

## Key Acts and Cases for Alaska Tribal Court Jurisdiction

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**Alaska Native Claims Settlement Act (ANCSA) (1971).** ANCSA resolved the outstanding land claims of Alaska Natives through Congressional action. Prior to ANCSA, Alaska Natives held what is known as *aboriginal title* to land in Alaska. Through a series of United States Supreme Court cases dating back to 1823, aboriginal title was held to mean that Native American tribes were domestic dependent nations that had a right to occupy lands they had traditionally used but not to sell this land. This doctrine was later applied by the U.S. Supreme Court to Alaska Natives. In the face of confusion over the exact nature of Alaska Native rights to land, ANCSA explicitly extinguished all claims to aboriginal title by Alaska Natives. In exchange, a combination of Alaska Native village and regional corporations received \$962.5 million and the right to select 45.7 million acres of land.

**Indian Child Welfare Act (ICWA) (1978).** ICWA was passed by Congress to counteract a long history of Indian children being taken from their homes and being placed for foster care or adoption with non-Indian families. ICWA contains several provisions aimed at preserving Indian families. It is important to note that ICWA only applies to foster care and termination of parental rights proceedings and not to custody disputes between parents. ICWA sets heightened evidentiary standards for removing Indian children from their families. If children *are* removed, there are “placement preferences” that require, absent good cause to the contrary, that Indian children be placed with members of their extended family or with other Indian families. Tribes have exclusive jurisdiction over foster placement and termination proceedings for children that reside on reservations, but even for Indian children who do not live on a reservation, foster placement and termination proceedings can be transferred to tribal court provided that the parents do not object to the transfer. Federal and state courts are required to recognize tribal court decisions. Moreover, if a foster placement or termination proceeding does take place in state court, the Indian child’s tribe must be allowed to intervene in the proceeding.

**Native Village of Nenana v. State of Alaska, 722 P.2d 219 (Alaska 1986).** A tribe sought in Alaska state court to transfer to tribal court a petition to declare an Indian child to be in need of foster care services. The State fought the transfer and prevailed, with the Court holding that the Native Village of Nenana was not a federally

recognized tribe, that it had not attempted to reassume jurisdiction under the procedures set out in ICWA, and that federal law granted Alaska exclusive jurisdiction over custody matters involving Indian children.

**Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548 (9th Cir. 1991).** In this case, two village councils and two individuals who had adopted children through tribal courts sued the State for refusing to recognize the legal validity of tribal court adoptions by denying the adoptive parents public assistance that they otherwise would have been able to receive. The State contended that tribal court jurisdiction had been removed by a federal law that pre-dated ICWA and which in general granted jurisdiction over civil matters in certain specified states, including Alaska, to the state governments. The court held that ICWA still allowed tribal courts to have concurrent jurisdiction with state courts over the types of cases covered by ICWA. In reaching this conclusion, the court held that tribes have inherent sovereignty—meaning that as distinct political communities, tribes can exercise authority over their members unless this authority has been removed by Congress. Because Congress had not removed this authority for Alaska tribes, and in fact had affirmed it through ICWA, tribal courts could grant legally binding adoptions that the State of Alaska must recognize.

**Federally Recognized Indian Tribe List Act (1994).** One of the issues left unresolved by the *Venetie I.R.A.* case was whether Venetie and Fort Yukon, the two Native villages involved in the case, had sufficient historical connections to recognize them as being inherently sovereign. The history of tribal recognition in Alaska is long and confusing, leading some to argue against the existence of Alaska Native tribes or that any tribes that may have existed were extinguished by ANCSA. The federal legal status of Alaska tribes was clarified in the early 1990s, first with a list put out by the Department of the Interior in 1993 recognizing as tribes the Alaska villages specified in ANCSA, and then the next year with the Federally Recognized Indian Tribe List Act. Initially 226 tribes were recognized, but subsequent amendments have raised this to 230 federally recognized tribes in Alaska. Other than with one exception (the exception being the Metlakatla reservation on Annette Island in far Southeast Alaska), these tribes lack reservation land following the passage of ANCSA.

**State of Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520**

**(1998).** This case addressed whether the land selected by Alaska Native corporations through ANCSA constituted *Indian country*. This status is important because tribes can do things in Indian country normally associated with sovereign governments, such as tax business conducted on tribal lands and exercise criminal jurisdiction. Venetie had tried to collect taxes from the State and a private contractor for constructing a school on ANCSA land to which it held title. Relying upon a federal statute, the U.S. Supreme Court held that there were three types of Indian country: (1) reservations; (2) dependent Indian communities; and (3) Native allotments. The land in question was not a reservation because (other than Metlakatla) reservations had explicitly been extinguished by ANCSA. The land clearly did not fit the legal definition of Native allotment land. The Court then did a more detailed analysis of whether the Venetie land was a dependent Indian community and set out two criteria for this type of Indian country: the land must be federally set aside for use by Indians as Indian land, and the land must be under federal superintendence. The Venetie land met neither of these requirements because ANCSA lands were transferred to private ownership by state-regulated corporations and could be sold by the corporation. Thus, the land in question could not be considered Indian country.

**John v. Baker, 982 P.2d 738 (Alaska 1999).** The seminal case in establishing tribal court jurisdiction over civil matters in Alaska, the Alaska Supreme Court in *John v. Baker* found that a tribe had inherent sovereignty to hear a custody case between tribal members in its courts. The Court made this decision despite the fact that the tribe in question (Northway Village) did not possess what could be classified as Indian country. Rather, the Court determined that due to the central role that membership and regulating domestic relationships among members plays in exercising tribal sovereignty, jurisdiction rested not just with land but could also be derived from a tribe’s existence as a federally-recognized sovereign with powers over its tribal members. “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent power of regulating their internal and social relations.”

The Court noted that because of the lack of territorial-based jurisdiction, tribal courts in Alaska do not have exclusive jurisdiction

over custody cases and instead have concurrent jurisdiction, meaning that such cases could be started in either tribal or state court. But when a tribal court does issue a custody order, a state court should generally-speaking give recognition and legal effect to that decision, a principle known as *comity*. The state court is required to conduct a due process analysis to ensure that the due process rights of the litigants in the tribal courts were protected. As part of its due process analysis, the state court is to look at: (1) whether the parties received notice of the tribal court proceedings; (2) whether the parties were granted "a full and fair opportunity to be heard"; and (3) whether the tribal court judges were impartial and the proceedings conducted in a regular fashion. Tribal court procedures need not be identical to those of state courts, and state court judges should "respect the cultural differences that influence tribal jurisprudence, as well as recognize the practical limits experienced by smaller court systems."

***In the Matter of: C.R.H., 29 P.3d 849 (Alaska 2001).*** This case explicitly overruled the decision in *Nenana v. State of Alaska* by holding that ICWA allows transfer of child custody cases from state to tribal court regardless of whether the tribe had sought to reassume jurisdiction. Per the language of ICWA, state courts should retain jurisdiction if either parent objects to transfer from state to tribal court, the tribe declines the transfer, or the state court finds good cause to deny transfer. Good cause might exist where the state court proceedings are at an advanced stage, the child is over 12 and objects to the transfer, the child is over 5 and has had little contact with the tribe, or transfer would create an undue hardship to the parties or witnesses. Absent a finding of good cause or one of the other reasons for denying transfer, ICWA-related custody cases must be transferred to tribal court.

***Kaltag Tribal Council v. Jackson, 344 Fed. Appx 324 (9th Cir. 2009).*** In response to the decision in *In re C.R.H.*, the Alaska Attorney General in 2004 issued an opinion that state courts continued to exercise exclusive jurisdiction over child custody matters unless the tribe had petitioned the federal government to reassume jurisdiction or the case had been transferred from State court to tribal court. In essence, the opinion directed State administrative agencies not to grant full faith and credit to tribal court decisions in cases that started in tribal court. The Kaltag Tribal Council and two adoptive parents sued the Alaska Department of Health and Social Services and its commissioner for refusing to recognize a tribal court adoption order. The federal district court affirmed that tribal courts had concurrent jurisdiction under ICWA. The State had argued that tribal courts could only accept transfer of cases from state courts, but the federal court held that tribal courts could also initiate ICWA-related custody cases. The

federal court further noted that jurisdiction was based upon tribal membership of the child and not that of the parents. This decision was affirmed by the Ninth Circuit Court of Appeals, which reiterated, citing *Native Village of Venetie I.R.A. Council*, that "[r]eservation status is not a requirement of jurisdiction".

***State of Alaska v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011).*** This case can be thought of as the state court equivalent of *Kaltag Tribal Council*. In *Native Village of Tanana*, the Alaska Supreme Court held that Alaska tribes have the jurisdiction to initiate child custody proceedings and that the resulting tribal court decisions are entitled to full faith and credit by state courts and agencies. Drawing on *John v. Baker*, the Court concluded that tribes still have concurrent jurisdiction over ICWA-defined child custody proceedings independent of the existence of Indian country. Tribal courts retain this inherent sovereignty unless specifically divested of it by Congress. Moreover, neither ANCSA nor the federal law relied upon in *State v. Nenana* divested tribes of their sovereign authority over internal domestic relations among its own members.

***McCrary v. Ivanof Bay Village, 265 P.3d 337 (Alaska 2011).*** McCrary sued Ivanof Bay and its president for a breach of contract. Ivanof Bay contended that because it was a federally recognized tribe, it possessed sovereign immunity against being sued. Relying upon and affirming *John v. Baker*, the Alaska Supreme Court agreed. Despite not having a land-base, Alaska tribes do possess sovereign immunity.

***Simmonds v. Parks, 329 P.3d 995 (Alaska 2014).*** This case arose in Minto Tribal Court involving foster placement of a child (S.P.) who is a member of the tribe through her mother. Based on domestic violence allegations against the father and substance abuse issues with the mother, the tribe took custody of S.P. in 2008 and placed her with a pair of foster parents, the Simmonds. The following year, the Minto Tribal Court sought termination of the parental rights of both parents. At a hearing on terminating his parental rights, Parks purports to have objected to the Minto Tribal Court having jurisdiction to terminate his parental rights because he himself is not a member of the Minto tribe. Parks also asked that his attorney be allowed to argue the jurisdiction issue to the tribal court, but the tribal court refused this by saying that attorneys were not permitted to provide oral argument in their courts. Parks claims that this violated his due process rights. Parks' rights were subsequently terminated by the Minto Tribal Court, and he challenged this decision by filing a case in Alaska Superior Court seeking custody of S.P. The state court found both that the tribal court did not have jurisdiction over Parks and that Parks' due process rights were violated by not being allowed to be represented by an attorney in tribal court.

In a decision issued on July 18, 2014, the

Alaska Supreme Court held that because Mr. Parks failed to appeal the tribal court decision within the Minto tribal court system, he could not bring his case in the State of Alaska court system. Tribal court decisions are due the same respect in this regard as would be decisions from other states. The Supreme Court rejected Mr. Parks' argument that an appeal would have been futile, since the Minto Tribal Court did have an appeals process, including the opportunity for his attorney to submit written briefs, of which he could have availed himself. Because the Supreme Court decided the case on this one narrow issue, it did not definitively decide the jurisdiction and due process arguments raised in the briefs, though the Court did reject the argument by the State that there was no tribal court jurisdiction whatsoever, holding instead that there was a legally credible argument to be made that jurisdiction over termination of parental rights attached to the child and not the child's parents. The full implications of this case are at this point unclear, but at the very least it means that litigants in tribal courts must exhaust the tribal appellate process before bringing the case in state court.

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