IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KALTAG TRIBAL COUNCIL, and HUDSON AND SALINA SAM,

Plaintiff,

vs.

KARLEEN JACKSON, et al.,

Defendants.

Case No. 3:06-cv-211 TMB

O R D E R

I. MOTIONS PRESENTED

Plaintiff seeks summary judgment on all counts in the Amended Complaint. Defendants move for summary judgment of dismissal on all counts. Both motions have been fully briefed, and the Court heard oral argument on February 13, 2007. The Court being fully advised, now enters the following order.

II. BACKGROUND

N.S. was born on October 18, 1999. Her birth mother is a member of the Kaltag Tribe, a federally recognized tribe as defined by the Indian Child Welfare Act, ("ICWA").[1] Her birth father is from the Native Village of Koyukuk and is either a tribal member of Koyukuk or eligible for membership in that Tribe. N.S. is therefore an "Indian child" as defined in the Act.[2]

On September 3, 2000, a "Tribal Family Youth Specialist" ("Kaltag TFYS worker"), who is an employee of Plaintiff Kaltag Tribal Council ("Kaltag"), took emergency custody of N.S. due to her mother's inability to care for N.S. and a likelihood of physical injury. On September 6, 2000, the Kaltag court took temporary custody of N.S., and N.S. continued in the temporary custody of Kaltag court until July 29, 2004, when the Kaltag court terminated the parental rights of both parents, made

[1] 25 U.S.C. § 1903(8).

[2] 25 U.S.C. § 1903(4).

N.S. a ward of the court, and granted permanent guardianship to Plaintiffs Hudson and Selina Sam, who had been N.S.'s foster parents since her placement with them on April 27, 2004.

In August of 2005, the Sams petitioned the Huslia Tribal Court to adopt N.S. and make her a permanent part of their family. Because N.S. is a member of the Kaltag Tribe, and the Kaltag Tribal Court had already exercised jurisdiction over N.S., the petition was forwarded to the Kaltag Tribal Court, which issued an Order of Adoption on November 17, 2005, declaring the Sams to be N.S.'s legal parents. In the same order, the tribal court ordered that N.S.'s name be changed to reflect that of her new parents, and that this name change shall be reflected on a new birth certificate from the State of Alaska, Bureau of Vital Statistics. The same day that the Order of Adoption was signed, the clerk of Kaltag Tribal Court signed and submitted a Report of Adoption to the Bureau of Vital Statistics requesting a new birth certificate for N.S.

On January 26, 2006, the Department of Health and Social Services, Bureau of Vital Statistics rejected the request. In a letter to the Kaltag Tribal Council, the Bureau explained:

> As of October 25, 2005, the Bureau will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla. All other tribal entities will need to submit the Cultural Adoption packet in order for the Bureau to process the adoption.

The letter also stated that a Cultural Adoption packet was enclosed with the letter, and explained that once it was completed and returned, along with some other missing information, the Bureau would continue processing the request.[3] The Bureau never received a completed Cultural Adoption packet from Kaltag regarding N.S.

The Kaltag Tribal Council and the Sams filed this case on September 8, 2006, alleging that adoption orders issued by the Kaltag court are entitled to full faith and credit under Subsection 1911(d) of the ICWA, and that the Bureau of Vital Statistics violated the subsection by not granting the request for an amended birth certificate. Plaintiffs seek a declaration that Kaltag court's

[3] According to the Defendants, copies of denial letters such as the one sent to the Kaltag Tribal Council are not retained by the State once a cultural adoption application is received, which makes it difficult to determine how many "cultural adoptions" approved by the State were the result of the State's refusal to accept a tribal court adoption decree.

adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order by issuing the Sams a substitute birth certificate.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Where the material facts are not in dispute, the issue is one of law for the court and summary judgment is therefore appropriate. The parties here agree that there are no factual disputes.

IV. DISCUSSION

Plaintiffs' motion for summary judgment requests a declaration that federally recognized tribes in Alaska possess concurrent jurisdiction with the State to adjudicate adoptions of their own tribal members, and that the State must therefore give full faith and credit to tribal adoption orders pursuant to § 1911(d) of the ICWA. In addition, the motion seeks a declaration that, since the tribal adoption decree of N.S. is entitled to full faith and credit under § 1911(d) of the ICWA, the Sams, as the adoptive parents, are entitled to have N.S.'s adoption order recognized and an amended birth certificate issued pursuant to 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment seeks dismissal of all counts of the complaint, arguing that the case is barred by the Eleventh Amendment of the United States Constitution, and alternatively that Kaltag does not have the authority to initiate child protection proceedings in tribal court in Alaska.

The Eleventh Amendment

Defendants, all employees of the State of Alaska, ask this Court to dismiss the action because the Plaintiffs are prohibited from bringing this lawsuit by the Eleventh Amendment of the United States Constitution, which provides that a state is immune from suit regarding claims for which it has not consented to be sued.

Eleventh Amendment immunity protects Alaska and its officials from suits except for "certain suits seeking declaratory and injunctive relief against state officers in their individual

capacities."[4] This limitation of sovereign immunity is known as the *Ex parte Young* doctrine.[5] Defendants argue that although the *Ex Parte Young* exception allows state officials to be sued for declaratory and injunctive relief, that exception is not available here because of the impact the suit has on the state's "special sovereign interests." Defendants argue that a state forum is available here, and that any federal interest in interpreting the ICWA is outweighed by the state's sovereignty interests implicated by this case.[6] Accordingly, argue Defendants, the Court should decline to apply the *Ex parte Young* exception to state sovereign immunity, and should dismiss the Complaint.

The Ninth Circuit held in *Native Village of Venetie I.R.A. Council v. State of Alaska*,[7] (*"Venetie*"):

> [W]e agree with the district court – and Alaska does not seriously challenge this holding – that the eleventh amendment does not bar the plaintiffs' request for injunctive relief against the Commissioner of the Department of Health and Human Services.
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> . . . [D]eclaratory relief is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution. However, such is not the case here. Not only has Alaska refused to recognize the native village tribal adoptions in the past, it continues to do so in the present, and will apparently continue to refuse recognition in the future. Thus, if this refusal is ultimately determined to be unlawful, the grant of declaratory relief can most properly be described as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. The plaintiffs' request for declaratory

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[4]*Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) ("The Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. *See Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).")

[5]*Edelman v. Jordan*, 415 U.S. 651 (1974).

[6]Specifically, Defendants complain that granting the requested relief (declaration and injunction) would eliminate the state's exclusive jurisdiction, as set out in Section 1911 of the Act, to initiate child protection proceedings concerning Indian children of tribes, such as Kaltag, that are not on reservations or have not applied for exclusive jurisdiction. If, as the Plaintiffs claim, the state has to give full faith and credit to Kaltag's adoption orders arising from child protection proceedings that were initiated by Kaltag and not transferred from a state court proceeding, it would completely strip the state and its courts of its sovereign right to adjudicate matters concerning the birth family of the adopted child, since the state has no ability to intervene or transfer the action back to state court.

[7]944 F.2d 548 (9th Cir. 1991).

relief is not barred by the eleventh amendment.[8]

Although Defendants argue that the *Venetie* case is not on point, it does provide guidance on this issue. The Eleventh Amendment bars any claims for retroactive relief.[9] It does not bar a request for injunctive relief against the Commissioner of the Department of Health and Social Services.[10] If the Court determines that Defendants, as individuals, have violated federal law, injunctive relief would be appropriate. Regarding declaratory relief, the *Venetie* court noted that such relief "is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution."[11] There is no indication that such is the case here. The only relief sought by Plaintiffs is a declaration that Kaltag court's adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order in this case by issuing the Sams a substitute birth certificate. No damages or restitution are sought.

Furthermore, the *Venetie* court specifically found that Congress intended to give Indian tribes access to federal courts to determine their rights and obligations under the ICWA.[12] "The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes . . . It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act."[13] The Court finds that the Eleventh Amendment does not bar this suit.

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[8] *Id.* at 552 (citations omitted).

[9] *Venetie*, 944 F.2d at 552.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 553.

[13] *Id.* at 553-54, citing 25 U.S.C. § 1901(5)(1988).

The Indian Child Welfare Act ("ICWA")

It is undisputed that the state of Alaska must give full faith and credit to child custody determinations made by the tribal courts, if the tribal court properly exercised jurisdiction in the matter. The issue here is whether the tribal court had concurrent jurisdiction with the State to initiate a child protection matter.[14] Defendant argues that allowing tribes to initiate CINA-type cases outside of reservations and Indian country discounts the distinct differences in the parties' interests in such cases, and would radically re-cast the state/tribal jurisdictional balance already struck by Congress in their enactment of the ICWA. Plaintiffs argue that concurrent jurisdiction is intended and required under the ICWA. The portion of the ICWA pertaining to child custody proceedings reads as follows:

> **Indian tribe jurisdiction over Indian child custody proceedings**
>
> **(a) Exclusive jurisdiction**
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> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
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> **(b) Transfer of proceedings; declination by tribal court**
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.
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> **(c) State court proceedings; intervention**
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.
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> **(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes**
> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody

[14] Also referred to by the parties as "Child in Need of Aid" or "CINA-type" cases.

> proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[15]

A "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[16] The ICWA includes Alaska natives within its definition of "Indians," and Alaska native villages are "Indian tribes" within the meaning of the Act.[17] Only one tribe in Alaska, the Metlakatla Indian Community, occupies a reservation, so the jurisdictional provision of § 1911(a) related to domicile is not applicable to the Kaltag tribe.

According to the plain language of the ICWA, a tribe shall have exclusive jurisdiction over child custody proceedings (foster care placement, termination of parental rights, preadoptive placement, and adoptive placement) where the child is living within the reservation, or where a child living outside of the reservation is a ward of the tribal court.[18] In contrast, a state court, handling a proceeding for the foster care placement of, or termination of parental rights to, an Indian child *not* domiciled or residing within the reservation of the Indian child's tribe, is required to transfer such proceeding to the jurisdiction of the tribe, in the absence of good cause to the contrary.[19]

In the plain language of § 1911, there is a grey area, which is the crux of this case: When a child is *not* domiciled or residing within a reservation, must the state court initiate child custody/ protection proceedings or can such a proceeding originate in the tribal court? Plaintiffs suggest that the implication of § 1911 is that the tribal court has concurrent jurisdiction with the state court where an Indian child is not domiciled or residing on Indian land. Defendants' position is that tribes have only *transfer* jurisdiction in these circumstances, and that any case involving a child domiciled outside of Indian country must originate in state court, and be transferred to tribal court.

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[15] 25 U.S.C. § 1911.

[16] 25 U.S.C. § 1903.

[17] 25 U.S.C. §§ 1903(3) & (8).

[18] § 1911(a).

[19] § 1911(b).

The United States Supreme Court has held that §1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation . . ."[20] The parties disagree as to the meaning of "concurrent jurisdiction." Defendants allege that concurrent jurisdiction does not mean that Alaska Native villages have "concurrent authority" to *initiate* child protection cases, but rather that the transfer jurisdiction is a concurrent jurisdiction *conditioned upon* parental consent and the absence of good cause to deny transfer. To find otherwise, argue Defendants, would cut off the state's ability to protect its interest in child welfare, and would make the veto power that parents have with respect to transfer to tribal courts meaningless. Defendants further argue that legislative history suggests that Congress intended to limit tribal authority under §1911(b) to transfer-only concurrent jurisdiction.

The Court finds Defendants' interpretation of § 1911(b) strained, in light of the United States Supreme Court's language in *Holyfield*. It would be incongruent for this Court to find that "presumptively tribal jurisdiction" requires the Tribe to first defer jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court.

Defendants also argue that the state's interest in protecting minor Alaska Native citizens would be entirely cut off if the tribal court could take jurisdiction first, and the interests of non-Native or non-member parents could be impaired by having to appear in a tribal court without the opportunity to object to that court. However, as Plaintiff explained at oral argument, any party that finds itself in tribal court against its wishes is always free to object to the tribal jurisdiction, call a state CINA officer, or file a case in state court.[21] Alaska state courts retain concurrent jurisdiction over all disputes arising within the State of Alaska, whether tribal or not.[22] "The only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country."[23]

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[20]*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

[21]Indeed, in this case the state CINA office was notified; however, what resulted from that notification is unclear.

[22]*John v. Baker*, 982 P.2d 738, 759 (Alaska 1999).

[23]*Id.*, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

Voluntary vs. Involuntary Child Custody Proceedings

Plaintiffs' position is that the substantive issues in this case already have been decided by the Ninth Circuit in *Venetie*. There, the Ninth Circuit addressed the issue "whether federal law requires the state of Alaska to accord 'full faith and credit' to child-custody determinations made by the tribal courts of native villages,"[24] and concluded that it does so require. Defendants argue that the holding of *Venetie* should be limited to the facts in that case, and that the doctrine of collateral estoppel is not applicable because of the factual differences between the *Venetie* and the current case. Defendants distinguish *Venetie* arguing that it addressed strictly internal relations, such as a voluntary adoption among tribal members. The adoption in this case is not private nor voluntary, nor among members, nor did it originate as an adoption case.[25] Noting that one quarter of rural Alaskans do not have convenient access to state courts, Plaintiffs argue that drawing any line that would prevent Tribes from exercising jurisdiction over CINA-type cases would prevent them from assisting children when they are most at risk. Tribes closest to the situation in all of rural Alaska would be powerless to help children in their own villages at the most critical time.

Defendants' voluntary versus involuntary argument has previously been rejected by the Ninth Circuit. In *Doe v. Mann,* the Plaintiff's efforts to create a distinction between "involuntary" and "voluntary" proceedings in order to put her case outside of California's Public Law 280 jurisdiction were found unpersuasive and without statutory support.[26] The court examined the definition of "child custody proceeding" in the ICWA and concluded that it "definitely encompasses

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[24] *Venetie*, 944 F.2d at 550.

[25] Alternatively, Defendants argue that this case involves unmixed questions of law that should be reconsidered in light of legal developments since the *Venetie* decision. However, this Court is in no position to "reconsider" a valid Ninth Circuit decision.

[26] *Doe v. Mann*, 415 F.3d 1038, 1062 (9th Cir. 2005).

voluntary and involuntary proceedings"[27] Ultimately the Court held that imposing a "dividing line between voluntary and involuntary finds no support in the statute."[28]

Tribal Membership

Defendants note that the Alaska Supreme Court has held that a "tribe only has subject matter jurisdiction over the internal disputes of *tribal members*."[29] Similarly, in *Venetie*, the Ninth Circuit noted in a footnote that "[a] tribe's authority over its reservation or Indian country is incidental to its authority over its members."[30] However, it is the membership of the child that is controlling, not the membership of the individual parents. "A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as the ICWA, which focuses on the child's tribal membership as a determining factor in allotting jurisdiction. Because the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership."[31]

Public Law 280 and 25 U.S.C. § 1918

The State's policy that it need not grant full faith and credit to Kaltag's Tribal Adoption Order has been justified by an October 2004 Attorney General opinion, which concluded that because Alaska is a Public Law 280 state, the State has exclusive jurisdiction over adoption proceedings and therefore Alaska Tribes must petition pursuant to 25 U.S.C. § 1918 to reassume jurisdiction. Defendants argue that since most Alaska Native villages lack a reservation, they

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[27] *Id.* The court found particularly persuasive the phrase "where the parent or Indian custodian cannot have the child returned upon demand," as evidence of the fact that the ICWA covers both voluntary and involuntary proceedings.

[28] *Id.* at 1064.

[29] *John*, 982 P.2d at 759.

[30] *Venetie*, 944 F.2d at 559 n. 2 (citation omitted).

[31] See *John*, 982 P.2d at 759-60 (internal footnote omitted).

cannot exercise §1911(a) jurisdiction over child protection cases, and therefore all tribes must petition for jurisdiction under § 1918 of the ICWA.[32] In response, Plaintiffs argue that § 1918 is applicable only where tribes wish to have exclusive, rather than concurrent, jurisdiction over child custody proceedings. Plaintiffs are correct. In *Doe v. Mann,* the Ninth Circuit found that § 1918 was a mechanism provided by Congress to allow tribes in Public Law 280 states the opportunity to obtain *exclusive* jurisdiction over child custody proceedings.[33] The implication is that the tribes and the states otherwise shared concurrent jurisdiction.

In any event, despite the distinctions made by Defendants between the *Venetie* facts and the facts of this matter, the law remains the same: "resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents [the villages] from exercising concurrent jurisdiction [over their members' domestic relations]."[34]

V. CONCLUSION

While the Court is sensitive to the concerns expressed by the Defendants that the state will not be able to track child protection issues of Native children where a tribal court takes jurisdiction before the state does, the cases cited herein clearly control the outcome of this dispute. Furthermore, any grey area identified in § 1911 must be resolved in favor of the Tribe, as ambiguities are to be resolved to the benefit of Indians.[35] "[W]hen a question of tribal power arises,

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[32]25 U.S.C. § 1918 reads in relevant part:

"Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction."

[33]*Mann*, 415 F.3d at1061-62.

[34]*Venetie*, 944 F.2d at 562.

[35]*Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act."[36]

Accordingly, Plaintiff's Motion for Summary Judgment at **Docket 29** is GRANTED. Defendants' Motion for Summary Judgment at **Docket 31** is DENIED. The Kaltag court's adoption orders are entitled to full faith and credit, and the Bureau shall grant said status to the adoption order by issuing the Sams a substitute birth certificate.

Dated at Anchorage, Alaska, this 22nd day of February, 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

[36] *Venetie*, 944 F.2d at 556 (citing W.Canby, *American Indian Law* 71-72 (2d ed. 1988)).