IN THE SUPREME COURT OF THE STATE OF ALASKA

ASA'CARSARMIUT TRIBAL COUNCIL, Appellant. vs. JOHN D. WHEELER, III, Appellee,	)	Supreme Court Case No. S-15318

Trial Court No. 3AN-12-4581 CI

Appeal from the Superior Court
Third Judicial District at Anchorage
The Honorable Andrew Guidi

APPELLANT'S REPLY BRIEF

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Filed in the Supreme Court for
the State of Alaska this 22nd
day of May, 2014.

Marilyn May, Clerk

By: _____
Deputy Clerk

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Sec. 09.17.040. Award of Damages; Periodic Payments.

Sec. 11.41.320. Custodial Interference in the First Degree.
(a) A person commits the crime of custodial interference in the first degree if the person violates AS 11.41.330 and causes the child or incompetent person to be
(1) removed from the state; or
(2) kept outside the state.
(b) Custodial interference in the first degree is a class C felony.

Sec. 11.41.330. Custodial Interference in the Second Degree.
(a) A person commits the crime of custodial interference in the second degree if, being a relative of a child under 18 years of age or a relative of an incompetent person and knowing that the person has no legal right to do so, the person takes, entices, or keeps that child or incompetent person from a lawful custodian with intent to hold the child or incompetent person for a protracted period.
(b) The affirmative defense of necessity under AS 11.81.320 does not apply to a prosecution for custodial interference under (a) of this section if the protracted period for which the person held the child or incompetent person exceeded the shorter of the following:
(1) 24 hours; or
(2) the time necessary to report to a peace officer or social service agency that the child or incompetent person has been abused, neglected, or is in imminent physical danger.
(c) Custodial interference in the second degree is a class A misdemeanor.

Sec. 11.41.370. Definitions.
In AS **11.41.300 - 11.41.370, unless the context requires otherwise,**
(1) "lawful custodian" means a parent, guardian, or other person responsible by authority of law for the care, custody, or control of another;

Sec. 18.66.990 (a)(3).
(3) "domestic violence" and "crime involving domestic violence" mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

Sec, 25.24.150. Judgments For Custody.

(a) In an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may, if it has jurisdiction under AS 25.30.300 - 25.30.320, and is an appropriate forum under AS 25.30.350 and 25.30.360, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

(b) If a guardian ad litem for a child is appointed, the appointment shall be made under the terms of AS 25.24.310 (c).

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 - 25.20.130. In determining the best interests of the child the court shall consider

(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

(3) the child's preference if the child is of sufficient age and capacity to form a preference;

(4) the love and affection existing between the child and each parent;

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(9) other factors that the court considers pertinent.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

(e) Notwithstanding the provisions of (d) of this section, in awarding custody the court shall comply with the provisions of 25 U.S.C. 1901 - 1963 (P.L. 95-608, the Indian Child Welfare Act of 1978).

(f) If the issue of child custody is before the court at the time it issues a judgment under AS 25.24.160 , the court shall concurrently issue a judgment for custody under this

section unless, subject to AS 25.24.155, the court delays the custody decision for a later time.

(g) There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.

(h) A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence. The presumption may be overcome by a preponderance of the evidence that the perpetrating parent has successfully completed an intervention program for batterers, where reasonably available, that the parent does not engage in substance abuse, and that the best interests of the child require that parent's participation as a custodial parent because the other parent is absent, suffers from a diagnosed mental illness that affects parenting abilities, or engages in substance abuse that affects parenting abilities, or because of other circumstances that affect the best interests of the child.

(i) If the court finds that both parents have a history of perpetrating domestic violence under (g) of this section, the court shall either

(1) award sole legal and physical custody to the parent who is less likely to continue to perpetrate the violence and require that the custodial parent complete a treatment program; or

(2) if necessary to protect the welfare of the child, award sole legal or physical custody, or both, to a suitable third person if the person would not allow access to a violent parent except as ordered by the court.

(j) If the court finds that a parent has a history of perpetrating domestic violence under (g) of this section, the court shall allow only supervised visitation by that parent with the child, conditioned on that parent's participating in and successfully completing an intervention program for batterers, and a parenting education program, where reasonably available, except that the court may allow unsupervised visitation if it is shown by a preponderance of the evidence that the violent parent has completed a substance abuse treatment program if the court considers it appropriate, is not abusing alcohol or psychoactive drugs, does not pose a danger of mental or physical harm to the child, and unsupervised visitation is in the child's best interests.

(k) The fact that an abused parent suffers from the effects of the abuse does not constitute a basis for denying custody to the abused parent unless the court finds that the effects of the domestic violence are so severe that they render the parent unable to safely parent the child.

Sec. 25.30.320. Jurisdiction to Modify Determination.
Except as otherwise provided in AS 25.30.330 , a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under AS 25.30.300 (a)(1), (2), or (3) and
(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under provisions substantially similar to AS 25.30.310 or that a court of this state would be a more convenient forum under provisions substantially similar to AS 25.30.360; or
(2) a court of this state or a court of the other state determines that neither the child, nor a parent, nor a person acting as a parent presently resides in the other state.

Sec. 25.30.330. Temporary Emergency Jurisdiction.
(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
(b) If there is no previous child custody determination that is entitled to be enforced under this chapter and if a child custody proceeding has not been commenced in a court of a state having jurisdiction under provisions substantially similar to AS 25.30.300 - 25.30.320, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under AS 25.30.300 - 25.30.320 or provisions substantially similar to AS 25.30.300 - 25.30.320. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under AS 25.30.300 - 25.30.320 or provisions substantially similar to AS 25.30.300 - 25.30.320, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child.
(c) If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under AS 25.30.300 - 25.30.320 or provisions substantially similar to AS 25.30.300 - 25.30.320, an order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under AS 25.30.300 - 25.30.320 or provisions substantially similar to AS 25.30.300 - 25.30.320. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.
(d) A court of this state that has been asked to make a child custody determination under this section, on being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction

under AS 25.30.300 - 25.30.320 or provisions substantially similar to AS 25.30.300 - 25.30.320 shall immediately communicate with the other court. A court of this state that is exercising jurisdiction under AS 25.30.300 - 25.30.320, on being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute substantially similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Sec. 25.30.370. Jurisdiction declined because of conduct. (a) Except as otherwise provided in AS 25.30.330, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in wrongful conduct, the court shall decline to exercise its jurisdiction unless

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under AS 25.30.300 - 25.30.320 determines that this state is a more appropriate forum under provisions substantially similar to AS 25.30.360; or

(3) no court of another state would have jurisdiction under the criteria specified in AS 25.30.300 - 25.30.320.

(b) If a court of this state declines to exercise its jurisdiction under (a) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the wrongful conduct, including staying the proceeding, until a child custody proceeding is commenced in a court having jurisdiction under provisions substantially similar to AS 25.30.300 - 25.30.320.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under (a) of this section, that court shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party against whom the assessment is sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

Sec. 25.30.380. Information to Be Submitted to Court.

(a) Subject to a contravening court order, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses

of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party
(1) has participated, as a party or witness or in another capacity, in another proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;
(2) knows of a proceeding that could affect the current proceeding, including a proceeding for enforcement and a proceeding relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and
(3) knows the names and addresses of a person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.
(b) If the information required by (a) of this section is not furnished, the court, on motion of a party or its own motion, may stay the proceeding until the information is furnished.
(c) If the declaration as to an item described in (a)(1) - (3) of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.
(d) Each party has a continuing duty to inform the court of a proceeding in this state or in another state that could affect the current proceeding.
(e) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information shall be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

Sec. 25.30.410. Duty to enforce. (a) A court of this state shall recognize and enforce a child custody determination of a court of another state if the court of the other state exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(b) A court of this state may use a remedy available under other law of this state to enforce a child custody determination made by a court of another state. The procedure provided by AS 25.30.400 - 25.30.590 does not affect the availability of other remedies to enforce a child custody determination.

Sec. 25.30.430. Registration of Child Custody Determination.
(a) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state
(1) a letter or other document requesting registration;
(2) two copies, including one certified copy, of the determination sought to be registered and a statement, under penalty of perjury, that to the best knowledge and belief of the person seeking registration the order has not been modified; and
(3) except as otherwise provided in AS 25.30.380 , the name and address of the person seeking registration and the parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.
(b) On receipt of the documents required by (a) of this section, the registering court shall
(1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and
(2) serve notice on the persons named under (a)(3) of this section and provide them with an opportunity to contest the registration under this section.
(c) The notice required by (b)(2) of this section must state that
(1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;
(2) a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and
(3) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to a matter that could have been asserted.
(d) A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that
(1) the issuing court did not have jurisdiction under provisions substantially similar to AS 25.30.300 - 25.30.390;
(2) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under provisions substantially similar to AS 25.30.300 - 25.30.390; or
(3) the person contesting registration was entitled to notice, but notice was not given in accordance with provisions substantially similar to AS 25.30.840 in the proceedings before the court that issued the order for which registration is sought.
(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law, and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to a matter that could have been asserted at the time of registration.

Sec. 25.30.440. Enforcement of Registered Determination.
(a) A court of this state may grant relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.
(b) A court of this state shall recognize and enforce, but may not modify except in accordance with AS 25.30.300 - 25.30.390, a registered child custody determination of a court of another state.

Sec. 25.30.800. Proceedings Governed By Other Law.
(a) This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.
(b) A child custody proceeding that pertains to an Indian child as defined in 25 U.S.C. 1901 - 1963 (Indian Child Welfare Act) is not subject to this chapter to the extent that it is governed by 25 U.S.C. 1901 - 1963 (Indian Child Welfare Act).

Sec. 25.30.810. International Application of Chapter.
(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying AS 25.30.400 - 25.30.590.
(b) Except as provided in (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter shall be recognized and enforced under AS 25.30.400 - 25.30.590.
(c) A court of this state is not required to apply this chapter to a child custody determination made in a foreign country when the child custody law of the other country violates fundamental principles of human rights.

Sec. 25.30.860. Communication Between Courts.
(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

INTRODUCTION

The Superior Court initially enforced the Tribal Court's custody order, but then determined that it had concurrent jurisdiction. The Superior Court issued a whole new order and decree, ignoring four years of Tribal Court litigation. But, a superior court of this state is not free to modify existing Tribal Court orders any more than it may modify the orders of a federal court, sister states or other foreign courts. Both the common law and the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") prohibit the trial court from so proceeding.

In addition, Appellee John Wheeler's ("Wheeler") wrongful conduct deprived the Superior Court of whatever jurisdiction it may have had. Wheeler concedes that he omitted to disclose the existing Tribal Court orders in his Child Custody Jurisdiction Affidavit. The Superior Court also found Wheeler acted unlawfully and in violation of ATC Tribal Court orders in interfering with the lawful custodian's rights.

FACTUAL CLARIFICATIONS[1]

Wheeler concedes that his Child Custody Jurisdiction Affidavit [Exc. 14-16] is untruthful. Wheeler failed to disclose that he participated as a party in the ATC proceedings concerning the custody of J.W.[2] Wheeler excuses the omission in two ways.

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[1] Wheeler's excerpts includes parts of the record that were included in ATC's excerpts. In particular, Wheeler's excerpts include the same orders as are included In ATC's excerpt. *C.f.* Alaska R. App. Pro. 210(c)(2)(B) ("The appellee's excerpt of record must contain those parts of the record .... relied upon by appellee that were not included in the appellant's excerpt.") In order to avoid confusion, this brief, to the greatest extent possible refers to ATC's excerpt of record.

[2] *See* Wheeler brief ("Aee. Br. at 1").

First, Wheeler states that he came clean in a subsequent petition for a restraining order.[3] Second, Wheeler contends that the Defendant, Ms. Myer, never objected.[4]

The Child Custody Jurisdiction Affidavit, as a matter of law, must disclose existing child custody orders.[5] Failure to fully disclose those salient facts is fatal to the action under AS 25.30.370. Even if the Superior Court had jurisdiction (which it did not), AS 25.30.370(a) requires that the Superior Court "shall decline to exercise jurisdiction ...." Here, it is undisputed that Wheeler never corrected the actual Child Custody Jurisdiction Affidavit. Wheeler's frivolous petition for a restraining order [Exc. 93] does not mitigate the omission. Wheeler failed to comply with a basic prerequisite for invoking the custody jurisdiction of the Superior Court.

But, Wheeler is also demonstrably in error in his assertions that Ms. Myre did not object. Ms. Myre, before she answered the state court custody complaint, asserted "Mr. Wheeler has ignored the legal process that properly applies to him ... improperly filed a custody case in Alaska with flagrant disregard for that prior [Tribal Court] order (of which he states under penalty of perjury in his child custody affidavit that he had not participated in [sic] ....). [Exc. 108.] Nor did Ms. Myre waive that argument or acquiesce to the Superior Court. She relied upon the Tribal Court initial determination in her attempts to enforce that order. [Exc. 124-127.] Ms. Myre made it very clear that she

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[3] *Id.*

[4] *Id.*

[5] *See* ATC brief at 38, n. 103, citing AS 25.30.380(a)(1): The affidavit "must state whether the party (1) has participated as a party ... in another proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination...."

was not waiving Tribal Court jurisdiction. [Exc. 129 at n. 1.] She also attempted to register the Tribal Court order [Exc. 134-135] in order to enforce it.

Similarly, Wheeler is demonstrably in error in asserting that ATC's Motion to Dismiss/Defer [Exc. 153-19] was raised too late. [Aee. Br. at 4.] ATC's Motion to Intervene was the third objection to state court jurisdiction filed in the case.[6] Wheeler asserts that he opposed ATC's motion for dismissal/deferral because ATC was asserting its interest and not the best interests of J.W. [Aee. Br. at 5.] But that argument is not only specious, but circular. The ATC court had arrived at a best interest determination four years before Wheeler filed a complaint in the state court. [Exc. 2-5.] The lower court held that the Tribal Court's decision was "based ... on the same criteria that Alaska courts consider in reaching custody decisions, *i.e.*, the "best interests of the child" factors listed in AS 25.24.150." [Exc. 21.] In fact, ATC's best interest analysis was precisely the reason that the trial court initially enforced ATC's Tribal Court orders, compelling the return of J.W. to his mother, Ms. Myre. [Exc. 26-31.]

[6] Wheeler is simply in error that ATC's Motion to Dismiss was too late. "The doctrine of subject matter jurisdiction applies to judicial and *quasi*-judicial bodies to ensure that they do not overreach their adjudicative powers." *Hawkins v. Attatayuk,* 322 P.3d 891, 894 (Alaska 2014) quoting *N.W. Med. Imaging, Inc. v. State, Dep't of Revenue,* 151 P.3d 434, 438 (Alaska 2006). Consequently, "the issue of subject matter jurisdiction 'may be raised at any stage of the litigation and if noticed must be raised by the court if not raised by one of the parties.'" *Id.* at 894-895 quoting *Hydaburg Co-op Ass'n. v. Hydaburg Fisheries,* 925 P.2d 246, 268 (Alaska 1996) (quoting *Burrell v. Burrell,* 696 P.2d 157, 162 (Alaska 1984)).

ARGUMENT

A. Wheeler Failed to Raise Standing

1. ATC Does Have a Protected Interest

Wheeler did not challenge ATC's standing below. He did not seek dismissal of ATC's Complaint in Intervention below. Indeed, Wheeler did not answer ATC's Complaint in Intervention below.[8] To the contrary, Wheeler's opposition to the Complaint in Intervention was that it was untimely. ATC already had an interest in the subject matter of the subject action and the Superior Court's modification of its Tribal Court's longstanding initial determination. [Exc. 193-204.] Indeed, Wheeler conceded ATC's protectable interest, below, but asserted that the interest was adequately protected by Ms. Myre. [Exc. 199.] Because Wheeler did not raise the issue of ATC's standing below, this Court should not consider that issue first raised on appeal.[9]

2. ATC Has Standing

Wheeler contends that the trial court's "modification" of ATC's Tribal Court's initial determination with respect to a child member of the tribe does not impact the ability of the tribe to address internal domestic disputes. [Aee. Br. at 9.] Thus, Wheeler asserts that ATC lacks standing to bring or maintain this appeal [*id.*]. However, Wheeler

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[8] ATC's intervention is found at Exc. 190-191.

[9] *See Askinuk Corp. v. Lower Yukon School District,* 214 P.3d 259, 266 (Alaska 2009) (citing *Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc.,* 32 P.3d 346, 355 (Alaska 2001) (citing *Frost v. Ayojiak,* 957 P.2d 1353, 1355-56 (Alaska 1998)); *State v. Pub. Safety Employees Assoc.,* 235 P.3d 197, 203 (Alaska 2010).

fails to set forth the proper test for standing.[10] ATC clearly has interest-injury standing. In order to establish interest-injury standing, ATC must demonstrate that it has a "sufficient personal stake" in the outcome of the controversy[11] and "an interest which is adversely affected by the challenged conduct."[12] "[T]he degree of injury may not be great; indeed, an "identifiable trifle is sufficient to establish standing to fight out a question of principle."[13]

Here, ATC's Complaint in Intervention and its appeal to this Court demonstrate that ATC's interest and its injury are more than an "identifiable trifle." The injury in this case goes to the very heart of tribal sovereignty, the ability of a tribal court to decide in a tribal court custody proceeding domestic affairs involving tribal members.[14] Without question, ATC, in order to protect the orders of its Tribal Court lawfully entered, as in this case, has standing to vindicate its retained sovereignty.

In *United States v. City of Tacoma, Washington,*[15] the government sued the City of Tacoma seeking declaratory judgment to invalidate a 1921 condemnation proceeding

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[10] This Court holds that standing involves one of two general standards: citizen-tax payer standing or interest-injury standing and third-party standing *State v. Planned Parenthood of Alaska,* 35 P.3d 30, 34 (Alaska 2001). ATC relies on interest-injury standing.

[11] *Ruckle v. Anchorage School District,* 85 P.3d 1030, 1040 (Alaska 2004) quoting *Moore v. State,* 553 P.2d 8, 23 (Alaska 1976).

[12] *Alaskans for a Common Language, Inc. v. Kritz,* 3 P.3d 906, 915 (Alaska 2000) (citing *Trustees for Alaska v. State,* 736 P.2d 324, 327 (Alaska 1987)).

[13] *Ruckle,* 85 P.3d at 1040-41 (quoting *Trustees for Alaska,* 736 P.2d at 327).

[14] *See John v. Baker,* 982 P.2d 738, 751 (Alaska 1999) (citing *United States v. Wheeler,* 435 U.S. 313, 326 98 S.Ct. 1079, 55 L.Ed. 303 (1978)); *Montana v. United States,* 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981); *see* 25 U.S.C. §1901(3) "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes and their children."

[15] 332 F.3d 574 (9th Cir. 2003).

and to void land transfers by the tribe. Tacoma argued that the government lacked standing. The Ninth Circuit held that the United States had not only a property interest in view of its injury as a trustee, but also "an independent governmental interest ...."[16] Here, ATC clearly has an independent government interest. Indeed, it was permitted to intervene regarding its initial child custody determination under principles of concurrent jurisdiction.

Wheeler argues that ATC lacks standing because the case did not involve proceedings under the Indian Child Welfare Act. But, that argument is specious. If ATC's initial child custody determinations can be ignored by the Alaska Superior Court, then it is clear that ATC's sovereignty and this Court's comity principles would be meaningless. But, since this Court has consistently respected tribal court judgments, it is clear that ATC has suffered an injury in fact.

B. The Parties Are in Agreement that the ATC Tribal Court Issued the Initial Determination

1. The Parties Cannot Create Subject Matter Jurisdiction by Agreement

Wheeler agrees with ATC that ATC's Tribal Court issued the initial determination. [Aee. Br. at 10.] Wheeler concedes that for a period of almost four years, the parties proceeded in the Tribal Court. [*id.*] Wheeler also concedes that he was advised to seek modification in the Tribal Court. [*id.* 10-11.] Central to Wheeler's argument is that Wheeler can ignore principles of concurrent jurisdiction and, as well, the

[16] *Id.* at 579.

UCCJEA and simply begin new actions in a state court.[17] Ms. Myre did object to the trial court exercising jurisdiction. Because the Tribal Court exercised jurisdiction first and issued an initial determination, the Tribal Court obtained exclusive jurisdiction.

2. Principles of Concurrent Jurisdiction

Wheeler concedes, as he must, that concurrent jurisdiction exists with respect to initial custody determinations in Alaska.[19] A central premise of concurrent jurisdiction is that the court system first obtaining personal jurisdiction over the parties enjoys exclusive jurisdiction.[20]

That bedrock principle was violated in this case. For example, under the UCCJEA, courts of this state are required to recognize and enforce child custody determinations of the courts of other states.[21] That policy is consistent with the principles of concurrent jurisdiction and respect for tribal court judgments that this Court announced in *John v. Baker*.[22] The controlling principle is that "superior courts should not deny recognition to tribal court judgments simply because they disagree with the outcome

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[17] *See* Aee. Br. at 11-12. Wheeler asserts that Ms. Myre waived Tribal Court jurisdiction by proceeding in state court, and, consequently, the parties, together, bequeathed upon the state court subject matter jurisdiction. *See* Aee. Br. at 12.

[19] *accord, John v. Baker,* 982 P.2d at 763; *John v. Baker, II,* 30 P.3d 68, 79 (2001); *Starr v. George,* 175 P.3d 50, 75 (Alaska 2008).

[20] *Harris v. Young,* 473 N.W.2d 141, 146 -147 (S.D. 1991); *Briggs v. Estate of Briggs,* 500 P.2d 550, 554 (Alaska 1972); *Theodore v. State,* 407 P.2d 182, 184 (Alaska 1965).

[21] AS 25.30.410; *see also Rogers v. Rogers,* 907 P.2d 469, 472 (Alaska 1995) (exclusive jurisdiction as basis of "home state" of child); *State, Dep't of Rev., CSED, ex rel. Valdez v. Valdez,* 941 P.2d 144, 149 (Alaska 1997) (court issuing child support order has exclusive jurisdiction to modify order); *Steven v. Nikole,* 308 P.3d 875, 879 (Alaska 2013) (exclusive jurisdiction under UCCJEA). [Exc. 109, 209.]

[22] 982 P.2d 762-763.

reached by the tribal judge or because they conclude that they could better resolve the disputed issue."[23]

Here, Wheeler offers no legal support other than the Superior Court's theory that because it had concurrent jurisdiction, it could modify the tribe's initial tribal child custody determination. Wheeler asserts, contrary to the record, that the parties chose to litigate the issues in the Anchorage Superior Court. [Aee. Br. at 12.] Similarly, Wheeler's companion argument, that ATC's jurisdiction somehow ended when Wheeler filed a complaint in Superior Court, is also in error. Wheeler has no support that the exclusive jurisdiction following ATC's Tribal Court's exercise of jurisdiction in a concurrent jurisdiction setting is terminable upon Wheeler's state court complaint.

3. ATC's Initial Exercise of Jurisdiction Created Exclusive Jurisdiction

Thus, the fundamental flaw in Mr. Wheeler's argument is that he fails to understand the meaning of concurrent jurisdiction. Mr. Wheeler states:

> While ATC may have concurrent jurisdiction over custody matters, there [sic] jurisdiction only arises when a party files a competing motion in the Tribal Court. In this matter, both parties chose to litigate there [sic] issues in the Anchorage Superior Court, a choice both parties clearly made due to the absence of any competing motions being filed in the Tribal Court. Therefore ATC's jurisdiction to decide the custody issues is not triggered. [Aee. Br. at 12.]

Under the common law and Alaska's UCCJEA, ATC's jurisdiction was exclusive from 2007, and Wheeler's filing in state court in January 2012 should have been a

[23] *Id.*, 763-764 (citing *Hilton v. Guyot,* 159 U.S. 113, 202-03, 16 S.Ct. 139 40 L.Ed. 95 (1895)).

nullity.[24] By then, the Superior Court lacked jurisdiction because the ATC Tribal Court had entered an initial child custody determination.[25] In short, the exclusive jurisdiction provisions of the UCCJEA are consistent with Alaska common law with respect to concurrent jurisdiction. Wheeler's understanding of concurrent jurisdiction is demonstrably inapposite of the common law and the UCCJEA.

4. The Trial Court, Having Initially Accepted the ATC Initial Determination As Enforceable, Lacked Subject Matter Jurisdiction to Modify the Order

a. The Superior Court's Initial Comity Analysis was Correct

Wheeler concedes that the Superior Court initially enforced the Tribal Court order. [Aee. Br. at 13.] The court in fact determined that the ATC custody order was an "established lawful Tribal Court custody order ...." [Exc. 30.] The court, finding that the ATC determination was an "established lawful Tribal Court order," and that Wheeler's retaining custody of J.W. in Washington state was in violation of the order, and an act of custodial interference, constituting domestic violence within the meaning of AS 18.66.990(a)(3). [Exc. 30.][26] There was no question that Ms. Myre was "the lawful

[24] *See* AS 25.30.860(a) ("a court of this state may communicate with a court in any other state concerning a proceeding arising under this chapter").

[25] In any case, the Superior Court lacked jurisdiction to modify the ATC Tribal Court determination under AS 25.30.320. AS 25.30.320 provides, in relevant part, that "except as otherwise provided in AS 25.30.330 (referencing emergency jurisdiction), a court of this state may not modify a child custody determination...." *See also Robertson v. Riblet,* 194 P.3d 382, 385 (Alaska 2008) (UCCJEA to be strictly applied with respect to modification jurisdiction); *see also* AS 25.30.330 (requiring a court to "immediately communicate with the court of the state issuing a child custody determination in order to, *inter alia,* determine a period for the duration of the temporary order."

[26] Custodial interference is defined at AS 11.41.330 (Custodial Interference in the second degree) and AS 11.41.320 (custodial interference in the first degree). Custodial interference in the second degree is a Class A misdemeanor. Custodial interference in the

custodian" on the basis of the "established lawful tribal custody order...." [Exc. 30.] The Superior Court, therefore, properly gave comity to the ATC order within the meaning of Alaska law. That is, Ms. Myre was determined to be the "lawful custodian" by authority of law for the care, custody and control of J.W.[27]

b. The Superior Court's April 5, 2013 Order Violated Principles of Concurrent Jurisdiction.

Wheeler points to the Superior Court's April 5, 2013 order. [Exc. 42-43]; [Aee. Br. at 13.] In that order, the court noted, again, the validity of the existing order, but justified Wheeler's actions as those "seeking to modify the earlier custody decision...." [Exc. 43.] The legal authority relied upon by both Wheeler and the state court to modify another court's judgment, whether under common law or the UCCJEA, is not addressed. This is so because the Superior Court lacked such authority.

Under AS 25.30.320, the Superior Court is prohibited from modifying "a child custody determination made by a court of another state...."[28] Similarly, under the principles of concurrent jurisdiction, the Superior Court lacked jurisdiction because the ATC Tribal Court had exclusive jurisdiction over its orders.[29]

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first degree is a Class C felony and occurs when an individual violates AS 11.41.330 and keeps the child outside the state.

[27] *See* AS 11.41.370(1).

[28] AS 25.30.320.

[29] *See Harris,* 473 N.W.2d 146-147; *Estate of Briggs,* 500 P.2d 550; *Theodore,* 407 P.2d 184; *see also Jensen v. Froissant,* 982 P.2d 263, 266 (Alaska 1993) (state court and bankruptcy court have concurrent jurisdiction to decide whether debt dischargeable); *Standifer v. State,* 3 P.3d 925, 928 (Alaska 2000) (if district court determines that debt discharged in federal bankruptcy, then it loses subject matter jurisdiction to enforce its judgment.)

c. Wheeler's Wrongful Conduct Required Dismissal.

The Superior Court recognized the jurisdiction of the ATC Tribal Court early in the proceedings. It found that Wheeler acted wrongfully in violation of the Tribal Court order. The Superior Court was then required under either the common law and AS 25.30.370(a) to decline to exercise jurisdiction.[30]

Moreover, Ms. Myre did not acquiesce in the exercise of the Superior Court's jurisdiction, but in fact opposed it. [Exc. 129 at n. 1.] The ATC Tribal Court, which did have jurisdiction, did not determine that the Superior Court was a more appropriate forum.

In *Stokes v. Stokes,*[31] a pre-UCCJEA case, this Court defined "wrongful conduct" as that conduct that is "so objectionable that a court cannot in good conscience permit the party access to its jurisdiction."[32] In *Stokes,* this Court directed the Superior Court to consider "the totality of circumstances" "the length of time the child has been in one of the several jurisdictions, the effect on the child of removing the child from one jurisdiction to another, whether subterfuge has been used, and whether either party has

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[30]AS 25.30.370(a) provides that, except in the case of emergency jurisdiction under AS 25.30.330 "if a court of this state has jurisdiction under this chapter because if a person invoking the jurisdiction has engaged in wrongful conduct, the court should decline to exercise its jurisdiction unless

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of this state otherwise having jurisdiction under AS 25.30.300-235.30.320 determines that this state is a more appropriate forum under a provision substantially similar to AS 25.30.360; or

(3) no court of another state would have jurisdiction under the criteria specified in AS 25.30.300-25.30.320.

[31] 751 P.2d 1363 (Alaska 1988).

[32] *Id.* at 1366 [quoting *Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91, 94 (1978)].

already sought protection of another court."[33] All of these factors are present with respect to Wheeler's conduct. It is undisputed that J.W. lived with his mother in Mountain Village and is a tribal member. The effect of his removal was remarked upon by the Superior Court which properly found Wheeler's conduct to constitute criminal custodial interference. [Exc. 29-30.] Subterfuge was clearly utilized as reflected in the Court's March 1, 2012 order. [Exc. 27.]

Wheeler's failure to disclose the ATC Tribal Court proceedings, in addition to constituting subterfuge, violated AS 25.30.380.[34] Wheeler also violated AS 25.30.380(d) in that he has "a continuing duty to inform the court of a proceeding in this state or in another state that could affect the current proceeding."[35]

Thus, contrary to Wheeler's argument, ATC is not simply asserting that the Superior Court's "modification" of ATC's Tribal Court was a denial of comity.[36] ATC also asserts that the Superior Court simply found modification jurisdiction where none existed. It appears Wheeler concedes that, absent modification jurisdiction (which did not exist), the custody order in this case is a nullity in that no jurisdiction existed.

5. The Tribal Court Abstention Doctrine is Applicable

Wheeler appears to argue that the Tribal Court abstention doctrine is only applicable to cases arising in Indian country. [Aee. Br. at 14.] However, this Court made clear in *John v. Baker* that the Superior Court lacks jurisdiction to modify an existing

[33] 751 P.2d 1366.
[34] AS 25.30.380(a)(1) through (3) requires initial disclosure of existing custody orders.
[35] *See* AS 25.30.380(d).
[36] *See* Aee. Br. at 13.

Tribal Court order until the Tribal Court is provided an opportunity to pursue internal remedies in the event its procedures are questioned.[37]

Wheeler erroneously asserts that "neither party pursued motion practice with the tribe ...." [Aee. Br. at 14-15]. But both parties pursued motion practice in Tribal Court for years. It is undisputed that Wheeler simply decided to go forum shopping, after he was told to initiate additional motion practice before the Tribal Court. [Exc. 79.] Wheeler asserts that Ms. Myre only presented the Tribal Court order for the purpose of registration [Aee. Br. at 15]. That argument is specious. Ms. Myre presented the Tribal Court order for the purposes of enforcement. Enforcement is initiated by registration.[38]

D. The UCCJEA Does Prohibit Enforcement of Alaska Native Village Tribal Court Orders.

UCCJEA was enacted to provide uniformity with respect to initial custody determinations, modifications and custody orders and enforcement of custody orders.[39] Thus, the UCCJEA is intended to further the goal of promoting cooperation, avoiding jurisdictional competitions, deferring abductions, avoiding re-litigation of custody issue decisions and facilitating the enforcement of custody decrees. The Alaska UCCJEA should be construed in light of these purposes.[40]

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[37] *See John v. Baker*, 30 P.3d at 74 (noting that principles of sovereignty require exhaustion of tribal court remedies).

[38] *See* AS 25.30.430-440.

[39] *See* National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Enforcement Act at 3 (1997) (available at http://www.familylaw.org/uccja.htm) (last visited 4/12/2014).

[40] *See Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829, 830 (Alaska 2001) (*quoting Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 512 (Alaska 1998)).

Here, Mr. Wheeler argues that, because UCCJEA §§ 104(b) and (c) were omitted from the Alaska version of the UCCJEA, this Court must conclude that the Alaska UCCJEA is inapplicable to tribal court judgments. But Wheeler concedes that "the issue of Tribal Court orders was never mentioned" during the Alaska Legislative hearings on the UCCJEA. [Aee. Br. 17.][41]

In construing a statute, this Court looks "at both its plain language and at its legislative history and when possible, ...construe[s] a statute in light of its purpose."[42] "Interpretation of the statute begins with an examination of its language construed in light of its purpose."[43] This Court rejected the argument that a maxim of statutory construction, *expressio unios est exclusio alterious,* should trump the legislative purpose of a portion of the Tort Reform Act, AS 09.17.040(a) through (b).[44] It did so based upon the legislative history, and the "clear legislative purpose."[45] Thus, where "the legislative purpose can be ascertained with reasonable certainty, the maxims of construction...are secondary to the rule that a statute should be construed in light of its purpose."[46]

Here, the legislative history demonstrates that the purpose of Alaska's enactment of the UCCJEA was to conform with child custody jurisdiction issues in common with all

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[41] *See* ATC's Opening Br. at pp. 27-32 (establishing that the question of recognition of Alaska Native Village Tribal Court orders, although recognized by all but a handful of states under similar adoptions of the UCCJEA, was simply not discussed by the Alaska legislature).
[42] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 192.
[43] *Id., citing Vail v. Coffman Engineers, Inc.*, 778 P.2d 211 (Alaska 1989)
[44] *Beck v. State, Dept. of Trans. and Pub. Facilities,* 837 P.2d 105, 117 (Alaska 1992).
[45] *Id.*
[46] *Id.*

50 states.[47] Indeed, the Legislature was specifically told that "an enforcing court has an obligation to respect [an initial determination] order, not modify the order, and to enforce it."[48] The Alaska version requires that Alaska courts respect other courts' initial determinations including those of foreign courts.[49] Wheeler fails to explain why, given the compelling purpose as stated by the Legislature, the Alaska version of the UCCJEA should be construed to exclude Alaska Native Village Tribal Court initial determinations, but to include those of other states and foreign courts. The anomaly such a rule would create is directly contrary to the laudatory purposes of the UCCJEA.

The absence of a reference to Tribal Court judgments cannot, despite what Wheeler argues, constitute evidence that the Alaska Legislature intended to create an exception for such judgments. Indeed, such an inference would run contrary to federal Indian law, to the inherent powers of self-governing political communities,[50] and to the underlying policy supporting concurrent jurisdiction as an incident of sovereignty.[51] Construction of the UCCJEA as Wheeler argues would result in Alaska Tribal Court judgments having no enforceability under Alaska law while being fully enforceable in all states but the State of Alabama. That is an absurd result.

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[47] Comm. Minutes of House Comm. On Health Education and Social Services, 20th Leg., 0252 (Alaska June 29, 1998) (statements of Patty Swenson, Legislative Assistant).
[48] *Id.* Comm. Minutes of House Comm. On Health Education Social Services, 20th Leg., No. 0655 (statement of Deborah Behr, Asst. Attorney General). *See generally,* ATC Opening Br. discussion at pp. 28-32.
[49] AS 25.30.810.
[50] *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).
[51] *See John v. Baker,* 982 P.2d at 765.

L St. Investments v. Municipality of Anchorage[52] does not support Wheeler's argument. [Aee. Br. at 17.] There, this Court held "applying *expressio unios exclusio alterious* is inappropriate..." to the facts of that case. Similarly, here, the application of the canon is inappropriate.

Wheeler also relies upon *John v. Baker*[53] to support his theory that, the Legislature intended to exclude Indian tribes from UCCJEA enforcement. However, the *John* court's focus was the Uniform Child Custody Jurisdiction Act (UCCJA), now repealed.[54] Wheeler agrees that the Alaska Legislature was not aware of the recommended tribal court language in the Model UCCJEA[55]. By contrast, Alabama specifically omitted tribal adjudications from its adoption of the Act.[56] Thus, under the language and policy supporting the UCCJEA as adopted in Alaska, there is no basis for construing that statute as excluding tribal court judgments.[57]

E. ATC has Jurisdiction Over its Members' Children

John v. Baker held that a tribal court does have jurisdiction to enter initial determinations involving a child member of the tribe in which one of the parties is not a

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[52] 307 P.3d 965, 970 (Alaska 2013).
[53] 982 P.2d 762.
[54] The UCCJA, AS 25.30.010, *et seq.*, was repealed by § 4, Ch. 133 SLA 1998.
[55] *See* ATC Opening Br., Part IV A, pp. 26-27; Aee. Br. at p. 17 ("In fact, the issue of Tribal Courts was never mentioned").
[56] Ala. Code Section 30-3b-102, cmt to subsection 16.
[57] Indeed, the proceedings governed by other laws specifically excluded are set forth at AS 25.30.800. AS 25.30.800(b) excludes a "child custody proceeding that pertains to an Indian child, and then only "to the extent that [such proceeding] is governed by 25 U.S.C. §§ 1901 through 1963 (Indian Child Welfare Act)."

member of the Tribe.[58] Thus, Wheeler's attempts to distinguish *John v. Baker* from this case on the basis that Ms. Myer is the only parent that is a tribal member fails.[59]

Wheeler's argument that *Native Village of Tanana* limits Tribal Court jurisdiction to Native parents also fails. *Native Village of Tanana* concerned the inherent sovereignty of Alaska Native Villages under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq*. There, this Court overruled earlier case law and held that Pub. Law 280 "merely gives the states concurrent jurisdiction with tribes...."[60]

Healy Lake Village v. Mt. McKinley Bank[61] [Aee. Br. at 22] supports ATC's argument. This Court made clear that federal Indian law articulates "a core set of sovereign powers that remain intact; in particular, internal functions involving tribal membership and domestic affairs reside within a tribe's retained inherent sovereign powers." [62] Tribal courts and state courts thus have "concurrent jurisdiction over child custody matters involving children tribal members."[63] This case concerns child custody and therefore concurrent jurisdiction applies. The principles of concurrent jurisdiction set forth *supra*, are therefore applicable. Because ATC's Tribal Court was the first to exercise jurisdiction, its exercise was exclusive of the state court. The state court erred in modifying the initial determination.

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[58] 982 P.2d 738. *See also* cases collected in n. 51, p. 23 of Aee's Opening Br.
[59] Wheeler's argument that *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) is applicable appears to misunderstand the holding in *Native Village of Tanana*.
[60] *Id.* 249 P.3d 751, referring to 28 U.S.C. §1360.
[61] 322 P.3d 866 (Alaska 2014)
[62] *Id.* at 875 (*quoting John v. Baker*, 982 P.2d 738, *citing Wheeler*, 435 U.S. at 326; *Montana v. United States,* 450 U.S. 544.
[63] *Id.*

The Superior Court's April 5, 2013 Order. [Exc. 0042-43.] explained: "The custody orders of every court in this state are subject to modification when circumstances change." [Exc. 00043.] But ATC's Tribal Court is not "a court in this state." ATC's Tribal Court is the Tribal Court for the Native Village of the Asa'carsarmiut Tribe, a federally recognized tribe. Under principles of comity, concurrent jurisdiction and the UCCJEA, ATC's Tribal Court's jurisdiction excluded the Superior Court.

F. The Superior Court Abused its Discretion

The Superior Court's omission to consider the litigation that had occurred and was ongoing in the Tribal Court in its final orders [Exc. 44, 46] is an abuse of discretion. For even if the Superior Court had jurisdiction to modify, which it did not, it was still required to consider the change in circumstances as "demonstrated relative to the facts and circumstances that existed at the time of the prior custody order that the party seeks to modify."[64] Here, the Findings and Conclusions make no mention of the Order it was alleged to have modified. Rather, the court simply concluded that it had personal and subject matter jurisdiction over the parties, the minor child and the custody issues in the matter. [Exc. 0059.]

Wheeler argues that the court's April 5, 2013 order cured the abuse of discretion. [Appellee Brief at 25; Exc. 00042-00043.] Wheeler now contends that the failure to include the earlier finding of a "substantial change of circumstances" with reference to the ATC initial determination is "merely clerical error..." [Aee. Br. at 26] But this Court

[64] *Heather W. v. Rudy R.*, 274 P.3d 478, 481-82 (Alaska 2012)

determines whether an error is a clerical error as a question of law.[65] Such questions are reviewed *de novo*.[66] In *Frost*, the clerical error that the court corrected resulted in the ejectment of the Defendant.[67] The error was thus substantive, not an accident. "Clerical errors" are 'accidental omissions, copying or computational mistake' or the like."[68] The omission here, like in *Frost*, was not an accident. Indeed, the omission ignored an initial determination and hence formed the basis for the court's erroneous conclusion that it had jurisdiction.

CONCLUSION

The state Superior Court committed reversible error. This matter should be reversed, and remanded with direction to dismiss or, alternatively, to defer to and communicate with the ATC Tribal Court.

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[65] *Frost v. Ayojiak*, 957 P.2d 1355.
[66] *Id.*
[67] *Id.* at 1356.
[68] *Johnson v. Johnson*, 214 P.3d 369, 372 (Alaska 2009).