No. 10-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.P., by EDWARD PARKS, *et al.*,

Plaintiffs-Appellants,

v.

NATIVE VILLAGE OF MINTO, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
The Honorable Judge H. Russel Holland

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES NATIVE VILLAGE OF MINTO AND MINTO TRIBAL COURT

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INTRODUCTION

The court has ordered the parties to submit supplemental briefs. In this brief the Tribal Appellees, the Native Village of Minto and the Minto Tribal Court, address the following question: whether the district court should have dismissed the action below because the Plaintiffs-Appellants (hereafter "Appellants") failed to exhaust the tribal appellate process.[1]

ARGUMENT

A federal court may have jurisdiction to consider the federal question whether a tribal court has exceeded its jurisdiction, but "exhaustion is required before such a claim may be entertained by a federal court." *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) ("*Boozer*"), *citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985) ("*Nat'l Farmers Union*"). *See also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943 (9th Cir. 2008) ("*Atwood*"). Appellants failed to exhaust tribal remedies and the district court could have dismissed the complaint on this ground.

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[1] The Federal Appellees will address the other two other issues posed in the court's Order, Dkt. #67: 1) the effect, if any, of the Appellants' reservation of federal questions in state court on the court's decision to abstain; and 2) whether abstention is appropriate where the underlying state court action was filed after the federal court action.

I. Facts.

The Appellants asked the district court to declare that the Minto Tribal Court lacked "authority to involve itself in matters regarding, or in any way affecting, the legal or physical custody of plaintiff S.P." because Minto is not a "federally recognized tribe." Excerpts of Record ("ER") 64-65.[2]

The Minto Tribal Court made S.P. a ward of the court in June 2008, awarding temporary custody to Jeff and Rozella Simmonds, relatives of S.P.'s mother. Neither Bessie Stearman (S.P.'s mother) nor Appellant Edward Parks (who claimed to be S.P.'s father) participated in this initial hearing. After conducting three additional temporary custody hearings, the court terminated the parental rights of Stearman and Parks in an order dated May 7, 2009. ER at 79-82. Appellant Parks voluntarily participated on his own behalf in the three temporary custody hearings and appeared with counsel in the parental termination hearing on May 7, 2009. The district court found that while Mr. Parks participated in the hearings, he objected to the tribal court involving itself

[2] Appellants claimed district court jurisdiction on the basis of two federal questions: 1) whether Minto is a "federally recognized tribe," ER 56-58 (Claims One and Two); and (2), if Minto is federally recognized, whether that recognition creates impermissible classes of Alaska children in violation of the Due Process Clause of the Fifth Amendment, *id.* 59-63 (Claims 3 and 4). Each claim implicates the Minto Tribal Court's jurisdiction to make S.P. a ward of the court and award custody pursuant to tribal authority affirmed in the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq.

in the custody of S.P. *See id.*[3] Five days after the Minto Tribal Court's May 7 order, on May 12, 2009, Appellants filed this action in federal district court. ER 25. Appellants filed two additional suits in Alaska state court.[4]

Before the district court, in a brief in support of a motion for summary judgment, Appellees Native Village of Minto and Minto Tribal Court argued that the action should be dismissed because the Appellants failed to exhaust tribal administrative remedies. *See* Tribal Appellees' Second Supplemental Excerpts of Record ("SSER") at 00002-03 (Memorandum in Opposition). The Minto Tribal Code clearly provides an appellate process. *See id.* at 00068 (Ex. H to Memorandum in Opposition). In the state court proceeding, the Appellants' attorney acknowledged that Appellant Parks was aware of the right to appeal but

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[3] The district court referred to Appellant Parks' participation in temporary custody hearings that resulted in Minto Tribal Court orders dated August 28, 2008, and December 8, 2008. ER 79-82. Appellant Parks also participated in the hearing on March 25, 2009. *See* Tribal Appellees' Second Supplemental Excerpts of Record ("SSER") at 00030, 00051, Affidavit of Mishal Gaede ("Gaede Aff.") at para. 278 and Attachment 9, Exhibit E to Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment ("Memorandum in Opposition") (Docket 53).

[4] Appellant Evelyn Parks, Mr. Parks' mother, filed a case in state court, *In re S.P.*, No 4FA-09-00055 CN (Alaska Sup. Ct., 4th Judicial Dist.), challenging S.P.'s placement with the Simmonds. The court dismissed on September 17, 2009. Tribal Appellees' Supplemental Excerpts of Record ("SER") at 6-11. Two days later, on September 19, 2009, Appellants filed another action in state court, *Parks v. Simmonds*, No. 4FA-09-2508 CI (Alaska Sup. Ct., 4th Judicial Dist.), seeking an order awarding Mr. Parks physical custody of S.P. *See* SER at 12-25 (state court complaint). That action is still pending.

that he elected instead to directly challenge the jurisdiction of the tribal court in federal court. *See id.*, at 00065-00066, Exhibit F (Tr. 53:19 – 54:11). The district court dismissed the action on other grounds and did not address the exhaustion argument.

II. The district court was required to dismiss Appellants' complaint because they failed to exhaust available tribal court remedies.

A party must exhaust all available tribal court remedies before a challenge to the tribal court's jurisdiction will be heard by a federal court. *Boozer*, 381 F.3d at 935. "A federal court must give the tribal court a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts." *Id., citing Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16-17 (1987) ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). A tribal court must be afforded "the first opportunity to address all issues within its jurisdiction," *see Marceau v. Blackfeet Housing Authority,* 540 F.3d 916, 921 (9th Cir. 2008), including the applicability of federal statutes. *See El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 485 n. 7 (1999) (tribal courts "can and do decide questions of federal law").

A district court may either dismiss a case or stay the action while a tribal court handles the matter, s*ee Nat'l Farmers,* 471 U.S. at 857, but when custody

of an Indian child is still before the tribal court, dismissal is proper. *See, e.g.*, *Atwood*, 513 F.3d at 948.

Exhaustion may not be required in certain circumstances.[5] This court has succinctly outlined the limited exceptions to exhaustion as follows:

> The Supreme Court has outlined four exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay."

Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009) ("*Elliott*"), *citing Nevada v. Hicks,* 533 U.S. 353, 369 (2001) (internal quotation marks omitted). *See also Boozer*, 381 F.3d at 935. In this case, the Appellants made a conscious, deliberate decision to forego the right to seek tribal appellate review. None of the narrowly-crafted exceptions relieve Appellants of the obligation to exhaust tribal remedies.

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[5] Exhaustion of tribal remedies is a prudential doctrine, and thus may not be a jurisdictional prerequisite where exceptions apply. *See Boozer*, 381 F.3d at 935, *citing Strate v. A-1 Contractors,* 520 U.S. 438, 451(1997).

A. Minto Tribal Court jurisdiction does not violate an "express jurisdictional prohibition," nor is it "plain" that jurisdiction is lacking.

The second and fourth exceptions to exhaustion involve the nature and extent of the tribal court's jurisdiction to hear a case, and whether that jurisdiction has been expressly limited by federal law. The Minto Tribal Court clearly has tribal authority, affirmed in ICWA, to determine custody of a tribal member, and therefore has authority to determine its own jurisdiction. *See Boozer*, 381 F.3d at 935 ("argument that the tribe clearly lacks jurisdiction under ICWA is without merit").

There is no "express" provision in ICWA prohibiting the exercise of tribal jurisdiction in a custody case—on the contrary, the statute expressly confirms it. As the district court noted, "[e]ven plaintiffs recognize that the facts of this case bring into play the provisions of ICWA." ER at 15.[6]

By the same token, it is not "plain" that the tribal court lacks jurisdiction. Where the exercise of tribal court jurisdiction is "colorable" or "plausible," the "plainly lacking" exception "does not apply and exhaustion of tribal court remedies is required." *Elliott*, 566 F.3d at 848, *citing Atwood*, 513 F.3d at 948.

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[6] The district court also found that "the Native Village of Minto is an Indian tribe for purposes of ICWA," ER at 16, and that S.P., as a ward of the tribal court, may be an "Indian child" for purposes of ICWA. *Id.* at 17. There is a clear legal basis under federal law and tribal law (tribal membership) for the tribal court to determine its own jurisdiction.

See also Allstate Indem. Co v. Stump., 191 F.3d 1071, 1075-76.[7] There is no dispute that this case involves a "child custody proceeding" within the meaning of ICWA. Appellants conceded in their complaint that ICWA "designates Minto and other communities that are ANCSA 'Native villages' as 'Indian tribes' for the purposes of ICWA." ER at 36 (Complaint, ¶ 20).

Moreover, the suit primarily concerns the custody of S.P.; both S.P. and her mother are enrolled members of the Native Village of Minto. *See* SER at 26-30. The interests of non-members are affected, but that fact by itself does not limit tribal court jurisdiction. *See Atwood*, 513 F.3d at 948.

B. The Minto Tribal Court exercised jurisdiction in this case to protect the welfare of a tribal member child, and the assertion of jurisdiction was not motivated by harassment, nor was it conducted in bad faith.

The first exception requires evidence, in the record, of harassment or bad faith. There is no allegation in the complaint or evidence in the record to support a claim that the Minto Tribal Court has exercised jurisdiction in the custody proceeding in bad faith or that it has acted in a manner to harass Appellants. *See Atwood*, 513 F.3d at 948; *Elliott,* 566 F.3d at 847 (no evidence of bad faith or harassment in the district court record). To the contrary, the Minto Tribal Court's

[7] This exception to exhaustion applies when it is "plain that no federal grant provides for tribal governance of nonmembers' conduct." *See Strate v. A-1 Contractors,* 520 U.S. 438, 459-60 n.14 (on fee land); *Nevada v. Hicks,* 533 U.S. 353, 369 (2001) (state officials' actions related to official duties).

detailed orders demonstrate the Court's primary interest in securing the safety and welfare of the child. The Court conducted periodic hearings to reevaluate temporary custody and ordered measures intended to lead to reunification of Appellants with S.P., including provision for visitation and counseling.[8]

C. Appellants' obligation to exhaust remedies is not excused as futile.

Having failed to exercise their right to seek appellate review in the Minto Court of Appeals, Appellants cannot rely on the futility exception to claim they did not have an adequate opportunity to challenge jurisdiction.

First, Appellants cannot complain that the tribal court was incompetent or incapable of deciding the legal issues, or that the court's procedures did not provide adequate opportunity to challenge jurisdiction, without first exhausting appellate review options authorized by tribal law.

In *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986), the court held that the plaintiffs were precluded from claiming bias or incompetence as an excuse for failing to exhaust because they did not raise the claim in tribal court. In federal court the plaintiffs claimed that exhaustion would have been futile, arguing that the Chief Judge of the tribal court

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[8] *See, e.g.*, detailed findings and dispositions in Tribal Court orders attached to Gaede Aff., Exhibit E, Memorandum in Opposition: order dated August 28, 2008 (Attach. 4, SSER at 00042); order dated December 8, 2008 (Attach. 7, SSER at 00046); order dated March 25, 2009 (Attach. 9, SSER at 00051); and order dated May 7, 2009 (Attach. 13, SSER at 00056).

lacked legal training and was biased by her connection with the tribal council. *Id.* at 1416-17. The court stated that "failure to raise such a challenge because they assumed that it would be unsuccessful is not equivalent to raising the issue and having it resolved against them," as required under the exhaustion doctrine. *Id.* at 1417. A futility challenge based on bias or incompetence must be raised first in tribal forums. *Id.* Exhaustion requires that the tribal court be given "a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts." *Boozer*, 381 F.3d at 935. Appellants unequivocally declined to do this.[9]

In *Middlemist v. Secretary of U.S. Dept. of Interior*, 824 F. Supp. 940, 946 (D. Mont. 1993) *summarily aff'd*, 19 F.3d 1318 (9th Cir. 1994), the plaintiffs argued that exhaustion would have been futile because a tribal agency and the Tribal Court had prejudged the jurisdiction issue, lacked independence from the Tribal Council and the Tribal Legal Department, and were biased. *Id.* The court rejected the futility argument and held that bare claims of bias or incompetence

[9] Appellants could claim futility on the basis that their challenge to the federally recognized status of the Tribe relieves them of the obligation to exhaust because a court cannot be expected to rule against its own validity. That is not a legitimate reason for failing to exhaust. As noted above, the Minto Tribal Court is an existing judicial body with recognized authority and jurisdiction in ICWA cases. This claim is no different than garden-variety claims of futility based on bias or incompetence, which clearly must be raised first in tribal forums. *See, e.g., A & A Concrete, Inc.*, 781 F.2d at 1417; *Middlemist*, 824 F. Supp. at 946.

do not relieve plaintiffs from the obligation to exhaust. *Id.* ("[A]rguments questioning the competency and neutrality of tribal courts have long been a mainstay in attacks on tribal jurisdiction by non-Indians and have been consistently rejected.").[10]

Appellants in their complaint did not claim they had exhausted tribal remedies or that exhaustion was not required. However, in state court they argued that the tribal court's structure and procedure are flawed and do not provide due process. In *In re S.P.* the Appellants' attorney confirmed that Appellants were provided notice of a right to appeal, and characterized the Tribe's appellate process dismissively as "risible": "The appeal is that you can appeal to us who have just done this to you. That's the appeal."[11] This statement

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[10] For this reason, the Alaska Superior Court's ruling in *Parks v. Simmonds* that an appeal to the Minto Appeals Court would have been futile is, with all due respect to Judge Lyle, contrary to federal law. *See* Addendum to Minto Supplemental Brief ("Minto Addendum") at 14-15 (Decision Denying Motion to Dismiss). The state court found that the tribal appeals court permitted only a brief statement of the reasons for appeal, and "apparently" did not allow attorneys to speak, so Parks' would not have been able to adequately present his jurisdictional challenge to the appeals court. *Id.* But this ruling, made in the context of declining to afford the tribal court ruling full faith and credit was appealed to the Alaska Supreme Court, which appears highly skeptical of the superior court's decision. The Alaska Supreme Court remanded for further factual findings and legal analysis to decide, among other issues, whether due process requires representation by an attorney at all. Dkt. #64-2 (remand order attached to U.S. letter to court dated April 29, 2011).

[11] *See* SSER at 00065-66, Exhibit F, Memorandum in Opposition (Tr. 53:19 – 54:11).

appears to imply that the Minto Court of Appeals does not act independently or is identical to the trial court. Not true. The Minto Court of Appeals in any case is composed of three Tribal Council members, "with Tribal members outside the Council appointed as needed to make a fair panel of Judges." Judges sitting as the Minto Tribal Court would have an obvious conflict of interest, and therefore the appellate panel would have a different composition than the trial court.[12] Appellants made a deliberate decision to forgo the Tribe's appellate process and instead, five days after the tribal court decision, filed the federal court action. Appellants cannot now question the validity of the court, the adequacy of the Tribe's appellate process, or the competence of the Minto Tribal Court to understand the Appellants' legal arguments. These arguments and post-hoc rationalizations are no substitute for the exhaustion of tribal remedies. [13]

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[12] *See* SSER at 00068, Section 2, Chapter 14, Minto Court of Appeals, Minto Judicial Code (Exhibit H), Memorandum in Opposition. The code does not have an express conflict of interest provision but the concept is clear from the fact that the spouse of a trial court judge cannot serve on the appellate panel. *See id.*

[13] For example, one of the issues before the Alaska state court in *Parks v. Simmonds*, whether to give full faith and credit to the Minto Tribal Court order, has been argued as a question of the extent to which the Appellants, through their attorney, have been allowed to present written and oral argument to the court, whether a written or recorded transcript of proceedings should be required, and whether tribal lay judges, without formal legal training, are competent to understand and rule on the legal arguments. *See, e.g.*, Minto Addendum at 8-16 (Decision Denying Motion to Dismiss). These questions must be raised in tribal forums before the Appellants can file in federal court.

Second, the Appellants may not claim futility based on the argument that their right of appeal in tribal court may have lapsed. The Minto Court of Appeals rules provide that "[t]he Appellant shall file an Appeal with the Clerk within 30 days after receiving the Order from the Tribal Court."[14] Whether an appeal, if filed now, is subject to dismissal for failure to timely file, is an issue for decision by the Minto Court of Appeals.[15] The Appellants' dilemma is not an adequate excuse for failing to exhaust.

In *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948 (9th Cir. 1998), the court required exhaustion of tribal remedies despite claims of futility by an Indian criminal defendant who had failed to raise a specific issue in his Tribal Court appeal. The court concluded that the appellant could not show that exhaustion would have been futile or that the tribal court of appeals offered

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[14] *See* SSER at 00069, Section 4, Chapter 14, Minto Court of Appeals, Minto Judicial Code (Exhibit H), Memorandum in Opposition. The appellate code provides generally that "[t]he Minto Court of Appeals is established to assure a fair judicial process in the Minto Tribal government system." *See id.*, at 00068, Section 1.

[15] For example, tribal law may provide that filing the improper federal action tolled the time for appealing the Minto Tribal Court's May 7, 2009 order; or that the current status of the custody proceeding provides a basis for waiving the appeal deadline to ensure adequate appellate review and "a fair judicial process." Again, these are issues the Minto Court of Appeals would have to decide in response to a proper appeal filed by the Appellants.

no adequate remedy. *Id.* at 950. In that case the tribal court procedure included a firm deadline for filing appeal. The court stated:

> Of course, Selam's appeal of his right-of-confrontation claim in the tribal court of appeals would be futile now because tribal appellate procedure only entitled him to appeal within thirty days of his conviction. But if we were to assume jurisdiction over an unexhausted claim solely on the basis that it is now too late ("futile") for Selam to bring it, this would eviscerate the tribal court exhaustion requirement—at least in cases where parties have a limited period of time in which to file an appeal. Therefore, we decline to consider the appeal of a judgment in the tribal courts futile just because the dissatisfied party has neglected to file a timely appeal.

Id. at 950 n.6.[16] The Appellants chose to ignore the Tribe's appellate process and sought direct relief in federal court. Their complaint should be dismissed for failure to exhaust available tribal remedies.

Finally, the Appellants cannot claim futility based on delay that has occurred because they ignored tribal remedies and filed prematurely in federal court. "Unreasonable delay" in a custody proceeding may be sufficient to render exhaustion futile. *See Boozer*, 381 F.3d at 936. However, delay does not excuse Appellants in this case from making no effort to exhaust. *Boozer* involved facts that are remarkably similar to those in the present case; a dispute between a non-

[16] *See also Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999), *cert. denied* 529 U.S. 1099 (2000), where the court rejected a claim of futility where the plaintiff's attorney failed to timely appeal the tribal court's dismissal. "We do not think that the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiff's own failure to adhere to simple deadlines." *Id.*

member father and a tribal member mother over custody of their child. The mother died in June 2003 and the father filed a custody suit in federal court six days later, without attempting to exhaust tribal remedies. The court considered several related factors that militated in favor of requiring exhaustion: the existing tribal court proceeding, the tribal court's concern for the welfare of the child, questions about the parents' fitness, the fact that the father had voluntarily participated in tribal court proceedings, the fact that the father filed the federal action a mere six days after the mother's death, and the fact that there was no evidence the tribal court was not competent to handle the matter. *Boozer*, 381 F.3d at 936-37.

In this case, the Minto Tribal Court acted in a similar, deliberate fashion to secure the welfare of S.P. by making her a ward of the court and providing temporary custody, and then by supervising custody diligently, over a ten month period, holding periodic hearings, and, with the child's welfare and the parents' interests in view, providing measures for reunification of Appellants with S.P., including visitation and counseling. Appellants filed suit a mere five days after the Minto Tribal Court issued its May 7, 2009 order, without pursuing their right to appeal. As in *Boozer*, Appellants "made no effort to exhaust tribal court remedies before filing a federal claim." *Id.*, at 937. Appellants were

required to exhaust all tribal court remedies before initiating this challenge in federal court. *Id.* at 935.

CONCLUSION

The district court should have dismissed the action below based on the Appellants' failure to exhaust all available tribal court remedies.

Respectfully submitted this 8th day of June, 2011.

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It does not appear to the court that the parties will be prepared to proceed to trial on November 29, 2010. Whether trial should proceed will be addressed at the pre-trial conference scheduled for November 18, 2010 at 3:00 p.m.

Dated this 12th day of November, 2010, at Fairbanks, Alaska.

Paul R. Lyle
Superior Court Judge

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ADDENDUM TO MINTO SUPPLEMENTAL BRIEF

Decision Denying Motion to Dismiss,
Parks v. Simmonds, No. 4FA-09-2508 CI
(Alaska Sup. Ct., 4th Dist.) (Nov. 17, 2010)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

EDWARD PARKS,

Plaintiff(s),

vs.

ROZELLA SIMMONDS, JEFF SIMMONDS, and BESSIE STEARMAN,

Defendant(s).

Case No. 4FA-09-2508 CI

DECISION DENYING MOTION TO DISMISS

I. Introduction

Parks filed this lawsuit in September 2009 to regain custody of his biological child, S.P., from the physical and putative legal custody of the Simmondses. S.P., who is nearly three years old, is an Indian child and the Simmondses are her putative Indian custodians. The Simmondses were made S.P.'s custodians by the Native Village of Minto Tribal Court when the tribe took emergency custody of the child. Their custodianship was continued by the tribe following the tribal court's termination of the parental rights of Parks and S.P.'s mother, Bessie Stearman.[1]

The Simmondses moved to dismiss the complaint on the basis that Parks no longer has any legal right to legal or physical custody of S.P. as a result of the tribal

[1] Stearman's status in this litigation is not well defined. She was not made a party when the suit was initiated in September 2009. Parks named her as a defendant in an amended complaint filed in October 2009. She filed an entry of appearance as a *pro se* defendant in November 2009 and requested appointment of counsel, which the court denied. In January 2010, Parks' counsel indicated that he had decided to file a second amended complaint naming Stearman as a plaintiff and he stated that he would enter an appearance on her behalf. She was present at the temporary custody hearing held on January 22 and testified at an evidentiary hearing on the motion for physical custody in May and was represented at the later hearing by Mr. Mitchell. The second amended complaint, however, has not been filed.

decision terminating his parental rights. They seek full faith and credit for the tribe's termination order under the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (ICWA).

Parks claims that the Native Village of Minto has no subject matter jurisdiction to initiate ICWA "child custody proceedings" outside of Indian country and that the tribe lacks personal jurisdiction over him. He also claims that the tribe failed to afford him due process under the U.S. and Alaska Constitutions when terminating his rights. Thus, Parks asserts that the tribal court order terminating his parental rights is not entitled to full faith and credit.

The Simmondses filed their motion to dismiss in January 2010. The tribe was permitted amicus status (including the right to participate in oral argument) and filed a memorandum in support of the Simmondses' motion in March. Thereafter, Parks filed his opposition. The Simmondses replied. Oral argument was held in October when the court discovered that one of the parties expected oral argument but had not requested it. The motion to dismiss is ripe for decision and is denied.

II. Facts

As this motion is a motion to dismiss, the facts alleged in the complaint are deemed "to be true and provable." *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1020 (Alaska 2009) (citations omitted). In addition, the facts are largely either undisputed or have been proven by documentary evidence submitted by the parties.

S.P. was born in December 2007. Her mother, Bessie Stearman, is a member of the Native Village of Minto. The Native Village of Minto is an Indian tribe under the

holding of *John v. Baker*, 982 P.2d 738 (Alaska 1999) ("*John I*") and under ICWA § 1903(8).[2] Parks is one-half Alaska Native through his mother.[3]

Stearman has a history of alcohol and substance abuse problems. Stearman was facing incarceration in May 2008 for probation violations and asked the Simmondses to take care of S.P. while she was incarcerated. Stearman and Mrs. Simmonds are cousins. When she assumed custody of S.P., Mrs. Simmonds contacted a social worker at the Tanana Chiefs Conference (TCC).[4] On June 2, 2008, the Minto Tribal Court convened and took emergency custody of S.P. and placed her with the Simmondses. Exhibit N, p. 35. Parks received no notice of this hearing.[5] A hearing was scheduled for July 9, 2008. Parks did not attend that hearing. It is unclear from the record whether Parks was notified of the July 9th hearing. The TCC social worker mailed the emergency order to him at his place of work on the North Slope on or about June 3, 2008. Exhibit N, ¶¶ 78-80. But Parks called on June 6th to state he had quit his job so that he could take custody

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[2] Parks denies that the Native Village of Minto is a tribe for all purposes, but concedes it is a tribe for ICWA purposes. Thus, the tribal status of the Native Village of Minto is not an issue in this case. Nevertheless, if it were, the court would be bound by *John I*, which confirmed that Alaska Native Villages (like Minto) that are on the BIA List of Recognized Tribes are domestic dependent sovereigns possessing a limited, inherent authority.

[3] The Simmondses deny (for lack of sufficient information) that Parks is the father of S.P. However, the tribe has taken the position that Parks is the father of S.P. The court assumes this fact is true under *Pepper*, *supra*. Furthermore, TCC's social worker submitted an affidavit confirming that Parks is S.P.'s natural father. Exhibit N at ¶ 6. This affidavit was submitted by the Simmondses and they are estopped to deny its veracity.

[4] TCC is a non-profit corporation that provides social services and legal services to Alaska Natives and Alaska Native tribes in the interior region of Alaska.

[5] The Simmondses deny Parks' claim that he received no notice from the tribe. They also deny Parks' allegation that the tribe knew he was the father. As to the first point, the TCC affidavit establishes that Parks was not informed that the tribe took emergency custody until the day after the tribe acted. Exhibit N, ¶¶ 72-80. As to the second point, the TCC affidavit provided by the Simmondses establishes that the tribe was at least aware of a rumor that Parks was S.P.'s father as of December 2007 when TCC's social worker met with a representative of OCS and Stearman at the hospital. Exhibit N, ¶¶ 26-40. In addition, the tribal court orders in this case, including the order granting permanent custody to the Simmondses – and from which the defendants derive their claim to legal and physical custody – recognize Parks as the biological father of S.P.

of S.P.; Later that day, he called to indicate that he approved of S.P. being in the Simmondses custody temporarily. *Id.* at ¶¶ 89-100. The tribal court continued custody and set a hearing for July 23, 2008. Exhibit N, p. 39. No record of this hearing was submitted with the pleadings nor is it discussed in the TCC affidavit.

On August 28, 2008, the Minto Tribal Court held another hearing. Parks attended this hearing. Custody was extended and Parks was ordered to obtain a LEAP assessment and comply with its recommendations.[6] He was also given supervised visitation through the TCC social worker. A further hearing was scheduled for December 1, 2008. Exhibit N, pp. 42-45. In the interim, on October 9, 2008, the tribe issued a Temporary Protective Order against Parks when he was alleged to have threatened to take S.P. from the Fairbanks Native Association Early Head Start program. Exh. N. pp. 47-53. The protective order precluded all contact between S.P. and Parks, enjoined Parks from having any contact with the Simmondses in Fairbanks and awarded the Simmondses temporary custody of the child. *Id.* at p. 50.

The tribal court held its scheduled December hearing. Custody of S.P. was extended through March 9, 2009. Parks was given supervised visits. The March hearing was held on March 25, 2009. At that hearing, the tribal court noted that Parks was not complying with court orders to attend LEAP and parenting classes. Conclusion No. 6 of the March 25, 2009 order stated that the tribal court would consider terminating Parks' parental rights. Exh. N, p. 66. Custody of S.P. was continued with the Simmondses through April 28, 2009. *Id.* The April hearing was subsequently re-scheduled for May 7, 2009.

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[6] LEAP provides alternatives to violence programs and treatment for victims and perpetrators of domestic violence.

On May 6, 2009, Parks and Stearman took S.P. from the custody of the Simmondses and drove toward Anchorage with her. They were stopped by the Fairbanks police and advised to return the child to the Simmondses' care, which they did. This event was the subject of another tribal protective order issued on May 7, 2009 by the tribal court. Exh. N, pp. 71-78. On the same day, the tribal court held a hearing and terminated Parks and Stearman's parental rights.

The trial was held by teleconference. The four-judge tribal court, court clerk and tribal family and youth specialist were located in Minto. Parks, Stearman, the Simmondses and others were present at the Ketzler Building located in downtown Fairbanks. Parks was represented by his current counsel. The tribe was represented at the hearing by a TCC lawyer. The tribal court decided to terminate the parental rights of both parties, as stated above. The tribal court prepared an Order Terminating Parental Rights & Temporary Custody Order. Exhibit N, pp. 79-82. Finding 2 of that order confirms the allegations in the complaint that Parks' attorney was not permitted to speak and that Parks was denied both a request to tape record the hearing and a request to obtain a copy of the tribal court's tape recording.[7] Parks' attorney was prepared to mount a challenge to the tribal court's subject matter jurisdiction to hear the case and its personal jurisdiction over Parks. Since he was not permitted to speak, the challenge was not made.

S.P. was placed in the permanent physical custody of the Simmondses at a July 20, 2009 hearing. Exhibit M. As stated above, Parks filed this lawsuit to regain custody of S.P. in September 2009.

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[7] The order implies that the tribal court recorded the hearing. No recording has been offered as evidence in this matter.

III. Preliminary Issue Raised – Collateral Estoppel

The defendants and amici argue that Parks is collaterally estopped from asserting his claims concerning the tribal status of the Native Village of Minto and the jurisdictional reach of the Minto Tribal Court in ICWA cases because he raised (and lost) the same claims in a prior action filed in the U.S. District Court for the District of Alaska. Exh. A at p.7. That complaint was dismissed by the court.

In his order dismissing the complaint, the Hon. H. Russell Holland made the following decisions: (1) Minto is a federally recognized tribe, (2) Minto has concurrent jurisdiction with the State of Alaska over ICWA "child custody proceedings," including actions to terminate parental rights, and (3) Minto has jurisdiction under federal law to initiate an ICWA child custody proceeding. Rather than granting judgment to the tribe and federal defendants on these issues, however, Judge Holland dismissed the complaint under *Younger* abstention because this case was pending.[8]

In a motion for reconsideration, Parks argued that it was unfair of the district court to rule on the jurisdictional claims because the jurisdictional issues were first raised by the federal defendants in their reply memorandum. Exhibit B, p. 1. The motion for reconsideration was denied. *Id.*

The parties dispute the binding nature of Judge Holland's jurisdictional rulings. As stated above, the defendants claim that Judge Holland's rulings are final and binding thus estopping Parks to re-litigate them here under the doctrine of issue preclusion. Parks claims the rulings were mere *dicta* and that he is not bound by them because his case was

[8] That dismissal is on appeal to the Ninth Circuit Court of Appeals.

dismissed. He notes only the dismissal under *Younger* is on appeal to the Ninth Circuit, not the underlying jurisdictional claims.

This issue is an academic one in light of the court's decision to dispose of this case on other grounds. Nevertheless, in the event this suit must ultimately be decided on the jurisdictional issues, collateral estoppel must be addressed.

A party is estopped to re-litigate an issue in a second action only if the same party raised the same issue in a previous suit that resolved the issue by a final judgment on the merits. *Campion v. Dep't of Commerce and Regional Affairs*, 876 P.2d 1096, 1098 (Alaska 1994) (setting out elements of collateral estoppel). There is no doubt that Judge Holland resolved the jurisdictional issues in the tribe's favor. Dismissal of a federal complaint under *Younger* abstention, however, is not a decision on the merits of the underlying claims. "*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of *all claims*, both state and federal, to the state courts." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added); *see also Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 689 (9th Cir. 2009) ("*Younger* abstention requires dismissal of the federal complaint and thus the federal plaintiff must submit *all claims*, including any federal claims, to the state court." (quoting *Beltran v. State of California*, 871 F.2d 777, 782 n. 8; citing *Gibson*, 411 U.S. at 577) (emphasis added; inner quotation marks and bracket omitted)).

Judge Holland's decision reflects his intention that his dismissal under *Younger* preserved all issues for decision in the Alaska Superior Court:

> As for the third prong of Younger, *plaintiffs* [*i.e.* Parks and S.P. by Parks] can *raise their federal claims in the state court proceeding.* In this case, plaintiffs raise claims that the tribal defendants have no legal basis for

> being involved in matters regarding the legal or physical custody of S.P.,[9] and they raise due process claims. *Plaintiffs can litigate these claims in the state court.* In fact, it would seem *that these claims will have to be litigated as part of the custody suit*, as certainly one of the issues in the state court proceeding will be whether to give full faith and credit to the child custody orders issued by the Minto Tribal Court.

Exh. A. at 17 (emphasis added). Judge Holland thus recognized that, by dismissing Parks' federal complaint under *Younger*, Parks could raise his federal claims in state superior court. Likewise, because an issuing tribunal must have subject matter jurisdiction in order for its decision to be accorded full faith and credit, Judge Holland's decision recognized that the federal jurisdictional claims would necessarily "have to be litigated as part of the custody suit." *Id.*

The dismissal of Parks' federal action under *Younger* abstention preserved all of his claims for decision in the superior court. Collateral estoppel does not apply here.

IV. Full Faith and Credit under ICWA

The basis of the motion to dismiss here is twofold: First, the tribe asserts it has jurisdiction under ICWA and its inherent member-based authority over S.P. to terminate Parks' parental rights.[10] Second, having exercised that jurisdiction, ICWA § 1911(d) requires state courts to grant full faith and credit to the tribal court judgment. Thus, the Simmondses argue, the Alaska Superior Court must afford full faith and credit to the decision of the Minto Tribal Court terminating Parks' parental rights and must dismiss this case.

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[9] This phrase ("no legal basis for being involved in matters regarding the legal or physical custody of S.P.") is an unmistakable reference to Parks' jurisdictional claims.

[10] The tribe terminated Parks' parental rights. There is no question that termination of parental rights is a "child custody proceeding" within the meaning. ICWA § 1903(1)(ii).

Because there may be circumstances where a tribal judgment will not be afforded full faith and credit, even assuming the tribe has jurisdiction, the Alaska Supreme Court has looked first to the full faith and credit issue before addressing complex jurisdictional arguments. *Starr v. George*, 175 P.3d 50, 55 (Alaska 2008). Applying *Starr's* approach, it is assumed that the tribe has subject matter jurisdiction and personal jurisdiction over Parks and the tribal judgment's entitlement to full faith and credit is examined first.

ICWA § 1911(d) is the starting point for a full faith and credit analysis of final tribal judgments in ICWA child custody proceedings. It provides in relevant part:

> [E]very State . . . shall give full faith and credit to the . . . judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that [States] give full faith and credit to the . . . judicial proceedings of any other entity.

Because tribal ICWA judgments are entitled to full faith and credit in state courts "to the same extent" a state court would extend full faith and credit to a sister state's judgment, the Alaska Supreme Court has applied full faith and credit to tribal judgments as it would to the judgments issued by other states of the union. The supreme court's decision in *Starr* surveyed Alaska law on the application of full faith and credit generally and applied it to tribal court judgments in particular. *Starr* controls the analysis here.

As *Starr* noted, ICWA § 1911(d) does not require a receiving court to afford "absolute deference to a tribal court order regardless of the circumstances." *Starr*, 175 P.3d at 57. Rather, in order for any issuing court's judgment to be accorded full faith and credit, the issuing court must have subject matter and personal jurisdiction, must "afford the parties due process[, and must] render its judgment in accordance with federal and state constitutional standards." *Starr*, 175 P.3d at 55.

As a threshold matter, *Starr* observed that "[c]ompliance with due process requirements is particularly important in cases involving child custody and the termination of parental rights," and reiterated the holding in an earlier case "recognizing that the 'interest of a parent whose parental rights may be terminated . . . is of the highest magnitude." *Starr*, 175 P.3d at 58 & n. 45 (citations omitted).[11]

In addressing the due process requirement, the judgment of the issuing tribal court comes to the receiving state court with a presumption of soundness, thus requiring the party opposing full faith and credit to prove that the judgment is constitutionally infirm. *Starr*, 175 P.3d at 56. By "minimal due process," the court means "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Starr*, 175 P.3d at 57 (citation and quotation marks omitted). *Starr* recognized that tribal courts "do things differently" and "need not provide due process in the exact manner as state courts," meaning that tribal proceedings "need not . . . be conducted with all the trappings of a court of law." *Id.* at 58 and n. 46 (citations and inner quotation marks omitted). But,

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[11] The U.S. Supreme Court has likewise recognized the paramount importance of parental rights in termination proceedings:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . [P]arents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.
>
> [I]t [is] plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. . . . Once affirmed on appeal, a . . . decision terminating parental rights is *final* and irrevocable. Few forms of state action are both so severe and so irreversible.

Santosky v. Kramer, 455 U.S. 745, 753, 758-59 (1982).

tribal proceedings must "be addressed to the issues involved in a meaningful fashion and pursuant to adequate notice." *Id.* In a footnote accompanying this last quoted text, *Starr* quotes with approval from 2004 Formal Op. Att'y Gen No. 661-04-0467 (Alaska; Oct. 1, 2004):

> [T]he state will defer to . . . tribal court orders only if the tribe exercised jurisdiction in a manner consistent with ICWA, the tribe afforded due process to the litigants in the tribal court (including the opportunity to contest jurisdiction), and the tribal court otherwise acted in a manner consistent with the United States Constitution . . . .

Id. at 58 n. 47. Whether the Minto Tribal Court's judgment is entitled to full faith and credit must be assessed under these standards.

Parks claims that his due process rights were denied by the tribe when it would not permit his attorney to speak for him so that the attorney could raise jurisdictional objections to the tribal termination of parental rights proceedings.[12] It is undisputed that the tribal court would not permit Parks' attorney to speak at the hearing where his parental rights were terminated. Exh. K, p. 1 at Finding 2. Lay advocates may speak. *Id.* Attorneys may not. The issue here, however, is not the right of an attorney to speak, but the opportunity of a litigant to raise and have the tribal court decide a jurisdictional objection to the exercise of tribal authority.

Parks' jurisdictional objections to the exercise of tribal authority in this case are complex, esoteric, rooted in a complicated history and well beyond the ken of most lay

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[12] Parks also alleges that the tribal proceedings were irregular because the tribe did not record them and refused to let Parks do so. The court need not address this claim because it finds the denial of an opportunity to address jurisdiction constituted a denial of minimal due process. Moreover, there is no dispute about the relevant record of proceedings in this matter. The parties agree that Parks' attorney was not permitted to raise the jurisdictional claims at the May 2009 termination trial. The tribal court prepared and signed detailed orders following each hearing. That suffices in this case because there is no dispute about what was said or testified to at any of the hearings. Whether tribal orders alone would suffice in another circumstance is not an issue that needs to be addressed here.

people or lay advocates to understand or explain. Minimal due process requires that a party be afforded "an opportunity to present their objections," to the court including the opportunity to contest jurisdiction. *Starr*, 175 P.3d at 57-58 n. 47. Tribal proceedings must "be addressed to the issues involved in a meaningful fashion." *Id.* Parks sought to raise a jurisdictional issue before the tribal court. When Parks' attorney was prohibited from speaking at the outset of the termination trial, Parks was denied a meaningful opportunity to present his jurisdictional objections to the exercise of Minto's tribal authority.[13] Therefore, he was denied minimal due process under the U.S. and Alaska Constitutions.

Two defenses are raised against this conclusion. First, at oral argument, the Simmondses' counsel asserted that state courts must respect tribal custom and alleged that the tribe's practice of prohibiting attorneys from speaking at tribal proceedings comes within the ambit of tribal custom. Respect for tribal custom is an important feature in addressing either comity or full faith and credit of tribal court judgments. *John I* held that, "in deciding whether a party was denied due process, superior courts should strive to respect cultural differences that influence tribal jurisprudence . . . ." *John I*, 982 P.2d at 763. "[T]ribal courts need not follow the same procedures as Anglo-American

[13] In a notice of supplemental authorities (filed November 10, 2010), the Simmondses argue that Parks was, in fact, given an opportunity to challenge the tribal court's jurisdiction. Citing to Parks' complaint, they point out that Parks, in two prior tribal court hearings, protested the tribe's legal authority. Parks' two, single-sentence protests that the tribe "had no legal authority" to take custody of his child, are not evidence that Parks was given an opportunity to *meaningfully* present a jurisdictional objection. His protests were not met with an opportunity for a hearing or other opportunity to address his objections. Next, the Simmondses argue that Parks' attorney sent a memorandum to TCC's general counsel complaining that the Minto Tribal Court had no jurisdiction and requesting the general counsel to direct the Minto Tribal Court to desist. TCC provides legal support and social services to the Minto Tribe and its tribal court. But, TCC's legal counsel is not a member of the Minto Tribal Court nor does TCC or its counsel speak for the Minto Tribal Court. An argument presented to TCC's general counsel is not an argument to the Minto Tribal Court. And TCC counsel's refusal to advise the tribal court to desist is not a decision of the tribal court.

courts." *John v. Baker (Baker II)*, 30 P.3d 68, 74 (Alaska 2001). Tribes are free to enforce their customs and to develop their own jurisprudence and court procedures. But, the tribe's brief does not mention tribal custom. And, at oral argument, the tribe's attorney noted that attorneys are not permitted to speak at tribal proceedings because tribal judges are not law trained and cannot be expected to understand and rule on complex legal issues that might be raised by lawyers. It is therefore unclear that the underlying premise for the rule that prevented Parks from raising his jurisdictional claim is tribal custom.

The role of the superior court in deciding whether to accord full faith and credit to any issuing court's judgment is limited to determining whether a litigant was afforded *minimal* due process by the issuing court under the U.S. and Alaska Constitutions.[14] The supreme court's decision in *Starr* compels the conclusion that Parks was not afforded minimal due process because he was not afforded *any* opportunity by the tribal court to meaningfully raise his jurisdictional objections to the exercise of tribal authority. He brought a lawyer to his termination trial so that a jurisdictional challenge could be raised. The lawyer was not permitted to raise it. Nothing in the tribe's notice that it intended to address termination advised Parks that he could not have an attorney speak for him at his termination trial. Exh. N, p. 66 at Conclusion 6. No alternative procedures were offered

[14] In their November 10, 2010 supplemental brief, the Simmondses quote several cases holding that tribes are not bound by the due process clauses of the U.S. and Alaska Constitutions nor the detailed procedures developed under those clauses. But that is not the issue here. The issue here is whether the tribal judgment is entitled to full faith and credit in state court under ICWA § 1911(d). As explained herein, the final judgment of *any* court is entitled to full faith and credit *only* if minimal due process was afforded to the litigants, which means notice and an opportunity to be meaningfully heard on objections, including jurisdictional objections. *Starr*, 175 P.3d at 57, 58 n. 47. Parks was not afforded this opportunity and was thus denied minimal due process. As a result, this court is compelled by *Starr* to deny full faith and credit to the tribal court judgment.

when Parks came to his termination trial with a lawyer. Nothing in *John I*, *John II* or *Starr* counsels superior courts to subordinate minimal federal or state due process standards to tribal custom in deciding whether to accord full faith and credit to a tribal judgment. Indeed, *Starr* counsels against giving "absolute deference"[15] to tribal judgments, which is what superior courts would be doing if tribal judgments were accorded full faith and credit when tribal procedures fell below minimal constitutional standards for due process. *See also In re Laura F.*, 99 Cal.Rptr.2d 859, 867 (Cal. App. 2000) ("[W]e hold that the full faith and credit provision of the ICWA does not require a state court to apply a Tribe's law in violation of the state's own legitimate policy.").

The second defense raised is that Parks waived his jurisdictional arguments when he failed to exhaust his tribal remedies by appealing to the Minto Court of Appeals.[16] *John II* observed that "a litigant's failure to exhaust tribal remedies is a significant factor to be considered when that litigant challenges comity. While [the court did] not adopt a strict exhaustion requirement," it noted "that a party's failure to seek tribal appellate review may seriously undermine any claims that the tribal court denied him due process." *John II*, 30 P.3d at 74 n. 31.

The Minto appeal procedures permit only a "brief statement" of the reasons for the appeal and Minto apparently applies the same rule (that attorneys may not speak) in all of its proceedings: The evidence thus indicates that Parks' attorney would not have been allowed to speak and raise his jurisdictional argument on appeal. Given the limited statement permitted under the appeal procedures, the rule that lawyers may not speak

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15 *Starr*, 175 P.3d at 57.

16 Parks complained at oral argument that this claim was not briefed. It was briefed by the amicus tribe and Parks had an opportunity to respond to it in his opposition. The issue is properly before the court.

before the Minto tribal courts, and the reason given at oral argument for the rule – that Minto Tribal Court judges are not law-trained and therefore do not permit lawyers to speak – requiring exhaustion of tribal remedies would not cure the due process denial that occurred here – the refusal to permit a jurisdictional objection to be raised and heard in a meaningful fashion. It does not appear that Parks would have been permitted to raise his jurisdictional arguments at his appellate hearing in the only effective manner available to him – through counsel or through detailed legal briefing prepared by counsel and reviewed and decided by the court. *John II* stated that exhaustion of tribal remedies is not strictly required. *Id.* And the U.S. Supreme Court has held that exhaustion of tribal court remedies is not required "where exhaustion would be futile because of the lack of an *adequate* opportunity to challenge the [tribal] court's jurisdiction." *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 856 n. 21 (1985) (emphasis added; internal quotation marks omitted). The provision for tribal appellate review that excluded the opportunity to argue jurisdictional challenges would not have cured the due process denial and, therefore, exhaustion of tribal remedies is not required under the circumstances of this case.

Starr held that due process requires litigants be given a meaningful opportunity to address jurisdictional objections if an issuing court's judgment is to be accorded full faith and credit. Parks was denied the opportunity to raise his jurisdictional objections. Therefore, *Starr* compels the conclusion that full faith and credit may not be accorded to the Minto Tribal Court order terminating Parks' parental rights.

The court has considered whether comity should be accorded to the tribal judgment. However, *Starr* notes that, where due process is denied, a tribal judgment does

not meet the standards for comity or full faith and credit. *Starr*, 175 P.3d at 55; *see also, John I*, 982 P.2d at 763 ("We also agree with the Ninth Circuit that state courts should afford no comity to proceedings in which any litigant is denied due process." (citation omitted)).

The motion to dismiss must, therefore, be denied.

V. Case Status following Denial of the Motion to Dismiss

At oral argument, the parties were asked for their views as to how to proceed in the event the court denied the motion to dismiss. Parks asserts that a denial converts this case into a custody proceeding under *Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004) where the court must determine (by clear and convincing evidence) whether the biological parents are "unfit" or that "it would be clearly detrimental to the child to permit the parent to have custody." *Id.* at 1083 (citations and inner quotation marks omitted).

The tribe asserted that ICWA would apply if the court were considering taking the child from the custody of the Simmondses because they are the Indian custodians of the child. The Simmondses argued that the case should be returned to the tribal court for further proceedings. The court agrees, in part, with both the tribe and Parks but disagrees with the Simmondses.

Based on *J.W. v. R.T.*, 951 P.2d 1206 (Alaska 1998), the denial of the motion to dismiss shifts the focus of this case from issues of law (jurisdiction and full faith and credit) to its underlying substantive issue – legal and physical custody of S.P.: *J.W.* indicates that this case is an *Evans v. McTaggart* custody matter, but it also indicates that

ICWA – including the right of the tribe to intervene under ICWA § 1911(c) – applies to it.

In *J.W.*, the supreme court held that a state court custody dispute between an Alaska Native biological father and an Alaska Native stepfather (who claimed to be an Alaska Native child's custodian) was a "foster care placement" proceeding under ICWA § 1903(1)(i). *Id.* at 1212-13. And the court held that the ICWA § 1903(1) "divorce exception" does not apply to such custody disputes. *Id.* at 1213-14. At the same time, the court held that a dispute between an Indian parent and an Indian custodian did not trigger the parental-Indian custodian custody preference of ICWA § 1912(e). *Id.* at 1214. Instead, the court held that "the superior court should . . . apply the Alaska standard for [such] custody disputes," *i.e.*, the *Turner v. Pannick* standard subsequently re-stated and clarified in *Evans v. McTaggart*. *J.W.*, 951 P.2d at 1215 (citing to Part III.C.1. of the *J.W.* opinion holding that the "unfit parent" or "clear-determent-to-the-child standard" of *Turner v. Pannick* applied.). In this case, because the court has decided the motion to dismiss on the issue of full faith and credit and not on the issue of tribal jurisdiction, the Simmondses retain a viable claim that they are S.P.'s Indian custodians. This case, therefore, falls within the ambit of *J.W.*.

The court disagrees that this case should be remanded to the tribal court for two reasons:

First, no legal authority has been cited indicating that the remedy following a denial of full faith and credit by a receiving court is a remand of the judgment to the issuing court for re-trial. Where full faith and credit for an issuing court's final judgment is denied, the receiving court decides the case. The superior court in *Starr v. George* did

not remand the custody proceeding in that case to the tribal court once full faith and credit was not accorded to the tribal adoption decree. Rather, it proceeded to render a custody judgment. The supreme court in *Starr* did not criticize this approach and it is, therefore, followed here.

Second, the superior court's jurisdiction is limited to determining whether full faith and credit should be accorded in *state court* proceedings to a final tribal judgment. As between state and tribal courts, ICWA § 1911(b) envisions "concurrent but presumptively tribal jurisdiction in the case of [Indian] children not domiciled on the reservation." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 36 (1989). Remanding this case to the Minto Tribal Court for further proceedings to address the due process concerns raised in this case would be tantamount to ordering the tribal court to conform its procedures to this decision. The superior court has no appellate power over the decisions of tribal courts.

VI. Conclusion

Starr v. George compels the conclusion that full faith and credit cannot be accorded to the Minto Tribal Court order terminating Parks' parental rights. The decision denying the motion to dismiss brings to the fore the substantive custody issue and thus establishes this case, not as a "pre-adoptive placement" (as originally claimed by the amicus tribe) for which there is no ICWA-created right to intervene, but as an ICWA "foster care placement," in which the tribe has an absolute right to intervene under ICWA § 1911(c).

The motion to dismiss is denied. If the tribe wishes to intervene, it may do so "at any point in the proceeding" in accordance with ICWA § 1911(c).

It does not appear to the court that the parties will be prepared to proceed to trial on November 29, 2010. Whether trial should proceed will be addressed at the pre-trial conference scheduled for November 18, 2010 at 3:00 p.m.

Dated this 12th day of November, 2010, at Fairbanks, Alaska.

Paul R. Lyle
Superior Court Judge

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