2022 Alaska Native Case Law Update
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I. LANDS AND PROPERTY CASES

Ahtna, Inc. v. State, Department of Natural Resources and Department of Transportation & Public Facilities, ___ P.3d ___, Op. No. 7619, 2022 WL 4283097 (Alaska Sept. 16, 2022)

The *2021 Alaska Native Case Law Update* described the Alaska Supreme Court's March 21, 2021 opinion in this case as concluding "a years-long dispute between the State of Alaska and Ahtna, Inc. about the scope of permitted uses of an RS 2477 right of way, and whether aboriginal title affected the validity of that right of way." However, on December 17, 2021, the Court granted the State's petition for rehearing and withdrew the 2021 opinion. The Court issued a new opinion remanding the case to the superior court for further proceedings. Thus, the saga continues.

The Klutina Lake Road is 25 miles long and follows the Klutina River from Copper Center to Klutina Lake from the Richardson Highway. The road travels over land owned by Ahtna, Inc.—an Alaska Native Regional Corporation. In 2007, the State of Alaska cleared land along the road and removed a permit fee collection station that Ahtna had installed to collect fees for the use of its land. The State claimed that it had established a 100-foot-wide right of way pursuant to a 19th Century federal mining law—Revised Statute (RS) 2477—over the road. The State cleared land in the roadway in 1899, and again in 1960 a "more official" road was established to access Klutina Lake. According to the State, the RS 2477 right of way authorized a broad scope of activities including day use, camping, boat launching, parking, fishing, and the right to travel over the road.

In 2008, Ahtna sued the State for declaratory judgment, arguing that Ahtna's prior aboriginal title prevented the federal government from conveying a RS 2477 right of way.

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Alternatively, Ahtna argued that if the RS 2477 right of way did exist, the scope was limited to ingress and egress.

The superior court issued two partial summary judgment orders in the case. In 2016, the superior court granted Ahtna's motion for partial summary judgment regarding the scope of the right of way, concluding that RS 2477 rights of way convey only the right of ingress and egress. In 2018, the superior court denied Ahtna's second motion for partial summary judgment regarding aboriginal title, concluding that any claim to aboriginal title did not prevent the creation of an RS 2477 right of way. Ahtna and the State stipulated to the existence of a 100-foot RS 2477 right of way, 50 feet on each side of the Klutina Lake Road, and both parties cross-appealed the superior court's summary judgment decisions.

In the 2021 decision, the Alaska Supreme Court affirmed both partial summary judgment orders. *See* Op. No. 7508, 2021 WL 938371 (Alaska Mar. 12, 2021). First, the Court concluded that the superior court was correct that aboriginal title did not prevent creation of an RS 2477 right of way because the Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal title retroactively. Citing long-standing precedent, the Court reiterated that ANCSA's extinguishment clause barred claims and defenses asserting aboriginal title to invalidate a conveyance. Second, the Court affirmed the superior court's decision that RS 2477 rights of way were limited to ingress and egress. Because statutes and regulations from 1969—when the scope of the right of way was set—did not include recreational uses in the definition of "highway," the Court concluded that the State's use of the RS 2477 was limited to travel on the road.

After granting the State's petition for rehearing and withdrawing the 2021 opinion, the Court reversed its decision regarding the scope of the RS 2477 right of way. According to the Court's revised opinion, RS 2477 rights of way convey the right to use the road for highway purposes, which includes more than ingress and egress but not any recreational uses. Thus, it was a factual question whether the State's proposed uses "are reasonably necessary for highway purposes as defined in 1969, not simply that the projects would be nice facilities along the highway," Op. No. 7619 at 21. The Court vacated the superior court's decision and remanded for further fact-finding.

***Caswell v. Ahtna, Inc.*, 511 P.3d 193 (Alaska 2022)**

In 1997, a limestone miner signed a 20-year lease agreement with Ahtna, Inc., granting the miner a right of access to his mining operation across Ahtna's land. The lease included a hold over provision, contemplating a month-to-month tenancy upon expiration of the 20-year term, at Ahtna's discretion. Near the end of year 19, the miner paid Ahtna the final year's rent, plus an additional amount to cover rent through year 21, but he never provided Ahtna notice of an intent to extend the lease.

In May 2018, Ahtna filed a complaint against the miner for breach of the lease and trespass. Ahtna claimed the miner breached the lease agreement by constructing and using a structure on the property for commercial purposes. Ahtna acknowledged that the lease did include an option to extend but argued that because the miner was in default, he was prohibited from exercising that option. Subsequently, Ahtna amended its complaint to include a claim for forcible entry and detainer and trespass (FED), and moved for an expedited FED hearing, which the superior court granted. Following a two-day FED hearing, the superior court granted Ahtna judgment for FED. The miner appealed, arguing that the issues in the case were "too complex" to be resolved through FED proceedings, which have limited opportunity for discovery; that the FED proceeding was unlawful because he had not been served the required notice to quit; and that the miner's company was improperly named as a defendant and included in the FED judgment.

The Alaska Supreme Court affirmed, concluding that the lease dispute fell within the proper scope of an FED proceeding. Although FED proceedings are primarily actions to determine disputes over possession, parties are not precluded from litigating substantive rights and significant issues in an FED proceeding. The Court noted that this case was about possession of the property, the "essence" of FED proceedings.

The Court also rejected the miner's procedural arguments. First, the Court determined that the superior court's order precluding discovery was not an abuse of discretion because the miner failed to identify what evidence he needed but was prevented from obtaining—in fact, Ahtna responded to some of the miner's discovery requests but the miner never sought a discovery order to compel further responses. Second, the Court concluded that Ahtna met the FED notice requirement because the amended complaint was filed 11 months before the FED hearing. Third, the Court found no error in the superior

court's inclusion of the miner's company in the FED judgment because there was evidence that the miner and his company possessed the property jointly. The company was a "person in possession" subject to FED proceedings because it made rent payments on the lease from its account and stored a variety of equipment and assets on the leased property.

***State of Alaska v. Haaland*, No. 3:21-cv-0158-HRH (D. Alaska Mar. 14, 2022)**

The federal district court for the District of Alaska dismissed the State's lawsuit challenging the Department of the Interior's reconsideration of five public land orders (PLOs) affecting approximately 28 million acres of federal public land in Alaska. In the final days of the Trump Administration, Secretary of the Interior Bernhardt signed five PLOs partially revoking withdrawals of federal public land in Alaska, which would open the 28 million acres to State selections under the Alaska Statehood Act. The incoming Biden Administration paused the PLOs from becoming effective, citing "defects in the PLOs," including failure to consult with other federal agencies and conduct a sufficient analysis under the National Environmental Policy Act (NEPA), particularly with respect to potential effects on subsistence hunting and fishing. On July 7, 2021, the State sued the Secretary of the Interior, alleging that the delay in making the PLOs effective violated the Administrative Procedure Act (APA).

On March 14, 2022, Judge Holland granted the United States' motion to dismiss the case. According to Judge Holland, Secretary Haaland's decision to delay the effective dates of the PLOs was not a final agency action for purposes of the APA. Because there was no specific legal obligation to publish the PLOs signed by then-Secretary Bernhardt, the State lacked a cause of action. Judge Holland noted that the ongoing delay in finalizing the PLOs (until April 16, 2023), was not unreasonable because the case "involves 28 million acres of land and potentially four or more issues that may need additional attention at the agency level." Thus, "taking two years to ensure that the revocations of the withdrawals at issue are proper, when the agency has no statutory or regulatory duty to act within a specific period of time, is not unreasonable." The State's appeal of the district court's order is pending in the Ninth Circuit.

Cully Corp. v. United States*, 159 Fed. Cl. 427, *modified in part*, 160 Fed. Cl. 360 (2022)

This is an ongoing case involving a dispute between the Cully Corporation—the Alaska Native Village Corporation for Point Lay—and the United States Air Force regarding ownership of three buildings on the Chukchi Sea coast. In 2005, the Air Force planned to demolish the government buildings located on a former military Distant Early Warning site, which were contaminated with hazardous waste. Cully expressed interest in taking possession of the buildings instead. Through correspondences between Cully and the Air Force in 2005 and a 2006 "letter of transfer" the buildings were purportedly conveyed to Cully but remained subject to a 25-year lease to the North Slope Borough. Years after the purported transfer, the Air Force determined that the transaction violated federal regulations, leading the Air Force to claim that a valid transfer never occurred. Cully sued the United States in the Court of Federal Claims, seeking compensation for an unconstitutional taking, or alternatively for compensation under the doctrine of quantum meruit for work Cully performed remediating the contaminated buildings.

On April 14, 2022, the claims court denied the parties' cross-motions for summary judgment. The court determined that Cully held a valid reversionary interest in the properties at issue and that the United States' challenge to Cully's ownership interest was "baseless." However, the court concluded that there were genuine issues of material fact precluding summary judgment, including whether the United States' actions qualified as an interference necessary to prove a taking and whether Cully had incurred damages from the taking of its reversionary interest or could incur damages from the Air Force's continued interference.

On the eve of the pretrial conference, the United States substantially altered its legal position, resulting in the court amending a portion of its April 14 decision. The Air Force rescinded its prior position that the purported transfer to Cully was invalid. Consequently, the United States argued that because the Air Force now acknowledged the transfer, Cully's takings claim was moot. The United States further sought to reassure the court and the parties as to any prospective, future takings—to clarify that the buildings will revert to Cully when the lease with the North Slope Borough expires.

On June 29, 2022, the court modified its decision in part, agreeing with the United States that Cully no longer had a viable takings claim based on a permanent taking. But the

court concluded that because Cully had established a valid reversionary interest in the property at issue, Cully had a stated a claim for a temporary taking of that interest and that the United States' temporary taking of Cully's reversionary interest interfered with Cully's present rights. The court reiterated its April 14 decision that a trial is necessary to determine factual issues, which were limited to the actual damages Cully incurred from interference with the use of its reversionary interest and Cully's quantum meruit claim.

Friends of Alaska National Wildlife Refuges v. Haaland*, 29 F.4th 432 (9th Cir. 2022), *vacated and reh'g granted en banc*, No. 20-35721 (9th Cir. Nov. 10, 2022)

The Ninth Circuit recently granted rehearing en banc in this case involving a challenge to the proposed Izembek Road. The lawsuit was brought by environmental groups opposed to the road project who claimed that the Secretary of the Interior's decision to move forward with a land exchange to facilitate construction of the road through the Izembek National Wildlife Refuge violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Alaska National Interest Land Conservation Act (ANILCA). The State of Alaska, two affected Alaska Tribes, and the King Cove Corporation—the Alaska Native Village Corporation that would receive title to Refuge land that was necessary to construct the road in an exchange with the Department of the Interior—intervened in support of the federal government.

On March 16, 2022, a three-judge panel of the Ninth Circuit reversed the Alaska federal district court's decision that the Secretary's land exchange agreement violated the APA and ANILCA. According to the Ninth Circuit panel, the Secretary's decision to reverse the Department of Interior's previous refusal to authorize the road did not violate the APA because new administrations are entitled to rebalance competing policy objectives. Here, the Secretary concluded that socioeconomic concerns weighing in favor of road access to the remote Alaska community of King Cove outweighed the competing environmental values associated with the Refuge's unique natural resources.

The Ninth Circuit panel also concluded that the land exchange was authorized by the congressional purposes of ANILCA. Relying on *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019), which noted that ANILCA reflects a "grand bargain" of balancing two competing goals of natural resource protection and economic development, the panel concluded that one of the implicit purposes of ANILCA "is to address the economic and social needs of

Alaskans." Thus, ANILCA authorized the Secretary's decision to give more weight to the socioeconomic benefits of the road than environmental protection.

Judge Wardlaw dissented, concluding that the Secretary's decision to reverse the previous administration's position not to authorize road construction violated the APA because it contradicted key findings and facts in the previous position and failed to provide sufficient justification for the change in position. Finally, the dissent criticized the majority's reliance on *Sturgeon* to impute an implicit but contradictory congressional purpose of ANILCA. ANILCA contained two, and only two, explicit purposes—environmental preservation and protection of subsistence—representing Congress's final balancing of the goals of preserving natural resources and providing economic development opportunities. According to Judge Wardlaw, the majority's reading "turns ANILCA on its head by taking what is essentially a conservation measure and turning it into an economic stimulus."

On November 10, the Ninth Circuit announced that the case would be reheard en banc. The three-judge panel opinion was vacated.

State of Alaska v. United States of America*, No. 3:22-cv-00163-HRH (D. Alaska)

On July 15, 2022, the State of Alaska, Department of Environmental Conservation filed a lawsuit asserting Administrative Procedure Act (APA) claims against the U.S. Department of Interior (DOI), Secretary of the Interior Deb Haaland, the Bureau of Land Management (BLM), and BLM Director Tracy Stone-Manning. The State alleged that certain lands conveyed to Alaska Native Corporations pursuant to the Alaska Native Claims Settlement Act (ANCSA) contained environmental contamination, rendering those lands unfit for economic development.

Since 1990, Congress has repeatedly directed the DOI and BLM to study and identify ANCSA lands that were contaminated before their transfer to Alaska Native Corporations. However, the State alleges that DOI and BLM have not completed and submitted the reports that Congress required. The State's lawsuit seeks an order declaring that DOI and BLM violated the APA by withholding required agency action. The State also seeks an order requiring the federal agencies to comply with the relevant congressional directives by submitting reports on the contaminated lands to Congress.

On November 7, 2022, the United States filed a motion to dismiss the case. The United States argued that (1) the congressional reports are not "agency actions" under the APA, and thus the State lacks a cause of action; (2) the reports were actually submitted by BLM to Congress; (3) the statute of limitations bars the State's APA claims; and (4) the State lacks standing because there was no injury that resulted from the failure to submit reports or deficiencies in the reports. The State's response is due on November 28.

II. FISH AND GAME CASES

Metlakatla Indian Community v. Dunleavy, 48 F.4th 963 (9th Cir. 2022)

In 1891, Congress established the Annette Islands Reserve in Southeast Alaska for the Metlakatla Indian Community. In 1916, President Wilson proclaimed that the waters 3,000 feet from the shoreline of the Annette Islands were reserved for the exclusive use of the Metlakatlans. The Metlakatlans continued to fish both in the reservation waters and in the immediately surrounding areas. The Metlakatlans' ability to fish off-reservation allowed them to establish a cannery to replace the one they had left behind in British Columbia.

In 1972, Alaska implemented its limited entry permit system for commercial fishing in state waters. The limited entry permit system applied to Metlakatlans fishing in off-reservation waters (Districts 1 and 2), even though community members had traditionally fished for food, ceremonial purposes, and for commercial sale in those areas. In 2020, Metlakatlans sued the State in federal court to assert their non-exclusive right to fish in Districts 1 and 2. In 2021, the district court dismissed the complaint.

On appeal, the Ninth Circuit reversed the district court's dismissal, concluding that the Community's non-exclusive right to fish in the off-reservation waters where they had traditionally fished was not subject to Alaska's limited entry program. Applying the Indian Law Canons, the court found that the purpose of creating the Annette Island Reservation was to allow the Metlakatlans to continue to support themselves by fishing, as they had always done, including through the financial support of a commercial cannery. The panel found that the 1891 Act preserved the implied right to non-exclusive off-reservation fishing for personal consumption, ceremonial purposes, and commercial purposes within the

tribe's traditional fishing waters. The court further held that any regulation by the State must be consistent with the tribes' off-reservation fishing rights.

***State of Alaska, Department of Fish & Game v. Federal Subsistence Board*, 574 F. Supp.3d 710 (D. Alaska 2021)**

On August 10, 2020, the State filed a lawsuit challenging federal management actions with respect to two federal wildlife management decisions: (1) the Federal Subsistence Board's delegation of authority to open a special hunt for moose and deer in Southeast Alaska during the COVID-19 pandemic and (2) the Board's decision to close federal public lands in Game Management Unit (GMU) 13 to non-rural subsistence hunters. The State alleged that the Board exceeded its authority under the Alaska National Interest Lands Conservation Act (ANILCA), that the Board's actions were arbitrary and capricious in violation of the Administrative Procedure Act (APA), and that the Board is required, but failed to follow, open-government procedures in the Government in the Sunshine Act. The Organized Village of Kake intervened on the side of the Board to defend the delegation of authority to local managers to open emergency hunts on federal lands.

On December 3, 2021, the federal district court for the District of Alaska entered judgment in favor of the Board. First, the court determined that the Board was not an "agency" for purposes of the Sunshine Act, and thus, the Board is not required to make every portion of its meetings open to the public or publish notice at least one week before each meeting. Second, the State's claim that the Board's delegation of authority to open the Kake hunt was moot. According to the court, the delegation of authority had expired and because it only arose due to exceptional circumstances involving the COVID-19 pandemic, it was unlikely to be capable of repetition, yet evading review. Third, the court concluded that the closure of GMU 13 to non-rural hunters was proper under ANILCA and the APA because the Board has a duty to ensure the continuation of subsistence uses of wildlife in Alaska. Closing public lands to minimize competition between subsistence and non-subsistence hunting was reasonable and supported by the record. The State's appeal of the district court's order is pending in the Ninth Circuit.

United States v. State of Alaska*, No. 1:22-cv-00054-SLG (D. Alaska)

On May 17, 2022, the United States filed a complaint against the State of Alaska regarding salmon management on portions of the Kuskokwim River. The United States claims that the State's emergency orders opening the Kuskokwim River to state subsistence salmon fishing by "All Alaskans" are preempted by the Federal Subsistence Board's emergency special actions closing the Kuskokwim River salmon fishery to non-subsistence uses within the Yukon Delta National Wildlife Refuge. The complaint alleges that the State's management actions are in conflict with the federal rural subsistence priority in Title VIII of ANILCA and are preempted by federal law. The State counters that the Federal Subsistence Board, which was established by federal agencies in Alaska, violates the Appointments Clause in the U.S. Constitution, the delegation of authority from the FSB to the Refuge Manager was unlawful, and the Federal closure order was arbitrary and capricious. Ahtna, Inc. and Ahtna Tene Nené, the Kuskokwim Inter-Tribal Fish Commission, the Association of Village Council Presidents, and two subsistence users who live along the Kuskokwim River, Ivan and Betty Magnuson, intervened in support of the United States.

On June 23, Judge Gleason granted the United States' motion for preliminary injunction. The court concluded that the United States was likely to succeed on the merits of its ANILCA preemption claims, and that it had shown irreparable harm as a result of the conflicting federal and state fishing orders. The preliminary injunction enjoined the State from implementing its emergency orders opening the Kuskokwim River to non-rural users and from taking similar actions that authorize fishing 'by all Alaskans" when such actions would be contrary to federal management decisions. This is an ongoing case.

III. CINA & ICWA CASES

***J.P v. State of Alaska*, 506 P.3d 3 (Alaska 2022)**

In a child in need of aid (CINA) proceeding involving an Alaska Native child, the Sun'aq Tribe of Kodiak petitioned the superior court to transfer jurisdiction to tribal court pursuant to the Indian Child Welfare Act (ICWA). The superior court entered a transfer

order and the Sun'aq tribal court subsequently issued a placement decision for the child to live with out-of-state relatives.

While the tribal proceeding was pending, the child's foster parents in Alaska, J.P. and S.P., filed a motion to stay the transfer order in superior court. The superior court denied the stay. The foster parents then filed a motion for a stay pending appeal with the Alaska Supreme Court, which was also denied. The Court invited briefing on two issues in the appeal: (1) whether the foster parents were parties in the CINA proceedings below and may maintain an appeal; and (2) whether the public interest exception to the mootness doctrine applies.

In a March 16, 2022 order, the Alaska Supreme Court dismissed the appeal as moot. According to the Court, assuming without deciding that the foster parents were appropriately granted intervenor-party status in the child's proceedings, there was no remedy available because state courts lack the authority to order the Sun'aq Tribe, a separate sovereign, to transfer jurisdiction back to state court. The Court noted that the argument made by amicus curiae Goldwater Institute in support of the foster parents, that the tribal court lacked jurisdiction over the child's proceedings, was not properly before the Court in the appeal. The only issue was whether the transfer order was correct, which the Court concluded was moot.

Chief Justice Winfree, joined by Justice Carney, concurred in the decision but wrote separately to reiterate his concern regarding foster parent intervention in CINA and ICWA proceedings. According to Chief Justice Winfree, the foster parents should not have been granted intervention in this case for the reasons explained in his dissent in *State, Department of Health & Social Services, Office of Children's Services v. Zander B.*, 474 P.3d 1153 (Alaska 2020). In *Zander B.*, the Court affirmed a superior court decision to stay a child's placement order after the foster parents intervened to contest the state's decision to place the child with an out-of-state grandparent. Then-Justice Winfree (joined by Justice Carney) dissented, concluding that Alaska's CINA statutes and regulations do not allow intervention by foster parents. Then-Justice Winfree predicted that the majority opinion's failure to effectively limit foster parent intervention would lead to untenable results. In his concurring opinion in *J.P.*, Chief Justice Winfree again urged "superior courts to closely scrutinize foster parent intervention efforts in all child in need of aid cases, and particularly in those governed by ICWA."

***Native Village of Chignik Lagoon v. State, Department of Health & Social Services, Office of Children's Services*, 518 P.3d 708 (Alaska 2022)**

The Alaska Supreme Court rejected an Alaska Tribe's attempt to intervene in proceedings under the Indian Child Welfare Act (ICWA) involving a child who was determined to be eligible for membership in a different tribe. According to the Court, under ICWA, an Alaska Tribe's eligibility determination is final and not reviewable by state court.

In this case, two Alaska Tribes—the Native Village of Wales and the Native Village of Chignik Lagoon—both claimed to be a child's tribe under ICWA. The superior court terminated the biological parents' parental rights and granted Wales's motion to transfer the post-termination proceedings to Wales's tribal court. Prior to the transfer, the child's foster father enrolled as a member of Chignik and in January 2021, Chignik intervened and sought to stay and invalidate the transfer order. Wales enrolled the child as a member in February 2021, and, having participated in the proceedings for the past few years, moved to formally intervene.

Wales argued that because the child was already a tribal member (because the child's biological mother was a tribal member), Wales was the only tribe for which the child meets the "Indian Child" standard under ICWA. Neither of the child's biological parents were members of Chignik. In contrast, Chignik claimed the child was eligible for Chignik tribal membership based on his foster family relationship with a Chignik member. Chignik argued that the state court was required to invalidate a tribe's membership determination if, in the court's view, that determination is inconsistent with tribal or federal law.

The superior court concluded the child is both a member of Wales and eligible for membership in Chignik, clarifying that it is not the court's place to question that determination of either tribe and that it "will not, and cannot, question" their determination. The superior court concluded that Wales was the child's tribe and ordered jurisdiction transferred to the Wales tribal court. Applying 25 C.F.R. § 23.109, the superior court determined that Wales had "more significant contacts" with the child and concluded that there was no good cause not to transfer jurisdiction to Wales.

The Alaska Supreme Court affirmed the superior court's decision to defer to the tribes' membership and eligibility determinations. The Court rejected Chignik's interpretation of ICWA's implementing regulations as inconsistent with the regulations, which specify that the tribe determines membership "except as otherwise provided by Federal or Tribal law" and that a "state court may not substitute its own determination regarding a child's membership in a Tribe." In other words, a tribe has the last word in determining its tribal membership unless federal or tribal law provides that another entity—such as the state court or the Bureau of Indian Affairs (BIA)—should make that determination instead.

The Court also affirmed the superior court's determination that Wales is the child's tribe for ICWA purposes, noting that a state court may recognize only one tribe for this purpose. ICWA defines "Indian child" to mean any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. Under federal regulations, the court determines the child's tribal membership in three steps: First, under subsection (a), if an Indian child is "a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe." Second, under subsection (b), if "an Indian child meets the definition of 'Indian child' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes." And third, under subsection (c), if an Indian child is "a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe," the court must provide the tribes an opportunity to decide which should be designated as the Indian child's tribe. If the tribes do not agree, the state court then considers relevant factors to determine the Indian child's tribe based on which tribe has more significant contacts, for which there is an enumerated list of factors. The Court did not reach the question of which tribe has more significant contacts because it agreed that Wales was the only tribe for which the child met the ICWA definition of "Indian child."

The Court raised sua sponte the issue of Chignik's continued standing to pursue these procedural issues on appeal if the court affirmed the superior court's finding that Wales, not Chignik, is the child's tribe for ICWA purposes. The court held Chignik's status as an intervenor was not enough to establish standing for the duration of the case regardless

of the disposition of the issues in which it claims an interest. The court noted that the policies underlying ICWA —"the protection and preservation of Indian tribes and their resources," including "Indian children"— apply both to tribes of which a child is a member and those for which a child can claim eligibility. The court rejected the notion that ICWA's policies are intended to protect the interests of a tribe whose relationship to the child depends on membership eligibility when neither parent is a member of the tribe and the child is a member of another tribe.

***State, Department of Health and Social Services, Office of Children's Services v. Cissy A. and Butch R.*, 513 P.3d 999 (Alaska 2022)**

In a per curiam opinion, the Alaska Supreme Court clarified that cultural expert testimony is not strictly required in every Indian Child Welfare Act (ICWA) parental rights termination case; however, the need for expert testimony about prevailing social and cultural standards of the child's tribe is the rule, not the exception. The State has the burden of showing that expert cultural testimony is "plainly irrelevant" to the termination proceedings if such testimony is not provided.

The appeal involved two consolidated cases in which the superior courts denied petitions to terminate parental rights of Indian children based on the State's failure to present cultural expert testimony. In *Cissy A. and Butch R.*, the State petitioned to terminate the parental rights of an Indian child whose parents struggled with substance abuse and domestic violence. During the termination trial, the State presented brief testimony from a representative of the child's tribe. The superior court determined that termination of parental rights was in the child's best interests, but the superior court concluded that the cultural expert testimony was too vague and generalized to be helpful.

Similarly, in *Linette S. and Marquis D.*, the State petitioned to terminate the parental rights of two Indian children with special needs based on parental substance abuse and neglect. At the termination trial the State presented a single expert witness who testified about the children's welfare and parental risk assessments. The superior court cautioned the State that "this is an ICWA case" and that the State had not offered cultural expert testimony regarding the children's tribal customs. The State then offered two more witnesses who testified in general terms about tribal social and cultural standards, but neither of the State's cultural expert witnesses had specific knowledge of the facts of the

case. The superior court determined that termination of the parental rights was in the children's best interests but that the witnesses' testimony was too vague to satisfy ICWA's cultural expert testimony requirement, as explained in *Oliver N. v. State*, 44 P.3d 171 (Alaska 2019).

In both cases, the superior court concluded that despite its findings that termination would be in the child's bests interest, the court could not do so because the State had failed to "properly conceptualize the cases within the culture and values of the children's Tribes." On appeal, the Alaska Supreme Court affirmed the superior court's determinations in both cases. But the Court clarified that a cultural expert testimony is not strictly required in all ICWA termination cases, specifically disavowing any interpretation of its prior cases suggesting that cultural expert testimony is required in all cases except for certain specific exceptions.

Going forward, the need for expert testimony about prevailing social and cultural standards of the child's tribe is the rule, not the exception. The State bears the burden to show beyond a reasonable doubt that culture is "plainly irrelevant" to the case. Cultural experts should be provided with the same reasonable opportunity to prepare for trial afforded to other experts so that their testimony is grounded in the issues or questions presented in the case and provides meaningful assistance to the court.

***Mona J. v. State, Department of Health & Social Services, Office of Children's Services*, 511 P.3d 553 (Alaska 2022)**

The Alaska Supreme Court provided additional guidance on the "active efforts" standard that the Alaska Office of Children's Services (OCS) is required to follow in order to keep families together in ICWA termination cases. OCS moved to terminate Mona's parental rights to two of her children, both of whom qualified as "Indian children" under ICWA. Mona initially sought assistance from OCS in June 2017, noting that she lacked sufficient family support in Anchorage, was taking medication for anxiety and depression, and was feeling overwhelmed. Subsequently, between June 2017 and March 2021, OCS made multiple efforts to keep the family united, including offering Mona bus passes, arranging for temporary alternative caregivers for the children, arranging for Mona to attend a six-week residential treatment program, placing Mona's children with their father

and paternal grandmother at Mona's request, formalizing contact plans that allowed Mona to visit the children, assisting Mona in finding housing, and creating multiple case plans.

In March 2021, the superior court terminated Mona's parental rights after finding clear and convincing evidence that OCS had made active efforts to provide remedial services and rehabilitative programs intended to prevent the breakup of families. The superior court concluded that Mona was never willing to engage in an attempt to unify her family and actively attempted to frustrate OCS's attempts to provide services. Although the superior court acknowledged that "there were times when OCS was more lax in [its] efforts," the superior court concluded that "OCS testified convincingly that OCS offered services to Mona over the life of the case."

The Alaska Supreme Court affirmed, holding that OCS made active efforts to reunite the family as required by ICWA. The Court explained that "the analysis of active efforts under ICWA turns primarily on OCS's actions, not on the parent's response." Although "a parent's lack of cooperation or unwillingness to participate in treatment does not excuse OCS from making active efforts," a parent's unwillingness to cooperate can impact a court's active efforts analysis if: (1) it can excuse further active efforts once it is clear those efforts would be futile; (2) it can excuse minor failures by OCS; and (3) it can influence what actions qualify as active efforts."

As to the first exception, the Court noted that it should be the least frequently invoked and that when a parent is unwilling to cooperate, OCS must attempt to overcome that noncooperation. The Court also noted that OCS must "[understand] why the parents of Alaska Native and Native American children may be suspicious of OCS and reluctant to cooperate in a case plan." Even so, the Court noted that there is a point at which continued active efforts become futile.

As to the third exception, the Court noted that "a lack of cooperation does not justify a decision to make only passive efforts," but "a parent's noncooperation with OCS will necessarily affect the kind of efforts OCS is able to make toward reunification." Finally, the Court encouraged, as a recommendation of good practice but not a requirement of the law, that trial courts engage in a substantive review of ongoing efforts throughout ICWA proceedings and to collaborate with affected parties on identifying next steps, given the difficulty of assessing active efforts retrospectively over many years.

The Court held that OCS made active efforts to reunite Mona with her children. The Court noted that OCS provided bus passes and cab vouchers, coordinated with family members to provide temporary care, creating case plans, arranging assessments and appointments, coordinating flights, supplying applications for multiple treatment facilities, assisting her with obtaining housing separate from her boyfriend, and contacting members of Mona's family to seek alternative placements for the children, among other things. The Court also noted that OCS facilitated visitation throughout the case, and coordinated flights and other resources to assist with visits. OCS also "continued its efforts despite Mona's lack of consistent cooperation." Although OCS's efforts were not perfect, they were "affirmative, active, thorough and timely," as required by ICWA.

IV. CORPORATE GOVERNANCE CASES

Southcentral Foundation v. Alaska Native Tribal Health Consortium, No. 3:17-cv-00018-TMB (D. Alaska Jul. 20, 2022)

The federal district court for the District of Alaska concluded that the Southcentral Foundation (SCF)—a member of the Alaska Native Tribal Health Consortium (ANTHC)—is entitled to ANTHC corporate documents and information necessary for SCF to fulfill its governance role under federal law. ANTHC is an intertribal consortium created by Congress pursuant to Section 325 of the Department of the Interior and Related Agencies Appropriation Act of 1998 to provide certain statewide health services at the Alaska Native Medical Center in Anchorage, Alaska. SCF—a nonprofit regional tribal health organization that provides health care programs and services to over 65,000 Alaska Natives—is a member of the intertribal consortium, with a representative serving as a director on the ANTHC Board.

The case involved a dispute over what information SCF is entitled to receive from ANTHC in order to "exercise effectively the governance and participation rights" created by section 325. In January 2017, SCF filed a complaint seeking a declaration that ANTHC's policies violated Section 325 by contemplating that certain information would be withhold from SCF's representative and restricting information sharing between SCF's ANTHC representative and SCF management.

SCF and ANTHC entered into a partial settlement agreement, which the court consented to as a stipulated partial judgment. However, SCF reserved the right to continue its lawsuit with respect to certain "reserved issues": (1) whether ANTHC can share information covered by the attorney-client privilege, attorney work product doctrine or other similar protection with SCF under the common interest doctrine, joint defense doctrine, or other applicable doctrine without waiving the privilege; (2) the persons at SCF with whom SCF's representative may share information; and (3) the documents and information that SCF's representative may share with SCF and whether the ANTHC Board can amend ANTHC's governance documents in a way that reduces the documents and information that SCF may receive.

The district court granted in part SCF's motion for summary judgment. The court concluded that ANTHC's policies violated section 325 by effectively denying SCF documents and information that were necessary for SCF to exercise its governance and participation rights in ANTHC. The court held Section 325 entitles SCF to all documents and information that are necessary to exercise these rights and that any ANTHC policy to the contrary violates Section 325. According to the court, for SCF's governance and participation rights to be meaningful, SCF's representative must be able to share documents and information necessary to exercise these rights with SCF management. Depending on the circumstance, this may include SCF's Board of Directors, Officers, and legal counsel, subject to their agreement to keep ANTHC documents and information confidential. The case was dismissed with prejudice.

Triem v. Kake Tribal Corporation*, 513 P.3d 994 (Alaska 2022)

The Alaska Supreme Court concluded that an attorney representing two classes of shareholders in lawsuits against the Kake Tribal Corporation (KTC) lacked standing to appeal the superior court's entry of Rule 60 relief from judgment. The case involves a longstanding dispute between KTC and its shareholders regarding a benefit distribution plan that improperly discriminated among shareholders. The attorney represented two classes of shareholders, which each sued KTC. One class prevailed in litigation, receiving a monetary judgment, including an attorney's fees award. The other class entered into a court-approved settlement agreement with KTC for damages.

After KTC filed for Chapter 11 bankruptcy, both classes of shareholders voted to relieve KTC of its outstanding debt to the shareholders. The shareholder classes each moved for court approval of their debt forgiveness proposals. The superior court granted the classes' request for debt forgiveness, treating the requests as Rule 60 motions.

The attorney and a class member appealed; however, on July 8, 2022, the Alaska Supreme Court dismissed the appeal in part for lack of standing. According to the Court, neither the attorney nor the class member who appealed identified "any personal adverse impact" from the Rule 60 order—at least with respect to the class that the appellant shareholder did not belong. The Court ordered further briefing on the question of whether the class member may appeal the Rule 60 order with respect to the class to which he did belong. However, the Court left open the possibility that the class member may still lack standing: "This briefing may include further discussion of whether [the class member] is a real party in interest with authority to purse the appeal as to the Hanson class proceedings." This is an ongoing case.

***Pederson v. Arctic Slope Regional Corporation*, 517 P.3d 606 (Alaska 2022)**

This is the third appeal in this case involving an Arctic Slope Regional Corporation (ASRC) shareholder's allegation that ASRC violated his statutory right to inspect certain corporate records under AS 10.06.430(b). The shareholder sought information relating to executive retirement plans and compensation, as well as an alleged transfer of an interest in an ASRC subsidiary to executives. The shareholder explained that his purpose in seeking corporate records was to permit other shareholder review of executive compensation and to obtain shareholder signatures to amend ASRC's procedures and bylaws relating to executive compensation. After informal negotiation failed, the shareholder filed suit under AS 10.06.430(c).

In *Pederson I*, the Alaska Supreme Court reversed and remanded the superior court's judgment in favor of ASRC, holding that the shareholder's right to inspect "books and records of account" includes records of individual executive compensation and transfer of corporate assets to executives. On remand, the shareholder moved for summary judgment. The superior court denied the motion, reasoning that *Pederson I* was new law and that ASRC had not violated the shareholder's inspection rights at the time it denied the request. The shareholder petitioned the Alaska Supreme Court for review, and the Supreme

Court again reversed and remanded to the superior court, instructing that *Pederson I* was the existing and applicable law at the time ASRC denied the shareholder's request.

On remand for the second time, ASRC argued that the shareholder failed to state a proper purpose for his request to inspect corporate records. The superior court agreed and issued a final judgment in favor of ASRC. On appeal, the Alaska Supreme Court again reversed, holding that the shareholder had stated a proper purpose. The Court instructed that, "[t]ypically, a court should be able to determine from the face of the inspection request whether a stated purpose is a legally proper basis for inspection." Although here, the shareholder's requests included paragraphs entitled "Purpose of Inspection," the superior court erred in limiting its analysis of the purpose to those paragraphs. Instead, the Court instructed that "[t]he stated purpose must be gleaned from the totality of the written request." The Court concluded that the shareholder's request made it clear that he sought information about executive compensation because he suspected "shenanigans" by ASRC executives. Additionally, the Court was explicit that "[a]uditing executive compensation is a proper purpose for a shareholder to pursue," explaining that this conclusion was supported by both legislative history and its holding in *Pederson I*.

***Borer v. The Eyak Corporation*, 507 P.3d 49 (Alaska 2022)**

The Eyak Corporation is the Alaska Native Village Corporation for Cordova. Eyak's Bylaws require all directors to sign a Code of Conduct and Confidentiality Agreement before being seated on the Board. In 2019, Lucas Borer was elected as a director. However, when Borer was presented with the Code of Conduct and Confidentiality Agreement, he refused to sign both. Eyak determined that Borer was ineligible to be seated as a director and filled the director vacancy with the candidate who received the next highest number of votes.

Borer filed a lawsuit against Eyak, challenging the Code of Conduct and Confidentiality Agreement, and seeking a court order that Eyak seat him as a director. In May 2020, the superior court granted summary judgment to Eyak, dismissed Borer's claims, and awarded Eyak attorney's fees. The superior court concluded that because Borer refused to sign the required Code of Conduct and Confidentiality Agreement as required by Eyak's Bylaws, he could not be seated as a director. Borer appealed.

The Alaska Supreme Court rejected Borer's attempt to challenge Eyak's code of conduct and confidentiality agreement for the board of directors, ruling that the shareholder's lawsuit was not ripe because there were no concrete facts showing how the Code of Conduct and Confidentiality Agreement were being applied that would allow the Court to review their legality. The Court focused on the ripeness doctrine, concluding that "the risks of making a decision without concrete facts outweigh the harm of withholding a decision." "Borer's argument in a nutshell is that were he to sign the [code of conduct and confidentiality agreement] as a condition of being a director of the board," he would be unable "to fulfill his fiduciary duties to the corporation." But because Borer had not alleged any "concrete factual scenarios" where the code of conduct and confidentiality agreement were being applied, the Court could not "confidently answer that question without seeing how the challenged terms of those agreements are applied to real-world situations." Thus, the Court affirmed the superior court's judgment in favor of Eyak.

V. TRIBAL SOVEREIGNTY CASES

Yvonne Ito v. Copper River Native Association, No. 3AN-20-06229CI (Alaska Sup. Ct. 2021), No. S-17965*

This case centers on the question of whether a non-profit tribal organization providing services under the Indian Self-Determination and Education Assistance Act (ISDEAA) is entitled to sovereign immunity under Alaska law. Yvonne Ito was employed by Copper River Native Association (CRNA) for approximately a year and a half until she was fired in May 2019. Ito sued CRNA in superior court and CRNA moved to dismiss, asserting tribal sovereign immunity as a jurisdictional defense. Ito opposed, arguing that CRNA was not entitled to sovereign immunity under Alaska law.

The superior court granted the motion to dismiss on two separate grounds: (1) because ISDEAA is explicit that tribal organizations "have the rights and responsibilities of the authorizing tribe," including sovereign immunity; and (2) because CRNA met the Alaska Supreme Court's test in *Runyon v. Association of Village Council Presidents* to establish that CRNA was an "arm of the tribes" and that the tribes were the real parties in interest.

Ito appealed to the Alaska Supreme Court, arguing that the superior court misapplied *Runyon*. According to Ito, because CRNA is a non-profit corporation registered with the State it was a legal entity separate and distinct from its member villages, who are not liable to pay any judgment against Ito. Ito also argued that the superior court erroneously concluded that ISDEAA grants *sovereign* immunity to tribal organizations like CRNA. Ito argued that the only rights and responsibilities conferred by tribes to tribal organizations via the statute are the rights and responsibilities conferred by the statute to the tribes. Ito also pointed to 25 U.S.C. § 5332(1), which provides that "nothing in [ISDEAA] shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."

CRNA responded that ISDEAA establishes that tribal organizations or consortia, like CRNA, have sovereign immunity from suit, and that a contrary interpretation would undermine the purpose of ISDEAA. CRNA also argued that federal common law, including the Ninth Circuit's test in *White v. University of California*, clearly established that CRNA was entitled to sovereign immunity and that the Alaska Supreme Court has historically deferred to federal courts on questions of tribal sovereign immunity. Finally, CRNA argued that its member tribes were the real parties in interest because the funds the tribes would otherwise receive under ISDEAA as tribes are received by CRNA, and CRNA uses those funds to provide services for the tribes' members.

The Court heard oral arguments in June 2022 and a decision is forthcoming.

***State of Alaska v. Shungnak Native Store*, 2KB-22-00139CR (Alaska Sup. Ct.)**

On April 27, 2022, the State of Alaska filed an information charging the Shungnak Native Store with two class A misdemeanors related to a 2020 oil spill that occurred during the course of a fuel transfer in Shungnak. The Shungnak Native Store is wholly owned by the Native Village of Shungnak, a federally-recognized Alaska Tribe. The Native Village of Shungnak filed a limited entry of appearance in the criminal case, indicating that it challenged jurisdiction on the grounds of sovereign immunity. On August 10, the State voluntarily dismissed all charges.

State v. Tony*, 4BE-21-00802CR (Alaska Sup. Ct.)

In Bethel, Superior Court Judge Terrence Haas issued an oral ruling that an arrest of a criminal defendant by tribal police officers (TPOs) for state law violations did not require suppression of the evidence obtained subsequent to the arrest. The defendant was arrested for felony assault by three TPOs in Tooksok Bay and turned over to the Alaska State Troopers. After indictment, the defendant moved to suppress evidence that was seized after his arrest, specifically the gun that he allegedly grabbed during an altercation with the TPOs that resulted in the felony assault charges. The defendant argued that the TPOs lacked authority under state law to make an arrest and thus, the resulting evidence should be suppressed. The State responded that the arrest was lawful because the definition of "peace officer" in statutes included TPOs.

The superior court sua sponte requested briefing from amici curiae regarding the authority of TPOs to make an arrest for violations of state law. The Alaska Native Justice Center filed an amicus brief urging the court to frame the issue in terms of tribal sovereignty. Citing the U.S. Supreme Court's recent case, *United States v. Cooley*, 141 S. Ct. 1638 (2021), the Alaska Native Justice Center explained that tribes have inherent sovereign authority to protect their members from threats to public safety, including by directing TPOs to arrest violators for crimes under state law. Thus, the TPOs had authority to arrest the defendant regardless of whether the TPOs are considered "police officers" or "peace officers" under state statutes.

After oral arguments on October 17, Judge Haas issued an oral ruling agreeing with the Alaska Native Justice Center and denying the defendant's motion to suppress the evidence. A written decision is forthcoming.

VI. OTHER CASES

***Association of Village Council Presidents Regional Housing Authority v. Mael*, 507 P.3d 963 (Alaska 2022)**

The Alaska Supreme Court held that a Regional Native Housing Authority's contractual duty to inspect a home under a HUD Indian housing program gave rise to a

tort duty when a boiler exploded causing serious personal injuries. AVCP Regional Housing Authority (AVCP RHA) administers a homeownership program established by HUD regulations under the 1937 Indian Housing Act (1937 Act), the predecessor to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Under the 1937 Act "Mutual Help" program, AVCP RHA developed single family homes for eligible families, who would enter into a "lease to own" agreement for 25 years. After 25 years, homebuyers were deemed to have fully paid the home's declining "purchase price," and could receive record title.

In 1984, Thomas and Rose Mael signed a HUD form "Mutual Help and Occupancy Agreement" for their AVCP RHA home. The Maels agreed to perform regular maintenance while AVCP RHA agreed to regularly inspect and ensure that "the housing is being kept in decent, safe and sanitary condition." The agreement did not state an expiration date, but it provided that the lease under the agreement terminated when the purchase price of the home was fully amortized after 25 years.

The Maels' home became eligible for conveyance in 2009. AVCP RHA did not convey the home to the Maels, but continued to inspect the home, as it had done annually since 1986, until 2011. AVCP RHA also continued to accept monthly administrative charges after the home became eligible for conveyance.

In 2016, the Maels' adult son was severely injured when the boiler exploded. The Maels sued the housing authority in tort to recover for his injuries. Expert testimony at trial suggested that the cause of the explosion was lack of maintenance and inspection. The superior court ruled that the agreement imposed a tort duty on the housing authority to inspect the home, including the boiler, with reasonable care and that the duty existed at the time of the explosion. The jury awarded over 3 million dollars in damages to the family, concluding that ACVP RHA negligently failed to inspect the boiler.

On appeal, AVCP RHA argued that the superior court erred in concluding that the agreement created a tort duty at the time of the explosion. AVCP RHA conceded that the agreement created a contractual obligation to inspect the boiler, but argued that a contractual promise could not give rise to a tort duty, and that any duty under the agreement expired in 2009, when the home became eligible for conveyance. The Alaska Supreme Court rejected both arguments.

First, the Court held that the agreement and applicable federal regulations gave rise to a tort duty to inspect the boiler with reasonable care. The Court reasoned that although "[p]romises set forth in a contract [generally] must be enforced by an action on that contract," there is an exception "when a party's actions violate a general duty of care," which may give rise to an independent action in tort. Noting that tort law imposed a duty of care on individuals who undertake to perform inspections, the Court held that because AVCP RHA had undertaken to perform inspections in the agreement, the agreement could give rise to a tort duty. The Court also found that AVCP RHA's duty to inspect had an "independent source in federal law," under a HUD regulation that "placed 'overall responsibility' for the home's maintenance and safety on the housing authority."

Second, the Court concluded that because AVCP RHA had not conveyed the home to the Maels, it continued to have a duty to inspect. Although the agreement provided that the lease under the agreement expired after 25 years, the Court held that the term "lease" referred only to a subpart of the agreement, not the entire agreement, and that the agreement governed the parties' relationship until conveyance or termination. The Court noted this interpretation was also supported by the fact that AVCP RHA initially performed inspections after 2009, and continued to collect payments from the Maels. The Court affirmed the jury verdict for the Maels.