TWO SOVEREIGNS, BUILDING A UNIFIED SYSTEM TOGETHER

The Importance of Respecting Both Tribal and State Sovereignty In Building a Unified System of Law and Justice for Rural Alaska

Eric D. Johnson
Tribal Rights Attorney
Association of Village Council Presidents
P.O. Box 219
Bethel, Alaska 99559
(907) 543-7309

For the Alaska Rural Justice and Law Enforcement Commission
April 6, 2005

Welcome to Bethel. I am glad that each of you, as Commissioners, have been able to make it here today, to hear directly from people here in our region about the justice and law enforcement needs their communities face, the important roles tribal governments are playing in meeting these needs, and the ways in which the provision of basic services by the State of Alaska could be improved.

Your Commission has been directed to "make recommendations" on how to "create a unified law enforcement system, court system, and system of local laws or ordinances for Alaska Native villages[.]" When I testified before you back in January, I stressed the importance of building such a unified system in a manner that fully respects and acknowledges both tribal and state sovereignty.

In my view, this is the *only* way that a truly unified system will develop in rural Alaska, as it is the only way to get around conflict and mutual antagonism, to build something good together. Any option that unilaterally diminishes tribal sovereignty would lack any moral legitimacy in the eyes of the villages and their residents, and would never truly work as a result. And by the same measure, the State of Alaska is unlikely to accept a diminishment of state sovereignty either. Instead of creating unity, options that would diminish tribal or state sovereignty are only capable of creating lasting disunion and division. This leaves, as the only realistic options for this Commission to pursue, those options that can successfully build on the sovereignty of *both* Tribe and State, creating "win-win" opportunities for both sovereigns to exercise their governmental authority on matters of mutual concern, while working together toward shared objectives.

The purpose of this testimony today is to focus more specifically on what a unified system of this sort might look like, in each of the five subject areas this Commission is looking into. Within each of these five subject areas, I will first

briefly demonstrate how both Alaska Tribes and the State of Alaska possess – and share – sovereign authority. Then, I will make some general suggestions on how unity might better be achieved without diminishing tribal or state sovereignty.

(1) Courts and Justice.

As sovereigns, both the State of Alaska and Alaska Tribes can and do operate courts for meeting the justice needs of people in Alaska Native villages. While the authority of the state courts is derived from Article IV of the Alaska Constitution, the Alaska Supreme Court has also recognized that Alaska tribal courts can resolve internal tribal matters, including disputes between members (child custody disputes in particular), and that this authority survives even in an absence of Indian country. *John v. Baker*, 982 P.2d 738 (Alaska 1999). The Court has also recognized that state and tribal courts thus share concurrent jurisdiction over matters such as child custody disputes concerning tribal children. *Id.*

Thus, it can be assumed that for the most part, both state and tribal courts already share considerable authority when it comes to resolving a wide range of disputes or problems within a given village – the state courts, because such matters arise within the borders of Alaska, and the tribal courts, because these matters typically involve tribal members.

Of the five subject areas being considered, this may well be the area least in need of an extensive "fix" by this Commission. The reason for this is simple: out of the three branches of our state government, it is the Alaska Court System that has shown the greatest willingness to build a cooperative and mutually supportive relationship with its tribal counterparts. While some misunderstandings between different judicial systems will inevitably arise from time to time, the Alaska Court System should be commended for its efforts of recent years in building bridges between state and tribal court systems here in Alaska. If a legislative fix has not become a necessary means of creating a more unified court system, in the same way such a fix may perhaps have become necessary in other areas, this is because if left to its own devices, the Alaska Court System will almost surely continue in its current ongoing efforts to build a more unified system based on effective cooperation with tribal courts, and mutual acknowledgement of the roles both court systems have to play in providing justice across rural Alaska.

The Alaska Court System has recognized the unique role that tribal justice systems have to play here in Alaska, and that this role is separate and distinct from – and complementary to – the important role that the state courts also have to play:

> By acknowledging tribal jurisdiction, we enhance the opportunity for Native villages and the state to cooperate in the child custody arena

> by sharing resources. Recognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all.
>
> . . .
>
> *See, e.g.,* Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access 107-08 (1997) (recommending that state courts "generally enhance equality in the effective delivery of justice system services by associating or blending [] local resources [like tribal courts] with the formal court system" and noting that "[t]he western justice system is not always the most appropriate model for the problems of many rural areas").

John v. Baker, 982 P.2d at 760 & n.153. The Alaska Court System has also taken a healthy approach towards the differences between tribal and state court systems, while respecting that which makes tribal systems unique. While the Alaska courts will not give respect to tribal court orders where jurisdiction or due process appear to have been lacking, the state courts'

> due process analysis in no way requires tribes to use procedures identical to ours in their courts. The comity analysis is not an invitation for our courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure. Instead, in deciding whether a party was denied due process, superior courts should strive to respect the cultural differences that influence tribal court jurisprudence, as well as to recognize the practical limits experienced by smaller court systems.

John v. Baker, 982 P.2d at 738.

The willingness of the Alaska Court System to recognize tribal court authority and to respect what tribal courts have to offer provides a good model for how a "unified" system might look – one in which unity is not achieved by destroying separate tribal and state institutions, but rather by drawing upon the strengths of both institutions, to create a stronger overall system that will better serve the justice needs of people in rural Alaska villages.

(2) Law Enforcement.

Law enforcement is another area in which both Alaska Tribes and the State of Alaska should have strong claims to concurrent jurisdiction and authority. Because Alaska is a Public Law 280 state, the State of Alaska has criminal

jurisdiction even on any remaining Indian country lands. 18 U.S.C. § 1162. And as far as tribal criminal jurisdiction over tribal members goes, this Commission has received an excellent memorandum from Professor Robert T. Anderson, the Director of the Native American Law Center at the University of Washington School of Law, that discusses this and other sovereignty issues here in Alaska.

While the Alaska Supreme Court has yet to confront questions of tribal law enforcement jurisdiction in Alaska, the logic of its decision on civil jurisdiction in *John v. Baker* strongly supports a claim of tribal law enforcement authority over members as well. For in reaching its conclusion in that case, that Alaska Tribes have retained child custody jurisdiction even outside of Indian country, the Court relied heavily on the United States Supreme Court decision in *United States v. Wheeler*, 435 U.S. 313 (1978), concerning the nature of inherent, retained tribal sovereignty. *See, John v. Baker*, 982 P.2d at 751-52. And while the Alaska Supreme Court recognized that the *Wheeler* decision made it clear that "internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers" even outside of Indian country, *John v. Baker*, 982 P.2d at 751, the *Wheeler* decision also provides equal support for the notion that Alaska Tribes have retained the inherent sovereign power to enforce tribal laws against their members, both on and off Indian country. For as explained by the Supreme Court in *Wheeler*, a Tribe's:

> right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.
>
> . . .
>
> Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.

435 U.S. at 322-26. Thus, like tribal child custody jurisdiction over members, tribal law enforcement authority over members should be presumed to exist concurrent with state jurisdiction, unless affirmatively divested by Congress.

This Commission should recommend to Congress instead that it encourage the best in *both* state and tribal law enforcement in Alaska, through maximum cooperation between state and tribal institutions of community policing. Access to federal funding for tribal police should be guaranteed and protected for Alaska Tribes. And cross-deputization of state and tribal police should be encouraged. As with the courts, a more unified system of law enforcement can be achieved in rural Alaska by drawing on the strengths, abilities and differences that Tribes and the State are each able to bring to the table. A truly cooperative tribal-state system

would protect the sovereignty of both governments, while allowing for mutual assistance, information sharing, and backup. In short, it would lead to better law enforcement in the villages, not by destroying tribal or state institutions, but by finding opportunities for the two institutions to work together towards shared ends.

If law enforcement in Alaska is not "unified" enough, then much of the blame for this must rest on the State's shoulders, irrespective of the existence of tribal police. For the state system *itself* lacks unified standards. Indeed, as explained in the appellants' brief from the *Alaska Inter-Tribal Council v. State* lawsuit,[1] copies of which have been provided to the Commission by the Native American Rights Fund, the State has always operated a dual system, in which it has established lower standards for special categories of police that operate in the villages than it has for the "regular" or "certified" police that operate in road grid communities and regional hubs. Indeed, the lower end of this dual system was intentionally designed with Native village communities in mind – communities which, as a result, are now being served by police with less training, certification and authority than police are required to possess elsewhere in Alaska.

Until this dual state system is abolished, villages in rural Alaska will never see anything even approaching a rough equality in law enforcement services. And because building a more unified system of law enforcement is a central goal of this Commission, this Commission should, at a minimum, recommend that the State of Alaska replace its current dual system with a more unitary system of standards. A more unitary system of standards would recognize commonly accepted levels of training and certification, that would transcend the various classifications of law enforcement officers in Alaska, while at the same time allowing individual officers a reasonable expectation of advancement to full "certified" police officer status – a status few Village Public Safety Officers (VPSOs) or Village Police Officers (VPOs) ever achieve under the State's dual system that is in place today.

However, the relationship of *tribal* police to a more unified *state* system of this sort would need to build upon voluntary intergovernmental opportunities for cooperation. For while the Alaska State Troopers, municipal police, VPSOs and VPOs all derive their authority from state law, and are therefore clearly subject to standards mandated by state law, tribal police are different in that they draw their authority from a separate basis in tribal sovereignty. Thus, Alaska Tribes should not be forced to conform to state standards, anymore than state police are forced to conform to tribal standards.

---

[1] Alaska Supreme Court Case No. 10844. The undersigned attorney is one of the attorneys representing plaintiffs/appellants in this lawsuit and appeal.

This being said, however, there are plenty of opportunities for allowing a better integration of state and tribal police programs, with shared standards and expectations. For example, Tribes may be encouraged to train and certify their tribal police to levels of training and certification acceptable to the State, should the State conclude that shared standards of this sort are a necessary prerequisite for cross-deputization of tribal police with the Alaska State Troopers. By the same measure, the State can also take steps to ensure better opportunities for training and certification of tribal police – for example, the Alaska State Troopers might provide field training for tribal officers, and state laws that currently deny the Alaska Police Standards Council (APSC) the ability to track the training and certification levels of tribal police could be changed to ensure that the APSC can track (as opposed to mandate) tribal police certification and standards.

In the end, law enforcement, like the other four areas this Commission is investigating, provides yet another opportunity for a "win-win" model of tribal-state cooperation, in which *both* sovereigns can emerge with stronger and better law enforcement systems, better able to work together to ensure that the shared interests of Tribes and the State in adequate village law enforcement will be met.

(3) Alcohol Control.

State authority to control alcohol is clear under the 21st Amendment to the United States Constitution. At the same time, the United States has long exercised its authority to prohibit trade in alcohol with Native Americans, and has delegated some of its authority to control alcohol to Tribes, at least in the reservation setting. Furthermore, for reasons already discussed above, Tribes have retained sovereign authority to prevent misconduct by their members, whether this misconduct is alcohol-related or not. But outside Indian country at least, current federal statutory law leaves little room for direct tribal control or regulation of alcohol itself, *see Rice v. Rehner*, 463 U.S. 713 (1983), even if Alaska Tribes have retained inherent authority to control and punish alcohol-related misconduct by their members.

The relative weakness in the *legal* position of Alaska Tribes in the alcohol area is matched, however, by the weakness of the State, as a *factual* matter, in effectively controlling alcohol at the village level. State local option laws all too often remain largely unenforced in the villages, due to the inability of Troopers in distant regional hubs to respond effectively to village bootlegging and importation incidents when they are busy responding to calls on more serious crimes – crimes which, ironically, are usually alcohol related. In contrast, while Alaska Tribes may lack federal recognition of their ability to act against alcohol offenses in the villages, because Tribes are present in the villages they do know what is going on in their communities, and have an ability to respond promptly to bootlegging and importation as it is happening in a village, and before it becomes too late to cut off

the alcohol at its source. Thus, with alcohol control, as with the other areas of discussion, there is ample room for developing "win-win" solutions that will ensure that both tribal and state sovereignty can work together to ensure that alcohol is kept out of village communities.

To create an effective partnership of this sort, the legal position of Alaska Tribes should first be strengthened through Congressional legislation that would recognize tribal jurisdiction over alcohol within core village areas. Legislation of this sort could require consistency between tribal and state local option laws. And tribal jurisdiction should reach nonmembers as well, whether through a Tribe's exercise of civil jurisdiction or though federal prosecutions, should nonmembers violate tribal alcohol prohibitions in a village. Without the ability to keep nonmembers from bringing alcohol into a village, a Tribe is largely powerless to control the devastation alcohol causes rural communities; there is no safe haven.

The Alaska Federation of Natives has proposed legislation that would recognize tribal alcohol authority, and this Commission should recommend that legislation of this sort be adopted. For reasons discussed in a separate issue paper I have written for the Commission, legislation of this sort would be constitutional, and if built upon certain core principles (such as respect for both state and tribal sovereignty, and cooperation) legislation of this sort could prove far more effective than the status quo as well. By strengthening the tribal hand in alcohol control at the village level, legislation of this sort would also benefit the State, by allowing it to concentrate its limited alcohol interdiction resources in the regional and air hubs where the State's ability to control the flow of alcohol is probably at its best. Preserving state authority while expanding tribal authority in this manner would allow for the creation of a truly unified system in which state, tribal (and federal) partners in alcohol enforcement could work together while focusing their respective resources where each is likely to have the greatest impact in controlling alcohol importation and bootlegging into dry communities in rural Alaska.

(4) Child Protection.

Child protection is an area in which the authority of both State and Tribe are clear. With child protection, Alaska Tribes can not only rely on principles of inherent tribal sovereignty, but on federal statutory recognition as well, as the Indian Child Welfare Act, 25 U.S.C. § 1901 *et. seq.* (ICWA), clearly recognizes and indeed enhances tribal jurisdiction over child protection and adoption cases.

Until quite recently in fact, Tribes and the State were making real progress in working together on Indian child welfare issues. Unfortunately, the Alaska Attorney General issued a legal opinion in October of last year, 2004 Op. Att'y Gen. No. 1, that now takes a ridiculously narrow view of tribal authority over

child protection and adoption cases. With few exceptions, the opinion denies that Alaska Tribes can even do tribal court adoptions or initiate their own tribal child protection cases. This new opinion thus denies full faith and credit to tribal court orders in children's cases, in violation of 25 U.S.C. § 1911(d), and has been challenged in court as a result.[2] It also wreaks havoc on tribal child protection efforts, by effectively denying Trooper and other state backup for tribal foster and adoptive parents and the children they are raising and protecting, should a parent or someone else decide to arbitrarily remove or endanger a child.

In short, the October 2004 Attorney General opinion is not only wrong as a matter of law, but is very destructive of child protection efforts in the villages as well – it gives no consideration at all to the major role that tribal child protection efforts play in Alaska today, in ensuring that children in the villages will be safe and secure. The opinion also harms tribal children by denying Tribes access to confidential information concerning these children to which Tribes are entitled.

The State will likely contend – as it does in the Attorney General Opinion – that it is merely following existing law as stated in the so-called *Nenana* line of cases, so named for *Native Village of Nenana v. State, Dep't of Health & Social Services*, 722 P.2d 219 (Alaska 1986),[3] in which the Alaska Supreme Court held that Alaska Tribes lack even concurrent jurisdiction over children's cases unless they have successfully petitioned the Secretary of the Interior for a reassumption of jurisdiction pursuant to the ICWA, 25 U.S.C. § 1918. Legal reasoning of this sort cannot justify the State's choice of an anti-tribal policy here, however, as the *Nenana* line of cases has been overtaken by more recent decisions of the Alaska Supreme Court that have largely negated these cases. *See, e.g., In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (recognizing tribal right to transfer of ICWA cases pursuant to 25 U.S.C. § 1911(b), and substantially overruling the *Nenana* line of cases); *John v. Baker*, 982 P.2d 738 (Alaska 1999) (recognizing in non-ICWA case that tribal jurisdiction over child custody dispute was inherent and retained).

Thus, the Attorney General's reliance on *Nenana* is misplaced. It would appear likely that *Nenana*'s holding that Tribes lack even concurrent jurisdiction over children's cases will one day be completely overtaken by the Alaska Supreme Court's more recent and far more insightful recognition that Tribes can and do exercise inherent retained sovereignty. If this is true with child custody disputes,

---

[2] *Native Village of Tanana v. State*, No. 3AN-04-12194 CI. The undersigned counsel is one of the attorneys for the tribal plaintiffs in this lawsuit as well.

[3] The other two cases in the *Nenana* line of cases are *In re F.P.*, 843 P.2d 1214 (Alaska 1992), and *In re K.E.*, 744 P.2d 1173 (Alaska 1987).

as recognized in *John v. Baker*, then it is true with child protection and adoption cases as well; there is no principled basis for distinguishing the one from the other.

Once the Alaska Supreme Court squarely confronts this realization, it will hopefully rule that Alaska Tribes do have concurrent jurisdiction over children's cases alongside the State, and are therefore allowed to commence their own tribal child protection and adoption cases. A recognition of this sort would bring Alaska case law into conformity with federal case law, which already recognizes that Alaska Tribes have inherent and concurrent jurisdiction over such matters. *Native Village of Venetie IRA Council v. State*, 944 F.2d 548, 558-62 (9th Cir. 1991). But the Attorney General need not passively await such a decision; rather, he should find an opportunity to actively seek reconsideration of the *Nenana* line of cases by the Alaska Supreme Court, as these cases were wrongly decided, and are hurting tribal children by now being resurrected through the Attorney General opinion.[4]

In the meantime, this Commission should recommend that the October 2004 Attorney General opinion be immediately withdrawn by the State. The State should return to its prior policy of recognizing tribal jurisdiction over children's matters, which would then allow the development of a more unified system of child protection in Alaska. The Commission should also recommend that conflicts between state and tribal child protection efforts be worked out through cooperative agreements authorized by the ICWA at 25 U.S.C. § 1919. The State's effort to back Tribes into as small a jurisdictional corner as possible is precisely how *not* to create a more unified child protection system; it just hurts tribal children instead.

(5) Domestic Violence.

The State of Alaska has authority to control domestic violence, just as it may control most any other crime or civil injury in Alaska. And as with child protection, domestic violence is an area over which Tribes not only have inherent, retained jurisdiction, but federal statutory recognition of their authority as well.

Inherent tribal jurisdiction to prevent domestic violence among tribal members should be clear, both as a logical outgrowth of the inherent jurisdiction of Tribes to regulate domestic relations among their members, as recognized in *John v. Baker*, and because Tribes have inherent authority to punish misconduct by their members, as recognized in *United States v. Wheeler*. If anything, federal statutory law has expanded on this inherent jurisdiction. The Violence Against Women Act (VAWA) requires that States give full faith and credit to protective

---

[4] In both *C.R.H.* and *John v. Baker*, attorneys for the State of Alaska took pro-tribal positions that greatly assisted the Court in advancing its reasoning on Tribes.

orders issued by Tribes, where notice and opportunity to be heard have been provided the person against whom the order is issued. 18 U.S.C. § 2265.

A more unified system of domestic violence prevention could be built simply by recognizing this existing tribal authority. The State should simply provide full faith and credit to tribal child protection orders under the VAWA, instead of trying to fight such orders, as it unsuccessfully tried to do a couple of years ago after the State Troopers had been called upon to assist in enforcement of a protective order that expelled a perpetrator from the Native Village of Perryville. Furthermore, full faith and credit is a two-way street, for just as States are required to give full faith and credit to tribal protective orders, so too are Tribes required to give full faith and credit to state protective orders. 18 U.S.C. § 2265. Thus, federal law already provides a very effective way of ensuring a unified system, simply by requiring that both Tribes and States respect the others' protective orders as their own. Simply put, things cannot get much more unified than that.

Thus, once again, a cooperative model provides the best model for a unified system, allowing the State and Tribes to achieve things together that neither would be able to achieve alone in protecting victims of domestic violence.

Conclusion.

Tribal and state sovereignty are too often described as a zero sum game, in which the empowerment of the one means the diminishment of the other. In each of the areas being studied by this Commission, however, this is the wrong way to see things. Rather, Tribes and the State can and should be partners in a unified system that solves problems of mutual concern while protecting and strengthening the sovereignty of both. Cooperation of this sort is good not only for Tribes and the State, but for village residents as well, who then receive much better services.

Like two columns, state and tribal sovereignty are separate, and each must stand securely centered on its own foundation or collapse. But together, these two columns are capable of supporting the two ends of an arch together, creating a structure that is stronger than the sum of its parts. An arch of this sort is the most stable structure this Commission could consider, in designing a more unified architecture for providing the basic law and justice services village residents so badly need.

- EDS