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Joel Gilbertson, Commissioner
Department of Health and Social Services
P.O. Box 110601
Juneau, Alaska 99811-0601

Re: Jurisdiction of State and Tribal Courts
In Child Protection Matters
A.G. file no: 661-04-0467
2004 Op. Att'y Gen. No. 1

Dear Commissioner Gilbertson:

I. INTRODUCTION

The purpose of this opinion is to provide analysis and advice on the question of when tribes in Alaska may exercise jurisdiction over tribal children in child custody proceedings under the Indian Child Welfare Act (ICWA).[1] This office previously provided advice to Acting Commissioner Jay Livey on this and related issues in a memorandum dated March 29, 2002. That memorandum followed the Alaska Supreme Court's decision in *In re C.R.H.*[2] and discussed the implications of the decision for child protection matters and adoptions involving tribal children. We have reevaluated that advice and this memorandum sets out our revised opinion on

[1] 25 U.S.C. §§ 1901 – 1963. The term "child custody proceeding" is specifically defined in ICWA § 1903. *See* footnote 10 for the statutory definition of this term.

[2] *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

these important issues.[3] Due to the length of this opinion, we have indexed the individual topics for ease of reference.

[3] The analysis and advice provided to Acting Commissioner Jay Livey in the memorandum dated March 29, 2002, referencing *In the Matter of C.R.H.*, A.G. File No. 441-00-0005, is expressly revoked. This opinion replaces that memorandum of advice in its entirety.

II. SUMMARY OF ADVICE

A. General Rule

Under the Alaska Supreme Court's decisions in *Native Village of Nenana*[4] and *C.R.H.*, Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children unless (1) the child's tribe has successfully petitioned the Department of Interior to reassume exclusive or concurrent jurisdiction under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction of the child's case to a tribal court in accordance with 25 U.S.C. § 1911(b) and the tribal court is exercising its jurisdiction.

[4] *Native Village of Nenana v. State, Dep't of Health and Social Services*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986).

B. Tribes that have Reassumed Jurisdiction

1. Barrow and Chevak

The Native Village of Barrow and the Native Village of Chevak have reassumed exclusive jurisdiction over child custody proceedings involving their member children who reside or are domiciled within their respective villages. For those children, the Department of Health and Social Services, Office of Children's Services (OCS), lacks the authority to file a child custody proceeding in state court unless the child is at risk of imminent harm. OCS still has the responsibility to investigate reports of harm involving member children of Barrow or Chevak who reside or are domiciled within those villages.

If OCS receives a report of harm concerning a Barrow or Chevak member child who is temporarily located outside of the child's village limits, then OCS may investigate the report of harm and file a child-in-need-of-aid petition for adjudication in state court. Barrow or Chevak may then petition to transfer jurisdiction to the child's tribal court.

2. Metlakatla

The Metlakatla Indian Community has reassumed concurrent jurisdiction over its member children who reside or are domiciled on the Annette Islands Reserve. Both Metlakatla and OCS may investigate reports of harm and initiate child protection cases concerning member children of Metlakatla residing or domiciled within the Annette Islands Reserve.

C. Tribes that have Not Reassumed Jurisdiction

Under *Nenana* and *C.R.H.*, tribes in Alaska that have not reassumed jurisdiction have no authority to initiate child custody proceedings in tribal courts. However, under ICWA § 1911(c), these tribes have the right to intervene in state child custody proceedings involving their member children. In addition, under ICWA § 1911(b), tribes that have not reassumed

jurisdiction may petition the superior court to transfer to tribal court those child protection proceedings involving their member children that are initiated in state court. A petition to transfer may not be granted over the objection of either of the child's parents and may otherwise be denied only for "good cause."

As in the case of tribes that have reassumed jurisdiction, the state should investigate all reports of harm received concerning tribal children who are members of tribes that have not reassumed jurisdiction and should initiate child protection proceedings in state court as necessary.

D. The State's Ability to Investigate Reports of Harm and to Act in an Emergency

OCS has a statutory duty to investigate reports of harm it receives pertaining to Alaska Native children, as required by AS 47.17.025. OCS may take emergency custody of any child residing or located in Alaska if the requirements of AS 47.10.142(a) are met. Additionally, 25 U.S.C. § 1922 authorizes the state to take emergency action notwithstanding tribal court jurisdiction over a child. However, once custody is assumed, the state may be required to transfer jurisdiction to the tribe.

E. Releasing Confidential Information to Tribes

AS 47.10.093(f) authorizes OCS to release information concerning minor children for whom state court proceedings have not been initiated to any "person with a legitimate interest" in the information. Tribes are "persons" within the meaning of this statute. A tribe properly exercising jurisdiction over a child protection proceeding involving the tribe's member child has a legitimate interest in receiving reports of harm and other confidential information in OCS's possession concerning that child. However, OCS must promulgate regulations governing the release of this information.

F. Full Faith and Credit for Tribal Court Judgments

Once a tribe properly asserts jurisdiction over an ICWA child custody proceeding involving the tribe's member child, the state must accord full faith and credit to the public acts, records and court decisions of the tribe affecting that child to the same extent that the state accords full faith and credit to the public acts, records and decisions of sister states. Full faith and credit will not be accorded to any judgment if: (1) due process was not accorded to the parties, (2) the judgment was based on an unconstitutional law, (3) the tribal court lacked subject matter jurisdiction or personal jurisdiction, or (4) the tribal court failed to provide a full and fair opportunity for the parties to litigate jurisdictional issues.

G. Jurisdiction Over Adoption Proceedings

Under *Nenana* as modified by *C.R.H.,* the state retains exclusive jurisdiction over Alaska Native adoption proceedings unless a tribe has reassumed jurisdiction under ICWA § 1918. Full faith and credit should be given to adoption orders entered by Alaska tribal courts for tribes that have reassumed jurisdiction under ICWA. An adoption proceeding initiated in state court cannot be transferred to tribal court under ICWA § 1911(b).

However, the state has long ratified Indian adoptions that occur under tribal custom as a matter of equity under state law. Nothing in *C.R.H.* or this opinion should be construed as changing this longstanding policy in any respect.

III. LEGAL ANALYSIS

A. Key Legal Precedent

In *Native Village of Nenana v. State, Department of Health and Social Services,*[5] the Alaska Supreme Court construed ICWA and Public Law 280 and held that Public Law 280 effectively divested tribal jurisdiction and granted state courts exclusive jurisdiction over matters involving Indian children. After *Nenana*, the Ninth Circuit Court of Appeals, in *Native Village of Venetie IRA Council v. Alaska,*[6] held that Alaska Native villages and the state have concurrent jurisdiction over matters involving Indian children. In *In re F.P.*,[7] the Alaska Supreme Court rejected the holding in *Native Village of Venetie* and confirmed its earlier holding in *Nenana*. Almost ten years later, in *C.R.H.*,[8] the Alaska Supreme Court was again asked to abandon *Nenana* and find that Alaska Native villages affected by P.L. 280 retain concurrent jurisdiction over their children. The court chose to resolve the case on other grounds, leaving *Nenana* for the most part intact.

C.R.H. did make one significant change to *Nenana.* The court held that an Alaska Native village may petition a state superior court under 25 U.S.C. § 1911(b) for transfer of a case to the village's tribal court even if the tribe has not successfully petitioned the Department of the

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5 *Native Village of Nenana v. State,* 722 P.2d at 221.

6 *Native Village of Venetie IRA Council v. Alaska,* 944 F.2d 548, 559 (9th Cir. 1991).

7 *In re F.P.*, 843 P.2d 1214, 1216 (Alaska 1992), *cert. denied*, 508 U.S. 950 (1993).

8 *In re C.R.H.*, 29 P.3d. 849.

Interior for reassumption of jurisdiction.

The state and its agencies are bound to follow the precedent set by the Alaska Supreme Court. Therefore, as required by *Nenana*, state courts have exclusive jurisdiction over child custody proceedings under ICWA unless (1) the child's tribe has successfully petitioned the Department of the Interior to reassume exclusive jurisdiction (as is the case in the Native Villages of Barrow and Chevak), (2) a state superior court has transferred jurisdiction of the child's case to a tribal court, or (3) the child is a member of the Metlakatla Indian Community, whose courts have reassumed concurrent jurisdiction with the state over ICWA cases involving Metlakatla tribal children domiciled on the Annette Islands Reserve.

B. The Indian Child Welfare Act In Alaska Today

ICWA (or the Act) governs "child custody proceedings" involving Indian children.[9] A "child custody proceeding" includes foster care placements, termination of parental rights actions, and preadoptive and adoptive placements.[10] The term "child custody proceeding" does not include an award of custody to a parent in a divorce action.[11] In any analysis

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[9] 25 U.S.C. §§ 1901 – 1963.

[10] 25 U.S.C. § 1903(1) provides: "(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."

[11] 25 U.S.C. § 1903(1).

concerning tribal court jurisdiction over a child custody proceeding, the threshold question is whether the child is either a member of or eligible for membership in the tribe seeking to exert its jurisdiction.[12] Only tribes that are Indian tribes as defined in the Act[13] may assert jurisdiction over child protection matters under ICWA. Whether the child is a member of or eligible for membership in an Indian tribe is determined by the tribe itself unless otherwise limited by statute or treaty.[14] For ICWA determination purposes, tribes have ultimate authority to decide who qualifies as an "Indian child."[15] Once it is determined that the child is an Indian child, the focus shifts to determining the type of jurisdiction that may be asserted by the tribe.

Even if a tribe does not seek to exercise jurisdiction over a child as described above, it may still intervene in any state court child protection proceeding. This is the most common form of involvement for tribes in Alaska. The child's tribe is entitled to notice of the proceeding, to intervene in the case, to assert its placement preferences, and to petition to transfer jurisdiction to the tribe.[16]

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[12] "'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." 25 U.S.C. § 1903(4). "'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." 25 U.S.C. § 1903(5).

[13] "'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 [section 3(c) of the Alaska Native Claims Settlement Act]." 25 U.S.C. § 1903(8).

[14] *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978).

[15] *In re Adoption of Riffle*, 902 P.2d 542, 545 (Mont. 1995).

[16] 25 U.S.C. §§ 1911(b) and (c), 25 U.S.C. § 1912, and 25 U.S.C. § 1915.

Although intervention in state court proceedings is the most common form of involvement in ICWA proceedings for Alaska tribes, ICWA grants tribal courts jurisdiction over their Indian children in three circumstances: exclusive jurisdiction within ICWA-defined reservations under § 1911(a), transfer jurisdiction under § 1911(b), and reassumption jurisdiction under § 1918.

1. Exclusive jurisdiction under ICWA § 1911(a)

The first manner in which a tribe may exercise jurisdiction over a child protection matter is under 25 U.S.C. § 1911(a).[17] Under this subsection, if the tribe has a reservation,[18] then the tribe has exclusive jurisdiction "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."[19] However, as we explain below, Alaska tribes fall within ICWA's exception to exclusive tribal jurisdiction.

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[17] 25 U.S.C. § 1911(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.").

[18] In ICWA, the term "reservation" means "Indian country as defined in section 1151 of title 18, United States Code 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." 25 U.S.C. § 1903(10).

[19] 25 U.S.C. § 1911. When a tribe exercises exclusive jurisdiction under § 1911(a), the state may not act on the child's behalf unless there is a state-tribal agreement that provides for state jurisdiction or unless the state acts to take emergency custody to protect an Indian child from imminent harm under ICWA § 1922. Exclusive jurisdiction ceases when the child is no longer domiciled on the reservation and the tribal court wardship order has expired. 25 U.S.C. § 1911(a).

Alaska is a Public Law 280 state.[20] This federal statute provides that the State of Alaska "shall have jurisdiction" over all civil causes of action arising within "all Indian country in the State." As recognized by the Alaska Supreme Court in *C.R.H.*, "[s]ubsection 1911(a) grants tribes exclusive jurisdiction over cases involving Indian children who reside on reservations *'except where such jurisdiction is otherwise vested in the State by existing Federal law'* such as P.L. 280."[21] Alaska's tribes can exercise exclusive ICWA jurisdiction only by petitioning the Secretary of the Interior to reassume exclusive jurisdiction under ICWA § 1918.[22]

In the absence of an Alaska tribe that has formally reassumed exclusive jurisdiction under ICWA § 1918, OCS will rarely encounter a situation where a tribe exercises exclusive jurisdiction over ICWA child custody proceedings directly under § 1911(a).[23]

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[20] Public Law 280 is commonly referred to as "P.L. 280" and is codified at 28 U.S.C. § 1360. P.L. 280 grants the state jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the area of Indian country" listed in the statute, including "all Indian country within the State" of Alaska.

[21] *C.R.H.*, 29 P.3d at 852-53 (quoting ICWA § 1911(a), italics in original); *see also* Conference of Western Attorneys General, *American Indian Law Deskbook*, at 477 (3rd ed. 2004)("The most common instance of [the applicability of § 1911(a)'s exception to exclusive tribal jurisdiction] is in those states that have assumed civil jurisdiction over Indian reservations under Public Law 280 or similar laws ….")

[22] There is one reservation in Alaska, the Annette Islands Reserve. That reservation was set aside for the Metlakatla Indian Community under 25 U.S.C. § 495. Under P.L. 280, the state has jurisdiction over all civil causes of action arising within the reservation. 28 U.S.C. § 1360(a). Thus, even Metlakatla could not exercise exclusive jurisdiction under ICWA § 1911(a) in the absence of petitioning to reassume jurisdiction under § 1918. In 1993, Metlakatla reassumed concurrent jurisdiction of child protection proceedings involving its member children. 58 Fed. Reg. 16,448 (Mar. 26, 1993) as corrected at 58 Fed. Reg. 16,448 (Mar. 26, 1993). Thus, the tribe and the state share concurrent jurisdiction over Metlakatlan child protection proceedings arising within the Annette Islands Reserve.

[23] The Native Villages of Barrow and Chevak have reassumed exclusive jurisdiction under ICWA § 1918. The reassumption of jurisdiction by these villages is discussed below in section III.B.3, pp. 19-20, and section III.C.2, pp. 23-24.

Instances where OCS might have contact with a tribe exercising exclusive jurisdiction directly under § 1911(a) include those where an Indian child, temporarily in Alaska, is domiciled or resides on a reservation outside the State of Alaska in a non–P.L. 280 state, and those where an Indian child, although living in Alaska, continues to be a ward of a Lower 48 tribe in a non–P.L. 280 state.

2. Transfer jurisdiction under ICWA § 1911(b)

A tribe may also exercise jurisdiction over its children when the parents, the tribe, or the Indian custodian petition under 25 U.S.C. § 1911(b) to transfer jurisdiction from a state court to the tribal court.[24] Petitions to transfer jurisdiction under § 1911(b) are a relatively recent development. Before August 2001, the Alaska Supreme Court had held in *Native Village of Nenana* and its progeny that tribes were unable to seek a transfer of jurisdiction to tribal court under 25 U.S.C. § 1911(b) unless the tribe had first reassumed jurisdiction under 25 U.S.C. § 1918 by a petition to the Secretary of the Interior.[25] In August 2001**,** the Alaska Supreme Court's decision in *C.R.H.* overruled these earlier cases insofar as they required that a tribe petition for reassumption of jurisdiction in order to exercise transfer jurisdiction. *C.R.H.* recognized the right of tribes to request that state child protection cases involving tribal children

[24] "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." 25 U.S.C. § 1911(b) (italics in original).

[25] *Native Village of Nenana v. State, DHSS*, 722 P.2d at 221; *In re K.E.*, 744 P.2d 1173, 1174 (Alaska 1987); *In re F.P.*, 843 P.2d at 1215-16.

be transferred to tribal court pursuant to 25 U.S.C. § 1911(b).[26] The court in *C.R.H.* focused solely on § 1911(b) to hold that under ICWA either parent, the tribe, or the Indian custodian may petition the state court to transfer jurisdiction to the tribe without requiring that the tribe first petition the Secretary of the Interior to reassume jurisdiction.[27]

Although urged to do so by the parties, the court in *C.R.H.* did *not* hold that tribes in Alaska retain concurrent jurisdiction with the state in child protection matters involving Indian children. The court concluded that it did not need to reach that issue because the facts in *C.R.H.* concerned transfer jurisdiction. The court held that § 1911(b) authorizes transfer of certain child protection matters from state to tribal court regardless of how P.L. 280 affects a tribe's jurisdiction under § 1911(a).[28]

Petitions to transfer under § 1911(b) are limited to "foster care placement" and "termination of parental rights" proceedings and may only be filed by a parent, the Indian custodian, or the Indian child's tribe.[29] The tribal court may decline to accept jurisdiction.[30] Parents have an absolute veto power over a request to transfer jurisdiction.[31] And, once a case is transferred to a tribe, there is no explicit mechanism under ICWA that provides for the transfer

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[26] *In re C.R.H.*, 29 P.3d at 852–53.

[27] *In re C.R.H.*, 29 P.3d at 852 (overruling *Native Village of Nenana v. State, DHSS*, 722 P.2d 219 (Alaska 1986); *In re K.E.*, 744 P.2d 1173 (Alaska 1987); and *In re F.P.*, 843 P.2d 1214 (Alaska 1992), to the extent those cases are inconsistent).

[28] *In re C.R.H.*, 29 P.3d at 852-853.

[29] 25 U.S.C. § 1911(b).

[30] 25 U.S.C. § 1911(b) ("subject to declination by the tribal court").

[31] 25 U.S.C. § 1911(b) ("absent objection by either parent").

of the case back to state court.[32]

Because of the importance of the parental veto power and the potential permanence of a transfer to tribal court, state attorneys have been advised to ensure that both parents have been appropriately served with the petition for transfer, whether or not they were served with the state's petition, and that the parents have been advised of the potential consequences of a transfer of jurisdiction.

(i) The role of "good cause" in transfer cases

If a parent has not opposed a petition to transfer jurisdiction, and the tribal court has not declined to accept jurisdiction, the law requires that the case be transferred absent a finding of "good cause." "Good cause" is not defined in ICWA, and the Alaska Supreme Court has not addressed the question of what constitutes good cause to decline transfer to a tribe.

In determining "good cause" it is likely that the Alaska Supreme Court will consider at least some of the factors in the Bureau of Indian Affairs Guidelines regarding the good cause exception. The Guidelines provide, in part, as follows:

> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> > (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

[32] *See* 25 U.S.C. §§ 1901-1923; *People in the Interests of M.C.,* 504 N.W.2d 598, 602 (S.D. 1993) (acknowledging the lack of a mechanism to transfer the case back to state court).

> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Bureau of Indian Affairs, U.S. Dep't of the Interior, Guidelines for State Courts, Child Custody Proceedings, 44 Fed. Reg. 67,584 - 67,591 (1979).

Guideline (a), which requires that a tribal court exist before a child protection matter can be transferred to a tribe, is identical to the rationale behind the *Nenana* line of cases. The Alaska Supreme Court's concern in *Native Village of Nenana* was that not all tribes in Alaska had "systems for dispute resolution in place capable of adjudicating [child protection] matters in a reasonable and competent fashion."[33] The court noted that it was "highly unlikely that Congress was unaware of this when it enacted the [ICWA]."[34] The court believed that before a petition for transfer could be granted under § 1911(b), the tribe had to present "satisfactory proof that a particular tribe ha[d] the ability to properly adjudicate such cases."[35] As noted by the federal Guidelines, this concern over whether a tribe has the ability to adjudicate cases is similarly present in § 1911(b) transfer cases. We believe that the court in *C.R.H.*

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[33] *Native Village of Nenana*, 722 P.2d at 222; *see also In re K.E*, 744 P.2d at 1174 (before being allowed transfer jurisdiction under § 1911(b), "tribe must present a petition to the Secretary of the Interior that includes a suitable plan for dealing with custody matters before it 'may reassume jurisdiction over child custody proceedings.'").

[34] *Native Village of Nenana*, 722 P.2d at 222.

[35] *Native Village of Nenana*, 722 P.2d at 222 and n.1.

recognized that § 1911(b) is a second mechanism under ICWA that, like the § 1918 reassumption procedure, will ensure that the tribal court has the infrastructure necessary to adjudicate child protection matters.

The Alaska Supreme Court is not bound by the Guidelines, and, in fact, has departed from them in the past.[36] Although the best interests of the child is not a factor included in the Guidelines, the court in *C.R.H.* recognized that there was a split of opinion in other state courts about whether best interests should be considered in a "good cause" analysis.[37] The Alaska Supreme Court has recognized that it is appropriate to consider a child's best interest in determining whether there is good cause to deviate from the ICWA placement preferences.[38] Based on its previous departure from the Guidelines and the fact that consideration of the best interests of the child will be most protective of children, we believe that the Alaska Supreme Court would consider the best interests of the child to be a relevant consideration in determining whether to transfer a case to tribal court.

When a case is transferred to tribal court and the tribal court has appropriately exercised jurisdiction, the state court action will be dismissed. The state court retains concurrent

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[36] *In re C.R.H.*, 29 P.3d at 853 n.20 (citing cases which departed from the Guidelines); *In re Adoption of F.H.*, 851 P.2d 1361, 1364 (Alaska 1993) (The Guidelines "do not have binding effect" and the Alaska Supreme Court uses them as "guidance.").

[37] *In re C.R.H.*, 29 P.3d at 854 n.24 (recognizing some state courts include substantive considerations of the best interests of the child even though this consideration is not in the Guidelines).

[38] *C.L. v. P.C.S.*, 17 P.3d 769, 776 (Alaska 2001); (The Guidelines are not exclusively controlling and "the best interests of the child must be paramount in these proceedings."); *In re N.P.S.*, 868 P.2d 934, 936 (Alaska 1994) ("Although ICWA and the Guidelines draw attention to important considerations, the best interests of the child remain paramount.").

jurisdiction but it cannot exercise its jurisdiction while the tribal court is exercising jurisdiction, except to protect a child who is in imminent danger. However, OCS still has the authority and responsibility under state child protection statutes to investigate reports of harm.

Some language in § 1911(a) that could facially support the argument that a tribal court gains exclusive jurisdiction after a transfer under §1911(b) does so only when read out of context. Section 1911(a) provides that "where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." This sentence in § 1911(a) must be interpreted in the context of that subsection, which addresses exclusive jurisdiction over children residing or domiciled within a reservation. Furthermore, the word "retain" in this sentence connotes a continuation of the jurisdiction granted under § 1911(a), not transfer jurisdiction under § 1911(b).

Our conclusion that the language in § 1911(a) does not address respective tribal and state jurisdiction where there has been a transfer of jurisdiction from the state to a tribal court under § 1911(b) is supported by *In re Adoption of T.R.M.*[39] The Indiana Supreme Court in *T.R.M.* stated:

> We find that § 1911(a) can pertain only to such wardship orders of the tribal court, which are entered while the child is residing or domiciled on the reservation. This allows the tribal court to exercise subsequent exclusive jurisdiction notwithstanding a state court proceeding when the domicile or residence of the child has changed after the initial tribal court order of wardship. . . The tribal court could not be empowered to effectuate the status of a child as a "ward of the court" relying upon § 1911(a) where the child was never domiciled on the reservation, and was not residing on the reservation at the time the tribal court exercised jurisdiction and entered the wardship order.[40]

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39 *In re T.R.M.*, 525 N.E.2d 298 (Indiana 1988).

40 *In re T.R.M.*, 525 N.E.2d at 306.

We believe the analysis of the Indiana court is sound and no portion of § 1911(a) applies to cases where the tribal court cannot assume exclusive jurisdiction in the first place. Since § 1911(a), by its terms, does not apply to states, like Alaska, where Public Law 280 vested exclusive jurisdiction in the state, no portion of the section may be used to grant jurisdiction to an Alaskan tribal court.

Thus, the state retains concurrent jurisdiction with a tribe after a transfer under § 1911(b). Nevertheless, the state court cannot exercise its jurisdiction while the tribe is exercising transfer jurisdiction over the same case except in emergency circumstances where necessary to protect the child from imminent harm.[41] The tribal court's decisions after transfer are entitled to full faith and credit in state court.[42]

The Alaska Supreme Court recently adopted a new court rule, Child in Need of Aid Rule 23, addressing the procedure for the transfer of jurisdiction from state to tribal court under § 1911(b).[43] The rule sets out who may file a transfer petition, the required contents of the petition, the notice and service requirements, the procedures for state court consideration of the petition, the acceptance or declination of transfer of jurisdiction by the tribal court, the required state court findings and order, and when the transfer of jurisdiction takes effect.[44]

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[41] *See* section III.C.1, p. 21.

[42] 25 U.S.C. 1911(d). *See* section III.C.6, p. 26 for conditions that tribal judgments must meet before being entitled to full faith and credit by Alaska's state courts.

[43] CINA Rule 23 will go into effect on October 15, 2004. Supreme Court Order 1521 dated July 8, 2004.

[44] The Alaska Supreme Court has also begun the initial phases of proposing CINA rules pertaining to the registration and confirmation of tribal court orders after a transfer of jurisdiction under CINA Rule 23, the enforcement of registered and confirmed orders, and writs

3. Reassumption jurisdiction under ICWA § 1918

The third manner in which a tribe in Alaska may exercise jurisdiction over child custody proceedings is when it has successfully petitioned the Secretary of the Interior to reassume jurisdiction under ICWA § 1918. The tribe's petition may seek either exclusive or concurrent jurisdiction. The Secretary of the Interior, without regard to the reservation status of the land, may designate a geographic area within which a tribe may exercise its reassumed jurisdiction.[45]

At this time, the Secretary has granted exclusive jurisdiction under § 1918 to the Native Village of Barrow and the Native Village of Chevak and has granted concurrent jurisdiction to the Metlakatla Indian Community. Barrow and Chevak exercise their reassumed exclusive jurisdiction within the geographic boundaries of their respective villages, as set out in the secretarial order approving their reassumption petitions.[46] Metlakatla exercises its reassumed concurrent jurisdiction within the Annette Islands Reserve.[47]

Child custody proceedings under ICWA pertaining to children of either Barrow or Chevak who reside or are domiciled within their respective villages are subject to the exclusive jurisdiction of those tribal courts. However, OCS must investigate all reports of harm received on Barrow and Chevak children because their exclusive jurisdiction only applies to

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of assistance to take physical custody of a child after a tribal child custody order has been registered and confirmed. *See* discussion at pp. 28-29 of this opinion.

[45] *See* 25 U.S.C. §1918.

[46] 64 Fed. Reg. 36,391 (July 6, 1999).

[47] 58 Fed. Reg. 11,766 (February 26, 1993), as corrected at 58 Fed. Reg. 16,448 (March 26, 1993).

"proceedings."[48] OCS lacks the authority to file an action in state court unless a child is in imminent harm. OCS, however, may enter into agreements with Indian tribes respecting the care, custody, and jurisdiction over Indian children.[49] In addition, Barrow and Chevak children living outside their respective villages are subject to state court jurisdiction.

Because the Metlakatla Indian Community has reassumed concurrent jurisdiction over its member children who reside or are domiciled within the Annette Islands Reserve, both Metlakatla and OCS may investigate reports of harm and initiate child protection proceedings concerning those children. However, once one of the entities exercises jurisdiction over a child by filing a child custody proceeding, the other entity must give full faith and credit to any orders issued.

In sum, the only tribes in Alaska currently approved to exercise exclusive ICWA jurisdiction over child custody proceedings are the Native Villages of Barrow and Chevak where the child is a member of the tribe and resides or is domiciled within the geographic confines of those villages. The Metlakatla Indian Community exercises concurrent jurisdiction with the state over ICWA cases arising on the Annette Islands Reserve.

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[48] *See* discussion at section III.C.1., pp. 21–23.

[49] 25 U.S.C. § 1919(a) provides: "States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes." The state has entered into an ICWA § 1919 agreement with the Native Village of Barrow. This agreement is intended to establish a cooperative arrangement regarding the investigation of child protection cases and care of Barrow children.

C. Ramifications for the State

1. The state's duty to investigate reports of harm pertaining to Alaska Native children and to take protective action

There is an important distinction between tribal court jurisdiction and the duty of the state to carry out its statutory child protection functions. "Tribal court jurisdiction, like any court jurisdiction in child protection matters, is over 'proceeding[s],' not over administration of protection or treatment programs. . ."[50] OCS is required to investigate all reports of harm it receives pertaining to children in the State of Alaska (including Barrow, Chevak and Metlakatla), and, within 72 hours, must provide a report of its investigation to the Department of Law.[51] Many citizens within the state are mandated by law to report suspected child abuse and neglect to OCS.[52] OCS is required to notify law enforcement of appropriate information regarding a case "as may be necessary for the protection of any child or for actions by that agency to protect the public safety."[53] AS 47.17.020(e) requires OCS to immediately notify the nearest law enforcement agency under certain circumstances, including if the report involves possible

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[50] *See Sayers v. Beltrami County*, 472 N.W.2d 656, 661 (Minn. App. 1991), *reversed on other grounds*, *Sayers v. Beltrami County*, 481 N.W.2d 547 (Minn. 1992).

[51] AS 47.17.025(a) states: "A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review."

[52] AS 47.17.020.

[53] AS 47.17.093(b)(6).

criminal conduct or the abuse or neglect results in the need for medical treatment of the child.[54] OCS has the responsibility under ICWA and state law to provide family support and remedial services in order to prevent the removal of the child from the home.[55] Even if the report of harm is substantiated, OCS often works informally with a family to provide these services. In the vast majority of its cases, OCS does not pursue a child custody proceeding in court. Thus, OCS's statutory child protection responsibilities remain, notwithstanding the possibility that a tribe may have, or petition the state superior court to have, adjudicatory responsibility for child protection proceedings that may be brought.[56]

As a matter of state law, AS 47.10.142 authorizes OCS to take emergency custody of a child who has been abandoned, sexually abused, is in a life-threatening situation, or is in need of immediate medical treatment.[57] State statutes authorizing emergency custody are not overridden by ICWA.[58] Under ICWA, the state may take action under state law in order to prevent imminent physical damage or harm to a child, even if a tribal court is exercising

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[54] AS 47.17.020(e) provides: "The department shall immediately notify the nearest law enforcement agency if the department (1) concludes that the harm was caused by a person who is not responsible for the child's welfare; (2) is unable to determine (A) who caused the harm to the child; or (B) whether the person who is believed to have caused the harm has responsibility for the child's welfare; or (3) concludes that the report involves (A) possible criminal conduct under AS 11.41.410 - 11.41.458; or (B) abuse or neglect that results in the need for medical treatment of the child."

[55] 25 U.S.C. § 1912(d) and AS 47.10.086.

[56] *See Sayers v. Beltrami County,* 472 N.W.2d at 661.

[57] AS 47.10.142(d).

[58] *State of Oregon v. Charles*, 688 P.2d 1354, 1358 (Ore. App. 1984). Alaska's emergency custody provisions are found at AS 47.10.142(a).

jurisdiction over a child.[59] Although this statute appears to apply only to reservation children, several courts, including the Alaska Supreme Court, have sanctioned the application of § 1922 to non-reservation children in Alaska.[60] Therefore, even if a child is subject to the jurisdiction of a tribal court, the state should investigate reports of harm and take emergency custody if necessary. At that point, the state must either "expeditiously initiate a child custody proceeding subject to provisions of [ICWA], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian."[61] The state is required to terminate the emergency removal or placement as soon as the "removal or placement is no longer necessary to prevent imminent physical damage or harm to the child."[62]

2. The state's responsibilities in the Native Village of Barrow and the Native Village of Chevak

If a child is a member of a tribe that has reassumed exclusive jurisdiction over child custody proceedings involving its children, the state court *lacks* jurisdiction to file a child custody proceeding (as defined in ICWA) pertaining to a child who is either within the

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[59] 25 U.S.C. § 1922 ("Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child . . . temporarily located off the reservation . . . or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child."); *See In re Welfare of R.I.,* 402 N.W.2d 173, 176 (Minn.App.1987) (trial court had jurisdiction despite exclusive jurisdiction of tribe where children were taken into emergency custody by the state).

[60] *D.E.D. v. State*, 704 P.2d 774, 779 (Alaska 1985); S*ee also, State of Oregon v. Charles*, 688 P.2d 1354, 1358 n.2 (Ore. App. 1984*)*; *Hampton v. J.A.L.*, 658 So.2d 331, 342 (La. App. 2 Cir. 1995) (stating "the legislative history bears this out," citing to H.B. 1386, 95 Cong., 2d Sess. 25).

[61] 25 U.S.C. § 1922.

[62] 25 U.S.C. § 1922.

geographic boundaries of the tribe as described in the Secretary's action granting reassumption, or pertaining to a child who is subject to an already established tribal court wardship order. OCS, however, continues to have a state statutory responsibility to investigate reports of harm it receives on these children. In these circumstances, OCS should refer its investigative report to the tribe for necessary action. If a tribe has exclusive jurisdiction over its child custody proceedings, neither state nor federal law permits OCS to second-guess a tribe's decision-making. If a member child resides outside of the tribe's geographic area at the time a report of harm is received, the state should investigate the report and, if necessary, take custody of the child under state law.

3. The state's responsibilities in the Metlakatla Indian Community

The state should investigate reports of harm it receives on children who are members of the Metlakatla Indian Community. The state should assume custody of Metlakatla children if warranted under state law. Because the Metlakatla Indian Community has concurrent jurisdiction over child custody proceedings involving its children, if Metlakatla provides the state with a tribal court order entitled to full faith and credit reflecting that it already has custody of a child, the state may not file a child-in-need-of-aid proceeding in state court. However, the state still has a statutory duty to investigate all reports of harm.[63]

4. The state's responsibilities where a tribe has transfer jurisdiction

In all other circumstances, Alaska state courts have exclusive jurisdiction over child protection proceedings involving an Indian child until a petition for transfer to tribal court

[63] AS 47.17.025, *see* n.51.

is approved by the superior court and the tribal court has exercised its jurisdiction.[64] Following transfer of the case, the state has concurrent jurisdiction with the tribal court. Although state courts may not act to exercise their jurisdiction while the tribal court is exercising transfer jurisdiction in a particular case, OCS still has a statutory duty to investigate all reports of harm on children within the state.[65]

5. The state's ability to share confidential information with a tribe

In the event the state receives and investigates a report of harm on a child who is properly within the jurisdiction of a tribal court, the state may release this otherwise confidential information to the tribe pursuant to AS 47.10.093(f). A tribe is a "person" under AS 01.10.060(8).[66] AS 47.10.093(f) authorizes the department to promulgate regulations allowing for the release of information concerning minors to a person with a legitimate interest in that information where the minor is not subject to the jurisdiction of the court under AS 47.10.010. A person to whom this information is provided must safeguard the confidentiality of the information or be subject to criminal liability.[67] Accordingly, the state should adopt regulations that will allow it to forward reports of harm, the results of its investigation on reports

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[64] *Native Village of Nenana*, 722 P.2d 219; *In re C.R.H.*, 29 P.3d 849.

[65] AS 47.17.025, *see* n.51.

[66] "In the laws of the state, unless the context otherwise requires, . . .(8) "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person. . ." Tribes recognized by the federal government are domestic dependent sovereigns. As such, they are more than mere "associations" or "organizations." However, tribes fit well within the common definitions of these terms.

[67] "A person, not acting in accordance with department regulations, who with criminal negligence makes public information contained in confidential reports is guilty of a class B misdemeanor." AS 47.17.040(b).

of harm, and additional confidential information to a child's tribe.

6. Full faith and credit for tribal court judgments

With the exception of tribal court adoption orders addressed in section III, C.7, at pp. 29-31 below, the state must give full faith and credit to a tribe's "public acts, records, and judicial proceedings . . . applicable to Indian child custody proceedings to the same extent" that the state gives full faith and credit to any other judicial proceeding.[68] When considering whether to accord full faith and credit to a judgment from the courts of sister states, the Alaska Supreme Court first determines whether the issuing court had personal and subject matter jurisdiction when it entered its judgment.[69] In *Wall v. Stinson*,[70] the Alaska Supreme Court stated that "[a] valid final judgment in one state is ordinarily entitled to full faith and credit in its sister states."[71] It further held:

> We grant full faith and credit to another state's judgment only if the issuing court had jurisdiction over the parties and the subject matter in controversy. But when jurisdiction has been fully

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[68] 25 U.S.C. § 1911(d) ("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.").

[69] However, although ICWA requires the state to give full faith and credit to ICWA tribal custody proceedings, this does not compel the state to substitute the statutes or ordinances of a tribe for state statutes dealing with a subject matter over which the state is competent to legislate. Full faith and credit pertains to judgments, not to tribal statutes and ordinances. 25 U.S.C. § 1911(d)("public acts, records, judicial proceedings"). For example, full faith and credit does not require a state court to adhere to a tribal resolution opposing adoptions. *In re Laura F.*, 99 Cal. Rptr.2d 859, 865-66 (Cal. App. 2001), *cert. denied*, 121 S.Ct. 1618 (2001).

[70] *Wall v. Stinson*, 983 P.2d 736 (Alaska 1999).

[71] *Wall v. Stinson*, 983 P.2d at 741, citing U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause).

> litigated in the issuing court, we must credit that court's jurisdictional decision.[72]

Because ICWA requires the state to give the same credit to tribal court judgments as it does to the judgments of courts of sister states, the rule in *Stinson* applies with equal force to judgments issued in ICWA child custody proceedings.

In addition to having personal and subject matter jurisdiction, full faith and credit requires that the issuing court afford the parties due process and render its judgment in accordance with statutes and ordinances that meet federal constitutional standards.[73] In *Fann*, the court held:

> We note that the full faith and credit clause would not mandate enforcement in all cases. For example, the clause would not preclude a challenge to the constitutional validity of a foreign judgment.
>
> > The requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice, protected by other constitutional provisions which it was never intended to modify or override. … [N]o state may obtain, in the tribunals of another jurisdiction, full faith and credit for a judgment which is based upon an unconstitutional law, or is rendered in a proceeding wanting in due process of law enjoined by the fundamental law.[74]

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[72] *Wall v. Stinson*, 983 P.2d at 737; *See also Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc.*, 102 S.Ct. 1357, 1366-67 (1982).

[73] *State, Dep't of Public Safety v. Fann*, 864 P.2d 533 (Alaska 1993).

[74] *Fann*, 864 P.2d at 536 n. 5, quoting 47 Am.Jur.2d *Judgments* § 1221 (1969)(footnotes omitted); *see also, Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1898 & n.24 (1982)(full faith and credit is not due to a state court judgment that does not satisfy the "procedural requirements of due process").

Therefore, as with the judgments of any state court, full faith and credit will be accorded to tribal court judgments only if tribal courts afford due process to the parties and otherwise decide cases in accordance with constitutional laws.[75]

In addition to the jurisdictional and constitutional inquiries discussed above, tribes may need to have tribal orders registered with the Alaska Court System in order to have their orders recognized and enforced. The Alaska Supreme Court is currently considering this issue. The court recently proposed three draft CINA rules (proposed rules 24, 25 and 26) pertaining to (1) the registration and confirmation of tribal court child custody orders issued by a tribal court when the child's tribe may exercise jurisdiction under ICWA § 1911(b) and jurisdiction has been transferred to the tribal court of the Indian child's tribe under CINA Rule 23, (2) the enforcement of such orders, and (3) the process for obtaining a writ of assistance to take physical custody of a child after a tribal court child custody order has been registered and confirmed. The Alaska Supreme Court is in the process of seeking comment from the CINA Rules Committee and will later seek public comment on any rules that are ultimately drafted by that body and approved by the court.

In the meantime, social workers should seek advice from our office if an issue arises with regard to the recognition of a tribal court order. Social workers should ask for copies

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[75] The analysis applied to determine whether full faith and credit should be accorded to tribal court judgments is similar to the analysis used to determine whether a state court should grant comity to tribal child custody orders involving Indian children in non-ICWA cases. *See John v. Baker*, 982 P.3d 738, 762-64 (Alaska 1999). In *John v. Baker*, the court held that comity should not be granted to tribal judgments where the tribal court was without subject matter or personal jurisdiction, where due process was denied (including situations where the tribal court was "dominated by the opposing litigant"), or where the judgment violates the public policy of the United States or the State of Alaska.

not only of the tribal court order, but also additional documentation that demonstrates that both parents were served with notice of the tribal court proceeding, that they were given a full and fair opportunity to be heard by the tribal court, and that the tribal court was not dominated by one of the parties to the proceeding. In the absence of court rules setting out the procedure for registration, confirmation, and enforcement of tribal court orders under ICWA, the state will defer to such 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 and the other conditions set out above.

7. Jurisdiction over adoption proceedings

The holding in *C.R.H.* concerned only transfer jurisdiction under ICWA § 1911(b). Although adoption proceedings are within ICWA's definition of "child custody proceeding,"[76] adoption proceedings initiated in state court cannot be transferred to tribes under § 1911(b): That section only authorizes transfers of "foster care placement" and "termination of parental rights" proceedings to tribal courts.[77] Thus, tribal courts cannot obtain jurisdiction over adoption proceedings by transfer under § 1911(b).

Since tribes cannot obtain ICWA transfer jurisdiction over adoption proceedings, the question is whether Alaska tribes have independent jurisdiction over adoption proceedings to which the state must give full faith and credit under ICWA § 1911(d). Under the current state of the law, the answer to this question is "no."

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[76] 25 U.S.C. § 1903(1).

[77] *Matter of J.B., State, DHS v. Cheyenne-Arapaho Tribes of Oklahoma*, 900 P.2d 1014, 1016 (Okla.App. 1995)("Congress chose to limit transfer authority to only two of the four proceedings included in the definition of 'child custody proceeding.'").

In *Native Village of Nenana*, the court held that P.L. 280 vests the state with exclusive jurisdiction over child custody proceedings (including adoption matters) unless a tribe reassumes jurisdiction under ICWA § 1918.[78] In *C.R.H.*, the court declined to reconsider this ruling, holding instead that, regardless of P.L. 280, tribes may obtain transfer jurisdiction over child custody proceedings under § 1911(b).[79] As we discussed above, transfer jurisdiction is available only for foster care placement and termination of parental rights proceedings.

As modified by *C.R.H.* and applied to adoption matters, *Nenana* now means that the state has exclusive jurisdiction over Indian child adoption proceedings unless a tribe has reassumed jurisdiction under ICWA § 1918.[80] Thus, in the absence of tribal reassumption, full faith and credit is not due to tribal court adoption decrees because Alaska tribal courts have no subject matter jurisdiction over Indian child adoptions.[81] In the absence of tribal reassumption under ICWA § 1918, the state has exclusive jurisdiction over adoptions.

However, the state has long ratified Indian adoptions that occur under tribal custom as a matter of equity under state law.[82] The state ratifies these adoptions in recognition of "the obvious cultural differences which are present in Alaska" and "to avoid [the] hardship

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[78] *Native Village of Nenana*, 722 P.2d at 221.

[79] *In re C.R.H.*, 29 P.3d at 852.

[80] Because the Native Villages of Barrow and Chevak and the Metlakatla Indian Community have reassumed jurisdiction under ICWA § 1918, their tribal adoption orders are entitled to full faith and credit in accordance with the standards discussed in section III.C.6, pp. 26–29.

[81] *Wall v. Stinson*, 983 P.2d at 737. *See* discussion at section III.C.6, pp. 26-28.

[82] *Calista Corp. v. Mann*, 564 P.2d 53, 61 (Alaska 1977); *see also, Hernandez v. Lambert*, 951 P.2d 436, 441 (Alaska 1998); 7 AAC 05.700(b)(authorizing issuance of new birth certificates for Indians adopted under tribal custom).

created in part by the diversity of cultures found within this jurisdiction."[83] Nothing in *C.R.H.* or this opinion should be construed as changing this longstanding policy in any respect.

IV. CONCLUSION

We withdraw the advice previously provided to Acting Commissioner Jay Livey on March 26, 2002, A.G. File No. 441-00-0005. We recommend that OCS act in accordance with the guidance provided in this opinion. The Department of Law is available to assist OCS in drafting the regulations recommended in this opinion.

Sincerely,

Gregg D. Renkes
Attorney General

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[83] *Calista Corp. v. Mann*, 564 P.2d at 61-62.