S-13332

IN THE SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, Joel Gilbertson, in his official capacity as Alaska Commissioner of Health and Social Services, Marcia Kennai, in her official capacity as Deputy Commissioner of the Office of Children's Services, Phillip Mitchell, in his official capacity as Chief of the Alaska Bureau of Vital Statistics, and Gregg Renkes, in his official capacity as Attorney General Appellants, v. Native Village of Tanana, Dan Schwietert, Theresa Schwietert, Nulato Village, Village of Kalskag, Akiak Native Community, Village of Lower Kalskag, and Kanaitze Indian Tribe, Appellees.	)	Supreme Court No. S-13332 Superior Ct. 3AN-04-12194 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE SEN TAN, PRESIDING

BRIEF OF APPELLANT STATE OF ALASKA

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25 U.S.C.A. § 1903.

Definitions.

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or

eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C.A. § 1911

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

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

Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

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

(c) State court proceedings; intervention
In any State court proceeding 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 a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes
The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C.A. § 1918

Reassumption of jurisdiction over child custody proceedings

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

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

STATEMENT OF JURISDICTION

The superior court entered a final judgment on August 26, 2008. This Court has jurisdiction pursuant to AS 22.05.010.

LIST OF PARTIES

The appellants in this case are the State of Alaska, Joel Gilbertson in his official capacity as Commissioner of the Alaska Department of Health and Social Services, Marcia Kennai in her official capacity as Deputy Commissioner of the Office of Children's Services, Phillip Mitchell in his official capacity as Chief of the Alaska Bureau of Vital Statistics, and Gregg Renkes, in his official capacity as Attorney General.

The appellees are the Native Village of Tanana, Dan Schwietert, Theresa Schwietert, Nulato Village, Village of Kalskag, Akiak Native Community, Village of Lower Kalskag, and Kenaitze Indian Tribe.

ISSUES PRESENTED

Whether to rule on a 2004 Attorney General's Opinion. The tribes challenge an Attorney General's opinion. The opinion analyzed the tribal-state jurisdictional provisions of the Indian Child Welfare Act. Is a challenge to the opinion ripe given the absence of a specific child custody jurisdictional dispute?

Whether the Indian Child Welfare Act is ambiguous. The Indian Child Welfare Act, 25 U.S.C. § 1911(b), directly addresses how tribes obtain jurisdiction over cases involving Indian children outside Indian country. Tribes obtain cases by intervening in a state court proceeding and petitioning for a case transfer. In *In re C.R.H.*, the Court found this provision of ICWA to be unambiguous. Given that

§ 1911(b) specifically identifies transfer jurisdiction, is ICWA's off-reservation transfer provision ambiguous?

Whether inherent tribal authority extends to jurisdiction over people who are not members of the tribe outside Indian country. If the clear wording of ICWA does not resolve this case, federal common law recognizes narrow categories of inherent tribal authority. This authority is limited to protecting tribal self-government or controlling internal relations, and is even more limited as applied to nonmembers and off-reservation. Does inherent tribal authority exist to assert jurisdiction off-reservation over tribal nonmembers, such as a non-Indian parent of an Indian child involved in a child custody proceeding?

Whether tribal authority exists outside Indian country when the mother, father, and child are all members of the same tribe. Outside Indian country, the procedural requirements of § 1911(b) apply (parental right of objection, court's authority to deny transfer of jurisdiction for good cause). Tribal assertion of jurisdiction outside Indian country must also consider the state's interests in its comprehensive state child protection programs. Given the procedural requirements of § 1911(b), and the state's comprehensive child protection scheme, do the tribes have an unfettered right to assert inherent jurisdiction over tribal members?

Whether Public Law 280 must be addressed. Public Law 280 gave the state certain powers over Indian country; *Native Village of Nenana v. State* held the tribes were thereby divested of certain powers. If tribes are granted jurisdiction of child custody proceedings arising on state land, yet have no similar authority in Indian country,

a "disjunction" in Indian law is created because tribes can exert more control outside Indian country than within Indian country. Can federally recognized Indian tribes exercise greater authority outside Indian country than they do inside?

Whether full faith and credit must be accorded to tribal decisions arising outside the limited scope of ICWA. ICWA requires that states give full faith and credit to Indian tribe decisions applicable to Indian child custody proceedings. Where a tribe asserts inherent jurisdiction that does not arise under either 25 U.S.C. § 1911(a) (on a reservation or ward of a tribal court) or § 1911(b)(transfer jurisdiction), must the state grant full faith and credit to such decisions?

INTRODUCTION

This case asks when landless federally recognized Indian tribes can assert jurisdiction over Indian children's proceedings arising outside reservations. The state maintains that no such jurisdiction exists.

The case was resolved below on summary judgment as the parties had no factual disputes. Indeed, no facts are involved in this case. That is because the tribes challenged an Attorney General's opinion issued in 2004, seeking declaratory and injunctive relief to prevent enforcement of the 2004 opinion, rather than waiting until an actual case or controversy arises.

The 2004 opinion analyzed the federal Indian Child Welfare Act, concluding in part that ICWA does not allow tribes to exert original jurisdiction over child custody . arising outside reservations. The superior court disagreed, erroneously concluding that it was bound to follow *John v. Baker*, 982 P.2d 738 (Alaska

1999)—a domestic relations case specifically excluded from ICWA coverage—and therefore must allow tribes to take original jurisdiction over Indian children in children's proceedings, as defined in ICWA, outside Indian country.

The superior court's ruling ignores the Congressional jurisdictional scheme already established by ICWA. That jurisdictional scheme carefully balances parental rights, state rights and tribal rights. Section 1911(a) gave tribes exclusive jurisdiction inside Indian country; Section 1911(b) requires a state court to transfer certain cases to tribal court based on the request of the tribe, and subject to parental veto, thus establishing presumptive tribal jurisdiction. Tribes may also intervene, at any time, in state foster care and termination of parental right proceedings involving an Indian child.[1]

Unsatisfied with presumptive jurisdiction and the unqualified right of intervention, the tribes seek to vindicate an alleged inherent right to initiate Indian children's proceedings outside reservations.

Ignoring ICWA's defined jurisdictional scheme is neither necessary nor appropriate. ICWA identifies a balanced jurisdictional arrangement, respecting parental rights, state rights, and tribal rights. Granting tribes initiating jurisdiction off-reservation violates the spirit and intent of ICWA, and raises a variety of troubling, fact specific questions about the full scope and breadth of that jurisdiction which cannot practically be addressed in the context of this appeal.

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[1] 25 U.S.C.A. § 1911(c) (West 2007).

STATEMENT OF THE CASE

In 2004 the Attorney General's Office issued an opinion interpreting ICWA. [Exc. 1-31]. The opinion concluded, in part, that tribes cannot initiate child custody proceedings outside Indian country, including adoptions. [Exc. 4-6, 12-14, 29-31]. Various tribes immediately challenged the opinion in court. [R. 1338-51].

Proceedings on the merits

The tribes filed a complaint on October 28, 2004, challenging the 2004 opinion interpreting ICWA. [R. 1338-51]. The tribes amended the complaint twice: the first time to add two non-native parents, Dan and Teresa Schweitert, who had adopted an Indian child and were concerned about the availability of benefits if tribal adoption orders were not recognized [R. 1320, 1322, 1328-29]; the second time to add the Kenaitze Indian tribe [Exc. 65-86]. The state opposed the second amendment, arguing that an actual controversy did not exist. [R. 221-35].

The state then filed a motion to dismiss the entire action arguing that the case was not ripe because no actual case or controversy existed. [Exc. 32-64]. The state argued that its sole action was to issue a legal opinion, which does not create an actual case. [Exc. 44]. The superior court orally denied the state's motion to dismiss. [Exc. 155-57]. The state petitioned this Court for review of that order, again arguing that the case was not ripe. [R. 327-41]. The Court denied the petition for review. [R. 957].

The tribes then moved for summary judgment.[2] [Exc. 162-81]. They argued that *John v. Baker, In re C.R.H.*, and *In re J.M.* jointly recognize inherent non-territorial tribal authority over Indian children, and that Public Law 280—a law that will be described below potentially limiting tribal authority if it is interpreted as a "divestiture statute"—does not apply outside reservations. [Exc. 162-81]. The state filed an opposition and cross-motion. [Exc. 182-240]. The state argued that P.L. 280 continues to limit tribal jurisdiction, that in off-reservation cases the Indian Child Welfare Act already sets clear jurisdictional rules between the state and tribes, that tribal inherent authority does not go so far as to extend control over tribal nonmembers, and that the tribes' potential assertion of jurisdiction is limited because it would impact external relations with the state, specifically, the state's *parens patriae* interest in the welfare of children. [Exc. 182-240]. The superior court granted the tribes' motion for summary judgment and denied the state's cross-motion, concluding that the "doctrine of *stare decisis* binds this court to follow the *John v. Baker* decision, regardless whether it is consistent with Federal precedents." [Exc. 340]. The court found that the tribes retain concurrent off-reservation jurisdiction with the state to legislate, initiate, and adjudicate CINA cases. [Exc. 347].

Following entry of summary judgment, the tribes moved for injunctive relief to enforce the superior court's order. [R. 611-17, 620-21]. The state opposed and moved for a stay of the court's decision pending entry of final judgment. [R. 1220-33].

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[2] The plaintiffs' motion was called one for "partial summary judgment." The court's resolution of the plaintiffs' motion, and the state's cross-motion, effectively resolved the substantive issues raised in this case.

The state also filed a motion for entry of final judgment, arguing that the summary judgment orders resolved the case in its totality. [R. 1141-63]. The tribes filed an opposition [R. 1125-36], and then a cross-motion [R. 1019-29] to the state's motion for entry of final judgment. The competing motions focused on what form the final judgment should take, and how—if at all—full faith and credit was to be accorded to tribal decisions in child custody cases.

The dispute about whether the case had been resolved by the superior court's summary judgment order also led to a further disagreement about whether discovery was necessary or appropriate. [R. 1104-10, 1073-78]. The superior court granted a motion to compel filed by the tribes to conduct additional discovery [R. 1060-61], and although there were no legal claims pending, the tribes conducted limited discovery. [R. 1030-56].

On August 26, 2008, the superior court issued its final judgment and order. [Exc. 349-51 (Judgment); Exc. 352-57 (Order)]. In so doing, it prematurely denied a stay of its final order and judgment pending appeal.

The state moved for reconsideration, arguing in part that the issue of a stay pending appeal had not yet been briefed. [R. 1433-39]. The court granted this portion of the state's motion for reconsideration and allowed the state to brief the issue of whether the court should issue a stay pending appeal. [R. 1425]. After considering the state's argument, the superior court denied the state's request. [R. 1497-98].

STANDARD OF REVIEW

Whether the superior court applied the law correctly in entering summary judgment against the State of Alaska is a question that this Court reviews *de novo*, applying the rule of law that is most persuasive in light of precedent, reason, and policy.[3]

Whether the superior court properly denied the state's motion to dismiss is decided on an abuse of discretion standard.[4]

ARGUMENT

This case is not ripe for decision. Rather than wait for an actual case or controversy to arise, the tribes have elected to challenge the legal conclusions of an Attorney General's opinion. [Exc. 65-86]. On this basis alone, the case should be dismissed. Nuanced analyses depending on the facts or procedural history are not possible.

If the court nevertheless addresses the merits, the lower court decision should still be dismissed. In upholding the tribes' off-reservation right to initiate jurisdiction in children's proceedings, the lower court (1) ignored the off-reservation rules balancing parental rights, state rights and tribal rights under § 1911(b); (2) ignored the potential impact of its decision on parents who do not belong to the tribe, notwithstanding Supreme Court precedent severely restricting off-reservation jurisdiction over tribal nonmembers; (3) failed to consider the impact its decision would have on core

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[3] *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001); *John v. Baker*, 982 P.2d 738, 744 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).

[4] *Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

state child protection interests; and (4) failed to analyze the disjunction in the law created when tribes outside a reservation have greater jurisdiction than within a reservation. [Exc. 331-48 (superior court decision granting summary judgment)]. If the case is not dismissed because it is not ripe, this Court should reverse the trial court's order and direct the trial court to enter judgment in favor of the state as a matter of law.

I. Because It Does Not Create an Actual Case or Controversy, The 2004 Opinion Is Not an Appropriate Vehicle for Resolving Complex State-Tribal Jurisdictional Disputes

A. A Specific Fact Pattern Would Allow a More Precisely Tailored Ruling

This case raises difficult questions of state-tribal jurisdictional law better resolved on a specific set of facts. In the area of state-tribal relations, clear jurisdictional lines are seldom available.[5] The task of deciding this case is even more difficult because it is not clear what is to be decided. The case lacks any real facts and only six of Alaska's 229 federally recognized tribes[6] chose to challenge the legal conclusions in the 2004 opinion.

The line between challenging the 2004 opinion, on one hand, and simply asking the Court for a declaration of jurisdictional rights for plaintiff tribes under § 1911 and 25 U.S.C. § 1918, on the other, is difficult to draw. The remedy the tribes seek amounts to a series of ICWA and non-ICWA rulings: (1) vindication of alleged "inherent

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[5] *White Mountain Apache v. Bracker*, 448 U.S. 136, 141, 142 (1980) (finding that generalizations on subject of state-tribal jurisdiction "treacherous"; "no rigid rule" applies).

[6] *See* Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553-01 (April 4, 2008). Depending how one interprets certain entries, the list may identify 231 tribes.

authority" to control children's proceedings for Indian children; (2) interpretations of ICWA, touching on various provisions such as § 1911 and § 1918; and (3) rulings on P.L. 280. But a sweeping declaration of state-tribal jurisdictional rights is precisely the type of decision that a court should refrain from making if no case or controversy exists.[7]

B. This Case Should Be Dismissed So That Related Issues Can Be Resolved in the Context of Specific Child Custody Cases

The lack of particular facts in this case requires "grappl[ing] with hypothetical possibilities rather than immediate facts," making the case particularly appropriate for dismissal.[8]

The trial court had few facts before it. [*See* Exc. 69-74]. The court nevertheless orally denied the state's motion to dismiss, stating that some of the plaintiffs operate formal tribal courts that consider child protection cases. [Exc. 155-56]. In briefing the issue of ripeness in the lower court, the parties' arguments roughly mirror the majority and dissenting views in *Brause v. State, Department of Health & Social Services.* [*See* Exc. 34-64 (defendants' brief); Exc. 87-125 (plaintiffs' brief)]. In *Brause*, the majority of the Court decided that a challenge to a statute prohibiting gay marriage was not ripe for decision and emphasized the "level of abstraction" and need for issues to be "concretely framed."[9] The dissent, meanwhile, relied on *Johns v. Commercial*

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[7] *See Brause*, 21 P.3d at 360 (noting level of abstraction and lack of facts as issues mitigating against ripeness).

[8] *Id.* at 359 (*citing* 13A Charles A. Wright, et al., *Federal Practice & Procedure* § 3532.1, at 114-15 (footnotes omitted)).

[9] *Id.* at 360.

Fisheries Entry Comm'n,[10] emphasizing that the threat of future injury generally will confer the right to seek relief in courts.[11]

Conclusions about state-tribal jurisdictional matters will vary depending on[12] (1) whether the parents in the child custody case are members or nonmembers of a tribe[13] and, if tribal members, whether they belong to the same tribe[14]; (2) where the underlying action occurred, whether on Indian land, non-Indian land within Indian country, outside Indian country, on one reservation or two reservations, or a mixed fact pattern involving multiple land interests[15]; (3) what was the conduct of the parties[16]; (4)

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[10] 699 P.2d 334 (Alaska 1985).

[11] *Brause*, 21 P.3d at 361 (Bryner, J., dissenting).

[12] *See, e.g., McLanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 167-68 (1973) (noting that decision may vary according to (1) whether case involved Indians who left or never inhabited reservation; (2) exertions of state sovereignty over non-Indians who undertake activity on Indian reservations; (3) activity undertaken by reservation Indians on non-reservation lands).

[13] *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct. 2709, 2718-20, 2721-22, 2724, 2726 (2008) (considering differing rules depending on tribal member or nonmember status).

[14] At least one commentator suggested that jurisdictional rules may vary according to whether the litigation involves all tribal members, Indian members belonging to different tribes, or tribal members and non-Indians. *See* Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 329, 355-56 (1989).

[15] *See, e.g., Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (finding tribe lacked authority to impose hotel occupancy tax on hotel guests for hotel operated by non-Indian on non-Indian fee land within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (finding tribal court lacked authority to entertain highway-accident tort suit when highway belonged to the state, notwithstanding that highway was located on a reservation).

[16] *See, e.g., Brendale v. Confederated Tribes & Band of Yakima Nation*, 492 U.S. 408, 430-32 (1989) (considering impact of particular proposed actions on whether tribe had authority to impose zoning conditions within its reservation over nonmember

what are the tribes' practices with respect to the particular jurisdictional dispute[17]; (5) what type of claim is involved (*e.g.*, commercial, tax, ICWA, or tort)[18]; (6) the impact on the tribe of the particular activity;[19] (7) whether the tribe asserts jurisdiction over causes of action where Congress has mandated certain forum selection rights or other rights which could be denied or unrealized in tribal court;[20] and (8) if a nonmember is involved, whether the nonmember is a plaintiff or defendant in the tribal court action, and whether a party consents or objects to tribal jurisdiction.[21] Without the development of a specific

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fee lands); *Montana v. United States*, 450 U.S. 544, 566 and 566 n. 16 (1981) (observing that complaint did not allege that State of Montana imperiled subsistence of tribe, nor that State had "abdicated or abused" its wildlife responsibilities on the reservation); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1137 (9th Cir. 2006) (giving consideration to fact that nonmember plaintiff brought suit in tribal court and was in "full control of the forum in which he prosecutes his claims").

[17] *See, e.g., Montana*, 450 U.S. at 566 (considering that tribe had "traditionally accommodated itself" to the state's assertion of jurisdiction over hunting and fishing on fee lands within the reservation).

[18] *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 368 (2001) (finding that no provision of federal law provides for tribal court jurisdiction over § 1983 actions); *Boxx v. Warrior*, 265 F.3d 771, 777 (9th Cir. 2001), *cert denied, Long Warrior v. Boxx*, 535 U.S. 1034 (2002), *rev'd on other grounds, Smith v. Salish Kootenai College*, 434 F.3d 1127 (2006) (finding that garden variety automobile claims are not something that threatens tribal government).

[19] *Montana*, 450 U.S. at 566 ("nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation").

[20] *See Hicks*, 533 U.S. at 368.

[21] *Philip Morris USA v. King Mountain Tobacco Co.*, ___ F.3d ___, No. 06-36066, 2009 WL 115589, at *6 and *6 n.6 (9th Cir. Jan. 20, 2009) (identifying plaintiff/defendant alignment and issue of consent as important considerations); *Salish Kootenai College*, 434 F.3d at 1130-32 (stating that nonmember party status—whether plaintiff or defendant—is most important fact in determining tribal court jurisdiction);

fact pattern, a court will be unable to consider these factors appropriately, limiting its ability to reach a determination applicable to all future cases.

This need for specific facts is clearly demonstrated in the "*Montana* exception" cases,[22] a designation for instances as outlined in that case when tribes may assert jurisdiction over nonmembers. These instances require analysis and consideration of very particular fact patterns.[23] The procedural status of this case also distinguishes it from the specific facts relied on in *Johns v. Commercial Fisheries Entry Comm'n* decision and in the "threat of future injury" line of cases.[24] And *Brause* indicates that hardship to the parties is another relevant consideration.[25] Such evidence of hardship, like any specific facts, is simply missing in this case.

At the trial court level, the tribes described the harms created by the 2004 opinion as lack of access to benefits, a potential that the state would lack incentive to work with tribes, and a threat to tribal sovereignty.[26] [R. 1397-1401]. These "harms"

John, 982 P.2d at 759 n.141 (noting that consent of parents may form basis for jurisdiction).

[22] *Montana*, 450 U.S. at 564-66. This line of cases is discussed *infra*, pp. 30-37.

[23] *See, e.g., Martinez v. Martinez*, No. C08-5503 FDB, 2008 WL 5262793, at *5-6 (W.D. Wash. Dec. 16, 2008) (detailed factual analysis of both *Montana* exceptions).

[24] *See Johns*, 699 P.2d at 337-38 (describing various cases where because of the threat of future injury, standing existed to pursue litigation).

[25] 21 P.3d at 359.

[26] On appeal, the tribes state without any factual support that "countless tribal children" will be returned to "legal and social limbo." [Opposition to Motion to Stay, dated January 2, 2009, at 17.] The tribe also reiterated financial concerns (a matter squarely outside the 2004 opinion and dependent on state statute (AS 47.07.020) and dependent on state-federal negotiations (AS 47.07.040)) and provided anecdotal evidence

only restate the generic jurisdictional dispute that is presented. It is premature to say which party has ultimately been harmed.

The "need for further factual development"[27] coupled with the "difficulty and sensitivity"[28] of respective state-tribal jurisdictional questions strongly suggest that dismissal is appropriate. Dismissal on grounds of ripeness also will have the benefit of avoiding many of the other specific pitfalls outlined by the *Brause* Court, such as the premature resolution of a case.[29]

II. ICWA's Balance of Parental, Tribal and State Interests Would Be Upset if Tribes Can Initiate Jurisdiction Off-Reservation

ICWA's legislative scheme reflects Congress' reasonable balancing[30] of tribal rights,[31] parental rights off-reservation,[32] and state rights off-reservation.[33] A tribal

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of a named plaintiff who allegedly had difficulties dealing with the state in a child custody case. [Opp., pp. 17-18.] Considering that the state has over 7000 Native children in its care [R. 1420], the plaintiffs have failed to make any convincing showing of harm.

[27] *Brause*, 21 P.3d at 359 (citing 13A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532.1, at 114-15 (2d ed. 1984)).

[28] *Id.*

[29] In discussing its concerns about premature resolution of cases, the Court mentioned that the parties might negotiate some of their differences, the difficulty in litigating "intelligently," and the threat of "ill-advised adjudication" *Id.*

[30] *Catholic Social Servs. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989) (ICWA "strikes a balance between the sometimes conflicting interests of Indian parents, Indian children, and their tribes.").

[31] Congress provided for exclusive tribal jurisdiction on a reservation. 25 U.S.C. § 1911(a). Tribes have presumptive jurisdiction off-reservation under 25 U.S.C. § 1911(b). *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

court initiating jurisdiction off-reservation would fundamentally upend ICWA's delicate balance of parental, state, and tribal interests.

The Indian Child Welfare Act speaks unambiguously to the issue of on-reservation and off-reservation jurisdiction. ICWA defines the extent of a tribe's jurisdiction because tribal court jurisdiction is a "federal question of law[.]"[34] Section 1911(a) defines the on-reservation jurisdiction,[35] and § 1911(b) defines off-reservation jurisdiction. The statutes are clear on their face, and the legal issues presented in this case can be resolved solely with reference to them.[36]

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[32] Section 1911(b) places various checks on tribal transfer authority. *In re C.R.H.*, 29 P.3d 849, 853 (Alaska 2001). One such check is the right of a parent to veto a transfer from state court to tribal court. *Id.*

[33] ICWA's legislative history demonstrates a Congressional concern in preserving off-reservation state's rights. H.R. Rep. 95-1386 at 17 ("the provisions of the bill do not oust the state from the exercise of its legitimate policy powers in regulating domestic relations"); H.R. 95-1386 at 19 ("the committee does not feel that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children falling within their geographic limits").

[34] *Salish Kootenai College*, 434 F.3d at 1130 (citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985)).

[35] 25 U.S.C. § 1911(a) also discusses jurisdiction over Indian children held to be a "ward of a tribal court." That particular provision would not appear to be at issue in this case.

[36] *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) ("[W]e cannot, under the guise of interpretation, create Presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean."); *see also Doe v. Mann*, 415 F.3d 1038, 1066 (9th Cir. 2005) (stating Indian canon of construction not applicable where no ambiguity exists).

A. If a Tribe Can Initiate Children's Proceedings Off-Reservation, Parents' Rights Under ICWA Would Not Receive Proper Recognition

ICWA's § 1911(b) provision protects parental interests by explicitly recognizing a parental right to object to transfer of a case from state court to tribal court.[37] Parental interests "compete" with a tribe's interest in tribal children.[38] And, off-reservation, parental rights may predominate over tribal rights.[39]

ICWA's recognition of off-reservation parental rights is consistent with the overall goal of providing stability and security in Indian families:

> [W]hen the Indian family resides off the reservation, it is subject to the countervailing influence of the Anglo-American culture. . . . By allowing the Indian parents to "choose" the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of the Indian families by allowing the Indian parents to defend in the court system that most reflects the parents' familial standards.[40]

Assertion of tribal inherent jurisdiction would upset the parents' ICWA rights. Inherent tribal jurisdiction would certainly be a victory for tribal rights, but would ignore and throw out of balance competing parental rights already recognized by

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[37] *In re Larissa G.*, 51 Cal.Rptr.2d 16, 21 (Cal. App. 1996) (concluding that § 1911(b) gives parents the "ultimate say over jurisdiction" while still accommodating the interests of tribes).

[38] *Id.* at 20.

[39] *Id.* (citing with approval case finding that off-reservation, a tribe's interest is not as great as on a reservation, and parents' interests may be primary over tribal interests); *see In re Appeal in Maricopa County, Juvenile Action No. JD-6982*, 922 P.2d 319, 321-22 (Ariz. App. 1996) (finding that § 1911(b), although providing for concurrent jurisdiction, gives parents an absolute veto).

[40] Mack T. Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 Ariz. L. Rev. 1123, 1141 (1979).

Congress in § 1911(b) by denying parents the right given them by that subsection to choose their preferred forum.

B. If a Tribe Can Initiate Children's Proceedings Off-Reservation, State Rights Under ICWA Would Not Receive Proper Recognition

Congress intended to recognize and preserve state rights off-reservation.[41] In discussing ICWA supremacy principles in connection with state rights, the House Report expressed the intention to protect state rights and to assure a state would not be "ousted" in the "exercise of its legitimate policy powers in regulating domestic relations."[42] Recognition of off-reservation tribal jurisdiction would indeed "oust" the state of its normal domestic relations authority.

The congressional recognition of off-reservation "traditional" state interests in children's proceedings is embodied in § 1911(b). Off-reservation, a state court may exercise jurisdiction as it normally would, subject only to transfer upon request from a tribe, and subject to certain "checks."[43] Were a tribe able to initiate jurisdiction off-reservation, anything resembling a traditional state interest in children's proceedings would be upended. In fact, it would be possible for all Indian child cases to be initiated in tribal courts (potentially 229 of them), leaving little, if any, role for either the state Office of Children's Services or Alaska state courts.

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41 *See* H.R. Rep. 95-1386 (1978).

42 *Id.* at 17; *see also id.* at 19 ("the committee does not feel that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children falling within their geographic limits").

43 *In re C.R.H.*, 29 P.3d at 853 (recognizing various checks on tribal transfer jurisdiction).

Prior to ICWA, assertion of state court jurisdiction over Native Americans outside reservations was the norm, including child custody cases.[44] If ICWA was passed during the time that assertion of state jurisdiction outside reservations was the norm—and this seems to be beyond question—then § 1911(b) merely expresses a preference for tribal proceedings subject to state court review. This view has been supported—even if grudgingly—by those who have undertaken detailed reviews of the legislative history.[45] While at least one commentator strongly disagreed with the tenor of § 1911(b), she indicated that the jurisdiction, while concurrent, is subject to the § 1911(b) state checks.[46] Other courts and commentators have come to the same conclusion—that § 1911(b) simply reflects a transfer mechanism from state court to tribal court, and does not create a broader tribal authority outside reservations.[47]

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[44] Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 Iowa L. Rev. 585, 613 (1994).

[45] *Id.* at 610-614.

[46] *See id.* at 614 and 614 n.166 (noting that concurrent jurisdiction dependent on transfer from state court, and further noting ICWA's legislative history strongly suggestive that continued state jurisdiction within state borders was presumed).

[47] *See, e.g., Barbry v. Cauzat*, 576 So.2d 1013, 1020 (La. App. 1991) (rejecting idea that Congress has recognized off-reservation tribal inherent authority in ICWA proceedings, and finding that tribal membership of one parent insufficient to establish tribal jurisdiction where the other parent objects); *Cohen's Handbook of Federal Indian Law* § 11.03, at 831 (Nell Jessup Newton et al. eds., 2005) (recognizing transfer mechanism, and noting that the "provision for concurrent jurisdiction and transfer reflects the legislative compromise made when states and others resisted tribes exercising exclusive jurisdiction") (footnote omitted); *American Indian Law Deskbook*, Conference of Western Attorneys General 478 (3d ed. 2004) ("Under 25 U.S.C. § 1911(b), when an Indian child is neither domiciled on nor a resident of the reservation of the child's tribe, the ICWA establishes a preference for tribal court jurisdiction over foster care placement and parental rights termination proceedings. That preference is subject to rebuttal on several grounds . . . .").

Had Congress wanted to recognize a broader off-reservation tribal right, it could have easily done so.[48] Instead, in cases arising off-reservation, Congress chose to grant tribes presumptive jurisdiction.[49] A broader tribal jurisdictional right (*i.e.*, "off-reservation inherent jurisdiction") would run directly contrary to legislative intent and would impermissibly impact state rights.

C. Tribal Rights Are Already Expressly Recognized in ICWA, And Do Not Include Initiating Jurisdiction in Cases Arising Off-Reservation

ICWA specifically protects tribes' jurisdictional rights.[50] Section 1911(a) grants tribes exclusive jurisdiction off-reservation. Section 1911(b) grants tribes presumptive jurisdiction over proceedings for foster care or termination of parental rights.[51] Therefore tribal rights, too, are already a part of ICWA's jurisdictional balance.

This Court found that § 1911(b) is unambiguous.[52] Creating a judicial exception to ICWA's unambiguous jurisdictional rules would be inappropriate.[53] But off-reservation tribal initiating jurisdiction would be precisely such a judicial exception.

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[48] *See Montana*, 450 U.S. at 562 (noting in interpretation of non-ICWA statute that if Congress had wished to extend tribal jurisdiction over lands owned by non-Indians, "it could have easily done so . . .").

[49] *Holyfield*, 490 U.S. at 36 (recognizing § 1911(b) as "presumptively tribal jurisdiction").

[50] *See* 25 U.S.C. § 1911.

[51] 25 U.S.C. § 1911(b).

[52] *In re C.R.H.*, 29 P.3d at 852. The *C.R.H.* holding overturned an earlier decision, *In re F.P.*, 843 P.2d 1214 (Alaska 1992), which held that tribes could not petition for transfer without first reassuming jurisdiction under 25 U.S.C. § 1918.

[53] *See, e.g., In re Baby Boy Doe*, 849 P.2d 925, 932 (Idaho 1993) (refusing to apply Indian family doctrine where that limitation was not found in ICWA).

Off-reservation initiating jurisdiction is simply missing in ICWA, and Congress has the authority to provide for, limit, or eliminate tribal powers.[54] Congress set forth a complete jurisdictional scheme in § 1911. Where Congress knows how to say something, and does not, the silence is controlling.[55]

The tribes err insofar as they ignore Congress' jurisdictional scheme, and treat § 1911(b) as irrelevant. [Exc. 261-63]. The tribes seek to assert an independent and allegedly pre-existing tribal inherent authority to initiate children's proceedings in ICWA cases. [Exc. 247-49]. Had it been Congress' intent to recognize a tribal right to initiate proceedings off-reservation, in addition to presumptive authority in state originated cases, one would expect that important purpose to be reflected in ICWA.

Another problem with recognition of off-reservation initiating jurisdiction is that where a parent of an Indian child is not a tribal member, only "express authorization by federal statute or treaty" will generally be sufficient to uphold tribal jurisdiction.[56] Section 1911(b) contains nothing resembling "express authorization" for original jurisdiction over cases impacting nonmember parents.

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[54] *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978) (noting that Congress has plenary power to limit, modify, or eliminate powers which the tribes otherwise possess).

[55] *See, e.g., CBS v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001) (quoting *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)).

[56] *Strate*, 520 U.S. at 445.

Congress set ICWA's jurisdictional scheme, and courts have been traditionally reluctant to upset this scheme.[57] ICWA appropriately balances parental rights, state rights, and tribal rights off-reservation. Congress struck that balance when it passed ICWA in 1978, and recognition of a separate tribal right to initiate cases off-reservation would undo this carefully balanced jurisdictional scheme.

III. Case Law Does Not Modify ICWA's Transfer Mechanism or Define a Separate or Pre-Existing Tribal Right to Initiate Child Protection Proceedings

In challenging the 2004 opinion, the tribes attack ICWA's § 1911(b) jurisdictional scheme in two ways: (1) they argue that the United States Supreme Court interprets ICWA to establish "concurrent jurisdiction," and interprets "concurrent jurisdiction" to mean that tribal courts may initiate child protection proceedings; and (2) they argue that they have long-standing and pre-existing rights to exercise off-reservation jurisdiction over children's proceedings. [Exc. 247-49; 264-70]. Both arguments are without merit and ignore Congress' plenary authority to limit, modify or eliminate tribal authority.[58]

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[57] *See Mann*, 415 F.3d at 1066-67 (refusing to limit court's on-reservation P.L. 280 powers unless a tribe used the reassumption provision of § 1918, noting "we do not think the court should substitute its judgment for that of Congress where Congress explicitly provided tribes an opportunity to assert their sovereignty over child custody proceedings"); *Catholic Social Servs.*, 783 P.2d at 1160 (refusing to find a right of notice for voluntary termination of parental rights under ICWA because "Congress has both created and defined tribal rights in adoption and termination proceedings").

[58] *See, e.g., Santa Clara Pueblo*, 436 U.S. at 57 (noting Congress' plenary authority).

Only one United States Supreme Court case has analyzed ICWA, *Mississippi Band of Choctow Indians v. Holyfield*, and the Court did not hold that concurrent jurisdiction is the same as initiating jurisdiction.[59] The tribes argued below that *Holyfield* decided the intent of § 1911(b). [Exc. 265] The Court commented that § 1911(b) "creates concurrent but presumptively tribal jurisdiction,"[60] but the comment was not a case holding.[61] And the intent of § 1911(b) cannot rest on this single sentence, particularly since *Holyfield* was about § 1911(a), not § 1911(b).[62] Because *Holyfield* was a § 1911(a) case, its parenthetical mention of § 1911(b) should be given little weight.

To the extent the Supreme Court analyzed § 1911(b) at all, it was in the *Holyfield* dissent. The dissent identified the tribal rights to intervene in a state proceeding and to request a case transfer,[63] and specifically found that "concurrent jurisdiction" assumed a parental veto right via the § 1911(b) transfer process.[64] In the context of § 1911(b), therefore, "concurrent" simply means that both state and tribal courts can and do exercise jurisdiction—state courts through original jurisdiction and tribal courts via the § 1911(b) transfer mechanism.

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[59] *See* 490 U.S. at 49 (holding that § 1911(a) established tribal jurisdiction since both parents were domiciled on the Choctaw Reservation).

[60] *Id.* at 36.

[61] *See In re Larissa*, 51 Cal.Rptr.2d at 19 (referencing a discussion about § 1911(b) as not being a holding in *Holyfield*).

[62] *See Holyfield*, 490 U.S. at 48-49 (finding that parental domicile was on reservation, and noting tribal jurisdiction rule under § 1911(a)).

[63] *Id.* at 57-58 (Stevens, J., Rehnquist, J., Kennedy, J. dissenting).

[64] *Id.* at 60 (Stevens, J., Rehnquist, J., Kennedy, J. dissenting) (finding that ICWA reflects a scheme where the parents of an Indian child can choose in which forum to litigate their claims).

In the lower court briefing, the tribes cited to a number of decisions that use the phrase "concurrent jurisdiction." [Exc. 265 and 265 n.63]. These cases are not relevant as almost no courts[65] interpret *Holyfield* as recognizing *off-reservation* tribal inherent jurisdiction to initiate cases (to the exclusion of state courts).

State courts interpret "concurrent" consistent with the plain wording of § 1911(b): § 1911(b) embodies the tribal right to intervene in state court proceedings and to have presumptive jurisdiction.[66] For example, in interpreting *Holyfield*, the decision of *In re M.M.*[67] interpreted "concurrent" as merely establishing a presumption for tribal jurisdiction:

> ICWA "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation[.]" . . . . Put another way, ICWA establishes a preference for tribal court jurisdiction in cases of foster care placement or termination of parental rights involving Indian children, even where those children are not domiciled or residing within the tribe's reservation.

As stated in another case, "concurrent" means that the "state court must transfer the proceedings to the tribal court upon the petition of either parent, an Indian custodian, or the Indian child's tribe . . . ."[68] There is no suggestion in other cases, even most of those

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65 The case of *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 555 (9th Cir. 1991), suggested that voluntary tribal adoptions might qualify for initiating jurisdiction, but with very limited discussion of ICWA, and a cursory citation to *Holyfield*. The case has little persuasive value, and is specific to voluntary adoptions, a small sub-set of the total universe of potential children's proceedings.

66 *See, e.g., In re M.M.*, 65 Cal.Rptr.3d 273, 280 (Cal. App. 2007).

67 *Id.*

68 *In. re T.A.*, 883 N.E.2d 639, 643 (Ill. App. 2008).

cited by the tribes, that "concurrent" means anything other than a congressionally recognized off-reservation preference for tribal court jurisdiction accomplished through the § 1911(b) transfer mechanism.[69]

Attempted tribal assertions of off-reservation initiating jurisdiction have been rejected as inconsistent with ICWA.[70] The tribes have been unable to identify ICWA decisions which clearly endorse a broad-based off-reservation original jurisdiction in children's proceedings. The notion that off-reservation tribal inherent authority supplements ICWA's presumptive tribal jurisdiction in § 1911(b) is not generally recognized. To so hold would fundamentally alter how ICWA operates.

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[69] The tribes relied on a long string of cases at the trial court level that, other than perhaps using the word "concurrent," do not support ICWA recognition of tribal off-reservation authority except via the transfer mechanism in 25 U.S.C. 1911(b). [Exc. 265 n.63] *See, e.g., In re Adoption of Arnold*, 741 N.E.2d 456, 460-61 (Mass. App. 2001) (finding section 1911(b) created dual jurisdictional scheme, and tribe has right to choose to intervene in state court proceeding at any time); *In re Laura F.*, 99 Cal.Rptr.2d 859, 866 (Cal. App. 2000) (noting concurrent jurisdiction, and that either state or tribal court could assert jurisdiction, but then explaining that "ICWA gave the Tribe the means by which to exercise jurisdiction" under 25 U.S.C. 1911(b) and, on the facts of that case, the Tribe never chose to exercise that jurisdiction); *Spear v. McDermott*, 916 P.2d 228, 234 (N.M. App. 1996) (finding that state court could retain jurisdiction in state-initiated case notwithstanding potential change in children's domicile during pendency of action from New Mexico to the Cherokee Nation).

[70] *Brown v. Rice*, 760 F.Supp. 1459, 1463 (D. Kan. 1991) (rejecting case initiated in tribal court in part because case was not transferred "pursuant to law" from state court to tribal court); *see* Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 Ariz. L. Rev. 127, 133-35 (Spring 2008) (recognizing concurrent jurisdiction as an exercise of jurisdiction by and through the transfer mechanism in § 1911(b)); Newton et al., *supra* n. 47, § 11.03 (canvassing the 25 U.S.C. § 1911(b) transfer mechanism and how tribe may acquire jurisdiction, but never mentioning an independent ability to assert original jurisdiction).

IV. Tribes Have No Inherent Authority to Assert Off-Reservation Jurisdiction over Children's Proceedings Where Nonmembers Will Be Impacted

Tribes generally have no jurisdiction over nonmembers.[71] ICWA does not authorize anything resembling off-reservation initiating jurisdiction,[72] nor do the limited *Montana* exceptions apply to child custody proceedings.[73]

Section § 1911(b) gives parents an absolute right to object to a case transfer.[74] Thus, Congress clearly wanted to limit off-reservation jurisdiction over nonmembers. Insofar as the tribe asserts "inherent authority" over an Indian child, nonmembers would have no correlative ability to object to the assertion of jurisdiction by the separate sovereign.

Montana articulated limited exceptions for when tribes may assert jurisdiction over nonmembers.[75] The tribes dismiss *Montana* as "irrelevant." [R. 1394; R. 1390 ("this case has never been about tribal jurisdiction over nonmembers.")

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[71] *See, e.g., Martinez*, 2008 WL 5262793, at *4 (noting that tribal sovereignty "centers on the land held by the tribe," and on "tribal members within the reservation," and that jurisdiction over nonmembers is highly disfavored and there exists a presumption against tribal jurisdiction).

[72] *See* 25 U.S.C. § 1911(b).

[73] *See* 450 U.S. at 565-66 (setting forth limited exceptions for tribal jurisdiction over nonmembers).

[74] *See In re C.R.H.*, 29 P.3d at 853 (finding that 25 U.S.C. § 1911(b) creates three checks on tribal transfer jurisdiction).

[75] *Montana*, 450 U.S. at 565-66 (finding that either a consensual relationship or conduct threatening a tribe may provide a basis for assertion of jurisdiction over nonmembers).

(underline in original)]. But *Montana* is a test of subject matter jurisdiction.[76] And having a socially consensual relationship with a tribal member does not establish tribal jurisdiction over nonmembers under the *Montana* analysis.[77] To disregard *Montana* is to ignore the interests of all nonmember parents whose rights are impacted by a tribal decision involving their child or children.

Disregarding *Montana* and nonmember rights also could raise potential due process concerns which might evade review if the sole and only relevant factor is a child's tribal membership.[78] One such due process concern is that nonmembers would be denied access to state courts whenever a proceeding is initiated in tribal court.[79] The due process concern arises out of the interpretation the tribes place on ICWA. The tribes interpret ICWA's presumptive jurisdiction under § 1911(b) as merely supplemental to an already existing inherent tribal authority over nonmembers. [*See* Exc. 268]. Interpreting

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[76] *See, e.g., Hicks*, 533 U.S. at 367 n.8 (finding that limitation on jurisdiction over nonmembers is a question of subject matter jurisdiction, not merely personal jurisdiction); *In re J.D.M.C.*, 739 N.W.2d 796, 809 (S.D. 2007) ("Montana is really a test for subject matter jurisdiction, typically used to determine if tribal courts have legislative jurisdiction.).

[77] *In re J.D.M.C.*, 739 N.W.2d at 810 n.21 (rejecting idea that marrying a tribal member can establish a "consensual relationship" under the *Montana* exceptions to assertion of jurisdiction over tribal nonmembers).

[78] *See* Exc. 252 and 252 n.27 (tribes arguing that subject matter jurisdiction over nonmembers is established by Indian child's tribal membership, the sole remaining issue being personal jurisdiction).

[79] *Sands v. Green*, 156 P.3d 1130, 1134 (Alaska 2007) (finding that due process clause of Alaska Constitution contains within it a right of access to state courts).

ICWA in this way engenders potential constitutional issues, and therefore violates a settled policy of federal statute interpretation.[80]

A. Indian Land Is a Jurisdictional Anchor

Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation."[81] A tribe's sovereign interests are generally "confined to managing tribal lands,"[82] and do not extend to nonmembers.[83] Without the jurisdictional anchor of Indian land, any tribal efforts to regulate nonmembers are presumptively invalid.[84]

The *Plains Commerce Bank* Court stated that a tribe has the burden to establish an appropriate basis for asserting jurisdiction over nonmembers outside Indian country.[85] The tribes' dismissive argument that nonmember interests are not at issue[86] and that the *Montana* exceptions are "irrelevant" [R. 1394] does not meet this burden.

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80 *See Gomez v. United States*, 490 U.S. 858, 864 (1989) (holding in the context of a different statute that an interpretation of a federal statute engendering constitutional issues should be rejected if a "reasonable alternative interpretation poses no constitutional question.").

81 *Plains Commerce Bank*, 128 S.Ct. at 2718.

82 *Id.* at 2723; *see also Atkinson*, 532 U.S. at 660 (finding that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe is the "first principle, regardless of whether the land at issue is fee land or land owned by or held in trust for an Indian tribe.") (Souter, J., Kennedy, J., Thomas, J., concurring); *Philip Morris USA*, 2009 WL 115589, at *3 ("tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries") (citation omitted).

83 *Plains Commerce Bank*, 128 S.Ct. at 2726.

84 *Id.* at 2720.

85 *Id.*

B. Tribal Authority Is Generally Limited to Internal Tribal Matters

The United States Supreme Court generally limits tribal authority to matters involving a tribe's own members.[87] Tribes may punish "tribal offenders," may determine tribal membership, may regulate "domestic relations among members," and may "prescribe rules of inheritance among members."[88] The *Montana* Court emphasized that tribal inherent powers are a reflection of tribes' "dependent status," and their powers of self-government involve "*only the relations among members of a tribe*."[89]

When nonmembers are involved, the matter is not entirely one of "self-government" or "internal relations."[90] Consistent with these general limitations, it is a "bedrock principle" that tribes' inherent authority does not generally extend to nonmembers.[91]

C. This Case Potentially Impacts Nonmember Parents

Anytime a nonmember parent is the subject of a ruling by a tribal court concerning the nonmember parent's Indian child, the nonmember parent's rights are

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[86] *See, e.g.*, Opposition to Motion to Stay, dated January 2, 2009, at 13 ("the State again simply diverts the focus to something that is not at issue in this case—tribal jurisdiction over non-members") (underline in original).

[87] *Montana*, 450 U.S. at 564.

[88] *Id.* at 564 (underline added); *Cossey v. Cherokee Nation Enters.*,___ P.3d___, No. 105300, 2009 WL 146685, at *6 (Okla. Jan. 20, 2009) (finding that tribal inherent powers of self-government involve "only the relations among members of a tribe").

[89] *Montana,* 450 U.S. at 564 (citation omitted) (italics in original).

[90] *See Hicks*, 533 U.S. at 371 (self government or internal relations not at issue where tribes apply law to state officers enforcing state law on reservation for off-reservation conduct).

[91] *Plains Commerce Bank*, 128 S.Ct. at 2726.

affected. But the trial court's ruling is not limited to tribal members.[92] [Exc. 349]. The trial court held, without any apparent qualification, that the tribes share concurrent jurisdiction with the State of Alaska over children's proceedings. [Exc. 349]. The tribes nevertheless insist that this case is not about nonmembers.[93]

The tribes' assertion is misleading. The tribes argue that the sole relevant consideration in establishing subject-matter jurisdiction over nonmembers is a child's tribal status, a point with which the state strenuously disagrees.[94] Having summarily dismissed nonmember status as a non-issue, the tribes assert that the *Montana* analysis for analyzing potential jurisdiction over nonmembers is "irrelevant."[95] [R. 1394].

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[92] The trial court's judgment says that "plaintiff-tribes share concurrent jurisdiction with the State of Alaska over child custody proceedings as the term is defined by the ICWA 25 U.S.C. § 1903." [Exc. 349]. The trial court commented after the state filed its Notice of Appeal that "this court's decision addresses issues related to tribal members and not to nonmembers." [R. 1498]. The lack of facts potentially explains the confusion about the scope of the trial court's ruling, and again makes it difficult to narrowly frame the issue for this court to decide.

[93] Opposition to Motion to Stay, dated January 2, 2009, at 13 ("the State again simply diverts the focus to something that is <u>not</u> at issue in this case – tribal jurisdiction over <u>nonmembers</u>.") (underlines in original).

[94] Exc. 252 and 252 n.27 (tribes arguing that subject matter jurisdiction over nonmembers is established by Indian child's tribal membership, the sole remaining issue allegedly being personal jurisdiction).

[95] Notably, the tribes allege no facts in their complaint which might establish that either *Montana* exception would apply in this case. [Exc. 65-86]. *See Montana*, 450 U.S. at 566 and 566 n. 16 (noting lack of allegations in complaint which might meet the *Montana* exceptions as one basis to reject tribal assertions of jurisdiction).

This case is not only about tribal jurisdictional rights. Parents' "competing rights" to a say in the protection of their children is also squarely at issue.[96] These rights are considered important and substantial under the Alaska Constitution.[97] The rights of parents whose relationship to their child or children may be irrevocably affected by the determination of a tribal court must be considered.[98]

D. The United States Supreme Court Strongly Curtails Tribal Rights Over Nonmembers

As applied to potential parent nonmembers, a tribe's adjudicative authority is a federal question.[99] Limitations on tribal jurisdiction over nonmembers are matters of subject-matter jurisdiction.[100] The general rule is that tribal jurisdiction over nonmembers does not exist, and even within the limited *Montana* exceptions is highly

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[96] Courts recognize the substantial rights parents have in care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1971) (noting that the right to conceive and raise one's child is essential among the basic civil rights of man, and "'far more precious . . . than property rights'") (citation omitted); *In re D.C.*, 596 P.2d 22, 23 (Alaska 1979) (noting that child protection laws represent a balance struck by the Alaska legislature between competing child and parental rights). Parental rights also receive explicit statutory recognition in Alaska. *See* AS 47.05.065; AS 47.10.084.

[97] *In re S.D., Jr.*, 549 P.2d 1190, 1200 (Alaska 1976) (finding that right of parents to the care, custody and control of their children is an important and substantial right protected by constitution)

[98] *See Catholic Social Servs.*, 783 P.2d at 1160 (recognizing that ICWA takes into account parental rights); *see also Holyfield*, 490 U.S. at 57 (Stevens, J., Rehnquist, J., Kennedy, J., dissenting) (finding that ICWA tribal rights "complement" and "help effect" the rights of parents and Indian children, and do not "restrict" them).

[99] *Plains Commerce Bank*, 128 S.Ct. at 2716; *see also* Exc. 340 (trial court felt bound to follow *John v. Baker* "regardless of whether it is consistent with Federal precedents").

[100] *Hicks*, 533 U.S. at 367 n.8 (finding that limitation on jurisdiction over nonmembers is a question of subject matter jurisdiction, not merely personal jurisdiction).

disfavored.[101] Tribal jurisdiction does not generally extend beyond tribal boundaries,[102] and assertion of jurisdiction over nonmembers "is necessarily inconsistent with a tribe's dependent status."[103]

In addressing tribal jurisdiction over nonmembers, the *Plains Commerce Bank* Court noted several concerns. Tribal sovereignty is outside the basic structure of the United States constitution.[104] The Court recognized the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent."[105] The nonmembers have no representation or ability to participate in tribal matters. Therefore, unless consent has been obtained from a nonmember, it is inherently unfair to subject that

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101 *See, e.g.*, *Strate*, 520 U.S. at 445 (explaining that tribal jurisdiction over the conduct of nonmembers generally requires express authorization by federal statute or treaty, and exists only in limited circumstances); *Brendale*, 492 U.S. at 432 (finding no tribal interest in zoning lands held in fee by non-Indians); *MacArthur v. San Juan Country*, 497 F.3d 1057, 1068 (10th Cir. 2007) (finding with reference to *Montana* that inherent sovereign powers do not extend to activities of nonmembers); *In re J.D.M.C.*, 739 S.W.2d at 810 n.20 (noting general rule that "sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); *see also Plains Commerce Bank*, 128 S.Ct. at 2723-2726 (finding no tribal interest in the sale of non-Indian fee land).

102 *See, e.g.*, *Philip Morris USA*, 2009 WL 115589, at *3.

103 *Brendale*, 492 U.S. at 427.

104 *Plains Commerce Bank*, 128 S.Ct. at 2724.

105 *Id.* The lack of a factual record is again a problem. Suppose a tribal member from one village fathers a child with a woman who is a tribal member of a different village. It is likely that the child will be a member of, or eligible for membership in, both tribes. Suppose at the father's insistence his tribal court initiates a proceeding to terminate the mother's parental rights. Suppose the proceeding is contested. Should the nonmember mother, whose parental rights may be extinguished in the foreign tribal proceeding, be forced to defend herself in the father's tribal court? *See also Philip Morris USA*, 2009 WL 115589, at *6 (stating that analysis of nonmember jurisdiction should consider whether a "non-member is haled into tribal court against his will").

individual to the jurisdiction of the tribal court.[106] The consent would of course be fact dependent, and would not be effective unless the tribe would otherwise have subject matter jurisdiction.[107]

Narrow, judicially-defined circumstances exist where a tribe may exert jurisdiction over nonmembers. The case of *Montana v. United States* established two exceptions to the general rule prohibiting jurisdiction over nonmembers:

> (1) a nonmember enters a consensual relationship with the tribe through commercial dealings, contracts, leases, or other arrangements;
>
> (2) conduct by nonmembers which threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[108]

These two *Montana* exceptions are "'limited'" ones and "cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it."[109] While *Montana* addressed only tribal regulatory authority, its analysis applies to adjudicatory authority as well, and a tribe's adjudicatory authority can be no greater than its regulatory authority.[110]

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106 *Plains Commerce Bank*, 128 S.Ct. at 2724. ("[N]onmembers have no part in tribal government-they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.").

107 *See id.* (noting consent must be in relation to a tribal regulation stemming from a "tribe's inherent sovereign authority").

108 *Montana*, 450 U.S. at 565-66.

109 *Plains Commerce Bank*, 128 S.Ct. at 2720 (citations omitted).

110 *See, e.g., Philip Morris*, 2009 WL 115589, at *4-5.

1. A Nonmember Parent Has Not Entered a Consensual Relationship with a Tribe Under the First Prong of the *Montana* Exceptions

In this case, the "action" of a nonmember is having a personal relationship with a tribal member. But "marriage" is not the "consensual relationship" envisioned in *Montana*.[111]

Merely entering some kind of a relationship with a tribe does not mean a person has thereby submitted to tribal jurisdiction.[112] The Ninth Circuit has consistently rejected the notion that a "socially consensual" relationship meets *Montana*'s first exception.[113] While a nonmember may, under limited circumstances, voluntarily submit to tribal court jurisdiction,[114] those are not facts before this Court.[115] Nor can nonmember consent be presumed. To the contrary, one might reasonably conclude that in many

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[111] *In re J.D.M.C.*, 739 N.W.2d at 810 n.21 ("Marrying a tribal member and allowing your children to receive tribal services does not constitute the consensual relationship envisioned by the *Montana* jurisdictional analysis.").

[112] *Salish Kootenai College*, 434 F.3d at 1138.

[113] *Id.* at 1138 (citing with approval *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2000) for proposition that socially consensual relationships "cannot serve as the basis for tribal court jurisdiction").

[114] *Salish Kootenai College* concluded that a nonmember may voluntarily submit to tribal jurisdiction by initiating a lawsuit as a plaintiff. 434 F.3d at 1137, 1140. The "nonmember's status as a plaintiff was crucial" to the *Salish Kootenai College* decision. *Philip Morris USA*, 2009 WL 115589, at *6 n.2. There may also be limits on the kinds of tribal proceedings which a nonmember may legitimately bring before a tribal court as a plaintiff. *See Salish Kootenai College*, 434 F.3d at 1140 n.5 (suggesting limits on the kinds of proceedings to which a state court might be required to give comity).

[115] If a nonmember initiated a case in tribal court against a tribal member parent, presumably this entire case would be different. These kind of potential factual nuances highlight the fact that this case is not ripe.

instances, nonmembers will object to having a child custody dispute resolved in a tribal court forum.

In cases other than those initiated by nonmembers in tribal court, the first *Montana* exception is generally limited to the kinds of commercial activities specifically identified in *Montana*.[116] Those activities include on-reservation sales transactions, tribal permit taxes for livestock or for business activities within reservation boundaries, and a tax for on-reservation cigarette sales.[117] Socially consensual relations are not similar. Each transaction listed in *Montana* also had a strong and direct connection to Indian country, and socially consensual relations which occur off-reservation are therefore unlikely to be recognized as falling within the first *Montana* exception.[118]

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[116] *See Hicks*, 533 U.S. at 372 (explaining that *Montana's* first exception referred to private individuals voluntarily submitting themselves to tribal regulatory jurisdiction, and cases relied on all involved "private commercial actors"); *Strate*, 520 U.S. at 457 (stating that the scope of the first *Montana* exception should be defined with reference to the specific examples provided by the *Montana* court); *American Indian Law Deskbook*, *supra* note 47, at 164 (observing that United States Supreme Court precedents "leave little question . . . that the first exception is limited in practical effect to commercial relationships consummated on tribal reservation lands"); *see also Philip Morris USA*, 2009 WL 115589, at *7 (analyzing first *Montana* exception to determine whether a commercial relationship existed, or whether a voluntary litigation fact pattern existed); *Salish Kootenai College*, 434 F.3d at 1136 (distinguishing the nonmember plaintiff scenario from the cases of *Hicks*, *Strate*, and *Montana*).

[117] *Strate*, 520 U.S. at 457.

[118] *Plains Commerce Bank*, 128 S.Ct. at 2721-22 (observing four cases which discuss *Montana*'s jurisdiction and "[e]ach involved regulation of non-Indian activities on the reservation," and subsequent cases permit "regulation of certain forms of nonmember conduct on tribal land"); *MacArthur*, 497 F.3d at 1071-72 (finding that consensual relationship test can only go to "reservation borders," and as applied to nonmember-member relationship "within the confines of the reservation"); *In re J.D.M.C.*, 739 N.W.2d at 810 (finding that *Montana* "generally applies to conduct *within the reservation.*") (italics in original) (citation omitted); *see Salish Kootenai College*, 434

The *Plains Commerce Court* said that it "'defies common sense to suppose' that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple."[119] Lacking a consensual mandate, it also defies common sense that this Court should require a nonmember, living off-reservation, to submit to the jurisdiction of tribal courts simply because that individual entered into a private, socially consensual relationship with a tribal member.

2. No Nonmember Conduct Exists That Threatens or Has Some Direct Effect on the Political Integrity, The Economic Security, or the Health or Welfare of the Tribe Under the Second Prong of the *Montana* Analysis

The second *Montana* exception allows a tribe to exercise jurisdiction outside Indian country where "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[120] The tribes cite ICWA's legislative history to support the argument that tribes must be able to control custody of their children. [Exc. 259-61; 267-69]. The tribes place significance on a quote in the House Report: "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves than to

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F.3d at 1139 (finding tribe could assert jurisdiction over nonmember who files suit as plaintiff in tribal court by reference to a tribe's territorial management powers and because of "deliberate actions" to enter tribal lands).

[119] *Plains Commerce Bank*, 128 S.Ct. at 2724.

[120] *Id.* at 2720 (citing *Montana v. United States*, 450 U.S. 544, 566 (1981)).

interfere with tribal control over the custody of their children."[121] [R. 1394]. This Court used the quote in concluding that tribes "do possess governmental powers over child custody matters."[122] But this case raises a different question: how far does that jurisdiction extend?

The *Plains Commerce Court* cautioned that the second *Montana* exception's jurisdictional bar is high. The conduct over which the tribe seeks to assert jurisdiction must "imperil the subsistence" of the tribal community, or the exercise of jurisdiction must be "necessary to avert catastrophic consequences."[123] Since tribes already have presumptive jurisdiction in cases arising off-reservation, and have the unqualified right to intervene—at any time—in a state CINA proceeding involving an Indian child, the claim that initiating jurisdiction is necessary to avoid "catastrophic consequences" rings hollow.

The fact that the state has over 7000 Native children under its care is evidence of the overall success of state jurisdiction. [R. 1420]. The tribes produced no evidence below that application of state children's proceedings through OCS has "imperiled" their subsistence or is in any other way "catastrophic." They simply dismiss

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[121] *See Baker*, 982 P.2d at 753 (quoting H.R.Rep No. 95-1386 at 15) (quoting *Wakefield v. Little Light*, 347 A.2d 228, 237-38 (Md. 1975)). The "threat to essential tribal relations" used by the tribes came from the case of *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975). In *Wakefield*, an Indian child was removed from a reservation by white social workers. The state has no qualm with the principle that Indian children may not be forcibly removed from reservations. Section 1911(a) of ICWA makes that point abundantly clear.

[122] *Baker*, 982 P.2d at 753-54.

[123] *Plains Commerce Bank*, 128 S.Ct. at 2726.

Montana as completely "irrelevant," [R. 1394] and therefore have failed to meet their burden to establish a basis for assertion of off-reservation jurisdiction over nonmembers.

V. Tribes Do Not Have Unfettered Off-Reservation Authority, And That Authority Does Not Extend to Off-Reservation Child Jurisdiction Matters Involving Tribal Members

A. Section 1911(b) Defines the Scope of Tribal Jurisdiction Off-Reservation

Courts addressing § 1911(b) presume that actions arising on state land are appropriate for state jurisdiction, subject to a right of transfer for certain defined ICWA actions.[124] The tribes take exception to the state's interpretation, arguing that they have preexisting tribal jurisdiction, and that failure to recognize such preexisting jurisdiction allegedly works a "prohibition" or "termination" of their authority. [Exc. 272-73]. Requiring that a case be transferred from state court to tribal court is hardly a prohibition or termination of tribal authority. Neither the tribe's general authority to control domestic relations among its members, nor its right to exercise that authority consistent with § 1911, is at issue.[125]

B. Assertions of Tribal Jurisdiction on State Land Should Be Subject to Similar Tests Applicable to Attempted Assertions of State Jurisdiction on Tribal Land

Even assuming tribes had the right to assert jurisdiction over their members off reservation, that right is not unfettered. Consideration must be given to the potential

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[124] *See, supra* at 18 n.47 and 23-24.

[125] *See Montana*, 450 U.S. at 564 (finding that Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members).

impact the exercise of that jurisdiction will have on state interests.[126] Where children's proceedings are at issue, the state has incorporated a comprehensive child protection scheme, and the possibility of 229 tribes exercising initial child protection jurisdiction could negatively impact that scheme.

The concept of tribal jurisdiction outside Indian country remains the exception rather than the rule.[127] In enacting ICWA in 1978, Congress could not have reasonably anticipated that tribes would initiate child protection proceedings outside reservations. Prior to the passage of ICWA "state jurisdiction over Native Americans outside the reservation was the norm."[128] To put that rule in some perspective, while a reservation is considered to be a part of the state,[129] the state is not a part of a reservation. Indians going beyond reservation boundaries are subject to nondiscriminatory laws of the state otherwise applicable to all citizens of the state.[130] Indeed, Felix Cohen's 2005 "Federal Indian Law" treatise devotes a scant paragraph to the topic of "Jurisdiction

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126 *See Hicks*, 533 U.S. at 364 (holding the tribes could not interfere with state service of process on reservations, and tribal control over state officials was not necessary to protect tribal self government or to control internal relations); s*ee also* Exc. 223-25 (state brief identifying state interest in children's proceedings, and discussing *Nevada v. Hicks* as relevant authority); Exc. 284 (state brief stating ICWA cases implicate compelling state interests); Exc. 303-06 (state brief applying *Nevada v. Hicks* and discussing tribe's activities as impacting a tribe's "external relations with the state").

127 *See, e.g.*, *Philip Morris USA*, 2009 WL 115589, at *3 (jurisdiction of tribal courts does not extend beyond tribal boundaries).

128 Carriere, *supra* note 44, at 613.

129 *Hicks*, 533 U.S. at 361-62.

130 *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); Carriere, *supra* note 44, at 612 (observing that if a child resided in the state, rather than on the reservation, the tribe would lack police power to initiate child welfare proceeding).

Outside Tribal Authority," and despite setting forth a largely pro-tribal stance on matters of tribal jurisdiction, relies primarily on *John v. Baker* in concluding that jurisdiction outside Indian country "may" exist but is "more constrained."[131]

The fact that tribal jurisdiction outside Indian country is the exception rather than the rule is reflected in the dearth of case law regarding tribal assertion of off-reservation jurisdiction in children's proceedings. To the extent related case law exists, it involves attempted assertions of state jurisdiction within Indian country.[132] By examining those cases, correlative rules for tribal jurisdiction off-reservation can be developed.

In analyzing attempted assertions of state jurisdiction in Indian country, states have no authority to regulate property or conduct of tribes or tribal members in Indian country.[133] States have only limited ability to regulate nonmembers on tribal property.[134] Where a state tries to assert jurisdiction over nonmembers within a tribal reservation, the state may do so only if (1) federal law does not preempt the state actions, and (2) the state actions do not infringe on tribal government.[135] But the converse must also be true: if the State of Alaska is to entertain assertions of tribal jurisdiction over

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131 Newton et al., *supra* note 47, § 4.01[2][d], at 218; § 7.02[1][c], at 602-03.

132 *See, e.g., Williams v. Lee*, 358 U.S. 217, 222 (1959) (ruling that state court did not have jurisdiction to resolve civil action arising on reservation between non-Indian store owner-plaintiff and Indian customers).

133 Newton et al., *supra* note 47, § 6.03, at 520.

134 *Id.* § 6.03[2][a].

135 *Id.* § 6.03[2][a], at 525-26.

tribal members premised only on inherent tribal sovereignty, such tribal jurisdiction should only be allowed if it would not infringe on state government functions.[136]

Drawing from analogy to Indian law limiting state jurisdiction on reservations, the following would be an appropriate test: (1) require that tribal jurisdiction on state lands be within the narrow categories of tribal authority identified in *Montana* "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members";[137] and (2) if the exercise of jurisdiction is within the *Montana* categories identified in Step (1), analyze whether the assertion of such jurisdiction would infringe on state government.

C. Inherent Tribal Jurisdiction over Children's Proceedings Off-Reservation Would Negatively Impact a Comprehensive State Child Protection Scheme

Child custody proceedings that involve members of the same tribe (*i.e.*, mother, father and child all belong to a single tribe) may meet *Montana*'s "domestic relations among members" requirement. It is important to point out, however, that any time the tribe attempts to assert jurisdiction outside Indian country, it is possible that particular facts could modify the jurisdictional analysis.[138] The analysis could also vary

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[136] *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (noting that a principle of tribal self-government is to seek an accommodation between the interests of the Tribes and of the Federal government, on the one hand, and those of the State, on the other hand).

[137] 450 U.S. at 564.

[138] *See, e.g., Wisconsin Potowatomies of the Hannahville Indian Cmty. v. Houston*, 393 F.Supp. 719, 730 (D.C. Mich. 1973) (noting situation where tribal member living off reservation and taking advantage of benefits and obligations of state law can lead to a point where a "transformation" occurs from tribal court to state court); John R.

depending on the type of proceeding, whether foster care, termination of parental rights, or adoption.[139] Lacking any specific facts in this appellate record, the most that can presently be accomplished is to assume, for discussion purposes, that the first part of the test has been met.

Assuming a case falls within a tribe's inherent authority, the impact on state government should be considered. The state contests tribal jurisdiction in this case because it would infringe on a comprehensive state child protection scheme. The fact that the state has a comprehensive child protection scheme in place distinguishes this matter from the decision of *John v. Baker*, which arose from a divorce action and involved no similar comprehensive scheme.[140]

Renner, *The Indian Child Welfare Act and Equal Protection Limitations On the Federal Power Over Indian Affairs*, 17 Am. Indian L. Rev. 129, 131, 173-74 (1992) (observing that as a law ceases to concern reservations or Indian tribes and focuses its attention on Indians lacking significant contacts with these societies, the Equal Protection Clause should limit the law's scope, and membership alone is not necessarily appropriate in determining applicability of ICWA).

[139] Section 1911(b) only allows a transfer for termination of parental rights and foster care, not for adoptions. Congress' decision to exclude adoptions, however, does not leave tribes without the ability to do adoptions. Adoptions which occur after a foster care or parental termination of rights state court to tribal court transfer could qualify for recognition. The state also ratifies adoptions that occur under tribal custom as a matter of equity. *Calista Corp. v. Mann*, 564 P.3d 53, 61 (Alaska 1971); 7 AAC 05.700(b) (authorizing issuance of new birth certificates for Indians adopted under tribal custom); *see also American Indian Law Deskbook*, *supra* note 47, at 163 (observing that existence of federal or state remedies that can mitigate or eliminate the harm to tribal interests will negate the need for the exercise of tribal jurisdiction).

[140] Some of the underlying premises of the majority decision in *John v. Baker*, such as that membership and Indian country can be "teased apart," are also in some doubt in light of recent federal decisions. *See* 982 P.2d at 754 (suggesting land-based sovereignty and membership sovereignty can be teased apart). A membership-only tribal jurisdiction has not received United States Supreme Court approval. *See, e.g., Plains*

Cases analyzing state jurisdiction on reservations provide a useful backdrop for analyzing tribal jurisdiction outside reservations. The Supreme Court will balance state, federal and tribal interests before allowing a state to exercise jurisdiction on reservations.[141] The facts of each case must be examined in order to make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake."[142] The presence of a comprehensive tribal scheme can prevent a state from asserting jurisdiction on tribal lands.[143]

A similar rule should apply to tribal assertion of jurisdiction on state land. The rule requires a balancing of interests and a particularized inquiry into the nature of the respective interests.

The Alaska Legislature deliberately chose to protect all children in the state —Native and non-Native alike—when it enacted comprehensive child in need of aid and child protection statutes.[144] The legislature mandated that its child in need of aid

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Commerce Bank, 128 S.Ct. at 2718 (observing that tribal sovereignty "centers on the land held by the tribe and on tribal members *within the reservation*") (italics added); David M. Burton, *John v. Baker and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 Alaska L. Rev. 1, 24 (2003) (observing that *Montana*'s new paradigm requires both territorial and membership aspects of tribal sovereignty be examined, and assertion of tribal jurisdiction in the absence of Indian country is inappropriate). However, it is not necessary to overrule *John v. Baker* to resolve the instant appeal.

[141] *Bracker*, 448 U.S. at 144-45.

[142] *Id.* at 145.

[143] *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 328 (1983) (considering fact that tribe and federal government jointly conducted a comprehensive fish and game management program in overruling New Mexico's effort to regulate nonmember hunting and fishing activities on tribal lands).

[144] *See* AS 47.10.005-142 (CINA); AS 47.17.010-290 (child protection).

provisions be liberally construed to "promote the child's welfare and the parents' participation in the upbringing of the child,"[145] and with respect to child protection statutes mandated the services be available to all children to advance significant and specific state child protection goals:

> (1) prevent further harm to the child;
>
> (2) safeguard and enhance the general well-being of the children in this state; and
>
> (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.[146]

Likewise, the Court's CINA rules apply to all children.[147]

The Department of Health and Social Services' "interest in protecting the children of this state is compelling in nature."[148] "[T]he State has a special, indeed compelling interest in the health, safety, and welfare of its minor citizens[.]"[149] This state interest is part and parcel of its *parens patriae* interest in protection of its citizens.[150]

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145 AS 47.10.005.

146 AS 47.17.010.

147 *See In re D.D.S.*, 869 P.2d 160, 163 (Alaska 1994) (analyzing CINA rules, and placing no apparent limitation on the type of child to whom CINA rules apply); *see* CINA Rules 1-23.

148 *In re D.D.S.*, 869 P.2d at 163.

149 *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007).

150 *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (noting that state has *parens patriae* interest in "preserving and promoting the welfare of the child", and quoting with approval case finding such interest to be "urgent"); *State, DHSS v. Native Village of Curyung*, 151 P.3d 388, 399 (Alaska 2006) (noting that state has protectable *parens patrie* interest in matters of public concern, including the "well-being of its populace").

When a tribal member avails himself or herself of state benefits and services, and lives within the boundaries of the state instead of a reservation, the state has a clear and undeniable interest in the Indian child.[151] The state's interests are as strong for Native children as for non-Native children.[152]

While only six named tribes are participating in this case, they sought relief that would be used by other tribes in the state to assert jurisdiction over children's proceedings. There are 229 tribes in Alaska.[153] Each tribe claims to be a separate sovereign entity, with the ability to make and apply its own rules to children's proceedings.[154]

"Sharing" pure concurrent jurisdiction between the state's Office of Childrens' Services (OCS) and 229 tribes will effectively throw the state's existing child protection scheme into disarray, because the tribe will control the progress as well as the outcome of the case.[155] Yet the state's legislative mandate to take certain actions will not evaporate just because the tribe has initiated the proceeding.

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151 *See, e.g., Langdeau v. Langdeau*, 751 N.W.2d 722, 730 (S.D. 2008) (finding that when wife left reservation to reside in Rapid City, state acquired an interest in the matter).

152 2000 N.D. Op. Atty. Gen. No. 07 (2000) (observing that state has as much of an interest in the welfare and parentage of Indian children as it does in non-Indian children).

153 *See supra* note 6.

154 *See* William C. Canby, Jr., *American Indian Law* 87 (4th ed. 2004) (tribal sovereignty has operated as a shield against intrusions of state law into Indian country).

155 *See Briggs v. Briggs Estate*, 500 P.2d 550, 554 (Alaska 1972) (finding that if two courts have concurrent jurisdiction, court exercising jurisdiction first gets exclusive jurisdiction).

If a tribal court assumes jurisdiction without the opportunity for parental objection, the state will have no practical way to determine whether the best interests of the child require further action,[156] to direct persons having custody or control of the minor to appear,[157] to make emergency findings to assume custody,[158] to appoint a guardian ad litem or attorney,[159] to conduct hearings,[160] to enter other judgments or orders as contemplated by the Alaska legislature,[161] or even to provide family support services.[162]

Mandatory statutory duties to investigate reports of harm will also be thrown into limbo once a tribe asserts jurisdiction.[163] Whether any given tribe will cooperate in state investigations and interviews—which are still mandated by state law—is also unclear. The assertion of jurisdiction by a tribe may effectively cut short any further state involvement,[164] including any superior court adjudications.

The legislature directed that in making dispositional orders, the "court shall keep the health and safety of the child as the court's paramount concern."[165] Nothing in

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156 AS 47.10.020(a).

157 AS 47.10.030(b).

158 AS 47.10.030(c).

159 AS 47.10.050.

160 AS 47.10.070.

161 *See, e.g.*, AS 47.10.080.

162 AS 47.10.086(a).

163 *See* AS 47.17.025.

164 *See* AS 47.17.033 (statute governing OCS's obligation to conduct investigations and interviews in child abuse and neglect cases).

165 AS 47.10.082.

the Alaska statutes suggests that this state scheme should only protect non-Native children.

The nearly inescapable fact is that assertion of tribal jurisdiction over children's proceedings will restrict the state's ability to carry out its mandated legislative duties. The state's comprehensive program will be "infringed" by the assertion of tribal jurisdiction over children's proceedings, and accordingly the state's interest should prevail and tribal jurisdiction should be denied.

VI. Off-Reservation Assertions of Jurisdiction Implicate an Unresolved "Disjunction" in Alaska Jurisprudence

A final complication of off-reservation assertion of tribal jurisdiction is the disjunction it would create in Indian law.[166] The disjunction is that tribes could potentially have more authority in children's proceedings off reservation than they would have on reservation.[167]

The potential disjunction is created because of how Public Law 83-280[168] (P.L. 280) is interpreted. Congress passed P.L. 280 in 1953, conferring criminal and civil jurisdiction to various states over Indian country. Public Law 280's primary purpose was

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166 *Baker*, 982 P.2d at 748 n.46.

167 *Id.* at 805 (Matthews, J., dissenting) (noting potential that Alaska court may be required to address the "disjunction"); *see American Indian Law Deskbook*, *supra* note 47, at 479-80 (noting "seeming anomaly" in Alaska where Alaska court may exert jurisdiction over ICWA proceedings on a reservation but outside reservations are subject to preferred tribal jurisdiction).

168 Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

to fill perceived deficiencies in law enforcement on reservations.[169] Congress intended P.L. 280 states to have "jurisdiction over child dependency proceedings unless tribes availed themselves of § 1918 in order to obtain exclusive jurisdiction."[170] Alaska ultimately became a P.L. 280 state.[171]

The long simmering question is whether in granting states civil and criminal jurisdiction, P.L. 280 had the effect of divesting tribes of jurisdiction. If so, then assertion of ICWA tribal jurisdiction on reservation would not be appropriate unless a tribe took further action such as re-assuming jurisdiction as allowed under § 1918.

This Court held in *Native Village of Nenana v. State*, 722 P.2d 219, 221 (Alaska 1986), that P.L. 280 gave the state exclusive jurisdiction over custody matters until a tribe petitions for re-assumption under § 1918.[172] The *John v. Baker* Court appears to limit the scope of the *Nenana* ruling by concluding that P.L. 280 only applied to Indian country.[173] Since most Alaska ICWA matters will arise off-reservation, at least an argument exists that this matter need not be resolved in this case. The counter argument is that the "disjunction" noted by the majority and dissenting opinions in *John v. Baker* will remain unexplained and unaddressed. A situation could be allowed to exist where off-reservation tribal jurisdiction in children's proceedings (P.L. 280 does not

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169 *See Baker*, 982 P.2d at 807 (Matthews, J., dissenting).

170 *Mann*, 415 F.3d at 1064.

171 *Baker*, 982 P.2d at 745 (noting that Alaska is a P.L. 280 state).

172 *See also id.* at 745-46, 748 n.46 (majority opinion discussion of P.L. 280); 776-771, 805-814 (Matthews, J., Compton, J., dissenting) (detailed analysis of P.L. 280).

173 *Id.* at 747 ("By its very text, P.L. 280 applies only to Indian country").

apply, per *John v. Baker*) may be greater than tribal jurisdiction on-reservation over children's proceedings (P.L. 280 applies and divests tribes of ICWA jurisdiction, per *Nenana*).

Subsequent to *Nenana*, this Court was invited to reconsider *Nenana's* ruling on P.L. 280 in the case of *In re C.R.H.*[174] The Court declined because it found an alternate basis to resolve the jurisdictional question at issue. Specifically, the *C.R.H.* Court found that Congress had unambiguously provided tribal jurisdiction via the transfer mechanism in § 1911(b). Because § 1911(b) was the independent authority necessary for transfer jurisdiction, the Court deemed further consideration of P.L. 280 unnecessary.[175]

Thus, when presented with the opportunity to reconsider its prior P.L. 280 rulings, this Court chose not to. Public Law 280 and its related rulings therefore have continued vitality in Alaska. The State of Alaska Attorney General's office was bound to consider this Court's prior P.L. 280 rulings in considering its application to ICWA jurisdiction. However, the 2004 opinion does not need to rest on P.L. 280 to sustain the jurisdictional conclusions. The jurisdictional conclusions can be reached independently of P.L. 280 by relying only on ICWA's language and guidance from the United States Supreme Court.

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[174] *In re C.R.H.*, 29 P.3d at 852 (noting that child's mother urged court to reconsider *Nenana*'s interpretation of P.L. 280).

[175] *Id.* at 852-53.

VII. The Trial Court Erred in Demanding Full Faith and Credit For All Tribal Proceedings

The general rule is that tribal court decisions are entitled to comity in state court.[176] Part of the comity analysis involves the examination of the tribal court's subject matter and personal jurisdiction.[177] Relying on ICWA 25 U.S.C. § 1911(d), the trial court held full faith and credit was to be accorded to tribal public acts, records and judicial proceedings "regardless of whether the tribe initiated the proceedings or by way of transfer from State court." [Exc. 350].

A large portion of this case is about the tribes' argument that they have inherent authority to assert jurisdiction independent of ICWA. Decisions not arising out of ICWA's § 1911(a) or § 1911(b) provisions deserve comity recognition according to the general rule, not full faith and credit under § 1911(d).

CONCLUSION

This Court should dismiss this action because it is not ripe. In the alternative, the Court should reverse the trial court's decision recognizing tribal inherent

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[176] *John v. Baker*, 30 P.3d 68, 72 (Alaska 2001) (*John II*) (finding that comity provides proper framework for deciding when state courts should recognize tribal court decisions).

[177] *Id.*

authority to initiate children's proceedings under ICWA, and reverse the decision to give full faith and credit to such tribal orders.

DATED this 9th day of February, 2009.

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