The Changing Legal Environment and ICWA in Alaska: A Regional Study

A report to the

Bureau of Indian Affairs

by

Lisa Rieger
Justice Center
University of Alaska Anchorage

Caroline Brown
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Acknowledgments

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Introduction

The Indian Child Welfare Act (ICWA) is a federal law passed in 1978 in response to overwhelming evidence that Native children were being adopted out of tribes at alarming rates. Currently, Native American tribes all over the United States feel the effects of a mass removal of Indian children from their communities pursuant to various governmental policies aimed at assimilation, an attempted solution to the "Indian problem" (Ambrose-Goldberg 1994, Metteer 1998). The Association of American Indian Affairs found that by 1974, approximately 25-35 percent of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions.[1] ICWA mandates that tribes and Alaska Native villages have jurisdiction over their child welfare cases. If these children's cases are heard in state courts for whatever reason, then ICWA also requires that certain rules be followed, including permitting the tribe to intervene in the state case at any time, higher levels of proof, and special evidentiary requirements.

Recently, Alaska state law regarding state court acceptance of tribal roles in ICWA proceedings has changed dramatically. Previously, the state Supreme Court had refused to recognize villages' ability and authority to handle their own child welfare cases as required by the Act. One of the most significant changes was the Alaska Supreme Court decision of August 2001 acknowledging tribal courts as an appropriate venue for Indian child welfare cases. This change, however, has been preceded by several challenges to and shifts in the state's official position towards tribes in Alaska, including, among others, the publication of the BIA list of federally recognized tribes including 226 Alaska Native villages (1993), the United States Supreme Court decision in the *Venetie* case on the issue of Indian Country in Alaska (1998), a reversal of the Alaska Supreme Court rulings on the status of tribal courts in general (1999), and the signing of an agreement with the villages recognizing sovereignty by the Knowles' administration (2000). Thus, this most recent reversal, recognizing tribal courts as an appropriate forum for child welfare cases, legally eliminates the resistance at the state level to tribes choosing to transfer cases from state court to their own forums in addition to cases they already handle. This may mean a dramatic change in the numbers of cases that are heard in tribal court in the future, if tribes choose to increase their role.

This report to the BIA describes the current implementation status of ICWA in Interior and Southcentral Alaska, with an analysis of the changing legal environment and its significance for Alaska Native villages. The project grew out of discussions with the BIA about the need to better understand how the changing legal environment might have an impact on the way the BIA assists tribes in delivering services in ICWA cases. For example, how has the changing legal environment

[1] Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong. 14, 15 (1974).

affected the ability of tribes to handle ICWA cases, both on the village level and through intervention in state courts? Working from the understanding that ICWA was passed, in part, to increase tribal roles in native child welfare cases, our analysis pays specific attention to how these changes positively or negatively affect tribal participation in and management of ICWA cases. To do this, we consider a history of ICWA implementation in Alaska alongside an analysis of the particular problems Alaska presents for this implementation. Further, we wondered about the benefits or detriments of a more village oriented approach to policy development and funding priorities. To this end, we consider specific regional and local examples of the different ways in which tribes have chosen to respond to the constraints of state law, provide an analysis of the ways in which tribal authority is manifested on both regional and local levels, and finally the extent to which this relationship has an impact on state level processes. This analysis includes recommendations to enhance the protection of Indian child welfare in Alaska. These recommendations will address funding streams based on findings about ICWA implementation that respond to a changing legal environment in the state and to shifts in regional approaches.

This report is divided into two sections. The first section compiles an historical review of legislation related to ICWA implementation and an analysis of the shifting legal terrain of case law as those statutes have been interpreted in state and federal courts. The second section takes a more ethnographic approach to consider local examples from Interior and Southcentral Alaska, comparing strategies and structures for ICWA implementation employed regionally. These two sections correspond roughly to the two separate, but interrelated issues of determining the ways in which state and federal court opinion and practice have an impact on the way tribes participate in state courts and secondly, evaluating the mechanisms in place that inform the way tribes handle cases in their own courts.

Methodologically, the project utilized archival resources in Fairbanks and Anchorage to determine the history of ICWA implementation in Alaska, the extent to which Alaska representatives were involved in the formulation of the statute, and how the particularities of state geography/ demographics, political representation, and attitudes towards native populations have an impact on the current status and implementation of the Act. Researchers conducted extensive interviews with key actors in the ICWA process to understand central concerns about historical and current implementation. These actors included: Division of Family and Youth Services (DFYS) social workers, village ICWA workers and other tribal representatives in Tanana and Native Village of Eklutna, Native Village of Eklutna's Child Advocacy Center, Tanana Chiefs Conference (TCC) professional and legal staff, and attorneys for the state.

Archival and interview data were analyzed with regard to two related themes: the negotiation of concurrent jurisdiction between the state and tribal authorities and cultural concerns impacting the resolution of child welfare cases. Where permitted, interviews were taped and transcribed. The research did not include the tracking of actual cases as they arise in state or tribal courts. Tracking these cases would have allowed researchers to observe the effects, if any, of potential modifications in the state's stance on tribal control in ICWA cases to identify how broad legal and policy changes affect ICWA implementation at all levels. Observation and tracking of cases would also have allowed

researchers to consider the effects, if any, of a proposed shift from regional to village level resolution. However, tribal judges were not willing to compromise the privacy of tribal court proceedings, and were only willing to talk about cases in general terms, so as to protect the confidentiality of the people involved. Therefore, a sample hypothetical case was used to allow the tribal judges an opportunity to articulate the ways in which they would identify concerns for child welfare and craft solutions to those concerns.

Historical Analysis of ICWA Implementation in Alaska

In order to contextualize the current status of ICWA concerns, this project provides an historical analysis of ICWA implementation in Alaska. This analysis pays particular attention to the legislative history of ICWA and the extent to which Alaska representatives and experts were involved in the formulation of the statute, ICWA's role in a larger body of law dealing with native populations, the interaction between ICWA and Alaska Child In Need of Aid (CINA) rules, and an analysis of case law addressing issues of shared jurisdiction and authority on the state level, notice and intervention, good cause, standards of proof, and the "existing Indian family" exception.

This historical analysis is crucial to understanding the imminent shifts in ICWA implementation and funding streams as a result of these state and regional changes in the legal and policy environment. There are few comprehensive studies to date on ICWA implementation on the national level (Plantz, et al. 1988), and these do not consider the unique legal circumstances in Alaska. Those studies that do address ICWA implementation in Alaska (Rieger 1994; Carns, et al. 1996) predate new developments in the legal environment and have not provided a close analysis of the particularities of regional influences in the state that may prove useful in compiling a comprehensive statewide picture. More general legal analyses of ICWA address issues such the construction of a child's best interests,[2] evaluation of "good cause" standard, [3] inconsistencies is state court application of the Act,[4] and the relationship of a general juvenile court system to ICWA.[5] While analyzing significant procedural and legal-theoretical concerns with the law, these contributions do not address the pragmatic side of implementation in order to make meaningful and specific recommendations about policy development.

The following section considers the legislative history of ICWA and ICWA's intersection with other state and federal laws related to child welfare; we then use this legislative backdrop to explore

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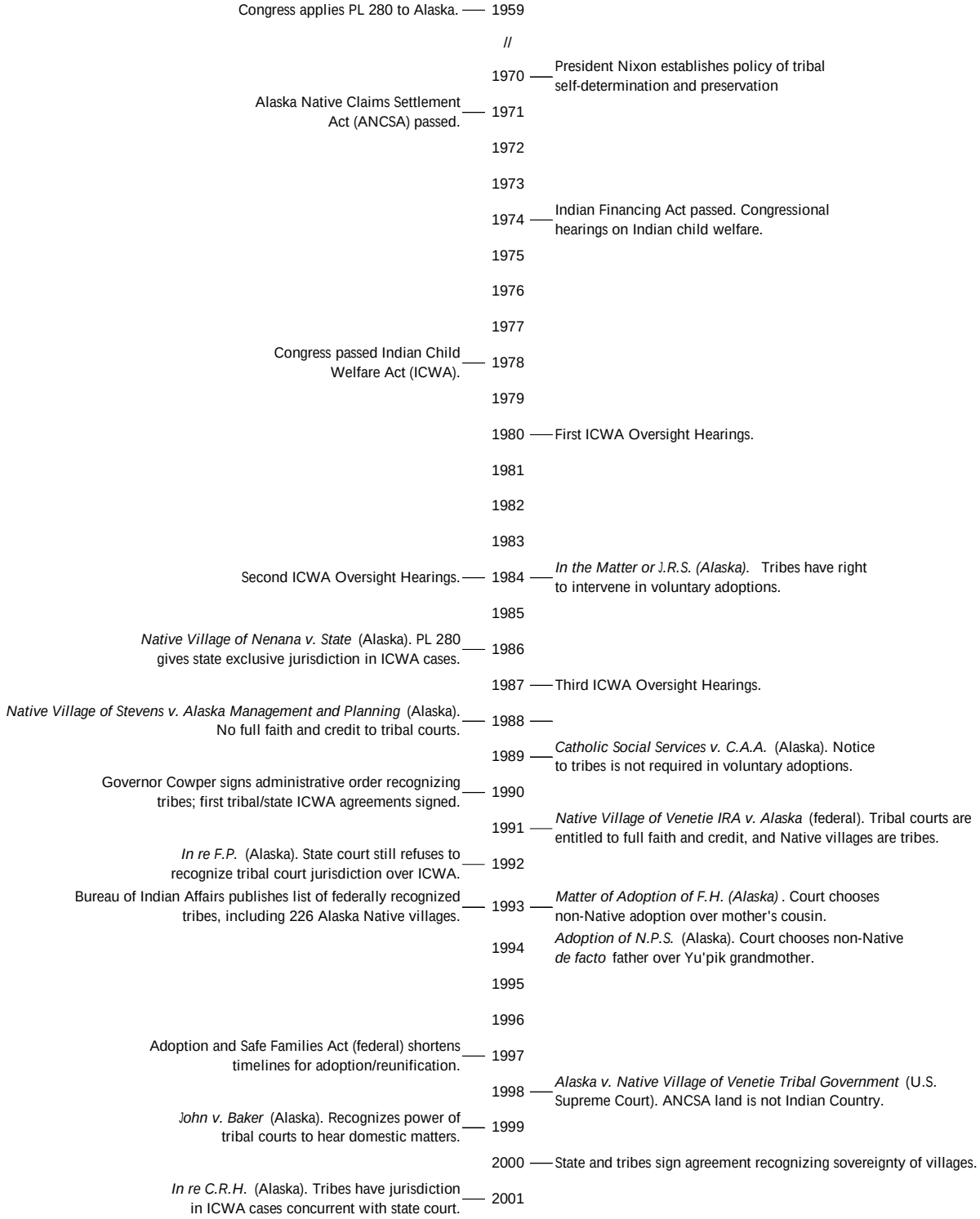
[2] Dale, Michael J. 1991/92. "State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interests of the Child Test." *Gonzaga Law Review* 27:353-391.

[3] Stiffarm, Denise L. 1995. "The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences." *Washington Law Review* 70:1151-1174.

[4] Metteer, Christine. 1998. "Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act." *Santa Clara Law Review* 419-62.

[5] Thompson, Edward L. 1990. "Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Act." *American Indian Law Review* 15:1-114.

ICWA in Alaska: Timeline



the state and federal case law flowing from those statutes as tribes assert their authority under the law and attempt to push the state courts to implement it.

Legislative History

The issues of Indian child welfare and the problems it caused for Indian children, families, and tribes began long ago, when the first missionaries decided that Indian babies would be "better off" with a "nice family" or at a boarding school. The story of the Indian Child Welfare Act begins in 1974, when Congress held hearings before the Subcommittee on Indian Affairs to gather information about the state of native child welfare across the country. The hearings brought together a variety of tribal representatives, state representatives, and child welfare specialists to understand the background and current concerns of protecting native children. The findings were dramatic. According to William Byler, Executive Director of the Association of American Indian Affairs, approximately 25 percent of all American Indian children were then removed from their families and placed in foster or adoptive care, boarding schools, or other institutions. Reasons for this removal varied, but a lack of cultural knowledge about native communities and a lack of respect for cultural considerations in a child's life permeated this growing problem. Further, tribes were not adequately involved, if at all, in the proceedings involving child members, nor were their parents, who often did not have counsel during such proceedings.

As a result, the Senate held two additional hearings after they drafted S. 1214, a bill drafted to "establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes." Native American tribes from around the country described the negative effects on children and tribes of the high proportions of removal. There was evidence that when Native children became teenagers, they experienced higher rates of suicide when they had been removed from their culture, and there was evidence that tribes were drastically losing members during the previous decades. Alaskan participation was minimal, except for the statement of Donald Mitchell, then representing the Rural Alaska Community Action Program. His testimony is organized into several themes raised by the bill in question, which was eventually amended and passed as law (ICWA). According to Mitchell, "I would advise you to survey the situation [in Alaska] very closely, because you do have some real logistical problems up there with this" (Indian Child Welfare Program Hearings 91). Mitchell's concerns, however, go beyond logistical difficulty to highlight significant conceptual problems with what was to be the implementation of Indian child welfare law. First, he commented on the issue of notice, a crucial aspect of ICWA implementation and one that continues to plague state efforts. The concern is two-fold: to whom to give notice that a native child has been taken into custody by the state, and what is adequate notice?

The first question comes from the complexity of Alaska Native political reorganization through the land claim, the Alaska Native Claims Settlement Act (ANCSA): "…it is a real problem in Alaska, because you have villages that have never been a part of the reservation system, they don't have a tribal organization per se and you have inside of those villages regional corporations, village corporations, village nonprofit corporations, regional health corporations. Who gets notice, I think,

is a very technical question that should be looked at in terms of particular notices to be given." (Indian Child Welfare Program Hearings 94). The real problem behind who should get notice, of course, is who should be considered a tribe? He explicitly links this problem of definition to the land claim, "One of the problems you have in the Settlement Act is that in its wisdom Congress tried to make everyone state –sponsored capitalists, instead of acknowledging that this is, in fact, native land…it is part of the real problem that the Congress stated in its wisdom when it got us off the native track and onto the corporate track" (97). Though this technical, legal question was answered by the Department of the Interior's 1993 list[6] confirming 226 Alaska Native villages as tribes, it remains a question of great confusion in actual implementation.[7] And the fact that "ANCSA failed to resolve…the nature and reach of tribal jurisdiction" left the legacy that resulted in the litigation over tribal courts of the past three decades (Johnson 2001).

When providing notification, the question remains as to when notification is satisfactory and sufficient. As Mitchell notes, "the preoccupation of our culture and our legal system with an equating written notice with due process does not apply, in my judgment, in most Eskimo communities" (91). He cites some of the reasons why sending a letter out to a village does not let the agency "off the hook": the remoteness of some villages, limited access to technology for response, and a lack of understanding what is happening. While the extent to which this remains a problem in Alaska varies from region to region, and village to village, it does underscore the specific challenges facing implementation in Alaska that continue to shape the course of the law itself.

Other concerns raised in the hearings included: cultural concern for traditional practices, licensing of foster homes, and legal counsel for parents. Tribes described how traditional practices for dealing with troubled families were disregarded when Native families went through state court processes. They pointed out that foster home licensing was biased against Indian housing and caused perfectly acceptable foster families to be rejected. Thus, public and private child welfare agencies were not only intruding into Indian families, but they also were placing Indian children "in settings that discouraged their knowledge of and identity with their cultural heritage" (Plantz, et al. 1988). In some states in the 1970s, Indian children were adopted into non-Native homes at rates of 75 and 97.5 percent (Bureau of Indian Affairs Task Force 4, 1976).

These concerns as a whole, and the testimony before Congress, led Congress to pass the Indian Child Welfare Act in 1978 with the following stated purpose:

> To protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect unique values of Indian culture, and by

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[6] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54, 364 1993.

[7] See Brown, Caroline and Rieger, Lisa. (2001). "Culture and Compliance: Locating the Indian Child Welfare in Practice." *Political and Legal Anthropology Review*, forthcoming.

providing the assistance to Indian tribes in the operation of child and family service programs.

ICWA in the 1980s

The first oversight hearings on ICWA were held by the Senate Select Committee on Indian Affairs in 1980, just two years after the law was passed. Given the relative newness of the law, these hearings were held, according to Chairman Inouye, to make sure the law was off to a good start. While there was no participation from Alaska Native villages or Alaskan agencies responsible for ICWA, several tribes testified about the wholly inadequate funding streams available to tribes as they act on behalf of their children and families. These concerns would prove significant for implementation of the law in Alaska, as well.

Ten years later in the third oversight hearing on the Act in 1987, Alaskan participation was dramatic. Further, concerns with ICWA implementation had expanded far beyond concerns about adequate funding to include issues especially relevant to Alaska. This analysis is limited to those sections of the hearing dedicated to the particular issues facing Alaska. Julie Kitka, on behalf of the Alaska Federation of Natives (AFN), testified that 98 percent of all litigation at that time involved not land and subsistence issues, but dealt instead with the protection of Native families. She raised several concerns in her testimony, including the disparities in ICWA implementation regionally across Alaska, noting that some regions are better prepared to respond to ICWA issues than others. Further, Kitka drew attention to the issue of jurisdiction, an issue that has plagued ICWA implementation in Alaska. She stated, "Local control of issues such as how native people raise their children and address child welfare issues is absolutely essential. Our councils in our villages must have the authority to make critical decision on the ground. Areas are remote and there are real clinical benefits for local control and native councils being able to make these decisions" (Senate Select Committee Oversight Hearings, 1987: 9). Finally, she noted the additional concerns of voluntary proceedings and notice practices. Voluntary proceedings remained a loophole in legal implementation whereby a tremendous amount of children slip away from their communities because tribes are not notified when parents seek out voluntary adoptions. Adoption agencies had a problem providing notice to the tribes when a native child comes into their system, though notice problems also occur with the DFYS; there was concern that they fall short of their responsibilities under the notice provisions of the law (9).

These concerns were echoed in a letter submitted on behalf of the Aleutian/Pribilof Islands Association, the Copper River Native Association, the Kodiak Area Native Association, the Native Village of Tanana, and the Cook Inlet Tribal Council (Senate Select Committee Oversight Hearings 1987: 354-374.) These associations argued that private adoption agencies regularly skirted the notice provisions of ICWA and the requirements for culturally appropriate remedial and rehabilitative services for Native children and families. In their goals of meeting adoption demands, these agencies might also use relinquishment proceedings to terminate parental rights prior to adoption proceedings, substantially limiting parental rights and depriving parents and tribes of meaningful participation in adoption proceedings (362-365). On the issue of strengthening tribal notice by the state agency,

these native organizations advocated a dual system of notice, where two letters of notice would be sent, one to the village, and one to the regional non-profit organization often responsible for assisting villages with ICWA cases, though at the time of the hearing, this suggestion was resisted by the state agency.

A representative of one of those regional non-profit organizations, Al Ketzler from Tanana Chiefs Conference, a regional consortium of 43 Interior villages, also testified. Ketzler noted that the problems ICWA was passed to rectify, had worsened in Alaska.[8] His comments focused more specifically on the inadequate funding provided by the federal government that hampered ICWA implementation more generally. Myra Munson, Commissioner for the Department of Health and Human Services in Alaska, supported this notion. From the state side, she also maintained that the tribal identification of children in protective custody remained a challenge that the BIA had not been helpful in addressing because of the "chaos" of their own organizational challenges and inadequate record keeping. Additionally, she identified a major problem in the data retrieval methods for her department; record keeping at DFYS was massively insufficient for the task of compiling aggregate records of Native children in state custody.

The concerns outlined in the 1987 hearing, including jurisdiction and local control, compliance with the notice provisions of the Act (including voluntary proceedings), and the disparities of statistical figures available for Native children in state protective custody and receiving state protective services as a means to gauge state compliance led to a special field hearing held in Anchorage in 1988 to address concerns unique to Alaska. This hearing was well attended by local and regional Native representatives from across the state, as well as state agency representatives. Mitch Demientieff, President of Tanana Chiefs Conference, testified that Alaska Supreme Court decisions had created a "race to the courthouse" situation where exclusive jurisdiction was granted to whichever system—tribal or state—learned of a situation and acted first. This method of determining jurisdiction limited tribes' ability to transfer cases to their own forums, as provided by the Act. At the time of the hearing, it was unknown how many villages operated in Alaska with the assistance of tribal courts, or councils acting as courts. Tribal jurisdiction in ICWA cases was particularly complicated by the state's stance on PL 280. On the state side, Myra Munson, present again on behalf of the Department of Health and Human Services, argued that the two most significant issues facing Alaska with regards to ICWA were jurisdictional battles and the problem of voluntary adoptions addressed above.

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[8] He offers these statistics: A 1976 survey compiled by the Association of on American Indian Affairs indicated an estimated 393 Alaska Native children in State and federal out-of-home placement. In 1986, that figure increased to 1,010, representing a 256 percent increase, while the Alaska Native population increased only 18 percent. Further, while the Alaska Native population accounts for only 14 percent of the total Alaskan population, Alaska Native children made up 49 percent of the State's out-of-home placements in 1986. These statistics were amended by Myra Munson. She stated that in 1986, only 34 percent of children in child protective custody are native, and 66 percent of those children received services while living in the home of his or her parents, meaning that DFYS was meeting the goals of maintaining the integrity of Indian families. The remaining 34 percent of native children who were placed out of their natal homes were placed with a relative or in a foster home. Though she could not provide statistical evidence on foster home, she did state that 26 percent of their foster homes were native (41-42).

It will not be surprising to anyone working in ICWA in Alaska that these issues were present in 1984 and 1987. They will be familiar to tribal, non-profit and state ICWA workers in the 1990s and 2001 as well. Jurisdictional issues complicated by the state's stance on Public Law 280 (to be discussed below), problems of notice in the case of voluntary adoptions or of emergency custody, adjudication hearings or other state action, inappropriate standards for determining the best interests of the child as a Native child persist. The next section situates ICWA next to state law regarding child welfare to begin an analysis of the current status of ICWA implementation in Alaska.

CINA and ICWA

In addition to the federally mandated ICWA, Alaska state agencies must follow the state Child in Need of Aid (CINA) rules, which address general child abuse and neglect in Alaska. These state rules are not to be confused with tribal rules and ordinances, both written and customary, that control the child abuse and neglect issues for tribes. The intersection of ICWA and CINA creates a complicated grid of mandates that social workers must negotiate, especially since 50 percent of the current social work caseload in Alaska involves work with Native families (Alaska Division of Family and Youth Services, 2001). ICWA requires notice to the tribe or Indian custodian in addition to the parents, bringing additional parties into the proceedings. At each stage, from emergency custody to termination of parental rights or reunification, the higher standard for removal demands more evidence in state court than in a non-Native case.[9] Moreover, social workers are required to follow federally prescribed placement preferences for Native children.

Though Alaska's CINA rules closely track the requirements of ICWA, many problems have arisen as the state agencies, courts and Native people have worked with ICWA's objectives (*cf.* Ambrose-Goldberg 1994; Metteer 1996). These problems range from cultural conflict between native parents, children or tribal representatives and service providers (especially within the context of social control mechanisms and parent-child relations) to legal disputes over jurisdiction and the parameters of tribal sovereignty.[10]

In 1997, the federal Adoption and Safe Families Act again shifted how state and tribes work together on Native child issues, specifically with regards to finding appropriate solutions for placement and adoption, if need be. Specifically, this Act significantly restricts the ability of the DFYS to pursue reunification of the child with his or her parents by shortening the time limits parents are granted to resolve the issues that led to the removal of their children. The Act reflects a shift in the definition of the "best interests" of a child from family reunification to permanency in placement for

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[9] The court must make additional findings by clear and convincing evidence, based on expert testimony, that custody of the parent or Indian custodian will likely result in serious emotional or physical damage, and that the agency has made active efforts to provide remedial services and rehabilitative programs, which have failed. The same findings must occur for termination of parental rights, but with the additional requirement that they be beyond a reasonable doubt.

[10] However, the 1998 amendments to the CINA statutes conflict with ICWA in narrowing the time during which parents can strive for reunification and requires the social worker to commence permanency planning immediately. See Brown and Morrow, *Northern Review*, no.23. for a discussion of the Adoption and Safe Families Act and its relationship to ICWA.

the child. According to one judge in the Fourth Judicial District, the difficulties of "…planning for termination [of parental rights] at the same time you are trying to reunify the family" already creates a disjuncture in the way social workers must deal with these cases, especially since substance abuse, which is usually present in such cases, takes a long time to heal (Closuit, personal communication, 2000). The actual impact of this shift on tribes and children remains unclear because of a backlog in cases due to the shortened timeline for parents to resolve their conflicts. Changes like these also contribute to the importance of tribes taking charge of their own cases, where they may not need to follow such strict timelines.

Shortened timelines for permanency placements, usually in the form of adoptions under the state system, exacerbate an additional existing cultural dilemma for tribes when they intervene in state cases regarding their children. The competing definitions of a child's "best interests" dictate the methods used in protecting children. Unfortunately, data for DFYS levels of compliance in placements under ICWA are inconsistent despite regulations that mandate preferences of placement for Native children within their home communities if possible. Placement concerns are paramount for the Act's goal of protecting the integrity of Indian families and the protection of a child's right to his or her own culture. For many state practitioners, there exist tensions between placing a child in the community or with relatives and removing him or her from the abusive situation and hence out of the community. The reasons for this vary, from differences in the way compliant placements are defined to a lack of appropriate state approved native foster homes (Carns, et al. 1996). In contrast, tribal priorities appear to lean towards placements that protect kinship ties and ties to the community, as a means to maintain cultural connections. Native children adopted through the state system are generally severed from their birth families through the termination of parental rights, a concept eschewed by tribal courts if at all possible. Other areas where the laws overlap or pose inconsistencies create significant questions for DFYS social workers. For example, what is the difference between active efforts and reasonable efforts? How can a social worker demonstrate that he/she has made diligent efforts to find a placement within the preferences? What is adequate notice to tribes and how does a social worker correctly identify tribal affiliation? While the state law is thus consonant with the federal law, working between these legal frames continues to cause problems for social workers.

Before turning to the existing case law, which demonstrates the problematic nature of ICWA application in actual practice, we now turn to an examination of tribal status in Alaska, a problem that forms the basis of tribal court jurisdictional dilemmas.

Tribal status and Alaska Native Villages

Against this backdrop of federal and state law, we can chart a struggle over tribal status for Alaska Native villages. This struggle occurs in the area of Native child welfare especially because the ICWA expressly affirms Alaska Native villages' jurisdiction over their own child welfare cases. It is only state court interpretation and state agency application of the law that have interfered with that federal requirement. (Jurisdictional issues also arise in the areas of subsistence and land rights, but that is not the subject of this report.) Over the last thirty years, but especially in the last ten,

tribal status for Alaska Native villages has been tirelessly explored and heavily litigated. For Native people, of course, tribal self-rule, or at least sovereignty, is not an issue; it is an inherent right. The different perspectives of state and federal law make tribal status an issue from the outside looking in.

Under federal case law, Indian tribes enjoy a unique and complicated relationship with the federal government because of their status as "dependent sovereigns" under United States law. The tribal status of Native villages is integral to the analysis of legal rights for Alaska Natives precisely because the body of federal case law and statutes presumes tribal status in upholding Indian rights and therefore is linked to jurisdiction. Until the Department of the Interior published a list of 226 Alaska Native "tribes," the Alaska Supreme Court took the position that Alaska Native villages do not have tribal status. Accordingly, Alaska State courts neither recognized nor gave full faith and credit to the decisions of village courts, councils, or conflict resolving bodies (*Native Village of Stevens v. Alaska Management and Planning*, 1988; *Native Village of Nenana v. State,* 1986*; In Re F.H.*, 1992). The state courts took this position despite explicit language to the contrary in ICWA, the Self-Determination Act, the Indian Financing Act, the Indian Health Care Improvement Act, and the Indian Tribal Justice Act statutes, which included Alaska Native villages as delineated in ANCSA as tribes. Further, the federal court opinion on Alaska Native tribal status in *Native Village of Venetie I.R.A. Council v. State of Alaska* (1991), in which the Ninth Circuit Court of Appeals upheld the tribal status of two Native villages, required the state to give full faith and credit to the adoption decisions of the Native tribal councils.[11] With the 1993 list, tribal status in Alaska became inarguable, though the state continued to not recognize tribal courts as an appropriate forum for child welfare cases, until *In the matter of C.R.H.* [12], to be discussed below.

For Indian tribes of the contiguous United States, much of the legal analysis of tribal court jurisdiction revolves around the concept of "Indian Country," which is based on the existence of reservations and identifiable Indian land, and the centralized tribal governments that control those reservations. Because tribal court jurisdiction and authority in the lower 48 is largely based on territory encompassed in reservations, the United States Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520 (1998) has severely undermined Alaska Native villages' assertion of their tribal court authority. In this case, the US Supreme Court determined that ANCSA land is not "Indian Country," land specially defined through its use and occupancy by Native people as being generally outside of state jurisdiction, similar to reservations in the lower 48 states. In Alaska, there is only one reservation, Metlakatla, that can be technically called Indian Country, while the state or federal courts have yet to definitively decide cases about Native allotments, which might also meet the definitions for Indian Country. The special status of Indian Country is linked to tribal authority by creating clearer lines of jurisdictional boundaries for state and tribal courts. However, there are many venues in which tribal court authority operates; subject matter jurisdiction, such as that encapsulated in ICWA, makes territory largely irrelevant.

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[11] This decision follows another in which the federal Court of Appeals affirmed the tribal status of Native villages in other contexts, *Native Village of Tyonek v. Puckett* (1989).

[12] 29 P.3d 849 (Alaska 2001).

In Alaska, the contorted process through which state courts arrived at their initial conclusion flows from Public Law 280, an earlier law passed in 1954 and extended to Alaska at statehood in 1959. PL 280 provides for concurrent jurisdiction in the state and tribal courts over criminal and civil matters. The legislative history of PL 280, though meager, indicates that Congress sought to ameliorate a situation in which some reservations were unable to provide basic fire and police protection services to their populations. Alaska is one of five mandatory PL 280 states (i.e., the state did not have an option about taking responsibility for servicing the Native populations). The Alaska Supreme Court interpreted PL 280 to mean that state courts have exclusive jurisdiction over child welfare matters unless and until the villages reassume their exclusive jurisdiction under 25 U.S.C. 1918. *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska 1986). This leads to the legal problem that ICWA creates for the state of Alaska. By specifically including Alaska Native villages with Indian tribes of the contiguous United States, ICWA and its contemplated tribal court jurisdiction over child welfare cases posed a perceived threat to governmental integrity in Alaska, an issue that goes beyond legal definitions of jurisdiction into land control concerns, encapsulated in ANCSA.[13]

ANCSA marked a profound change in the redistribution of land and monetary resources, and by extension, in the structure of Native involvement in the state's activities. The creation of Native corporations under ANCSA signaled a fundamentally different interpretation from the nature of reservations. As laid out in ANCSA, benefits (land and money) would accrue to Native people as individual shareholders of corporations, not through communal affiliations of clans, families, or tribes. Thus, ANCSA reformulated that relationship, not through the federal "wardship"[14] found in the lower 48 tribes, but through a privatized relationship of corporations where Native people are redefined as "shareholders." The corporate restructuring of land ownership and administration, along with the attendant system of share-holding, mandates economic development on corporation controlled land to ensure the survival of the competing, capitalist, Native-run structures, under the risk of bankruptcy and loss.

Many of these corporations have parallel nonprofit, service-providing corporations, which coordinate services and provide infrastructure for their member villages. These non-profits do not have the recognized political status of the villages (see Indian Self-Determination Act, 25 U.S.C. 450(b)(e), 1988 and ICWA, 25 U.S.C. 1903 (8), 1978), though member villages often delegate their right to funding and representation to the regional non-profit by tribal council resolution. In many regions across the state, these organizations have played a significant role in assisting villages in the development of mechanisms to deal with child welfare cases, both case-by-case and through more comprehensive techniques.

It is important to note that Alaska Native villages, about one-third of which had incorporated under the Indian Reorganization Act with tribal constitutions and laws, and about two-thirds of

[13] Johnson argues that since the United States Supreme Court decision in Venetie ruled that ANCSA land was not Indian Country, PL280 no longer applies either. This is a point that merits further discussion and consideration. See Johnson, 2001.

[14] The Supreme Court of the 1830's developed the legal theory of federal guardianship over Indian tribes in the Cherokee Nation cases. As "domestic, dependent nations," Indian tribes became wards of the federal government (Deloria and Lytle 1983:25-40).

which continue as traditional councils, continued throughout the land claims era and today as the ongoing sovereign entities of Alaska Native tribes. While there is some overlap between corporation shareholders and tribal members, the two groups are not identical, because ANCSA limits the inclusion of more shareholders unless the shareholders vote to expand the numbers, while tribes have complete control over adding new members. Furthermore, the villages have a government-to-government relationship with the federal government, and receive their funding based on their political status. The corporations, though listed in several laws as being an organization qualified to receive funding on behalf of Alaska Natives, do not have that government-to-government relationship. As such, ANCSA split the financial and political/social control in the villages: ANCSA corporations bear much of the responsibility for the economic aspects of Alaska Native life while the tribal entities, whether IRA or traditional councils, bear the majority of the responsibility for political and social issues. This division of roles and responsibilities has been complicated in the last decade by the economic development opportunities being offered to tribes (but not corporations) through the BIA.

Case Law

Given these laws and the ways in which they intersect, there are three ways that tribes have exercised their sovereign authority in the area of child welfare. The first tactic has been to assume control and responsibility over their child welfare cases, either through express tribal ordinances or through traditional social control mechanisms asserted through tribal staff or tribal councils. The second tactic has been to assert a tribal voice in federal courts, resulting in federal cases that confirm tribal authority to handle child welfare cases. The third tactic has been to push the state to implement the ICWA on a case-by-case basis, arguing each of its elements and resulting in state case law. ICWA is most binding on the state courts, and therefore the legal implementation of ICWA is tested in state court and articulated through state court decisions. Actual ICWA implementation in the state of Alaska can be analyzed through the legal requirements of the law discussed earlier in this report, including jurisdiction, good cause, intervention and notice, standards of proof, and the "existing Indian family" exception. This section will focus on each of these in turn, chronologically from earliest to most recent, to create a broader picture of ICWA implementation on the state level. This should not be considered an exhaustive analysis of state case law on Indian child welfare in Alaska, but rather a thorough interrogation of seminal cases. Furthermore, we do not intend to imply that the legal environment for Alaska Native villages is solely, or even primarily, contained in Alaska state case law; clearly the legal environment as a whole is not limited to case results but rather is encompassed in entire systems of laws including values, beliefs, customs and traditions that are often unwritten.

Jurisdiction. The Alaska Supreme Court came closest to recognizing tribal jurisdiction in *In the Matter of J.M.*, 718 P.2d 150 (Alaska 1986). In that case, the Native Village of Kaltag filed a motion to dismiss Child In Need of Aid (CINA) proceedings for lack of state court jurisdiction. The village claimed exclusive jurisdiction under ICWA, which provides that: "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" (*id.* at 152, citing 25 U.S.C. sec. 1911 (a)). The state argued that the village had waived whatever jurisdiction it had by requesting through its Village Chief that the DFYS take custody of J.M. so the child's Native foster family could collect foster care payments. The Alaska Supreme Court held that Kaltag had not explicitly waived jurisdiction by seeking state action to establish J.M.'s eligibility for foster care payments (*In the Matter of J.M.* at 155). Nor would the court imply a waiver because to do so would be inconsistent with ICWA's objective of encouraging tribal control over child custody proceedings involving Indian children (*id.*) However, the state in that case did not dispute that J.M. was a ward of the tribal court and that Kaltag had exclusive jurisdiction under 1911 (a) (*id.* at 153).

The history of state ICWA implementation is dominated by the findings in the Nenana trilogy of cases, including *Native Village of Stevens v. Alaska Management and Planning*[15], *Native Village of Nenana v. State, Department of Health & Social Services*[16], *In re F.P.*[17] All cases from Interior Athabascan villages, this trilogy defined the parameters of tribal jurisdiction over Indian Child welfare cases until very recently. At issue in *Nenana* (1986) is the transfer of Native child welfare cases from state superior court to the appropriate tribal court. In its findings, the state denied tribal courts the ability to transfer child welfare cases to their own courts as defined by ICWA. The court's finding that tribes cannot transfer jurisdiction in such cases without petitioning the Secretary of the Interior to reassume jurisdiction over child welfare proceedings hinged on the state's interpretation of PL 280, the federal statute passed in 1953 that granted Alaska, among other states, jurisdiction over all civil and criminal matters in Indian country.[18] The Alaska Court reasoned that PL 280 divested Native communities of their authority over child welfare matters, leaving child welfare matters the exclusive jurisdiction of the state, rather than held concurrently with tribes. In *Nenana*, the Court reasoned that the ICWA provision requiring Indian tribes to petition for a reassumption of jurisdiction would be meaningless if PL 280 had not in fact removed such jurisdiction *Native Village of Nenana* at 221. These cases, then, defined the limits of tribal court authority by denying transfer of tribal jurisdiction in cases involving Native children. By not recognizing tribal courts as an appropriate forum for these cases, the *Nenana* ruling effectively denied tribal courts in Alaska the very set of rights that ICWA was passed to recognize. It does not, however, interfere with a tribe's right to intervene in state court on behalf of a tribal member in child welfare proceedings as laid out by ICWA. It also does not affect a tribe's ability to take custody of a child in need of aid and process the case through their own tribal court or other decision-making body, such as a tribal council.

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[15] 757 P.2d 321 (Alaska 1988).
[16] 722 P.2d 219 (Alaska 1986).
[17] 843 P.2d.1214 (Alaska 1992).
[18] While federal laws have priority over state laws, they are intended to accommodate a measure of state discretion. However, the State of Alaska's interpretation of PL280 exceeds that of other PL280 states, creating a legal arrangement that does not comport well with the establishment of tribal authority in child welfare proceedings by the federal law. No other state has interpreted PL 280 to grant exclusive jurisdiction of ICWA cases to state court unless the tribe has reassumed exclusive jurisdiction itself.

In the first *Venetie* case, which involved ICWA rather than the land issues in the case that eventually went to the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit rejected the Alaska state court's interpretation of PL 280 in *Native Village of Venetie I.R.A. Council v. Alaska,* 944 F.2d 548 (9th Cir. 1991). This case involved two Athabascan children from Fort Yukon and Venetie who were denied benefits because the state did not recognize their tribal court adoptions. The villages asserted on appeal that because of their inherent sovereignty they retained at least concurrent jurisdiction with the state over child welfare cases after PL 280, and that Alaska was thus required under ICWA to give "full faith and credit" to the village adoption decrees (*id.* at 556).

The Ninth Circuit agreed that Alaska would be required to give full faith and credit to the adoptions if Fort Yukon and Venetie were determined to be sovereign entities (as legally defined by "modern-day successors to identifiable Native tribes that were sovereign" prior to their incorporation by the United States). Such sovereignty can only be removed, the Ninth Circuit held, by assimilation into non-Native culture or by an express act of Congress (*id.* at 558). Contrary to the Alaska Supreme Court, the Ninth Circuit did not interpret PL 280 as an express divestiture act. The Ninth Circuit instead found, based on the legislative history of PL 280, the decisions of courts in other PL 280 states, related holdings of the United States Supreme Court and the position of the United States Department of Justice at the time PL 280 was enacted, that the evidence weighed heavily in favor of the view that Indian tribes retained concurrent jurisdiction over child custody matters (*id.* at 559-562). At best, the Ninth Circuit held, the statute is ambiguous, and ambiguities should be resolved to the benefit of Indians (*id.* at 562). This case did not address the status of ANCSA lands as Indian Country, and the villages were recognized as tribes with concurrent jurisdiction over child welfare matters.

On the issue of jurisdiction, though specifically *not* dealing with ICWA, *John v. Baker*[19] (1999) represents the first time the Alaska Supreme Court recognized Alaskan tribal court actions. We include this case here, though it does not specifically speak to ICWA implementation, because of its importance in an analysis of tribal court jurisdiction. Briefly, *John v. Baker* was first heard as a custody hearing between two parents from different Interior villages by the Northway tribal court. The Northway tribal court conducted the custody hearing with the permission of the non-Northway parent (mother). When the court granted custody of the two children to the non-Northway parent, the Northway parent (father) appealed the case to the Superior Court in Fairbanks. Ignoring the existing tribal court order, the Superior Court heard the case and granted custody to the father. The mother then appealed the case to the Alaska Supreme Court, who found in her favor, relying on the argument that the Superior Court should have recognized the tribal court's original order granting custody to the non-Northway mother.

John v. Baker does not actually involve ICWA, since the case is about a custody dispute regarding two children of Alaska Native parents from different Interior villages. Custody battles are explicitly excluded by ICWA; therefore the Alaska Supreme Court's recognition of tribal court actions

[19] 982 P. 2d 738 (Alaska 1999).

does not extend to transfer of jurisdiction of child welfare cases from state to tribal venues. However, it does address the state's recognition of tribal governing bodies and the question of the authority and competence of tribal courts to ensure the welfare of Native children in domestic relations cases.

On remand, the Superior Court still would not grant comity to the Northway tribal court because it was unable to determine that due process had been granted the father due to a lack of court records. On a second appeal to the Alaska Supreme Court, the Supreme Court found that the Superior Court should not equate an incomplete record with a denial of due process, but the point was moot since the original tribal court order had expired by its own terms. Therefore, the Supreme Court of Alaska remanded it back to Superior Court with instructions to refer it back to the Northway tribal court for new proceedings. Though this appeal also does not directly address ICWA, it is important here for the Supreme Court's consistency in recognizing a tribal court as the appropriate forum jurisdictionally for determining custody, an issue of child welfare. Further, it begins to outline the terms for being granted comity, or respect, by state courts reviewing tribal court decisions. And the court specifically stated that Alaska courts should not place hurdles in front of granting comity to tribal courts. This is a significant factor for tribal courts as they continue to operate in this shifting legal terrain.

In the matter of C.R.H.[20] constitutes the most recent change in the law addressing the jurisdiction of Alaska Native tribal courts in ICWA cases. This case, also involved an Interior village acting on behalf of a child born in Anchorage, though eligible for membership in the village of Nikolai. Interestingly, this case did not arise from disagreement over where the child should be placed; "The parties to this appeal agree that this [maternal relatives in the village of Nikolai] should be C.R.H.'s permanent home, but disagree about the appropriate legal mechanism for finalizing the placement" (p. 2) That is, the village argued that its tribal court, rather than the state court, should have the authority to make this final determination. In its attempt to transfer the case to its own tribal court, the village was thwarted by the *Nenana* trilogy, specifically the Alaska Supreme Court's interpretation of PL 280 discussed earlier. On appeal, however, the Alaska Supreme Court overruled this opinion based on a reanalysis of subsection 1911(b)[21] of ICWA, which reflects "congressional intent that all tribes, regardless of their PL 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts." (p. 6) In this decision, the Supreme Court recognizes that PL 280 should affect exclusive jurisdiction over child welfare cases, but not the ability of a tribe to transfer jurisdiction, thereby recognizing the rights of tribes to transfer cases to their own courts if they so choose, barring any objection by either parent or the Indian custodian.

Good Cause. Under ICWA, absent good cause to the contrary, preference in an adoptive placement of an Indian child must be given in the following order to: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C.

[20] 29 P.3d 849 (Alaska 2001).

[21] Subsection 1911(b) states: "In any court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to the declination by the tribal court of such tribe." 25 U.S.C. 1911.

sec. 1915 (a). A tribe may alter this placement preference system by resolution. 25 U.S.C. sec. 1915(c). ICWA does not define what constitutes "good cause" for a state court to modify these preferences, other than to say that the preference of the Indian child or parent may be considered where appropriate (*id.*). The BIA guidelines indicate that good cause should be based on one or more of the following considerations: the request of the biological parents or an older child; the extraordinary physical or emotional needs of the child; or the unavailability, after a diligent search, of suitable Indian families (44 Fed.Reg. at 67594). These BIA guidelines are not binding and Alaska courts have relied on the "best interests of the child" and other factors in finding good cause.

For example, even though DFYS had recommended that a child be placed with the mother's cousin (a first place adoption preference under ICWA), the Alaska Supreme Court upheld an adoptive placement in a non-Indian home in Washington State (*In the Matter of Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993)). The lower court based its decision on the mother's preference for the non-Indian home, the bond between the Indian child and her foster mother, Mrs. Hartley, with whom the child had lived, the "openness" of the adoption—that is, the willingness of the Hartleys to allow access to the child by the mother and her extended family—and the uncertainty of the child's future if the adoption were not allowed (*id.* at 1364). The Supreme Court found that this case presented a close question because of the possibility of a placement with a relative in Noatak (*id.* at 1365). However, the Court ruled that the lower court had based its findings of good cause on appropriate factors and thus its decision to deviate from ICWA preferences was not clearly erroneous (*id.*)

Similarly in *Adoption of N.P.S.*, 868 P.2d 934 (Alaska 1994), the Supreme Court upheld the placement of an Indian child in a non-Indian home in Wasilla, Alaska, over the protests of the child's tribe and his grandmother, Jenny Sims, a Yup'ik widow living in Toksook Bay. The grandmother had cared for N.P.S.'s brother since birth and sought to adopt N.P.S. after his mother's death. The child's mother, however, expressed a strong preference in her will that N.P.S. be adopted by a male friend, Xavier Medley, with whom the child had lived most of his life.[22]

The Guardian Ad Litem (GAL) appointed to investigate the case concluded that the child's cultural needs would best be met in Toksook Bay with his grandmother and brother, but that his emotional needs might not be met there (*id.* at 935). Following the GAL's recommendation, the Superior Court found good cause to place N.P.S. with Medley based on the mother's preference, the child's preference, and the child's emotional and educational needs.[23] Although the Superior Court agreed with the GAL that N.P.S.'s cultural needs would be better served in Toksook Bay, the court found that these cultural needs would be adequately satisfied by a one-month trip every year to Toksook Bay and by visits to an uncle incarcerated in Palmer (*id.* at 937-38).

The root of the issue raised on appeal, according to the Alaska Supreme Court, was whether the lower court gave sufficient weight in its overall decision to the grandmother's superior ability to provide for N.P.S.'s cultural needs (*id.* at 938). The Supreme Court concluded, given the advantages

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[22] The child, N.P.S., told Superior Court Judge Curda that he preferred to live with Medley, despite a desire to be with his brother. *Adoption of N.P.S.* at 935. However, the Toksook Bay Traditional Council later filed a letter, signed by N.P.S., stating that he wished to remain in Toksook. The matter was further confused by a second letter from N.P.S. indicating he wanted to live with Medley and Sims. *Id* at 936.

[23] The GAL recommended that N.P.S. be assessed for attention deficit disorder and indicated that treatment would be easier to get in Wasilla. The Superior Court agreed.

of living with Medley, in particular the fact that he had been a *de facto* father to N.P.S. for most of the child's life, that the lower court had not abused its discretion in finding good cause to deviate from the ICWA preferences. Here, as one Eklutna tribal council member notes, the Supreme Court narrowly focused on the presence of a *de facto* father and *easier* services for attention deficit disorder *assessment* as sufficient good cause to deviate from ICWA in order to meet a child's emotional needs rather than cultural needs. While specific emotional needs were seemingly considered, there is no indication that cultural needs were sufficiently explored or whether the court's idea of "easier" had to do with economics or a bias regarding what is superior (i.e., what can be provided in the village versus what can be provided in the urban areas). And the concept of the "best interests of the child' including the child's best interest as an Indian child seems lost.

The Alaska Supreme Court recently again affirmed a superior court's decision to allow separate adoptions of Native children by a non-Native single woman and by distant Yup'ik relatives in *L.G. v. State Department of Health and Social Services*, 14 P.3d 946 (Alaska 2000) and *C.L. and C.L. v. P.C.S*, 17 P.3d 769 (Alaska 2001). In these companion cases, the grandparents sought to adopt two sisters whom the DFYS had placed in two different homes. In upholding the superior court's decision, the Supreme Court relied on its previous decisions, described above, in *F.H.* and *N.P.S.* The Court once again rejected the idea that the BIA Guidelines restricted the court from considering bonding as a sufficient reason to go outside the guidelines, and supported the court's evaluation of a "broad range of factors." In its discussion, the Supreme Court accepted the lower court's determinations that close family relationship was less important in determining the best adoptive placement for the children than the children's existing bonds with the adoptive parents, their desire to be adopted by that person, the symptoms of separation anxiety, multiple past placements and "the grandparents misunderstanding of the harm done to J.G. by exposure to her mother and alcohol" while she was living with her grandparents.

The manner in which these factors are weighed in state court emphasizes the importance of the jurisdictional cases that now will make it easier for villages to take over child welfare cases; many of the judgments made in state court might be handled very differently in tribal court. Again, as analyzed by one tribal council member, "the Supreme Court claimed to support a broad range of factors placing less importance on close family relationships (tribal) and more on (post-removal) multiple placements and bonds. One excuse was '*grandparents misunderstanding of the harm done by exposure to her mother and alcohol.*' There is no indication that the court considered the state's misunderstanding of overall harm to the family caused by western assimilation efforts and devaluing of Native peoples and culture as a root to alcohol use in order to allow healing and restoration. There is no indication that the court considered the individual impact adoption outside the culture has had on Native people already. There is no indication that the court considered other cultural connections as a condition of adoption."

The Minnesota Supreme Court in 1994 took a very different approach in reversing a lower court ruling placing three children in a non-Indian adoptive home on the basis of expert testimony regarding their strong emotional need for permanence (*Matter of Custody of S.E.G.*, 521 N.W.2d 357, 364 (Minn. 1994). The Minnesota Supreme Court noted differences between native extended family and non-native nuclear family conceptions of "permanence" in ruling that there was not sufficient

cause to deviate from ICWA's clear preference for keeping Indian children within their tribal community. Id at 365-66. Similarly in *In re the Adoption of M.T.S., a Minor,* 489 N.W.2d 285 (Minn. App. 1992), the Minnesota Court of Appeals held that the placement preferences under ICWA preempted Minnesota's best interests of the child standard (*id.* at 287). The fact that separation of an Indian child from a non-Indian foster family would be initially painful to the child was not good cause to defeat ICWA's presumption that an Indian child's best interests are served by placement with extended family (*id*. at 288).

Intervention and Notice. Alaska's CINA rules, effective in 1987, govern child welfare procedure under Alaska Statute 47.10.010, which largely mirrors ICWA and the 1979 BIA guidelines to the federal act. Under ICWA, an Indian child's tribe has the right to intervene in child custody proceedings in state court.[24] In Alaska, where the courts have not, until now, recognized tribal jurisdiction over child custody cases, intervention in state proceedings has been the primary way for Native villages to protect their interests in child custody matters in state court.

ICWA's requirements that Indian parents and tribes be notified of involuntary child custody proceedings are detailed and explicit. The state must notify an Indian child's parents and tribe or tribes before any involuntary proceeding to terminate parental rights is heard in state court (25 U.S.C. sec. 1912 (a), CINA Rule 7(e)). The notice must be by registered mail with return receipt requested (*id.*). If the identity or location of the parent or tribe cannot be determined, notice must be provided to the Secretary of Interior (*id.*). No proceeding terminating parental rights may be held until at least 10 days after the notice is provided. Id. The parties must be given an additional 20 days to prepare upon request (25 U.S.C. sec.1912 (a), CINA Rule 15(b)). A parent or tribe may petition the court to invalidate a termination of parental rights is the action violated certain ICWA provisions, including notice requirements (25 U.S.C. sec. 1914).

However, the Act is unclear regarding whether this tribal right to intervention extends to adoptions and other voluntary child placements. While the 1911(c) provision granting tribes a right to intervention in any child custody proceeding makes no distinction between voluntary and involuntary placements, tribal notice of the right to intervene is only explicitly required for involuntary proceedings.[25] This ambiguity has subjected the statute to two opposing interpretations: (1) If Congress had intended a tribal right to intervention in voluntary proceedings, it would have included a right to notice in such proceedings; and (2) Congress, through section 1911 (c), gave tribes a right to intervention in any child custody proceeding and the right to intervention in voluntary placements is as critical to the Act's purpose of helping tribes preserve their identity as the right to intervention in involuntary proceedings.[26] Some commentators have found additional support for an implicit right to

[24] 25 U.S.C. sec. 1911 (c) provides: "In any state court proceedings for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have the right to intervene at any point in the proceeding."

[25] 25 U.S.C. sec. 1912 (a) provides: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe…." There is no similar notice provision for voluntary proceedings.

[26] These two positions are expressed in the majority and dissenting opinions in *Catholic Social Services, Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989).

intervention in section 1914, which allows tribes to bring an action to invalidate a voluntary termination of parental rights that did not comply with ICWA's procedural protections.[27] While the BIA guidelines state that there is no right to tribal notice or intervention in voluntary child custody matters because of the parents' interests in confidentiality (44 Fed.Reg. at 67586), these guidelines do not carry the force of law.

In Alaska, the Supreme Court in *Matter of J.R.S.*, 690 P.2d 10 (Alaska 1984) found a tribal right to intervention in voluntary proceedings grounded in state, not federal, law. In that case, the court held that a tribe must be allowed to intervene in adoption proceedings under Alaska Civil Rule 24 if it has a substantial interest in the proceedings and intervention is necessary to protect that interest, even though ICWA does not grant tribes this right of intervention (*id.* at 15). The court found support for this position in the spirit, rather than the words, of ICWA. "If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly implicated," Judge Rabinowitz wrote for the majority (*id.*).[28]

However, the Alaska Supreme Court's position is that an Indian child's tribe is not entitled under ICWA to notice of a proceeding for voluntary termination of parental rights (*Catholic Social Services, Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), cert. den. 495 U.S. 948, 110 S. Ct. 2208). Relying on legislative history and the nonbinding BIA interpretive guidelines, the Court held in a brief opinion that Congress explicitly granted intervention rights to tribes in involuntary termination proceedings but did not do so in voluntary termination proceedings, and therefore notice is not required in the latter case (*id.* at 1160).

Justice Rabinowitz, in a more lengthy dissent reminiscent of his majority opinion in *Matter of J.R.S.*, argued that a tribe's right to notice in voluntary proceedings to terminate parental rights is implicit in the fundamental rights of tribes under ICWA to intervene at any point in any state child custody proceeding regardless of the parents' consent (*id.* at 1162, citing 25 U.S.C. 1911 (c)). To deny tribes this right, Rabinowitz argued, "is to allow parents to defeat the Congressional scheme by usurping the tribe's equal interest in the Indian child" (*id.*). This interest is rooted in the fundamental purpose of ICWA, which, he argues, "is no less than to help Indian tribes preserve their identity" (*id.*).

Standards of Proof. Parents of Indian children are granted procedural protections in termination of parental rights proceedings that are stronger than those applied in CINA cases involving non-Indian children. For example, the state must show by a preponderance of evidence before removing an Indian child from his or her parents that "active efforts" have been made to provide remedial

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[27] Adams, Jill E. "The Indian Child Welfare Act of 1978: Protecting Tribal Interests in a Land of Individual Rights." 19 *American Indian Law Review* 301, 332 (1994) (citing 25 U.S.C. sec. 1914).

[28] A California appeals court took a similar in *In Re baby Girl A,* 282 Cal.Rptr. 105 (Cal. App. 4 Dist. 1991). In that case, an Indian mother attempted to have her child adopted by a non-Indian couple and relinquished her own tribal membership when the tribe sought to intervene. The appeals court held that the lower court erred in denying the tribe's right to intervene in the adoption proceeding, While ICWA does not expressly permit such intervention, the court held that the tribe's interests were sufficient to allow them to join the proceeding under state law (Calif. Code of Civil Proc. 387).

service and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts have been unsuccessful (25 U.S.C. sec.1912(d) (1988); CINA Rules 17(c)(2) and 18(c)(2); see also *A.M. v. State*, 891 P.2d 815, 826 (Alaska 1995)). In contrast, only "reasonable efforts" are required for non-Indian children (42 U.S.C. sec.671(a)(15), CINA Rule 15(g)). As interpreted by Alaska courts, incarceration of the custodial parent, doubtful prospects for rehabilitation or poor motivation on the part of the parent *before* remedial efforts have been undertaken do not relieve the state of this duty (*A.M. v. State* at 827; overruled on other grounds in *Matter of S.A.*, 912 P.2d 1235 (1996)). However, once active remedial efforts have been undertaken, a parent's resistance to or rejection of assistance may be considered in determining whether additional efforts are required (*Matter of J.W.*, 912 P.2d 604, 610 (Alaska 1996); see also *K.N. v. State*, 856 P.2d 468 (Alaska 1993)). For example, the state was relieved of its responsibility to continue active efforts after a father with sole custody of his Indian children refused to follow his treatment plan or to cooperate in setting up an alternative plan, denied having mental problems and resisted DFYS intervention (*K.N. v. State* at 477). The court's decision does not address what the nature of the treatment plan was, how it was created, or on what basis DFYS determined that the father was "resistant." To the extent that DFYS dictated the plan to the father without consultation, did not provide culturally appropriate treatment or misread cultural cues, including different styles of communication, the fact that the father was "resistant" could have been merely a conclusion based on misunderstanding and lack of knowledge.

The 1979 BIA guidelines specify that the State's "active efforts" should take into account "the prevailing social and cultural conditions and way of life of the Indian child's tribe" and should involve the resources of the extended family, tribe, and Indian social service agencies and caregivers (44 Fed. Rge.67584 at 67592 (1979)). While these cultural issues may play a role in remedial efforts by DFYS, they are generally not addressed in Alaska Supreme Court decision regarding the adequacy of the State's "active efforts" to preserve Indian families.

ICWA also provides that: "No foster care placement may be ordered…in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in *serious emotional or physical damage* to the child" (25 U.S.C. sec.1912(e), CINA rule 17 (c)(2); emphasis added). The type of evidence relied on for this finding varies. In a case involving three Indian children, the Alaska Supreme Court affirmed removal to foster care on the basis of expert testimony that serious emotional or physical damage was likely due to fighting, inappropriate discipline, one child's threats of suicide, and failure by the Indian mother and stepfather to address their children's emotional and other special needs (*A.H. v. State*, 779 P.2d 1229, 1233 (Alaska 1989)). The Indian children in that case had been placed with their mother after their father had been arrested for sexual abuse of the children (*id.* at 1230). In a subsequent case, the Court held that a mother's persistent substance abuse and failure to take responsibility for her Indian child since birth was not sufficient basis for removal to foster care in the absence of explicit findings by the Superior Court on the likelihood of future harm (*D.H. v. State*, 929 P.2d 650, 656 (Alaska 1996)).

The standard of proof is higher in termination, as opposed to temporary placement proceedings. Where parents' rights are to be terminated, the state must show *beyond a reasonable doubt* that

custody of a child by the parent or the Indian custodian is likely to result in emotional or physical damage to the child (25 U.S.C. sec.1912(f), CINA rule 18 (c)(2); emphasis added). Expert testimony on this issue should address two questions: (1) Will parental conduct cause serious physical or emotional harm to the child? And (2) Can the parent be persuaded to change such damaging conduct? (*Matter of Parental Rights of T.O.*, 759 P.2d 1308, 1310 (Alaska 1988), citing BIA guidelines, 44 Fed. Reg. at 67593). It is not necessary that one qualified expert possess the knowledge necessary to answer both prongs; rather, the testimony of witnesses may be combined (*id.* at 1310-11).

BIA guidelines on expert witnesses specify that the behavior of the parent or custodian will often need to be placed in the context of the tribal culture and child rearing practices to determine if it is likely to cause serious emotional harm.[29] The broader cultural context of parental behavior is rarely raised in appellate opinions. However, in response to a claim that witnesses should not have been qualified as experts under 25 U.S.C. sec. 1912(f) because they lacked knowledge of Native culture, the Supreme Court affirmed the qualification of seven witnesses where two had knowledge of Native culture, one as a social worker who was a member of the relevant Native community and had Native children and the other as a counselor with 20 years experience teaching and counseling Native Alaskans (*id.* at 1309).

For a finding of likely emotional harm in a termination proceeding, it is not sufficient to show that there is a willing custodian other than the parent who would do a better job (*A.M. v. State* at 826, citing 44 Fed.Reg at 67593). However, evidence relating to an available foster care situation may be relevant. For example, the close ties two Indian children developed with their foster mother, and the effects that prolonged separation due to the father's incarceration would likely have on the children's emotional health if they were eventually returned to him, may be considered as evidence relevant to the issue of likely emotional harm (*id.* at 826).

The "Existing Indian Family" Exception. Alaska has declined to follow several other states that have held that ICWA does not apply to the adoption of an Indian child who had never been part of an Indian family.[30] The reasoning behind those state decisions is that Congress intended to protect Indian families and tribal communities, and that ICWA should not apply to an Indian child who has never been part of such a family or community. This view is hostile to tribal interests, as it would, for example, remove any tribal control over an Indian born to a non-Indian mother and Indian father where the mother lived in a non-Indian community and did not have contact with the father or tribe.[31]

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[29] The BIA guidelines provide that the removal of a child should be based on testimony from one or more qualified experts. Persons with the following characteristics are most likely to be qualified: (i) a member of the child's tribe who is recognized in the community as knowledgeable in family-related tribal customs; (ii) a lay expert witness with substantial experience in the delivery of child and family services to Indians and extensive knowledge of cultural standards and childrearing practices within the tribe; (iii) a professional person with substantial education and experience in the area of his or her specialty. 44 Fed.Reg. at 67593.

[30] See, for example, *In re Adoption of Baby Boy L*, 643 P.2d 168 (Kan.1982) and *In the Matter of the Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

[31] Hollinger, Joan Heifetz. (1989). "Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children." 66 *University of Detroit Law Review* 451, 477.

The Alaska Supreme Court rejected this judicially created exception in a case in which a non-Indian mother had served as a surrogate parent for her sister and her sister's Indian husband, who could not have children (*In the Matter of the Adoption of T.N.F., a Minor*, 781 P.2d 973 (Alaska 1989), cert. Den. 494 U.S. 1030, 110 S.Ct. 1480). The woman, who was impregnated with the Indian husband's sperm, relinquished custody of the child to her sister and the biological father when the baby was born. Several years later, the biological mother filed a motion to vacate the adoption decree, arguing the ICWA applied and that her consent was invalid under 25 U.S.C. sec.1913(a) because it had not been recorded before a judge (*id.* at 974). The adoptive parents relied on "existing Indian family" exceptions in other states to urge the court to refuse to apply ICWA because doing so would disrupt an Indian family, not preserve one. That is, by adhering to the procedural requirements of ICWA, the court would be removing the child from her Indian family and placing her in a non-Indian home.

While recognizing that Congress probably did not have surrogate parenthood in mind when it passed ICWA, the court declined to create an exception to the plain language of the Act. "Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in ICWA" (*id.* at 977). The court went on to say that, "state courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities" (*id.* at 977-978). However, the mother's action to vacate the adoption was barred by a state one-year statute of limitations and the child remained with her adoptive parents (*id.* at 982).

This outline of cases moves us into an analysis of shared jurisdiction and authority on the state level. The ethnographic information relating to ICWA and the relationship between regional corporations and local village, political representation, leads to an understanding of what role ICWA has played in the relationship between regional corporations and local villages. In particular, we compare the impact of regional services when offered through a village organization as opposed to a regional organization.

Ethnographic analysis of ICWA implementation in Alaska

This history is important in considering the ways in which and to a certain extent, whether or not villages handle their own cases. Though in the strictest legal sense, it is federal actions and decisions, not state cases, that should have the most impact for tribes, given the unique relationship between tribes and the federal government, a history of state practice does, as a practical matter, shape the parameters and possibilities of tribal court actions, both in terms of what tribal courts believe they can accomplish and control in the face of state intervention *and* in real limitations placed on them by previous state level case law. With the current legal configuration of concurrent jurisdiction over Indian child welfare cases in Alaska, however, Alaska Supreme Court actions have created a more reciprocal duty in transferring cases. This potentially may have a major impact on

tribes, in that they now have the choice to handle more cases without fighting for the right to do so first, and also without feeling like they need to wait for permission.

Villages have had all kinds of responses to previous state actions: some have actively sought reassumption (Barrow and Chevak), while others have argued that they do not need to reassume because they never lost their sovereignty in the first place; others have petitions pending, and still others persist quietly in managing their own families with or without state knowledge or help. Though they may have such impact, we caution against reading changes in state law and policy regarding recognition of tribes and tribal rights in child welfare as driving choices on the village level, given the myriad social, political, and legal pressures motivating communities in any given situation. Or, put another way, the reasons behind any particular tribal decision should not be reduced to legal constraints placed by the state; Native communities continue to defy external categorization to meet local needs. And indeed, we found that interviewees did not feel that external case law changed the way they operated at the village level; rather, they noticed changes in state agency behavior as a result of the changes in law. They noted that attitudes of state workers were sometimes very bad; "you can just tell that they think tribes are idiots." However, they did notice a slow change and growing respect for tribes in spite of continuing misunderstandings and lack of communication. Some felt that, while the state seemed more aware of needing to get the tribe involved, ICWA is still better known in the villages than the hubs, and that state courts do not know what to do with a tribal voice when it is heard in the courtroom. And some of the interviewees still express concern, similar to that in the Oversight Hearings in 1987, about the "race to the courthouse" to take jurisdiction over children's cases.

With that caution, this section addresses the way state and federal decisions have an impact on the way villages handle cases in tribal courts, providing an analysis of this shared jurisdiction and authority in practice. To do so, this section collates the perspectives of those individuals, working on behalf of or for tribes in the Interior and Southcentral regions of Alaska, on the process itself in their own communities, as well as considering a composite case to illustrate what issues arise in tribal court and how they are addressed. As described above, we interviewed tribal staff, regional non-profit organization staff, ECAC staff, tribal council members, state attorneys general and tribal judges. Our list of questions is attached to this document. All interviews were coded for confidentiality, the Native Village of Eklutna created the sample case for discussion with the tribal judges, and the villages had an opportunity to comment on the findings before publication.

Child Services in Interior Alaska

The Interior region of Alaska, spread across approximately 235,000 square miles of territory, is home to 43 Athabascan villages, divided roughly into the cultural and linguistic groupings of Deg Hi'tan, Koyukon, Han, Lower Tanana, and Gw'ichin. This broad region stretches across much of Interior Alaska, encompassing within its villages a vast array of historical decision-making practices and organizational structures. Incorporated formally in 1971 after ANCSA, Tanana Chiefs Conference, Inc. (TCC) is a regional consortium representing 37 federally recognized Indian Tribes and 5 non-

recognized villages/Native groups situated in Interior Alaska, to address the governmental, health, and social needs of more than 15,000 Alaska Native people. As a consortium, TCC represents the tribes throughout the Interior. It draws its direction and authority from the tribes themselves through resolutions from the tribal councils. It is important to stress here that the Interior tribes maintain their inherent authority as sovereign governments and that differences among them, in both their choices and actions, may vary broadly, depending on local needs and priorities.

According to regional leaders, TCC is the successor to historical meetings between locally based chiefs from throughout the interior of Alaska who met periodically during times of trade to address problems and concerns facing Athabascans throughout the region. Historically, the Chiefs met at the village of Tanana, at the confluence of the Tanana and Yukon Rivers, or "Nuchalawoyyah." TCC, as a regional consortium, derives from a regional governing assembly, operating under the power and influence of situational and local leaders. Two recorded meetings speak to the regionally based discussions to preserve the maintenance of local autonomy. In July 1915, the original Tanana Chiefs Conference met in Fairbanks with the Territory of Alaska's delegate to

Congress, Judge James Wickersham, to discuss issues of land tenure and standard of living problems, which were beginning to present problems for Interior Alaska's Athabascan Indians. Again in 1962, the chiefs met at Tanana to consider a region-wide response to growing problems. Congregating under the Athabascan principle, Dena' Nena' Henash ("Our Land Speaks"), the group met to address the particular problems Alaska's new statehood brought to their land. Expanding on its historic beginnings as a conference of native leaders from the region, TCC currently works on behalf of member villages by contracting with federal and state governments. According to TCC staff, TCC provides services ranging from technical expertise, social programming administration under self-determination contracts, as well as the provision of health care. Not all villages authorize TCC to work on their behalf choosing instead to conduct their own business, though they may still be a member of the consortium.

On issues of child welfare, members of Interior villages work with TCC, the regional non-profit corporation and the Northern Office of the Division of Family and Youth Services (DFYS). Member villages work to varying degrees with the family services department of TCC to develop tribal court structures and procedures, and to initiate foster care provisions and adoptions. Several departments work together to serve Interior villages' needs on child welfare issues, including the legal department, family services, and the tribal government department. While Family Services deals most directly with reports of harm to children, working with families in need, training Tribal Family and Youth Specialists (TFYS) in the villages, and providing foster care and adoption services, the Legal and Tribal Government Departments offer crucial support in these fields. For example, one attorney on staff at TCC provides legal counsel for tribal governments choosing to intervene on behalf of a child, while Tribal Government provides background infrastructure, training, and support to tribal councils throughout the region to develop their own methods of dealing with child welfare issues locally, including tribal court development.

Perhaps TCC's most significant effort towards the goal of maintaining local control in child welfare cases is in their approach of providing for tribal court development in its current form with

the creation and support of the TFYS program. Dispute resolution and other forms of decision-making, such as village movement, subsistence and land tenure concerns, and quality of life issues were historically dealt with through recognized chiefs and leaders in each community. Coming from an oral tradition and an absence of written codes, these chiefs handled situations as they arose among their people. Thus, the idea of tribal forums for decision-making should not be considered recent, but stemming from a long history of orally-based, locally significant, situational leadership and problem solving. Tribal courts, as they are currently being structured though written codes and procedures throughout Interior Alaska, represent a continuation of this history in a different form. The tribes of the Interior region appear to be pursuing the development of formalized tribal courts more so than the other regions of the state, partly due to TCC's efforts. Additionally, the TFYS program provides local, resident expertise in responding to child welfare issues and a direct link to regional expertise and services for the community. TFYSs are trained on a semiannual basis in Fairbanks; training programs include attention to the legal parameters of native child welfare in Alaska, tribal court development, and social service programming, such as educational information on substance abuse, domestic violence, and healing. TCC's Family Services Department, its member villages, and other Interior villages that do not contract through TCC for their family services issues also work in conjunction with the DFYS. In Fairbanks, it is unclear statistically how many children the Northern Office deals with from Interior communities, since their data retrieval systems were not able to provide, upon request, breakdowns by village or cultural group, such as Athabascan.

Tanana Native Council and Tribal Court Activity

These regional services stand in conjunction with the local responses to child welfare needs offered through the villages of the Interior. For example, the village of Tanana, located on the confluence of the Yukon and Tanana Rivers approximately 300 air miles west of Fairbanks in the Tanana Flats area, and the historic meeting site for the original Tanana Chiefs Conference, maintains an active program with regards to children in need of aid within the community itself, throughout Alaska, and in other states. This Koyukon Athabascan village of approximately 350 people formalized an active tribal court in 1983, which deals primarily with child welfare cases, though they also, on occasion, hear cases involving juvenile issues and other disputes. The tribal council and court of Tanana maintain minimal ties with TCC, primarily enlisting TCC in an advocacy role, while preferring to pursue ICWA interventions on their own. According to the "Native Village of Tanana Codification of Ordinances for the Benefit of Minor Tribal Members," it is the policy of the Tanana Native Council to intervene in every case involving one of their children of which they receive notice. The tribal court handles child welfare cases through its own trained ICWA social worker, tribal counselors, and tribal court judges. These individuals are members of the community who reside in the village although they sometimes work with outside legal specialists.

The Tanana Tribal Court recently underwent a reformulation in its structure. Originally, the court was made up of seven judges, who served in this capacity as part of their responsibilities as elected council members. Additionally, two elders sat as judges to contribute their skills as mediators

and their knowledge about traditional practices of child-rearing and decision-making. The Court generally meets once a month to hear children's cases, including reports of harm, foster care placement, adoptions, name changes, custody disputes or any other issue having to do with a child's well-being. They also meet on an emergency basis as the need arises. In 2001, the Native Council voted to change the court to an elected body separate from the Council itself, consisting of four judges. Currently, three of those judges are elders, and the fourth is another community member. A clerk, who records the proceedings and acts as an administrator for the court, also attends the court sessions.

In child welfare cases, the tribal court operates under the Native Village of Tanana Codification of Ordinances for the Benefit of Minor Tribal Members, a written description of the priorities and policies driving child welfare concerns in Tanana. It is divided into sections addressing all aspects of child welfare matters, including jurisdiction, removal and placement procedures, and professional personnel responsible for ensuring child welfare for the community.

With reference to jurisdictional issues discussed earlier, the tribe makes a strong statement about their rights and responsibilities towards children of the tribe. According to this Code, "It is the determination of the Tanana Tribal Council that PL 83-280 did not extinguish or take away the jurisdiction of the tribe over child custody proceedings. The Tribe has continuously exercised jurisdiction over the welfare of children of the Tribe since time immemorial." Further, the tribal council determined that PL 83-280 did authorize concurrent jurisdiction with the tribe in child welfare matters, though once the tribe has exercised its jurisdiction, that jurisdiction becomes exclusive. Finally, the Code sets out the order of legal precedence to be followed by the court: first, the "properly authorized and enacted codes, ordinances, court rules, and regulations of the Native Village of Tanana," second, the "traditional and customary law of the Native Village of Tanana," and finally, "such other tribal, federal, and/or state laws which the Court may determine appropriate and prudent to apply."

Though there is much room for individual priorities on a case-by-case basis because cases may differ greatly from one to the next, the Court itself strongly prioritizes keeping children in the community and with family to maintain those connections. When placing children in foster homes, the Code outlines the priorities in descending order, as placement with family members in or out of the village, extended family in the village, tribal members with close ties to the family in the village, tribal foster homes in the village, extended family outside of the village, tribal members with close ties to the family outside of the village, tribal foster homes outside of the village, other tribal members outside of the village, other Alaska Native families, and finally other community members.

The Native Council employs an ICWA agent, responsible to investigate reports of harm, provide for temporary custody if the child is in danger, and to work with families on remedial and rehabilitative services for family reunification, and the development of case plans for the child and family. This individual is primarily responsible for all child welfare cases, and keeping the Court informed of progress and problems with cases as they attempt to act in the child's best interests. Additionally, the Code sets out the terms for the Child Protection Team (CPT). The CPT consists of seven members representing a cross section of the tribe when possible, appointed by the council to serve for two years. Members may be a tribal social service worker, a tribal elder, an educator, a health care

provider, a mental health provider, a parent, or a general tribal member. The team must be available for general support to the ICWA worker and court in the evaluation and resolution of cases, in the recruitment and training of foster parents in the community, and stand as positive role models more generally.

The systems in place in Interior Alaska find parallels in other regions of Alaska such as Southcentral, where some villages also handle their own cases, and the non-profit corporation provides services on a regional basis. However, as is evident from the above discussion of Alaska state case law, the Interior villages have been very active in testing the state court application of ICWA through litigation. On the other hand, we will now turn to a more detailed example from Southcentral Alaska and the Native Village of Eklutna to consider their choices and priorities in child welfare.

Child Services in Southcentral Alaska

Alaska's largest city exists on traditional Eklutna land, which stretches into the Matanuska Valley and down to the Kenai Peninsula. As such, though Anchorage is in Eklutna, the Native Village of Eklutna is within the municipal boundaries of Anchorage near Chugiak. Home of the Athabascan Denaina, Eklutna's land ranges from the Talkeetna Mountains to Kenai Peninsula. The 230 tribal members sometimes live and work in Anchorage, conduct subsistence activities on and near the Matanuska River and Cook Inlet. The Native Village of Eklutna (NVE) is the official host for Native meetings and gatherings in Anchorage. Anchorage is also home to over 29,000 other Alaska Natives and Native Americans, who come from all over the state to live and work in Alaska's largest city.

Several regional and local organizations provide services relating to child services (either directly or indirectly) to Native families in need in Anchorage. Some of these are primarily Native organizations, while others serve the entire community, and Alaska Natives within that larger group. Thus, various suborganizations of Catholic Social Services, such as Brother Francis Shelter, Homeward Bound and Bean's Café serve Alaska Native clients. Covenant House for runaway teens, and Claire House for pregnant substance-abusing women etc., also serve a mixed population that includes Alaska Natives when they are part of those population groups.

Within Anchorage Native entities, Cook Inlet Tribal Council, Inc. (CITC), Cook Inlet Housing Authority and Dena A Coy provide services to Alaska Native families. The Alaska Native Justice Center (ANJC) provides advocacy and referral services (at different times, CITC and the ANJC were also very involved in assisting parents in ICWA cases). Because people from all over the state come to Anchorage, often the village link between Anchorage residents and their home village is not as strong as it is in other parts of the state. In Bethel or Fairbanks, for example, people travel back and forth between their home villages and the hub much more frequently, and also move their place of residence between the two more frequently. Of course the Alaska Native Medical Center also brings many people to Anchorage for short or long stays, depending on the nature of their medical problem.

The large, statewide Native population of Anchorage poses problems when child welfare issues arise. Tribal representatives are far away in the village, their regional non-profits, which might

represent them in hub cities, are also far away, and cannot effectively represent tribes at the Anchorage court house. This problem is worsened by the fact that some child welfare work occurs informally, when parties are together for other cases, or during non-court time. As mentioned above, CITC and ANJC have, in the past, attempted to fulfill the need for tribal representation in Anchorage courts; however, neither organization had sufficient personnel depth to supply the needs of tribes from around the state. As a result, the Anchorage courts are less likely to hear a tribal voice in ICWA cases (even where telephonic participation occurs, there are often problems connecting with the appropriate individuals, cases get delayed, or the notice of hearing has not been served). In addition, the regional non-profit entities are sometimes viewed as bureaucratic and too separate from village life and experience; several interviewees expressed both distrust and disappointment at the level of service provided by the regional non-profits, and regret that there was little effective collaboration between them. (On the other hand, there seemed to be quite a lot of cooperation between the regional health and the village organizations).

In order to remedy this deficit of Native participation in Indian child welfare in Anchorage and to address its jurisdictional rights to handle ICWA cases, the Native Village of Eklutna applied for and received an Administration for Native Americans grant to establish the Eklutna Child Advocacy Center (ECAC). This department of the tribal government of Eklutna, serving both the tribal court for Eklutna and representing tribes in the state courts, provides representation of tribes from all over the state in their cases in Anchorage. Its goal is to be sure that all Native children appearing in Anchorage courts have a tribal voice to protect the interests of Native children as members of their villages. It also provides intermediary services for families who have not yet been formally referred to DFYS. ECAC's staff includes counselors and social workers, court advocates and administrative staff. Interviewees indicate that they feel they are offering valuable services to tribal members and to other Alaska Natives caught in the court system. They feel that tribal members know where to come for help, that they are more comfortable coming to the Native owned and operated ECAC and that they receive excellent help. Furthermore, ECAC has handled a large client population that either would not be served by DFYS or would be caught in a court process that did not solve the problems presented by their cases.

For example, several interviewees pointed out that termination of parental rights, a common and in fact necessary occurrence in state court, is not consistent with Native family practices. Termination of parental rights is not just about losing your parents, explained one tribal member, it is also about losing your aunts and uncles, cousins and all your other relatives. One interviewee indicated that a person could be raised by their grandparents until they were 21 years old, and they would still know who their parents were.

The ECAC's mission is to keep Native families out of DFYS court processes and to support their quick resolution of cases when they are involved in the state court process. This involves working with state personnel as well as strengthening tribal court processes to handle the cases instead. For state court purposes, the ECAC serves as an ICWA resource center, interacting with state social workers, assistant attorneys general, public defenders, guardians ad litem, child welfare judges and other child welfare professionals. The ECAC also supports NVE's tribal court

development, coordinating training for tribal judges, facilitating code revision and consulting on cases referred by tribal members. Altogether, the ECAC has handled over 500 cases, representing tribes in state court cases, providing social services for Native families with children in state custody (informal advocacy with DFYS, home visits, referrals to statewide social service agencies, information and consultation, transportation to and from services, supervised visitation, case progress monitoring, crisis counseling and intervention and family support) and staffing tribal court cases.

Interviewees felt that Eklutna had stepped into the breach left by Anchorage's large Native population, lack of statewide services, and problematic relationship with DFYS. They were proud that Eklutna had created a department where Native clients could feel safe and could improve their situations. They have a vision of expanding the services so that a family referred by the tribal court, state court, or DFYS would receive all the types of counseling, parenting, anger management, or whatever program they might need in the same place. They are also planning a group foster home where Native parents would live full-time, and where older Native children could work toward emancipation in a comfortable and familiar setting. The autonomy and independence represented by the ECAC was very important to the interviewees. The good work performed there reinforced their beliefs that if the villages could assume responsibility for more of their cases, that child welfare would work better.

Interviewees expressed some frustration at the dual role of ECAC; because it served both the state court and the tribal court, staff sometimes had difficulty adjusting between state protocol and the tribal system. For example, one tribal member and employee, who lives with tribal traditions pertaining to child welfare policies, thinks the tribally employed social workers at their ECAC have a tendency to treat tribal cases in too bureaucratic a manner, probably because of their involvement with social work in the state courts and their work with DFYS. Rather than pursuing more traditional mechanisms, the tribal member felt they were focusing on legal and evidentiary rules to the exclusion of traditional concerns and techniques. While local level control would seem to militate against such bureaucratization, these findings reinforce the need to bridge cultural and communication gaps between state and tribal structures as well as to meet needs through the traditional tribal system. However, the dual role of ECAC staff presents a challenge: on the one hand, they must follow the strict evidence rules and formal procedures of cases going through state court, and on the other hand, they must be able to respond to the subtle concerns of village life. Some interviewees worried that staff were placing too high a priority on acting like state social workers and worried that they would not respond to tribal cases appropriately. This is evidence of a persistent effort by tribal members to ensure that traditional methods are appropriately valued at the ECAC.

Thus, ECAC is a village department operating at a regional level as well as at a local tribal level. At the regional level, ECAC maintains a village perspective and outlook that generally facilitates a high comfort level for clients receiving services. Interviewees were unanimous in their dissatisfaction with the relationship with the regional entity in Southcentral Alaska, CITC. One person described CITC as "so much red tape, only interested in filling out reports." Another pointed out that ECAC was able to work with CITC for information sharing, family services and counseling, but that the regional non-profit is more structured like a state agency with its own agenda that does not necessarily

take into consideration what the tribes want. In fact, that tribal member felt that it might be the structure itself that prevented CITC from helping the villages because of all the rules and regulations it had to follow. As one tribal member explained, CITC suffers from high turnover, fragmented service provision and inexperience, problems that also plague DFYS. Thus, ECAC hopes to remedy these problems with its plan to provide holistic services for family counseling, home visits, parenting and other programs. At the local tribal level, ECAC provides support to the child welfare activities of the tribal council and tribal court.

The Native Village of Eklutna Tribal Court Activity

The Native Village of Eklutna has an active tribal council that passed tribal court and children's codes in 1996 and revised them in 1999. The tribal council has seven members, meets at least quarterly to carry on the business of the tribe, revises codes, ordinances, and constitutional provisions, and manages the financial resources and assets of the tribe. Special meetings, committees and consultations occur in conjunction with these quarterly meetings. The tribal staff consists of the CEO, Deputy Executive, Department Managers, program staff, bookkeeper and receptionist. Other individuals perform tribal functions as required and needed by specific grants or other necessities.

Although written codes and ordinances allow otherwise, the tribal court is comprised of the five matriarchs of the village, representing the five main families (accommodating tradition and cultural structure); three are currently active judges and two are alternates. They may serve together or individually to decide cases, but they do not serve as judge for their own families. This "disqualification" is one that is not considered to be traditional. One interviewee described that, in the old days, it was the matriarchs who were responsible for making the very decisions about family members and other relations that are today considered a conflict of interest. As the head of a family, the matriarch would be most knowledgeable about the circumstances and best positioned to make a decision; however, contemporary requirements on tribal courts mandate fairness through objectivity and relative distance. In contrast, one of the judges commented that she thought that her own family would respond better to someone other than herself, because she might be "too easy on them." The tribal judges were unanimous that they would not hear a case involving their own family, but that they would report a family case to ECAC.

Tribal judges act both formally and informally, talking to families before any official action has been taken or making decisions once official action has been taken. They also consult with the ECAC staff on cases involving tribal members. In recent history, other than consultations, the tribal council conducted formal hearings on three children cases before adopting the written tribal court code.

The matriarchs described their involvement with ICWA as ongoing and a part of their lives. Although they all dated their experience from when Eklutna passed its tribal court code in 1997, it was clear that they had all served in traditional capacities or as foster parents for long before that. The Children's Code, revised in 1999, further positioned them to take cases for the Native Village of Eklutna. To date, they have consulted informally with the ECAC on cases they receive either on

referral from DFYS or from tribal members, and they have decided several cases, either individually or in various combinations of the three.

As one tribal member explains, "The Native Village of Eklutna exerts its tribal jurisdiction over its traditional use lands, which include Anchorage and all American Indian and Alaska Native guests found within that jurisdiction, as the federally recognized tribe in the area. Its area encompasses over five million acres of Southcentral Alaska, so they intervene in state court on behalf of all Alaska Natives and American Indians because of their tribal right to do so." The NVE tribal court code provides: "Since time immemorial, the Athabascan people (Dena-ina), including the Native Village of Eklutna Tribe, have delivered justice, resolved disputes and conflicts, and maintained community peace within our tribal territory through the use of traditional Athabascan laws, customs and practices." The purpose of the code is "to honor and acknowledge our prior customs, history, traditions and experiences for the purpose of preserving, strengthening and continuing the NVETC (Native Village of Eklutna Tribal Court) into the future. The NVETC shall continue to resolve conflicts and disputes and enforce tribal laws through the use of cultural traditions, customary and traditional values, and written laws such as codes and ordinances, to ensure the efficient and fair administration of justice." Eklutna finds its authority in its inherent sovereignty as expressed through the tribal council, constitution, bylaws, ordinances and codes.

The tribe asserts jurisdiction over all cases of a civil, domestic and juvenile nature governed by written Tribal law and unwritten Tribal custom in the following territory: the land and waters constituting the Indian Country of Eklutna Tribe as defined by federal law. Such lands and waters traditionally used by Eklutna Tribe shall also include all lands withdrawn for selection by Eklutna Inc. under the Alaska Land Claims Settlement Act, and all lands within the traditional lands of the Eklutna, including those lands upon which there has been the issuance of a patent or unrestricted fee title. Personal jurisdiction covers enrolled members of the NVE Tribe, persons eligible for membership in the NVE Tribe, non member Natives who are members of any tribe other than the NVE Tribe and who are living in the territorial jurisdiction, any other persons residing within or traveling through the territorial jurisdiction of the NVE Tribe consistent with federal law, or any person consenting to the jurisdiction of the NVE Tribe. The code also reserves specific jurisdiction over any historical and cultural sites within the traditional tribal area. These code sections highlight how irrelevant the tribe finds state and federal case law: the assertion of territorial jurisdiction over ANCSA land in the aftermath of the Venetie case, which concluded that ANCSA lands were not Indian Country, and therefore not subject to the jurisdiction of tribal courts demonstrates the autonomy of villages. Indeed, the Native Village of Eklutna has taken the position that it does not need to petition for reassumption of jurisdiction because it is not an IRA village, and therefore never gave up any of its inherent sovereignty.

The tribal court makes decisions based on the tribal Children's Code. In an effort to provide a recognizable mechanism to work with western culture, NVE developed a written guideline and adapted court structure. Even the written laws and rules of NVE give high credence to tradition and culture as part of its law, whether written or unwritten. The tribal court only hears children cases

under the Children's Code as guide and retains the use of traditional practice and culture. It is anticipated that the codes may well be an evolving document.

The Children's Code provides for exclusive jurisdiction over child welfare cases. Child welfare cases are defined as cases in which a child lacks a responsible adult to provide for the physical, medical, emotional or supervisory needs of the child, which is likely to result in serious harm of the child, physical injury which was not accidental and bears substantial risk of being injured again, lacks adequate nutrition, clothing, shelter, medical care or supervision, likely to cause serious harm to the child, has been subjected to "indecent sexual activities" or as defined by new law regarding alcohol and substance abuse, federal law or traditional tribal law. Although "extended family member" is defined as the traditional law or custom of the child's tribe, the code also includes grandparents, aunts and uncles, siblings, sibling-in-law, niece or nephew, first or second cousin or step-parent in the absence of traditional law. The code includes separate sections for activity in state court and activity in tribal court. Regarding custody decisions, the tribal children's code takes similar issues into consideration as were described above in the case law discussion, including the child's preference, the love and affection between the child and the placement, and the length of time the child has lived in a stable environment, but specifically references what will best allow the child to become a productive member of the tribe and society, and how to best foster an awareness of the child's cultural heritage and identity. Although the terms might be the same, there is a notable contrast in the way these terms are used and valued as described in the previous analysis of case law and the following discussion of the sample tribal court case.

Tribal Court Case and Discussion

The sample case discussed by the NVE tribal court judges is a composite case constructed by ECAC staff:

> Susan and John are a married couple who have been together for ten years. They live in Anchorage in a modest house. John gets occasional odd jobs, but his drinking problem and temper usually result in his getting fired after only a few weeks. Susan works regularly, but sometimes she misses work after fights with John in the household. No one has ever contacted the police over the fights.
>
> The couple has three children: John Jr., who is nine, Maijon who is eight and little Ruth, who is six. All three children are enrolled in the local elementary school, where Ruth in particular seems to be having problems adjusting. She is withdrawn and does not interact with her fellow students. She has no knowledge of her numbers or colors, and cannot even read letters. The older brother and sister, while no problem, are also not up to class level.
>
> Susan is a member of Eklutna tribe, and John is Kiowa, but he has no contact with his extended family or tribe. He is well integrated with Susan's extended family, although they don't like him because he seems to be mistreating Susan.
>
> Recently Susan's sister Ilene, who babysits the children after school while Susan works (she does not want to inhibit John in his job searches or while he is working by saddling him with the children), has noticed some bruises on the children,

> which do not seem to come from normal play. The children refuse to talk about them, and just answer "I don't know" to her questions about where they have gotten them. Ilene is concerned that Susan is getting more and more depressed about the fights in the home, and struggling to pay the bills on her salary alone. She has made a referral to the tribal court, to see if they can help in the situation. Ilene has offered to keep the children for up to six months in order to give the tribe time to work things out. She lives right near Susan and John's house, so the children would remain in the neighborhood with friends and in their same school.

Three tribal judges discussed the above scenario. Their approach is holistic, looking at the entire situation without isolating any family member. Although their initial impressions varied, they came to a consensus while discussing it. There were several stages to the way in which they considered the case. First, before it went to tribal court, NVE would intervene and refer it to ECAC. They considered that Susan's sister would have to undergo a background check to be sure she is acceptable for taking care of the kids if they were placed with her, but that they would first work with the family without removing the children.

If Ilene were not capable or qualified, then the tribe would have to take custody of the children and find another placement. However, they were adamant that the family would not "just get shoved in front of the court," rather, they would first go to ECAC and work with them to try to solve everyone's problems through counseling for the children and both parents. For example, the staff at ECAC could speak with each of the children and the parents individually so that they could be more forthcoming about what was going on in the home ("so the family wouldn't feel like they had to tell on each other"). They concluded that the father should go to AA or be enrolled in some kind of long-term treatment such as residential treatment for drinking problems. This would require ongoing supervision, in which the ECAC would provide follow-up and report back to judges. The whole idea is to keep the whole family together so they will not be torn apart, but if they do not succeed, there would be another appeal to the tribal judges.

If they do not make any progress, for example if they were not there for a home visit on three occasions, then the judges "would have to be harder on them" when they came to tribal court. One of the judges said that she would ask the father, "Do you want your family with you?" and "What is your problem?" She would ask the mother what she wanted in terms of help in raising her children and how she might improve her child-rearing. She recognized that it would be difficult for her to be too hard on the family because she understood so well what they were experiencing. This is one of the greatest assets of the tribal court, as perceived by all of the interviewees, that the judges really know the people and can look at the whole picture of what is going on with them. As judges, they would order the children and parents to get help and order the children into a home for a six month trial basis to see how it works. The court would review in six months, and ECAC would monitor the situation in between court hearings.

The judges struggled with the problems associated with the bruises and the necessity for teachers or police officers to report it to "authorities." They wanted the tribal court, as an official authority,

to work with the police if necessary. However, this reveals a distrust of outsiders by tribal members, based on their experiences, which is understood in the community.

The judges were very concerned that there be counseling and physical exams for the children, in case there are other problems. One of the judges thought that the children's poor performance in school might be due to organic problems that needed to be addressed. They speculated about why the father might be abusing the children, whether he was drinking because he lacked courage to discipline them, whether he was discouraged because he was not being responsible, whether he threatened the children so that they would not speak about it. On the other hand, other judges thought the school problems would be solved by improving the home situation through counseling. One of the judges thought they should "make school a family affair," and sit down every night for one hour to go over reading and math. She felt that even if the father did not know how to read or do math himself, he could learn with his children.

In considering what is most important in deciding what is best for children, the judges thought that they need their parents first off, and to keep the family together. However, if it is not a healthy environment, then they need to make sure they get nutrients and school. They might try a short period out of home, maintaining contact with the parents.

Upon further discussion, they concluded that since the father has the more serious problem, he should check into a treatment program for a month. They all preferred that the father voluntarily admit himself to an alcohol program because he would be more successful that way. During this time the family would be involved in the recovery phase, and the mother and children would also be getting counseling. The tribal judges would be interested in helping the mother with expanding her choices as well, perhaps looking at further schooling and getting a better job in addition to assistance with parenting. After a month, he would come home and they would take a look at the whole situation to see how it works. If he decided to get help and do something about it, maybe that would change the environment.

The consensus of the judges was that if dad and mom get help and the children participate in dad's recovery, everything else will fall into place—so all aspects of the sample tribal court case were part of the same problem and could be solved by counseling and hard work. They were concerned about both Susan and John's social isolation and hoped that getting them more involved in activities such as church and school would help their situation.

Many valuable principles derive from the judges' exploration of this sample case. In speaking to each family member separately, the judges expressed the cultural value in not confronting someone directly. As one tribal member described, "Direct confrontation is reserved primarily for enemies and threats." Furthermore, putting people on the defensive, as one would with direct confrontation, does not promote resolution of difficult interpersonal conflicts. Throughout, the judges place a priority on including the entire family in the identification, ownership, and resolution of the family problems. This is a very group-oriented, "tribal" approach to dealing with a situation. "Making school a family affair" also reflects these communal goals. The entire attitude presents a group healing process that facilitates a favorable opportunity for healing, reduces victimization, and sponsores individual and family improvement, responsibility and growth. Throughout, the support

of the ECAC provides encouragement and supports change during the healing process. Thus, the tribal court method is to deal with all aspects of a problem and seek opportunities for change.

Conclusion

This historical and comparative review of ICWA in Alaska provides examples and elucidates the various forces operating to encourage and discourage effective child welfare management in Native Alaska. Clearly, Native child welfare issues have been a site of volatile battles over authority between tribes and the state. This results both because child welfare is such a sensitive and personal issue but also it also complicated by jurisdictional challenges and cultural difference. Alaska Native people represent a broad spectrum of cultural beliefs and historical experience and these histories come to play in contemporary child welfare negotiations. The current status of concurrent jurisdiction points to the need once again for improved cooperation between tribes and the state; but this cooperation demands or requires a better communication and sensitivity to historical and cultural experience. The recent changes in legal environment at both the state and village levels offer an opportunity for an even stronger voice on the part of tribes in the welfare of their children in need.

Recommendations

1. The BIA should continue to support individual village and tribe activity with regard to child welfare.

2. The BIA should seek active ways to support individual villages rather than regional corporations in their child welfare programs.

3. The villages should seek and obtain information from DFYS about all children from their village currently under DFYS supervision, and move in the state court to transfer the case to the tribe.

4. The BIA should attempt to coordinate federal funding of tribal court activity so that villages can consolidate their efforts in tribal court development and effectively manage child cases.

5. The BIA should require valid statistics from the state Division of Family and Youth Services about the numbers of Native children in custody, their village and region, placement compliance and adoption placements.

6. The BIA should balance the value of economies of scale offered through regional non-profits and other consortia with the value of local control over child welfare issues.

7. The BIA should promote the government to government relationship between the villages and the state and federal governments. In particular, the BIA should educate the state departments about the meaning of such a relationship as it relates to cooperation between different government groups (for example, “consultation” does not mean that the state dictates to the tribes what the rules will be).

8. The BIA should work with villages, regional non-profits and other entities to be clear about the differences between tribes, special purpose entities and regional non-profits in its allocation of resources.

9. The BIA should not rely on state standards for tribes to demonstrate competency or access funding.

10. The BIA should increase funding for culturally appropriate treatment, tribal and family support, foster care and emergency placement needs, and tribal judge stipends.

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Appendix: Eklutna Questionnaire

"ICWA Implementation in a Changing Legal Environment:
Lessons from Interior and Southcentral Alaska"

General questions:

1. How would you describe your role in ICWA implementation or child welfare issues more generally?
   a. How long have you been involved in child welfare cases?
   b. In what ways have you been involved?
   c. Have there been any changes in your involvement?

2. How would you characterize ICWA implementation in the state?
   a. In the Southcentral region?
   b. From the perspective of particular villages?
   c. Have there been any changes in implementation?
   d. What is your understanding of legal cases or decisions that apply to ICWA?
   e. How do you use these decisions?

3. What would you identify as the greatest asset of the system as it is now?
   a. What would be its primary failure?
   b. Do you have any feelings about how to improve on this failure?

4. What works well with ICWA?
   a. What does not work with ICWA?

For state officials:

4. How do you perceive recent findings (as a result of Venetie, for example) as affecting ICWA implementation, or your role and responsibilities more specifically?

5. What other influences or trends on the state level, if any, have affected ICWA implementation in Alaska?
   a. What other influences or trends on the state level have affected ICWA implementation in the Interior?

6. How does ICWA implementation in Southcentral Alaska compare with other regions of the state?
   a. Is it uniform, or can you identify concerns that set the Southcentral apart?
   b. If so, to what do you attribute those differences and how should that affect future ICWA implementation and funding streams?

For ECAC professional staff:

7. Do you perceive a shift from regional to a more village oriented focus in ICWA implementation?
   a. If so, how does this affect your role and responsibilities?
   b. How does it affect the resolution of child welfare cases, especially with regard to the relationship between villages and the regional non profit?
   c. Do you have any concerns for long term effects?

8. How do you perceive and use ICWA guidelines?
   a. How do your understandings of both the law and local concepts of child welfare correspond to those in the villages you represent?

9. Have you identified any cultural obstacles to child welfare proceedings in Athabascan villages?
   a. If so, how should this be considered in potential policy or funding stream changes?

For village representatives:

10. How does the decision making body for the village prioritize local needs regarding child welfare? In other words, how does the decision-making body decide between equally situated placements, multiple tribe children, etc.?

11. What are the main considerations in child welfare cases for the tribal court or council?

12. When and under what circumstances, if at all, does the village involve regional non profit corporation assistance?
   a. If the village enlists the help of the corporation, how are local concerns for resolution balanced with the priorities on the regional level?