2024 Alaska Native Case Law Update

October 9, 2024

Anna Crary and Andy Erickson[1]

Landye Bennett Blumstein LLP

701 W. Eighth Ave, Suite 1100

Anchorage, AK 99501

I. LANDS AND PROPERTY CASES

***State of Alaska v. Newland*, No. 3:23-cv-00007-SLG (D. Alaska June 26, 2024)**

On June 26, 2024, Judge Gleason vacated and remanded a decision from the U.S. Department of the Interior (DOI) to place into trust a 787-square-foot parcel of land located in Juneau owned by the Central Council of Tlingit & Haida Indian Tribes of Alaska (Tlingit & Haida).

The State of Alaska filed suit after the DOI Assistant Secretary of Indian Affairs approved Tlingit & Haida's application for the DOI to accept the parcel into trust. The State argued that DOI's decision to accept land into trust on behalf of Tlingit & Haida was arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and otherwise contrary to the law in violation of the Administrative Procedure Act.

In considering whether DOI has authority to take land into trust in Alaska, the court looked to four relevant federal statutes: the Indian Reorganization Act of 1934 (IRA); the Alaska Indian Reorganization Act of 1936 (Alaska IRA); the Alaska Native Claims Settlement Act of 1971 (ANCSA); and the Federal Land Policy and Management Act of 1976 (FLPMA).

The court noted that Section 5 of the IRA authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians." And while FLPMA repealed Section 2 of the Alaska IRA (authorizing the Secretary to establish reservations in Alaska), it did not repeal Section 1 of the Alaska IRA, which made the Secretary's trust acquisition authority in Section 5 of the IRA applicable to Alaska.

---

[1] Anna and Andy were courageously assisted by LBB Associates Noah Star, Jackson Morawski, Ryan Thomas, and Suzanne Adler.

The State of Alaska argued that ANCSA implicitly repealed DOI's land into trust authority in Alaska. However, the court stated that a repeal by implication can occur only where provisions in the two acts are in irreconcilable conflict, or where a later act covers the whole subject of the earlier act and is clearly intended as a substitute.

The court found that while ANCSA eliminated all existing reservations (except Metlakatla), ended the Alaska Native allotment program going forward, and extinguished all aboriginal claims, it did not end the discretionary authority that Congress had vested in the Secretary through the Alaska IRA to take private lands into trust in Alaska. Ultimately, the court held that it was possible to give effect to both ANCSA and the Alaska IRA, and further that ANCSA did not cover the whole subject of the Alaska IRA and was not clearly intended as a substitute.

The court found that while the Secretary has the authority to take lands into trust in Alaska, the Assistant Secretary's decision in this case was arbitrary and capricious. First, the court found problematic that the decision cited the "restoration of Indian lands" as justification for acquiring the parcel into trust. The court stated that ANCSA extinguished "[a]ll aboriginal titles . . . and claims of aboriginal title in Alaska based on use and occupancy." Thus, basing the decision on the "restoration of Indian lands" was arbitrary and capricious "because it relies on a factor—aboriginal title—that Congress had not intended the agency to consider by extinguishing such title through ANCSA."

Second, the court found that the decision failed to establish, as a prerequisite to taking land into trust, whether Tlingit & Haida qualified under the definition of "Indian" in Section 19 of the IRA. The court took issue with the Assistant Secretary's conclusion that "IRA Section 19, however, provides a standalone definition of 'Indian' applicable to Alaska Natives and Alaska Tribes, which eliminates any need to consider their eligibility under Section 19's other definitions of 'Indian,' including whether the Tribe was 'under Federal jurisdiction' in 1934." Instead, the court found that there was no standalone "Alaska Definition" which would allow the DOI to take land into trust for Alaska Natives without making a finding that one of the three definitions within Section 19 of the IRA has been met.

***Norton Sound Health Corp. v. City of Nome*, No. 2NO-22-00095CI (Alaska Super. Ct. Jul. 18, 2023) (on appeal No. S-18833)**

This case addresses whether tribal entities providing healthcare services under the Indian Self-Determination and Education Assistance Act (ISDEAA) are exempt from paying municipal property taxes. Norton Sound Health Corporation ("Norton Sound") applied for exemptions from the City of Nome's real property tax for its hospital and six other properties in Nome. Norton Sound is a tribally owned nonprofit healthcare

organization carrying out services under an ISDEAA self-governance compact. Norton Sound claimed an exemption under AS 29.45.030(a)(3), which exempts from taxation property used exclusively for hospital and charitable purposes. The six non-hospital properties included two facilities providing housing for hospital and clinic employees, a patient hostel, and a storage facility for equipment and supplies (Properties 1 through 4), as well as two vacant buildings (Properties 5 and 6). The City issued assessment notices that effectively denied Norton Sound's exemption request for these six properties.

Norton Sound appealed this denial to the Nome Board of Equalization. After a hearing on appeal, the Board of Equalization issued a written decision upholding the denial and finding that the "hospital purposes" exemption should be narrowly construed to encompass only facilities providing actual medical, surgical, or nursing care. Norton Sound further appealed to the Superior Court.

The Superior Court reversed the Board of Equalization's exemption denial for Properties 1-4, but upheld it for the vacant Properties 5 and 6. Because Norton Sound uses Properties 1-4 to support its delivery of healthcare and medical services, the Superior Court concluded that those properties fell within the exemption for "hospital purposes." Additionally, Properties 1-4 were plainly used for "charitable purposes"—the Board of Equalization had simply ignored or overlooked this argument for exemption. However, the Superior Court decided that because Properties 5 and 6 were vacant, they were not being "used" for hospital or charitable purposes, or part of any programs subject to comprehensive federal oversight. Accordingly, exemptions for Properties 5 and 6 were properly denied.

Norton Sound also argued that the taxation was precluded by implied federal preemption because it uses the properties to carry out federal programs that are subject to comprehensive oversight. The Superior Court found that the City's taxation of Norton Sound's properties was preempted as a matter of law because of comprehensive and pervasive federal oversight under Norton Sound's ISDEAA Title V multi-tribe self-governance compact with IHS. The Court reasoned that local taxation could impede the federal interest in promoting Indian healthcare. Finally, Norton Sound argued that it enjoys sovereign immunity from suits to collect taxes, but the Court rejected this argument as inapplicable because the case was not a suit to collect taxes.

The City appealed the ruling to the Alaska Supreme Court, and it is currently awaiting oral argument.

II. FISH AND GAME CASES

***State of Alaska v. Federal Subsistence Board & Organized Village of Kake*, 700 F. Supp. 3d 775, No. 3:20-cv-00195-SLG (D. Alaska Nov. 3, 2023)**

On remand from the Ninth Circuit, the Federal District Court for District of Alaska addressed the State's challenge to the Federal Subsistence Board's ("FSB's") emergency action to open a hunt for the Organized Village of Kake ("the Village") during the COVID-19 pandemic. The district court held that the FSB reasonably interpreted Title VIII of ANILCA to authorize the FSB to open emergency hunts, to allow delegation of that authority to local federal land managers, and to subdelegate limited authority to the Village to select participating hunters and to distribute the harvest.

In 2020, food security concerns in rural Alaska prompted the FSB to delegate authority to local federal land managers to issue emergency hunts. The FSB issued a "delegation letter" outlining the process for these emergency hunts to open. Pursuant to letter, the Organized Village of Kake requested that the local Tongass National Forest district ranger open an emergency hunt for the Village due to food security concerns. The district ranger complied with the FSB delegation letter's process and ultimately deferred the request to the FSB itself. The FSB authorized a limited emergency hunt for up to 60 days to be managed by the district ranger. Participation was limited to "federally qualified users," meaning rural residents as defined by FSB regulations, selected by the Village. The hunt successfully concluded after 60 days and the harvest was distributed to 135 households in the Village.

The State first challenged the emergency hunt opening in 2020, but the district court dismissed that challenge as moot since the hunt had already concluded. However, the Ninth Circuit reversed, holding that the challenge fell within the public interest exception to mootness.

On remand, the district court addressed the scope of the remand and the major questions doctrine before determining the substantive merits of FSB's authority to delegate. The court rejected that the law of mandate prevented considering new arguments raised by the State. Because the issue of whether ANILCA authorizes a sub-delegation of FSB authority to local federal land managers or the Village were not addressed on appeal and also not moot, the court found them ripe for consideration on remand. The court then concluded that the "Major Questions Doctrine" did not bar the FSB's interpretation of ANILCA because the narrow issue before the court – whether the FSB could open an emergency hunt for federally qualified rural subsistence users – did not pose a major question.

The court first addressed the "substantive issues" of the remand. On the issue of the FSB's authority to open emergency hunts, the court determined that ANILCA was ambiguous on the hunt-opening authority question and used the *Chevron* doctrine's second step – whether the FSB's interpretation of ANILCA was "reasonable" and warranting deference – to resolve the case. The court agreed with the FSB's analysis that in the "continued absence of a state program compliant with ANILCA's rural subsistence preference," the FSB had to step in and ANILCA gives the FSB authority to implement regulations to manage subsistence as is necessary. Although ANILCA does not expressly authorize opening emergency hunts, ANILCA "read as a whole, clearly expresses Congress's intent create a federal regulatory scheme to 'protect the resources related to subsistence needs' and 'to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.'" The court looked to section 804 and 805's implementation of the federal responsibility to manage for subsistence opportunity as evidence that FSB's hunt-opening authority in 50 CFR § 100.19 was a reasonable interpretation, finding implied authority for the FSB to do more than just "clos[e] public lands to the taking of fish and wildlife," and instead "to actively manage to ensure the physical well-being of rural residents of Alaska in an emergency." The court similarly found the State's arguments regarding ANILCA's legislative history unpersuasive, reading ANILCA's legislative history to instead support the position that the FSB has emergency hunt-opening authority under section 805.

The court rejected the State's arguments suggesting a narrower subsistence priority. The court disagreed that the rural subsistence priority applies only to restrict subsistence uses. Such a narrow reading nullified ANILCA's broader objective to give rural residents an opportunity to engage in "a subsistence way of life." And the State could not argue that ANILCA is not meant to diminish its management authority when the State failed to manage subsistence uses as Title VIII requires. Section 1314 of ANILCA plainly instructs that "[n]othing in [ANILCA] s intended to enlarge or diminish the responsibility and authority of the State … except as may be provided in Title VIII." Title VIII is clear that there "must be a 'rural subsistence priority.'" Accordingly, FSB's regulation regarding emergency hunt authority was consistent with Title VIII even if it altered the State's management authority. The court held that FSB's interpretation of its own authority was reasonable and therefore warranted *Chevron* deference.

Addressing the FSB's authority to subdelegate hunt opening authority to local managers, the court held that the delegation was reasonable "given the valid concern of a potentially large number of food security and pandemic-related emergency requests at the outset of the pandemic." ANILCA broadly authorizes the Secretaries to prescribe regulations as necessary and appropriate to carry out ANILCA's rural subsistence priority. The court deemed this challenge to be tied up in the first issue. Because the court "concluded that the FSB's interpretation of ANILCA to include authority to open

emergency hunts [was] reasonable," the court also held that "FSB's delegation of that authority to local federal land managers as authorized by its promulgated regulations valid.

Finally, addressing the FSB's authority to sub-delegate authority to the Village, the court determined the only sub-delegation that occurred was the selection of hunts under the distribution of game. The federal government had oversight over all other rules under the terms of the emergency special action. The limited sub-delegation to a tribe was permissible as the Tribe is separate sovereign with authority over its own members and territory. Under Ninth Circuit and U.S. Supreme Court precedent sub-delegation to a tribal sovereign does not require express authority. This limited sub-delegation was therefore permissible.

***Metlakatla Indian Community v. Dunleavy*, No. 5:20-cv-0008-SLG (D. Alaska June 7, 2024)**

This case concerns the geographic scope of the Metlakatla Indian Community's reserved rights to fish in off-reservation waters. On August 7, 2020, Metlakatla sought declaratory relief that it had a reserved fishing right to the non-exclusive traditional fishing grounds reserved to them in 1891 when Congress established Metlakatla's reservation, and a permanent injunction preventing the State from asserting jurisdiction over Metlakatla when inconsistent with that reserved right.

The Alaska federal district court's initial decision held that Metlakatla "did not have implied off-reservation fishing rights" and dismissed the suit. On appeal, the Ninth Circuit reversed, 58 F.4th 1034 (9th Cir. 2023), holding that the 1891 congressional act establishing Metlakatla's reservation included an implied right to non-exclusive off-reservation fishing in the traditional fishing grounds." The Ninth Circuit instructed the district court to determine whether Metlakatla's traditional fishing grounds protected by the reserved right included the waters managed by the Alaska Department of Fish and Game, known as Alaska Districts 1 and 2.

On remand, the State of Alaska argued that the Alaska Native Claims Settlement Act (ANCSA) extinguished all of Metlakatla's reserved and aboriginal rights. The State also argued that Metlakatla could not prove that it had actual, exclusive, and continuous use of off-reservation waters. Metlakatla maintained the case was about "reserved rights, a legal theory distinct from aboriginal rights" because "[a] reserved right may arise regardless of whether an aboriginal right to the same land or resource previously existed."

The district court concluded that Metlakatla held an implied off-reservation fishing right in the traditional fishing grounds by virtue of the 1891 Act of Congress establishing the reservation. The district court clarified that the Ninth Circuit's decision "did not rest on

aboriginal rights, rather, it was based on an implied reserved right from the 1891 Act." The district court rejected the State's position that the discussion of Metlakatla's traditional fishing grounds and the purpose behind the 1891 reservation required demonstrating aboriginal rights, i.e., that Metlakatla's use of the waters must be exclusive, and reiterated that the Ninth Circuit established that Metlakatla possessed reserved, not aboriginal, rights, rendering ANCSA irrelevant in determining the scope of the reserved rights.

Accordingly, the district court determined that the remand required a limited factual inquiry into whether Metlakatla's "traditional fishing grounds" reserved by congressional act included the waters within Alaska Fishing Districts 1 and 2. The district court rejected as "premature" the State's arguments that the limited entry program is a permissible regulation of the reserved rights for conservation reasons. At trial, the district court will determine whether the traditional off-reservation fishing grounds included the waters within Alaska's Districts 1 and 2, and what "aspects of the State's limited entry program are incompatible with the Community's off-reservation fishing rights."

***Sitka Tribe of Alaska v. State of Alaska, Department of Fish & Game*, 540 P.3d 893 (Alaska 2023)**

The Alaska Supreme Court rejected the Sitka Tribe of Alaska's constitutional challenge to the Alaska Department of Fish and Game's (ADF&G) decision to withhold a scientific study from consideration by the Board of Fisheries. The Tribe argued that the Sustained Yield Clause in Article VIII, section 4 of the Alaska Constitution requires ADF&G to provide all relevant scientific information to the Board in making policy decisions. Because ADF&G never gave the Board a "report that analyzed the Department's current method of forecasting the abundance of spawning herring stock, called an age-structured analysis," the Tribe argued that ADF&G failed to comply with its constitutional duties.

In its decision, the Alaska Supreme Court concluded that ADF&G has discretion to decide what information is relevant and how it is shared with the Board, and that those discretionary decisions are subject only to "hard look review" under Article VIII of the Alaska Constitution. The Court rejected the Tribe's position that the Alaska Constitution imposed a duty on the ADF&G to share the "best information available" with the Board and concluded that hard look review only requires that the ADF&G consider "all relevant information and 'engage[] in reasoned decision making.'" The Court held that ADF&G's decision to not provide the report to the Board did not violate the hard look standard and was not "arbitrary because it was a highly technical report mostly concerned with computer coding fixes to the biomass forecasting program." Further, because the decision of what information to communicate and how to communicate was already subject to hard look review, the Court "declined to create a constitutional requirement that [is] not in the plain

language of article VIII, section 4 of the Alaksa Constitution" and that would infringe on the legislature constitutional powers to manage Alaska's resources, a power the legislature in turn delegated to the Board.

***United States v. State of* Alaska, No. 1:22-cv-00054-SLG (D. Alaska March 29, 2024)**

In 2022, the United States sued the State of Alaska to enjoin the State's emergency orders opening subsistence salmon fishing on the Kuskokwim River to "All Alaskans." The State's emergency orders conflicted with federal orders issued under the Alaska National Interest Lands Conservation Act (ANILCA) which closed parts of the Kuskokwim River to salmon fishing except for qualified rural residents. The federal district court for the District of Alaska allowed the Kuskokwim Inter-Tribal Fish Commission, Association of Village Council Presidents, Ahtna Tene Nené and Ahtna, Inc., and the Alaska Federation of Natives to intervene on the side of the United States.

On March 29, 2024, the district court granted the United States' and intervenors' motions for summary judgment, concluding that the federal government's subsistence fishing orders preempted the State's contrary orders. The district court determined that the relevant portions of the Kuskokwim River adjacent to a national wildlife refuge were "public lands" under Title VIII of ANILCA based on the Ninth Circuit's *Katie John* precedent, which remains binding law. The district court determined that the *Katie John* precedent was not clearly irreconcilable with *Sturgeon.* The district court also rejected the State's arguments that the Federal Subsistence Board violated the federal constitution's Appointments Clause. According to the district court, the Federal Subsistence Board was authorized by law and its members are inferior officers not subject to the Appointments Clause. The State's appeal is currently pending before the Ninth Circuit. This is an ongoing case.

III. CINA & ICWA CASES

***Anton K v. State of Alaska, Department of Family & Community Services, Office of Children's Services*, ___ P.3d ___, No. 18916 (Alaska Sup. Ct. Aug. 30, 2024)**

The Alaska Supreme Court determined that the State had made active efforts toward reunifying an incarcerated father's family under the Indian Child Welfare Act (ICWA). Anton was the father of two children who were eligible for enrollment in his Tribe qualifying them as Indian children under ICWA. The two children were removed from Anton and their mother's home in 2019 and placed in OCS's temporary custody before entering a foster home in Anchorage. Following removal, OCS engaged with Anton and the children's mother, developing case plans, organizing at least one in-person visit, and helping Anton travel to and from OCS visits and appointments by taxi voucher. Anton had

a case plan with OCS requiring him to engage in substance abuse assessments and treatment, drug testing, violence parenting education and domestic violence intervention classes, among other services. However, before he could engage in those services under the case plan, he was arrested and incarcerated.

OCS continued to make efforts to reunify the children with their parents – directed at both Anton and Keri, as well as to place the children with Anton's and Keri's relatives. But, the COVID-19 Pandemic limited the services provided to Anton during the first 15 months of his incarceration. Despite the pandemic, OCS's efforts included offering to allow Anton to write letters to his children, bringing cards written by Anton to his children, and send him photographs of the children, as well as inquiring about (but not following through on setting up video visitation with the children). The remote location of his incarceration and his restricted custody level complicated OCS's efforts to establish visitation.

After Keri relinquished her parental rights in April 2023, OCS made efforts to place the children with either Anton or Keri's relatives. Anton suggested several relatives as placement, which OCS investigated and conferred with the children's Tribe about, but ultimately declined as placements. OCS continued to work with the children's Tribe to find placement options elsewhere in the children's family. OCS ultimately placed the children with their maternal uncles.

The superior court then terminated Anton's parental rights, finding that there was clear and convincing evidence that OCS had made active efforts. The Court cited OCS's case plan for Anton and OCS's work with the Tribe to reunify the family and place the children. The superior court acknowledged deficiencies in visitation efforts but found that Anton's ability to visit the children was "hampered by [his] imprisonment." The court noted OCS's inconsistency about what kind of visitation was appropriate, but also identified some active efforts that OCS had made to connect Anton with his daughters, including the option to write letters to them that Anton declined.

The level of OCS's efforts was the only issue on appeal. Anton argued that OCS made active efforts toward reunification prior to his arrest, but that OCS failed to make active efforts while he was incarcerated. The Alaska Supreme Court determined that OCS's efforts during Anton's incarceration were sometimes passive and significantly lacking. Overall, the Court held that OCS made active efforts by working to reunify the children with Anton before he was incarcerated through case planning and service provision, by trying to reunify the children with Keri, and working with Anton and the children's Tribe to place the children with extended family, including those identified by Anton. The court further acknowledged the difficulties with Anton's rehabilitative services and case planning while incarcerated. Though the pandemic and the nature of his incarceration made some efforts difficult, the court noted that Anton's conduct limited his programming options, as

he his "inability to conform to [DOC] rules [had] also interfered with his access to rehabilitative opportunities and visitation with his children.

The Court reiterated that ICWA requires continued active efforts even during a parent's incarceration. Active efforts must be tailored to the facts and circumstances of the case; in the case of an incarcerated parent, the Court has "credited efforts" towards the nonincarcerated parent because those efforts are important to family reunification when reunification with the incarcerated parent may not be possible "within a reasonable time frame." The Court read ICWA's implementing regulations to support crediting active efforts to a nonincarcerated parent because the regulations list activities aimed at supporting the children and their family as part of active efforts, and not just efforts targeting the parent facing parental rights' termination. Accordingly, the Court held "when a parent has been incarcerated for an extended period, and particularly when the parent remains incarcerated at the time of the termination trial and may continue to remain so for a substantial period, OCS's work to place the child with an extended family member who supports the goal of reunification may be credited by the court toward active efforts."

Applying this rule to Anton's case, the Court assessed both "weaknesses in OCS's efforts," but also "some important strengths." Anton conceded that OCS's efforts, including arranging visitation, including him in decision meetings, and providing him with taxi vouchers, were active. Further, OCS's efforts to reunify the children with Keri and then to place the children Anton or Keri's relatives were active. OCS worked with the children's Tribe to investigate possible family placements, specifically family members that Anton had identified. Anton characterized these efforts as not active because he was not involved in the decision-making. But the Court rejected this argument because it took his preferences into consideration, made active efforts to place the children with his preferred family members even if the communication to Anton about those efforts was lacking due to the COVID-19 Pandemic. Ultimately, OCS placed the children with members of Keri's family, the maternal uncles, who also kept Keri involved in the children's lives and committed to keeping the children connected to the tribe.

However, OCS's efforts while Anton was incarcerated were weak. The Court characterized OCS's failure to establish in person visitation as a "serous lapse" with "scant evidence" to excuse or explain the agency's failure to establish video visitation. OCS also did not actively work with Anton on the services called for in his case plan, including a domestic violence intervention program, parenting classes, a substance abuse assessment and a psychological assessment by a specialist with expertise in child sexual abuse offenders, and a sober support group. Anton completed some of these services independently, but failed to engage in others, such as the sober support group. The Court noted that some services were impractical or impossible to provide while Anton was incarcerated due to his conduct and during the COVID-19 pandemic. For example, the

Court noted how Anton declined calls from his caseworkers – a crucial mode of contact – and also that his misconduct in prison reduced his access to visitation.

Ultimately, the Court concluded that OCS's efforts to reunify the children with Anton before he was incarcerated, to reunify the children with Keri, and then to place them with Anton and Keri's family members in partnership with the Tribe constituted active efforts despite "flawed" efforts at providing rehabilitative services and visitation or contact with the children to Anton while he was in prison.

***Rosalind M. v. State of Alaska, Department of Family & Community Services, Office of Children's Services*, ___ P.3d ___, No. 18683 (Alaska Sup. Ct. Sep. 6, 2024).**

The Alaska Supreme Court rejected a foster family's attempt to intervene in an Indian Child's CINA proceedings. The Native Village of Togiak petitioned the superior court to transfer a CINA proceeding involving an Alaska Native child to the tribe. The child's foster parents moved to intervene based upon their belief that the tribe intended to transfer the child's placement from them to a foster placement that they believed to be insufficient to meet the child's medical needs. The Office of Children's Services (OCS) opposed the foster parent's motion to intervene, arguing that federal law prohibits the consideration of potential placement when determining if good cause exists to deny the tribe's petition to transfer. The trial court denied the foster parents' motion to intervene but stayed the transfer order pending the resolution of this of the foster parent's appeal.

On appeal, the foster parents argued that the trial court abused its discretion in denying their motion to intervene and that the foster mother was an Indian Custodian with a right to intervention under ICWA. The Supreme Court rejected both arguments. The Alaska Supreme Court affirmed that foster parents may intervene in a CINA proceeding in rare circumstances; however, in this case the only issue before the trial court was whether or not "good cause," existed to deny the tribe's motion to transfer jurisdiction. While ICWA does not define what constitutes "good cause," to deny a motion to transfer, the Bureau of Indian Affairs ("BIA") adopted binding regulations to assist state courts in evaluating jurisdictional transfer issues. Such regulations prohibit the trial court from considering "[w]hether transfer could affect the placement of the child." Since the foster parents' motion to intervene was solely based upon impermissible considerations, the trial court appropriately denied the motion.

The Supreme Court concluded that the foster mother was not an Indian Custodian under ICWA because it was OCS, and not the child's parents, who placed the child with the foster mother. When a child is placed with a foster family, legal custody of the child remains with OCS.

Finally, the Supreme Court addressed the trial court's decision to stay the transfer to tribal court, pending resolution of the foster parent's appeal. Once jurisdiction of a case transfer to tribal court, any appeal of the transfer order is moot. In future cases, if a foster parent moves to stay enforcement of a transfer order, the trial court should issue a temporary stay to preserve the foster parents' right to appeal and seek a stay from the Supreme Court.

***Ronan F. v. State of Alaska, Department of Family and Community Services, Office of Children's Services,* 539 P.3d 507 (Alaska 2023)**

In a child in need of aid proceeding (CINA), involving two minor Alaska Native children, the Office of Children's Services (OCS) terminated the parental rights of both parents who each appealed, alleging that OCS had failed to engage in active efforts to reunify the parents with their children.

On appeal, the Alaska Supreme Court affirmed OCS's termination of the mother's parental rights. The Court agreed with the trial court that OCS had appropriately decided to focus on the mother's substance abuse treatment because OCS was familiar with the mother from her prior history with OCS. The Court considered the entirety of OCS' efforts and determined that OCS had met its burden to engage in active efforts to attempt reunification.

However, the Court concluded that OCS had not made active efforts to reunify the father with his children. The father worked with three caseworkers during the pendency of this case. The father had a good working relationship with the first assigned caseworker; however, the record did not reflect that the second caseworker engaged in any efforts to attempt reunify the father with his children. With respect to the third caseworker, the Court found that her efforts to get the father to work with her were "overly rigid." The third caseworker repeatedly disregarded the father's requests to engage with her through means other than the ones she preferred, and ultimately made no additional effort to assist him. The Court ultimately found that OCS failed to make "active efforts" to reunify the father with his children because it failed to make such efforts during most of the time the children were in OCS' custody. Thus, the Court reversed OCS's termination of the father's parental rights.

***Richman ex. rel. C.R. v. Native Village of Selawik*, No. 3:22-cv-00280-JMK (D. Alaska June 1, 2023)**

In this case, the U.S. District Court rejected a guardian's attempts to use a federal habeas corpus challenge to circumvent a tribal court's custody order. Shortly after a child's father murdered the child's mother, the father executed a limited power of attorney

providing a guardian with legal authority over the child. The father placed the child with the guardian shortly before he was arrested for the murder of the child's mother. The child's mother was an enrolled member of the Selawik Tribe at the time of her death, and the child was enrolled as a member of the Selawik Tribe shortly after birth. The guardian filed a petition to be appointed as the child's guardian with the Native Village of Venetie, on the basis that the father was a member of the Venetie Tribe. The Venetie Court did not respond to that petition, but in a separate hearing confirmed the guardian's role and continued the child's foster care placement with her. The Selawik Tribe petitioned to transfer the case from Venetie to Selawik, and the Venetie Court referred jurisdiction over the case to the Selawik Court.

Prior to that transfer, the guardian filed a petition to adopt the child in Alaska Superior Court in which she initially identified the child as an Indian Child. The Superior Court dismissed the petition and held that the Selawik Tribe had exclusive jurisdiction over the child's custody case. The guardian then sought to dismiss the proceedings in the Selawik Court on the basis that the child was not an Indian Child, that the Selawik Court lacked jurisdiction over the child, that the Selawik Court was not properly constituted under the Tribe's Constitution, and that the Selawik Court was not complying with the Indian Civil Rights Act, 25 U.S.C. § 1303 ("ICRA"). She then asked the Selawik Court to allow her to either adopt the child or continue to have custody over her. Following a series of home visits and hearings, the Selawik Court ordered the placement of the child be transferred from the guardian to a tribal member in Selawik. The guardian subsequently filed a Petition for Writ of Habeas Corpus with the U.S. District Court alleging that Selawik illegally detained the child and requesting that the Court invalidate the Selawik Court's custody orders.

The Selawik Tribal Court filed a motion to dismiss the habeas action on the basis that the court lacked subject matter jurisdiction over the matter. The guardian asserted that the federal court had subject matter jurisdiction on two legal bases: (1) under ICRA, because the Selawik Tribal Court "illegally detained [the child]" by issuing a custody order, and (2) under federal question jurisdiction, 28 U.S.C. § 1303, because the guardian argued that Selawik does not have jurisdiction over [the child] because she is not a tribal member. The district court ultimately granted the motion to dismiss, finding that the court lacked jurisdiction over the Selawik Tribal Court in this case.

The federal court rejected the guardian's argument that the Selawik Tribal Court has "detain[ed]" the child by issuing a custody order. Relying on the United States Supreme Court precedent in *Lehman v. Lycoming County Children's Services*, the federal court determined that "habeas jurisdiction is not available to challenge parental rights or custody orders and that the guardian did not demonstrate that the tribe's custody order was "a several actual or potential restraint on liberty."

The guardian argued that because the child was not a member of the Selawik Tribe, the Tribal Court's exercise of jurisdiction over her was a question of federal law. But the federal court rejected that argument because the uncontested facts in the record show that C.R. became an enrolled tribal member shortly after birth. In response to the guardian's argument that C.R.'s admission to the tribe violated the Tribe's constitution, the court noted that a federal court lacks jurisdiction to review tribal membership decisions as such matters fall within the exclusive jurisdiction of a tribal court.

Finally, the Court dismissed the guardian's arguments that the Selawik Tribal Court violated her procedural and substantive due process rights because those claims focused on the tribal court's processes and the Court lacked jurisdiction to consider such claims.

IV. CORPORATE GOVERNANCE

Amanda Bremner et al. v. Yak-Tat Kwaan, Inc. et al., No. 3AN-23-06096CI (Alaska Super. Ct. Oct. 27, 2023)

Anchorage Superior Court Judge Laura Hartz issued an order confirming the election of nine individuals to the board of directors of Yak-Tat Kwaan, Inc. (Yak-Tat), following a shareholder meeting in which the presence of a quorum was disputed by the parties. The case turned on the definition of quorum and whether quorum had been met at the shareholder meeting. At issue was whether certain individuals should have been counted for purposes of quorum and the total number of available shares for purposes of establishing quorum.

Yak-Tat's meeting rules defined quorum as all voting shareholders "who have registered" at the meeting and the proxies held by proxy holders. Yak-Tat argued that quorum was not met because two shareholders were present solely in their professional capacities and that they did not register as shareholders at the meeting as required by the meeting rules. Yak-Tat also argued that consistent with its meeting rules, it properly included shares from unsettled estates of deceased shareholders in the number of total possible shares available for calculating quorum.

The court found that Yak-Tat's meeting rules, defining quorum as shareholders "registered" at the meeting, were in conflict with Alaska law and Yak-Tat's bylaws, which only required that a majority of shareholders or their proxies be present in person or remotely. Therefore, registration at the shareholder meeting was not required to be counted for purposes of quorum, and, since the disputed shareholders were present at the meeting, they should have been counted for purposes of quorum regardless of whether they had registered.

With respect to whether Yak-Tat should have counted unsettled estates of deceased shareholders for purposes of quorum, the court found that the meeting rules were inconsistent with Yak-Tat's bylaws, its articles of incorporation and the Alaska Native Claims Settlement Act (ANCSA), and that shares held in the name of a deceased shareholder and not yet transferred to the heirs should not be entitled to vote for purposes of achieving quorum.

The court found that if Yak-Tat had not counted unsettled estates of deceased shareholders for purposes of calculating quorum, a quorum would have been reached regardless of whether the disputed shareholders were considered "present" at the meeting. Accordingly, the court held that a quorum was present and established at the shareholder meeting and confirmed the election of the board.

V. TRIBAL SOVERIGNTY

Yvonne Ito v. Copper River Native Association, 547 P.3d 1003 (Alaska 2024)

This case centers on the question of whether inter-tribal consortia are entitled to the same sovereign immunity that their constituent tribes enjoy. In April 2024, the Alaska Supreme Court answered that question in the affirmative.

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.

On appeal, the Alaska Supreme Court affirmed that CRNA had sovereign immunity from suit and overruled *Runyon*'s threshold financial insulation test in favor of a new multi-factor approach to arm-of-the-tribe analysis that had developed since *Runyon*. The Court adopted this multi-factor test articulated in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) and subsequently adopted by the Ninth Circuit in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014), under which courts consider (1) purpose, (2) method of creation, (3) control, (4) tribal intent, and (5) financial relationship, along with a sixth factor—whether the purposes of tribal

sovereign immunity are served by granting immunity—that focuses the inquiry but need not be considered separately. No single factor is dispositive under this framework.

The Court ruled that each of these factors favored finding that CRNA was entitled to assert sovereign immunity from suit, though the method of creation factor was mixed. Weighing each of these factors, the court determined that CRNA was an arm of its member tribes and entitled to sovereign immunity. Because CRNA had not waived its sovereign immunity, the Court affirmed the superior court's dismissal of the suit.

The Court's opinion did not address the manner in which a consortium is deemed to have validly waived sovereign immunity.

VI. OTHER CASES

***Balli v. Akima Global Services, LLC*, No. 1:23-cv-00067 (S.D. Tex. Oct. 26, 2023)**

The federal district court for the Southern District of Texas concluded that corporations formed pursuant to the Alaska Native Settlement Claims Act ("ANCSA") are exempt from the definition of employer under Title IIV of the Civil Rights Act of 1964. Plaintiff Maria Del Refugio Balli was employed by Akima Global Services, LLC ("Akima"), a subsidiary of Akima, LLC, which itself is a subsidiary of NANA Regional Corporation. After being terminated, Balli filed an employment discrimination claim with the EEOC, which dismissed the claim based on jurisdictional limitations for cases involving tribal entities.

Balli then filed a claim in federal district court, alleging that Akima violated Title VII of the Civil Rights Act of 1964 by fostering a discriminatory work environment. Akima moved to dismiss the complaint because ANCSA exempts Alaska Native Corporations and subsidiaries from the definition of an "employer" under Title VII. Responding to Akima's motion to dismiss, Balli argued that Akima waived its sovereign immunity by advertising itself as an equal opportunity employer and by including an anti-discrimination clause in a collective bargaining agreement it entered into with a union.

The court granted Akima's motion to dismiss, noting that Akima never raised sovereign immunity—and that because it was an Alaska Native Corporation, not a federally recognized tribe, it had no sovereign immunity it could waive. Moreover, its exemption from being considered an employer under Title VII could not be waived.

***Native Village of Unalakleet and Native Village of Elim v. U.S. Department of Agriculture, Rural Utilities Service*, No. 3:24-cv-00100 (D. Alaska)**

On May 3, 2024, the Native Village of Unalakleet and the Native Village of Elim filed a complaint in federal district court for the District of Alaska against the U.S. Department of Agriculture (USDA) Rural Utilities Service (RUS) alleging violations of federal regulations in the distribution of broadband internet funding. Plaintiffs also filed a Motion for a Preliminary Injunction on May 24, 2024.

RUS, which administers federal funding to broadband service providers through the Rural eConnectivity Loan and Grant Program (ReConnect Program), awarded nearly $70 million in grants to Interior Telephone Company (Interior) and Mukluk Telephone Company (Mukluk) to deploy a broadband internet network within the Nome Census Area. Interior and Mukluk have moved to intervene in the case.

The complaint alleges that neither Interior nor Mukluk obtained a tribal government resolution of consent from the Tribal Councils of Unalakleet or Elim, rendering the grants void and enforceable and the RUS' decision to award the grants arbitrary, capricious, and in violation of the Administrative Procedure Act. The plaintiffs further allege that because of the RUS grants to Mukluk and Interior, the plaintiffs are now ineligible to receive funding under another program, the Broadband Equity, Access, and Deployment ("BEAD") Program.

At issue is whether the area to be served by the RUS grants is "Tribal Land" under the ReConnect Program's regulations, and whether tribal government resolutions of consent are required as a condition to awarding the grants to Interior and Mukluk. According to the ReConnect Program's funding opportunity announcement, "Tribal Land" is defined as "any area identified by the United States Department of Interior as tribal land over which a Tribal Government exercises jurisdiction." Citing this definition of Tribal Land and a GIS mapping tool located on the RUS website for the ReConnect Program, the United States argues in its response that the lands in question are not "Tribal Lands" and that a tribal government resolution of consent was not required.

A hearing on the preliminary injunction and Mukluk and Interior's motion to intervene was held on September 20, 2024. This is an ongoing case.

***Native Village of Kwinhagak v. State of Alaska, Department of Health & Social Services, Office of Children's Services,* 542 P.3d 1099 (Alaska 2024)**

In this case, a minor child was committed to North Star Hospital and held there without a hearing for 46 days. In reviewing her commitment, the Alaska Supreme Court addressed the legal process that applies when the Office for Children's Services (OCS)

seeks to admit a child in its custody to a hospital for psychiatric care, and due process implications that arise from the failure to follow that process.

In 2019, Mira, a member of the Native Village of Kwinhagak ("the Tribe"), was adjudicated as a child in need of aid, placed in OCS custody, and then placed with a foster family in Sitka. In 2021, the foster parents sought treatment for Mira at the Sitka Hospital. In response to a clinician's recommendation that Mira receive "acute residential treatment," OCS decided to transfer Mira to North Star Hospital ("North Star") on December 14; she was physically transported on December 20 or 21. On December 22, 2021, in response to the Tribe's request for an update on Mira's status, OCS notified the parties she had been transferred. That same day, the Tribe moved for a hearing and expedited consideration under Alaska's civil commitment statutes (AS 47.30.700 *et seq*). The Court appointed counsel for Mira and set a hearing for December 30, 2021; however, the hearing wasn't held until January 18, 2021, and Mira remained in North Star.

Alaska Statute 47.10.087 governs the placement of children in "secure residential treatment centers" and requires judicial review at least once every 90 days when OCS seeks to place a child at such a facility. But North Star is not considered a secure residential treatment center, and at the hearing, OCS asserted that because it had legal custody of Mira under the CINA statutes, it had authority to admit her to the hospital for psychiatric care, subject only to standards established in a permanent injunction issued in *Native Village of Hooper Bay v. Lawton* enjoining OCS from holding any child under the care of OCS for longer than 30 days at North Star without conducting an AS 47.10.087-type hearing. The Tribe argued that the court should evaluate Mira's hospitalization under the civil commitment statutes at AS 47.30.700, which trigger a court's involvement almost immediately and require a contested hearing to be scheduled within days of commitment.

The superior concluded that AS 47.10.087 applied, that the civil commitment statutes did not, and set a hearing for 3 weeks later to consider less restrictive treatment options. The Tribe appealed. During the pendency of this appeal, Mira was released from psychiatric hospitalization.

The Alaska Supreme Court rejected the Tribe's position that the civil commitment statutes applied to Mira's hospitalization. The Court recognized that OCS had the power and the obligation to obtain medical care for a child in its custody, and that obtaining treatment for Mira at Sitka Hospital and North Star was within OCS's duty to provide medical care to her. Recognizing that OCS has a separate basis of authority to seek psychiatric medical care for children in its custody, the Court concluded that OCS was not subject to the Alaska's civil commitment statutes.

Turning to the Tribe's constitutional arguments, the Court first concluded that the *parens patriae* doctrine gave the Tribe standing to assert constitutional claims on Mina's behalf and that its claims were not moot. The Court concluded that Mira's admission to the Sitka Hospital and North Star did not violate her equal protection or substantive due process rights because Mira did not receive differential treatment based upon her being placed within OCS's custody and she had the opportunity to participate in treatment and the duration of the treatment at North Star was reasonably related to her acute psychiatric care needs.

However, the Alaska Supreme Court concluded that Mira's procedural due process rights were violated when 46 days elapsed between Mira's first admission to the hospital and the first hearing. OCS' failure to notify the parties that Mira was held at the Sitka Hospital for mental health treatment, OCS' failure to notify the parties that Mira would be admitted to North Star, and the superior court's failure to hold a hearing before Mira's 46th day of being hospitalized were all violations of Mira's procedural due process rights.