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.[66] 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.[67] 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.[68]

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."[69] "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."[70] In addition to tribal sovereignty over

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[66] 25 U.S.C. 1301 and following sections.

[67] 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.

[68] *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).

[69] *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added).

[70] *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,[71] paternity,[72] and child support.[73]

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.[74] 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*[75] 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.[76] 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.[77] 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.[78] Alaskan tribes also have inherent authority to decide domestic relations cases involving their members.[79]

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[71] *See, e.g., John v. Baker*, 982 P.2d at 748.

[72] *See, e.g. U.S. v. Keys*, 103 F.3d 758, 760 (9th 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.)

[73] *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).

[74] *See generally, State v. Native Vill. Of Tanana*, 249 P.3d 734 (Alaska 2011).

[75] *John v. Baker*, 982 P.2d 738 (Alaska 1999).

[76] *Id.* at 754.

[77] 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).

[78] Powers of Indian Tribes, 55 Interior Decisions 14 (October 25, 1934).

[79] *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 (9th Cir. 1991).

The Indian Child Welfare Act requires the State to give full faith and credit to tribally-issued adoptions.[80]

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.[81] 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.[82]

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.[83] 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.[84] 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.[85] 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.[86]

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,[87] a BIA probate judge recognizes heirs by adoption when an adoption has been established through a state court order or a tribal court order.[88]

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[80] 25 U.S.C. § 1911(d);.

[81] Ernest S. Burch, Jr., *Eskimo Kinsmen* (1975), pp. 129, 52.

[82] Burch, p. 166.

[83] *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).

[84] 15 Alaska Administrative Code sec. 125.845.

[85] See 7 Alaska Administrative Code sec. 05.700.

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

[87] 25 U.S.C. § 372a.

[88] *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*,[89] 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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[89] 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.[90] The Violence Against Women Act of 1994 was enacted by Congress to combat all forms of violence against women.[91]

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

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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[90] Alaska Network Domestic Violence and Sexual Assault Advocate Curriculum, 2004.
[91] The Violence Against Women Act of 1994, Pub. L.No. 133-322, 108 Stat. 1902.
[92] Some examples are the Native Villages of Barrow, Chinik and Tetlin, and the Sitka Tribe of Alaska.
[93] 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,[94] 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*,[95] 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."[96] 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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[94] *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.

[95] *John v. Baker*, 982 P 2d. at 759.

[96] 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 (9th 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.[97]

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."[98] 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.[99]

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[97] *Id.*

[98] 18 U.S.C. § 2265(e).

[99] 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 LBGT victims, and that recognizes tribal criminal jurisdiction over non-Native domestic violence offenders in Indian Country.[100] 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.[101] 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

[100] S. 1925, VAWA Reauthorization Act of 2011.
[101] H.R. 4970, VAWA Reauthorization Act of 2012

members for tribal offenses"[102] 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."[103]

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.[104] Although the tribe might, under some circumstances, have jurisdiction over nonmember juveniles,[105] 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).[106] 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.[107] Strong support comes from the Indian Child Welfare Act (ICWA).[108] Even though the definition of "child custody proceedings" under the Act does "not include a

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[102] *United States v. Wheeler*, 435 U.S. 313, 326 (1978)
[103] 25 U.S.C. 1901(3).
[104] *John v. Baker*, 982 P.2d at 748-49.
[105] 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.
[106] 18 U.S.C. 5031 and following.
[107] 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).
[108] 25 U.S.C. 1901 and following.

placement based upon an act which, if committed by an adult, would be deemed a crime,"[109] 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.[110]

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.[111] 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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[109] 25 U.S.C. 1903(1).

[110] *See* Polashuk, *infra* n.108.

[111] *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.[112] 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.[113] 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.[114]

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.[115] All of the juveniles charged with underage drinking successfully completed the terms of their sentences.

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[112] Harvard Kennedy School, ASH Center for Democratic Governance and Innovation, *Kake Circle Peacemaking*, www.innovations.harvard.edu/awards.html?id=6164, (accessed Sept. 15, 2012).
[113] *Id.*
[114] *Id.*
[115] *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.[116] 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."[117]

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.[118] 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."[119] 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.[120]

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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[116] *Id.*

[117] 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, (accessed Sept. 15, 2012).

[118] 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.

[119] *Id.*

[120] Magistrate Christopher McLain, *Circle Sentencing and Community Outreach Efforts* (2012).

Recognition of Tribal Court Orders

Domestic Violence Violence Against Women Act (VAWA)	
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 *should* be given where victim has filed the petition.
Victim is a member Offender is a non-member	Untested in Alaska. Full faith and credit *may* 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.
Community Protection Order (Banishment) *Perryville*: 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 *before* the order was issued, the order was clearly limited to one village, and it had a set expiration date.	

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 *should* be given based on tribal status of child. The AK Supreme Court is considering this now in *Simmonds v. Parks*, 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.

Child Custody (between parents), Divorce, Paternity (*John v. Baker*)	
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.
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 *State v. Central Council*, S-14935.	

Alcohol and Drug Offenses Other Offenses Juvenile Offenses (Comity)	
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 (*Oliphant*): No criminal jurisdiction over non-Indians. Untested for civil jurisdiction. The offender's contacts with the Tribe may be considered