IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Patrick Galvin, in his official capacity of Commissioner of the Alaska, Department of Revenue and John Mallonee, in his official capacity as Director of the Alaska Child Support Services Division,

Appellants,

v.

Central Council of Tlingit and Haida Indian Tribes of Alaska, on its own behalf and as parens patriae on behalf of its members,

Appellee.

Supreme Court Case No. S-14935

Trial Court Case No. 1JU-10-00376 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HONORABLE JUDGE PHILIP M. PALLEMBERG

BRIEF OF APPELLEE

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Table of Contents

Table of Authorities

Cases

Alaska Codes, Rules & Statutes

State Codes & Statutes

U.S. Codes & Regulations

Miscellaneous

AUTHORITIES PRINCIPALLY RELIED UPON

FEDERAL STATUTES

42 U.S.C. § 655(f). Payments to states

The Secretary may make direct payments under this part to an Indian Tribe or Tribal organization that demonstrates to the satisfaction of the Secretary that it has the capacity to operate a child support enforcement program meeting the objectives of this part, including establishment of paternity, establishment, modification, and enforcement of support orders, and location of absent parents. The Secretary shall promulgate regulations establishing the requirements which must be met by an Indian Tribe or Tribal organization to be eligible for a grant under this subsection."

FEDERAL REGULATIONS

45 C.F.R. § 309.05 -- Subpart A--Tribal IV-D Program: General Provisions
What definitions apply to this part?

Indian Tribe and *Tribe* mean any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe and includes in the list of Federally-recognized Indian Tribal governments as published in the Federal Register pursuant to *25 U.S.C. 479a-1.*

45 C.F.R. § 302.36 -- Provision of services in intergovernmental IV-D cases.

(a) The State plan shall provide that, in accordance with § 303.7 of this chapter, the State will extend the full range of services available under its IV-D plan to:
(1) Any other State;
(2) Any Tribal IV-D program operating under § 309.65(a) of this chapter; and
(3) Any country as defined in § 301.1 of this chapter.

45 C.F.R. § 303.7 Provision of services in intergovernmental IV-D cases.

(a) *General responsibilities.* A State IV-D agency must:

(1) Establish and use procedures for managing its intergovernmental IV-D caseload that ensure provision of necessary services as required by this section and include maintenance of necessary records in accordance with § 303.2 of this part;

(2) Periodically review program performance on intergovernmental IV-D cases to evaluate the effectiveness of the procedures established under this section;

(3) Ensure that the organizational structure and staff of the IV-D agency are adequate to provide for the administration or supervision of the following functions specified in § 303.20(c) of this part for its intergovernmental IV-D caseload: Intake; establishment of paternity and the legal obligation to support; location; financial

assessment; establishment of the amount of child support; collection; monitoring; enforcement; review and adjustment; and investigation;

(4) Use federally-approved forms in intergovernmental IV-D cases, unless a country has provided alternative forms as part of its chapter in *A Caseworker's Guide to Processing Cases with Foreign Reciprocating Countries.* When using a paper version, this requirement is met by providing the number of complete sets of required documents needed by the responding agency, if one is not sufficient under the responding agency's law;

(5) Transmit requests for information and provide requested information electronically to the greatest extent possible;

(6) Within 30 working days of receiving a request, provide any order and payment record information requested by a State IV-D agency for a controlling order determination and reconciliation of arrearages, or notify the State IV-D agency when the information will be provided;

(7) Notify the other agency within 10 working days of receipt of new information on an intergovernmental case; and

(8) Cooperate with requests for the following limited services: Quick locate, service of process, assistance with discovery, assistance with genetic testing, teleconferenced hearings, administrative reviews, high-volume automated administrative enforcement in interstate cases under section 466(a)(14) of the Act, and copies of court orders and payment records. Requests for other limited services may be honored at the State's option.

(b) *Central registry.*

(1) The State IV-D agency must establish a central registry responsible for receiving, transmitting, and responding to inquiries on all incoming intergovernmental IV-D cases.

...

(d) *Responding State IV-D agency responsibilities.* Upon receipt of a request for services from an initiating agency, the responding State IV-D agency must:

(1) Accept and process an intergovernmental request for services, regardless of whether the initiating agency elected not to use remedies that may be available under the law of that jurisdiction;

(2) Within 75 calendar days of receipt of an intergovernmental form and documentation from its central registry:

(i) Provide location services in accordance with § 303.3 of this part if the request is for location services or the form or documentation does not include adequate location information on the noncustodial parent;

(ii) If unable to proceed with the case because of inadequate documentation, notify the initiating agency of the necessary additions or corrections to the form or documentation;

(iii) If the documentation received with a case is incomplete and cannot be remedied without the assistance of the initiating agency, process the case to the extent possible pending necessary action by the initiating agency;

(3) Within 10 working days of locating the noncustodial parent in a different State, the responding agency must return the forms and documentation, including the new location, to the initiating agency, or, if directed by the initiating agency, forward/transmit the forms and documentation to the central registry in the State where the noncustodial parent has been located and notify the responding State's own central registry where the case has been sent.

(4) Within 10 working days of locating the noncustodial parent in a different political subdivision within the State, forward/transmit the forms and documentation to the appropriate political subdivision and notify the initiating agency and the responding State's own central registry of its action;

...

(6) Provide any necessary services as it would in an intrastate IV-D case including:

(iv) Processing and enforcing orders referred by an initiating agency, whether pursuant to UIFSA or other legal processes, using appropriate remedies applied in its own cases in accordance with §§ 303.6, 303.31, 303.32, 303.100 through 303.102, and 303.104 of this part, and submit the case for such other Federal enforcement techniques as the State determines to be appropriate, such as administrative offset under 31 CFR 285.1 and passport denial under section 452(k) of the Act;

ALASKA STATUTES

Chapter 25.25. UNIFORM INTERSTATE FAMILY SUPPORT ACT

Sec. 25.25.101. Definitions. In this chapter,

(19) "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States; the term "state" includes an Indian tribe and a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter or under the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act;

Sec. 25.25.203. Initiating and responding tribunal of this state.

Under this chapter, a tribunal of this state may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state.

Sec. 25.25.207. Recognition of controlling child support order.

(a) If a proceeding is brought under this chapter and only one tribunal has issued a child support order, the order of that tribunal is controlling and shall be recognized.

Sec. 25.25.317. Communications between tribunals.

A tribunal of this state may communicate with a tribunal of another state in writing, or by telephone or other means, to obtain information concerning the laws of that state, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding in the other state. A tribunal of this state may furnish similar information by similar means to a tribunal of another state.

Sec. 25.25.502. Employer's compliance with income withholding order of another state.

(a) Upon receipt of an order under AS 25.25.501_, the obligor's employer shall immediately provide a copy of the order to the obligor.
(b) The employer shall treat an income withholding order issued in another state that appears regular on its face as if it were issued by a tribunal of this state.
(c) Except as provided by (d) of this section and AS 25.25.503_, the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order, as applicable, that specify

(1) the duration and the amount of periodic payments of current child support, stated as a sum certain;

(2) the person or agency designated to receive payments and the address to which the payments are to be forwarded;

(3) medical support, whether in the form of periodic cash payment, stated as a sum certain, or an order to the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) the amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

Sec. 25.25.507. Administrative enforcement of orders.

(a) A party seeking to enforce a support order or an income withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to the child support services agency of this state.

(b) Upon receipt of the documents, the child support services agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the child support services agency shall register the order under this chapter.

Sec. 25.25.601. Registration of order for enforcement.

A support order or an income withholding order issued by a tribunal of another state may be registered in this state for enforcement.

Sec. 25.25.602. Procedure to register order for enforcement.

(a) A support order or income withholding order of another state may be registered in this state by sending the following documents and information to a tribunal of this state:

(1) a letter of transmittal to the tribunal requesting registration and enforcement;

(2) two copies, including one certified copy, of all orders to be registered, including any modification of an order;

(3) a sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) the name of the obligor and, if known,

(A) the obligor's address and social security number;

(B) the name and address of the obligor's employer and any other source of income of the obligor; and

(C) a description and the location of property in this state of the obligor not exempt from execution; and

(5) the name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall file the order as a foreign judgment, together with one copy of the documents and information, regardless of their form.

(c) A complaint or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.

Sec. 25.25.603. Effect of registration for enforcement.

(a) A support order or income withholding order issued in another state is registered when the order is filed in the registering tribunal of this state.

(b) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

(c) Except as otherwise provided in AS 25.25.601_- 25.25.612, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

Sec. 25.25.605. Notice of registration of order.

(a) When a support order or income withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party

(1) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) that a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice;

(3) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) of the amount of alleged arrearages.

(c) Upon registration of an income withholding order for enforcement, the registering tribunal shall notify the obligor's employer under AS 25.27.

Sec. 25.25.606. Procedure to contest validity or enforcement of registered order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within 20 days after the notice of the registration. The nonregistering party may seek to vacate the registration, to assert a defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of alleged arrearages under AS 25.25.607.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

Sec. 25.25.607. Contest of registration or enforcement.

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) the issuing tribunal lacked personal jurisdiction over the contesting party;
(2) the order was obtained by fraud;
(3) the order has been vacated, suspended, or modified by a later order;
(4) the issuing tribunal has stayed the order pending appeal;
(5) there is a defense under the law of this state to the remedy sought;
(6) full or partial payment has been made; or
(7) the statute of limitation under AS 25.25.604 precludes enforcement of some or all of the arrearages.

(b) If a party presents evidence establishing a full or partial defense under (a) of this section, the tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

Sec. 25.25.608. Confirmed order.

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.

INTRODUCTION

This case asks the Court to determine whether the inherent jurisdiction of Alaska Native tribes over internal domestic relations recognized in *John v. Baker*[1] includes child support as well as child custody. The parties in *John v. Baker* raised the issue of child support during litigation, but the case was resolved on other grounds.[2] The question of tribal child support jurisdiction is now ripe for decision.

Central Council of Tlingit and Haida Indian Tribes of Alaska ("Central Council" or "the Tribe") has been issuing child support orders for tribal member children through its tribal child support agency since 2007. Ordinarily, the State processes and enforces child support orders from other states or tribes under the Uniform Interstate Family Support Act (UIFSA), AS 25.25. UIFSA has procedures for recognizing, registering and enforcing foreign orders, including procedures for parties to raise jurisdictional objections to recognition. However, the State of Alaska has refused to recognize the validity of any of the Tribe's support orders, or even process them under UIFSA's procedures. In doing so, the State has relied on its own internal legal opinion that Alaska tribes cannot issue child support orders outside Indian Country. The court below ruled that the State's blanket non-recognition policy contradicts well-settled principles of tribal jurisdiction in Alaska, and ignores the intertwined nature of child custody and support. That decision should be affirmed in this Court.

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[1] 982 P.2d 738 (Alaska 1999).

[2] *See John v. Baker*, 125 P.3d 323, 327 (Alaska 2005) ("*John v. Baker III*").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court was correct in deciding that inherent tribal jurisdiction over domestic relations, which indisputably encompasses child custody matters, also includes child support.

2. Whether the trial court's judgment in favor of the Tribe was correct, thereby supporting the award of attorney's fees to the Tribe.

STATEMENT OF THE CASE

A. Development of Central Council's IV-D Child Support Program.

The federal government funds states and federally-recognized tribes to operate child support programs under Title IV-D of the Social Security Act.[3] These are commonly referred to as IV-D child support programs. The Tribe secured a two-year federal start-up grant in 2004 to build a tribal IV-D program, including development of codes, guidelines, systems and procedures, as well as recruiting, hiring, and training staff.[4] [Exc. 169] On March 28, 2007, the federal Office of Child Support Enforcement ("OCSE") approved the Tribe's program plan and granted its application for full funding. [Exc. 167] Central Council's Tribal Child Support Unit ("TCSU") became the first tribal IV-D program established in Alaska, and officially opened its doors in 2007 to provide child support services. [Exc. 169]

Since 2007, the Tribe has continued to provide child support services to families, including the location of non-custodial parents, establishment of paternity, the

[3] 42 U.S.C. § 651.

[4] 45 C.F.R. § 309.150

establishment, modification, and enforcement of support orders, and when appropriate, referrals to other agencies. [Exc. 169] Federal IV-D regulations give tribes flexibility to create a culturally appropriate program, and to use tribal laws, procedures, and guidelines for establishing and enforcing child support orders.[5] The Tribe's IV-D plan is designed to support the values of the Tribe, to support exiting tribal services such as its Adult Basic Education program and Fatherhood Initiative, to support existing state services, and to focus on strengthening relationships between parents and children. [Exc. 62 – 63, 77]

When this case was filed, TCSU employed seven full- time staff: a manager, staff attorney, administrative office leader, and four case specialists, including one outreach worker in Ketchikan. [Exc.170] TCSU staff are responsible for fulfilling the IV-D plan mandates, including accepting all applications for child support services, establishing paternity and support orders, reviewing and modifying support orders and locating non-custodial parents. [Exc. 811] The Tribe uses a judicial process to issue child support orders, and employs a full-time magistrate and child support clerk to handle cases at the tribal court. [Exc. 169, 813-816]

The Tribal Child Support Schedule, like Alaska Rule of Civil Procedure 90.3, provides a quantitative, percentage-of-income method for calculating child support obligations. [Exc. 158, 160, 161-162] In-kind support may be permitted to satisfy current support, but requires prior court approval and is not permitted to satisfy support

[5] 45 C.F.R. §309.90.

obligations owed to anyone other than a parent, such as money owed to the government to reimburse public assistance benefits. [Exc. 162]

There are three primary types of cases that TCSU has opened since its inception: 1) cases "transferred" from the Alaska Child Support Services Division (CSSD); 2) cases opened when a parent or custodian applies for child support services, and 3) cases opened when a parent or custodian applies for tribal Temporary Assistance to Needy Families (TANF) benefits. These will be discussed in turn.

After TCSU opened, CSSD agreed to "transfer" certain Alaska state child support orders to the Tribe for enforcement. [Exc. 170] This was not an actual transfer of jurisdiction or authority to modify orders, but rather an agreement that the Tribe, instead of the State, would enforce these orders. [Exc. 171] Initially, the transfer included several batches of cases where the custodial parent or guardian had received tribal TANF and assigned his or her child support rights to the Tribe. [Exc. 170]

After the initial batches were transferred, TCSU and CSSD agreed to a process where case transfers are done on a case by case basis. [Exc. 170] Under this agreement, when the Tribe receives an application for child support services and determines there is an existing state child support order, CSSD sends the state order to TCSU with a transmittal form, TCSU registers the order with the tribal court, then TCSU takes over enforcement from the state. [Exc. 171] If there is a request by a parent or custodian to modify the state order, TCSU refers the individual to the appropriate state administrative or court process. [Exc. 810] At the time of filing this case, the State had transferred more than 700 cases to the Tribe for enforcement. [Exc. 171, 572]

TCSU also opens a case when a parent or custodian submits an application for child support services, and there is no existing child support order. TCSU is required to accept all applications for child support service. [Exc. 170, 171] After verifying with CSSD that no child support order already exists for the child, TCSU will file a petition to establish paternity or child support in the tribal court. [Exc. 171] Once a new order is established, a copy of the order is sent to CSSD for entry into the state registry system. [Exc. 171] CSSD is required to keep a state registry of all child support orders issued in the state.[6]

TCSU also opens a case when parents or custodians apply for tribal TANF and assign their rights to child support to the Tribe, and there is no existing state support order. [Exc. 171] This process is similar to the Alaska Temporary Assistance Program (the state equivalent of TANF), where recipients of state public assistance are required to assign their rights to child support to the State.[7] Since TCSU opened, child support applications from tribal TANF recipients have been referred to TCSU, instead of CSSD, so that TCSU can collect child support directly from the non-custodial parent. [Exc. 171]

Between 2007 and January 2011, the tribal court issued approximately 126 original child support orders. [Exc. 171]

Distribution of tribal child support payments is governed by 45 CFR § 309.115. First, current support is paid to the parent, or to assigned TANF obligations (if a parent is receiving TANF). [Exc. 151] Next, arrears owed to the parent are paid, then arrears to

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[6] AS 25.27.020(a)(13) ("The agency shall . . . act as the central registry for all child support orders and exchange information as required by federal law.")

[7] AS 25.27.120, AS 25.27.130.

TANF, and then other arrears. [Exc. 151-52] Support cases remain open until the child support obligation has been fully met and the child has reached the age of majority or emancipation, or until the custodial parent withdraws from services. [Exc. 829-30]

TCSU's primary tool for enforcing support orders is garnishing a portion of the non-custodial parent's employment income. [Exc. 149-151] Once a child support order is in place, immediate income withholding is required by TCSU policy as is the use of the standard Federal Income Withholding form. [Exc. 149] The Uniform Interstate Family Support Act provides that the Federal Income Withholding form order can be issued across state lines; all employers are required under federal law to honor and garnish the non-custodial parent's wages when such orders are received.[8] TCSU also enforces through other methods, such as garnishment of Native corporation dividend, garnishment of fishing payments, referral to the Tribe's Elders Panel or the family clan, assessing fines for failure to pay, and requiring the non-custodial parent to seek work, educational or vocational assistance or training, or address social or physical barriers to employment through training, counseling, or treatment.[9] [Exc. 148]

To garnish IRS tax refunds of non-custodial parents, one of the fifty states must make the request to the IRS; tribal child support agencies seeking these funds must contract with a state. [Exc. 174] When this case was filed, Alaska refused to contract

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[8] *See* AS 25.25.502 ("Employer's compliance with income withholding order of another state...(b) The employer shall treat an income withholding order issued in another state that appears regular on its face as if it were issued by a tribunal of this state....."); AS 25.25.101(19) (including federally-recognized Tribes within the definition of "state.")

[9] CCTHITA Title 10.03.006.

with the Tribe to intercept IRS refunds. [Exc. 174] The State of Washington agreed to provide this service to the Tribe. [Exc. 174]

Despite the myriad of enforcement tools available to the Tribe, there are certain enforcement services that only Alaska CSSD can provide. TCSU, like all other state and tribal IV-D programs, must request services from CSSD to garnish a non-custodial parent's Alaska unemployment insurance benefits and Alaska Permanent Fund Dividends ("PFDs").[10]

Beginning in at least 2005, the Tribe engaged in ongoing discussions with CSSD concerning the coordination of the state and tribal IV-D programs. [Exc. 169] Throughout the discussions, the State expressed its doubts about tribal jurisdiction to issue child support orders. [Exc. 169] In 2008, the Tribe followed CSSD's procedures to request garnishment of obligor PFDs in tribal child support cases where the obligor owed at least a minimum amount of child support arrears. [Exc. 173] CSSD processed the requests in which the Tribe was enforcing state orders. [Exc. 173] CSSD refused the requests in which the underlying order was issued by the tribal court. [Exc. 173]

B. Alaska's 2009 Update to Its Uniform Interstate Family Support Act.

In 2009, Alaska amended its version of the Uniform Interstate Family Support Act (UIFSA) to conform to the national model, which includes collaboration with federally-recognized tribes. Alaska originally adopted UIFSA in 1997, as required by the Personal

[10] AS 25.27.150; AS 43.23.065(b). CSSD procedures for other child support agencies to request PFD garnishment are posted annually on its website: www.childsupport.alaska.gov/resources/OtherStates.asp.

Responsibility and Work Opportunity Reconciliation Act (PRWORA).[11] UIFSA enhances the enforcement of child support orders nationwide, and helps different child support agencies use a common set of procedures for recognition and cooperative enforcement.[12] To promote the coordination of inter-governmental child support enforcement, child support agencies use federal transmittal forms to process interstate cases; the forms contain details such as the party information, addresses, phone numbers, employer information, and other information necessary to process cases on an inter-governmental basis.[13]

The model UIFSA refers to state child support agencies, and defines a "state" as "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States," and the term includes "an Indian tribe."[14] However, Alaska's original version of UIFSA excluded Indian tribes from its definition of "state."[15] No other state excludes Indian tribes.[16]

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[11] 42 U.S.C. 666(f); AS 25.25.

[12] Tina Fielding, *The Uniform Interstate Family Support Act: The New URESA*, 20 Dayton L. Rev. 425, 453 (1994).

[13] Unif. Interstate Family Support Act, § 602 (2008); *see also* http://www.acf.hhs.gov/programs/css/resource/interstate-child-support-enforcement-case-processing-and-uifsa (last visited March 5, 2014).

[14] Unif. Interstate Family Support Act §101(19) (2008).

[15] Former AS 25.25.101(19) (1997).

[16] *See* Code of Ala. § 30-3A-101(20); 34 Ariz. Rev. Stat. § 25-1202(22); Ark. Code Ann. § 9-17-101(19); Cal. Fam. Code § 4901(s); Colo. Rev. Stat. § 14-5-102(21); Conn. Gen. Stat. § 46b-212a(22); 13 Del. C. § 6-102(21); D.C. Code § 46-301.01(22); Fla. Stat. § 88.1011(19); Ga. Code Ann. § 19-11-101(19); Haw. Rev. Stat. § 576B-101; Idaho Code § 7-1002(21); 750

In 2008, the State of Alaska petitioned the OCSE twice for an exemption allowing it to exclude tribes from its version of UIFSA. [Exc. 721-748, 751-757] The OCSE rejected the requests, stating that Alaska's exclusion of tribes, contrary to the intent of UIFSA, would require individuals and entities seeking recognition and enforcement of tribal child support orders to endure lengthy comity proceedings instead of UIFSA's streamlined recognition processes. [Exc. 749-750, 758-759] The State then inquired about the penalties for refusing to enact the required UIFSA change, to which OCSE responded that failing to comply with the federal statute would render the State's IV-D plan subject to disapproval and could cause immediate suspension of all IV-D payments and the block grant for Temporary Assistance to Needy Families – over $61 million in federal funding. [Exc. 760-766]

In 2009, the Alaska Senate Health and Social Services Committee, with support from the Governor, introduced a bill, which among other changes to the child support

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Ill. Comp. Stat. 22/102; Ind. Code § 31-18-1-21; Iowa Code § 252K.101(19); Kan. Stat. Ann. § 23-9,101(s); Ky. Rev. Stat. Ann. § 407.5101(19); La. Ch.C. Art. 1301.3(22); 19-A Me. Rev. Stat. § 2802(19); Md. Code Ann. Fam. Law § 10-301 (v); Mass. Gen. Laws ch. 209D, § 1-101(19); Mich. Comp. Laws § 552.1104(f); Minn. Stat. § 518C.101(s); Miss. Code Ann. § 93-25-3(u); Mo. Rev. Stat. § 454.850(19); Mont. Code Anno. § 40-5-103(20); Neb. Rev. Stat. § 42-702(21); Nev. Rev. Stat. Ann. § 130.10179; N.H. Rev. State. Ann. 546-B:1(XIX); N.J. Stat. § 2A:4-30.65; N.M. Stat. Ann. § 40-6A-102(21); NY Family Ct. Act § 580-101(19); N.C. Gen. Stat. § 52C-1-101(19); N.D. Cent. Code § 14-12.2-01(19); Ohio Rev. Code Ann. 3115.01(U); 43 Okla. Stat. § 601-101(21); Or. Rev. Stat. § 110.303(19); 23 Pa. Cons. Stat. § 7101(b); R.I. Gen. Laws § 15-23.1-101(21); S.C. Code Ann. § 63-17-2910(21); S.D. Codified Laws § 25-9B-101(18); Tenn. Code Ann. § 36-5-2101(19); Tex. Fam. Code Ann. § 159.102(21); Utah Code Ann. § 78B-14-102(21); Vt. Stat. Ann. Title 15B § 101(19); Va. Code Ann. § 20-88.32; Wash. Rev. Code § 26.21A.010(21); W. Va. Code § 48-16-102(21); Wis. Stat. Ann.§ 769.101(19); Wyo. Stat. § 20-4-140(a)(xviii).

statutes, added "Indian tribe" to the definition of "state" under UIFSA.[17] The Department of Revenue sought to include legislative intent language that: "In Alaska, the scope of tribal authority to enter, modify or enforce child support orders is an unsettled legal question, due in part to the lack of Indian country in most of the state."[18] The language the Legislature finally adopted states that the intent of the bill is to "remain neutral on the issue of the underlying child support jurisdiction, if any, for the entities listed in the amended definition of 'state'," "not to expand or restrict jurisdiction," and "not to assume or express any opinion" about jurisdiction.[19] The new law became effective on July 1, 2009.[20]

With Alaska's version of UIFSA corrected to meet the national standard, the Tribe requested that the State begin processing TCSU's enforcement requests according to UIFSA's procedures, whereby CSSD registers orders for enforcement, and parents have an opportunity to raise jurisdictional objections. [Exc. 172] Instead, CSSD continued to deny or ignore all requests for enforcement from the Tribe. [Exc. 172-31, 872-873] For example, when the Tribe transmitted tribal court order 07-CS-0011 to CSSD to garnish a non-paying, non-custodial parent's state unemployment insurance benefits, CSSD did not acknowledge the request or otherwise respond. [Exc. 173, 767-786]

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[17] CSSB 96 (HSS), 26th Leg., 1st Sess. (AK 2009).

[18] [R. 366, 368]

[19] Chapter 45 SLA 09 § 1 (2009) (amending AS 25.25.101(19)).

[20] Chapter 45 SLA 09 § 18 (2009).

C. Litigation History.

The Tribe filed this lawsuit in Juneau Superior Court on January 19, 2010, to request an injunction requiring CSSD to follow the registration and enforcement procedures in UIFSA when the Tribe requests enforcement of a child support order, and to provide inter-governmental child support enforcement services to families with tribal support orders where appropriate. [Exc. 1-9] The Tribe also sought a declaratory judgment that it possesses inherent jurisdiction to issue child support orders for children enrolled or eligible for enrollment with the Tribe. [Exc. 9] While the case was pending, TCSU sent additional requests for UIFSA recognition and enforcement of tribal child support orders to CSSD on January 13, 2010 and March 8, 2010. [Exc. 872-873] CSSD did not acknowledge the requests or otherwise respond to those requests. [Exc. 872-873]

There were no material facts in dispute in the trial court. Both parties moved for summary judgment on questions of law concerning the Tribe's authority to issue child support orders for tribal children. [Exc. 23, 179] Juneau Superior Court Judge Pallenberg granted the Tribe's motion for summary judgment on October 25, 2011, on the question of whether the Tribe has jurisdiction to adjudicate child support in its tribal court. [Exc. 655] In the October 25, 2011 order, the Superior Court requested additional briefing on the precise language of the injunctive relief and on whether or how personal jurisdiction should be considered in light of *Kulko v. Superior Court*[21] and other authority. [Exc.

[21] 436 U.S. 84 (1978).

667-69] Each party submitted additional briefing and both sides agreed that the court's injunction need not cover personal jurisdiction. [Exc. 841, 862]

The Superior Court's final judgment concluded that the Tribe has subject matter jurisdiction to enter child support orders concerning tribal member children, and that nothing in the lawsuit required the court to examine personal jurisdiction. [Exc. 671] The trial court considered the State's argument that there may be practical difficulties with concurrent tribal and state jurisdiction, but asserted that "practical complications are inevitable with a system of dual sovereignty . . . however, I believe the solution to these problems lies somewhere other than in this court." [Exc. 668] The State appealed.

STANDARD OF REVIEW

This Court evaluates *de novo* the scope of tribal jurisdiction.[22] A grant of summary judgment is also reviewed *de novo*, applying the Court's independent judgment.[23] *De novo* review requires application of the rule of law most persuasive in light of precedent, reason, and policy.[24] An overarching tenet of federal Indian law applies to questions of tribal sovereignty: "Courts must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans."[25]

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[22] *See State v. Native Village of Tanana*, 249 P.3d 734, 737 (Alaska 2011) ("*Tanana*").

[23] *See Estate of Kim v. Coxe*, 295 P.3d 380, 385 (Alaska 2013).

[24] *See id.*

[25] *Starr v. George* 175 P.3d 50, 54 (Alaska 2008), *citing John v. Baker*, 982 P.2d at 752.

LEGAL ARGUMENT

The appropriate starting point for any tribal jurisdiction analysis is the assumption that tribes have retained their traditional sovereign authority: "[W]hen a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act."[26]

Here, the question is not what act of Congress *authorized* federally-recognized Alaska tribes to hear child support cases. Rather, the appropriate question is whether Congress acted to *specifically eliminate* tribal authority to decide how parents should support tribal member children. In this case, neither Congress nor the Alaska Legislature needed to bestow jurisdiction on the Tribe to adjudicate child support; that jurisdiction is retained by the Tribe until affirmatively extinguished by Congress.

A. Alaska Tribes Have Retained Authority Over Internal Domestic Relations Matters.

Alaska Native tribal authority over domestic relations cases has been well-settled for more than two decades. As recently recounted in the *Tanana* case,[27] the Ninth

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[26] [Exc. 797-798] Order, *Kaltag Tribal Council v. Jackson*, Case No. 3:06-cv-211 TMB, at 11-12 (D. Alaska, February 22, 2008), *aff'd* 344 Fed. Appx. 324 (9th Cir. 2009) (unpublished), *petition for cert. denied,* 2010 U.S. LEXIS 6530 (Oct. 4, 2010) ("*Kaltag*"), *citing Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 556 (9th Cir. 1991) ("*Venetie*") and W. Canby, *American Indian Law*, 71-72 (2d ed. 1988). *See also Tanana*, 249 P.3d at 750 ("unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.").

[27] *Tanana*, 249 P.3d at 739-45. More detailed histories of tribal jurisdiction in Alaska are presented in Heather Kendall-Miller, *State of Alaska v. Native Village of Tanana: Enhancing Tribal Power By Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside And Outside Of Indian Country*, 28 Alaska L. Rev. 217

Circuit's 1991 decision in the *Venetie* adoption case clarified that neither the Alaska Native Claims Settlement Act (ANCSA) nor Public Law 280 extinguished tribes in Alaska or their sovereign authority over tribal members.[28] Rather, federally-recognized Alaska Native tribes have continued to exercise jurisdiction over domestic relations cases, concurrent with state jurisdiction.[29] In 1993, the Department of the Interior published a list of federally-recognized tribes that included over two hundred Alaska Native tribes.[30] Congress affirmed that the federal government recognized these tribes as sovereign nations in the Federally Recognized Tribe List Act of 1994.[31]

In 1999, this Court decided *John v Baker*, which recognized inherent tribal jurisdiction outside the confines of Indian country to adjudicate non-ICWA child custody disputes.[32] In *John v. Baker*, the father, a member of Northway Village, petitioned for sole custody of his children in the Northway tribal court.[33] The mother, a member of a different Alaska Native tribe, agreed to have the Northway court decide the case.[34] Later,

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(2011), and Natalie Landreth and Erin Dougherty, *The Use Of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 Am. Indian L. Rev. 321 (2011).

[28] *Tanana*, 249 P.3d at 739-41, *citing Venetie*, 944 F.2d at 559-62.

[29] *Tanana*, 249 P.3d at 741-42.

[30] *Id.* at 742, *citing* Indian Entities Recognized and Eligible to Receive Services from the *United State Bureau of Indian Affairs*, 58 Fed. Reg. at 54, 365-66.

[31] *Id.*, *citing* 25 U.S.C. § 479a, 479a-1. *See also* Tlingit and Haida Status Clarification Act, Title II of Pub. L. No. 103-454, 108 Stat. 4792 (1994), codified at 25 U.S.C. 1212 et seq.

[32] 982 P.2d 738.

[33] *Id.* at 743.

[34] *Id.* at 743, 759, n. 141.

the father, unsatisfied with the tribal court's decision, challenged the tribal court's subject matter jurisdiction in state court.[35]

Relying on a long line of federal decisions, this Court determined that nothing divested Alaska Native tribes of their inherent sovereignty to decide non-ICWA custody cases pertaining to tribal member children, even when those cases arise outside of Indian country.[36] According to *John v. Baker*, Alaska Native tribes retain sovereign powers to regulate and adjudicate "internal functions involving tribal membership and domestic affairs."[37] Whether a particular issue falls within the scope of these retained sovereign powers turns on the character of the power the tribe seeks to exercise, not on whether pertinent events occurred on tribal land.[38]

In reaching its decision, this Court looked to Congress' recognition in the Indian Child Welfare Act that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[39] Although *John v Baker* was not an ICWA case, it quoted this language to explain why adjudication of child custody disputes was within Alaska Native tribes' "core sovereign authority."[40] This Court observed that Congress' passage of ICWA seven years after ANCSA conveyed that Alaska's tribal

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[35] *Id.* at 743.

[36] *Id.* at 751.

[37] *Id.*

[38] *Id.* at 752, 754-55.

[39] *Id.* at 753.

[40] *Id.*

courts were capable and appropriate forums to decide child custody.[41] The timing also "makes clear that Congress did not intend ANCSA to eradicate tribal court jurisdiction over family law matters."[42] Congress' purposes behind ICWA — including tribes' "preserving and protecting the Indian family as the wellspring of its own future" — and ICWA's explicit inclusion of Alaska Native villages "reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes."[43] The *John v. Baker* court held that deciding custody of member children is necessary "to protect tribal self-government or to control internal relations," and thus "its tribal courts require no express congressional delegation of the right to determine custody of tribal children."[44]

The *John v. Baker* court also addressed how concurrent state and tribal jurisdiction should work in Alaska.[45] First, the Court noted that the recognition of concurrent jurisdiction in family law cases would bring Alaska in line with the rest of the country. The Court cited children's cases from other states where a native or non-native parent may live off the reservation, depriving the tribe of exclusive jurisdiction, but permitting either the state or tribe serve as family law tribunal.[46] Second, the Court determined that Alaska Native tribes' exercise of concurrent jurisdiction would help meet the needs of Native children by affording a forum more responsive to Native culture. Acknowledging

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 754.

[44] *Id.* at 752.

[45] *Id.* at 759-61.

[46] *Id.* at 759-60, *citing In re Marriage of Skillen*, 956 P.2d 1, 4-5, 18 (Mont. 1998).

the sometimes "foreign and inaccessible" state judicial system's shortcomings, the Court found that "[r]ecognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all."[47] Thus, the Court explained that the role of concurrent jurisdiction is to expand opportunities for families to access justice, rather than to rob the state of judicial power, or deny Alaska Natives access to state courts.[48]

John v. Baker has been consistently upheld by this Court since 1999,[49] and the *Tanana* court deemed it "foundational Alaska authority regarding Alaska Native tribal jurisdiction over the welfare of Indian children."[50] In the same year as *Tanana*, this court also affirmed the continuing vitality of *John v. Baker* in a tribal sovereign immunity lawsuit.[51] In the *McCrary* case, this Court wrote that *John v. Baker*'s conclusion regarding tribal sovereignty "was not dictum — it was decisional and an essential foundation of the broader holding that Alaska Native tribes, by virtue of their sovereign

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[47] *Id.* at 760.

[48] *Id.* at 761.

[49] *See McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 340 (Alaska 2011); *Tanana*, 249 P.3d at 735, 750; *Bruce L. v. W.E.*, 247 P.3d 966, 975 (Alaska 2011); *Starr v. George*, 175 P.3d 50, 50, 57, (Alaska 2008); *Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 398 (Alaska 2006); *In re Adoption of Sara J.*, 123 P.3d 1017, 1022 (Alaska 2005); *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 439 (Alaska 2004); *Evans v. Native Village of Selawik IRA Council*, 65 P.3d 58, 60 (Alaska 2003); *Malabed v. N. Slope Borough*, 70 P.3d 416, 427 (Alaska 2003); *In re C.R.H.*, 29 P.3d 849, 851, 853 (Alaska 2001); *Sierra v. Goldbelt, Inc.*, 25 P.3d 697, 701 (Alaska 2001).

[50] *Tanana*, 249 P.3d at 750.

[51] *McCrary*, 265 P.3d at 340.

powers, have concurrent tribal jurisdiction to adjudicate certain child custody disputes involving tribal members."[52]

The federal district court in Alaska has also continued to recognize the jurisdiction of Alaska tribes over domestic relations outside of Indian Country. In *Kaltag v. Jackson*, the State had refused to issue a new birth certificate based on a tribal court adoption, which originated from a tribal child protection case.[53] The adoption "[was] not private nor voluntary, nor among members, nor did it originate as an adoption case."[54] Nonetheless, the district court held that it is the tribal membership of the child that controls whether a case is an "internal domestic custody matter."[55] Absent Congress' explicit withdrawal of tribal authority, the Court held, Alaska tribes continue to exercise concurrent jurisdiction over domestic relations cases involving children who are tribal members or eligible for membership.[56]

Most recently, this Court held in *Tanana* that Alaska Native tribes have retained their inherent authority to hear child welfare cases outside Indian country, regardless of whether or not the tribes have petitioned to assume exclusive jurisdiction under ICWA Section 1918.[57] *Tanana*, like *John v. Baker,* begins with the presumption that tribal powers of self-government include the inherent authority to regulate internal domestic relations, and

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[52] *Id.*

[53] *Kaltag, infra,* at 2. [Exc. 788]

[54] *Id.* at 9. [Exc. 795]

[55] *Id.*, citing *John v. Baker*, 982 P.2d at 759-60. [Exc. 795]

[56] *Id.* at 11. [Exc. 797]

[57] *Tanana*, 249 P.3d at 751.

concludes that child welfare qualifies as a matter of internal domestic relations when the child is eligible for tribal membership. A tribe's subject matter jurisdiction in a child welfare case turns on the child's tribal affiliation, and is concurrent to the State's jurisdiction.[58] *Tanana* reaffirmed that no act of Congress, including ANCSA, eroded Alaska Native tribes' inherent authority to protect the best interests of its children.[59]

B. Ensuring the Financial Care of Tribal Children Is a Matter of Internal Domestic Relations.

The State asks this court to find that — in *all* cases — although Alaska tribes have inherent jurisdiction over child custody decisions, they can *never* have authority to order child support. Below, the State relied heavily on the theory that child support is less about children and more about debt collection and a national social welfare program. [Exc. 8-9, 12]. The trial court rejected that characterization of child support, instead deciding that child support is "integral to the statutory and common-law duty parents have to their children." [Exc. 665] In this Court, the State relies primarily on the theory that child support is not a matter of "internal" domestic relations because the issuance of tribal support orders will allegedly require "continuous state involvement."[60] The State also argues extensively about what jurisdictional questions could be at issue if the Court were considering a tribal child support case involving a non-member parent.[61]

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[58] *Id.* at 750-51.

[59] *Id.*

[60] Appellant's Brief at 17.

[61] Appellant's Brief at 32.

The State's primary theory stands at odds with controlling authority on what "internal domestic relations" is, and the nature of child support under Alaska law. Moreover, it stands at odds with the evidence in the record. The State's arguments regarding non-member parents raise interesting questions but not ones the Court is called upon to answer in this case. Here, the state policy at issue is one uniformly rejecting all child support orders from the Tribe, regardless of parental membership, based on their issuance outside of Indian country. These arguments will be addressed in turn below.

1. What Makes A Domestic Relations Case "Internal" Is The Child's Tribal Citizenship.

Because the safe upbringing of tribal children is essential to the future of any tribe, tribes have a recognized interest in legal cases concerning families and child-rearing.[62] This Court has held that for Alaska tribes, "internal domestic relations cases" are those where the child in the case is a member of the tribe, or eligible for membership in the tribe.[63]

A domestic relations case may be "internal" even when a parent is not a tribal member, as illustrated by *John v. Baker*.[64] Under the facts of the case, the Court found that a dispute involving a non-member parent was "internal" based on the child's eligibility for membership in the tribe:

> Although Ms. John is not a member of Northway Village, she argues that the children themselves are eligible for tribal membership. This is a critical fact that must be determined by the superior court on remand . . . . A tribe's inherent sovereignty

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[62] *John v. Baker*, 982 P.2d at 755, 759.

[63] *Id.* at 759.

[64] *Id.*

> to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child.[65]

The federal district court in Anchorage and the Ninth Circuit reached a similar conclusion in the *Kaltag* litigation. There, a baby was born to a mother from Kaltag and a father from Koyukuk.[66] Tribal family services placed the baby with foster parents from Hulisa, who sought to adopt the baby.[67] The Kaltag tribal court granted the adoption.[68] Although the case involved three separate tribes, the Courts determined that the adoption was an internal domestic relations dispute under Kaltag's jurisdiction, given the child's eligibility for membership in Kaltag.[69] The district court decision noted the State's theory that a domestic relations case in tribal court is only "internal" if all parties involved in the suit are tribal members.[70] The Court rejected this theory, quoting *John v. Baker* for the principle that:

> [a] tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as the ICWA, which focuses on the child's tribal membership as a determining factor in allotting jurisdiction.[71]

Likewise in *Tanana*, this Court determined that child welfare cases involving alleged abuse or neglect of tribal children constituted matters of internal domestic relations, despite

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[65] *Id.*

[66] *Kaltag, infra,* at 1. [Exc. 787]

[67] *Id.* at 1-2. [Exc. 787 - 788]

[68] *Id.* at 2. [Exc. 788]

[69] *Id.* at 10. [Exc. 796]

[70] *Id.*

[71] *Id., quoting* 982 P.2d at 759-60 (internal footnote omitted).

the common involvement of state workers in investigating reports of harm against tribal children, and the State's undoubtedly significant interest in protecting Native children from abuse or neglect.[72] Under the Court's holding, child welfare is a matter of internal domestic relations because it calls on the tribe to exercise its authority to protect the best interests of its children.[73] Notably, any discussion of *Tanana*, other than in the Standard of Review, is absent from the State's brief.[74]

In this Court's view, therefore, what makes a domestic relations case "internal" is whether or not the child in the case is, or is eligible to be, a tribal citizen — not whether the case involves individuals "external to the Tribe."[75] In making the argument that "internal domestic relations" excludes cases where state agencies may have an enforcement role, the State cites only *Montana v. United States*.[76] *Montana* was about a tribe regulating non-Indian hunters and fishermen who had no dealings with the tribe on land not owned by the tribe.[77] The case did not involve domestic relations nor children at all. Rather, the case concerned land and resource management issues.

The State's theory that inherent tribal jurisdiction evaporates when jurisdiction has an impact on the State is also an invention unsupported by statute or case law.[78] The

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[72] 249 P.3d at 746-47.

[73] Id at 751.

[74] Appellant's Brief at x, 6.

[75] Appellants' Brief at 16.

[76] Appellants' Brief at 16, *citing Montana v. United States*, 450 U.S. 544 (1981).

[77] *Montana*, 450 U.S. at 547.

[78] Appellants' Brief at 17.

State's brief on this point cites two U.S. Supreme Court cases that stand for entirely different principles.[79] *Wagnon v. Prairie Band Potawatomi Nation* analyzes the boundaries of *state* authority to impose an off-reservation gas tax with "downstream economic consequences" on a tribe.[80] Instead of addressing tribal infringement on state sovereignty, the case addresses state infringement on tribal sovereignty.[81] *Wagnon* tells us nothing about a tribe's retained inherent jurisdiction over children's cases.

The other case, *Nevada v. Hicks*, deals primarily with the scope of *state* jurisdiction to come onto tribal lands to investigate off-reservation crime.[82] *Hicks* analyzes the ability to sue state law enforcement officials in tribal court for money damages related to a search conducted on a reservation.[83] The Supreme Court held that under the particular facts of the case, the state law enforcement officers could not be subject to suit in tribal court for investigating poaching laws in a reservation home because state authority extended into the reservation.[84] *Hicks* includes explicit limiting language: "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law."[85] *Hicks* does not proscribe the boundaries of tribal jurisdiction over families coming to court to establish child support. Nor is there an

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[79] Appellants' Brief at 17, n. 62.

[80] 546 U.S. 95, 114 (2005).

[81] 546 U.S. 95, 99 (2005).

[82] *Nevada v. Hicks*, 533 U.S. 353, 365 (2001).

[83] *Id.* at 356-57.

[84] *Id.* at 364-65.

[85] *Hicks*, 533 U.S. at 358 n. 2.

apt analogy between the State's duty to provide intergovernmental child support enforcement services under federal IV-D requirements and the State's liability to suit in tribal court for monetary damages for law enforcement activities.

Federal law does not impose jurisdictional limitations on tribes based on claims that tribal authority would "infringe" on state interests. As the State itself notes, "practicalities do not determine tribal jurisdiction under federal law."[86]

The fears of infringement raised by the State here are much like those raised in *Tanana*, where the State argued that concurrent state and tribal child protection jurisdiction "will effectively throw the state's existing child protection scheme into disarray" and infringe on the state's "comprehensive child protection scheme."[87] The State's *Tanana* brief speculated further that if 229 tribal courts were to assume jurisdiction over children's proceedings, it would upend traditional state interests in the proceedings and suffocate the Office and Children's Services and the state court system.[88] The *Tanana* court attempted to quell the far-reaching speculation, and held that recognizing concurrent tribal jurisdiction to initiate child protection cases did not upend ICWA's balance of parental, state and tribal interests.[89] The *Tanana* court excluded from its analysis the many policy and administrative complaints concerns raised by the State in

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[86] Appellants' Brief at 46, citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. at 316, 340 (2008).

[87] *State of Alaska v. Native Village of Tanana*, Brief of Appellant State of Alaska, 44, 46 (Feb. 9, 2009).

[88] *Id.* at 17.

[89] *Tanana*, 249 P.3d at 750.

its briefs, including fear of many tribes operating within a single state, the burden on state agencies to work with tribes, and challenges coordinating the actions of state and tribal agencies.[90] The Court restricted its decision to the case before it, and advised that any particular thorny jurisdictional questions could be resolved later under specific factual circumstances.[91] As in the *Tanana* case, this Court need not render an advisory opinion on what the tribal-state child support system may look like in the future, and should instead limit its decision to how Indian law jurisprudence defines an internal domestic relations case here.

2. Not only Is "State Infringement" an Invented Exception to Inherent Tribal Jurisdiction over Domestic Relations, the Record Does not Support The State's Description of TCSU Crippling the State.

The State relies on a gross distortion of the factual record in arguing that child support is an "external" domestic relations matter because "CSSD will act as a virtual arm of the Tribe."[92] TCSU functions separately from the State of Alaska in most respects: it processes applications from family members, [Exc. 809] it establishes paternity [Exc. 819], it files its own support petitions [Exc. 831], it provides all notices to parties in tribal cases [Exc. 832–833, 834-36], it establishes orders through its own judicial system [Exc. 823], its case workers do day-to-day case management with families [Exc. 811], it issues income withholding orders to employers [Exc. 824-826] (which employers are required

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[90] *Id.* and *State of Alaska v. Native Village of Tanana*, Brief of Appellant State of Alaska, 44-46 (Feb. 9, 2009).

[91] *Id.*

[92] Appellants' Brief at 21-23.

to honor[93]), it distributes payments [827-828], and it engages in other enforcement activities [Exc. 824]. As described in the fact section above, the Tribe's primary enforcement tool is the tribal court's Income Withholding Orders [Exc. 149]. CSSD is not involved in that type of tribal enforcement action at all.

TCSU — like all other state IV-D agencies collecting from obligors in Alaska — must request certain enforcement actions from CSSD: Permanent Fund Dividend ("PFD") garnishment and unemployment garnishment. [Exc. 171][94] Aside from PFD garnishment requests, the record contains evidence of only five requests from TCSU to CSSD for other state enforcement services in the four-year period between 2007 and 2010 [R. 419-474; Exc. 172-31, 872-873]. Hypothetically, if the Tribe wanted to seek license revocation or bank garnishment for an obligor in arrears, it would have to request these services from the State, but there is nothing in the record showing the Tribe has ever requested that from CSSD. [Exc. 171] There is no evidence in the record, nor is it plausible, that processing requests for PFD and unemployment garnishments from the Tribe would render CSSD an arm of the Tribe.[95]

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[93] UIFSA requires all "states" to honor Income Withholding Orders from other "states." *See* AS 25.25.501 ("An income withholding order issued in another state may be sent to the person or entity defined as the obligor's employer under AS 25.27 without first filing a complaint or comparable pleading or registering the order with a tribunal of this state.")

[94] AS 25.25.507(b) (administrative enforcement under UIFSA); AS 25.27.250 (garnishment of personal property other than income); 15 AAC 125.410 (garnishment procedures). CSSD provides information for other states to request PFD garnishment through its website: www.childsupport.alaska.gov/faq/faq_pfd.asp.

[95] The State also catalogs fears about what could go wrong if the Tribe were to issue a child support order for a child receiving state public benefits or in state custody. Appellants' Brief at 22-23, 27. However, the State only describes one actual case where the Tribe collected

The hyperbole that CSSD will act as a virtual arm of the Tribe is even more disingenuous considering that CSSD has transferred over 700 state orders to the Tribe to enforce. [Exc. 171, 572] Not only is the Tribe the primary enforcer of its own support orders, it is also enforcing hundreds of state orders with TANF repayment agreements. [Exc. 169, 171] In these hundreds of cases, the Tribe is now doing the work that the State would have otherwise been responsible for, and is also able to offer unique services under its "children first" model, including referral to tribal educational and vocational programs, tribal veterans, programs, tribal youth activities, and other programs within the Tribe. [Exc. 803-805]

Finally, the State claims it is an intolerable burden to maintain two staff positions to address the Tribe's requests for services.[96] The State neglects to mention that these two staff positions are not dedicated to the Tribe; the two positions also serve as the first point of contact for every tribe in Alaska, work with all tribal TANF agencies, and travel to do outreach in bush communities. [Exc. 571-572] According to CSSD's 2012 audit, its rural outreach staff traveled over 6,000 miles in 2012 to meet with individual clients and perform genetic testing. [Exc. 571] Outside of litigation, CSSD itself promotes the beneficial, collaborative relationship it has with the Tribe and other Alaska tribes. [Exc. 572]

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support for the benefit of the Office of Children's Services, and does not explain why TCSU disbursing funds to Alaska for foster care is different and more injurious than any other state IV-D agency disbursing funds to Alaska for foster care. [Exc. 530-531] There is no case in the record where TCSU collected ATAP for the State, and that scenario is unlikely given the State's process to initiate its own child support case when a parent applies for ATAP.

[96] Appellants' Brief at 19.

While it is true that the Tribe likely issues more child support orders than any other Alaska tribe because it is a formal IV-D program, inter-governmental cooperation is part and parcel of Alaska's IV-D child support funding. If CSSD must expend some resources communicating and coordinating with TCSU, it is a requirement of the title IV-D program, and an expectation of every single IV-D child support agency in the country.[97] Other state IV-D agencies like California and Washington have expressed no reservations about providing inter-governmental services to TCSU. [Exc. 177]

Notably, when the OCSE drafted implementing regulations for the tribal IV-D expansion, it fully considered the unique circumstances of Alaska tribes and chose not to limit the scope of IV-D tribal funding to "Indian country."[98] Rather, the IV-D regulations use the term "Indian Tribe," and define "Tribe" to specifically include "any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe."[99] The OCSE used this language despite objections from one state commenter, who suggested that definitions for "Tribal resident," "reservation" and "Indian Country" be promulgated, thereby excluding most Alaska tribes from the program. The OCSE declined this invitation:

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[97] 45 C.F.R. § 302.36(a)(2).

[98] 69 Fed. Reg. 16648 ("We have determined that it is not appropriate or necessary in this regulation to define the territorial limits of a Tribe's authority by defining 'Tribal resident' or 'reservation.' The parameters of 'Tribal resident' and 'reservation are more appropriately determined by Tribal law, the jurisdiction of the Tribe's courts or administrative process and by applicable federal law, not by child support enforcement regulations.'").

[99] 45 C.F.R. § 309.05. *See also* 69 Fed. Reg. 16,638, 16,649 (2004).

> We are aware of the special circumstances in Alaska related to the term "Indian country" as a consequence of the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).* For clarification, except where specifically noted, throughout the preamble "Indian country" is replaced with the term "Tribal territory" in consideration of the special circumstances in Alaska. The final regulatory definition of "Indian Tribe and Tribe" encompasses all Indian Tribes and Alaska Native entities enumerated in the Department of the Interior's listing of Federally-recognized entities such that each is eligible to apply for direct IV-D funding.[100]

Since IV-D funding opened up to tribes, the Secretary has required through regulation that every state IV-D agency "extend the full range of services available under its IV-D plan" to tribal IV-D programs, including promptly opening a case where appropriate.[101] Services available under a IV-D plan include "[p]rocessing and enforcing orders referred by another state, whether pursuant to the Uniform Interstate Family Support Act or other legal processes. . ."[102] Commentary to these regulations advise that their intent is to require IV-D agencies to cooperate with other "states" — including tribes — in inter-governmental IV-D cases.[103] The OCSE also revised its regulation on intergovernmental services in 2010 to "*clarify* that a state must provide services in all intergovernmental IV-D cases."[104] The revised regulations substitute the term "intergovernmental" for "interstate" throughout the rules to clarify that IV-D rules apply

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[100] 69 Fed. Reg. 16649.

[101] 45 C.F.R. § 302.36(a)(2).

[102] 45 C.F.R. § 303.7(c)(7)(iii).

[103] *See* 69 Fed. Reg. 16,638, 16,641, 16,666 (2004).

[104] 75 Fed. Reg. 38,615 (emphasis added).

to cases between states and tribal IV-D programs, not just between states and other states.[105] If the State finds it too burdensome to follow federal regulations requiring services to tribal IV-D programs and compliance with UIFSA, the State can choose to give up its IV-D funding and opt out of IV-D program requirements.[106] To date, it has not made that choice.

In sum, the record does not support the accusation that the Tribe unduly "interfer[es] with the State's orderly administration of child support matters within the State."[107] The State cites no instance where CSSD's ability to perform its functions and satisfy its mission was hampered by the Tribe's child support program. In fact, The Tribe affords CSSD assistance in enforcing its own administrative orders, as well as eliminating from its caseload all of the tribal citizens electing to use tribal rather than state child support services. [Exc. 171, 572]

3. Child Support is Intertwined with Child Custody Under the Umbrella of Internal Domestic Relations.

The State's attempt to excise child support from the realm of domestic relations also fails to explain why tribes enjoy less of an interest in the material and financial care of tribal children than the physical and legal custody of their children. Certainly no case in Alaska or

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[105] *Id.* at 38,614.

[106] *See Kansas v. United States*, 214 F.3d 1196, 1198 (10th Cir. 2000) (where Kansas sued the U.S. arguing that the amended IV-D program requirements are too onerous and expensive, necessitate too much manpower, and encroach upon its ability to determine its own laws, the Circuit Court upheld dismissal of the suit because a state that elects to receive the federal block grant under the TANF program must operate a child support enforcement program that meets IV-D's requirements.)

[107] Appellants' Brief at 2. Indeed, no portion of the record is cited for this claim in the brief.

elsewhere holds this to be true. The State's brief cites no authority for this proposition. Nor does it make sense considering the intertwined nature of child custody and child support.

In actuality, child support implicates the same critical tribal integrity and tribal relations issues as child custody. Child support is, by its nature, intimately related to the protection and preservation of children: a child support award is imposed by a court "to ensure the sustenance and well-being of the obligor's children."[108] A child support award arises from the moral and legal obligation of a parent "to provide the child with the necessities of life, and to ensure the child's welfare until it is emancipated and able to provide for itself."[109] Child support awards against non-custodial parents are meant to guarantee that even if the "natural bonds" between parents and children are weakened by the dissolution of the parents' relationship, the children will still be provided for.[110] As a mechanism for ensuring that parents fulfill their obligations to their children, and that children are provided with the necessities of life, child support orders fall squarely into the domestic relations issues this Court has found lie at the core of tribal sovereignty.

As with child custody and child protection, tribes have a legitimate concern with the well-being of children who make up their membership; these children are their future leaders and culture bearers. For example, in the Tribe's child support plan, its statement of purpose includes the "emotional and financial support for children with a more holistic view." [Exc. 64] Financial support is one aspect of a child's wellbeing on par with placement decisions,

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[108] *U.S. v. Ballek*, 170 F.3d 871, 873 (9th Cir. 1999).

[109] *Id.* at 874.

[110] *Id.* at 874-75.

visitation opportunities, and protection from abuse and neglect. Alaska law provides that child support is mandatory, and must be ordered whenever a child custody decision is made.[111] This Court has held that the phrase "care and custody of minor children" (included in a statute outlining orders a court may make in a divorce case) includes provisions for the children's financial support.[112] A tribe's interest in this aspect of a child's wellness is no less great than other aspects of a child's wellness.

Child support orders are also directly related to the integrity of the tribal community. Child support issues exist at the core of tribal sovereignty not only because they protect the welfare of tribal children, but also because they directly affect the health of the tribal community. As the Court of Appeals for the Ninth Circuit has noted, child neglect raises more than a private legal dispute: "it is a matter of vital importance to the community."[113] It is for this reason that child support orders – which regulate what would otherwise be private familial relations – may be enforced by criminal sanctions, i.e. actions brought for the public at large.[114] As the trial court correctly noted, "Ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe – like that of any society – requires no less." [Exc. 666]

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[111] *See* Civil Rule 90.3, AS 25.20.030; AS 25.24.160(a)(1). *See also* Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 Fam. L.Q. 293, 305-07 (1992) (the duty of support "is not merely related to the status determination; it is an inevitable concomitant of custody decisions.").

[112] *Houger v. Houger,* 449 P.2d 766, 770 (Alaska 1969) (discussing former AS 9.55.210(1)).

[113] *U.S. v. Ballek*, 170 F.3d at 874.

[114] *Id.*

The inter-relation of child support and child custody in Alaska state proceedings reinforces the conclusion that both subjects are matters of internal domestic relations. Child support is paid by the non-custodial parent: a change in custody can cause a shift in the child support burden.[115] While child support awards are routinely calculated as a percentage of the non-custodial parent's income, those calculations are thought to reflect the "cost" of raising a child as the custodial parent.[116] While it is true that the link between custody and child support does not absolutely require that both issues be addressed by the same court, the issues certainly arise from closely related subject matter.

The trial court relied on this Court's opinion in *McCaffery*, 931 P.2d 404, 414 (Alaska 1997) to illustrate the extent to which child custody and child support are interrelated under Alaska law. [Exc. 662-64] The State attempts to distinguish *McCaffery* by explaining that the relevant issue in *McCaffery* was whether an Alaska court had *personal jurisdiction* to modify a child support order, not whether the court had subject matter jurisdiction.[117] While personal jurisdiction was the key issue in *McCaffery*, it was this Court's discussion of child support and custody issues, not the jurisdictional analysis, that the trial court found instructive. [Exc. 662-64] In *McCaffery*, this Court reiterated that a child support order reflects a non-custodial parent's obligation *to his or her children*, and that a support order is therefore "an inevitable

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[115] *See, e.g.*, AK R. Civ. P. 90.3; *Killary v. Killary*, 123 P.3d 1039, 1041 (Alaska 2005) (trial court order reinstating father's child support obligation was in error where child ran away from mother's home, leaving neither parent with de facto custody of the child, because "[c]hild support awards, by their very definition, are intended to benefit the child, not provide a windfall to a parent.").

[116] *See Coats v. Finn*, 779 P.2d 775, 776 n.5 (Alaska 1989).

[117] Appellants' Brief at 42 – 46.

concomitant of custody decisions."[118] While this reasoning is not dispositive of the jurisdictional issue, it illustrates the degree to which custody and support determinations are two parts of a whole, and therefore not meaningfully distinguishable in terms of subject matter jurisdiction.

Alaska would not be alone in concluding that child support is a matter of inherent domestic relations for tribes. A federal court in South Dakota held that the Rosebud Sioux Tribe "has retained its sovereign status to decide whether its members who are stepparents have a legal obligation to support their stepchildren."[119] In reaching this decision, the Court found that tribal jurisdiction over child support "is an expression of the Tribe's original sovereignty over its domestic relations."[120] While the case concerned a tribe with a reservation, the reservation status was only significant in determining whether the tribe's jurisdiction was exclusive as opposed to concurrent; the Court's focus on inherent jurisdiction over support of tribal member children supports the Tribe's arguments in favor of concurrent jurisdiction in Alaska. The high courts in Montana[121] and North Carolina[122] have reached similar decisions regarding inherent tribal jurisdiction over support of tribal children.

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[118] *McCaffery v. Green*, 931 P.2d 404, 414 (Alaska 1997), *quoting* Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 Fam. L.Q. 293, 307 (1992).

[119] *Iron Heart v. Ellenbecker*, 689 F. Supp. 988, 993 (C.D.S.D. 1988).

[120] *Id.*

[121] *See Montana v. Three Irons*, 621 P.2d 476, 477 (Mont. 1980); *State ex rel. Flammond v. Flammond*, 621 P.2d 471, 474 (Mont. 1980); *Sanders v. State of Montana Dept. of Public Health and Human Serv., Child Support Enforcement Div.*, 2005 MT 230 (Mont. 2005) (unpublished).

[122] *See Jackson County ex rel Smoker v. Smoker*, 459 S.E.2d 789 (N.C. 1995).

Finally, Congress' decision to include Alaska tribes in IV-D funding supports the conclusion that Alaska tribes retain inherent authority over child support jurisdiction.[123] Tribal IV-D regulations do not restrict tribal child support agencies that operate only on reservations, and its scope is not limited to Indian country.[124] Rather, Congress and the administration deliberately chose to include all Indian tribes, including Alaska tribes in the IV-D program.[125] While the Title IV-D statutes and regulations regarding tribal IV-D funding do not confer jurisdiction, they presume that Alaska tribes can provide appropriate forums for determining support for tribal member children.

The Court in *John v. Baker* reached a similar conclusion in evaluating the 1993 Tribal Justice Act, which provided financial support for tribal court activities without consideration of Indian country and explicitly encompassed Alaska Native villages.[126] The *John v. Baker* court took this as "further evidence" that Congress intended Alaska Native tribes to retain governmental powers over custody matters for tribal member children.[127] Likewise here, Congress' funding of tribal child support agencies in Alaska evidences its intent that Alaska tribes would exercise their authority to adjudicate child support cases.

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[123] 69 Fed. Reg. 16649.

[124] 42 U.S.C. §§ 651, 655; 45 C.F.R. § 309.1(a)(b).

[125] *See* note 100, *infra.*

[126] 982 P.2d at 754.

[127] *Id.*

4. This Case Does Not Raise Issues About Tribal Authority Over Non-Members.

The State also claims that child support is not a matter of "internal domestic relations among members" because there may be cases in tribal court where one parent is not an enrolled tribal member. However, like *Tanana*, this case is not about enforcing a particular tribal court order. Rather, it is about the State's blanket objection to the Tribe asserting jurisdiction over child support in *all* cases, and refusal to process *any* of its tribal child support orders under UIFSA procedures. [Exc. 6-7] There is no specific case involving a non-member before this Court. In this trial court, the State raised no arguments concerning the lack of jurisdiction in any particular tribal court case, or allegations of due process violations against any particular parent. Any discussion about a child support order for a non-member parent, consenting or otherwise, would be advisory because there is no live controversy involving a non-member parent.

The State's extensive discussion of *Montana*, 450 U.S. 544 (1981) and other cases regarding the scope of tribal jurisdiction over non-members is extraneous. The State agreed with the Tribe below that the parties did not brief any claims regarding personal jurisdiction in this case, and that "[q]uestions related to the existence and extent of tribal personal jurisdiction over particular parties should be left to future cases, if any, where such questions are actually at issue." [Exc. 862] The lower court's decision concluded that the Tribe has subject matter jurisdiction over issues of child support for tribal member children, and agreed with the parties that it was not required to decide the issue of personal jurisdiction. [Exc. 667] While there could be cases in the future where a

non-member parent objected to jurisdiction, the lower court found that the instant case did not require an examination of that personal jurisdiction issue. [Exc. 667-668] As in *Tanana*, this case does not present the issues the State raises concerning tribal jurisdiction over non-members.

In addition, the Uniform Interstate Family Support Act (UIFSA) provides a clear procedure for a parent to object to state enforcement of a tribal child support order if a jurisdictional objection were to exist. Under UIFSA, if any state or tribe sends a support order to Alaska for recognition and enforcement, there are well-defined steps to follow.

- The "foreign" state or tribe sends a copy of its child support order together with a transmittal form, a sworn statement of arrears, and party information.[128]
- Alaska, as the responding "state," initiates administrative enforcement if the documents are complete, or take timely steps to complete documentation.[129] Administrative enforcement can include general enforcement services or single-action services like garnishment of Alaska Permanent Fund Dividends.[130]
- Should a parent or custodian object to administrative enforcement on jurisdictional or any other grounds, the responding state must register the order in superior court pursuant to sections 605-607 of the Act.[131]
- An objecting party can request a hearing, may seek to vacate the registration, to assert a defense to an allegation of noncompliance with the registered order, or to contest the remedies sought or the amount of alleged debt.[132]

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[128] AS 25.25.602(a); 15 AAC 125.700(a).

[129] AS 25.25.602; 15 AAC 125.700(a) and (b).

[130] AS 25.25.507(b).

[131] AS 25.25.507(b); 15 AAC 125.700(c). *See also* AS 25.25.607 (listing defenses to registration).

[132] AS 25.25.606(a).

- The registering tribunal can then proceed with enforcement, stay enforcement, continue the proceeding to permit production of additional evidence, or issue other appropriate orders.[133]

- Upon completion of registration, the registered order becomes "enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state."[134]

- To help this inter-governmental process work smoothly, different tribunals can communicate in writing, or by telephone or other formal or informal means.[135]

Thus, should questions arise in the future as to personal jurisdiction in a tribal court order CSSD is asked to enforce, UIFSA provides a procedure for the parents or custodians to voice objections to jurisdiction and for those objections to be resolved in a fair forum. The State and the Tribe agree that UIFSA's statutory procedures for recognition and enforcement are meant to replace cumbersome comity procedures:

> A tribal child support order would be registered in the Alaska state courts under the UIFSA procedures instead of a comity process. These changes are consistent with the purpose of UIFSA. The purpose of UIFSA is to unify state laws relating to child support orders, to provide efficient procedures for collecting child support in interstate cases, and to eliminate multiple support orders that were permitted under prior child support laws. [R. 113]

Opposing counsel also issued a similar opinion to a state legislator in 2009, namely that the proposed UIFSA amendment would "also result in a procedural change for recognition of tribal support orders in the Alaska state courts. Instead of a comity

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[133] AS 25.25.607(b).

[134] AS 25.25.603(b).

[135] AS 25.25.317.

process, tribal support orders would be registered in Alaska state courts under the UIFSA procedures." [R. 115-116]

For the Tribe, recognizing orders through UIFSA instead of the comity process means sending a transmittal form to CSSD instead of filing a lawsuit against the State in Superior Court every time enforcement action is sought. Parents in the case still get an opportunity to object to tribal court proceedings on jurisdictional and due process grounds, but through a more efficient process. All parties, court systems, and families would benefit from this significantly streamlined procedure.

C. This Court Should Affirm the Other Relief Granted, Which the State Has Not Substantively Challenged.

The State does not challenge the wording of the injunction. Therefore, if the trial court's substantive decision is affirmed, the injunction should remain in place as is. Nor does the State challenge the trial court's decision to enhance attorney's fees. Its argument on fees is solely that if the trial court's decision is reversed, the fee award to the Tribe should be vacated.[136] There are no arguments concerning the calculation of the award. Thus, together with affirming the trial court's decision on summary judgment, this Court should affirm the trial court's fee award as well.

RELIEF SOUGHT

The Tribe respectfully requests that this Court affirm the decision below.

[136] Appellants' Brief at 48.

Respectfully submitted, this the 14th day of March, 2014, at Juneau, Alaska, by:

FOR

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