 26, 2008, Superior Court Judge Tan issued a declaratory judgment in favor of the Tribes and the Schwieterts, after which the State of Alaska appealed to the Alaska Supreme Court.<sup>145</sup>

While the *Tanana* state court case was proceeding, the Kaltag Tribal Council and Hudson and Salina Sam (the Sams) filed suit in federal district court challenging the State of Alaska's refusal to recognize the Sams' adoption decree from the Kaltag Tribal Court.<sup>146</sup> Kaltag and the Sams sought a judgment that the State was required to give full faith

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142. *Id.* at 736 n.6.

143. *Id.* at 736.

144. *Id.* at 737 (alterations in original) (quoting Superior Court Judge John Suddock denying the State's dismissal motion from the bench in March 2005).

145. *Id.*

146. *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-00211-TMB, at 1 (D. Alaska filed Feb. 22, 2008) ("As of October 25, 2005, the Bureau [of Vital Statistics] will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla. All other tribal entities will need to submit the Cultural Adoption packet in order for the Bureau to process the adoption." (quoting letter to Kaltag Tribal Council from the Bureau of Vital Statistics refusing to recognize the Sams' adoption decree made by the Tribe's court)), *aff'd*, 344 Fed. App'x 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010).

and credit to the Kaltag Tribal Court's adoption decree pursuant to ICWA's full faith and credit clause.<sup>147</sup> Like the Ninth Circuit some twenty years earlier in *Native Village of Venetie I.R.A. Council v. Alaska*,<sup>148</sup> the federal district court agreed.<sup>149</sup> On appeal, the Ninth Circuit affirmed that Indian country or reservation status is not a requirement for a tribe to exercise member-based jurisdiction because a "Tribe's authority over its reservation or Indian country is incidental to its authority over its members."<sup>150</sup> The State of Alaska's petition for certiorari was denied by the United States Supreme Court on October 4, 2010.<sup>151</sup>

### **B. The Alaska Supreme Court's Holding in *State v. Native Village of Tanana***

On March 4, 2011, the Alaska Supreme Court issued its decision in the *Tanana* case. In a carefully written opinion, the court addressed two issues: (1) whether the inherent sovereign jurisdiction of Alaska Native tribes recognized in *John v. Baker* includes the initiation of "child custody proceedings" as the term is used in ICWA; and (2) if so, whether those proceedings are entitled to full faith and credit by the State.<sup>152</sup>

The Alaska Supreme Court began its analysis by reviewing ICWA, Alaska and federal case law 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.<sup>153</sup> After reviewing *John v. Baker's* tribal jurisdiction analysis, the court reiterated four main points to "set the stage for . . . consideration of the State's arguments."<sup>154</sup> First, the court acknowledged that, absent an explicit divestment by Congress, all federally recognized tribes retain sovereignty and inherent authority "to regulate internal domestic relations among [their] members."<sup>155</sup> Second, although ANSCA eliminated nearly all Indian country in Alaska, it "did not divest federally-recognized sovereign Alaska Native tribes of their authority to

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147. *Id.* at 5.

148. 944 F.2d 548 (9th Cir. 1991).

149. *Kaltag*, No. 3:06-cv-00211-TMB, at 12 ("The Kaltag court's adoption orders are entitled to full faith and credit, and the Bureau [of Vital Statistics] shall grant said status to the adoption order by issuing the Sams a substitute birth certificate.").

150. *Kaltag Tribal Council v. Jackson*, 344 F. App'x 324, 325 (9th Cir. 2009) (quoting *Venetie*, 944 F.2d at 559 n.12), *cert. denied*, 131 S. Ct. 66 (2010).

151. *Hogan v. Kaltag Tribal Council*, 131 S. Ct. 66 (2010).

152. *State v. Native Vill. of Tanana*, 249 P.3d 734, 735 (Alaska 2011).

153. *Id.* at 738.

154. *Id.* at 750.

155. *Id.* (citing *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999)).

regulate internal domestic relations among their members.”<sup>156</sup> Third, ambiguities in statutes that affect the rights of Native Americans must be construed in favor of Native Americans and the court “will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.”<sup>157</sup> Fourth, Congress enacted ICWA with the 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>158</sup>

After reiterating these four fundamental principles, the court addressed the State’s argument that ICWA § 1911 constitutes a “complete jurisdictional scheme” reflecting “Congress[s] reasonable balancing of tribal rights, parental rights off-reservation, and state rights off-reservation.”<sup>159</sup> From the State’s perspective, the 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.<sup>160</sup>

Rejecting the State’s claims, the court agreed with the Tribes that “ICWA creates limitations on states’ jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes’ jurisdiction over those proceedings.”<sup>161</sup> The court then expressly overruled what remained of its earlier holding in *Nenana*.<sup>162</sup> In so doing the court acknowledged:

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. What remains of *Nenana* must now be overruled.<sup>163</sup>

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156. *Id.* (citing *John*, 982 P.2d at 753).

157. *Id.* (quoting *John*, 982 P.2d at 753–54).

158. *Id.* (alterations in original) (quoting *John*, 982 P.2d at 753–54).

159. *Id.* (alteration in original).

160. *Id.* at 750–51 (alteration in original) (internal quotation marks omitted).

161. *Id.* at 751.

162. *Id.*

163. *Id.*

The court then adopted the position that P.L. 280 did not divest Alaska Native tribes of their jurisdiction under ICWA § 1911(a) but instead created concurrent jurisdiction with the state.<sup>164</sup> Further, the court held that “federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under [ICWA] § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country.”<sup>165</sup> Upon this foundation, the Alaska Supreme Court recognized the inherent sovereignty of Alaska Native tribes, entitled to all rights and privileges granted in ICWA, including procedural due process safeguards imposed on states.<sup>166</sup> Accordingly, the court held that ICWA’s full faith and credit clause mandates that the State recognize all Alaska Native tribal court orders in ICWA-defined child custody proceedings in the same manner that the State gives full faith and credit to orders of other state courts and foreign courts.<sup>167</sup>

The *Tanana* decision brings a welcome level of clarity to an area that had been hotly contested for over two decades. But, the court was careful to limit its decision to the facts before it, and it declined to address additional issues concerning tribal jurisdiction over nonmembers.<sup>168</sup>

## VII. REMAINING AMBIGUITIES IN THE LAW

In its briefing, the State requested that the court delineate limitations on an Alaska Native tribe’s inherent jurisdiction over child custody proceedings when the proceeding touches upon the rights of parents who are either non-Native or who are Native but members of another tribe. The court declined the invitation but noted that the nature and extent of tribal jurisdiction in any particular case will be based upon the following factors: “(1) the extent of the federal recognition of a particular tribe as sovereign; (2) the extent of the tribe’s authority under its organic laws; (3) the tribe’s delegation of authority to its tribal court;

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164. *Id.*

165. *Id.*

166. *Id.* (citing 25 U.S.C. § 1912(a) (2006) (requiring notice to Indian tribes); *id.* § 1911(b) (providing Indian tribes with right to petition for transfer to tribal court); *id.* § 1911(c) (providing Indian tribes with right to intervene); JONES, TILDEN & GAINES-STONER, *supra* note 39, at 83–111).

167. *Id.* at 751 & n.129 (citing *John v. Baker*, 982 P.2d 738, 761–62 (Alaska 1999) (“ICWA requires courts to extend full faith and credit to tribal court decisions involving ‘child custody proceedings’ as that term is defined by [ICWA].”)).

168. *Id.* at 749.

and (4) the proper exercise of subject matter and personal jurisdiction.”<sup>169</sup> Noting that it did not have sufficient facts before it to make such determinations, the court left those questions to be addressed another day in the context of specific factual scenarios.<sup>170</sup>

The court specifically stated:

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.<sup>171</sup>

Without a factual context, it is impossible to predict the outcome of the three remaining issues left undecided in *Tanana*. For future litigants, however, a potential answer to each question is best discerned by reference to ICWA.

With respect to the parental objections to tribal court jurisdiction, that notion springs from ICWA’s provision permitting a parental veto over ICWA’s mandatory state court-to-tribal court transfer provision.<sup>172</sup> In ICWA Congress set out to enhance and strengthen tribal interests, not to curtail them.<sup>173</sup> As a result, there is no statutory foundation for construing ICWA’s limitation on court-to-court transfers as a limitation on the exercise of inherent tribal jurisdiction. Inherent tribal jurisdiction is not rooted in ICWA. Not surprisingly, in thirty years no court has ever relied on subsection 1911(b)’s court-to-court parental veto provision to create a new limitation on the inherent authority of tribal courts to protect tribal children when initiating child protection cases.

As for jurisdictional questions, nothing in ICWA impacts the right of any parent (or any other litigant, for that matter) to raise personal or other jurisdictional objections before a tribal court. To the extent a tribal court acts in derogation of a parent’s due process rights, the resulting decree will not be entitled to full faith and credit or comity recognition.<sup>174</sup>

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169. *Id.* at 751–52.

170. *Id.*

171. *Id.* at 752.

172. See 25 U.S.C. § 1911(b) (2006).

173. See *supra* text accompanying notes 84–85.

174. See *Starr v. George*, 175 P.3d 50, 55 (Alaska 2008) (“Full faith and credit also requires that the issuing court afford the parties due process and render its judgment in accordance with federal and state constitutional standards.”); *Evans v. Native Vill. of Selawik IRA Council*, 65 P.3d 58, 60 (Alaska 2003); *John v.*

The issue of personal jurisdiction over a non-member parent is best discerned from ICWA's jurisdictional scheme, which appropriately focuses on the status of the child at the heart of any court proceeding and not the identities of other parties (or potential parties).<sup>175</sup> Similarly, state law provides an exception to personal jurisdiction of an absent or non-consenting parent based on the "status exception" of a child in a custody proceeding.<sup>176</sup> When a child is a tribal member, typically one or both parents will be members too.<sup>177</sup> Neither tribal jurisdiction under ICWA §§ 1911(a) and (b), nor ICWA § 1911(d)'s requirement to extend full faith and credit to tribal proceedings, is subject to an exception based on the membership status of a party other than the child.

Finally, ICWA's jurisdictional scheme does not distinguish between those tribal children who have significant contacts with their member tribe and those who do not. By its terms, ICWA applies to any Indian child who is a "member of an Indian tribe or is eligible for membership in an Indian tribe," notwithstanding a tribe's contacts with the child.<sup>178</sup> Nonetheless, "minimum contacts" is a constitutional prerequisite for the assertion of personal jurisdiction in state and federal fora.<sup>179</sup> Personal jurisdiction questions are therefore likely to form a fertile basis for challenging tribal court jurisdiction where member children or their parents have limited or no contact with the tribe.

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Baker, 982 P.2d 738, 763 (Alaska 1999) (noting the "requirement that a tribal court possess personal jurisdiction over litigants appearing before it").

175. See *Kaltag Tribal Council v. Jackson*, Case No. 3:06-cv-00211 TMB, at 10 (D. Alaska filed Feb. 22, 2008), *aff'd*, 344 Fed. App'x 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010) (explaining that in determining a tribal court's jurisdiction, "it is the membership of the child that is controlling, not the membership of the individual parents"); see also *John*, 982 P.2d at 759 ("A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child.").

176. *S.B. v. State, Dep't of Health & Social Servs.*, 61 P.3d 6, 14 (Alaska 2002) (citing *Balestrieri v. Maliska*, 622 So. 2d 561, 562-64 (Fla. Dist. Ct. App. 1993)) (concluding that personal jurisdiction is not required to make an out-of-state parent a party to a state court custody case).

177. See 25 U.S.C. § 1903(4) (2006) (defining "Indian Child" as "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").

178. See *id.*

179. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (finding that the Due Process clause of the Fourteenth Amendment requires minimum contacts with the forum state).

## CONCLUSION

The Alaska Supreme Court has affirmed the inherent jurisdiction of tribes in Alaska, concurrent with the State, to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Resolving thirty years of contentious litigation, the existence and inherent sovereignty of federally recognized Alaska Native tribes is now a matter of settled law. With the law clarified by the *Tanana* decision, the State of Alaska and Alaska Native tribes can again work cooperatively in recognition of their shared jurisdiction over proceedings involving tribal children.