Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Tribal and Family Court Issues

Presenter:

The Honorable Jeremy Brave-Heart, Chief Judge, Klamath Tribes

Chief Judge Jeremy Brave-Heart, a citizen of the Shawnee Tribe of Oklahoma, holds a J.D. from the University of Michigan Law School, and has degrees in Anthropology and Political Science. Mr. Brave-Heart serves as Chief Judge for the Klamath Tribes, was a Judge for the Hopi Tribal Courts, and is concurrently Of Counsel to the Indian Law firm Ceiba Legal, LLP. As a tribal member and lawyer specializing in all aspects of Federal Indian and Tribal Law and Policy, Mr. Brave-Heart has been honored to serve dozens of tribes. Before returning home to the West, Mr. Brave-Heart was in private practice in Washington, D.C., at the Indian Law firm of Hobbs, Straus, Dean, & Walker, LLP. While in Washington, D.C., Mr. Brave-Heart defended and advocated for critical tribal issues such as Education, Health, Gaming, Treaty Rights, Federal Indian Policy, and as is so often necessary these days, litigation on behalf of tribes at the state and federal courts. Mr. Brave-Heart also served as the Assistant Attorney General for the Eastern Shoshone Tribe, where he represented the Tribe as co-counsel in defending its reservation boundary in the United States Court of Appeals for the 10th Circuit, as well as representing dozens of its tribal departments. Outside of serving tribes and their citizens, Mr. Brave-Heart's passions include ceremony, shooting, hunting, fishing, writing music and poetry, and above all, spending time with his wife and two daughters.

TRIBAL COURT/STATE COURT FORUM
Memorandum of Understanding
Between
The Oregon Judicial Department
and
The Nine Federally Recognized Tribes of Oregon

This Memorandum of Understanding (MOU) sets forth the terms and understanding between the Oregon Judicial Department and the Nine Federally Recognized Tribes of Oregon to establish an ongoing forum of state, tribal and federal judiciaries.

Background

Oregon has nine federally recognized Indian tribes: the Burns Paiute Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Confederated Tribes of Grand Ronde; the Confederated Tribes of Siletz Indians; the Confederated Tribes of the Umatilla Indian Reservation; the Confederated Tribes of Warm Springs; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; and The Klamath Tribes. Oregon also has 36 Circuit Courts and six Federal Courts including one US District Court in four locations, one Bankruptcy Court and one Ninth Circuit Court of Appeals. State, Federal and tribal courts have a range of common responsibilities. However, at times, they can misunderstand, misinterpret and disagree about issues important to each jurisdiction. These parallel and sometimes overlapping responsibilities require open communication between court systems. In August of 2015, six Tribal judges, twelve Circuit Court Judges and one Federal Judge convened to discuss cross jurisdictional issues affecting all of their systems. At the conclusion of their meeting, they unanimously expressed a need for an ongoing forum to continue the work.

Purpose

The Tribal Court/State Court Forum will create and institutionalize a collaborative relationship between judicial systems in Oregon, identify cross-jurisdictional legal issues affecting the people served by those systems, and improve the administration of justice of all our peoples. It will allow judges and court representatives to gain knowledge of their various court procedures and practices, identify strategies and facilitate improvements in their interactions, and allow them to coordinate and share resources, educational opportunities and materials.

Membership

The membership of the forum shall consist of equal representation of nine state court representatives from diverse locations and nine tribal representatives. One state court judge and one tribal court judge shall serve as co-chairs of the forum. The co-chairs can designate an attorney representative with knowledge of Indian Law and a federal court representative to serve as members of the forum.

Meetings

The forum will meet up to two times each year and will alternate between tribal and state locations.

Funding

This MOU is not a commitment of funds.

Duration

This MOU is at-will and may be modified by mutual consent of the members. This MOU shall become effective upon signature by the authorized officials listed below and will remain in effect until modified or terminated by any one of the partners by mutual consent.

Non-Binding

The parties understand that this MOU is not legally binding on them but is designed to reflect an understanding of the way in which they can effectively cooperate to create a tribal/state court forum in Oregon. Nothing in the MOU restricts any party from exercising independent judgment or discretion given it under applicable statutes, regulations, or other sources.

OREGON JUDICIAL DEPARTMENT
SIGNED
SEPTEMBER 29, 2016
CHIEF JUSTICE BALMER

CONFEDERATED TRIBES OF WARM SPRINGS
PENDING BEFORE TRIBAL COUNCIL

BURNS PAIUTE TRIBE
SIGNED
AUGUST 22, 2016
CHARLOTTE RODERIQUE, TRIBAL COUNCIL

COQUILLE INDIAN TRIBE
PENDING BEFORE TRIBAL COUNCIL

CONFEDERATED TRIBES OF THE UMATILLA INDIANS
SIGNED
SEPTEMBER 26, 2016
JUDGE WILLIAM D. JOHNSON

COW CREEK BAND OF UMPQUA TRIBE INDIANS
SIGNED
NOT DATED
MICHAEL RONDEAU

CONFEDERATED TRIBES OF GRAND RONDE
SIGNED
NOT DATED
JUDGE DAVID SHAW

THE KLAMATH TRIBES
SIGNED
NOT DATED
JUDGE JEREMY BRAVE-HEART

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS
SIGNED
NOT DATED
JUDGE J.D. WILLIAMS

CONFEDERATED TRIBES OF SILETZ INDIANS
SIGNED
NOT DATED
JUDGE CALVIN GANTENBEIN

Tribal/State Court Forum Members

First Name:	Last Name:	Tribe / County:	Agency
Judges:			
Daniel	Ahern	Jefferson County	Circuit Court Judge
Sally	Avera	Polk County	Circuit Court Judge
Jeremy	Brave-Heart	Klamath Tribes' Judicial Branch	Tribal Court Judge
Donald	Costello	Coquille Indian Tribe	Tribal Court Judge
William	Cramer	Grant/Harney Counties	Circuit Court Judge
Cal	Gantenbein	Confederated Tribes of Siletz Indians	Tribal Court Judge
Lynn	Hampton	Umatilla County	Circuit Court Judge
William	Johnson	Confederated Tribes of the Umatilla	Tribal Court Judge
Mark	Kemp	Burns-Paiute Tribe	Tribal Court Judge
Lisa	Lomas	Confederated Tribes of Warm Springs	Tribal Court Judge
Valeri	Love	Lane County	Circuit Court Judge
Maureen	McKnight	Multnomah County	Circuit Court Judge
Michael	Newman	Josephine County	Circuit Court Judge
Darleen	Ortega	Statewide	Appellate Court Judge
David	Shaw	Confederated Tribes of Grand Ronde	Tribal Court Judge
Martha	Walters	Statewide	Oregon Supreme Court Justice
J.D.	Williams	Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians	Tribal Court Judge
Ron	Yockim	Cow Creek Band of Umpqua Indians	Tribal Court Judge
OJD Staff:			
Leola	McKenzie	Juvenile and Family Court Programs (JFCPD)	Director, JFCPD
Amy	Benedum	Juvenile and Family Court Programs (JFCPD)	Program Analyst, JFCPD

Other Meeting Attendees			
First Name:	**Last Name:**	**Tribe / County:**	**Agency**
Craig	Dorsay	Multnomah	Dorsay & Easton LLP
David	Gallaher	Umatilla	CTUIR
Claudia	Groberg	Lane	Department of Justice
Hope	Hicks	Marion	OJD - JFCPD
Rodger	Isaacson	Klamath	OJD
Dawn	Marquardt	Marion	OR Department of Justice
Rebecca	Orf	Statewide	OJD - JFCPD
Stephanie	Striffler	Multnomah	Oregon Dept of Justice

PRINCIPLES OF FEDERAL INDIAN LAW

APPLICABLE TO

FAMILY LAW ISSUES IN STATE COURTS

IAML Family Law Conference

February 14, 2013

Craig J. Dorsay, Attorney

I. Relevant Principles of Federal Indian Law.

A. Inherent Sovereign Status of Indian Tribes.

1. Indian tribes are one of three sovereigns expressly described in the United States Constitution – states, the federal government, and tribes.

2. Indian tribes pre-dated the United States Constitution, and therefore are not included in its provisions or coverage, except as expressly noted. *Talton v. Mayes*, 163 U.S. 376, 384 (1896)(5th Amendment does not apply to Indian tribes).

3. Indian tribes have historically been recognized as "distinct, independent political communities" which exercise powers of self-government not by virtue of delegation from a superior sovereign, but rather as original, inherent sovereign authority. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *United States v. Lara*, 541 U.S. 193, 204-05 (2004). Tribal sovereignty remains until limited or ended by Congress.

4. One of the earliest Supreme Court cases described Indian tribes as "domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). This guardian ward relationship does not undermine, but does limit, the independent sovereign status of tribes. Tribes start as governments possessing the sovereign powers of independent nations, who came under the authority of the United States through treaties, agreements and through the assertion of authority by the United States.

The United States has a fiduciary obligation to protect and preserve tribal self-government and to continue their integrity as self-governing entities. *See, e.g.*, *Worcester*, *supra*, 31 U.S. at 555-561.

5. Tribal sovereignty continues undiminished except as "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This last provision – limited by necessary implication of dependent status – impacts the field of family law. The Supreme Court has held that Indian tribes retain "the power of regulating their internal and social relations," *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173 *(quoting United States v. Kagama*, 118 U.S. 375, 381 (1886)).

6. Tribes retain sovereign power over their members and their territory, subject only to federal law limitations. *Worcester v. Georgia*, *supra*, 31 U.S. at 555; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)(membership); *White Mt. Apache Tribe v. Bracker*, 448 U.S. 141-42 (1980), although the Court "long ago departed from [*Worcester v. Georgia's*] view that 'the laws of [a State] can have no force within reservation boundaries." *Id.* (quoting *Worcester v. Georgia*, *supra*, 31 U.S. at 555. "[T]here is a significant geographical component to tribal sovereignty." *White Mt. Apache Tribe v. Bracker*, *supra*, 448 U.S. at 151. *Cf. John v. Baker*, 982 P.2d 738, 761 (Alaska 1999)(tribal sovereignty over domestic relations of members extends off-reservation).

B. Constitutional Principles.

1. States generally lack authority under the Constitution over Indian tribes and Indian territory: "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996).
2. Laws separating out Indians and Indian tribes for separate treatment do not violate the United States Constitution and are based on the political status of tribes under the Constitution, rather than being racially based. *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974).

C. Recent Changes in Supreme Court Law on Tribal Authority and Jurisdiction over Non-Indians – *Montana v. U.S.* and its Progeny.

1. In 1981, the Supreme Court issued what has been subsequently referred to as a "pathmarking" decision in *Montana v. United States*, 450 U.S. 544 (1981). While previously it had been commonly understood that Indian tribes retained sovereign authority over both Indians and non-Indians within "Indian country," *e.g.*, *Willams v. Lee*, 358 U.S. 217, 220 (1958)(tribes retain the authority "to make their own laws and be ruled by them"; state suit by on-reservation non-Indian trader to collect debt owed by reservation Indian prohibited); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985)(tribal court civil subject matter jurisdiction over non-Indians not automatically foreclosed; careful examination of various factors required); *but see Strate v. A-1 Contractors*, 520 U.S. 438, 448-53 (1996)(Court distinguishes *National Farmers* and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and reaffirms the *Montana* rule), *Montana* held that the implicit divestiture of tribal sovereignty because of tribes' dependent status necessarily includes relations between an Indian tribe and nonmembers of the tribe. *Montana*, 450 U.S. at 564. *See Strate*, *supra*, 520 U.S. at 445 ("absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

2. The decision in *Montana* is limited to tribal regulatory and adjudicative jurisdiction over the conduct of non-members on non-Indian fee land within an Indian reservation. *Strate, supra*, 520 U.S. 446. There is some non-controlling language indicating that the Supreme Court could extend the *Montana* rule in the future to all Indian country, whether owned by the Tribe, individual Indians, in trust, or in fee or other status. *Nevada v. Hicks*, 533 U.S. 353 (2001).

3. The Court in *Montana* held that Indian tribes retain the following inherent sovereignty: "In addition to the power to punish tribal offenders, the Indian tribe retains their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. This principle was restated in *Duro v. Reina*, 495 U.S. 676, 685-86 (1990)(result overturned by legislation): "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. Oliphant recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in Wheeler reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own customs and social order."

4. The Court then described what authority Indian tribes can exercise over the conduct of non-Indians within a reservation: "To be sure, Indian tribes exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (citations omitted – *Williams v. Lee¸supra*, one of the cites) . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

5. These two circumstances where a tribe may assert civil authority over non-Indians have become known as the two *Montana* exceptions – consent and essential tribal relations. Both exceptions are implicated in the family law arena.

6. Short-hand, the case law states that non-Indians cannot be named as defendants in a tribal court action unless one of the *Montana* exceptions applies, and under *Fisher v. District Court* and other precedent, tribal members who reside on-reservation generally cannot be named as a defendant in a state court action. *E.g.*, *Hinkle v. Abeita*, 283 P.3d 877 (N.M.App. 2012)(state court lacks jurisdiction over on-reservation motor vehicle accident, brought by non-Indian against on-reservation tribal member).

D. U.S. Supreme Court cases on Indian Domestic Relations Law.

1. The most cited Indian domestic relations case is *Fisher v. District Court*, 424 U.S. 382 (1976). It is cited as the basis for the exclusive jurisdiction provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(a). *Fisher* was an adoption case involving two members of a tribe residing on-reservation seeking in state court to adopt a child, also a tribal member residing on-reservation, that they had been granted custody of by the tribal court. The Supreme Court ruled that the state court lacked jurisdiction over the adoption, even though the on-reservation adoptive Indians were also state citizens.

2. The Court held: "State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. . . . it would create a substantial risk of conflicting adjudications affecting the custody

of the child and would cause a corresponding decline in the authority of the Tribal Court. No federal statute sanctions this interference with tribal self-government." 424 U.S. at 387-88.

3. The Court noted: "Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive. The Runsaboves have not sought to defend the state court's jurisdiction by arguing that any substantial part of the conduct supporting the adoption petition took place off the reservation." 424 U.S. at 389.

4. The Court concluded: "Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible, racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. at 390-91.

5. *Fisher* is cited by the Supreme Court in *Montana* as authority for the second *Montana* exception, that Indian tribes retain inherent authority to exercise civil authority over the conduct of non-Indians when that conduct threatens or has some direct effect on the political integrity or health and welfare of the tribe. *Montana*, 450 U.S. at 566.

6. The other Supreme Court Indian domestic relations case is *United States v. Quiver*, 241 U.S. 602 (1916), involving a federal adultery prosecution against an on-reservation tribal member. The Court ruled: "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws. . . . the relations of the Indians among themselves –the conduct of one toward another – is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise ." 241 U.S. at 603-06.

II. Factors that Must be Considered in Determining the Outcome of Family Law Cases Involving Indian Families, Parents, Children, and Tribes.

A. Tribal Status.

1. The protections and rights that attach to Indian tribes apply to what are known as "federally-recognized" Indian tribes. Some rights may apply to tribes that are only recognized on the state level. Rights possessed by tribes generally do not extend to non-recognized tribes, unrecognized tribes, or terminated tribes that have not been restored.

2. The Bureau of Indian Affairs (BIA) publishes an annual list of all federally-recognized tribes in the Federal Register. The most current list appears at 77 Federal Register 47868 (Aug. 10, 2012). This list is entitled to judicial notice.

B. Land Status.

1. Indian tribes exercise authority over their territories. The general legal term of art used for this geographic area is "Indian country," defined as the area within which Indian laws and customs and federal laws relating to Indians are generally applicable. "Generally speaking, jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998).

2. The term "Indian country" is defined in a federal criminal statute, 18 U.S.C. § 1151, but the Supreme Court has applied it also to questions of civil jurisdiction. *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n.5 (1987).

3. The definition of Indian country includes "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation," "all dependent Indian communities," and "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

4. Lands within a reservation include lands in trust, restricted or fee status, owned by the Tribe, individual Indians, or non-Indians. Reservations include both formal and information reservations. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

5. Some tribes do not have reservations or other defined Indian country. Oklahoma and Alaska, for example, do not have reservations under federal law. Other tribes have defined "service areas" within which they exercise governmental authority.

C. Membership Status – Tribal Member, Non-Member Indians, and Non-Indians.

1. Under the *Montana* test and other Supreme Court precedent, tribal sovereign authority exists primarily over members of that tribe. The general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565.

2. Nonmembers of a tribe – Indians who are members of a different tribe – are generally treated the same as non-Indians under this test. *See Duro v. Reina*, *supra*; *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161 (1980)("[N]onmembers are not constituents of the governing tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.").

3. Congress can expressly authorize tribal authority over all Indians – both members and nonmember Indians – on a reservation or within Indian country. For example, Congress re-established tribal criminal jurisdiction over nonmember Indians after *Duro*. In the Indian Child Welfare Act, Congress expressly authorizes exclusive tribal jurisdiction over <u>any Indian child</u> who is domiciled or resident on a particular reservation. *See* 25 U.S.C. § 1911(a).

4. Indian tribes have exclusive authority to determine membership status. *Santa Clara v. Martinez*, 436 U.S. 49, 72 n.32 (1978)("a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence."). A tribal determination of membership is conclusive for purposes of the Indian Child Welfare Act. *E.g.*, *In re S.M.H.*, 103 P.3d 976, 981 (Kan App), *rev. denied*, 279 Kan. 1006 (2005).; *In re Adoption of Riffle*, 902 P2d 542, 545 (Mont. 1995). Enrollment is the most common but not the only method of determining membership; a child may be a member of a tribe without being formally enrolled. *Nelson v. Hunter*, 888 P.2d 124 (Or App 1995). If it can be shown that a tribe has not followed its own membership requirements, it is possible that a tribal membership determination will not be deferred to. *See In re A.W.*, 741 N.W.2d 793, 798 (Iowa 2007).

5. Every tribe has different membership requirements, and blood quantum requirements are different for each tribe. *Angus v. Joseph*, 655 P.2d 208 (Or App 1982). The child may be a member of or eligible for membership in a different than the custodial parent. *In re Armell*, 550 NE2d 1060 (Ill App 1990). It is possible that a child may be almost full-blood Indian, but does not have enough

blood quantum derived from any one tribe to be a member of any tribe. *See In re Smith*, 731 P.2d 1149, 1151-53 (Wash App 1987).

6. State recognition of tribal authority over children extends to children who are members of a tribe. State recognition of tribal authority over children who are not members of or eligible for membership in a tribe may violate the Equal Protection Claus of the Constitution because special treatment of such children would no longer be based on a permissible political classification. *See In re A.W., supra*; *State ex rel. SOSCF v. Klamath Tribe*, 11 P.3d 701, 706-07 (Or App 2000)("the status of the children in this case – by virtue of the Tribe's own definition of membership – is no different than that of any other 'non-Indian' child."). In *Klamath Tribe*, a State-Tribal Agreement extended coverage of the ICWA to Klamath children who were the children of tribal members, but who were not eligible for tribal membership themselves. The Oregon Court of Appeals concluded that the Klamath Tribes exercised complete control over this issue – it could extend membership eligibility to such children (by lowering the tribal blood quantum), at which point the children would come under the ICWA. The ICWA expressly extends its application not only to children who are members of a tribe, but also to children who are eligible for membership in a tribe and the biological child of a member of a tribe. 25 U.S.C. § 1903(4).

7. This issue can get complicated because federal law often extends benefits to Indian children who are not eligible for membership, and tribal law many times extends tribal jurisdiction to descendants of tribal members, whether eligible for membership or not. For example, members of an Indian household are eligible for Indian Health Service benefits and Indian Housing benefits even though not eligible for membership in a tribe. *See United States v. John*, 437 U.S. 634 (1978)(upholding federal criminal jurisdiction over Indian based on blood quantum, not membership).

D. Tribal Law.

1. An Indian tribe has authority to determine and limit its own authority and jurisdiction. Tribal law is expressed in written constitutions and ordinances, in tradition and custom, and sometimes is oral in nature.

2. An Indian tribe may limit its authority and jurisdiction only to tribal members, for example, in which case tribal jurisdiction under its own law will not extend to non-members of the tribe. Often, however, the tribe will set out its jurisdiction

and authority in broad terms, often in language that states something like – "to the full extent permitted by federal law and inherent tribal sovereignty."

3. The question of whether a tribe or tribal court has exceeded its jurisdiction or sovereign authority as a matter of federal law is a federal common law question that is within the subject matter jurisdiction of the federal courts to decide. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992). State courts lack authority to interfere with tribal sovereignty by determining that a tribal court or tribe lacks authority in a given case. *See Garcia v. Gutierrez*, 217 P.3d 591, 607 (N.M. 2009); *U.S. v. Lopez*, No. CE. 11-50073-JLV (Order, 12/19/12)(dismissing federal prosecution for failure to pay child support, based on state enforcement of tribal court order, where tribal court order was based on tribal court adoption to non-Indian, in violation of tribal law restricting adoption of tribal members only by tribal members).

E. Tribal sovereign immunity; Exhaustion of Tribal Court Remedies.

1. As discussed above, the federal courts have jurisdiction to determine whether an Indian tribe has exceeded its jurisdiction or sovereign authority over a non-Indian parent or child in a given case. However, federal (or state) jurisdiction is complicated by the fact that Indian tribes and tribal entities are generally immune from suit in the absence of express tribal consent or Congressional mandate. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505,509 (1991); *see Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001) (tribal chief had no actual or apparent authority to waive tribe's sovereign immunity by signing contract, where tribal ordinance provided specific procedure for waiver of tribe's immunity).. There is only one extremely limited federal statutory waiver of tribal sovereign immunity, for criminal habeas corpus proceedings. 25 U.S.C. § 1303. Courts have uniformly rejected the application of this statute to child custody proceedings.

2. Tribal sovereign immunity is a complicated subject and beyond the scope of this presentation. Cases supporting tribal sovereign immunity include: *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751(1998); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,532 U.S. 411(2001). Tribal "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi Indian Tribe v. Cal. St. Bd. Of Equal.*, 757 F.2d 1047, 1052 n.6, *rev'd on other grounds*, 474 U.S. 9 (1985). Tribal sovereign immunity applies on and off the

reservation, in all courts – federal, state and tribal, and to commercial and governmental entities. *Kiowa, supra*. Indian Tribes are not immune from suits by the United States. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Even when a tribe voluntarily waives its sovereign immunity, say by tribal ordinance, it ordinarily does so only in its own courts, and such waiver does not mean the tribe has waived its immunity with regard to state court jurisdiction. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2d Cir. 2001). States cannot condition tribal access to state courts upon a general waiver of tribal sovereign immunity. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

3. When an Indian tribe brings suit in a court it necessarily consents to that court's jurisdiction to determine the claims adversely to it. *E.g., Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981); *but see Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1985)(*U.S. v. Oregon* tests the outer limits of implied consent to other claims). This consent does not, however, extend to counterclaims, mandatory counterclaims, or cross-claims. *U.S. v. USF&G Co.*, 309 U.S. 506, 511 (1940); *Chemehuevi Indian Tribe v. California State Bd. of Equal.*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985); *Squaxin Indian Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); *Thompson v. Crow Tribe of Indians*, 289 Mont. 358, 962 P.2d 577 (Mont. 1998)(tribe's filing of tribal tax lien with county recording officer did not waive tribe's sovereign immunity as to suit in state court to void the liens); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987)(terms of sovereign's consent to be sued in any court define that court's jurisdiction to entertain the suit).

4. Tribal sovereign immunity is jurisdictional in nature. *Chemehuevi Indian Tribe, supra*, 757 F.2d at 1051; *Thompson, supra* (sovereign immunity can be raised at any time, even on appeal; if sovereign immunity exists, court cannot entertain action, let alone rule on the merits).

5. While a tribe may not be sued directly, the Supreme Court has determined that the *Ex Parte Young* doctrine applies to tribal officials who act beyond the sovereign authority retained by Indian tribes under federal law. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505,509, 514(1991); *Dept. of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*,

512 U.S. 61, 72 (1994)(citing *Citizen Band*); *Tamiami Partners, Ltd. V. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225 (11th Cir. 1999); *Vann v. Dept. of Interior*, ___ F.3d ___, 2012 WL 6216614 (D.C. Cir. 12/14/12). Tribal officers and employees acting within the scope of their authority and in their official capacity are immune from suit. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983); *United States v. Oregon*, *supra*, 657 F.2d at 1012 n.8; *Great Western Casino, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828, 838-40 (Cal.App. 2d. Dist. 1999); *Redding Rancheria v. Superior Court*, 105 Cal. Rptr. 2d 773, 777-78 (Cal.App. 3rd Dist. 2001), *cert. denied sub. nom, Hansard v. Redding Rancheria*, 70 U.S.L.W. 3461 & 3463 (Jan. 22, 2002); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Cal.App. 4th Dist. 1999).

6. Before a non-Indian can challenge tribal court authority in federal court, he or she must still exhaust all available tribal court remedies, under Supreme Court precedent. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985); *Boozer v. Wilder*, 381 F.3d 981, 984 (9th Cir. 2004). This includes exhausting available tribal appellate review. *Boozer*, *supra*; *Iowa Mut. Ins. Co.*, *supra*, 480 U.S. at 16-17. Opportunities to avoid exhaustion are limited.

F. **Full Faith & Credit vs. Comity**.

1. It is fairly well-accepted at this point that the judgments and orders of tribal courts, particularly in the field of domestic relations, are not entitled to automatic enforcement as a matter of full faith and credit. Rather, they are enforced as a matter of comity so long as the tribal court entering the judgment or order had jurisdiction to do so, and fundamental due process was accorded. *Garcia v. Gutierrez*, 217 P.3d 591, 606-07 (N.M. 2009). *See* SDCL § 1-1-25 (South Dakota statutory procedure for granting comity to tribal court judgments); *In re J.D.M.L.*, 739 N.W.2d 796 (S.D. 2007)(refusing to grant comity to tribal court order because tribal court lacked personal jurisdiction over non-Indian parent); *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990).

2. Older cases that addressed this issue sometimes classified Indian tribes as territories under the federal full faith and credit act at 28 U.S.C. § 1738. Others concluded that this classification did not apply to tribes because tribes are not expressly included. As discussed below, some federal statutes now expressly include tribes in their definitions section.

G. Public Law 280.

1. Public Law 280 is a termination-era federal statute passed in 1953. The civil portion of this statute is codified at 28 U.S.C. § 1360. The statute delegates some of the federal government's exclusive authority over Indian affairs to certain states. Public Law 280 includes six mandatory states (states that Congress mandated in the statute that Public Law 280 would apply to – Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin) and optional states (Congress allowed other states under the statute to opt into P.L. 280 coverage. There are ten states with varying degrees of PL 280 jurisdiction – Arizona, Idaho, Iowa, Washington, Florida, Nevada, Montana, South Dakota, North Dakota, Washington). Public Law 280 allows state courts to exercise concurrent jurisdiction over private civil adjudications involving Indians who reside or are domiciled within Indian country, including domestic relations matters. *See Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). Public Law 280 does not delegate jurisdiction over tribes themselves, and does not include any regulatory matters. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

2. You should check the Public Law 280 status of each state that may be involved in a custody or divorce action, in analyzing which government has jurisdiction over a case.

H. Indian Child Welfare Act.

1. Most of the Indian Child Welfare Act is inapplicable in domestic relations proceedings. The Act is primarily directed at involuntary state court dependency and neglect proceedings, but it does provide coverage of adoption proceedings, voluntary or involuntary. The Act expressly excludes from its definition of covered proceedings the award of custody to one of the parents. 25 U.S.C. § 1903(1). *DeMent v. Oglala Sioux Tribal* Court, 874 F.2d 510, 514 (8th Cir. 1989). Award of custody to someone other than the parent would be included under the Act. *See In re S.B.R.*, 719 P.2d 154 (Wash App 1986)(mother's attempt to grant guardianship to maternal grandmother covered by ICWA). Case law has also excluded custodial battles between unwed biological parents from coverage under the Act. *In re DeFender*, 435 N.W. 2d 717, 721 (S.D. 1989).

2. A parent does not include a non-Indian adoptive parent. *In re J.R.*, No. 57,934 (Okla. 2/2/82); *Carson v. Carson*, 13 P.3d 523, 525 n.4 (Or.App. 2000). If adoptive parents of an Indian child get divorced, and one parent is Indian and one

is non-Indian, awarding custody to the non-Indian adoptive parent, who is not a "parent" as defined by the ICWA, would invoke the Act. *See* 25 U.S.C. § 1916(a).

3. The ICWA applies to most adoption proceedings. 25 U.S.C. § 1903(1). It applies to both voluntary and involuntary adoptions. *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986); *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Step-parent adoptions are included under the ICWA. *Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Cal. App. 1991); *In re Crystal K*, 276 Cal.Rptr. 619 (Cal. App. 1990). The Act would arguably apply to surrogacy and in vitro arrangements. The U.S. Supreme Court has just accepted certiorari of an adoption case under the Indian Child Welfare Act. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012). Oral argument is set for April.

4. Tribal court orders and judgments (and public acts) that come under coverage of the Indian Child Welfare Act are entitled to full faith and credit by state courts to the same extent they would accord full faith and credit to any other jurisdiction. 25 U.S.C. §1911(d).

5. The U.S. Supreme Court accepted certiorari of an ICWA case on January 4, 2013, likely scheduled for oral argument in mid-April. The case is *Adoptive Couple v. Baby Girl*, 731 SE2d 550 (S.C., July 26, 2012). As the title indicates, the case involves adoption under the ICWA, and the certiorari petition raised establishment of paternity for unwed fathers under the Act and the applicability of the "existing Indian family exception" as issues. Amicus briefs address the authority of Indian tribes over Indian children in various circumstances, so the Court's opinion in this case could affect family law practice generally.

I. Discovery/Subpoenas.

1. As a component of their sovereign immunity from suit, Indian tribes generally are immune also from unconsented discovery through subpoena or other means. *United States v. James*, 982 F.2d 1314, 1319-20 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993); *Alltel Communications LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). If a tribe voluntarily provides discovery in one area, it may be subject to additional discovery to flesh out the information provided. *James*, *supra*. Even here, the tribal officer or employee who voluntarily waives the sovereign immunity of the Tribe must have authority to do so under tribal law. *Chance v. Coquille Indian* Tribe, 963 P.2d 638 (Or. 1998). This sovereign immunity extends to tribal officers and employees acting within their official capacity and within the

scope of the Tribe's legal authority. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983); *Great Western Casino, Inc. v. Morongo Band of Mission Indians*, 88 Cal.Rptr.2d 828, 838-40 (Cal.App. 2d Dist. 1999).

2. When an Indian tribe brings suit, it necessarily consents to discovery related to claims involved in that suit. *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981). This consent does not extend to other claims, however, such as counterclaims, mandatory counterclaims, or cross claims. *USF&G*, *supra*, 309 U.S. at 511. Some courts have held that limited discovery can be conducted on the issue of whether a tribe has validly waived its sovereign immunity or not, when the tribe raises sovereign immunity as a defense to suit. *See, e.g., Seaport Loan Products LLC v. Lower Brule Community*, Index No. 651492/12 (N.Y. Sup. Ct., New York County, 1/8/13)(Order on Motion to Compel Discovery).

3. Indian tribes and tribal casinos often receive subpoenas ducas tecum looking for per capita payments, gaming activity records, income statements and the like in state family law matters. Tribes and their arms and entities are not subject to state court processes, and it is entirely voluntary whether tribes or tribal entities comply with such discovery requests.

J. Service of Process.

1. Where an Indian tribe has a procedure in place under tribal law for service of process within the reservation or Indian country for state court proceedings, that process must be complied with to obtain personal jurisdiction over an Indian defendant. *E.g., State v. Surface*, 802 P.2d 100 (Or.App. 1990); *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990); *Francisco v. State*, 556 P.2d 1 (Ariz. 1976).

2. If a tribe does not have its own procedure for service of process in a state court proceeding for an Indian defendant on the reservation, the case law generally permits the state court to acquire personal jurisdiction by following its own procedures. *M.L.S. v. Wisconsin*, 458 N.W.2d 541 (Wisc. App. 1990); *State v. Railey*, 532 P.2d 204 (N.M. 1975).

3. Service of process still does not determine whether the state court has valid personal and/or subject matter jurisdiction over an Indian person who resides on a reservation and has had no contacts, or limited contacts, off the reservation.

K. Tribal Courts.

1. This is another subject that is too complicated to discuss at adequate length in this presentation or outline. Indian tribes generally have their own court systems, and the federal government has a trust obligation to preserve and protect tribal judicial authority over tribal territory and tribal members. *Fisher v. District Court, supra*.

2. Tribal courts vary widely in structure and sophistication. Tribes such as Cherokee and Navajo have sophisticated judicial structures with written, published laws, procedures and decisions, multiple appeals courts and judicial divisions, bar exams, and formal court, Anglo style court procedure in most instances. The Pueblos in New Mexico and Arizona have courts composed of religious leaders. Many tribes have an informal tribal customary judicial structure that exists alongside the more formal court, and other tribes have "Peacemaker" or other customary court systems that exercise judicial authority in certain circumstances. Other smaller tribes have small courts that meet infrequently, or share resources with other tribes. The Northwest Inter-Tribal Court System in Washington, for example, consists of fourteen tribes and includes courts of appeal. The court sits as the court of a particular tribe in a specific case, and applies the laws of that tribe in the case. Information about tribal courts is generally available on each Tribe's website.

3. The structure of tribal courts also varies widely. Many tribes have constitutions that establish the tribal court as an independent branch of the tribal government. Other tribal constitutions or laws place the tribal court system under either the executive or legislative branch. A number of tribes do not have constitutions or other formal governing documents, and their courts or judicial forums act pursuant to inherent tribal sovereign authority, with no formal structure. The ICWA, 25 U.S.C. § 1903(12), states that a tribal court means "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses (*see* 25 C.F.R. Part 11 – mostly Oklahoma), a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings."

4. Tribal judges also vary widely in qualifications and requirements. Many are law trained, and a number of tribes require that judges be practicing members of a state bar. Many tribes have Indian preference or tribal preference for judges. A number of tribal courts do not require law trained judges; the Warm Springs Tribe Court of Appeals, for example, is composed of appointed tribal elders. The Resources Section below includes sources to learn more about tribal courts.

5. The Indian Civil Rights Act, 25 U.S.C. § 1302 applies to actions of the tribal court. This Act applies some but not all of the Bill of Rights to the public actions of Indian tribes, since as discussed above Indian tribes are not subject to the United States Constitution. For example, there is no right to a jury trial in civil proceedings. 25 U.S.C. § 1302(10).

L. UCCJEA.

1. The UCCJEA by its terms does not apply to Indian tribes. Some tribes have adopted the UCCJEA or its predecessor, the UCCJA into tribal law, providing for cooperation with state courts in family law matters under specified conditions. The model UCCJEA contains an optional provision allowing a state to treat tribes as states under the Act. Several states, including Minnesota and New Mexico, have enacted this provision into state law. *E.g.*, N.M.S.A. 40-10A-101-403. *See Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009)(applying the *Montana* test rather than the UCCJEA to determine "home state" under the UCCJEA).

2. Under the older UCCJA, states were split on whether tribes qualified as other "states" under their version of the UCCJA. Doesn't apply: *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn.App. 1987); *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988). Does apply: *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz. App. 1987); *Alegria v. Redcherries*, 812 P.2d 1085 (Ariz.App. 1991).

3. In a very recent case (attached), the Navajo Nation Supreme Court applied the analysis under the UCCJEA to defer to a New Mexico state court custody, paternity and child support action despite the fact that under Navajo law, the Navajo courts had exclusive jurisdiction over the proceeding. *Bahe v. Platero*, Nav. Sup. Crt, 1/8/13)

M. Parental Kidnapping Prevention Act (PKPA, 28 U.S.C. § 1738A).

1. The prevailing view is that the PKPA does not apply to Indian tribes, although the case law is split. *Garcia v. Gutierrez*, *supra* (does not apply); *John v. Baker*, 982 P.2d 738, 762 (Alaska 1999)(does not apply); *Desjarlait*, *supra* (does not apply); *Malaterre*, *supra* (does not apply); *Platero v. Platero*, 10 Indian Law Reporter 3108 (D.N.M. 1983)(PKPA does not apply to inter-tribal custody disputes); *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989)(does apply); *Martinez v. Superior Court*, *supra*.

2. Some tribes have a version equivalent to the PKPA in tribal law, where the tribe will grant full faith and credit to state court custody orders if that state grants full faith and credit to tribal court custody orders.

N. Full Faith and Credit for Child Support Orders, 28 U.S.C. § 1738B.

1. Section 1738B by its terms defines "states" under the statute to include "Indian country," so the statute applies to Indian tribes. *See Smith v. Hall*, 707 N.W.2d 247 (N.D. 2006). Courts can modify the child support orders of other jurisdictions only under limited circumstances. The Siletz Tribal Code, for example, allows the Siletz Tribal Court to review the parent's ability to pay and to modify the payment amount in appropriate circumstances.

2. A number of tribes and states have entered into agreements setting out how this statutory provision will be enforced. It is also a requirement of receiving federal child welfare funding and is often a provision in Title IV-E Agreements between tribes and states, or entered into directly by tribes with the federal government.

3. Even where a state has validly issued a child support order against an Indian father who resides on a reservation, a garnishment order implementing that order can only be enforced through a tribal court proceeding. *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980). The State has no jurisdiction to enforce child support orders directly on the reservation against and Indian who resides on the reservation and has no off-reservation contacts. *State ex rel. Flammond v. Flammond*, 621 P.2d 471 (Mont. 1980); *Nenna v. Moreno*, 647 P.2d 1163 (Ariz. App. 1982); *McKenzie County Social Services Board v. V.G.*, 392 N.W.2d 399 (N.D. 1986), *cert. denied*, 480 U.S. 930 (1987).

O. Interstate Compact on Placement of Children (ICPC).

1. The ICPC does not apply to Indian tribes. Memorandum, March 29, 1982, Association of Administrators of the Interstate Compact on the Placement of Children.

2. In *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007), the Court held that the ICPC required that the State ICPC administrator verify that a proposed adoptive placement of an Indian child in Florida complied with the Indian Child Welfare Act before approving the proposed adoptive placement and allowing the child to leave Oklahoma.

3. In *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, the South Carolina Supreme Court denied application of the ICPC to invalidate an adoptive placement of an Indian child from Oklahoma to South Carolina. The court held that the purpose of the ICPC was to ensure that placement of children across state lines was safe, and does not protect the rights of birth parents. 739 P.3d at 559. The birth mother, a non-Indian, reported the child's ethnic heritage on ICPC forms as "Hispanic" rather than "Native American" to avoid application of the ICWA. *Id.* At 554-55.

4. Practice varies from state to state about whether a tribal home study in the receiving state qualifies as a valid home study for purposes of the ICPC.

III. Application of Federal Indian Law Principles to Family Law.

A. Applying the *Montana* test.

1. The two *Montana* exceptions allow tribal court jurisdiction over the actions of non-members within Indian country when 1. the non-member consents to tribal jurisdiction, or 2. the actions of the non-member threaten the political integrity, the economic security, or the health and welfare of the tribe.

2. Consent to tribal jurisdiction by a non-member can occur by one of two methods. First, a non-member consents to tribal jurisdiction by initiating a lawsuit in tribal court. *Smith v. Salish & Kootenai College*, 434 F.3d 1127 (9th Cir. 2006); *John v. Baker*, 982 P.2d 738 (Alaska 1999), 30 P.3d 68 (2001). Second, while the general *Montana* rule is that non-members cannot be made defendants against their will in a tribal court action, a non-member consents to tribal court jurisdiction by participating in a tribal court action initiated by a tribal member. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341-42 (2008)(use by bank of tribal court to serve process for state court action does not constitute consent to tribal court jurisdiction for action by tribal members against bank). Consent to tribal court jurisdiction is narrowly construed; consent in one area is not consent to tribal court jurisdiction for other matters. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)(tribal contract did not constitute consent to tribal jurisdiction for tort action involving car accident); *Atkinson Trading Co. v. Shirley*, 531 U.S. 645, 656 (2001)(receipt of tribal services by non-Indian business located on fee land within reservation is not consent to tribal taxation unrelated to those services – "it is not 'in for a penny, in for a Pound.'"); *Jones v. Lummi Tribal Court*, No. CR-1915-JLR, Order, W.D.Wash. 12-10-12 (consent to

tribal jurisdiction regarding order of protection is not consent to adjudication of custody in tribal court).

3. Domestic relations involving tribal members and tribal member children have been held to be a matter essential to the political integrity, the economic security, and health and welfare of the tribe. *See In re Marriage of Skillen*, 956 P.2d 1, 11-12 ("[The ICWA] accentuates that custody matters that involve Indian children implicate a broader range of concerns than custody matters that do not involve Indian children, and furthermore, that those interests are of great importance to the United States, and of course, to the integrity of Indian tribes. Despite the ICWA's nonapplication to dissolution-based custody disputes, we also recognize that the tribal court's experience and abilities in these areas are inherent advantages over state courts and remain as such when the custody matter before a tribal court happens to occur pursuant to a marriage dissolution."), 15 ("We further assert that in any matter so essential to tribal relations as a custody matter involving an Indian parent and Indian child who reside on Indian land, we must presume that the tribal court has jurisdiction and consider the potential state exercise of jurisdiction in terms of its infringement on tribal sovereignty."), 16 ("Especially when Indian children reside on the reservation, they represent the single most critical resource to the tribe's ability to maintain its identity and to determine its future as a self-governing entity. As such, we cannot think of a more legitimate and necessary manifestation of tribal self-government than the tribe's right to have a role in a custody determination of its member children who reside on the reservation with an enrolled parent.")(Mont. 1998)(" Based on these . . . criteria, we conclude as a matter of law that a more reasoned approach for the courts of this state is to recognize exclusive tribal jurisdiction in child custody proceedings between parents where at least one parent is an Indian and that parent resides on the reservation with an Indian child," even where the non-Indian parent resides off-reservation and has filed a divorce action in state court.).

4. This essential tribal interest in its children is reflected in the ICWA. *See* 25 U.S.C. § 1901(3)("There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee in protecting Indian children"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52-53 (1989)("The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the [Indian] child which is distinct from but on a parity with the interests of the parents. . . . the interests of the tribe in custodial decision with respect to Indian children are as entitled to respect as the interests of the parents." (*quoting In re Adoption of Halloway*, 732 P.2d 962, 969-

70 (Utah 1986)), 34 ("Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."); *Wakefield v. Little Light*, 347 A.2d 228, 234, 237-38(Md. App. 1975)("there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children."; "[W]e think it plain that child-rearing is an 'essential tribal relation'"); H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 15 (July 24, 1978)(House Report in support of ICWA: "Even this State court (in *Wakefield*) recognized that a tribe's children are vital to its integrity and future.").

5. This essential tribal interest over Indian children extends everywhere, even off-reservation. *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999)("We hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess [inherent , non-territorial sovereignty allowing them to resolve domestic disputes between their own members." (*John* involved Alaska villages, which have no Indian country territory under federal law; father was a member of a different Alaska Native Village than mother and child; Alaska Native Villages are recognized Indian tribes)); *Johnson v. Jones*, Order on Motion to Dismiss¸ No. 6:05-cv-1256-Orl-22KRS, p. 3, D.M.D. Fla., 11/3/05)(tibe's "sovereign authority extends beyond a tribe's territorial boundaries," citing *John v. Baker* and quoting *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980)(domestic relations)); *Bahe v. Platero, supra*, Navajo Supreme Court – Navajo exclusive jurisdiction over member children under tribal law extends to all such children, without regard to location).

6. The territorial component of the *Montana* test - that Indian tribes generally lack jurisdiction over the activities of non-members on non-Indian fee land within a reservation - also plays a part in determining domestic relations jurisdiction. *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009)(Non-Indian mother resides with Indian child within Indian reservation but on non-Indian fee land, giving state court concurrent jurisdiction over her divorce action).

7. The converse of the *Montana* test is also true – Indians residing on a reservation cannot be made defendants in a state court custody or divorce proceeding without their consent, where the tribal member has no relevant contacts off-reservation. *See Hinkle v. Abeita*, 283 P.2d 877 (N.M.App. 2012) .

B. Concurrent Jurisdiction: State vs. Tribal Jurisdiction over Family Law matters involving Indian parents and children.

1. While the legal principles discussed above are relatively straightforward, the reality of family structure on the ground makes these principles difficult to apply in a given fact situation. Indian tribes and tribal members have greatly increased their interaction with non-Indian society in the last 50 years. Tribal members travel off-reservation for a variety of reasons – school, work, marriage, etc., and non-Indians commonly reside on reservations and become involved with tribal members. It is an uncommon case today where all the contact and activity in a given divorce or custody case occurs on a reservation, or all off the reservation. Most cases involve a mix of on and off-reservation residence, and on and off reservation activity that is relevant to a determination of court jurisdiction.

2. Because of the mix of on and off-reservation activity, most cases result in concurrent jurisdiction. Both the relevant state court and tribal court can exercise valid jurisdiction over a domestic relations case. In many of the cases listed below, both courts have exercised their jurisdiction – the Indian parent has filed in tribal court and the non-Indian parent has filed in state court – and the question then becomes whether and under what conditions one court should defer as a matter of comity or judicial efficiency, or as a matter of law, to the other court. In addition, the question of whether a court can exercise jurisdiction over all aspects of the case must be addressed. For example, if the children are tribal members and reside on the reservation, the off-reservation non-Indian parent can validly file a divorce action in state court, but the state court will likely lack jurisdiction to decide custody of the children in such action. Likewise, if the children are non-members of the tribe and perhaps ineligible for enrollment in the tribe (i.e., their tribal blood quantum is too low), the tribal court may lack jurisdiction over the children as a matter of tribal law.

3. In some cases, there is no court that can exercise complete jurisdiction over all aspects of a domestic relations proceeding. This is an outcome of the various federal policies and federal Indian law principles that protect the integrity of Indian tribes and governments. In most cases, the tribal and state courts must decide as a matter of comity whether to defer to the other court. The good news is that there is much greater cooperation among and communication between state and tribal courts, generally and in specific cases. In some cases, such as Minnesota and Wisconsin (the Teague Protocol), the state and tribal courts have formed judicial consortiums to address how to determine jurisdiction in domestic relations cases in orderly fashion and in a way that promotes the best interests of the children and parties.

4. As a general matter, state courts lack jurisdiction to determine some incidents of divorce when an Indian is involved. The federal government has exclusive authority over land held in trust by an individual Indian, usually as an allotment, or over trust funds that might have been awarded to individual Indians in a claims case brought by a tribe against the United States for violation of the federal government's fiduciary obligation to tribes. *See, e.g. In re Marriage of Wellman*, 852 P.2d 559 (Mont. 1993); *Sheppard v. Sheppard*, 655 P.2d 895, 921 (Idaho 1982); *Landauer v. Landauer*, 975 P.2d 577 (Wash.App. 1999); *In re Estate of Big Spring*, 255 P.3d 121 (Mont. 2011).

5. The issue of concurrent jurisdiction over child custody matters and comity also applies to inter-tribal custody disputes. There is no overriding federal statute that requires Indian tribes to give full faith and credit or even comity to the domestic relations orders of other tribes. The ICWA requires tribes to give full faith and credit to child custody proceeding (as defined by the ICWA) orders of other tribes, 25 U.S.C. § 1911(d), but there is no enforcement mechanism and no waiver of tribal sovereign immunity. These cases involve children who are eligible for membership in more than one tribe. *See Platero v. Platero*, 10 Indian Law Reporter 3108 (D.N.M. 1983); *Navajo Nation v. Confederated Tribes of the Warm Springs Reservation of Oregon*, No. 87-915-DA (D.Or. 1988), 15 Indian Law Reporter 3058, 3060 (dismissed on sovereign immunity grounds). The *Ex parte Young* doctrine has since been applied to tribes and could be used to test whether one tribal court has valid jurisdiction over a child, as opposed to another tribe.

6. The following is a non-inclusive list of state and federal cases that have addressed the issue of concurrent state versus tribal child custody jurisdiction, in addition to the cases cited above. Each case is highly fact-dependent:

    a. *Marriage of Limpy*, 636 P.2d 266 (Mont. 1981).
    b. *Wildcatt v. Smith*, 321 S.E.2d 909 (N.C.App. 1984).
    c. *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950).
    d. *Lonewolf v. Lonewolf*, 657 P.2d 627 (N.M. 1982).
    e. *In re Custody of Zier*, 750 P.2d 1083 (Mont. 1988).
    f. *Fisher v. Fisher*, 656 P.2d 129 (Idaho 1982).
    g. *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz.App. 1984).
    h. *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1984).
    i. *Red Fox and Red Fox*, 542 P.2d 918 (Or.App. 1975).
    j. *Thomas v. Thomas*, 453 N.W.2d 752 (Neb. 1990).
    k. *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn.App. 1985).

l. *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988).
m. *Joseph v. Redwing*, 429 N.W.2d 49 (S.D. 1988).
n. *Jackson County v. Swayney*, 331 S.E.2d 145 (N.C.App. 1985), *aff'd in part, rev'd in part*, 352 S.E.2d 413 (N.C. 1987).
o. *State ex rel. Dept. of Human Services v. White*, 660 P.2d 590 (N.M. 1983).
p. *In re the Matter of J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007).
q. *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989)
r. *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980).
s. *Wisconsin Band of Potowatomies of the Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (W.D.Mich., N.D. 1973).
t. *Gerber v. Eastman*, 673 N.W.2d 854 (Minn.App. 2004).
u. *IN re Lelah-Puc-Ka-Chee*, 98 F. 429 (D.Iowa 1899).

IV. Resources.

A. There are many sources of information about Indian law generally. They include:

1. Cohen's Handbook of Federal Indian Law (Lexus Nexus 2012).

2. American Indian Law in a Nutshell, Canby Jr., Willam C. . West Publishing, 5th ed. 2009.
3. The Rights of Indians and Tribes, Pevar, Stephen L., 4th ed 2012, Oxford University Press.

B. Websites with information about tribal courts and tribal laws include:

1. The Native American Rights Fund is the largest public interest law firm representing tribes and individual Indians on a broad range of issues. Their website, www.narf.org, contains an online manual on the Indian Child Welfare Act, and many other Indian law topics. In addition, NARF operates the National Indian Law Library, which contains an extensive set of tribal laws and constitutions in addition to other Indian law materials. www.narf.org/NILL.

2. The National Indian Justice Center in Santa Rosa, California, conducts extensive training for tribal court personnel and other tribal government personnel on a broad range of issues. www.nijc.org.

3. The National American Indian Court Judges Association is an organization representing tribal court judges across the country. They also operate a tribal court

resource center and conduct trainings for tribal court judges and court personnel. http://naicja.org.

4. West Publishing Co. recently began publishing a tribal court reporter that reports tribal court decisions. In addition, they are assembling and publishing tribal court laws and ordinances – I do not know how extensive their collection is.

5. Finally, most tribes have their own websites now that contain tribal laws and policies, and usually have a description of the tribal court and tribal government, in addition to a tribal history. These sites are readily available on the web.

TRIBAL AND STATE JURISDICTION

TO

ESTABLISH AND ENFORCE CHILD SUPPORT

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The information in this publication is current as of December 2005.

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PREFACE

In 1991, the Federal Office of Child Support Enforcement (OCSE) published Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. In addition to legal research, the publication identified barriers to, and possible solutions for, Tribal and State court reciprocity in child support. The publication included information from interviews conducted by the American Bar Association with attorneys, judges, and child support caseworkers who daily worked in State and Tribal courts. Organizations such as the National Child Support Enforcement Association, the Institute for Court Management, the Bureau of Indian Affairs, and the American Indian Law Center also provided input.

Since 1991, there has been increased interaction between States and Tribes in the area of child support. There are now nine Tribes receiving Federal funding to operate Title IV-D child support programs. OCSE has established a Tribal/State Cooperation Workgroup. The U.S. Supreme Court has also issued several decisions regarding Tribal and State jurisdiction. As a result of this activity, OCSE issued a task order to revise its 1991 publication.

Unlike the first publication, the focus of this revised publication is on legal research rather than identification of best practices. Researchers used on-line internet resources , identified in the Appendix, as well as traditional “law library” resources, in order to identify Tribal and State case law, law review articles, and other publications. The goal of this revised publication is to provide a comprehensive legal resource for child support lawyers and decision-makers, although Tribal and State caseworkers may also benefit from the jurisdictional discussions and explanation of Federal regulations regarding child support establishment and enforcement.

Historical information about Federal legislation affecting Tribes provides a context for the discussion of jurisdictional issues in child support cases. The publication is not intended to be a statement of Federal/Tribal policy. For comprehensive information about the relationship between Tribes, States, and the Federal government, readers should consult the Handbook of Federal Indian Law by Felix Cohen, which is updated on a regular basis. The most recent update is Nell Newton et al., eds., Cohen’s Handbook of Federal Indian Law (2005 ed.).

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CHAPTER ONE
INTRODUCTION

OVERVIEW

According to data submitted to the Federal Office of Child Support Enforcement, State child support agencies reported 15.9 million child support cases in FY 2004.[1] These cases resulted in the establishment or acknowledgment of 1.6 million paternities, the establishment of 1.2 million new child support orders, and the collection and distribution of $21.9 billion in child support payments.[2] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases. The collections represented about 59% of the total current amount due and a collection in about 60% of arrears cases.[3] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases.

During the same period, nine Tribes operating Federally funded IV-D child support programs reported 26,425 child support cases.[4] These cases resulted in the establishment of 2,773 paternities, the establishment of 10,211 support orders, and the collection and distribution of $12.4 million in child support payments.[5] Such data do not include child support cases heard within the legal system of those nine Tribes that were not processed through the Tribal IV-D program. Nor do they include child support cases arising within the other 553 Federally recognized Tribal governments.

Although there are information gaps, it is clear from the above statistics that there are large numbers of children entitled to child support for whom enforcement remains a problem. To date, most of the focus has been on improving interState enforcement between States. However, many of the same issues that arose in years past in the interState arena – lack of reciprocity in enforcement, service of process problems, poor communication – are present today when there is interaction between a State and an American Indian Tribe. [6]

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[1] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Child Support Enforcement (CSE) FY 2004, Preliminary Report to Congress.
[2] *Id*.
[3] *Ibid*.
[4] Office of Child Support Enforcement, *supra* note 1. The reporting Tribes were the Chickasaw, Lac du Flambeau, Lummi, Menominee, Navajo, Forest County Potawatomi, Puyallup, Sisseton-Wahpeton, and Port Gamble S'Klallam.
[5] *Id*.
[6] As noted by the Native American Training Institute, "[t]he dilemma over whether to use the term Indian, Native American, American Indian, or some other term, when referring to the collective group has been a long-running debate. The only agreement seems to be that there is no agreement on any one term. . . . [T]he issue often comes down to a matter of personal preference. . . . It is also important to note that some people may have definite preferences for the term used while others will not have a particular preference as long as any term is used respectively." North Dakota Department of Human Services, Journey to Understanding: An Introduction to North Dakota Tribes (2003) (written under contract by the Native American Training Institute) [hereinafter referred to as Journey to Understanding]. According to a 1995 U.S. Census Bureau survey of people within the group that the term was meant to represent, 49.76% of the respondents preferred the term "American Indian," 37.35% preferred the term "Native

In 1989, a project funded by the State Justice Institute surveyed various individuals in the 32 States with Federally recognized Indian Tribes. The second most frequently cited area of disputed jurisdiction cases was that of domestic relations cases--divorce, child custody, and support.[7] Specifically, in the area of child support enforcement, the following problems were cited: "a non-Indian spouse may challenge a Tribal court child support order accompanying a divorce; a reservation Indian may seek to reject a State court's jurisdiction with child support; a Tribe member may seek to reject a State court process served on the reservation."[8] Tribal court judges have raised similar concerns. In a 1999 survey of Tribal court judges in the lower 48 States, 80% of the respondents indicated that they had encountered problems having their Tribal court judgments enforced in State forums – even when the States are required to do so by Federal law.[9]

Over 40% of the difficulties with State court recognition of Tribal court orders related to subject matters covered by the Federal full faith and credit mandates of the Violence Against Women Act[10] and the Full Faith and Credit for Child Support Orders Act.[11] In hearings before the U.S. Commission on InterState Child Support, American Indians also cited the need for State courts to be more sensitive to Tribal custom and collection procedures, and the need for expedited modification or review procedures when a State support order is based on imputed wages, which may be unrealistic for obligors living on Indian reservations.[12]

In 1991, the Federal Office of Child Support Enforcement published the first edition of Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. The publication documented efforts by States and Tribes to address these issues through intergovernmental efforts. Innovations included intergovernmental forums addressing jurisdiction issues, intergovernmental agreements regarding support enforcement, specially drafted court rules, and uniform registration statutes addressing mutual recognition of State and Tribal support orders. This second edition updates the 1991 publication, with an emphasis on changes in law. The most dramatic change since 1991 is the advent of Federally funded Tribal child support programs.

DEFINITIONS

Indian According to the 2002 U.S. Census, there are about 4 million people who identified themselves as American Indian, Alaska Native, or a combination of Indian and other races. There are many legal definitions of "Indian." For example, under some

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American," 3.66 % preferred some other term, 3.51% preferred the term "Alaska native," and 5.72% expressed no preference. For purposes of this monograph, the term American Indian or Indian is used.

[7] Rubin, *Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution*, State Ct. J. 9 (Spring 1990).

[8] *Id.* at 11.

[9] *See* Reeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000).

[10] 18 U.S.C. § 2265 (2002).

[11] 28 U.S.C. § 1738B (2002).

[12] U.S. Commission on InterState Child Support, Supporting Our Children: A Blueprint for Reform (U.S. Gov't Printing Office: Washington, DC 1992).

Federal laws, an Indian is anyone of Indian descent.[13] Other Federal laws define "Indian" as a member of a "Federally recognized" Indian Tribe.[14] Federal regulations governing the Tribal IV-D program (45 C.F.R. § 309.05) define “Indian” as “a person who is a member of an Indian Tribe.” They then define “Indian Tribe” as “any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe and includes in the list of Federally-recognized Indian Tribal governments as published in the Federal Register pursuant to 25 U.S.C. 479a-1.” Still other Federal laws use the word "Indian" without defining it.[15] Additionally, each Indian Tribe has its own enrollment requirements. Enrollment is usually based on either descent or blood quantum. Therefore, a person who is not considered a member of a Tribe because he or she lacks the requisite percentage of Tribal blood may nevertheless be considered an Indian under Federal law. Similarly, a non-Indian adopted into Tribal membership may not be considered an Indian under Federal law.[16]

Indian Country "Indian country" is defined in a Federal statute addressing criminal jurisdiction:

> "Indian country" . . . means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[17]

Presumably, this definition would also apply to civil jurisdiction (for which there is no comparable Federal statute). The definition is significant because it means that land owned by a non-Indian that is located within an Indian reservation is still considered Indian country. Also, trust and restricted Indian allotments that are located outside of a reservation are considered Indian country.

"Indian country" and "Indian reservation" are often used synonymously but they are not identical. As noted above, Indian country can include trust and restricted Indian allotments that are outside of the reservation. Proper identification of Indian country is crucial in any discussion of Tribal court jurisdiction. If there is a dispute, proof is an issue of law to be decided by a judge rather than a jury.[18]

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[13] *See, e.g.*, 25 U.S.C. § 479.
[14] *Id*.
[15] *See, e.g.*, 25 U.S.C. §§ 451, 452, 456.
[16] *See United States v. Rogers*, 45 U.S. 567 (1846); *State v. Atteberry*, 519 P.2d 53 (Ariz. 1974).
[17] 18 U.S.C. § 1151.
[18] *See, e.g.*, *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied* 477 U.S. 906 (1986); *United States v. Levesque*, 681 F.2d 75, 78 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982).

Reservation A reservation is land under the jurisdiction of Indian Tribes, bands, or communities, and the Federal government, as opposed to the States in which they are located. It covers territory over which a Tribe(s) has primary governmental authority. Its boundary is defined by Tribal treaty, agreement, executive or secretariat order, Federal statute, or judicial determination.[19]

Tribe A Tribe is a group of Indians that has had a certain autonomous political status since the time of its first contact with European settlers. They have a government-to-government relationship with the United States, which finds its basis in the Constitution. In discussing jurisdictional issues, the term "Tribe" refers to a group of American Indians protected by a trust relationship with the Federal government.[20]

This special relationship with the United States only applies to Tribes that are "recognized" by the Federal government. Such recognition has its origins in treaties, Acts of Congress, Executive Orders, rulings by Federal courts, or the modern Federal acknowledgment process at the Department of the Interior.[21] As of 2005, there are about 1.5 million Indians who are enrolled in 562 Federally recognized Tribes. These Tribes are located in 32 of the contiguous States and Alaska.

Each Tribe establishes its own criteria for enrollment. These criteria are set forth in Tribal constitutions, articles of incorporation, or ordinances. Usually, to enroll as a Tribal member, a person must meet Tribal requirements regarding descent or blood quantum. Tribal membership is not contingent on residency. Each Tribe maintains its own enrollment records. As a general rule, a person cannot have dual enrollment status.

Trust Land "Trust lands" are lands owned either by a Tribe or by an individual Indian, and the United States acts as trustee to the Tribe or the individual Indian. The land cannot be sold, transferred, leased or used by someone else unless approved by the Federal government. It is not subject to most State jurisdiction, including taxation and condemnation, but it is subject to rules and administration of the Federal government.

[19] According to the Native American Training Institute, a common misperception is that "reservations" are parcels of land given to Indian Tribes by the U.S. government. To the contrary, a reservation is land that Indian Tribes have always owned; it is land that was "reserved" by the Tribes and never given over to the United States. Journey to Understanding, *supra* note 6.
[20] F. Cohen, Handbook of Federal Indian Law (ed. 1982).
[21] Information from the website of the U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee, http://resourcescommittee.house.gov/subcommittees/naia.htm.

CHAPTER ONE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 451

25 U.S.C. § 452

25 U.S.C. § 456

25 U.S.C. § 479

28 U.S.C. § 1738B

Case Law

United States v. Rogers, 45 U.S. 567 (1846)

United States v. Levesque, 681 F.2d 75 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982)

United States v. Sohappy, 770 F.2d 816 (9th Cir. 1985), *cert. denied* 477 U.S. 906 (1986)

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F. Cohen, Handbook of Federal Indian Law (ed. 1982).

North Dakota Department of Human Services, Journey to Understanding: An Introduction to North Dakota Tribes (2003) (written under contract by the Native American Training Institute).

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U.S. Commission on InterState Child Support, Supporting Our Children: A Blueprint for Reform (U.S. Gov't Printing Office: Washington, DC 1992).

CHAPTER TWO
HISTORY OF TRIBAL POWERS

PRIOR TO EUROPEAN CONTACT

Most Indian Tribes had developed their own forms of self-government long before contact with European nations. Although the forms of government varied, the traditional decision-making body was the Tribal council. Council leaders were usually consensus-oriented, achieving "control over members by persuasion and inspiration, rather than by peremptory commands."[22] Historically, Indian Tribes had no written laws. Conduct was governed by custom. Sanctions for violation of the norm of conduct included mockery, ostracism, and religious sanctions. Tribal justice also often included restitution or compensation to the injured party.

Contact with European nations – and increasing interaction with American society – forever changed Tribal government. However, Tribal sovereignty was recognized even then; various foreign governments negotiated treaties with American Indian Tribes, obtaining land in exchange for small goods, money, or promises.

POST FORMATION OF UNITED STATES

A Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power. Tribes can no longer exercise external powers of a sovereign, such as entering into treaties with foreign countries.[23] However, that does not mean that all preexisting Tribal powers are abolished. The guiding principle is that Tribal powers are exclusive in matters of internal self-government, except to the extent that such powers have been limited by Federal treaties or statutes.

The Eighteenth Century

In 1775, the Continental Congress created three departments of Indian affairs, which had responsibility for maintaining relations with Indian Tribes in order to assure their neutrality during the Revolutionary War.[24]

In 1789 – the first year of the first U.S. Congress – there were three statutes passed that affected Indians. The Act of August 7, 1789 created the Department of War. In addition to handling military affairs, the Department was required to handle "such other matters . . . as the President of the United States shall assign . . . relative to Indian affairs." The second statute required respect for Indian rights in the governance of the Northwest Territory. The third law also recognized the sovereign status of Indian Tribes by appropriating a sum not exceeding $20,000 to defray "the expense of negotiating and treating with the Indian Tribes."

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[22] Cohen, *supra* note 20, at 230.
[23] *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823). *See also* Cohen, *supra* note 20.
[24] Journey to Understanding, *supra* note 6, at 27.

The Nineteenth Century The first major Federal act impacting on Tribal jurisdiction was the General Crimes Act of 1817.[25] It gave the Federal government jurisdiction over crimes committed by Indians against non-Indians within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Significantly, Indian nations retained exclusive jurisdiction over crimes committed by Indians against other Indians.[26]

There were also three U.S. Supreme court decisions between 1823 and 1832 that addressed Tribal self-government: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Cherokee Nation v. Georgia*, the Cherokee Nation filed in the Supreme Court a motion for injunction against the State of Georgia to restrain the State from executing and enforcing the laws of Georgia within the Cherokee nation. The Court first addressed whether it had jurisdiction under Article 3 of the Constitution, which gives the Court jurisdiction over disputes between a State or the citizens thereof and a foreign State. Although the Court concluded that the Supreme Court lacked jurisdiction because an Indian Tribe within the United States is not a foreign State in the sense of the Constitution, Chief Justice Marshall highlighted the unique sovereign status of Tribes. He introduced the phrase “domestic dependent nations” as a way to describe the status of American Indian Tribes, stating that the relationship between Tribes and the United States resembled that of “a ward to his guardian.”

Worcester v. Georgia was particularly supportive of Tribal sovereignty. In 1829, Georgia had passed a law to add Cherokee territory to certain Georgia counties and to extend Georgia laws over the same. In 1830, Georgia passed another law making it unlawful for anyone, “under the pretext” of authority from the Cherokee Tribe, to meet or assemble as a council for the purpose of making laws for the Tribe, or to hold court or serve process for the Cherokee Tribe. It also made it unlawful for a white person to live within the Cherokee nation without a license from the Georgia governor, in which the person swore to uphold Georgia laws while within the Cherokee nation. Worcester, a Vermont resident who resided in the Cherokee nation in order to preach Christianity, was convicted of violating the law. The Supreme Court issued a writ of error, ordering Georgia to appear before the Court to show why its act was not unconstitutional. In *Worcester*, the Court acknowledged that war and conquest give certain rights to the conquering State. However, the relation between the Cherokee Nation and the United States was “that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character.” Specifically, the Court held that the Cherokee Nation was a distinct community over which the Cherokee Nation had exclusive authority and in which State laws had no force.

[25] Codified at 18 U.S.C. § 1152. Further discussion of the General Crimes Act is found within Chapter Three.
[26] *See* N. Newton *et al.*, eds., Cohen’s Handbook of Federal Indian Law § 9.02[c] (2005 ed.).

Despite the Supreme Court's recognition of Tribal sovereignty, the period from 1815 to 1845 was also the height of the Removal Era. President Andrew Jackson advised the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes to move west of the Mississippi River or be subject to the laws of the States of Georgia and Alabama. From 1845 to 1887, thousands of settlers seeking gold, land, and adventure took over this "promised" land west of the Mississippi. From 1817 to the late 1880s, approximately 42 different Tribes were forcibly relocated to "Indian country."

The Removal Era also gave rise to what are known as assimilationist policies – attempts to "civilize" Native Americans by indoctrinating them into "Western" religion, views on land ownership, and trade. The end of the nineteenth century marked a shift from the earlier recognition of Tribal self-government to legislative curtailment of the powers of Indian Tribes.

In 1883 the U.S. Supreme Court decided the case of *Ex parte Crow Dog*, 109 U.S. 556 (1883). Crow Dog had killed a fellow Sioux, Spotted Tail. Tribal law required that Crow Dog support the family of Spotted Tail; it did not provide for other punishment such as imprisonment. The family of Spotted Tail accepted the Tribal punishment. However, due to a public outcry in the States, the Federal government prosecuted Crow Dog in Federal court where he was convicted and sentenced to death. The Supreme Court reversed, concluding that the "pledge to secure to these people . . . an orderly government . . . necessarily implies . . . the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." The Court recognized the possibility of Congress' placing limits on Tribal self-government but only if Congress did so in clear language.

Two years later, Congress responded with passage of the Major Crimes Act. The Act only applies to Indian defendants. It makes it a Federal crime for an Indian to commit certain major crimes -- such as murder, rape, and arson -- against either an Indian or a non-Indian in Indian country. According to several commentators, it is unclear whether such Federal jurisdiction is exclusive or whether Tribal courts have concurrent jurisdiction over the crimes listed.[27]

[27] *See, e.g*., Stoner and Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders,* 34 N.M.L. Rev. 381 (2004); Department of Justice, Criminal Resource Manual, The Major Crimes Act – 18 U.S.C.§ 1153 (Oct. 1997). Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.23d 823, 825-26 (9th Cir. 1995)). Reading the statute such that Tribal concurrent jurisdiction remains is also consistent with subsequent Congressional action. In reaction to the Supreme Court case of *Duro v. Reina*, Congress amended the Indian Civil Rights Act. The 1991 amendment defines "powers of self-government" to include the inherent power of Indian Tribes to exercise criminal jurisdiction over all Indians; there is no express exception for crimes enunciated in the Major Crimes Act. *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 9.04 (2005 ed.).

Two years later, in 1887, Congress passed the General Allotment Act. This Act provided for the division of Tribal lands into 160-acre parcels allotted to individual Indians and for the sale of "surplus" Tribal lands to non-Indians. The allotment system was designed to break up reservations and dilute the powers of Tribal governments. By 1934, Indians had lost two-thirds of their land: from 148 million acres in 1887 to 48 million acres in 1934.

It was during this "assimilation era" that the Bureau of Indian Affairs instituted Courts of Indian Offenses (referred to as BIA or CFR courts). These courts were run by the BIA Indian agent for each reservation pursuant to legal codes and procedures established by the BIA. Indian judges were hired and fired by the BIA. Even the police were chosen by the BIA. The courts had the power to resolve Tribal civil disputes and minor criminal offenses. However, the structure imposed by the BIA undermined the authority of Indian chiefs and traditional Tribal self-government.

The Twentieth Century President Roosevelt renounced this policy of autocratic rule over Indians in signing the Indian Reorganization Act of 1934.[28] The Act reflected conflicting philosophies toward Tribal self-government. On the one hand, the Act abolished the allotment policy. It also guaranteed the right of any Indian Tribe to "organize for its common welfare," including the adoption of an "appropriate constitution and bylaws." On the other hand, it gave the Secretary of the Interior the authority to provide technical advice and assistance as the Secretary determined was needed. It replaced the traditional consensus decision-making approach of Tribes with a requirement that the constitution and by-laws would become effective when ratified "by a majority vote of the adult members of the Tribe" in a special election. Finally, it required the Secretary to "review the final draft of the constitution and bylaws . . . to determine if any provision" was contrary to applicable laws. Historically, Indian Tribes had governed through custom rather than formal written laws.[29] The Indian Reorganization Act resulted in Tribes ratifying constitutions and laws that, in large part, copied BIA codes.[30]

Congressional attitude toward Indian Tribes, as reflected in legislation, has varied in the years since the Indian Reorganization Act. In the 1950's Congress passed several termination acts that resulted in the termination of 109 Tribes as Federally recognized, self-governing entities.[31] In 1953, Congress also enacted Public Law 280. Discussed in greater detail later, Public Law 280 authorized States to impose State civil and criminal jurisdiction over reservations, with or without Tribal consent.

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[28] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

[29] Cohen, *supra* note 20.

[30] Most Tribes have now replaced BIA codes with codes that address diverse issues.

[31] Nearly all of these tribes were later successful in regaining Tribal status, although many recovered only a small portion of their former lands. See Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev. 53, nn. 8-9 (1995); Walch, *Terminating the Indian Termination Policy*, 35 Stan. L. Rev. 1181 (1983).

The 1960's saw passage of the Indian Civil Rights Act.[32] As noted by the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), there were two "distinct and competing" purposes in the Act. One objective was to promote Indian self-government and protect Tribal sovereignty from undue interference. For example, the Act narrowed the reach of Public Law 280 by requiring Tribal consent in order for Public Law 280 jurisdiction to be extended over reservations in the future. A second objective was to strengthen the position of individual Tribal members vis-à-vis the Tribe. Thus, the Act legislatively applied nearly all of the Bill of Rights to Tribal courts and governments. Another aspect of the Act that affected Tribal self-government was its limitation on Tribal court criminal punishment to six months and $500. Congress later raised those limits to one year and $5000.[33]

Since 1970, there have been a number of Congressional acts affirming Tribal self-government. The Indian Financing Act of 1974 provides financial assistance to Tribal governments. The Indian Self-Determination and Education Assistance Act of 1975[34] authorizes Federal grants to Tribes specifically to improve Tribal governments. It also authorizes Indian Tribes to enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services that otherwise would be administered by the Federal government. The Indian Child Welfare Act of 1978 (ILWA) recognizes the importance of Tribal control over custody and adoption proceedings. In 1991, Congress amended the Indian Civil Rights Act to define the "powers of self-government" to include "the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[35] In 1994 Congress enacted the Federal Full Faith and Credit for Child Support Orders Act.[36] The Act requires a State to recognize and enforce another State's child support order. "State" is defined as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)." Therefore, States and Tribes are required to recognize and enforce valid Tribal child support orders, without regard to whether such orders were issued by a State or Tribal court or agency.

Finally, amendments to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorize Federal funding to an Indian Tribe or Tribal organization that demonstrates the capacity to operate a child support enforcement program that meets the objectives of Title IV-D, "including the establishment of paternity, establish, modification, and enforcement of support orders, and location of

[32] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301 – 41).
[33] P.L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302(7)).
[34] P.L. No. 93-638. The Act was amended in 1988, 1990, and 1994.
[35] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians."
[36] 28 U.S.C. § 1738(B).

absent parents."[37] The Act also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[38]

United States Presidents have also been vocal in supporting Tribal sovereignty. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian Tribes and reaffirmed "the government-to-government basis" for dealing with Indian Tribes. President George H.W. Bush recognized that the Federal government's "efforts to increase Tribal self-governance have brought a renewed sense of pride and empowerment to this country's native peoples." At a 1994 meeting with the heads of Tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American Tribal governments" and issued a directive to all executive departments and Federal agencies that, as they undertook activities affecting Native American Tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of Tribal sovereignty. The directive also required the executive branch to consult, to the greatest extent practicable and permitted by law, with Indian Tribal governments before taking actions that affect Federally recognized Indian tribes. Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000.

More recently, President George W. Bush, Jr. reaffirmed the principles of Tribal sovereignty and self-determination for Tribal governments in the United States. On April 30, 2004, he signed Executive Order 13336, entitled American Indian and Alaska Native Education, which devotes greater assistance to American Indian and Alaska Native students in meeting the academic standards of the No Child Left Behind Act in a manner that is consistent with Tribal traditions, languages, and cultures. On September 23, 2004, he issued an Executive Memorandum that reinforces the unique government-to-government relationship with Indian Tribes and Alaska natives. Recognizing the existence and durability of the unique government-to-government relationship between the United States and Indian tribes and Alaska Native entities, President Bush stated that "it is critical that all departments and agencies adhere to these principles and work with Tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles."

[37] See Section 5546 of the Balanced Budget Act of 1997, P.L. No. 105-33 (codified as amended at 42 U.S.C. § 655(f)).

[38] P.L. No. 104-193, 110 Stat. 2166 at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.

The United States Supreme Court also has held repeatedly that Indian Tribes retain "attributes of sovereignty over both their members and their territory."[39] However, in the last quarter of the century, its decisions increasingly pointed out the limits of Tribal jurisdiction over non-Indians or nonmember Indians: *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Three of the cases involved Tribal jurisdiction in criminal cases. In *Oliphant*, the Court held that, by submitting to the overriding sovereignty of the United States, Indian Tribes necessarily gave up their power to try non-Indian citizens of the United States except as authorized by Congress. In *Wheeler,*[40] the Court upheld the power of a Tribe to punish Tribal members who violate Tribal criminal laws. It found that Tribal sovereignty over an Indian offender had not been divested as a result of the dependent status of Tribes. However, the Court noted that the powers of self-government involve only the relations among members of a Tribe, such as the power to punish Tribal offenders, and the inherent powers to determine Tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[41] In *Duro*, the Court directly addressed the issue of jurisdiction over nonmember Indians, i.e., Indians who are not enrolled members of the Tribe whose jurisdiction is invoked. It extended the ruling in *Oliphant* to deny Tribal courts criminal jurisdiction over nonmember Indians.[42]

Another Supreme Court case focused on Tribal regulatory authority. *Montana v. United States* involved a Tribal regulation of the Crow Tribe of Montana, which prohibited hunting and fishing within the reservation by any nonmember of the Tribe, including on lands within the reservation owned by nonIndians. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians

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[39] *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee,* 358 U.S. 217 (1959).

[40] *Wheeler* involved an Indian defendant who had been convicted and punished in a Navajo Tribal court for contributing to the delinquency of a minor and was subsequently prosecuted in federal court for statutory rape rising out of the same incident. The Court concluded that the subsequent federal prosecution of an offender already prosecuted and punished in Tribal courts did not violate double jeopardy because the Tribal and federal prosecutions were brought by separate sovereigns and therefore were not "for the same offense."

[41] 435 U.S. 313, 326.

[42] Congress subsequently passed a statute expressly granting Tribal courts such jurisdiction. *See* 105 Stat. 646 (codified at 25 U.S.C. § 1301(2)), amending the Indian Civil Rights Act. In *United States v. Lara*, 541 U.S. 193 (2004), the Court held that the amendment was a Constitutionally permissible reinstatement by Congress of a tribe's inherent power to prosecute nonmember Indians for misdemeanors. Therefore, because the Double Jeopardy Clause does not bar successive prosecutions brought by separate sovereigns, there was no bar to federal prosecution of a defendant nonmember Indian for assaulting a federal officer after he had been convicted under a Tribal criminal misdemeanor statute for violence to a policeman.

within the reservation. The United States filed an action in the Supreme Court seeking a declaratory judgment establishing that the Tribe and the United States had sole authority to regulate hunting and fishing within the reservation, and an injunction requiring Montana to obtain the Tribe's permission before issuing licenses for use within the reservation. The Supreme Court concluded that, while the Tribe may regulate hunting or fishing by nonmembers on land belonging to the Tribe or held in trust for the Tribe, it had no power to regulate non-Indian fishing and hunting on reservation land owned by nonmembers of the Tribe. The court cited *Oliphant* in stating that "exercise of Tribal power beyond what is necessary to protect Tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." The Court found that regulation of hunting and fishing by nonmembers of a Tribe on land no longer owned by the Tribe did not bear a clear relationship to Tribal self-government or to internal relations.

There is language in *Montana* that became especially important in the later case of *Nevada v. Hicks*. Writing for the majority, Justice Stewart stated:

> Though *Oliphant* only determined inherent Tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe. To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealing, contacts, leases, or other arrangement. . . . A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conducts threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. . . .No such circumstances, however, are involved in this case.[43]

The last case, *Strate v. A-1 Contractors*, involved Tribal adjudicatory authority in a civil action. There was a car accident, involving non-Indians, which occurred on a North Dakota public highway that ran through the Fort Berthold Indian Reservation. One of the drivers was a widow of a deceased Tribal member whose adult children were also Tribal members. She filed a personal injury action in Tribal Court, which ruled that it had jurisdiction over the claim. The respondent, who was the employer of the other driver, filed an action in Federal district court, seeking a declaratory judgment that, as a matter of Federal law, the Tribal Court lacked jurisdiction to adjudicate the personal injury action. The District Court dismissed the action, determining that the Tribal Court had civil jurisdiction. The Eighth Circuit reversed. Relying on *Montana*, it concluded that the Tribal court lacked subject matter jurisdiction over the dispute. The Supreme Court agreed, and affirmed the decision of the Eighth Circuit.

[43] 450 U.S. 544, 566-7.

Justice Ginsburg delivered the opinion for a unanimous Court. She began by stating, "Our case law establishes that, absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." After citing *Oliphant*, she declared that *Montana* "is the pathmarking case concerning Tribal civil authority over nonmembers." *Montana* described "a general rule that, absent a different congressional direction, Indian Tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the Tribe or its members; the second concerns activity that directly affects the Tribe's political integrity, economic security, health or welfare." The Court concluded that neither exception was present in the case. There was no consensual relationship. Nor was regulatory or adjudicatory authority over the State highway accident needed to preserve the right of reservation Indians to make their own laws. Therefore, the State forum was the proper place for the driver to pursue her case.

The Twenty-First Century Some commentators have noted that *Montana* marked a shift away from a strict territorial conception of Tribal power, as evident in the recent Supreme Court decision of *Nevada v. Hicks*, 533 U.S. 353 (2001).[44] Respondent Hicks was a member of the Fallon Paiute-Shoshone Tribes who lived on the reservation. He was suspected of killing protected game life. On two occasions, State game wardens obtained State court search warrants. They then obtained Tribal court warrants, and -- accompanied by a Tribal police officer -- searched the respondent's property. The respondent alleged that during the second search, two mounted sheep heads (of an unprotected species) were damaged. He brought suit in Tribal Court against the State officials in their individual capacities, alleging trespass, abuse of process, and violation of civil rights. The Tribal Court held that it had jurisdiction over the claims. The State officials then filed an action in Federal district court seeking a declaratory judgment that the Tribal Court lacked jurisdiction. The District Court ruled that the Tribal Court did have jurisdiction. The Ninth Circuit affirmed, concluding that although the game wardens were non-Indians, their conduct occurred in the respondent's home, which was located on Tribe-owned land within the reservation. The Supreme Court reversed.

Justice Scalia, writing for the majority, characterized the issue as that of determining whether the Tribal Court had jurisdiction to adjudicate the alleged tortious conduct of State wardens executing a search warrant for evidence of an off-reservation crime. Citing *Strate*, the Court noted that the Tribe's adjudicative jurisdiction over a nonmember cannot exceed its legislative jurisdiction. The Court, therefore, first examined whether the Tribe – either as an exercise of its inherent sovereignty, or under grant of Federal authority – could regulate State wardens executing a search warrant for evidence of an off-reservation crime. The Court acknowledged that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*. However, the majority concluded that the general rule of *Montana* applied to both Indian and non-Indian land: "The ownership status of land, in other words, is only one factor to

[44] *See* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 (2003).

consider in determining whether regulation of the activities of nonmembers is 'necessary to protect Tribal self-government or to control internal relations.'" The Court noted that sometimes land ownership would be a dispositive factor. In fact, in prior Supreme Court decisions, the fact that the cause of action arose on land not owned by the tribe had been virtually conclusive of the lack of Tribal civil jurisdiction. However, "the existence of Tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."

The Court then characterized the issue in the present case as that of determining whether regulatory jurisdiction over State officers was necessary to protect Tribal self-government or to control internal relations. It concluded that it was not. The Court noted that the Indians' right to make their own laws did not exclude all State regulatory authority on the reservation: "Though Tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'The Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet 515, 561 (1832)" [citing *White Mountain Apache Tribe v. Backer*, 448 U.S. 136, 141 (1980)]. The Court concluded that Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws was not essential to Tribal self-government or internal relations, and that the State's interest in execution of process was considerable.

In a concurring opinion, Justice Souter, joined by Justices Kennedy and Thomas, opined that the principal determination of jurisdiction over civil matters on a reservation should be the membership status of the nonconsenting party, not the status of the underlying real estate,[45] i.e., whether the action arose in Indian country: "The path marked best is the rule that, at least as a presumptive matter, Tribal courts lack civil jurisdiction over nonmembers."[46] Justice O'Connor wrote a separate concurring opinion, which Justice Scalia noted, "is in large part a dissent from the views expressed in this opinion." Her opinion, joined by Justices Stevens and Breyer, characterized the majority's "sweeping opinion" as one that, "without cause, undermines the authority of Tribes to make their own laws and be ruled by them" in a case that involved Tribal power to regulate the activities of nonmembers on land owned and controlled by the Tribe.

Another opinion, *United States v. Lara,*[47] interpreting the "*Duro*-fix" amendment to the Civil Rights Act of 1968, is a must-read on the issue of inherent Tribal sovereignty versus delegated Federal authority, as well as on the Constitutional authority given to Congress to legislate regarding Tribal sovereignty. In a 7-2 decision, there were three concurring opinions. As noted by Justice Thomas in his concurring opinion, "As this case should make clear, the time has come to reexamine the premises and logic of our

[45] *Id.*
[46] 533 U.S. 353, 376-7.
[47] *See supra* note 42.

Tribal sovereignty cases.[48] Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse Federal Indian law and our cases."[49]

[48] 541 U.S. 193, 214.
[49] 541 U.S. 193, 219.

CHAPTER TWO
TABLE OF STATUTES AND AUTHORITIES

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Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

General Allotment Act, 24 Stat. 388, ch. 119, codified at 25 U.S.C. § 331

General Crimes Act, codified at 18 U.S.C. § 1152

Indian Child Welfare Act of 1978, P.L. No. 95-608 (1978)

Indian Civil Rights Act, P.L. No. 90-284, 82 Stat. 77 (1968), codified at 25 U.S.C. §§ 1301 – 41

Indian Financing Act of 1974, P.L. No. 93-262, 88 Stat. 77 (1974)

Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934), codified as amended at 25 U.S.C. §§ 461-479

Indian Self-Determination and Education Assistance Act of 1975, P.L. No. 93-638 (1975)

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Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

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United States v. Wheeler, 435 U.S. 313 (1978)

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

Williams v. Lee, 358 U.S. 217 (1959)

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

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CHAPTER THREE
AN OVERVIEW OF TRIBAL COURT JURISDICTION

TRIBAL COURTS

According to the Bureau of Indian Affairs, there are now 562 Federally recognized Tribal governments within the United States.[50] Among the Federally recognized Indian Tribes and Alaska Native villages, there are approximately 275 Tribal courts and 23 CFR courts.[51]

Tribal courts have similar authority as State courts. They take sworn testimony and provide parties procedural rights.[52] However, there is greater diversity among Tribal courts than among State courts. Some Tribes operate both trial and appellate courts, and have detailed rules governing appellate review. For example, the Navajo Nation, which has the largest and most populous reservation in the United States, has a long-standing Tribal court system. It consists of seven district courts, including a children's court and a peacemaker court, within each district, as well as an appellate court, the Navajo Supreme Court.[53] In other Tribes, the Tribal council provides appellate review, while in others there is no appellate review at all. Among various Northwest and Plains Tribes, there are inter-Tribal courts of appeals.[54]

Tribal legal systems often include forums that focus on dispute resolution. "One example is the family forum for domestic relations disputes among the Pueblo communities where intra-familial matters are resolved through family gatherings or talking circles facilitated by family elders. . . . Another noted example is the Navajo Peacemaker Court, created in 1982 as a way of fostering and encouraging use of traditional Navajo justice methods. . . . It employs non-adversary methods of community participation in achieving conflict resolution through, for example, 'talking out,' apology, and restitution. The Navajos provide a peacemaker forum for each of the Nation's judicial districts to handle a wide variety of cases, including criminal actions, dissolution of marriage, child custody, and property disputes. . . . As one Tribal judge put it, '[t]he Peacemaker Court, which emphasizes the involvement of family and friends in dispute resolution, promotes Tribal traditions and community harmony for a Tribe that is reconstituting after a century of dislocation.'"[55]

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[50] *See* www.doi.gov/bureau-indian-affairs.html (2005).

[51] For the development of Tribal courts, *see* Hagan, Indian Police and Judges: Experiments in Acculturation and Control (1966); National American Indian Court Judges Association, Indian Courts and the Future (1978). In 1900, two-thirds of reservations had CFR courts. According to the Bureau of Indian Affairs, there are now 562 federally recognized Tribes in the contiguous United States and Alaska. Among these Tribes, there are approximately 275 Tribal courts and 23 CFR courts. www.Tribalresourcecenter.org.

[52] Although Tribes are not subject to the Bill of Rights within the U.S. Constitution, the Indian Civil Rights Act of 1968 made applicable many of the Constitutional rights to Tribes. The exceptions include the right to appointed counsel to indigent defendants in certain criminal cases.

[53] Atwood, *Tribal Jurisdiction and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 592 (2000).

[54] *Id*.

[55] Atwood, *supra* note 53, at 596-597.

Eligibility requirements to be a Tribal judge vary among Tribes. Some Tribes require their judges to be members who are fluent in the Tribe's language while others allow non-Indians to serve as Tribal court judges. State-licensed attorneys are not automatically admitted to practice in Tribal courts. Many Tribes have a requirement that the attorney be admitted to practice in Tribal court, according to local Tribal ordinances.

TRIBAL LAW

As a result of the Indian Reorganization Act, most Tribes now have written laws and constitutions. Although early laws often copied BIA codes, current Tribal codes address such diverse issues as divorce, custody and support, adoption, and health.

Tribal law includes treaties, the Tribal constitution, codes, decisional law, and custom (seldom codified).[56] The Federal government has recognized that many Tribal customs and traditions have the force and effect of law: "We have determined that such Tribal customs are equivalent to 'common law' as described by William Blackstone: '[t]he *lex nonscripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions' (Blackstone, 1 Commentaries on the Law of England 62)."[57]

Excellent collections of Tribal codes exist at the University of Washington, and the Native American Rights Fund in Boulder, Colorado. There are also several on-line resources for accessing selected Tribal codes. Such resources are listed in Appendix A.

Applicable Law in Civil Cases Many Tribal codes state that in all civil matters, the Tribal court shall apply the ordinances, customs, and usages of the Tribe not prohibited by the laws of the United States. In any matter not covered by Tribal ordinance, custom, or usage, such codes provide that the Tribal court may use relevant Federal or State laws as a guide. An example is found in the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indian Tribal Code:

> TITLE 2 - RULES OF PROCEDURE
> CHAPTER 2-2 CIVIL ACTIONS, LIMITATIONS AND LIABILITY
>
> 2-2-4 Laws Applicable in Civil Actions
>
> (a) In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (Tribes) and then shall apply any applicable laws of the United States and authorized regulations of the Department of the Interior. Where doubt arises as to customs and usages of the Tribes, the Tribal Court may request the advice of the appropriate committee which is recognized in the community as being familiar with

[56] Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. No. 2, n. 158 (Fall 1991).
[57] Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309).

> such customs and usages. Any matter not covered by Ordinances, customs and usages of the Tribes or by applicable Federal laws and regulations may be decided by the Court according to the laws of the State of Oregon.

Regulations governing Courts of Indian Offenses provide that in all civil cases the Tribal court shall apply any applicable laws of the United States, any authorized regulation of the Interior Department, and any ordinance or custom of the Tribe not prohibited by such Federal laws. Where there is doubt about custom or usage of the Tribe, the court may request the advice of counselors familiar with these customs and usages. Any matters not addressed by such laws, regulations, ordinances or custom must be decided by the Court of Indian Offenses according to the law of the State in which the disputed matter lies.[58]

TRIBAL TERRITORIAL JURISDICTION

Indians that commit offenses outside reservation boundaries, or outside trust land that was within the original borders of a now diminished reservation, are usually subject to State laws.[59] Tribal courts usually only have jurisdiction over causes of action that arise in Indian country. Domestic law cases are an exception to that general rule because a Tribal court may have jurisdiction over a paternity action even if conception occurred off the reservation.

TRIBAL SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the authority of a tribunal to hear a particular case. For example, a probate court typically has subject matter jurisdiction to hear cases related to estate matters but not to divorce. Many Tribal courts are courts of general jurisdiction (e.g., jurisdiction over matters ranging over a number of subject areas).

In order to understand the extent of Tribal subject matter jurisdiction over civil and criminal matters, it is important to understand these three principles:

(1) an Indian Tribe possesses, in the first instance, all the inherent powers of any sovereign State;

(2) a Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power and precludes the exercise of external powers of sovereignty of the Tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States. However, the Tribe’s presence within the territorial boundaries of the United States does not by itself affect the internal sovereignty of the Tribe;

[58] 25 C.F.R. § 11.500 (2004).
[59] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

(3) inherent Tribal powers are subject to qualification by treaties and by express legislation of Congress. Absent such qualification, full powers of internal sovereignty are vested in the Indian Tribes and in their duly constituted bodies of government.[60]

FEDERAL LIMITATION ON TRIBAL JURISDICTION

Overview Through several enactments, Congress has asserted the Federal government's jurisdiction over criminal matters in Indian country,[61] thereby lessening the control of Tribal courts. In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State criminal jurisdiction in Indian country. Finally, the United States Supreme Court has prevented Indian nations from exercising criminal jurisdiction over non-Indians and non-member Indians by determining that such jurisdiction is no longer within the Tribes' inherent authority.[62]

Congress has not enacted any general statute authorizing Federal courts to supplant Tribal courts in hearing civil matters arising in Indian country. However, Indian country cases will sometimes be within concurrent Federal jurisdiction under the general Federal question statute[63] or through the statute authorizing Federal courts to hear suits between citizens of different States (referred to as "diversity jurisdiction").[64] Thus, for example, Federal courts sometimes hear civil actions challenging the jurisdiction of Tribal courts to hear certain disputes involving non-Tribal members that arise in Indian country. In such cases, however, the Supreme Court has determined that Federal courts should require litigants to first exhaust their remedies in Tribal court.[65] In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State jurisdiction over civil causes of actions between Indians or to which Indians are parties, which arise in those areas of listed Indian country.[66] This jurisdiction is limited to private causes of action, and does not encompass State regulation.

Federal Indian Country Criminal Laws The first major Federal act affecting Tribal jurisdiction over criminal activity was the General Crimes Act,[67] enacted in 1817. It gave the Federal government jurisdiction over crimes, committed by Indians against non-Indians, within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. Because of the exception for cases in which the Indian defendant has already been punished under Tribal law, there is the understanding that the Federal jurisdiction under the General Crimes Act is concurrent with Tribal jurisdiction. However, the Federal criminal jurisdiction over crimes

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[60] N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 4.01[1] (2005 ed.). The Handbook notes that there have been some recent judicial departures from these principles.
[61] Indian country is defined in 18 U.S.C. § 1151.
[62] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[63] 28 U.S.C. § 1331.
[64] 28 U.S.C. § 1332.
[65] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).
[66] 28 U.S.C. § 1360.
[67] 18 U.S.C. § 1152.

committed by Indians against non-Indians is exclusive of the States. Importantly, under the General Crimes Act, Indian nations retain exclusive jurisdiction over crimes committed by one Indian against another. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Wherever the Federal government has jurisdiction under the General Crimes Act, offenses are defined by Federal criminal law, or are borrowed from State law through the Assimilative Crimes Act.[68]

The next significant Federal act was the Major Crimes Act of 1885.[69] Enacted in response to the Supreme Court's decision in *Ex parte Crow Dog,*[70] it originally granted Federal jurisdiction, exclusive of the States, over seven crimes committed by an Indian within Indian country. The number has steadily increased to include: "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact], incest, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and a felony under section 661 of Title 18 [within special maritime and territorial jurisdiction of the United States, the taking away with the intent to steal the personal property of another]."[71] It is unclear whether jurisdiction over these major crimes is exclusive with Federal courts or whether Tribal courts have concurrent jurisdiction.[72] As a practical matter, the severe limitations on Tribal criminal punishments introduced by the Indian Civil Rights Act of 1986[73] make Tribal prosecution of major crimes relatively rare.

Other Federal Legislation The Indian Civil Rights Act, mentioned above, initially limited Tribal court criminal punishment to six months and a $500 fine. These limits were later raised to one year and a $5000 fine.[74]

Public Law 280 In 1953, at the height of the termination and assimilation era,[75] Congress passed Public Law 280, which significantly affected Tribal jurisdiction by introducing State criminal authority into Indian country.[76] Historically, State courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and

[68] *See* N. Newton *et al.*,eds., Cohen's Handbook of Federal Indian Law § 9.02[c] (2005 ed.).
[69] 18 U.S.C. § 1153.
[70] 109 U.S. 556 (1883).
[71] 18 U.S.C. § 1153.
[72] *Supra* note 27.
[73] 25 U.S.C. § 1302(7) (limiting punishment for any one offense to one year in jail and a $5000 fine).
[74] *Supra* note 33.
[75] The Termination Era ran from approximately 1945 to 1961. The Court in *Bryan v Itasca County*, 426 U.S. 373 (1976), emphasized that Public Law 280 was not a termination measure. Rather it reflected an assimilationist philosophy: "That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in P. L. No. 280 to terminate Tribal self-government." *Washington v. Yakima*, 439 U.S. 463, 488 n. 32 (1979).
[76] Public Law 280 is codified in various sections of 18 U.S.C., 25 U.S.C., and 28 U.S.C. For detailed discussions of the statute, *see, e.g.*, Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975); Foerster, *Comment: Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999). *See also* the dissent of Chief Justice Matthews in *John v. Baker*, 982 P.2d 738 (Alaska 1999).

non-Indians. Jurisdiction was limited to the Tribes or Federal government.[77] Public Law 280[78] initially provided for the mandatory transfer to five States[79] of jurisdiction over criminal offenses committed by or against Indians in the area of Indian country listed opposite the named States or territory.[80] It also gave those States jurisdiction over civil causes of actions between Indians or to which Indians were parties, which arose in those areas of listed Indian country.[81] In 1958 Congress added Alaska as a sixth mandatory State.[82] There was no requirement that the Tribes consent to such transfer of jurisdiction to the listed States. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court declined to answer whether Public Law 280 conferred exclusive or concurrent jurisdiction on States. However, the consensus of lower Federal courts, many State courts, and the Solicitor's Office within the Department of the Interior is that Indian nations retain concurrent jurisdiction under Public Law 280.[83] A major consequence of Public Law 280 is that Indian nations lose exclusive jurisdiction over non-major offenses committed by one Indian against another Indian.

Other States not listed among the mandatory States had the option of assuming Public Law 280 jurisdiction. Congress granted permission for such States to assume civil or criminal jurisdiction "at such time and in such manner" as the people of the State by affirmative legislative action, should decide to assume.[84] If such a State had a constitution or statutes disclaiming jurisdiction in Indian country, Public Law 280 authorized the State to amend those laws, if necessary, in order to remove any legal impediment to the assumption of civil or criminal jurisdiction.[85]

An overall goal of Congress, in numerous pieces of legislation introduced during the session in which Public Law 280 was introduced, was "withdrawal of Federal responsibility for Indian affairs wherever practical, and . . . termination of the subjection of Indians to Federal laws applicable to Indians as such."[86] The legislative history of Public Law 280 suggests that Congress's main goal was to address the lack of law

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[77] *See* Gould, *supra* note 44.
[78] The text of Public Law 280 is set forth in Appendix B.
[79] California, Minnesota (except for Red Lake Reservation), Nebraska, Oregon (except for Warm Springs Reservation), and Wisconsin (except for Menominee Reservation).
[80] Codified at 18 U.S.C. § 1162. *See* Comment, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999).
[81] Codified at 28 U.S.C. § 1360.
[82] An exception within Alaska is the Metlakatla Reservation.
[83] *See* Jimenez & Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 AU L. Rev. 1627 (1998).
[84] 25 U.S.C. §§ 1321-1322.
[85] 25 U.S.C. § 1324. According to a report accompanying the House version of Public Law 280 in 1953, there were eight States, which – in response to Enabling Acts -- had Constitutions disclaiming all right and title to lands owned by Indians and declaring that such lands remained under the absolute jurisdiction and control of the Congress of the United States. *See* H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953). These States were Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.
[86] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409.

enforcement on Indian reservations.[87] The Report of the House Committee on Interior and Insular Affairs, which was subsequently incorporated into the Senate Report, stated: "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, Tribes are not adequately organized to perform that function; consequently there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility."[88] The Tribes exempted from the State assumption of jurisdiction were Tribes that had legal systems and organizations perceived as functioning in a "satisfactory manner."[89]

According to the Supreme Court in *Washington v. Yakima*, the jurisdictional bill also reflected Congressional concern over "the financial burdens of continued Federal jurisdictional responsibilities on Indian lands." There is less background as to why civil jurisdiction was also transferred to States. However, as noted by the Court in *Washington v. Yakima*, the legislation was "without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's. [omitting citations] The failure of Congress to write a Tribal-consent provision in the transfer provision applicable to option States as well as its failure to consult with the Tribes during the final deliberations on Pub. L. 280 provide ample evidence of this." 439 US.463, 490.

By 1958, as a result of amendments to Public Law 280 and implementing State legislation, 16 States had acquired Public Law 280 jurisdiction.[90] However, said jurisdiction in most of these States was limited to (1) less than all of the Indian reservations in the State, (2) less than all of the geographic areas within an Indian reservation, or (3) less than all subject matters of the law.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited the extension of Public Law 280 jurisdiction.[91] No State can now acquire Public Law 280 jurisdiction over Indian country unless the Tribe consents by a majority vote of the adult Indians voting at a special election.[92] The amendments also provide explicitly for partial assumption of jurisdiction. It is therefore possible for a State to have Public Law 280 jurisdiction but not with every Tribe located in the State or not over every subject area. The ICRA also authorized the United States to accept a "retrocession" or return of

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[87] *Id.* at 5.
[88] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2411-12.
[89] *Id*.
[90] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. Disclaimer States have responded in diverse ways to the Public Law 280 offer of jurisdiction. Only North Dakota actually amended its constitution. *See Washington v Yakima*, 439 U.S. 463, 486 n. 29 (1979). Many of these States have repealed their statutes assuming jurisdiction (e.g., Arizona), returned their jurisdiction to the federal government (e.g., Nevada), or had their statutes assuming jurisdiction invalidated by the courts (e.g., North Dakota and South Dakota).
[91] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-41). For a full discussion of Public Law 280, *see* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3] (2005 ed.).
[92] Codified at 25 U.S.C. §§ 1321 and 1322. *See Kennerly v. District Ct. of Montana*, 400 U.S. 423 (1971).

jurisdiction, full or partial, previously acquired by a State under Public Law 280,[93] but only at the request of the State. Tribes could not insist upon retrocession. Several States, such as Nebraska, Washington, Wisconsin, and Minnesota, have retroceded their Public Law 280 jurisdiction over various Tribes.

The chart[94] below summarizes the States that currently have some form of civil and/or criminal jurisdiction under Public Law 280:

[93] Codified at 25 U.S.C. § 1323(a). The Indian Civil Rights Act also repealed Section 7 of Public Law 280 with the proviso that the repeal did not affect any cession made prior to the repeal. 25 U.S.C. § 1323(b). Section 6 of Public Law 280 was re-enacted without change. 25 U.S.C. § 1324.

[94] The sources of information for the chart are N. Newton *et al*., eds., Cohen's Handbook of Federal Indian Law (2005 ed.) and Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 (UCLA American Indian Studies Center 1997), pages 9 - 10.

State	Extent of Jurisdiction
Alaska	All Indian country within the State[95]
California	All Indian country within the State
Florida	All Indian country within the State
Idaho	All Indian country within the State, limited to the following subject matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; mental illness; domestic relations; and operation of motor vehicles on public roads
Iowa	Only over the Sac and Fox Indian community in Tama County, limited to civil and some criminal jurisdiction
Minnesota	All Indian country within the State, except the Red Lake and the Nett Lake reservations[96]
Montana	Only over felonies on the Salish and Kootenai reservation.[97]
Nebraska	All Indian country within the State, except the Omaha and Winnebago reservations.
Oregon	All Indian country within the State, except the Burns Paiute and Warm Springs reservations. With regard to the Umatilla Reservation, jurisdiction is limited to civil jurisdiction.[98]

[95] In *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), the United States Supreme Court removed the Indian country status of most lands held by Alaskan Natives. Since Public Law 280 applies within "Indian country," that decision left Public Law 280 irrelevant to much of Alaska. However, there are still Native allotments and Native townsites that likely qualify as Indian country, leaving some room -- in addition to the Metlakatla Indian Reservation -- for the continued operation of Public Law 280. *See* Strommer & Osborne,"'Indian Country' and the Nature and Scope of Tribal Self-Government in Alaska," 22 Alaska L. Rev. 1 (2005).

[96] When Minnesota was listed as a mandatory Public Law 280 State, Red Lake Reservation was excepted from its jurisdiction. In 1975, Minnesota retroceded, its jurisdiction over the Nett Lake Reservation.

[97] *See* Public Law 280 discussion in *Balyeat Law, PC v. Pettit*, 291 Mont. 196, 967 P.2d 398 (1998).

[98] When Oregon was named as a mandatory Public Law 280 State, Warm Springs Reservation was excepted from its jurisdiction. In 1981, Oregon retroceded its criminal jurisdiction over the Umatilla Reservation.

Washington	Only fee patent (deeded) land within Indian country. Jurisdiction on trust land is limited to the following subjects, unless the Tribe consents to full State jurisdiction:[99] compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoptions; dependent children; and operation of motor vehicles on public roads.
Wisconsin	All Indian country within the State, except the Menominee reservation[100]

There have been several Supreme Court decisions interpreting Public Law 280.[101] In *Washington v. Yakima*, the Court held that Public Law 280 authorized a State to assert only partial jurisdiction within a selected area of an Indian reservation; in the case, the State of Washington had enacted legislation obligating the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, but – with the exception of eight subject matter areas, which included domestic relations – not to extend such jurisdiction over Indians on trust or restricted lands without the request of the affected Indian Tribe.[102] In *Bryan v. Itasca County*, the Court interpreted Public Law 280 to grant States jurisdiction over criminal matters and private civil litigation involving reservation Indians, but not to grant civil regulatory authority such as a State personal property tax within the reservation. Discussing the holding in *Bryan*, the Court in *California v. Cabazon Band* stated that "when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation, or civil in nature, and applicable only as it may be relevant to private civil litigation in State court." In *California v. Cabazon Band*, the Court set forth a test for distinguishing between criminal and civil laws: "[I]f the intent of a State law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the State law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian

[99] For a complete list of Tribes that consented to full Washington Public Law 280 jurisdiction (some of which have later retroceded), *see* National American Indian Court Judges Association, Justice and the American Indian, Vol. 1, The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations (1974).

[100] When Wisconsin was named as a mandatory Public Law 280 State, the Menominee Reservation was exempted from its jurisdiction. In 1976, when Congress terminated the Tribe, Wisconsin reacquired jurisdiction over that territory. When Congress restored the Menominee Tribe to federal status in 1976, Wisconsin retroceded the jurisdiction it had acquired by the termination.

[101] *See Washington v. Yakima*, 439 U.S. 463, 486 n. 30, citing *Williams v. Lee,* 358 U.S. 217 (1959); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); and *Bryan v. Itasco County*, 426 U.S. 373 (1976). *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[102] Partial Public Law 280 jurisdiction was explicitly authorized by the Indian Civil Rights Act of 1968. *See supra* note 91.

Reservation. The shorthand test is whether the conduct at issue violates the State's public policy." Applying such a test to the facts of the case, the Court concluded that Public Law 280's grant of criminal jurisdiction did not include a regulatory statute such as California's statute governing the operation of bingo games.[103]

TRIBAL, FEDERAL, OR STATE JURISDICTION IN CRIMINAL ACTIONS

As noted earlier, the General Crimes Act gives Federal courts jurisdiction over crimes committed by Indians against non-Indians or by non-Indians against Indians in Indian country. The Major Crimes Act is Federal legislation that gives Federal courts jurisdiction over certain serious crimes committed by Indians in Indian country, whether the victim is Indian or non-Indian.[104] It is unclear whether the Federal government's jurisdiction in such cases is exclusive or concurrent with the Tribe.[105]

Public Law 280 gives certain State courts jurisdiction over criminal offenses involving Indians in Indian country. In the mandatory Public Law 280 States, Federal jurisdiction under the General Crimes Act and Major Crimes Act is eliminated by statute.[106] In the optional Public Law 280 States, the impact on Federal jurisdiction is less certain, with courts differing on whether the Federal government retains criminal jurisdiction.[107]

Both in the non-Public Law 280 jurisdictions and those jurisdictions affected by Public Law 280, concurrent Tribal criminal jurisdiction likely exists. From the perspective of Tribal criminal jurisdiction, the main difference between these two arrangements is that in the non-Public Law 280 situation, Tribes have *exclusive* jurisdiction over non-major crimes committed by one Indian against another. In the Public Law 280 situation, Tribes share jurisdiction over such crimes with the States, at least in mandatory States and in optional States that have assumed full jurisdiction. If a State has assumed only partial jurisdiction under Public Law 280, then the Federal government and the Tribe will share jurisdiction over remaining matters.

The Supreme Court has also had occasion to review the criminal jurisdiction of Tribal courts in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990). Relying not on specific Federal legislation but on the dependent status of Indian Tribes in relation to the sovereignty of the United States, the Court in these cases held that Indian Tribes have no criminal jurisdiction over non-Indians or nonmember Indians for offenses

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[103] For a further discussion of the distinction between criminal and regulatory action, *see* Foerster, *supra* note 76.
[104] The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama*, 118 U.S. 375 (1886). *See also United States v. Antelope*, 430 U.S. 641 (1977).
[105] Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.3d 823, 825-826 (9th Cir. 1995)).
[106] 18 U.S.C. § 1162(c).
[107] *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][d] (2005 ed.).

committed in Indian country. Tribes do have Tribal jurisdiction over Indians who have committed crimes on the reservation.

Indian Tribal leaders viewed *Duro v. Reina* (exempting nonmember Indians from criminal misdemeanor laws of local Tribal governments) as a major assault on the ability of Tribal governments to administer justice in Indian country.[108] In reaction to the decision, Congress amended the Indian Civil Rights Act to define "powers of self-government" to include "the *inherent* power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians"[109] [emphasis added]. The Supreme Court examined the so-called "*Duro* fix" in the case of *United States v. Lara*, 541 U.S. 193 (2004). Lara, a nonmember Indian, was convicted in Tribal court of a misdemeanor offense of violence to a policeman. He was later charged with the Federal crime of assaulting a Federal officer. Lara claimed that the Federal prosecution was barred by the Double Jeopardy Clause. The Supreme Court ruled that it was not. In reaching that conclusion, the Court concluded that the Congressional amendment to the Indian Civil Rights Act had eliminated restrictions that the political branches had placed, over time, on the exercise of a tribe's inherent legal authority over nonmember Indians: "That new statute, in permitting a tribe to bring certain Tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own *Federal* power. Rather, it enlarges the *tribes'* own 'powers of self-government.'"[110] Therefore, since the Tribe had been acting as a separate sovereign in its prosecution of Lara, the subsequent Federal prosecution was not barred by the Double Jeopardy Clause.

One can summarize jurisdiction over criminal offenses according to the following chart. Wherever Federal and State court jurisdiction is not exclusive, Tribal jurisdiction is concurrent.

[108] Forum Summary, Tribal Leaders Forum on *Duro v. Reina*, held January 11, 1991. Sponsored by the American Indian Resources Institute in conjunction with the National Indian Justice Center and the Native American Rights Fund.

[109] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians." For an analysis of the "Duro fix," especially its language recognizing the "inherent power" of Tribes to recognize criminal jurisdiction over all Indians, *see* Gould, *supra* note 44.

[110] 541 U.S. at 198.

	Location	Type of Offense	Status of Defendant	Status of Victim
Exclusive Tribal Court	Indian Country in State without PL 280 criminal jurisdiction	Felony not listed in Major Crimes Act or Misdemeanor	Indian (either member or nonmember)	Indian or non-Indian
Exclusive State Court	Indian Country in State without PL 280 criminal jurisdiction	Felony	Non-Indian	Non-Indian
Exclusive State Court	Outside Indian Country	Felony or Misdemeanor, except in which Federal law makes crime one of national applicability	Indian or non-Indian	Indian or non-Indian
Exclusive State Court	Indian Country in State with complete mandatory PL 280 criminal jurisdiction	Felony or Misdemeanor (no Major Crime exception)	Non-Indian	Indian or non-Indian
Federal Court	Indian Country in State without complete PL 280 criminal jurisdiction	Major Crime* Felonies and Misdemeanors in which Indian has not been punished under Tribal law** Felonies and Misdemeanors***	Indian Indian Non-Indian	Indian or non-Indian Non-Indian Indian

*Unclear whether jurisdiction over Major Crimes is exclusive or concurrent with Tribal court jurisdiction; jurisdiction is exclusive of State courts.

**Jurisdiction is concurrent with Tribal courts, but exclusive of State courts.

***Jurisdiction is exclusive of Tribal and State courts.

Sometimes Federal crimes relating to Indian country are defined outside the framework of the General Crimes Act, the Major Crimes Act, and Public Law 280. The jurisdictional analysis for such offenses is entirely different, because the limitations and exceptions in the General Crimes Act and Major Crimes Act will not apply, and Public Law 280 does not eliminate Federal criminal jurisdiction under such special laws. Thus, for example, nonsupport is a Federal offense under some circumstances, and includes a failure to meet a support obligation established by a Tribal court. This crime is punishable under Federal law regardless of whether the support obligation was established in a Public Law 280 State or a non-Public Law 280 State.

Tribes may also have jurisdiction over the crime of nonsupport committed by Indians in Indian country, assuming their Tribal code sanctions such an offense.[111] In complete Public Law 280 jurisdictions, where the Tribal code establishes a criminal offense for nonsupport, the State will have concurrent criminal jurisdiction over a criminal nonsupport offense committed by an Indian in Indian country. When the offense is committed by a non-Indian in Indian country, only the State or the Federal government has subject matter jurisdiction to prosecute the defendant for criminal nonsupport.[112]

TRIBAL OR STATE JURISDICTION IN CIVIL ACTIONS

The United States Supreme Court has broadly affirmed Tribal civil jurisdiction within Indian country.[113] In non-Public Law 280 jurisdictions, a Tribe has exclusive jurisdiction over civil causes of action against member Indians that arise in Indian country: "Tribes have the power to make their own substantive laws in internal matters, and to enforce that law in their own forums."[114] When the suit is brought by an Indian against a non-Indian, and the claim arises on Indian land in Indian country, jurisdiction over civil causes of action is typically concurrent or shared by Tribal and State courts.[115] A State normally has exclusive jurisdiction over civil causes of action that arise outside Indian country and involve off-reservation residents, Indian or non-Indian.[116] In non-Public Law 280 jurisdictions, the issue of Tribal versus State jurisdiction typically arises

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[111] For example, criminal nonsupport is a misdemeanor offense in Tribes operating under CFR codes. 25 C.F.R. § 11.425 governing Courts of Indians Offenses provides the following: "A person commits a misdemeanor if he or she persistently fails to provide support which he or she can provide and which he or she knows he or she is legally obligated to provide to the spouse, child, or other dependent."

[112] *See State v. Zaman*, 252 Ariz. Adv. Rep. 49 (Ariz. App. Div. 1, cr 960349, decided 09/23/1997). Indian Tribes have no jurisdiction to prosecute non-Indians for crimes committed on an Indian reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

[113] *See*, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Williams v. Lee*, 358 U.S. 217 (1959); *but see Nevada v. Hicks*, 533 U.S. 353 (2001) (denying Tribal jurisdiction to hear claim against State official).

[114] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[115] *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984). For Tribal courts operating under authority from the Code of Federal Regulations, it is clear that civil jurisdiction encompasses nonmember Indians. 25 C.F.R. § 11.103(a).

[116] A notable exception is established by the Indian Child Welfare Act, 25 U.S.C. § 1911(b), which provides for the transfer of many off-reservation child welfare proceedings involving Indian children to Tribal court. Based on State case law, paternity cases involving an Indian party are also exceptions to the general rule.

in cases where the cause of action arose on non-Indian fee land or a State right-of-way in Indian country, and the defendant is a non-Indian. It also often arises in cases where the cause of action arose off the reservation, but one of the parties is an Indian living on the reservation. When jurisdiction is at issue, the practitioner must look to legislation and case law for guidance.

In Public Law 280 jurisdictions, the question of State jurisdiction over civil causes of action in Indian country is simplified. When the claim is against an Indian respondent, Tribal jurisdiction is often concurrent or shared with State jurisdiction. A mandatory Public Law 280 State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[117] An optional Public Law 280 State may also have civil jurisdiction,[118] but it may be partial (i.e., only certain specified subject areas or jurisdiction over a limited part of Indian country). Therefore, even if the case involves two member Indians, a State with full Public Law 280 civil jurisdiction will generally have authority to adjudicate the matter. The Supreme Court has declined to rule on whether Public Law 280 jurisdiction is exclusive or concurrent with Tribal jurisdiction.[119] However, other Federal and State courts have held that Tribes have concurrent jurisdiction.[120]

A challenge to jurisdiction arises when one of the parties believes that the forum selected by the petitioner lacks subject matter jurisdiction, and that the action should be heard by a different forum. When a petitioner files an action against an Indian respondent in State court rather than Tribal court, and the Indian respondent argues that the State court lacks jurisdiction, the Supreme Court decision that historically has been most relevant to the issue of State assertion of jurisdiction is *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian had brought suit in State court against a Navajo Indian for a debt arising out of a transaction that took place on the Navajo Reservation. The Arizona Supreme Court had upheld the exercise of State court jurisdiction. In reversing, the Supreme Court enunciated the following rule: "Essentially, absent governing Acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them." [121]

The test was rephrased as a preemption and infringement analysis in *White Mountain Apache Tribe v. Bracker*.[122] Under the preemption test, the question is whether the exercise of State authority is pre-empted by Federal law. Under the

[117] 28 U.S.C. § 1360(a).
[118] 28 U.S.C. § 1322(a).
[119] The Supreme Court in *Washington v. Yakima,* 439 U.S. 463, 488 n. 32, and 501 n.48 (1979), refused to address whether such jurisdiction was concurrent or exclusive.
[120] *See* Jimenez & Song, *supra* note 83.
[121] *Williams v. Lee*, 358 U.S. 217, 220 (1979).
[122] 448 U.S. 136 (1980).

infringement test, the question is whether the State action will "infringe on the right of reservation Indians to make their own laws and be ruled by them." Areas that the Supreme Court has identified as essential self-government matters include determination of Tribal membership, regulation of domestic relations among members, and rules of inheritance for members.[123] In conducting an infringement analysis, State court decisions tend to examine whether one or both parties are enrolled members of an Indian tribe, whether the cause of action arose on or off the reservation,[124] and what are the Tribal and State interests at stake.

When a petitioner files an action against a non-Indian or nonmember respondent in Tribal court rather than State court, and the non-Indian respondent argues that the Tribal court lacks jurisdiction, the Supreme Court decision that is most relevant on the issue of Tribal civil jurisdiction is *Montana v. United States*.[125] As noted earlier, *Montana* addressed a Tribal court's exercise of civil subject matter jurisdiction over a non-member of the Tribe on non-Indian fee land. While noting a Tribe's inherent sovereign power over its members, the Supreme Court also pointed out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." If the action involves a nonmember or a non-Indian, the question is whether "the exercise of Tribal power is necessary to protect Tribal self-government or to control internal relations."[126] Any exercise of Tribal power beyond that is "inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation."[127] In the case at hand, the Court concluded that Tribal regulation of hunting and fishing by nonmembers of a Tribe on lands no longer owned by the Tribe bore no clear relationship to Tribal self-government or internal relations. The Court identified two circumstances, or exceptions, where Tribal civil jurisdiction could exist over non-Indians on non-Indian fee land: when there is a "consensual relationship" between the non-Indian or nonmember Indian and the

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[123] *See United States v. Wheeler,* 435 U.S. 313, 322, n. 18 (1978). *See also, e.g., Fisher v. District* Court, 424 U.S. 382 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).

[124] A review of case law suggests that there is inconsistency in defining where the cause of action arose in paternity establishment and child support cases. Some courts look at conception as the defining event. Other courts focus on where the custodial parent applied for public assistance.

[125] 450 U.S. 544 (1981).

[126] *Montana v. United States*, 450 U.S. 544, at 565 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land. *See also Nevada v. Hicks*, 533 U.S. 353 (2001). In *Nevada,* the Supreme Court concluded that the Tribal court lacked jurisdiction in a civil law suit brought by a Tribal member against State game wardens who had executed State court and Tribal court search warrants to search his on-reservation home for an off-reservation crime. The Court stated that the fact that the nonmember's activity occurred on Tribal land was not dispositive. Citing *Montana*, the Court concluded that the "Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws is not essential to Tribal self-government or internal relations." In contrast, the Court found that the State's interest in execution of process was considerable. For a discussion of the impact of *Montana*, *see* Gould, *supra* note 44.

[127] *Montana v. United States* , 450 U.S. 544 at 564 (1981). *See also Nevada v. Hicks*, 533 U.S. 353 (2001).

Tribe or a Tribal member, "through commercial dealings, contracts, leases, or other arrangements"; and when exercise of jurisdiction is necessary to protect "the political integrity, the economic security, or the health or welfare of the Tribe."[128]

The Court has interpreted these *Montana* exceptions narrowly, out of concern that the exceptions might swallow the rule.[129] In *Atkinson Trading Co., Inc. v. Shirley*, 523 U.S. 645 (2001), the Supreme Court stated that the consensual relationship exception requires a nexus between the nonmember's conduct and the Tribe's regulation. The fact that a nonmember has received or may receive Tribal services, such as police and fire protection, does not create the necessary connection. It also stated that the second exception is "only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government."[130]

When a State has concurrent jurisdiction with a Tribe, the State court may nevertheless decline to exercise such jurisdiction if it feels such an exercise would infringe on a Tribe's self-governance.[131] Rules respecting deference to Tribal courts are currently under development for concurrent Tribal and State jurisdiction, especially in Public Law 280 States.[132] In the event of concurrent jurisdiction, the case may be adjudicated by the first tribunal to validly exercise jurisdiction.[133]

STATE JURISDICTION TO SERVE PROCESS IN INDIAN COUNTRY

If the State court has subject matter jurisdiction over a civil or criminal action involving an Indian who resides on a reservation, service of the pleadings or arrest warrant on the Indian must also be proper. Some States and Tribes have entered into cross-deputizing agreements to address service of process and service of arrest warrants. For example, pursuant to the Fort Peck Comprehensive Code of Justice, Title XII, § 208, a procedure exists to cross-deputize certain Montana law enforcement officers with authority to detain and arrest Indians on the Fort Peck Indian Reservation. The procedure requires that the Montana law enforcement agency submit the name of the officer to the Tribal Executive Board for a resolution approving that particular officer.

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[128] *Montana v. United States* , 450 U.S. 544 at 566 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal Court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land.

[129] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[130] 532 U.S. at 657, n. 12. As noted by federal courts, "the tribe's interest in the political, economic, health, or welfare effects of a particular action is not enough, by itself, to meet this exception. . . . Otherwise, the exception would swallow the rule." *See, e.g., County of Lewis v. Nez Perce Tribe*, 163 F.3d ___ (9th Cir. 1998).

[131] *See, e.g., Lemke v. Brooks*, 614 N.W.2d 242 (Minn. 2000).

[132] *See*, *e.g.*, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 265 Wis.2d 64, 665 N.W.2d 899 (Wis. 2003); *see also* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2005 ed.).

[133] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills,* 627 N.W.2d 790 (S.D. 2001); *Harris v. Young*, 473 N.W.2d 141, 145 (S.D. 1991).

If there are no such agreements, cases have split on whether State process may be served on the Indian respondent or defendant while he or she is on the reservation.[134] In a case involving action that arose off the reservation, the Supreme Court addressed the related issue of State service of a search warrant. In *Nevada v. Hicks*, 533 U.S. 353 (2001), respondent Hicks was a member of the Fallon Paiute-Shoshone Tribe of western Nevada, who lived on the Tribe's reservation. He was suspected of having killed, off the reservation, a California bighorn sheep, which was a gross misdemeanor under Nevada law. Twice, State game wardens obtained State-court and Tribal-court search warrants. Both times, in executing the warrants on the home of Hicks, the State sheriffs were accompanied by Tribal officers. After the second search, Hicks filed suit in the Tribal Court alleging, in part, that the wardens had trespassed and abused process. The Tribal Court held that it had jurisdiction, which was upheld by the Tribal Appeal Court. The petitioners then sought in Federal District Court a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The Federal court concluded that the fact that Hicks's home was on Tribe-owned reservation land was sufficient to support Tribal jurisdiction over the civil claims against nonmembers arising from their activities on that land.

The Supreme Court reversed. It concluded that the Tribal Court did not have jurisdiction to adjudicate the wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime because the Tribe did not have regulatory authority over the State officers.[135] The Court pointed out that the fact that Indians have the right to make their own laws and be governed by them "does not exclude all State regulatory authority on the reservation." A State may not be able to exercise the same degree of regulatory authority within a reservation as it may do off the reservation. However, using the *Montana* test,[136] the Court concluded that Tribal authority to regulate State officers in executing process related to the off-reservation violation of State laws was not essential to Tribal self-government or internal relations. Moreover, it concluded, the State's interest in executing process was considerable, and did not impair the Tribe's self-government.

Most of the reported State court decisions regarding State service of process within Indian country pre-date *Nevada v. Hicks*. Courts have used the *Williams* test to review State service of process on an Indian residing on a reservation. With regard to the preemption prong, courts have uniformly held that there is no Federal statute preempting State service of process. Conclusions regarding whether the State action infringes on Tribal sovereignty vary.

Montana courts have concluded that State service of process does not infringe on Tribal sovereignty: "Indian country is not a Federal enclave off limits to State process servers. Service of process extends to Indian defendants served within the reservation."[137] The Wisconsin Supreme Court has recognized that service of process

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[134] *See* W. Canby, American Indian Law in a Nutshell 192-194 (4th ed. 2004).
[135] In *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1977), the Court had stated: "As to nonmembers . . . a Tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. . . ."
[136] *Montana v. United States*, 450 U.S. 544 (1981).
[137] *Bad Horse v. Bad Horse,* 163 Mont. 445, 517 P.2d 893 (1974), *cert. denied* 419 U.S. 847 (1984).

is an attempt to apply State law on the reservation.[138] However, the court also found that applying State service of process statutes had little if any effect on Tribal sovereignty. The case involved a juvenile delinquency proceeding against an enrolled member of the Menominee Indian Tribe for acts that had occurred off the reservation. The New Mexico Supreme Court has also upheld State service of process on an Indian while on the reservation for off-reservation acts.[139] In contrast, the Arizona court in *Francisco v. State*, 556 P.2d 1 (Ariz. 1976) held that State service on an Indian while on the reservation was invalid. *Francisco* involved a mother and alleged father who were both Papago Indians; the mother and child had lived in Tucson, Arizona since the child's birth, and the father lived on the reservation. Action was brought in State court to establish paternity. The Pima County Deputy Sheriff served the alleged father while he was on reservation, and the alleged father subsequently challenged the State court's personal jurisdiction over him. The Arizona Supreme Court pointed out that Arizona lacked Public Law 280 jurisdiction. The court concluded, therefore, that the State could not extend its laws to Indian reservations such that a deputy sheriff could validly serve an Indian on the reservation.[140] In another case, Arizona attempted to accommodate concerns about interference with Tribal sovereignty by authorizing service of process within Indian country only when process is served by mail, as in the case of long-arm jurisdiction over out-of-State defendants.[141]

When State service is made on a non-Indian on the reservation, the court is less likely to find interference with Tribal sovereignty. In the later case of *State v. Zaman*,[142] the Arizona Court of Appeals emphasized the distinction between State service on an Indian within the boundaries of a reservation (not allowed under prior State case law) and State service on a non-Indian on the reservation. Citing prior U.S. Supreme Court decisions, it upheld the State service of process on a non-Indian on the reservation. It also commented that Public Law 280 was irrelevant because the law was a method whereby a State may assume jurisdiction over reservation Indians: "Arizona does not need Public Law 280 to extend its laws to non-Indians within the boundaries of a reservation."[143]

A comprehensive analysis of service of process in Indian country is found in Letter Opinion 94-L-245, written by the then Attorney General of North Dakota. The Attorney General was responding to an inquiry as to whether a county sheriff could enter the reservation to serve a notice of levy upon an Indian residing on the reservation. The Letter Opinion begins by stating that the response assumes that the State court had jurisdiction over the matter and the parties. Although it also predates *Nevada v. Hicks*, the Letter Opinion makes the following points, which are still valid:

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[138] *In Interest of M.L.S.,* 157 Wis. 2d 26, 458 N.W.2d 541 (1990).
[139] *See State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973).
[140] *Accord Martin v. Denver Juvenile Court*, 493 P.2d 1093 (Colo. 1972). Note that both of these cases were decided before the Supreme Court's ruling in *Nevada v. Hicks*, 533 U.S. 353 (2001).
[141] *See Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989).
[142] 194 Ariz. 442, 984 P.2d 528 (1999). Note that there are several Arizona appellate opinions arising from the original trial case.
[143] 194 Ariz. at 443-4, 984 P.2d at 529-30.

1. On a reservation, State authority over a nonmember Indian or non-Indian is more extensive than that over Tribal members.[144]

2. Prior to *Nevada v. Hicks*, State courts had split in their decisions regarding the service of process by a sheriff upon an Indian in Indian country.[145]

3. If Tribal law does not allow Tribal authorities to aid a sheriff in the service of process, service by the State sheriff is more likely to be held valid; the court is less likely to find infringement of Tribal sovereignty if the Tribe chose not to exercise its right of self-government in this area.[146]

4. If State law requires personal service of process, notice should be served in cooperation with Tribal authorities.[147]

5. State law may provide for a less intrusive form of service of process, such as service by mail.

6. Another way to avoid the jurisdictional problem is to have service conducted by Tribal law enforcement officers, assuming State law does not restrict service to State officers.[148]

Service on a defendant will not remedy an invalid exercise of subject matter jurisdiction. For example, when a State trial court lacks subject matter or personal jurisdiction over an Indian defendant, service on the individual while he or she is on the reservation is insufficient to give the State court jurisdiction over the defendant**.**[149]

TRIBAL PERSONAL JURISDICTION

Bases for Personal Jurisdiction Assuming subject matter jurisdiction, Tribal codes typically assert personal jurisdiction in a civil action over any person who is a

[144] *See, e.g., State v. Zaman*, 194 Ariz. 442, 984 P.2d 528 (1999).
[145] *Compare, e.g., State Sec., Inc. v. Anderson*, 506 P.2d 786 (N.M. 1973); *Little Horn Bank*, 555 P.2d 211 (Mont. 1976); *LeClair v. Powers*, 632 P.2d 370 (Okla. 1981)(upholding State service of process on Indians while they are within the boundaries of the reservation) *with Francisco v. State*, 556 P.2d 1 (Ariz. 1976); *Tracy v. Superior Ct.,* 810 P.2d 1030 (Ariz. 1991) (disapproving of State service upon Indians in Indian country).
[146] *But see* Comment, *A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country,* 61 U. Chi. L. Rev. 707, 725 (1994), positing that application of State law impinges on Tribal sovereignty even when the Tribe has not explicitly addressed the issue.
[147] In *Nevada v. Hicks*, the State game warden had obtained a Tribal warrant, in addition to his State court warrant, and had asked Tribal authorities to accompany him when he served the process on Hicks in his home on the reservation.
[148] The Letter Opinion notes dicta in *Francisco v. State* in which the court noted that an otherwise invalid sheriff's service upon an Indian in Indian country "could have validly been effected through the Papago Indian authorities who are vested with power to serve process pursuant to Tribal law. 556 P.2d 1 at 2, n. 1 (1976).
[149] *See, e.g., Nenna v. Moreno,* 132 Ariz. 565, 647 P.2d 1163 (1982); *State ex. rel. Flammond v. Flammond,* 190 Mont. 350, 621 P.2d 471 (1980).

member of the Tribe.[150] There may be limits to the exercise of civil jurisdiction over a nonmember Indian or non-Indian. For example, the Civil and Criminal Law and Order Code of the Hualapai Tribe (Arizona) provides that the Tribal court:

> shall have jurisdiction of all suits wherein the defendant is a member of the Tribe and between members and non-members which are brought before the Court, provided that the Tribal court shall not have jurisdiction over non-Indian defendants in civil matters, unless said non-Indian shall have submitted himself to said jurisdiction. Submission of jurisdiction shall be by written stipulation or oral stipulation in open court or by filing an action in Tribal court against an Indian.

Ch. 2, § 2.1 (1975). The Three Affiliated Tribes of Fort Berthold Reservation (North Dakota) limit civil jurisdiction in domestic relations cases to actions involving enrolled members of the Tribe. Section 2(a)(3).

Regulations governing Courts of Indian Offenses authorize jurisdiction over "all suits wherein the defendant is a member of the Tribe or Tribes within their [CFR court's] jurisdiction, and of all other suits between members and nonmembers which are brought before the [CFR] courts by stipulation of both parties." 25 C.F.R. § 11.22.

Tribal codes usually also assert personal jurisdiction over persons who are present, domiciled, or resident on the Tribal reservation or other Tribal lands.[151] Some codes specifically address non-Indians in that context. For example, the Tribal Code of Keweenaw Bay Indian Community of L'Anse Indian Reservation (Michigan) States the following:

> Any person, whether Indian or non-Indian, and whether natural or created by law, who is found within the territorial jurisdiction of this Court as defined by Section 1.501 . . . shall be subject to the jurisdiction of this Court. Non-Indian persons, by their residence, employment, or by their participation in any other activity within the territorial jurisdiction of this Court impliedly consent and submit to the provisions of this Code and the jurisdiction of this Court.

Ch. 1.5, § 1.502.

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[150] *See, e.g.*, Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(b) (2000); Coquille Tribal Code, Tribal Court Ordinance 610.200(c)(1). The Coquille Tribal Code also asserts personal jurisdiction over persons who are eligible for Tribal enrollment, or who have consented to the court's jurisdiction by marriage to a Tribal member.

[151] *See, e.g.*, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Tribal Laws, 1-2-104(2)(a); Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(a) (2000); Coquille Tribal Code, Chapter 610.200(c)(3).

The Law and Order Code of the Coeur d'Alena Tribe of Indians (Idaho) asserts that "[a]ny non-Indian who voluntarily comes onto or lives within the exterior boundaries of the Reservation hereby . . . consents to jurisdiction." 1-2.01.

The Hualapai Tribe (Arizona) ensures that nonresidents are aware of the significance of their presence on the reservation. Pursuant to the Tribal code, a sign must be erected at all entrances to the Reservation informing the general public that they have consented to Tribal jurisdiction upon entering the Reservation.[152]

If the respondent is a nonresident, many Tribal codes have long-arm statutes authorizing the assertion of personal jurisdiction under circumstances similar to State long-arm statutes.[153]

The definition of "residence" was raised in the case of *Father v. Mother*, No. 3 Mash. 204 (Mashantucket Pequot Tribal Court 1999). Denying the defendant's Motion for Relief, the Tribal court found that the court possessed exclusive subject matter jurisdiction over a paternity and custody action brought by the member father if the child was residing on the reservation at the time the original action was begun. The mother, a non-member Indian who lived in the State of Virginia, had argued that the child did not reside on the reservation; she characterized the child's 10-month stay there as a visit. In ruling that the child was a resident of the reservation, the court rejected "the historically gendered and sexist rules of the western common law" that presumed the child's residence was that of the mother's. Rather, it looked to Tribal law with its focus on the well-being of the Tribal member children:

> The Family Relations Law and Child Protection Law does not require a Tribal member child to have resided on Nation lands for any minimum amount of time before this Court may exercise its jurisdiction over him or her. In Tribal law, this is not an unusual omission. The lack of a requirement that residency be of a minimum duration reflects the special ties of native Americans to their ancestral homelands and reservations, and to the Tribal history, culture and extended family relations that are alive there. . . .. Thus for the Native American, the reservation is unlike any other place on the face of the earth.

Service of Process Finally, a valid exercise of Tribal court jurisdiction requires valid service of process. When the civil action is being heard by a Tribal court, service should comply with the relevant Tribal code. Most Tribal codes allow personal service; service by registered mail, return receipt requested; or, in certain circumstances, service by publication.[154]

[152] Civil and Criminal Law and Order Code of Hualapai Tribe Ch. 1, § 1.1 (1975).
[153] *See, e.g.*, Sisseton-Wahpeton Sioux Tribe, Chapter 45 Act of Non-Domiciliaries, Section 45-01-01 Personal Jurisdiction by Act of Non-Domiciliaries.
[154] *See, e.g.*, Crow Law and Order Code, 1-153, 1-154.

The Tribal code may also specify who may serve process.[155] For example, the Nez Perce Tribal Code authorizes service by any person who is not a party and who is at least 18 years old. At the plaintiff's request, the court may require service of process by a Tribal police officer or other person specially appointed by the court.[156]

[155] *See, e.g.*, Law and Order Code of the Kalispel Tribe of Indians, Ch. 3, 3-401.
[156] Nez Perce Tribal Code, Chapter 2-2, Rule 4(c).

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CHAPTER THREE
TABLE OF STATUTES AND AUTHORITIES

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CHAPTER FOUR
JURISDICTION IN DOMESTIC LAW CASES

The myriad Congressional acts and Supreme Court cases -- often reflecting inconsistent policies, philosophies, and interpretations -- have resulted in complex jurisdictional issues.[157] This is true in the domestic relations area.

Congress has recognized that a Tribe has a strong interest in "preserving and protecting the Indian family as the wellspring of its future."[158] The Supreme Court has also stressed the importance of Tribal power to regulate internal domestic relations.[159] But inherent jurisdiction is not conclusive in family law disputes in which one of the parents is a non-Indian or nonmember Indian.

In 1989, a committee of the Conference of Chief Justices mailed a survey to various individuals in the 32 States with Federally recognized Indian country. Twenty-one States reported disputed jurisdiction cases.[160] The most frequently cited case problems arose under the Indian Child Welfare Act. However, domestic relations disputes – divorce, child custody and support – were next in frequency. Disputes arose over which court system had jurisdiction over the establishment of paternity and support, and over enforcement of existing orders. In a more recent survey of Tribal courts, 83% of responding Tribal judges cited trouble enforcing their decisions in State courts.[161]

Although cooperation among Tribes and States has greatly improved since then, including an increase in the use of intergovernmental and cooperative agreements, issues still arise. The next section of this monograph will focus on jurisdictional and operational issues arising in paternity and child support cases in which at least one of the parties is an American Indian.

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[157] *Yakima v. Washington*, 439 U.S. 463, 470 n.7 (1979).
[158] H.R. Rep. No. 95-1386 at 19.
[159] *See Montana v. United States*, 450 U.S. 544 (1981). *See also Fisher v. District* Court, 424 U.S. 382 (1976).
[160] Rubin, *supra* note 7.
[161] Stoner and Orona, *supra* note 27.

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CHAPTER FOUR
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CHAPTER FIVE
PATERNITY ESTABLISHMENT

Parentage is at the heart of the determination of a duty to pay support. When children are born outside of marriage, the first step in a support establishment action is usually determination of paternity. A State IV-D agency does not pursue paternity establishment in public assistance cases where *good cause* exists.[162] "Good cause" is an exception to the public assistance recipient's obligation to cooperate with the State IV-D office in its efforts to establish paternity. A finding of good cause means that State IV-D efforts to establish paternity, or to establish and enforce a child support obligation, cannot proceed without a risk of harm to the custodial parent (or caretaker relative) and child. Nor must a State IV-D agency establish paternity when the IV-D agency has determined that it would not be in the best interest of the child in a case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending.[163] Federal regulations provide that the Tribal IV–D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the Tribal IV–D agency, it would not be in the best interests of the child to establish paternity.[164]

DETERMINATION OF PATERNITY

Voluntary Acknowledgment To be eligible to receive Federal IV-D funding, States and Tribes must operate a child support program that provides for the establishment of paternity. Federal regulations setting the paternity establishment requirements for a State IV-D program appear at 45 C.F.R. § 303.5. Federal regulations setting paternity establishment procedures that must be part of a Tribal IV-D program appear at 45 C.F.R. § 309.100.

One of the paternity establishment methods that State and Tribal IV-D programs must provide is a voluntary acknowledgment of paternity. There are no Federal regulations prescribing the voluntary acknowledgment process for Tribes. However, State child support programs must ensure that the civil process for acknowledging paternity is available at hospitals and birthing centers.[165] This process is often called "in-hospital acknowledgment." Unmarried parents are not required to sign a paternity acknowledgment but they must be given the opportunity to do so at each hospital and birthing center in the State. As part of this process, the putative father can consult with an attorney and may request genetic tests prior to signing the acknowledgment. Once the acknowledgment is signed, it is filed with the State registry of birth records. State law must provide that the signed paternity acknowledgment creates a rebuttable, or – at State option – a conclusive presumption of paternity and can be the basis for a support order without further paternity proceedings.[166] Either parent has 60 days, from the date an acknowledgment of paternity is signed, to revoke it for any reason. The Rescission Form must be in writing. After this 60-day period has expired, a parent must go to court

[162] 45 C.F.R. § 302.70.
[163] 45 C.F.R. § 302.70.
[164] 45 C.F.R. § 309.100.
[165] 45 C.F.R. § 303.5(g)(2).
[166] 45 C.F.R. §§ 302.70(a)(5)(iv), (vii).

to challenge it. If a parent does bring an action in court after the 60-day time frame, the bases for challenging the acknowledgment are limited to fraud, duress, or a material mistake of fact.

States must give full faith and credit to a determination of paternity made in another State through the paternity acknowledgment process.[167] There is no such requirement on Tribes, which are not subject to the Federal Full Faith and Credit clause of the Constitution in the absence of express legislation. Tribal courts may recognize such determinations pursuant to comity. See the discussion herein.

Genetic Testing States must have laws requiring a child and all other parties in a contested paternity case to submit to genetic tests upon the request of any such party.[168] They must also have procedures which provide that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence; if no objection is made, a written report of the test results is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. Finally, States must have laws that create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability of the alleged father being the father of the child.[169]

Tribal IV-D programs must have procedures requiring that, in a contested paternity case (unless otherwise barred by Tribal law), the child and all other parties must submit to genetic tests upon the request of any such party.[170] The phrase "otherwise barred by Tribal law" is intended to cover situations in which, either by action of one or both of the parties or the application of Tribal law, or both, paternity has already been conclusively determined and may not be reconsidered. In such cases, genetic testing to challenge the paternity determination would not be authorized.[171]

Judicial or Administrative Proceeding In the absence of an acknowledgment, a State IV-D plan must provide for the establishment of paternity by bringing a legal action (before a court or administrative forum) in accordance with State law.[172] A Tribal IV-D plan must provide for the establishment of paternity "by the process established under Tribal law, code, and/or custom." [173] Federal regulations expressly state that establishment of paternity pursuant to a Tribal IV-D program requirement has no effect

[167] 45 C.F.R. § 302.70(a)(11).
[168] 45 C.F.R. § 302.70(a)(5) and § 303.5(d) and (e).
[169] 45 C.F.R. §§ 302.70(a)(5)(v), (vi).
[170] 45 C.F.R. § 309.100(a)(3).
[171] 69 Fed. Reg. 16,638 at 16,658 (2004): "Examples of such a paternity determination would include a voluntary admission of paternity or circumstances under which the Tribe has other means of recognizing paternity under Tribal law. A Tribe, through its own custom, tradition or procedure, may recognize a man as the father or may preclude a man who holds himself out to be the father from challenging paternity. Similarly, a Tribe may have a conclusive presumption of paternity when a child is born to married parents or if a noncustodial parent has been validly served in a paternity proceeding and failed to contest paternity in such proceeding."
[172] 45 C.F.R. § 302.31.
[173] 45 C.F.R. § 309.100(a)(1).

on Tribal enrollment or membership.[174] However, in reality, paternity establishment can affect enrollment if a tribe's enrollment process requires a birth certificate and/or descent line. In such circumstances, if a man's name is on the birth certificate, the child can be enrolled into the tribe -- regardless of whether the name is on the certificate due to a paternity adjudication, a default paternity order, or a paternity acknowledgment, and regardless of whether the man is the child's biological father. Therefore, State and Tribal child support workers need to remember the importance of paternity establishment for potential Tribal children.

In a purely judicial setting before a State or Tribal court, a petition or complaint is filed requesting the establishment of parentage. Notice of the action is served, usually by certified mail or personal service, upon the alleged father. If the alleged father does not admit paternity, a trial is scheduled at which time both parties present evidence, including relevant testimony or facts meeting any presumptions recognized by the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the judicial officer decides the issue of paternity.

If the defendant has failed to respond after being served with the appropriate case paperwork (i.e., summons and pleading seeking paternity establishment), Federal regulations governing State IV-D programs require the IV-D agency to seek entry of a default order.[175] There is no such requirement on Tribal IV-D programs.

Judicial proceedings are available in both private cases and cases brought by a child support agency. In States using an administrative process to determine paternity, the administrative proceedings are only available in cases brought by a child support agency. In a typical administrative process, the alleged father is notified of the allegation of paternity and of a scheduled conference time. At the appointed time, he has the opportunity to acknowledge paternity. If he does not acknowledge paternity, an administrative hearing before an administrative hearing officer is scheduled. At the hearing, both parties present evidence, including relevant testimony of facts meeting any presumptions recognized in the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the administrative hearing officer decides the issue of paternity. Some Tribes, such as the Navajo Nation, have also established an administrative process for child support cases.

Tribes that do not receive Federal IV-D funding may also provide forums for the establishment of paternity. They do not need to meet Federal IV-D regulatory requirements.

Paternity establishment after the death of the alleged father is an issue that may arise among Indian children – not for support purposes, but because of the need to establish paternity to become enrolled with the Tribe. In some circumstances the Department of Interior may also determine the issue in a probate proceeding involving Indian trust land.

[174] 45 C.F.R. § 309.100(d).
[175] 45 C.F.R. § 302.70(a)(5)(viii).

Pursuant to the Full Faith and Credit for Child Support Orders Act,[176] States and Tribes are required to recognize and enforce valid child support orders. If such orders are premised on a finding of paternity, the State or Tribe must honor such paternity findings.[177] States are also required by Federal law to give full faith and credit to "stand alone" paternity determinations made in another State, whether through an administrative process or a judicial process.[178] Tribes are not subject to this requirement.

Custom Reuniting Indian fathers and their children is important for a number of reasons. Knowing who and where the father is obviously affects the children and other family members who want to reclaim kinship ties. In Native American culture, fathers are expected to provide food and shelter for their families. They are also traditionally viewed as teachers, guides, role models, leaders, and nurturers. Determination of paternity may also be a step toward Tribal enrollment. "Tribal membership is directly related to Federal benefits. Membership also has implications for legal jurisdiction, inheritance or restricted or trust lands, and voting rights."[179]

In developing regulations that govern Tribal IV-D programs, the Federal government has recognized that Tribes may provide for the legal determination of paternity pursuant to custom and religious practice. Such regulations define "Tribal custom" to make it clear that the term means unwritten law that has the force and effect of law.[180]

TRIBAL OR STATE SUBJECT MATTER JURISDICTION

The decision of whether a Tribal court or State court has exclusive or concurrent jurisdiction in a paternity case is influenced by a number of factors: whether the State is a Public Law 280 State with civil jurisdiction over domestic matters, whether the mother and alleged father are members of the same Tribe, whether one party is an Indian and the other is not, whether a party resides on a reservation or Tribal land, whether conception occurred on or off the reservation, whether the mother applied for public assistance from the State and the State IV-D agency is bringing the paternity action, whether there is a Tribal forum for a paternity action, and which court is making the initial decision regarding jurisdiction. It is impossible to draw many "bright lines" because the court rulings often conflict. For the purpose of the following discussion, we will initially focus on whether the parents in a particular case are American Indian. We will then note other factors that seemed decisive for the court. State child support agencies should keep in mind that if paternity has already been determined under Tribal

[176] 28 U.S.C. § 1738B.
[177] *See* 69 Fed. Reg. 16,658 (March 30, 2004).
[178] 45 C.F.R. § 302.70(a)(11).
[179] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children at 40 [hereinafter referred to as Strengthening the Circle].
[180] 45 C.F.R. § 309.05.

law, which usually includes custom, a State must give full faith and credit to that determination and should not attempt to initiate a State action for paternity establishment.

Member Indian Mother and Member Indian Alleged Father/Reside on Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 civil jurisdiction has jurisdiction over domestic relations actions, to which Indians are parties, and which arise in Indian country.[181] A case in point is *Becker County Welfare Department vs. Bellcourt*, 453 N.W.2d 543 (Minn.1990). In this case, the mother, alleged father, and child were enrolled Tribal members who lived on White Earth Reservation in Minnesota. As a result of the mother's receipt of public assistance, Becker County initiated a paternity action against Bellcourt in a State court. The court adjudicated paternity and ordered support. Bellcourt appealed on the issue of subject matter jurisdiction. Becker County pointed out that Public Law 280 conferred jurisdiction over civil causes of action in Minnesota to which Indians are parties. The father argued that the county's action was not based on a civil law of "general application to private persons," but rather was regulatory in nature and therefore outside of Public Law 280.

The Minnesota Court of Appeals disagreed. It concluded that, in seeking reimbursement of public assistance, the county was not acting in a regulatory capacity but was "only acting on behalf of a private party who has assigned her rights to establish paternity and recover child support."[182] Because the action was a civil action of "general application to private persons," the State trial court had properly exercised its Public Law 280 jurisdiction. Noting that "the legislative history of Pub. L. 280 indicates that the statute was intended to redress the lack of adequate Indian forums,"[183] the Court of Appeals noted that the constitution of the Minnesota Chippewa Tribe did not authorize creation of Tribal courts to deal with domestic relations matters: "Thus, even though the tribe has a strong interest in self-governance and in determining the parentage of Indian children, Congress cannot have intended that there be no forum to execute the AFDC reimbursement program it mandates."[184] Where conception occurred appeared to be an irrelevant factor in the court's analysis since it was not discussed.[185]

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[181] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[182] 453 N.W.2d 543, 544.
[183] *Id.*
[184] 453 N.W.2d 543, 544.
[185] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990) reached a similar conclusion, ruling that a State court may have concurrent jurisdiction to establish paternity. In *State v. W.M.B.*, the parties and child were all members of the same tribe, who lived on the reservation. The action was a contempt proceeding in which the father attacked the underlying paternity order as void. Using a federal preemption and infringement analysis, the court first concluded that federal regulations cited by the respondent as establishing federal preemption of State court jurisdiction did not do so. It then examined whether State jurisdiction to establish paternity would infringe on the right of tribes to establish and maintain their Tribal government. It concluded that it would not. The court found that when paternity and child support were first established by a State trial court in 1977, there was no Tribal code that focused on paternity and child support and no Tribal court existed at the time. In a later Tribal court proceeding

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, if both parents are enrolled members of the same Tribe, who live in Indian country, State courts have held that the Tribal court has exclusive jurisdiction. The decision in *Jackson County Child Support Enforcement Agency v. Swayney*[186] is illustrative.

In *Jackson County,* the mother, alleged father, and child were all enrolled members of the Eastern Band of Cherokee Indians living on the reservation. The mother had applied for public assistance from the State of North Carolina, and had assigned her right to establish paternity and collect child support to the State. The State agency filed a paternity action in State court; the alleged father challenged State court jurisdiction. On appeal, the North Carolina Supreme Court held that the State court lacked subject matter jurisdiction over the paternity matter. Using the *Williams v. Lee* test, the court stated:

> The determination of the paternity of an Indian child is of special interest to Tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations. Thus, exclusive Tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to Tribal self-governance. The State's interest in having this matter litigated in its own courts Is less compelling . . . [and] the State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child, thus meeting [the Federal AFDC] requirement.[187]

The Supreme Court of North Dakota also held that a Tribal court had exclusive jurisdiction to determine paternity when both parents and the children were enrolled members of the same tribe, conception occurred on the reservation, and the alleged father lived on the reservation. In *M.L.M. v. L.P.M*., 529 N.W.2d 184 (N.D. 1995), the court concluded that the mother's period of residency off the reservation and the alleged father's off-reservation employment were not significant enough to overcome the danger that "the exercise of such jurisdiction would undermine the authority of the Tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves."[188] In other cases, the North Dakota Supreme Court has held that the State's provision of public assistance[189] and a defendant's delay of eight years in raising

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involving custody, the court noted that the Tribal court had not questioned the State's jurisdiction in the paternity and support proceeding. NOTE: The court mentions a 1976 Governor proclamation retroceding jurisdiction over the Menominee Indian Reservation "pursuant to federal law," but does not identify Public Law 280 by name. Wisconsin currently has Public Law 280 civil jurisdiction over all Indian country within the State, with the exception of the Menominee Reservation. See *supra* note 101.

[186] 352 S.E.2d 413 (N.C. 1987).

[187] 352 S.E.2d at 418-9. *Accord Jackson County Smoker v. Smoker, Jr.*, 341 N.C. 182, 459 S.E.2d 789 (1995).

[188] 592 N.W.2d 184, 186, citing *McKenzie County Social Serv. Bd. v. V.G*., 392 N.W.2d 399, 402 (N.D. 1986).

[189] *See McKenzie County Social Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986); *McKenzie County Social Serv. Bd. v. C.G.,* 633 N.W.2d 157 (N.D. 2001).

subject matter jurisdiction[190] are each insufficient to outweigh the Tribe's significant interest in Tribal determination of parentage of children of Tribal members when conduct occurred on the reservation.

South Dakota courts have also concluded that there is exclusive Tribal court jurisdiction in a paternity action in which both parents are enrolled Tribal members domiciled on the reservation.[191]

In *Davis v. Means,*[192] the Navajo Tribal court emphasized how interwoven a child's Indian heritage is with paternity establishment and why the Tribal court has jurisdiction to resolve paternity, including the authority to order genetic testing: "The Navajo maxim is this: 'It must be known precisely from where one has originated.' The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tenet of family cohesion."[193] The court noted that establishing paternity with reasonable certainty was essential for the family to achieve stability and harmony.

In contrast to the above decisions is the Wisconsin case of *State v. W.M.B*.[194] The parties and child were all members of the Menominee Tribe, who lived on the Menominee reservation. The action was a contempt proceeding in which the father attacked the underlying State paternity order as void. He argued that the Tribal court had exclusive jurisdiction over any paternity action between Tribal members living on the reservation because in 1976 Wisconsin had retroceded its jurisdiction over the Menominee Indian Reservation, prior to initiation of the State action in 1977. In its analysis, the Court of Appeals noted that there were two barriers to a State's exercise of jurisdiction relating to Indian matters. First, was there Federal law preempting a State's authority to act? Second, did the State action infringe upon the rights of tribes to establish and maintain Tribal government? The court noted that "Wisconsin has recognized a trend toward reliance on Federal preemption and away from the idea of inherent Indian sovereignty as an independent bar to State jurisdiction."[195]

The court first concluded that the two Federal regulations cited by W.M.B as establishing Federal preemption – 25 CFR 11.22 and 11.30 – were enabling legislation of the Court of Indian Offenses and, as such, were not Federal statutes establishing Federal preemption of the exercise of subject matter jurisdiction by State courts over paternity and child support actions involving members of Indian Tribes. The court then examined whether State court jurisdiction unduly infringed on Tribal self-governance. The court was influenced by the fact that, despite Wisconsin's retrocession of

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[190] *Id.*
[191] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790 (2001); *Harris v. Young*, 473 N.W.2d 141, 144 (S.D. 1991) (citing *Fisher v. Dist. Court of Sixteenth Jud. Dist*., 424 U.S. 382 (1976); *Wells v. Wells*, 451 N.W.2d 402, 405 (S.D. 1990)).
[192] 21 Indian L. Rptr. 6125 (Navajo 1994).
[193] 21 Indian L. Reptr. 6125, 6127.
[194] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990). At the time of the State court action, Wisconsin had retroceded its Public Law 280 jurisdiction over the Menominee Tribe. See *supra* notes 101 and 185.
[195] 465 N.W.2d 221, 223.

jurisdiction, the Menominee Tribe had not "exercised its sovereign governmental authority in the resolution of paternity issues" in 1977. At the time of the State court paternity hearing, there was no Tribal court and the record was silent about the existence of any Tribal code dealing with paternity "that could demonstrate Tribal interest in an assertion of jurisdiction." In fact, the court noted, the Tribal court had subsequently determined custody issues in the case, without questioning the State's jurisdiction to adjudicate paternity. It held that the State court's judgment of paternity and support was not void for lack of subject matter jurisdiction.

It therefore appears that, at least for one State court, the availability of a Tribal forum or statute for paternity establishment is an important factor the court will consider in deciding whether State jurisdiction infringes upon Tribal self-government.

Member Indian Mother and Member Indian Alleged Father/One Member Resides off Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action involving Indians has jurisdiction over domestic relations matters if the cause of action occurred in Indian country.[196] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts in which one of the Tribal members resided outside of Indian country.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, State courts will conduct a *Williams* preemption-infringement analysis. If one of the parties files a paternity action in State court and jurisdiction is challenged, the State court will likely focus on where the cause of action arose. If conception occurred in Tribal territory, the State court will most likely find that the Tribal court has exclusive jurisdiction. A case in point is *McKenzie County Social Service Board v. C.G.*, 633 N.W.2d 157 (N.D. 2001). The case involved an Indian mother and alleged father from the same Tribe. Conception occurred on the reservation. The mother received public assistance from the State of North Dakota, which filed the paternity and support action in State court on her behalf. The alleged father lived off the reservation at the time the lawsuit was filed. When the alleged father failed to appear at the hearing, the State court entered a default order establishing paternity and support and ordering reimbursement of public assistance. Eight years later, the father moved to set aside the judgment for lack of subject matter jurisdiction. The court treated the motion as a Rule 60b motion for relief from a final judgment because the judgment was void.

The North Dakota appellate court used the infringement test to determine whether State court jurisdiction was proper: Would State court jurisdiction undermine the authority of Tribal courts over reservation affairs and infringe on the right of Indians to govern themselves? The court concluded that determination of the parentage of a child of Indian Tribal members was intimately connected with the right of reservation Indians to make their own laws and be ruled by them. The State provision of public

[196] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).

assistance, Title IV-D's requirements to recover support with the possibility of Federal financial sanctions for nonperformance, and the father's residency off the reservation were not enough to override that Tribal interest. The court concluded that the State district court had lacked jurisdiction to determine paternity in this case and the order was void. Based on the facts, the appellate court ruled that the Tribal court had exclusive jurisdiction.[197]

In contrast is the case of *Anderson v. Beaulieu*, 555 N.W.2d 537 (Minn. 1996). In *Anderson,* the mother, alleged father, and child were all members of the same Tribe. The mother and child lived off the reservation; the mother received public assistance from the county. At the time of the paternity and support action, which had been brought in State court, the alleged father worked off the reservation. His motion to dismiss for lack of subject matter jurisdiction was denied. After he obtained employment on the reservation, he brought a motion for reconsideration. The Minnesota appellate court asked whether the State action would undermine the tribe's right of self-government. Citing the case of *Jackson County CSEA v. Swayney*, but distinguishing the present facts, the court concluded that State court jurisdiction had not impinged on the tribe's self-governance.[198] Although the mother, father, and child were all members of the same Tribe, the mother and child lived off the reservation. Second, the action arose off the reservation because the mother had applied for AFDC through the county.[199] Finally, the court concluded that the "tribe's interest [in paternity establishment] is outweighed by the State interest in securing child support payments as required by the AFDC program." NOTE: When the paternity action began, the father was employed off the reservation. The court pointed out that by working off the reservation and voluntarily agreeing to genetic testing, he had voluntarily submitted himself to State jurisdiction. It is unclear to what extent those factors were the main basis for the court's holding versus the results of its infringement analysis.

South Dakota ex rel. Jealous of Him v. Mills, 627 N.W.2d 790 (S.D. 2001) also involved two member Indians, one of whom was an alleged father domiciled off the reservation. The court upheld the State trial court's jurisdiction in a paternity action between Tribal members: "When one party becomes domiciled off the reservation, State and Tribal courts enjoy concurrent jurisdiction, and the case may be adjudicated by whichever court first obtains valid personal jurisdiction." The court emphasized that it would have ruled differently if both members had been domiciled on the reservation.

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[197] *Accord In re M.L.M.*, 529 N.W.2d 184 (N.D. 1995) (where both parents were Tribal members and conception occurred on the reservation, the fact that the child was born off the reservation, that the mother lived off the reservation for a period of time, and that the alleged father lived off the reservation and was employed off reservation did not outweigh the right of Indians to govern themselves).

[198] Unlike the facts in *Swayney*, upon which the appellate court had concluded that the Tribe's interest would be infringed if the State court asserted jurisdiction over paternity, the court in *Anderson* concluded that the Tribe's interest would not be infringed if the State court asserted jurisdiction in this case. Here the mother and child lived off the reservation, the father worked off the reservation, and the father had submitted to State administered genetic testing.

[199] It is interesting that the court considered the cause of action to have arisen where the mother applied for public assistance as opposed to where conception occurred. Because the court determined that the cause of action arose outside of Indian country, Minnesota's Public Law 280 jurisdiction did not come into play. The court did not mention Public Law 280 in its analysis.

If the plaintiff files the paternity action in Tribal court and the defendant challenges subject matter jurisdiction, the Tribal court will most likely reject the challenge. When both parties are enrolled members of the same Tribe, the Tribal court will most likely conclude that it has jurisdiction, regardless of the residence of the parties, because of the importance of paternity establishment to Tribal interests. If conception occurred on the reservation, there is a strong argument for exclusive Tribal jurisdiction.

In summary, when both parties are members of the same Tribe but one of the Tribal members lives off the reservation, the facts of the specific case – where conception occurred, whether public assistance was provided by the State, whether there are consensual contacts between the defendant and the forum -- may be dispositive regarding jurisdiction.

Member Indian Mother and Member Indian Alleged Father/Both Parents Reside off Reservation No cases were found with this fact pattern. Although all parties lived off the reservation in *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the parties were not both member Indians. See discussion below. In Attorney General's Opinion 2000-F-07, the North Dakota Attorney General discusses hypothetical fact patterns regarding paternity actions involving enrolled Tribal members. Noting that there is no bright-line test for determining jurisdiction, she concluded that under North Dakota law, which is respectful of Tribal interests, it would be appropriate for a county attorney to invoke State court jurisdiction when conception and the application for public assistance take place off the reservation, and all parties live off the reservation; in her opinion, State court jurisdiction in such a case would not unduly infringe upon Tribal sovereignty. A Tribal court may reach a different conclusion if it finds that such action does constitute an undue infringement.

Member Indian Mother and Non-Member/Non-Indian Alleged Father

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action, has jurisdiction over domestic relations matters that occur in Indian country located within that State, involving Indians or to which Indians are parties.[200] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts involving one party who was a nonmember Indian or non-Indian.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when the alleged father is a non-Indian, and the action is filed in State court, State courts have usually engaged in a *Williams* preemption-infringement analysis. The analysis is the same, regardless of whether the party is a non-member Indian or a non-Indian.[201] A State decision that emphasizes that point is *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002). The case involved parents from different Tribes, who lived off the reservation. When the mother initiated a State action to establish paternity and support,

[200] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[201] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).

the father challenged State court jurisdiction. Upholding the trial court's exercise of jurisdiction, the North Dakota court stated that, as a nonmember of the mother's Tribe, the father had the same standing as a non-Indian, and thus could not assert the Tribe's right of self-government against the Tribe's own member. In other words, the "infringement test" could not be used offensively by a non-member Indian against a member Indian who had chosen to file her paternity action in State court.[202]

The court further held that when two Tribes were involved, each Tribe needed to conduct the *Williams* infringement test separately in the context of its own Tribe and Tribal member. Here, the court balanced the Tribe's "significant interest in determining the parentage of one of its members" against the facts of this case. The court concluded that State court jurisdiction did not infringe upon the Tribe's right to govern itself. In fact, given that the parents' relationship occurred off any reservation, the place of conception was unknown but most likely took place off the reservation, the parents signed a paternity acknowledgment off the reservation, the parents lived off the reservation, and the mother and child were receiving public assistance from the State, "the existence of any Tribal court jurisdiction, much less exclusive Tribal court jurisdiction, is questionable."[203]

The Arizona Supreme Court has also upheld State court jurisdiction in an action brought by the State against a non-Indian father to determine paternity.[204] The facts that conception occurred on the reservation and that all parties resided on the reservation were not dispositive.

Placing emphasis on the Tribal interest in paternity establishment are two Tribal court decisions: *Solomon v. Jantz*, 25 Indian L. Rptr. 6251 (Lummi Court 1998) and *Tafaya v. Ghashghaee*, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Court 1998). In both cases, the Tribal courts concluded that the Tribal court had properly exercised jurisdiction against a non-Indian in a paternity/support action. The courts did not discuss the Supreme Court holdings in *Montana v. United States* or *Nevada v. Hicks*.[205]

No cases were found post *Nevada* in which a nonmember Indian or non-Indian challenged Tribal court jurisdiction in a paternity action, and the Indian plaintiff argued

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[202] *Accord State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998) ("As long as the Indian party selects the State forum, there is nothing for the infringement test to protect against." 946 P.2d at 461. The putative father was a non-Indian who had argued that the Indian mother's State paternity action infringed upon the tribe's interest in self-government.)

[203] 649 N.W.2d at 576.

[204] *State v. Zaman,* 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998). In so holding, the Supreme Court reversed the Court of Appeals decision in *State v. Zaman*, 187 Ariz. 81, 927 P.2d 347 (1996) (*Zaman I*).

[205] *Montana v. United States*, 450 U.S. 544 (1981), *Nevada v. Hicks*, 533 U.S. 353 (2001). *Montana* had held that, absent federal legislation, Indian Tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation, subject to two exceptions: (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare. In *Nevada*, the Court applied the *Montana* test in a case involving conduct by a nonmember on Indian land within the reservation.

that where conception occurred on the reservation, the facts met one or both prongs of the *Montana* test.

Most Tribal participants in a 1991 ABA telephone survey responded that intertribal paternity situations usually are not troublesome. The opinion expressed, especially among Tribal judges, was that there exists a high level of cooperation between most Tribal court systems. Tribal judges stated that they were much more likely in intertribal matters to telephone one another, or otherwise agree upon a forum, than they were in Tribal/State matters. Most State and Tribal judges also remarked, however, that they desired more frequent interaction between States and Tribes as a way to quickly resolve many of the difficulties associated with determining the paternity of Indian children.

Non-Indian/Non-Member Mother and Indian Alleged Father When the non-Indian or non-member Indian mother files a paternity action against an Indian alleged father in State court, the Indian alleged father may raise a jurisdictional challenge. See above for a discussion regarding the role of Public Law 280 jurisdiction.

If conception occurred off the reservation or if the non-member Indian or non-Indian mother applied for public assistance from the State, and the State court views that action as the date the cause of action arose, Public Law 280 will not apply because the cause of action did not arise within Indian country.

Where Public Law 280 is not applicable, the State court will conduct a *Williams* preemption-infringement test. Using such a test in the case of *State ex rel. Vega v. Medina,*[206] the Iowa Supreme Court ruled that the State trial court had properly exercised subject matter jurisdiction over the State's action to establish paternity, current child support, and reimbursement of public assistance, when the State, child and mother were non-Indians; the child's conception arose off reservation; and the State has a strong interest in protecting its assistance program as well as ensuring the well-being of its citizens. The court also noted that the defendant's Tribe did not have a Tribal court to handle paternity and support cases.

If the non-Indian or non-member mother files a paternity action in the court of the Tribe in which the alleged father is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes one of determining whether Tribal law authorizes jurisdiction in such a case.[207] If it does, and if the Tribal court has personal jurisdiction over the Indian alleged father, the Tribal court will most likely uphold Tribal court jurisdiction. In *Dallas v. Curley*, (No. AP-005-94 - Appellate Court of the Hopi Tribe), the Appellate Court held that the Hopi Tribal court

[206] 549 N.W.2d 507 (Iowa 1996).

[207] The question in this case was not whether the State court had jurisdiction, but whether jurisdiction was with the Hopi Tribal Court or the Hopi Village of Upper Moenkopi, which was the residence of the alleged father. However, the holding of the court is relevant because of its examination of how the law treated disputes involving nonmember Indians.

properly exercised jurisdiction over a paternity action brought by a nonmember Indian mother against a member of the Hopi Tribe.

Non-Indian Mother and Non-Indian Alleged Father If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If the parties live off the reservation and conception occurred off the reservation, the State court has exclusive subject matter jurisdiction. If the parties live on the reservation and conception occurred on the reservation, it is still likely that a State court will find it has jurisdiction on the basis that there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian mother filed the paternity action in Tribal court, and the non-Indian father challenges subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether exercise of jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.[208]

[208] *See Montana v. United States*, 450 U.S. 544 (1981), which identifies two exceptions where Tribal civil jurisdiction can exist over non-Indians on non-Indian land.

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CHAPTER FIVE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Full Faith and Credit Clause of Constitution

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Public Law 280 (enacted in 18 U.S.C., 25 U.S.C. and 28 U.S.C.)

28 U.S.C. § 1738B

45 C.F.R. § 302.31

45 C.F.R. § 302.70

45 C.F.R. § 303.5

45 C.F.R. § 309.05

45 C.F.R. § 309.100

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

State Attorney General Opinion

North Dakota Attorney General's Opinion 2000-F-07

Case Law

Fisher v. District Ct., 424 U.S. 382 (1976)

Montana v. United States, 450 U.S. 544 (1981)

Nevada v. Hicks, 533 U.S. 353 (2001)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

Dallas v. Curley, (No. AP-005-94 - Appellate Court of the Hopi Tribe)

Davis v. Means, 21 Indian L. Rptr. 6125 (Navajo 1994)

Solomon v. Jantz, 25 Indian L. Rptr. 6251 (Lummi Court 1998)

Tafaya v. Ghashghaee, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Court 1998)

Anderson v. Beaulieu, 555 N.W.2d 537 (Minn. 1996)

Becker County Welfare Department vs. Bellcourt, 453 N.W.2d 543 (Minn.1990)

Harris v. Young, 473 N.W.2d 141 (S.D. 1991)

Jackson County Child Support Enforcement Agency v. Swayney, 352 S.E. 2d 413 (N.C. 1987)

Jackson County Smoker v. Smoker, Jr., 341 N.C. 182, 459 S.E.2d 789 (1995)

Marriage of Purnel v. Purnel, 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997)

McKenzie County Social Serv. Bd. v. C.G., 633 N.W.2d 157 (N.D. 2001)

McKenzie County Social Serv. Bd. v. V.G., 392 N.W.2d 399 (N.D. 1986)

M.L.M. v. L.P.M., 529 N.W.2d 184 (N.D. 1995)

Roe v. Doe, 649 N.W.2d 566 (N.D. 2002)

South Dakota ex rel. Jealous of Him v. Mills, 627 N.W.2d 790 (S.D. 2001)

State ex rel. Vega v. Medina, 549 N.W.2d 507 (Iowa 1996)

State v. Zaman, 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998)

State v. Zaman, 187 Ariz. 81, 927 P.2d 347 (1996) (*Zaman I)*

State v. W.M.B., 159 Wis.2d 662, 465 N.W.2d 221 (1990)

Wells v. Wells, 451 N.W.2d 402 (S.D. 1990)

Periodicals/Publications

Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children (1998).

CHAPTER SIX
SUPPORT ESTABLISHMENT

DETERMINATION OF SUPPORT OBLIGATION

Judicial or Administrative Proceeding When paternity is not an issue, the next stage of case processing is the establishment of a support order. Federal regulations governing both State and Tribal IV-D programs require the use of local law and procedures in establishing the support order.[209] The action may be brought before a judicial or an administrative forum.

When a State IV-D agency brings an action to establish a support order, it must meet certain Federal timeframes.[210] The Federal regulations require the establishment of a support order or, at a minimum, the service of process needed to begin the order establishment process, within 90 calendar days of locating the alleged father or non-custodial parent. If service of process cannot be obtained within this timeframe, the State IV-D agency must document that it has made a diligent effort to serve process. According to these regulations, if a State's tribunal dismisses a petition to establish a support order without prejudice, the child support office must review the case and examine the tribunal's reasons for dismissing the establishment action. If, after reviewing the reasons, the child support office determines that it would be appropriate to pursue the order establishment action again in the future, the office must bring the establishment action at that time. Finally, in a case whose parties acknowledge paternity, the regulations require the State IV-D agency to obtain a support order based upon that acknowledgment. Tribal IV-D agencies are also required to provide for the establishment of a support order, but are not subject to Federal timeframes.

Within both State and Tribal IV-D agencies, the establishment process typically involves the following steps:

1. Contact parents
2. Interview parents
3. Apply guidelines
4. Obtain order by consent or adjudication
5. Create fiscal account(s).

Especially among Tribal cultures, there is often an emphasis on working with the parties to reach an agreement short of full litigation.

Determination of Support Amount Pursuant to the Family Support Act of 1988, States, as a condition of receiving Federal IV-D funding, must have support guidelines that constitute rebuttable presumptions of the correct amount of support to be awarded by courts or administrative agencies when setting or modifying child support

[209] 45 C.F.R. § 303.4(b).
[210] 45 C.F.R. § 303.4(d).

orders.[211] Federal regulations establishing requirements for Tribal IV-D programs also require support guidelines. Both State and Tribal IV-D plans must establish one set of guidelines that are based on a specific descriptive and numeric criteria and result in a computation of the support obligation.[212] The support amount calculated pursuant to the guidelines is presumed to be correct. The presumptive amount is subject to rebuttal but, if a tribunal deviates from the presumptive amount, it must provide written findings on the record as to why the presumptive amount would be unjust or inappropriate in the specific case.[213] Tribes and States receiving IV-D funding must also review and revise, if appropriate, their support guidelines at least once every four years.[214]

The Federal regulations governing State child support guidelines also require the following:

- The guidelines must consider all earnings and income of the noncustodial parent.

  In the case of *Marriage of Purnel v. Purnel*,[215] the California Court of Appeal, Fourth District, was asked to determine whether the trial court impermissibly considered the noncustodial parent's receipt of funds from Indian trust allotment lands. Following a divorce proceeding, in which the non-Indian husband was awarded custody of the children, the State trial court ordered the noncustodial parent, who was a member of the Auga Caliente Band of the Cahuilla Indians, to pay support of $1063 per month per child for three children. The wife did not challenge the amount of the support order itself. Rather on appeal she argued that the State of California had no jurisdiction "to tax Indian reservation lands or the income earned by Indians from activities carried on within the boundaries of the reservation."

  The California Court of Appeals upheld the State trial court's jurisdiction as well as the award of support. The court concluded that the support award did not constitute an assignment of Indian trust property or monies, which is prohibited by Federal law. The support order did not require that the support be paid from any particular income source. The wife had "very substantial assets quite apart from the lucrative leases of her trust allotment lands, assets which are in no way related to her being a Native American."[216] The court also noted that once the wife received payment of the rental income from the lease of her Indian Trust Allotment lands, it lost its "Indian" character and became fungible money, which could be used to pay support as any other money could.

- The guidelines must provide for the health care needs of the child, through health insurance or other means.

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[211] 42 U.S.C. § 667(b)(2).
[212] 45 C.F.R. § 302.56 (guideline requirements that a State must meet); 45 C.F.R. § 309.105 (guideline requirements that a Tribe or Tribal organization must meet)
[213] 45 C.F.R. § 302.56(g).
[214] 45 C.F.R. § 302.56(e) (requirement governing State IV-D programs); 45 C.F.R. § 309.105(4) (requirement governing Tribal IV-D program).
[215] 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997).
[216] 52 Cal. App. 4th at 539, 60 Cal. Rptr. 2d at 675.

Federal regulations governing Tribal child support guidelines allow a Tribal IV-D plan to indicate whether non-cash payments will be permitted to satisfy support obligations.[217] Comments on the proposed final rule governing Tribal child support enforcement programs pointed out that many reservations and Indian communities are located in remote areas with little or no industry or business; thus, there are limited opportunities for cash employment. In drafting the final rule, OCSE was persuaded "to accommodate the long-standing recognition among Indian Tribes that all resources that contribute to the support of children should be recognized and valued by the IV-D programs.[218] Federal regulations define "non-cash support" as "support provided to a family in the nature of goods and/or services, rather than in cash, but which, nonetheless, has a certain and specific dollar value.[219] The non-cash support must directly contribute to the needs of a child, such as "making repairs to automobiles or a home, the clearing or upkeep of property, providing a means for travel, or providing needed resources for a child's participation in Tribal customs and practices."[220] If non-cash payments will be permitted to satisfy support obligations, Federal regulations[221] require the following:

- The Tribal support order allowing non-cash payments must State the specific dollar amount of the support obligation;
- The non-cash payments are not permitted to satisfy assigned support obligations.[222]

In the comments and responses to the proposed final rules, OCSE stresses that States should be able to process Tribal orders allowing non-cash payments through their automated systems because of the requirement that the orders also clearly include a specific dollar amount reflecting the support obligation.[223] For example, a Tribal support order could provide that an obligor owes $200 a month in current support, which may be satisfied with the provision of firewood suitable for home heating and cooling to the custodial parent and child. The order could provide that a cord of firewood has a specific dollar value of $100 based on the prevailing market. Therefore, the obligor would satisfy his support obligation by providing two cords of firewood every month. The valuation of non-cash resources is the responsibility of the Tribe.[224]

In a case decided by the Northern Plains Intertribal Court of Appeals, *Attikai v. Thompson, Sr.*,[225] the Court of Appeals emphasized the cultural differences between the "non-Native American population of the State of South Dakota and the Native American population of the Crow Creek Sioux Tribe." Because of those differences, the

[217] 45 C.F.R. § 309.105(a)(3).
[218] 69 Fed. Reg. 16,638 at 16,658 (March 30, 2004).
[219] 45 C.F.R. § 309.05.
[220] 69 Fed. Reg. 16,638 at 16,659 (March 30, 2004).
[221] 45 C.F.R. § 309.105(a)(3).
[222] However, the non-cash payments can be credited toward arrears, as well as current support obligations. 69 Fed. Reg. at 16,659.
[223] *See* 69 Fed. Reg. at 16,659.
[224] *Id.*
[225] 21 Indian L. Reptr. 6001 (No. CV-02-02-93 N. Pls. Intertr. Ct. App., Aug. 31, 1993).

Tribal court had discretion as to application of South Dakota State support guidelines and to adherence to South Dakota case law interpreting such guidelines. The mother had argued that the father had a duty to support his firstborn child, paramount to subsequent children born of the father. She based her position on a South Dakota case. The Court of Appeals held that the Tribal trial court did not need to adhere to such case law if it did not "fit within the acceptable cultural standards" of the Crow Creek Sioux Tribe. However, because there was no record about whether the Tribe "accepts as part of its cultural standard that the firstborn child has the paramount right of support over later born children, whether born within a marriage or outside of a marriage," the court remanded the issue back to the Tribal trial court for further hearings. If necessary, the court noted that it would be appropriate for the Tribal court judge to have testimony, possibly from Tribal elders, on this issue.

TRIBAL OR STATE SUBJECT MATTER JURISDICTION

Member Indian Custodian and Member Indian Noncustodian/Reside on Reservation

Public Law 280 Jurisdiction In a complete Public Law 280 State, the State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[226] In *County of Inyo v. Jeff*,[227] the California court found that California had concurrent jurisdiction in a child support action pursuant to Public Law 280. The court conducted an infringement analysis under *Williams* and concluded that the State had subject matter jurisdiction, despite the fact that both parents were member Indians. The dispositive factor for the court was the Federal requirement that States vigorously pursue the collection of child support from noncustodial parents or risk the loss of Federal funding.

Reaching a contrary result was the Iowa Supreme Court in *State of Iowa, ex rel. Dept. of Human Serv. v. Whitebreast*.[228] In that case, both parties were members of the Sac and Fox Tribe of the Mississippi. The custodial parent had assigned her support rights to the State in order to receive public assistance from the State of Iowa. In order to secure reimbursement of public assistance and prospective support from the noncustodial parent, the State agency brought an action in State court. The district court had dismissed the State's petition. On appeal, the Iowa Supreme Court affirmed the dismissal. Concluding that the State action was regulatory in nature rather than one of general application to private persons, it held that Public Law 280 was inapplicable.[229]

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[226] 28 U.S.C. § 1360.
[227] 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[228] 409 N.W.2d 460 (Iowa 1987).
[229] *But see McKenzie County Social Serv. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986) (the court, while acknowledging that county was a non-Indian, held that county's interest was only through an assignment

The court then applied the *Williams* preemption-infringement analysis, concluding that State jurisdiction was preempted:

> [T]he public nature of the Child Support Recovery Unit . . . seems to us inescapable. Though its obligations are statutorily described in terms of "services" to be furnished in the enforcement of child support awards, CSRU's function is clearly regulatory in nature. Its duties are defined and shaped by a host of administrative regulations. . . . Congress has not given Public Law 280 States, like Iowa, the jurisdiction to adjudicate controversies spawned by . . . regulation involving Tribal Indians. Thus we affirm the district court's dismissal of the State's petition.
>
> Inherent in our decision is the recognition that in areas of regulation and taxation our State laws must give way to the pre-emptive force of Federal and Tribal interests. . . .[230]

No Public Law 280 Jurisdiction In States without Public Law 280 jurisdiction, where the cause of action arose in Indian country and both parents are member Indians who reside in Indian country, the outcome is straightforward – the Tribal court has exclusive jurisdiction over the action.[231] This conclusion is consistent with the Supreme Court's holdings that Indian tribes retain an inherent authority to regulate domestic relations among members. However, the outcome becomes less clear when the custodian receives public assistance from the State. Due to the assignment of support rights, some State courts find that the cause of action arose off the reservation. That may be sufficient to "tip the balance" to the State under some State courts' infringement analysis.

For example, the North Carolina court in *Jackson County Child Support Enforcement v. Swayney*[232] upheld State court jurisdiction over the child support component of an action between Tribal members. The conclusion is especially interesting given that the court denied State court subject matter jurisdiction over the paternity component of the action. Unlike paternity, for which the court found undue infringement on Tribal self-governance by the State, in the child support context the court found that the State was specifically required by the Federal government as part of the "AFDC[233] program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support."[234] North Carolina later confirmed its opinion that the State and Tribe have concurrent jurisdiction when the action is one to

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of support rights from the Indian mother. The court considered the support action to be one between two Indians, and based its decision, in part, on an analysis of Public Law 280.) However, since the *McKenzie* decision was issued in 1986, North Dakota has enacted legislation confirming the separate interest of the people of the State of North Dakota in IV-D cases. See N.D. Century Code § 14-09-09.26.

[230] 409 N.W.2d at 463, 464.

[231] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).

[232] 352 S.E.2d 413 (N.C. 1987).

[233] Aid for Families with Dependent Children. AFDC was the public assistance program that was replaced in 1996 by Temporary Assistance for Needy Families (TANF).

[234] 352 S.E.2d at 420.

recover AFDC payments. In such a case, the court concluded, the tribe's interest in self-government is not significantly affected by concurrent jurisdiction.[235] The court also emphasized, however, that where the Tribal court has already assumed jurisdiction, it is unlawful infringement for the State court to later assume jurisdiction.[236]

In contrast, the Navajo Supreme Court has held that the provision of State public assistance is irrelevant and that Tribal jurisdiction is exclusive.[237] In *Billie v. Abbott*, both parties were enrolled Navajos living on the Utah side of the Navajo reservation. A Navajo divorce decree ordered Billie, who was unemployed, to pay "reasonable child support when he is employed and the monthly amount to be arranged by the parties." There was never a judicial determination of the support amount. Mrs. Billie subsequently applied to the State of Utah for AFDC benefits. In the absence of a court order specifying a support amount, the Utah child support agency used its administrative process to establish a support obligation in the amount of the AFDC grant. When the amount was not paid, Abbott, the director of Utah's child support agency, submitted the case for Federal income tax refund intercept. For several years Billie's tax refund was intercepted, collecting $218,278.66. In 1987, Billie brought an action in Navajo Tribal court seeking an injunction against further use of Utah's tax interceptions, the return of his intercepted Federal tax refunds, and payment of his cost and attorney's fees. On appeal, the Navajo Nation Supreme Court affirmed the Tribal court's decision as it related to subject matter and personal jurisdiction: "[T]he Navajo Nation's exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt."[238]

The Navajo Nation Supreme Court concluded that even if the obligee was receiving AFDC benefits from the State, the Tribal court had exclusive jurisdiction to establish the support obligation, to establish the arrearage amount, and to enforce the support order.

> Although Utah has an interest in serving eligible Navajo children, the manner in which it determines eligibility (use of non-Navajo law) implicates essential Navajo Tribal relations, and in the end Utah jeopardizes the rights of Navajos to have their support decided by Navajo courts. Only Navajo courts using Navajo law can decide Billie's child support obligation. Only Navajo courts can be used to collect past-due support owed by Navajos living on the Navajo reservation. . . . Utah's decision on Billie's support obligation would not only adversely affect Navajo authority over internal Tribal matters, but it may

[235] *Jackson County Child Support Enforcement Agency, ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995).
[236] The Tribal order awarded child custody to the wife and property to the wife with no support to be paid by the father. The North Carolina Supreme Court ruled that the Tribal court was available for the State to seek recovery of AFDC payments.
[237] *Billie v. Abbott*, 16 Indian L. Rptr. 6021 (Navajo Supreme Court Nov. 10, 1988)
[238] *Billie v. Abbott*, 16 Indian L. Rptr. 6021, 6023 (Navajo Supreme Court Nov. 10, 1988).

> encourage Navajos to go directly to Utah in hopes of receiving a larger award. State interference would indeed hinder the development of Navajo domestic relation law.[239]

Member Indian Custodian and Member Indian Noncustodian/One Member Resides off Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[240] None of the researched support establishment cases discussed Public Law 280 jurisdiction under circumstances in which one of the Tribal members resided outside of Indian country.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, and the action is filed in State court, State courts will usually conduct a *Williams* preemption-infringement analysis to resolve any jurisdictional challenge. As stated in the paternity discussion, there is no definitive answer regarding subject matter jurisdiction in this fact pattern. South Dakota has case law holding that when one Tribal member resides outside the reservation, and the other parent and child reside on the reservation, the State and Tribal courts possess concurrent jurisdiction in a child support action.[241] The case may be adjudicated by the first tribunal to validly exercise jurisdiction.

The North Dakota Supreme Court recently reached a similar conclusion.[242] In its decision, the court distinguished between paternity actions between enrolled Tribal members (over which prior North Dakota decisions have found exclusive Tribal jurisdiction) and support establishment actions between enrolled Tribal members. The court cited with approval the North Carolina decision of *Jackson County Child Support Enforcement Agency v. Swayney*,[243] which also distinguished between paternity and support establishment actions. The North Dakota Supreme Court somewhat narrowed the reach of its decision by holding "Tribal courts and State courts have concurrent subject-matter jurisdiction to determine a support obligation against an enrolled Indian, where parentage is not at issue[244] and the defendant is not residing on the Indian reservation when the action is commenced."[245] Nevertheless, the Chief Justice filed a dissent, finding the majority's distinction between paternity cases and support establishment cases, and its corresponding conclusion that State court jurisdiction infringes on Tribal interests in the former but not the latter, troubling: "It seems to me to

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[239] *Id.*
[240] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[241] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).
[242] *See Rolette County Social Serv. Bd. v. B.E.*, 697 N.W.2d 333 (N.D. 2005).
[243] 352 S.E.2d 413 (N.C. 1987).
[244] In this case, the defendant and noncustodial parent was the mother who acknowledged her support obligation.
[245] *Rolette County,* 697 N.W.2d 333 (N.D. 2005)

be presumptuous for the State courts to determine for the Tribes what is infringement on their right to govern themselves."

Member Indian Custodian and Member Indian Noncustodian/Both Parents Reside off Reservation No cases were found with this fact pattern. When conception and the application for public assistance take place off the reservation, and all parties live off the reservation, at least one State Attorney General has concluded that State court jurisdiction would not unduly infringe upon Tribal sovereignty and therefore has authorized the child support agency to consider filing such cases in State court.[246]

Member Indian Custodian and Non-Member/Non-Indian NonCustodian

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[247] If the plaintiff is the State IV-D agency bringing an action on behalf of an Indian custodial parent against a non-Indian, at least one court has concluded that the case is public in nature and is not one involving a private support action.[248] Under such an analysis, the case would then be considered one involving two non-Indians and Public Law 280 would be inapplicable. Other State courts focus on the assignment nature of the State's interest. Because the State derives its interest in the child support action from the Indian custodian by means of an assignment of support rights, such courts view the action as involving an Indian and therefore invoking Public Law 280 jurisdiction.[249]

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when one parent is a non-member Indian and the action is filed in State court, the State court will usually engage in a *Williams* preemption-infringement analysis. The court will conduct the same analysis, regardless of whether the noncustodian is a non-member Indian or a non-Indian. Recognizing the sovereign status of each Federally recognized Tribe, the Supreme Court has treated non-member Indians in the same way as non-Indians with regard to jurisdictional issues.[250]

If the Indian custodial parent files the support action in Tribal court and the non-member Indian or non-Indian challenges jurisdiction, the Supreme Court's holdings in *Montana v. United States,*[251] *Strate v. A-1 Contractors,*[252] and *Nevada v. Hicks*[253] become relevant. The Tribal court must decide whether jurisdiction over the non-member noncustodian is necessary to protect Tribal self-government or to control internal relations. At least with regard to non-Indians whose claims arose on non-Indian

[246] *See* North Dakota Attorney General's Opinion 2000-F-07
[247] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[248] *See State of Iowa, ex. rel. Dept. of Human Serv. v. Whitebreast,* 409 N.W.2d 460 (Iowa 1987).
[249] *See, e.g., McKenzie County, Social Serv Bd. v. V .G*, 392 N.W.2d 399 (N.D. 1986), *cert. denied,* 480 U.S. 930 (1987).
[250] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).
[251] 450 U.S. 544 (1981).
[252] 520 U.S. 438 (1997
[253] 533 U.S. 353 (2001).

land, the *Montana* Court has held that Tribal jurisdiction is presumptively lacking. Absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in the following limited circumstances: either (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare.[254] When one of the parties is an Indian and the other is a non-Indian or nonmember Indian, the establishment of support arguably would fall within those exceptions.

Non-Indian/Non-Member Custodian and Indian NonCustodian When the non-Indian or non-member Indian custodial parent files a support establishment action against an Indian noncustodial parent in State court, the Indian obligor may raise a jurisdictional challenge.

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians which occur in Indian country located within that State. See above for a discussion regarding the role of Public Law 280 jurisdiction. One of the few reported child support decisions to extensively discuss Public Law 280 jurisdiction is *Marriage of Purnel v. Purnel*. [255] The case was a post-judgment proceeding, following an earlier State court divorce decree, in which the trial court ordered the wife, a member of the Agua Caliente Band of the Cahuilla Indians, to pay support to her non-Indian husband. One of the issues raised was whether the State of California properly exercised jurisdiction. In concluding that it had, the court discussed Public Law 280 at length. It emphasized that as one of the mandatory Public Law 280 States, California had jurisdiction over civil causes of actions to which Indians are parties, including domestic relations matters.

The court noted the lack of decisions regarding Public Law 280 jurisdiction, other than cases involving State court jurisdiction that had been challenged due to an attempt to enforce the State's police powers or to exercise the State's authority to tax property, notwithstanding the Federal prohibition to do so in subdivision (b) of Public Law 280. Citing an earlier California decision,[256] the court concluded that when a California agency has filed a civil action seeking support pursuant to an assignment of support rights, it is acting as a private party. "In our view it is inconceivable that Congress could have intended that State courts not have jurisdiction to enforce the foregoing mandates [of Title IV-D], especially in view of the fact that such mandates arise only after approval of an application made to a county welfare department for AFDC benefits of a Native American child."[257] Similarly, a Public Law 280 State has jurisdiction to apply to Native American State laws on divorce.[258] Finally, the court noted that the defendant had

[254] See *Nevada v. Hicks*, 533 U.S. at 358: *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Montana v. United States*, 450 U.S. 544 (1981).
[255] *Supra* note 215.
[256] *County of Inyo v. Jeff*, 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[257] 52 Cal. App. 4th 527, 536, 60 Cal. Rptr. 2d 667, 673.
[258] *See also United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974).

voluntarily appeared and participated in the State divorce proceedings. In the court's opinion, "there is no question but that the trial court had the jurisdiction to make the child support order it did." [259]

No Public Law 280 Jurisdiction *New Mexico ex rel. Dept. of Human Servcs. v. Jojola*[260] is a case from a State without Public Law 280 jurisdiction, in which the New Mexico Supreme Court upheld the exercise of State court jurisdiction. The court found that the plaintiff, the county agency that was providing public assistance to the mother, was a non-Indian, so it considered the case as one between an Indian and non-Indian. In conducting a *Williams* analysis, the court applied a three-prong test: Determining (1) whether the parties were Indian or non-Indian; (2) whether the cause of action arose within an Indian reservation; and (3) the nature of the interest to be protected. The court found that the parties were Indian and non-Indian, the cause arose outside of the reservation when the mother applied for public assistance, and there was no interference with any Tribal interest. The court was influenced by the Congressional mandate requiring States to seek reimbursement of public assistance.

When the non-Indian or non-member custodial parent files a support establishment action in the court of the Tribe in which the obligor is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes whether Tribal law authorizes jurisdiction in such a case. If it does, and if the Tribal court has personal jurisdiction over the Indian noncustodial parent, the Tribal court will most likely uphold Tribal court jurisdiction.

Non-Indian Custodian and Non-Indian NonCustodian If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If both parties reside off the reservation, the State court has exclusive jurisdiction. If at least one of the parties resides on the reservation but the cause of action arose off the reservation, a State court will most likely find it has jurisdiction because there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian custodial parent filed the support action in Tribal court, and the non-Indian noncustodian challenges the subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.

[259] 52 Cal. App. 4th 527, 538, 60 Cal. Prtr. 2d 667, 674.
[260] 99 N.M. 500, 660 P.2d 590 (1983).

CHAPTER SIX
TABLE OF STATUTES AND AUTHORITIES

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Marriage of Purnel v. Purnel, 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997)

McKenzie County Social Serv. Bd. v. V.G., 392 N.W.2d 399 (N.D. 1986)

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State ex rel. LeCompte v. Keckler, 628 N.W.2d 749 (S.D. 2001)

State of Iowa, ex rel. Dept. of Human Serv. v. Whitebreast, 409 N.W.2d 460 (Iowa 1987)

Periodicals/Publications

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CHAPTER SEVEN
MEDICAL SUPPORT ENFORCEMENT

STATE TITLE IV-D REQUIREMENTS

Definition Medical support is the legal provision of medical, dental, prescription, and other health care expenses. It can include provisions to cover health insurance costs as well as cash payments for unreimbursed medical expenses. Child support establishment addresses the health needs of children in three ways. First, there are Federal laws and regulations that require the parents to provide health insurance coverage. Second, the guideline calculation can apportion the costs not reimbursed by health insurance to each of the parents. Finally, the guidelines can address extraordinary medical expenses.

Support Guidelines There are three categories of medical expenses: health insurance premiums; payment for the uninsured portion of regular medical expenses, such as co-payments, deductibles, and uncovered expenses; and extraordinary medical expenses.[261] Many guidelines are silent regarding the definition of a medical expense.

- **Health insurance premiums**

  Federal regulations require that child support guidelines provide for children's health care needs through "health insurance or other means."[262] Because the cost of insurance varies so greatly, it is not included within the basic guideline amount. Instead, most State guidelines treat the cost of health insurance in one of two ways. The most common method is to add the actual cost of health insurance to the basic support amount and then prorate the cost between the parents based on their proportion of income.[263] The other method is to order one parent to pay for health insurance and then deduct that cost from the paying parent's income.

- **Uninsured medical expenses**

  Uninsured medical expense encompasses a range of items that includes co-payments, medication costs, uncovered procedures and conditions, and cash payments in lieu of health insurance.

  – **Definition of medical expense -** Some States provide a definition of medical expenses. For example, they list treatment provided by medical doctors and dentists, treatment for chronic conditions and asthma,

[261] *See* Elrod, *Adding to the Basic Support Obligation*, in Guidelines: The Next Generation (M. Haynes, ed., U.S. Dept. of Health & Human Serv. 1994)[hereinafter Guidelines: The Next Generation].
[262] 45 C.F.R. § 302.56(c)(3).
[263] An analysis of health care provisions is contained in L. Morgan, Child Support Guidelines: Interpretation and Application (Aspen Law and Business, Supp. 2000) [hereinafter Child Support Guidelines].

counseling, psychiatric treatment for mental disorders, and physical therapy as medical expenses.[264]

– **Inclusion within guideline -** Support guidelines that expressly address medical expenses vary in how they distinguish ordinary medical expenses from extraordinary medical expenses. Some States expressly provide that the basic support amount assumes a certain amount of unreimbursed medical costs. For example, the Alabama Schedule of Basic Child Support Obligations assumes unreimbursed medical costs of $ 200 per family of four per year. These assumed costs include medical expenses not covered or reimbursed by health insurance, Medicaid, or Medicare.[265] Many States set a threshold amount for what constitutes an add-on medical expense; by implication, medical expenses that do not meet that threshold are subsumed within the basic support amount. For example, in New Jersey, unreimbursed health care expenditures (medical and dental) up to and including $250 per child per year are included in the schedules, which provide that "such expenses are considered ordinary and may include items such as nonprescription drugs, co-payments or health care services, equipment or products." The fact that a family does not incur that amount of health care expense is not a basis for deviating from the guidelines. Predictable and recurring unreimbursed health care expenses in excess of $250 per child per year are added to the basic support amount. [266] In Indiana, uninsured expenses in excess of 6 percent of the basic support obligation are considered extraordinary medical expenses resulting in an add-on to the basic amount. Presumably, expenses less than the threshold for extraordinary medical expenses are considered ordinary expenses that are subsumed within the basic support amount.

  Other States take the approach that the basic support amount can be adjusted by adding the cost of any noncovered medical, dental, and prescriptive medical expense.[267]

  If the ordinary medical expense is subsumed within the basic support amount or treated as an adjustment to the amount, the expense is typically shared by the parents in accordance with the guideline formula. In contrast, Hawaii statutorily specifies that ordinary uninsured medical and dental expenses are the responsibility of the custodial parent.[268]

[264] *See* guidelines of Alabama, Colorado, Delaware, Kentucky, and Maine.
[265] Ala. R. Jud. Admin. 32 (2001).
[266] *See* N.J.Ct. R., Appendix IX-A (2005).
[267] *See*, *e.g.,* Fla. Stat. Ann. § 61.30(8) (2005).
[268] Hawaii Family Court Child Support Guidelines, Instructions, p.7 (1998).

- **Extraordinary medical expenses**

  Extraordinary medical expenses are those expenses that extend beyond the ordinary expectation of medical need in a family, as contemplated by most State guidelines formulas.

  – **Definition -** Numerous States define "extraordinary medical expenses."[269] There seem to be several approaches, the most common of which is to define extraordinary medical expenses as unreimbursed medical expenses that exceed a certain amount per child per calendar year.[270] The next most common approach is to define extraordinary medical expenses as uninsured expenses in excess of $100 for a single illness or condition.[271] A third approach is to define extraordinary medical expenses as uninsured expenses that exceed a certain percentage of the basic obligation.[272]

    Sometimes States combine a threshold amount with an illustrative list of types of qualifying expenses. Examples include Colorado, Kentucky, and Maine.

    Other States do not use the phrase "extraordinary medical expenses." They do, however, recognize an adjustment for certain unreimbursed medical expenses. Like those States that do expressly address extraordinary medical expenses, they usually establish a threshold based on a certain dollar amount per child per calendar year.[273]

  – **Inclusion within guideline -** No State support guideline includes extraordinary medical expenses within the basic support amount. Such expenses are usually the basis for a deviation from the basic support amount or an add-on to the guideline amount.[274]

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[269] Those States are Colorado, District of Columbia, Indiana, Kentucky, Louisiana, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Vermont, Virginia, Washington, and West Virginia.

[270] Kentucky - $100; Maine - $ 250 per child or group of children per calendar year (2001); New Mexico - $ 100; Ohio - $ 100; South Carolina - $250; Vermont - $ 200 (but statute does not State whether that threshold is per child).

[271] Examples of this approach are found in the guidelines of Colorado and Maryland.

[272] Indiana – 6 percent (2004); Washington – 5 percent (2000).

[273] *See, e.g*., Alabama (guideline assumes unreimbursed medical costs of $ 200 per family of four per year); Iowa (CP pays first $ 250 per year per child of routine medical and dental expenses up to $ 500 per year for all children. Additional amounts are apportioned between parents) (2004); Massachusetts (CP pays first $100 per child per year. For routine medical and dental expenses above that amount, court allocates between parties) (2002); New Jersey ($250 per child per calendar year) (2005); Pennsylvania ($250 per child per year); Virginia (any reasonable and necessary unreimbursed medical or dental expenses in excess of $250 per calendar year per child) (2005).

[274] *See* Child Support Guidelines, *supra* note 263, Table 3-2. *See also* Notar & Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in Guidelines: The Next Generation, *supra* note 261.

Health Insurance Coverage Federal law and regulations require States to provide for children's health needs by obtaining health insurance or by other means.[275] Current regulations require State IV-D agencies to secure medical support information and to obtain and enforce medical support in the form of health care coverage from the noncustodial parent, when such coverage is available at a reasonable cost.[276] Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of the service delivery mechanism.[277]

To remove some of the impediments to obtaining medical coverage, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),[278] which:

- prohibited discriminatory health care coverage practices;
- created "qualified medical child support orders" (QMCSOs)[279] to obtain coverage from group plans subject to ERISA;[280] and
- allowed employers to deduct the cost of health insurance premiums from an employee's income.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[281] amended the Social Security Act to require States, as a condition of receiving Federal funds, to enact a provision for health care coverage in all orders established or enforced by the IV-D agency.[282] Before PRWORA, the requirement to seek health insurance coverage had been mandatory for public assistance cases, while nonpublic assistance IV-D applicants could opt not to have medical support established and enforced.

Because health care costs remained problematic, Congress again addressed medical support in 1998. Provisions in the Child Support Performance and Incentives

[275] 42 U.S.C. § 652(f); 45 C.F.R. § 302.56(c)(3).
[276] 45 C.F.R. §§ 303.30, 303.31.
[277] 45 C.F.R. §§ 302.80, 303.30, 303.31. The meaning of "reasonable cost" has evolved. 45 CFR 303.31 (a)(1) now reads, " Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism."
[278] P.L. No. 103-66 (1993).
[279] A "QMCSO" is a medical support order that creates the existence of an "alternative recipient's" right to receive benefits under a group plan. An "alternative recipient" is the child of a participant or beneficiary of a plan.
[280] In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) to help protect employer-provided pension and health benefits and to encourage employers to establish such plans. ERISA regulates most privately sponsored pension plans and health benefit plans. The law is important for child support purposes because it preempts State laws and regulations governing health insurance and employee benefit plans, including employer self-funded health insurance plans. ERISA also imposes requirements regarding information that must be provided to plan participants and beneficiaries, internal procedures for determining benefit claims, and standards of conduct of those responsible for plan management.
[281] P.L. No. 104-193 (1996).
[282] 42 U.S.C. § 666(a)(19)(A).

Act of 1998 (CSPIA)[283] were enacted to eliminate barriers to establishing and enforcing medical support coverage. CSPIA requires State IV-D agencies to enforce health care coverage by use of a National Medical Support Notice (NMSN). Implementing Federal regulations are at 45 C.F.R. § 303. A parallel regulation, developed by the Department of Labor, adopts the use of the NMSN under ERISA.[284] CSPIA also established the Medical Child Support Working Group, which was required to submit a report to the Secretaries of HHS and Labor recommending measures to improve health care coverage.[285] The resulting report contains 76 recommendations that would expand health care coverage for children in the IV-D system.[286]

National Medical Support Notice

The standardized NMSN complies with ERISA's informational requirements and restrictions[287] and with Title IV-D requirements. It also contains a severable employer withholding notice to advise the employer of:

- State law applicable to the requirement to withhold;
- the duration of withholding;
- limitations on withholding, such as the Consumer Credit Protection Act;
- prioritization under State law for withholding child support and medical support, if insufficient funds are available for both; and
- the name and phone number for the appropriate division of the State IV-D agency handling the withholding.[288]

The NMSN notifies the parent's employer of the provision for health care coverage for the child. In addition, if the NMSN is properly completed and satisfies ERISA's conditions, it constitutes a QMCSO as defined by ERISA.[289] The intent is to simplify the processing of cases for employers.

States must mandate the use of the NMSN in all cases in which the noncustodial parent is required to provide health care coverage and that parent's employer is known.[290] There is an exception to using the NMSN if the order stipulates that alternative health care coverage must be provided.

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[283] P.L. No. 105-200 (1998).
[284] 29 C.F.R. § 2590.
[285] Section 401 of P.L. No. 105-200 (1998).
[286] The Working Group's report, *21 Million Children's Health: Our Shared Responsibility,* can be found on the Federal Office of Child Support Enforcement (OCSE) web site at http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/index.html.
[287] 29 U.S.C. § 1169(a).
[288] 45 C.F.R. § 303.32.
[289] 29 U.S.C. § 1169(a).
[290] Section 466(a)(19) of Title IV-D of the Social Security Act, as amended by section 401(c)(3) of CSPIA, codified at 42 U.S.C. § 666(a)(19)(B).

Federal regulations[291] require States to have the following procedures:

- The NMSN must be used to notify employers of a health care coverage order;
- The NMSN must be transmitted to an employer within 2 business days from entry of the individual in the State Directory of New Hires;
- The employer must transmit the NMSN to the health coverage provider within 20 business days of the date of the NMSN and must withhold contributions and send them to the plan;
- The NMSN can be contested based on mistake of fact;
- The employer must notify the IV-D agency upon termination of the parent's employment; and
- The IV-D agency must notify the employer when the order becomes ineffective and must work with the custodial parent to choose a plan when options for coverage exist.

TRIBAL TITLE IV-D REQUIREMENTS

There is no current requirement that Tribal support orders include medical support. However, there is no prohibition for a Tribal support order to do so. Tribes are encouraged to make sure that children have access to medical care through the Indian Health Service (IHS) or otherwise.[292] The IHS is an agency of the United States Public Health Service, within the Department of Health and Human Services. It does not provide health insurance coverage. However, it is responsible for providing Federal health services to the approximately 1.5 million American Indians and Alaska Natives who belong to the more than 562 Federally recognized tribes in 35 States.

As of October 1998, the Federal system consisted of 37 hospitals, 59 health centers, 44 health stations, and four school health centers. American Indians and Alaska Natives, who are enrolled members of their Tribe and who reside within the service delivery area of an IHS facility, can access the services with no out-of-pocket charge. However, State child support workers need to be aware that Tribal members may not live near an available IHS facility. Also, lack of IHS funds may result in some Tribes requiring the Tribal member to use private insurance or Medicaid prior to IHS services.

Although there is no requirement for Tribes to include medical support in the establishment or modification of a support order, to the extent that the Tribe is enforcing a valid State support order pursuant to the Full Faith and Credit for Child Support Orders Act, it must also enforce any provision within the State support order concerning health care coverage.[293] If the State order requires the father to repay Medicaid costs

[291] 45 C.F.R. § 303.32(c).
[292] 69 Fed. Reg. 16,638 at 16,660.
[293] *Id.*

associated with birthing costs, issues regarding the Federal government's trust responsibility to provide health care to Native Americans and Alaska Natives may arise.[294]

[294] *See* C. Barbero, The Federal Trust Responsibility: Justification for Indian-Specific Health Policy (2005).

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CHAPTER SEVEN
TABLE OF STATUTES AND AUTHORITIES

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15 U.S.C. §§ 1601 *et seq*.

28 U.S.C. § 1738B

29 U.S.C. § 1169(a)

42 U.S.C. § 652(f)

42 U.S.C. § 666(a)(19)

29 C.F.R. § 2590

45 C.F.R. § 302.56(c)(3)

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CHAPTER EIGHT
MODIFICATION OF SUPPORT

Support orders that were fair when initially issued pursuant to support guidelines do not usually remain so with the passage of time. The financial circumstances of the parents change; the necessity for childcare might be eliminated; the costs of food, clothing, medical care, and school increase or decrease.

STATE TITLE IV-D REQUIREMENTS

Federal law requires a State, as a condition of receiving Federal IV-D funds, to have laws and procedures providing for a review of IV-D support orders at least once every three years at the request of either party or, in an assistance case, at the request of the State.[295] States can establish a reasonable quantitative standard based on either a fixed dollar amount or percentage, or both, as a basis for determining whether an inconsistency between the existing child support award amount and the guideline amount is adequate grounds for petitioning for adjustment of the order. States may also adopt procedures for three-year reviews that do not require a change in circumstances or a percentage of difference from the prior order.[296] States can use any of three different methods for the review:

- Child support guidelines;[297]
- Application of a cost-of-living adjustment in accordance with a formula developed by the State;[298] or
- Use of automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment under any threshold that might be established by the State.[299]

If child support guidelines are not used, either parent must be allowed to contest the adjustment.[300] Implementing Federal regulations also provide that addressing a child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to petition for an adjustment of the order, regardless of whether an adjustment in the amount of child support is necessary.[301]

[295] Section 351 of the Personal Responsibility and Work Opportunity Act of 1996, P.L. No. 104-193, codified at 42 U.S.C. § 666(a)(10).
[296] *Id.*
[297] 42 U.S.C. § 666(a)(10)(A)(i)(I).
[298] 42 U.S.C. § 666(a)(10)(A)(i)(II).
[299] 42 U.S.C. § 666(a)(10)(A)(i)(III).
[300] 42 U.S.C. § 666(a)(10)(A)(ii).
[301] 45 C.F.R. § 303.8.

TRIBAL TITLE IV-D REQUIREMENTS

Pursuant to Federal regulation, the initial Tribal application for Title IV-D funding must include a statement identifying how the Tribe or Tribal organization will operate a IV-D program that meets the objectives of Title IV-D. Among the objectives that the Tribal IV-D plan must address is the modification of support orders.[302] Beyond that general requirement, there are no Federal regulations detailing modification procedures that a Tribe must provide.

A Tribal court will apply Tribal law in a modification action. Whether an administrative agency could modify a judicial support order was the issue in *Esther Bedoni v. Navajo Nation Office of Hearings and Appeals*.[303] The court concluded that under the Navajo Nation Child Support Enforcement Act, the Office of Hearings and Appeals could only modify its own administrative orders. The Tribal trial court maintained jurisdiction to modify trial court orders.

INTERSTATE/INTERGOVERNMENTAL CASES

States, as a condition of receiving Federal IV-D funding, are required to enact the 1996 Uniform InterState Family Support Act (UIFSA).[304] Tribes are <u>not</u> required to enact UIFSA. On the other hand, both States and Tribes are subject to the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).[305] Like UIFSA, FFCCSOA sets limits on when a "State" is permitted to modify another State's support order. The Act defines "State" to include "Indian country (as defined in section 1151 of title 18)."[306] Therefore, both States and Tribes should be applying consistent rules regarding when another jurisdiction's support order can be modified. Those rules[307] are outlined below:

- If there is only one support order and an individual party or child resides in the issuing State, that State has continuing, exclusive jurisdiction to modify.
- If there is only one support order and no party or child lives in the issuing State, the party seeking modification must register the order for modification in a State – other than his or her own – that has personal jurisdiction over the nonmovant.
- If there is more than one support order entitled to recognition and more than one State can claim continuing, exclusive jurisdiction, the tribunal

[302] 45 C.F.R. §§ 309.15 and 309.90.
[303] No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003).
[304] Section 5537 of P.L. No. 105-33 (1997), amending Section 321 of P.L. No. 104-193 (1996) (codified at 42 U.S.C. § 666(f)). UIFSA (1996) is located at 9 Pt. 1B U.L.A. 235 (1999). It can also be accessed through the website of the National Conference of Commissioners on Uniform State Laws: www.nccusl.org. UIFSA was amended in 2001 but there is currently no federal funding mandate that States enact the 2001 amendments.
[305] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B). *See also* 69 Fed. Reg. 16,638 at 16,658.
[306] 28 U.S.C. § 1738B(b).
[307] Section 105 of UIFSA and 28 U.S.C. § 1738B(e), (f).

must determine the controlling order.[308] The State that issued the controlling support order is the State with continuing, exclusive jurisdiction to modify.

- If there is more than one support order entitled to recognition and no issuing State can claim continuing, exclusive jurisdiction, a tribunal with jurisdiction over both parties must issue a new support order, which becomes the controlling order in the case.

One Alaska Native commenter to the proposed final rule on Tribal child support enforcement programs stated that Tribal court jurisdiction does not mesh with FFCCSOA when there is no geographic region from which to determine whether the parent or child resides "in the State" for purposes of CEJ or a controlling order determination. The Federal response was that "FFCCSOA does not limit the exercise of jurisdiction to a geographical area. FFCCSOA only requires a court exercising jurisdiction to have the authority to do so."[309]

[308] The order issued by the child's home State, as defined by the Act, is the controlling order. If no issuing State is the child's home State, the most recent order is the controlling order. Section 207 of UIFSA.
[309] 69 Fed. Reg. 16,638 at 16,665.

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CHAPTER EIGHT
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

28 U.S.C. § 1738B

42 U.S.C. § 666(a)(10)

42 U.S.C. § 666(f)

45 C.F.R. § 303.8

45 C.F.R. § 309.15

45 C.F.R. § 309.90

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

UIFSA (1996), 9 Pt. 1B U.L.A. 235 (1999)

UIFSA (2001), 9 Pt. 1B U.L.A. __ (Supp. 2001)

Section 105 of UIFSA (1996) and (2001)

Section 207 of UIFSA (1996) and (2001)

Case Law

Esther Bedoni v. Navajo Nation Office of Hearings and Appeals, No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003)

Periodicals/Publications

None

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CHAPTER NINE
SUPPORT ENFORCEMENT

Once a court or agency has entered a support order with proper subject matter and personal jurisdiction, the order is enforceable. Both State and Tribal IV-D programs must provide enforcement services to their customers.

ENFORCEMENT REMEDIES

State and Tribal laws provide a variety of enforcement remedies. Some actions are directed against particular assets, such as personal or real property, and require that the court or agency have jurisdiction over the property. Such jurisdiction is called *in rem* jurisdiction, which is Latin meaning jurisdiction over the *res*, or thing. Other enforcement remedies are directed against the person, such as civil contempt or criminal prosecution. Those remedies require *in personam* jurisdiction, which is jurisdiction over the person. Federal law does not address jurisdictional requirements. However, Federal law does require that States and Tribes have certain types of remedies available to enforce support orders, in order to receive Federal IV-D funding. States and Tribes may have and use enforcement remedies in addition to the ones discussed below.

State Title IV-D Requirements Certain enforcement remedies are available exclusively to State IV-D agencies. Other remedies are available to any child support tribunal,[310] as well as to private attorneys and collection agencies. Some always involve court action; others are administrative in nature, requiring little or no court action. Determining correct remedies is case-specific. Thus, the facts, coupled with Federal and State mandates, dictate how a IV-D caseworker should proceed to enforce the particular support order. The following list highlights enforcement remedies that a State must have in order to receive Federal IV-D funding.

- **Income Withholding**

The most effective child support enforcement tool is income withholding, a procedure by which automatic deductions are made from wages or other income. Once initiated, income withholding can keep support flowing to the family on a regular basis. Today, any child support order issued or modified in a State, regardless of whether the case is a IV-D case, must contain a provision for income withholding.[311] Additionally, immediate withholding is required in all IV-D cases that have an order issued or modified on or after November 1, 1990.[312] The exceptions to immediate withholding are very limited. The Family Support Act of 1988[313] carved out a "good cause" exception to immediate income withholding. That exception requires the tribunal to approve a written agreement executed between the custodial parent and the noncustodial parent for an alternative payment arrangement. The tribunal must make a finding that implementing immediate income withholding would not be in the best interest of the child and require

[310] The term "tribunal" refers to a court and/or administrative agency.
[311] 42 U.S.C. § 666(a)(8)(B)(ii); 45 C.F.R. § 303.100(g).
[312] 45 C.F.R. § 303.100(b).
[313] P.L. No. 100-485 (1988).

some proof, if the order is being modified, that previously ordered support was paid in a timely manner.[314]

PRWORA brought about several additional changes to income withholding. For instance, different types of income, not just wages, are now subject to withholding.[315] Additionally, State agencies must have administrative authority to initiate income withholding. PRWORA also required the States to adopt UIFSA[316] and its direct income withholding provision. Under UIFSA, income withholding can be initiated in one State, and sent directly to an employer in another State, without involving a tribunal or the IV-D agency in either State.[317] Direct income withholding is available in all interState cases, including those handled by private attorneys.

In IV-D cases in which income withholding is not immediate, including those cases whose order predates the statutory date of November 1, 1990, and cases in which the court has found good cause, an income withholding must be initiated when the support owed is at least equal to one month's support amount.[318] Additionally, the noncustodial parent can request that income withholding be initiated or the State IV-D agency can determine, after request by the custodial parent, that income withholding would be appropriate.[319] In cases involving income withholding that is initiated rather than immediate, the noncustodial parent is entitled to notice. Should the noncustodial parent wish to contest the withholding, the only issue that the tribunal should consider is a mistake of fact (i.e., an incorrect amount or the incorrect individual).[320]

The National Directory of New Hires (NDNH) interacts with the Federal Case Registry (FCR), which contains information about persons in child support cases being handled by State IV-D agencies. These two databases compare their data and, when a match occurs, the NDNH provides the appropriate State with information concerning the noncustodial parent. That information can be used by the State to initiate an income withholding notice to the noncustodial parent's employer. OCSE has issued a standardized *Order/Notice to Withhold Income for Child Support*, which must be used for all child support orders.[321]

- **Judgments**

The Omnibus Budget Reconciliation Act of 1986[322] provided that all support orders must be entitled to judgment status. Further amendments to the Social Security Act have made it a State requirement that unpaid support installments become a judgment by operation of law, entitled to full faith and credit by States, and not subject to retroactive modification.

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[314] 42 U.S.C. § 666(b)(3)(A); 45 C.F.R. § 303.100(b)(2).
[315] 42 U.S.C. § 666(b)(8).
[316] Unif. InterState Family Support Act (1996)[hereinafter UIFSA], 9 Pt. 1B U.L.A. 235 (1999).
[317] UIFSA §§ 501 – 506 (amended 2001), 9 Pt. 1A U.L.A. 336 – 346 (1999).
[318] 45 C.F.R. § 303.100(c)(1).
[319] 45 C.F.R. § 303.100(c).
[320] *Id*.
[321] 42 U.S.C. §§ 666(a)(8)(B) and 666(b)(6)(A)(ii).
[322] P. L. No. 99-509 (1986).

- **Liens and Levy**

Federal law requires States, as a condition of receiving Federal funds, to provide that a lien, in the amount of overdue support, arises by operation of law against a noncustodial parent's real and personal property.[323] Methods for creating, and executing on, the liens are subject to State law. Federal law also requires States to give full faith and credit to the lien of another State, as long as "the State agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State[.]"[324] To increase recognition of sister State liens, Congress required States to impose liens using standardized forms beginning March 1, 1997.[325]

- **Federal Tax Refund Intercept**

States, as a condition of receiving Federal funds, are required to submit qualifying IV-D cases for Federal income tax refund offset. Note that current Federal law does not allow a State to release tax information to a Tribal IV-D agency.[326] Tribes and States may enter into agreement to refer Tribal cases to the State for submittal for Federal income tax refund offset. Any such access would currently also require a request for State IV-D services. However, there is nothing to preclude an individual from applying for and receiving services from both a State and Tribal IV-D agency.[327]

- **Financial Institution Data Match (FIDM)**

FIDM is a means of locating certain obligor assets, which later can be levied to fulfill the unpaid support amount. These assets include demand deposit accounts, checking accounts or negotiable withdrawal order accounts, savings accounts, time deposit accounts and money-market mutual fund accounts. As provided in PRWORA, a State IV-D agency, as a condition of receiving Federal IV-D funding, must establish agreements with financial institutions to perform data match exchanges, in which account information is matched against a list of delinquent obligors.[328] After identifying accounts owned by the obligor, the State IV-D agency, consistent with State law, can seek to attach these assets and seize them to satisfy delinquent support debts.

The Child Support Performance and Incentive Act of 1998[329] amended the FIDM process to authorize OCSE to act as a conduit between States and multiState financial institutions to facilitate a centralized, quarterly data match.

- **State Income Tax Refund Offset**

Any State that has an income tax must, in order to receive Federal IV-D funding, have enacted a statute authorizing the State revenue agency to withhold income tax

[323] 42 U.S.C. § 666(a)(4)(A).
[324] 42 U.S.C. § 666(a)(4)(B).
[325] 42 U.S.C. § 652(a)(11)(B)and 42 U.S.C. § 654(9)(E). The Notice of Lien form and accompanying instructions are available on the OCSE web site at www.acf.dhhs.gov/programs/cse.
[326] *See* 69 Fed. Reg. 16,638 at 16,656.
[327] *See* 69 Fed. Reg. 16,638 at 16,654.
[328] 42 U.S.C. § 666(a)(17).
[329] P.L. No. 105-200 (1998).

refunds due individuals who owe a child support debt. The procedure is nearly identical to the Federal tax refund offset procedure. The State revenue agency performs a role similar to the IRS.[330]

- **License Revocation**

As a condition of receiving Federal IV-D funds, a State must have procedures regarding the withholding, suspension, or restriction of the licenses of noncustodial parents who owe past due support. Specifically, the mandate relates to drivers' licenses, professional and occupational licenses, as well as recreational and sporting licenses.[331] Licenses can be affected when the noncustodial parent meets established criteria or fails to comply with subpoenas or warrants related to child support proceedings. Appropriate notice is required. Use of these procedures is not mandated in every case, but must be available at the State's discretion.

- **Consumer Reporting Agencies**

PRWORA required the States, as a condition of receiving Federal funds, to institute measures to periodically report unpaid child support to credit bureaus.[332]

- **Posting Bonds**

The Child Support Enforcement Amendments of 1984 required States, as a condition of receiving Federal funds, to enact and use "procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such noncustodial parent of the proposed action, and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[333]

Tribal Title IV-D Requirements Tribes that do not receive Federal funding for their child support programs must provide full faith and credit to valid child support orders, but are not subject to Federal requirements governing specific enforcement remedies. Like States, Tribes that receive Federal funding to operate Tribal IV-D programs are subject to Federal regulations that require the enforcement of support orders. However, unlike States, the only mandated enforcement remedy is income withholding.

- **Income Withholding**

The income withholding requirements for Tribes operating Federally funded IV-D programs are similar to those requirements governing State IV-D programs. Tribal laws must require amounts to be withheld for both current support and any arrears.[334] Tribal IV-D agencies are required to use the Federal standardized income withholding notice.[335] Like States, Tribes cannot exceed, but may set lower income withholding

[330] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666(a)(3)(A).
[331] 42 U.S.C. § 666(a)(16).
[332] 42 U.S.C. § 666(a)(7)(A).
[333] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666.
[334] 45 C.F.R. § 309.110(b).
[335] 45 C.F.R. § 309.110(l).

limits than the Consumer Credit Protection Act.[336] Employers who discriminate due to withholding must be subject to a fine. Where there are multiple withholding orders for the same obligor, the Tribal IV-D agency must allocate withheld amounts to ensure that each order receives some amount of current support.[337] Tribal law must provide for a fine if the employer discharges an employee due to withholding.[338]

There is an important exception, however. Tribes are not required to have immediate income withholding. In promulgating the final rule, OCSE noted that many of the comments it had received from Tribes to the proposed rule indicated that other methods of collecting support – such as bringing the noncustodial parent before Tribal elders -- were more effective than income withholding.[339] Therefore, Federal regulations governing Tribal IV-D programs require that income be subject to withholding once the noncustodial parent has failed to make support payments equal to one month's amount of support.[340]

The regulations also provide for an exception to income withholding when either parent demonstrates, and the tribunal enters a finding, that there is good cause not to require income withholding; or a signed written agreement is reached between the custodial and noncustodial parent that provides for an alternate agreement.[341] A Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure such orders are promptly served on employers.[342] However, because Tribes are not required to enact UIFSA, Tribal employers or Tribally-owned businesses are not required to honor direct income withholding orders. Tribes may choose to require employers to honor direct withholding requests, but the enactment of such a law is not mandated.[343]

Federal regulations leave it to Tribal law to determine what type of income can be withheld for child support enforcement.[344] "For purposes of this regulation, we [the Federal Office of Child Support Enforcement] have defined income at 309.05, to mean any periodic form of payment due to an individual, regardless of source, except that the exclusion of per capita, trust or Individual Indian Money (IIM) payments must be expressly decided by a Tribe. This allows Tribes the flexibility to exclude specific categories of payments from this definition, including per capita payments, trust income, and gaming profit distributions. We have not required Tribes to withhold the Tribal benefits (casino profits, oil and mineral rights) of obligors. . . . In respect for Tribal sovereignty, we have determined that it is not appropriate in this regulation to directly affect Tribal management of Tribes' own resources."[345]

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[336] 45 C.F.R. § 309.110(c).
[337] 45 C.F.R. § 309.110(m).
[338] 45 C.F.R. § 309.110(k).
[339] 69 Fed. Reg. 16,638 at 16,661.
[340] 45 C.F.R. § 309.110(i).
[341] 45 C.F.R. § 309.110(h).
[342] 45 C.F.R. § 309.110.
[343] *See* 69 Fed. Reg. 16,638 at 16,662.
[344] *See* 69 Fed. Reg. 16,638 at 16,661.
[345] *Id.*

RECOGNITION OF JUDGMENTS

Full Faith and Credit The United States Constitution requires that States give full faith and credit to the "Public Acts, Records, and Judicial Proceedings of every other State."[346] Because of their dependent sovereign status, Tribes are not bound by the Full Faith and Credit Clause of the Constitution.[347] Nor has Congress required Federal and State courts to give full faith and credit to all Tribal court decisions.[348] However, it has required full faith and credit in three specific areas: domestic violence orders (18 U.S.C. § 2265), child custody orders (25 U.S.C. § 1911(d)), and child support (28 U.S.C. § 1738B). In 1994, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA),[349] which specifically applies to Indian country (as defined by 18 U.S.C. § 1151), as well as States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories and possessions.[350] The Act requires the appropriate parties of such jurisdictions to:

- enforce according to its terms a child support order[351] made consistently with FFCCSOA by a court or agency of another State; and
- not seek or make a modification of such an order except in accordance with FFCCSOA.

Therefore, Tribes and States must recognize and enforce each other's valid child support orders, i.e., orders entered with appropriate subject matter and personal jurisdiction.[352] There is no Federal directive regarding how such recognition must occur. Many Tribes use a registration process for enforcement purposes under FFCCSOA.

Comity Comity between sovereigns is a voluntary, rather than mandated, recognition of each other's judgments and decrees:

> "[c]omity", in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative,

[346] U.S. Constitution art. IV, § 1, cl. 1.
[347] The U.S. Constitution does not apply to Tribes. *Talton v. Mayers*, 163 U.S. 376 (1896).
[348] *See, e.g.,* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 n. 18 (2003); Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D.L. Rev. 311 (2000); Stoner and Orona, *supra* note 27.
[349] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B).
[350] *See* OCSE-AT-02-03 on the applicability of FFCCSOA to States and Tribes.
[351] A Tribal order that did not State a specific dollar amount of support and did not provide criteria by which to judge whether the parties were fulfilling their obligations was not a recognizable child support order to which the court must give full faith and credit or extend comity. *John v. Baker*, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005). The Alaska Supreme Court stated that a Tribal child support order need not match the format of a support order issued by State courts in order to be recognized. However, if the order simply directed the parties "to help each other financially," it was not concrete enough to be enforceable. The court pointed out that the issuing Northway Village Tribal court, in a brief filed in a related custody proceeding, had also maintained that its custody order did not include child support.
[352] *See, e.g., Hanson v. Grandberry*, Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm). *See also Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

> executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws.[353]

Whereas FFCCSOA only addresses valid child support orders, a basis for States and Tribes to recognize each other's paternity adjudications is the doctrine of comity. Some States have specific statutes outlining when comity is appropriate. For example, South Dakota provides that before a State court may consider recognizing a Tribal court order or judgment, the party seeking recognition must establish by clear and convincing evidence that:

(a) The Tribal court had jurisdiction over both subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including, but not limited to, due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the State of South Dakota.[354]

In *Smith v. Scott*,[355] the Mashantucket Pequot Tribal Court used the doctrine of comity to recognize and enforce a Connecticut money judgment for damages in a sexual abuse case. In deciding whether a particular judgment is to be recognized and enforced through comity, the Tribal court set forth several requirements that must be met. First, comity will not apply unless there is reciprocal recognition of judgments, i.e., the other sovereign – here the State of Connecticut – must recognize judgments of the Mashantucket courts. Second, the foreign judgment must not contravene the public policy of the Tribe. Finally, the foreign judgment must have been issued by a court of competent jurisdiction in the foreign jurisdiction.

ENFORCEMENT OF TRIBAL SUPPORT ORDER

The following discussion focuses on enforcement of a Tribal support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

Obligor (Indian or Non-Indian) Resides and Works on Reservation

When the obligor resides and works on the reservation, Tribal courts may enforce the support order through a variety of means. The following remedies are common under Tribal codes:

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[353] *Hilton v. Guyot*, 159 U.S. 113 (1894).
[354] S.D. Codified Laws Ann § 1-1-25. *See also* N.D. Rule of Court 7.2.
[355] 30 Indian L. Rptr. 105 (Mashantucket Pequot Tribal Court, No. MPTC-CV-2002-182 April 23, 2003).

- an ongoing assignment of part of the obligor's periodic earnings or trust income;
- an order to withhold and pay money due;
- contempt;[356] and
- lien and execution on property.

As noted earlier, Tribes operating Federally funded IV-D programs must provide for enforcement by income withholding. A non-Tribal employer operating on the reservation must honor a Tribal income withholding order. By entering into "consensual relations" with the Tribe "through commercial dealings," the non-Indian employer is subject to Tribal jurisdiction.[357]

Tribal courts also often invoke non-punitive enforcement remedies, such as dispute resolution or admonishment by Tribal elders.

Obligor (Indian or non-Indian) Resides on Reservation but Works off Reservation

When the obligor resides on a reservation but works off the reservation, the Tribal IV-D agency can enforce the order by sending an income withholding order directly to the off-reservation employer. Although Tribes are not required to enact UIFSA as a condition of receiving Federal IV-D funds, States are. Therefore, each State has enacted UIFSA, which requires an employer to honor direct income withholding orders/notices sent by States or Tribes. The Tribal court may also enforce the support order by contempt since it continues to have personal jurisdiction over the obligor.[358] Assuming Tribal code authority, the support order can be enforced against any property the obligor may own on the reservation.

The Tribal IV-D agency can also ask the State court or administrative agency to recognize and enforce the Tribal support order pursuant to the FFCCSOA. The State court or agency will then use State law to enforce the Tribal support order. This may be particularly effective if the obligor owns property off the reservation.

The Tribal support order can also be registered in a State court pursuant to UIFSA. Because UIFSA defines "State" to include Indian Tribes, a support order issued by a Tribe is enforceable in the State as soon as it is registered for enforcement; there is a presumption that the registered order is valid. If the obligor wishes to challenge the validity of the registered order, he or she must do so within the 20-day time limit for raising a challenge. At least one State court has held that a motion to vacate a Tribal support order based on lack of personal jurisdiction is a defense to registration that must be raised within the 20-day time period or it is waived.[359]

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[356] *See Hogdon v. Nelson,* No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995). Accessible through www.Tribalresourcecenter.org/opinions.
[357] *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1314 (9th Cir. 1990).
[358] *See, e.g*., 9 Navajo Tribe Code tit 9, § 1303.
[359] *Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

ENFORCEMENT OF STATE SUPPORT ORDER

The following discussion focuses on enforcement of a State support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

Obligor (Indian or non-Indian) Resides and Works off Reservation

Whether or not the obligor is an Indian, so long as he or she resides and works off the reservation, the State court may enforce its support order just as it would enforce a support order involving non-Indian parties.

Indian Obligor Resides and Works on Reservation

The State court may attempt to enforce its order by a contempt proceeding against the obligor. However, service of process on the obligor must be valid. See the discussion on Service of Process, herein.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding request. However, as noted earlier, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request unless Tribal law so provides. If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from the State or other Tribes and ensure that such orders are promptly served on employers.

It is unlikely that a State agency can seek enforcement of an arrearage judgment by sending a State garnishment order directly to the obligor's employer, if that employer is located on a reservation. Courts have found such action an unlawful infringement on Tribal sovereignty.[360] Both *Joe v. Marcum* and *Begay v. Roberts* involved Indian defendants who had incurred commercial debts with non-Indians off the reservation. In each case, the non-Indian entity obtained money judgments, which it then attempted to enforce by writs of garnishments against the Indian's employer, which was located on the reservation. In *Joe v. Marcum*, the employer was a Delaware incorporated business, which operated a strip mine and maintained its offices exclusively on the reservation. The writ of garnishment was served on the reservation. The Federal court concluded that to permit the State court of New Mexico to run a garnishment against an employer, on the reservation, and attach wages earned by an Indian for on-reservation labor, "would thwart the Navajo policy not to allow garnishment. Such impinges upon Tribal sovereignty."[361]

[360] *See, e.g.*, *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980); *Begay v. Roberts*, 807 P.2d 1111 (Ariz. App. 1990).
[361] *Joe v. Marcum,* 621 F.2d at 361-62.

In contrast, although the defendant in *Begay v. Roberts* worked on the reservation, his employer was a political subdivision of the State of Arizona, with offices Statewide. The writs were served on the employer at one of its offices off the reservation. Begay argued that although the State court may have had jurisdiction to enter the judgments against him, it did not have jurisdiction to garnish his wages because he was an Indian who lived and worked on the Navajo reservation. The garnishee maintained that, because the employer issued the wages off the reservation, the State court had jurisdiction to garnish them. In its decision, the Arizona Court of Appeals emphasized that it did not matter that, under other circumstances, the employer was subject to the jurisdiction of the Arizona courts: "Because Begay is a Navajo Indian living and working on the reservation, . . . this case cannot be decided without considering the Indian law implications. The fact that the transaction resulting in the underlying actions occurred off the reservation does not eliminate these implications, although it may be a factor to consider."[362] The court used the preemption and infringement analysis set forth in *Williams v Lee.*[363] It concluded that "the garnishment of a reservation Indian's wages earned on the reservation is preempted and infringes on Navajo Tribal sovereignty."

Several factors were key to the court's holding. First, it stated that the Navajo Treaty of 1868 had been interpreted consistently to preclude State court jurisdiction over Navajos living on the reservation. Second, although the garnishment in this case took place physically off the reservation, unlike the garnishment in *Joe v. Marcum*, it did not believe that such a distinction affected the result; just as in *Joe v. Marcum*, the effect of the garnishment would reduce Begay's income and thus threaten or have a direct effect on the "health and welfare of the tribe," citing *Montana v. United States*.[364] Third, the State action of issuing a writ of garnishment against an Indian's wages, which were earned on the reservation, infringed upon Navajo Tribal sovereignty because the Navajo Tribal Code did not provide for enforcement of judgments by garnishment. Rather, the Navajo Tribe had chosen to provide alternative remedies for the enforcement of judgments against reservation Indians.

The State IV-D agency may seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

If the State has complete Public Law 280 jurisdiction over domestic matters, the State IV-D agency can probably also seek enforcement against any nontrust property[365] that is owned by the Indian obligor and located within the State, including personalty.[366]

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[362] *Begay v. Roberts*, 807 P.2d at 1111, 1115 (Ct. App. 1990).
[363] *Williams v. Lee,* 358 U.S. 217 (1959).
[364] *Montana v. United States,* 450 U.S. 544 (1981).
[365] 25 U.S.C. § 1322(b) excludes trust property from execution.
[366] *See Calista Corp. v. DeYoung*, 562 P.2d 338 (Alaska 1977) (allowed State with Public Law 280 jurisdiction to collect child support arrears by obtaining cash distributions from stock in corporations formed pursuant to the Native Claims Settlement Act).

Indian Obligor Resides on Reservation but Works off Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is working off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off the reservation.

When the obligor derives income off the reservation, the State IV-D agency can seek enforcement of the State support order by income withholding against the off-reservation income. A case in point is *First v. State*.[367] Applying a preemption/infringement test, the Montana Supreme Court found no Federal preemption to State enforcement against off-reservation income and no unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them. It therefore upheld State administrative income withholding against off-reservation income (unemployment benefits), payable to an enrolled Tribal member living on the reservation, as a means to enforce a State child support order. The court held that State court jurisdiction did not violate Federal law, but actually promoted Federal law regarding the Title IV-D child support program. It also concluded that since the Tribal code only addressed support enforcement against on-reservation income and was silent on enforcement against off-reservation income, Montana's assertion of subject matter jurisdiction did not interfere with Tribal sovereignty. It noted that although the purpose of the income withholding was to enforce a child support obligation, it was a collection action and therefore "not an area dominated by Tribal tradition and custom."[368]

If the obligor is a Federal employee, the Federal government has the authority to withhold wages for child support, regardless of American Indian/American Native membership, residency, or employment on a reservation.[369]

If the obligor owns property on the reservation against which the support order may be enforced, the State IV-D agency may ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court would then use Tribal law to enforce the State support order.

Indian Obligor Resides Off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding

[367] 247 Mont. 465, 808 P.2d 467 (1991).
[368] *Id*. at 473.
[369] *See* OCSE-IM-02-01 Income Withholding from Federal Employees Working on Indian Reservations.

request. However, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request against wages earned by an Indian obligor, unless Tribal law so provides. Based on case law addressing writs of garnishment, it is likely that such direct State action would be considered an infringement on Tribal sovereignty, regardless of whether the employer was the Tribe, a Tribally-owned employer, or an employer that also does business within the State – especially if the Tribe had not authorized income withholding for support enforcement.[370] If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure that such orders are promptly served on employers.

Probably the best approach is for the State IV-D agency to seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

Non-Member or Non-Indian Obligor Resides and Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. Service of process must be valid. See the discussion on service of process herein. It can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[371]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the State support order against such property.

[370] *See Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980) and *Begay v. Roberts,* 7 P.2d 1111 (1990).
[371] 45 C.F.R. § 309.110(n).

Non-Member or Non-Indian Obligor Resides off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[372]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. In *Hanson v. Grandberry*,[373] the plaintiff, a non-Indian who resided off the reservation, sought enforcement in Tribal court of a State child support order against the defendant, also a non-Indian, who resided off the reservation but who was an employee of the Puyallup Tribe, working at the Tribal College located within the reservation. The defendant argued that simply because he was an employee of the Tribe did not mean that the Tribe automatically had jurisdiction over him. The plaintiff argued that by voluntarily working for a Tribal enterprise, the defendant had consented to Tribal jurisdiction. She sought full faith and credit of the order and garnishment of wages. The Puyallup Tribal Court held that the defendant had entered into a consensual relationship with the Tribe, thereby giving the Tribe jurisdiction over him. Furthermore, FFCCSOA authorized the Tribe to enforce the State child support order.

Non-Member or Non-Indian Obligor Resides on Reservation but Works off Reservation

The State IV-D agency may attempt to enforce the State support order by contempt; the best approach for avoiding service of process issues is to serve the obligor while he or she is at work or otherwise off the reservation. When the obligor derives income off the reservation, the State IV-D agency can also seek enforcement of

[372] 45 C.F.R. § 309.110(n).
[373] Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm).

the State support order by income withholding against the off-reservation income. Federal and State income tax refund offset are also effective remedies.

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the support order against such property.

CHAPTER NINE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

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Alaska Native Claims Settlement Act, P.L. No. 92-203 (1971), codified at 43 U.S.C. §§1609 - 1624

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Child Support Performance and Incentive Act of 1998, P.L. No. 105-200 (1998)

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Family Support Act of 1988, P.L. No. 100-485 (1988)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Omnibus Budget Reconciliation Act of 1986, P. L. No. 99-509 (1986)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

15 U.S.C. §§ 1601 *et seq*.

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 1322(b)

25 U.S.C. § 1911(d)

42 U.S.C. § 652(a)(11)(B)

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42 U.S.C. § 666

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42 U.S.C. § 666(a)(4)(B)

42 U.S.C. § 666(a)(7)(A)

42 U.S.C. § 666(a)(8)(B)

42 U.S.C. § 666(a)(16)

42 U.S.C. § 666(a)(17)

42 U.S.C. § 666(b)(3)(A)

42 U.S.C. § 666(b)(6)(A)(ii)

42 U.S.C. § 666(b)(8)

43 U.S.C. §§1609 - 1624

45 C.F.R. § 303.100

45 C.F.R. § 309.110

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Uniform InterState Family Support Act (1996), 9 Pt. 1B U.L.A. 235 (1999)

Sections 501-506, UIFSA

9 Navajo Tribe Code tit 9, § 1303

S.D. Codified Laws Ann § 1-1-25

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Hilton v. Guyot, 159 U.S. 113 (1894)

Talton v. Mayers, 163 U.S. 376 (1896)

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)

Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980)

Hanson v. Grandberry, Puyallup Tribal Court (No. CV 98-004 June 8, 1999) (http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm)

Hogdon v. Nelson, No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995)

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Begay v. Roberts, 807 P.2d 1111 (Ariz. App. 1990)

Calista Corp. v. DeYoung, 569 P.2d 338 (Alaska 1977)

First v. State, 247 Mont. 465, 808 P.2d 467 (1991)

John v. Baker, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005)

Smith v. Hall, 2005 N.D. 215 (filed Dec. 20, 2005)

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Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 (2003).

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CHAPTER TEN
EFFORTS AT FACILITATING INTERJURISDICTIONAL SUPPORT ENFORCEMENT

TRIBAL AND STATE CHILD SUPPORT PROGRAMS

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[374] as amended by the Balanced Budget Act of 1997,[375] authorizes the direct funding of Tribal child support enforcement programs by the Federal government. The Department of Health and Human Services published a final rule on March 30, 2004,[376] providing the mechanism for Tribes to submit child support enforcement plans and, upon approval, to receive direct Federal funding of Tribally operated programs.

As of March 2007, the following Tribes have been approved to operate their own child support programs:

- Chickasaw Nation / OK
- Forest County Potawatomi Community / WI
- Lac du Flambeau Band of Lake Superior Chippewa Indians / WI
- Lummi Nation / WA
- Menominee Tribe / WI
- Navajo Nation / NM, AZ, UT
- Port Gamble S'Klallam Tribe / WA
- Puyallup Tribe of Indians / WA
- Sisseton-Wahpeton Oyate / SD
- Central Council Tlingit and Haida Indian Tribes / AK

There are also twenty-seven tribes with start-up programs: Osage Tribe of Oklahoma; Cherokee Nation of Oklahoma; Quinault Indian Nation (WA); Nooksack Indian Tribe (WA); Confederated Tribes of Umatilla (OR); Confederated Tribes of Colville (WA); Winnebago Tribe (NE); Three Affiliated Tribes (Mandan, Hidatsa and Arickara Nation) (ND); Red Lake Band of Chippewa Indians (MN); Oneida Tribe of Indians (WI); Keewenaw Bay Indian Community (MI); White Earth Nation (MN); Muscogee (Creek) Nation, (OK); Pueblo of Zuni (NM); Ponca Tribe of Oklahoma; Penobscot Nation (ME); Kickapoo Tribe of Kansas; Kaw Nation (OK); Mescalero Apache Tribe (NM); Comanche Nation (OK); Modoc Tribe (OK); Klamath Tribes (OR); Tulalip Tribes (WA); Aleutian/Pribilof Islands Association (AK); Northern Arapaho Tribes (WY); Chippewa Cree Tribe (MT); and Coeur D'Alene Tribe (ID) .

Some Tribal child support programs use the computer systems within their corresponding State. Others are not yet computerized and operate using manual

[374] P.L. No. 104-193.
[375] P.L. No. 105-33.
[376] 69 Fed. Reg. 16,638 (Mar. 30, 2005) (to be codified at 45 C.F.R. Part 309).

systems. A few Tribes have agreements with their individual States or counties for personal service on their reservation, although most do not.

Some Tribes operate their own Temporary Assistance for Needy Families (TANF) program. Members of Tribes that do not have their own program receive TANF benefits through the State's system.

Federal regulations governing State IV-D plans were also amended to require States to cooperate with Tribal IV-D programs.[377] 45 C.F.R. § 302.36(a)(2) now requires States to extend the full range of services available under the IV-D plan to all Tribal IV-D programs.

COOPERATIVE AGREEMENTS

PRWORA also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[378] It is not necessary that the Tribal entity have laws and procedures meeting Federal requirements for all IV-D functions. Implementing regulations are at 45 C.F.R. § 302.34.[379] Such arrangements shall contain provisions for providing courts and law enforcement officials with pertinent information needed in locating noncustodial parents, establishing paternity and securing support, to the extent that such information is relevant to the duties to be performed pursuant to the arrangement. A State may delegate one or multiple IV-D functions to the Tribal entity under a cooperative agreement.[380] Under cooperative agreements, Tribes will not have direct access to the Federal Parent Locator Service (FPLS), Federal debt recovery, or the Federal income tax refund offset. However, Tribal cases will be processed using all resources available through the State IV-D program, as outlined in 45 C.F.R. §§ 303.70, 303.71, and 303.72.[381]

45 C.F.R. § 303.107 establishes requirements for cooperative agreements. They must:

> (a) Contain a clear description of the specific duties, functions and responsibilities of each party;
>
> (b) Specify clear and definite standards of performance which [sic] meet Federal requirements;
>
> (c) Specify that the parties will comply with title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements;

[377] 69 Fed. Reg. 16,638 (Mar. 30, 2005).
[378] Public Law No. 104-193, 110 Stat. at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.
[379] 54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996).
[380] OCSE-AT-98-21 (July 28, 1998).
[381] *Id.*

> (d) Specify the financial arrangements including budget estimates, covered expenditures, methods of determining costs, procedures for billing the IV-D agency, and any relevant Federal and State reimbursement requirements and limitations;
>
> (e) Specify the kind of records that must be maintained and the appropriate Federal, State and local reporting and safeguarding requirements; and
>
> (f) Specify the dates on which the arrangement begins and ends, any conditions for revision or renewal, and the circumstances under which the arrangement may be terminated.[382]

Federal financial participation (FFP) in the eligible costs of providing IV-D services under such a cooperative agreement is available to the State.[383]

An example of a formal cooperative agreement is one between the Eastern Band of Cherokee Indian Tribe and the State of North Carolina. The State has one child support enforcement office that serves several counties in the area, including the reservation. The office, located in Bryson City, 10 miles from Cherokee, provides two case workers to the Cherokee CFR Court, one for intake of new cases, and the other for enforcement of current active cases. The primary objective of both offices is to provide the best services available to enrolled children.[384]

INTERGOVERNMENTAL AGREEMENTS

Nationwide, States and Indian Tribes have negotiated hundreds of intergovernmental agreements (IGAs) on such diverse subjects as hunting and fishing rights, taxation, cross-deputization, and the Indian Child Welfare Act.[385] States and Tribes are also exploring the use of IGAs to facilitate support enforcement. An example is the Colville Agreement of 1987 entered into by the Washington State Department of Social and Health Services and the Colville Confederate Tribes.[386]

[382] 54 Fed. Reg. 30,223 (July 19, 1989).
[383] *See* OCSE-AT-98-21 on cooperative agreements.
[384] Strengthening the Circle, *supra* note 179 at 10.
[385] *See* American Indian Law Center, State/Tribal Agreements: A Comprehensive Study (1981).
[386] For an overview of options for overcoming jurisdictional barriers, *see* J. Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases (State Justice Institute 1994).

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CHAPTER TEN
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

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42 U.S.C. § 654(33))

45 C.F.R. § 302.36(a)(2)

45 C.F.R. § 303.70

45 C.F.R. § 303.71

45 C.F.R. § 303.72

45 C.F.R. § 303.107

54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996)

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Case Law

None

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J. Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases (State Justice Institute 1994).

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CONCLUSION

The goal of this revised monograph has been to update information regarding the history, processes, jurisdictional issues, and innovations of State and Tribal interaction in the area of child support. Basic knowledge of both State and Tribal programs, and communication among stakeholders in each community, will lead to continued improvement in the delivery of services to Indian children. As one Tribal judge commented, "[o]nce we are willing to find out about each other, we can work together."

As the topic of Tribal and State interaction increasingly appears on the agenda of child support conferences, speakers and attendees have had opportunities for sharing best practices. Practice tips have included the following:

- To determine if someone is enrolled in a Tribe, ask the person for his or her Certificate of Degree of Indian Blood (CDIB) card, which shows enrollment.
- Remember that each Tribe is different, with its own laws.
- Find out what procedure(s) are required to register a State support order for enforcement with the Tribe.
- Coordinate service of process in Indian country with the Tribe. When personal service is required, Tribal authorities are often the most appropriate individuals for serving State process on a reservation.
- State and Tribal court clerks are excellent resources regarding pleadings, required forms, and filing deadlines and procedures.
- Attorneys should check regarding authority to practice law in a particular forum. Admission to practice in a State court does not automatically mean that the attorney is admitted to practice in a Tribal court in that State.
- Communicate.
- Build a foundation of trust.

Speakers have also made the following long-range recommendations:

- National and State child support conferences should include sessions that provide attendees an opportunity to become better informed about Tribal cultures and Tribal child support programs.
- Tribal child support conferences should include sessions that provide attendees an opportunity to learn about State's best practices so that Tribes can decide if such practices are helpful in developing their own child support programs.

- Joint conferences should be regularly planned for Tribal and State court judges who hear child support cases in order to address mutual problems, issues, and solutions regarding child support.

Appendix A
INTERNET RESOURCES

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian Tribes, and Alaska Natives. There are 562 Federal recognized Tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students. For information about the BIA see http://www.doj.gov/bureau-indian-affairs.html (Note: As of June 2005, the BIA website and the BIA mail servers have been made temporarily unavailable due to litigation.)

Indian Health Service

The Indian Health Service (IHS), an agency within the Department of Health and Human Services, currently provides health services to approximately 1.5 million American Indians and Alaska Natives who belong to 562 Federally recognized Tribes in 35 States. For information about health services for Indian children see www.ihs.gov

National Tribal Child Support Association

For information about Tribal IV-D child support programs see www.supportTribalchildren.org

National Tribal Justice Resource Center

According to its website, the National Tribal Justice Resource Center is the largest and most comprehensive site dedicated to Tribal justice systems, personnel and Tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native Tribal courts, providing both technical assistance and resources for the development and enhancement of Tribal justice system personnel. Programs and services developed by the Resource Center are offered to all Tribal justice system personnel -- whether working with formalized Tribal courts or with tradition-based Tribal dispute resolution forums. For information about Tribal courts see www.Tribalresourcecenter.org

Native American Legal Resource Center at Oklahoma City University (OCU) School of Law

OCU School of Law's Native American Legal Resource Center is dedicated to advancing scholarship in the field of American Indian law and improving the quality of legal representation for Native Americans. It advises Tribes and governments on matters of economic development and supports the activities of the OCU chapter of the Native American Law Student Association. The Center also helps make available Tribal law by publishing the *Oklahoma Tribal Court Reports* and *the Oklahoma Tribal Constitutions* Annotated. For information about American Indian law and initiatives in

area of domestic violence, see
http://www.okcu.edu/law/academiccenters/academiccenters_nativeamerican.html

Native American Rights Fund and the National Indian Law Library

Founded in 1970, the Native American Rights Fund (NARF) is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian Tribes, organizations and individuals nationwide. It operates the National Indian Law Library (NILL), which is a public law library devoted to Federal Indian and Tribal law. For information about Tribal law see www.narf.org

Office of Child Support Enforcement

The Federal Office of Child Support Enforcement (OCSE) is within the Administration for Children and Families, Department of Health and Human Services. Its mission is to provide direction, guidance, and oversight to State and Tribal CSE program offices for activities authorized and directed by Title IV-D of the Social Security Act and other pertinent legislation. Central and regional offices collaborate to assess State needs, and to provide technical assistance, policy clarification, training and support for CSE programs. For information about Federal, State, and Tribal initiatives in child support enforcement see http://www.acf.hhs.gov/programs/cse/fct/Tribal.htm

Tribal Law and Policy Institute

The Tribal Law and Policy Institute is a Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples. The Institute hosts a Tribal Court Clearinghouse. For Tribal codes see http://www.Tribal-institute.org

U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee

The jurisdiction of the House Committee on Resources includes: Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds; and Insular possessions of the United States generally (except those affecting the revenue and appropriations). For information about the Office of Native American and Insular Affairs Subcommittee see
http://resourcescommittee.house.gov/subcommittees/naia.htm
For frequently asked questions and answers regarding American Indians see
http://resourcescommittee.house.gov/subcommittees/naia/nativeamer/faqspf.htm

U.S. Senate Committee on Indian Affairs

Until 1946, when a legislative reorganization act abolished both the House and Senate Committees on Indian Affairs, the Senate Committee on Indian Affairs had been in existence since the early 19th century. After 1946, Indian affairs legislative and oversight jurisdiction was vested in subcommittees of the Interior and Insular Affairs Committees of the House of Representatives and the Senate. In 1977, the Senate re-established the Committee on Indian Affairs and voted it a permanent Committee in

1984. The Committee has jurisdiction to study the unique problems of American Indian, Native Hawaiian, and Alaska Native peoples and to propose legislation to alleviate these difficulties. These issues include, but are not limited to, Indian education, economic development, land management, trust responsibilities, health care, and claims against the United States. Additionally, all legislation proposed by members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee. For information on Federal legislation related to American Indians, Native Hawaiians, or Alaska Natives see http://indian.senate/gov/

U.S. Department of Justice, Office of Tribal Justice

The Office of Tribal Justice (OTJ) was established to provide a single point of contact within the Justice Department for meeting the Federal responsibilities owed to Indian Tribes. Because Indian issues cut across so many entities within the Executive Branch, OTJ, in cooperation with the Bureau of Indian Affairs, serves to unify the Federal response. According to its website, one of the activities for which OTJ has coordination and liaison responsibilities is Tribal Justice Systems and Public Law 280 Policy. For information on current legal issues in Indian Country see www.usdoj.gov/otj

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Appendix B
PUBLIC LAW 280

The relevant text of P.L. 280 as enacted in 1953[387] is set out below with subsequent amendments. An amendment in 1954 brought the Menominee Tribe within the provisions of this section; the deleted exception is indicated by a double strike through. The 1958 amendments[388] are underlined; they extended both the criminal and civil provisions of Public Law 280 to all Indian country within Alaska. In 1970, Congress again amended Public Law 280 by excepting the Metlakatla Indian community from the exclusive jurisdiction of Alaska, and providing that sections 1152 and 1153 (the General Crimes Act and the Major Crimes Act) are not applicable within the areas of Indian country listed in the mandatory Public Law 280 States, as “areas over which the several States have exclusive jurisdiction”; these 1970 amendments[389] are crossed out and capitalized. 1984 amendments deleted references to “Territories” that had been added in 1958; the deleted language is crossed out and in italics.

"AN ACT
"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"`1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"**SEC. 2**. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"` 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"`(a) Each of the States ~~*or Territories*~~ listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian

[387] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).
[388] Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).
[389] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

country listed opposite the name of the State ~~*or Territory*~~ to the same extent that such State ~~*or Territory*~~ has jurisdiction over offenses committed elsewhere within the State ~~*or Territory*~~, and the criminal laws of such State ~~*or Territory*~~ shall have the same force and effect within such Indian country as they have elsewhere within the State ~~*or Territory*~~:

"`State ~~*or Territory*~~ of Indian country affected

State or Territory of	Indian country affected
Alaska	All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, ~~except the Menominee Reservation~~

"`(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian Tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"`(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section AS AREAS OVER WHICH THE SEVERAL STATES HAVE EXCLUSIVE JURISDICTION.'

"**SEC. 3**. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"`1360. State civil jurisdiction in actions to which Indians are parties.'

"**SEC. 4**. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"` 1360. State civil jurisdiction in actions to which Indians are parties

"`(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
"`State of Indian country affected.

State of	Indian country affected
Alaska	All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, ~~except the Menominee Reservation~~

"`(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"`(c) Any Tribal ordinance or custom heretofore or hereafter adopted by an Indian Tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.'

"**SEC. 5**. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"**SEC. 6**. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"**SEC. 7**. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

(Added Aug. 15, 1953, ch. 505, Sec. 4, 67 Stat. 589; amended Aug. 24, 1954, ch. 910, Sec. 2, 68 Stat. 795; Pub. L. 85-615, Sec. 2, Aug. 8, 1958, 72 Stat. 545; Pub. L. 95-598, title II, Sec. 239, Nov. 6, 1978, 92 Stat. 2668; Pub. L. 98-353, title I, Sec. 110, July 10, 1984, 98 Stat. 342.)

AMENDMENTS

1984 - Subsec. (a). Pub. L. 98-353 struck out "or Territories" after "Each of the States", struck out "or Territory" after "State" in 5 places, and substituted "within the State" for "within the Territory" in item relating to Alaska.

1978 - Subsec. (a). Pub. L. 95-598 directed the amendment of subsec. (a) by substituting in the item relating to Alaska "within the State" for "within the Territory", which amendment did not

become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1958 - Subsec. (a). Pub. L. 85-615 gave Alaska jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in all Indian country within the Territory of Alaska.

1954 - Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective July 10, 1984, see section 122(a) of Pub. L. 98-353, set out as an Effective Date note under section 151 of this title.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

AMENDMENT OF STATE CONSTITUTIONS TO REMOVE LEGAL IMPEDIMENT; EFFECTIVE DATE

Section 6 of act Aug. 15, 1953, provided that: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act (adding this section and section 1162 of Title 18, Crimes and Criminal Procedure): Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

CONSENT OF UNITED STATES TO OTHER STATES TO ASSUME JURISDICTION

Act Aug. 15, 1953, ch. 505, Sec. 7, 67 Stat. 590, which gave consent of the United States to any other State not having jurisdiction with respect to criminal offenses or civil causes of

action, or with respect to both, as provided for in this section and section 1162 of Title 18, Crimes and Criminal Procedure, to assume jurisdiction at such time and in such manner as the people of the State shall, by legislative action, obligate and bind the State to assumption thereof, was repealed by section 403(b) of Pub. L. 90-284, title IV, Apr. 11, 1968, 82 Stat. 79, such repeal not to affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Retrocession of jurisdiction by State acquired by State pursuant to section 7 of Act Aug. 15, 1953, prior to its repeal, see section 1323 of Title 25, Indians.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 sections 566e, 711e, 713f, 714e, 715d, 1300b-15, 1300f, 1300i-1, 1323, 1747, 1772d, 1918.

Appendix C
FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS

Section 1738B. Full faith and credit for child support orders

(a) General Rule. - The appropriate authorities of each State -

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions. - In this section:

"child" means -

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order" -

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes -

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

"contestant" means -

(A) a person (including a parent) who -

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of Child Support Orders. - A child support order made by a court of a State is made consistently with this section if -

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g) -

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing Jurisdiction. - A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority To Modify Orders. - A court of a State may modify a child support order issued by a court of another State if -

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of Child Support Orders. - If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this

section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of Modified Orders. - A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of Law. -

(1) In general. - In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order. - In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation. - In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for Modification. - If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

Claudia Garcia Groberg
Oregon Department of Justice
Civil Enforcement Division/Civil Recovery Section

Child Support Enforcement between State & Tribal Courts

Background:

a. The Child Support Program, which consists of the Division of Child Supp01t (DCS) and 25 District Attorneys' (DA) offices in Oregon, may use any and all collection methods below to enforce a child support order:

Income Withholding -- ORS 25.372 -25.427
State and Federal Tax Intercept -- ORS 25.610 -25.625
Passport Suspension -- ORS 25.625
Financial Institutional Data Match -- ORS 25.640 -25.646
Personal Property Liens -- ORS 25.670 -25.690
License Suspension -- ORS 25.750 -25.785
New Hire Rep01ting-- ORS 25.790 -25.794
Real Property Lien-- ORS 18.150
Garnishment -- ORS 18.605
Contempt -- ORS Chapter 33
Bail Intercept -- ORS 25.715

b. We ask tribes to assist us in enforcing a child support order through wage withholding when the obligated parent is employed by the tribe. Tribes vary in their approach to honoring our wage withholding:

1. Some tribes will register the order and withhold under Oregon law
2. Some tribes will not register our order but will honor the wage withholding after allowing obligor an opp01tunity for hearing.

3. Some tribes will request the state attorney to be licensed in their comt and appear at each wage withholding hearing.
4. IV-D Tribes issue their own income withholding orders.

c. Under Oregon law, the state withholds:
   ı. 100% of current cases with no arrears;
   11. 120% of current cases with arrears; and
   m. 100% of the last court ordered amount on judgment only cases

d. Some tribes take a more holistic approach to what amount should be withheld at any given time.

The Klamath Tribes

Tribal Council

TRIBAL COUNCIL RESOLUTION #2008-20

TRIBAL COUNCIL RESOLUTION APPROVING AMENDMENTS TO THE KLAMATH TRIBES CHILD SUPPORT ORDINANCE, KLAMATH TRIBAL CODE TITLE 4, CHAPTER 29

\,\'hereas, The Klamath and Modoc Tribes and the Yahooskin Band of Snake lndwns si grn:d the Treaty of 1864 establishing the Klamath Reservation; and

\<\'hereas, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & VII, Section IV E) as approved and/or adopted by the General Council amended on November 25, 2000; and

W hcn'as, The Klan1ath Indian Tribes Restoration Act of August 27, l986 (P.L. 99-398) restored to federal recognition the Sovereign Government of the Tribes' Constitution and By-laws; and

Whereas, The Klamath Tribes Tribal Council is the elected governmental body c,f the Tn bes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the general guidancl.' of the General Council (Constitution, Article VII, Section I; Tribal Council Bv-l aws. Article I); and

\\'hereas, The General Council adopted the Klamath Tribes Chi ld Suppo1i Ord i nane<:. Klamath Tribal Code Title 4, Chapter 29 on February 23, 2008; and

Whereas, Minor amendments have been recommended to be made to the Ord ma nee pri<•r to submission of the Application for federal funding to operate a Title IV-D chi l d support program; and

[('!{ 2008-

501 Chilo9uin E>ivd. - P.O. Box *4)6* - Chilo9uin, Oregon 97624
(541) *78)-2219* - Fax (541) *187-)706*

Whereas, The Child Support Ordinance may be amended by a Resolution adopted by majority vote of the Klamath Tribes Tribal Council; and

\Vhereas, The Klamath Tribes Tribal Council has determined that it is in the best interest of the Klamath Tribes to approve the recommended amendments to the ordinance as presented to the Tribal Council on April 24, 2008;

Now therefore be it resolved, The Klamath Tribes Tribal Council hereby approves the amendments to the Child Support Ordinance, Klamath Tribal Code Title 4, Chapter 29;

Be it further resolved, That the Ordinance, as amended, shall become effective upon Tribal Council acknowledgment of receipt of sufficient funds to operate the Child Support Enforcement Office.

Certification

We. the undersigned. Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a scheduled T1ibal Council meeting held on the_24th_ day of_April____. 2008.
the Tribal Council duly adopted this resolution by a vote of 7 for, t?.f opposed. anu abstentions.

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Joscphi(irk .?
Chairman
The Klamath Tribes

4"'--0 . . d
T rina Case
Secretary
The Klamath Tribes

THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
Title 4 Chapter 29

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GENERAL PROVISIONS

29.1 Authority.

This Child Support Ordinance is adopted pursuant to the authority vested in the Klamath Tribes General Council by virtue of its inherent sovereignty as an Indian tribal government and Article VI of the Constitution of the Klamath Tribes that provides that the General Council has the power to adopt and enforce ordinances providing for the maintenance oflaw and order, and to exercise all other reserved powers.

29.2 Purpose.

The purpose of this Child Support Enforcement Ordinance is to establish a fair and equitable process for establishing, modifying and enforcing child suppo11orders and pcrfonning related activities including establishment of paternity, and locating noncustodial parents, to help provide for the care of children.

29.3 Policy.

It is the policy of the Klamath Tribes that **all** parents, both custodial and non-custodial , have an equal obligation to support their children. The Tribes are responsible for establishing governmental laws, procedures and guidelines for the equitable allocation of financial responsibility between parents for children's support where necessary.

29.4 Definitions.

For purposes of this Ordinance, the term

(a) "Acknowledged father" means a man who has established a father-child relationship under section 29.21 or 29.22.

(b) "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.

(c) "Alleged father" means a man who alleges himself to be, or is alleged to be. the genetic father or a possible genetic father of a child, but whose paterni ty has not been detennined. The term does not include a presumed father, or a man whose parental rights have been terminated or declared not to exist.

(d) "Assignee" means an individual or agency that has been assigned the right to collect child support from the parent obligor.

(e) "Child" means any person under the age of eighteen years. In accordance with the terms of this Ordinance, "child" may also include a person over the age !.If eighteen years who has not yet completed High School. but shall never mean a person over the age of twenty.

(f) "Child support order" and "child support obligation" mean a judgment, decree. or order, whether temporary, final or subject to modification, issued by a court of competent jurisdiction, tribunal or an administrative agency for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing jurisdiction, or of the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement, and which may include related costs and fees. interest and penalties, income withholding, attorneys' fees, and other relief.

(g) "Certify" means to present to the Tribal Court for determination.

(h) "Custodial parent" means a parent having the care, physical custody and control of a child or children.

(i) "Custodian" means any person who is not a parent, having the care, physical custody and control of a child or children.

(j) "comt" means any court having jurisdiction to detennine the liability of pcrs011s for the support of a child.

(k) "De novo" means independent review and consideration of all issues.

(l) "Deterrnination of parentage"means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity, adjudication by the court, adoption, or other method for determining parentage set forth at sections 29.20 and 29.21.

(m) "Disposable income" means that part of the income of an individual remaining after the deduction from the income of any amounts required to be withheld by law except laws enforcing spousal or child support and any amounts withheld to pay medical or dental insurance premiums.

(n) "Employer" means any entity or individual that engages an individual to perfom1 work or services for which compensation is given.

(o) "General Council" means the General Council of the Klamath Tribes with such powers that exist by virtue of the inherent sovereignty of the Klamath Trihes and as specified in the Constitution of the Klamath Tribes.

(p) "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. The tenn includes an analysis of one or a combination of the following:

1. Deoxyribunucleic acid; and
2. Blood-group antigens, red-cell antigens, human-leukocyte antigens. serum enzymes, serum proteins or red-cell enzymes.

(s) "Home Tribe or State" means the Tribal Reservation or Indian country nf a Tribe. or territory of a State in which a child lived with a parent or a person act mg as a parent for at least six consecutive months immediately preceding the time of tilin g of a petition or comparable pleading or application for support assistance and. if a child is less than six months old, the Tribal Reservation or Indian country of a Tribe, or territory of a State in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence is counted as part of the six-month or other period.

It) "Income-withholding order" means an order or other legal process directed tu an obligor's employer or other third party in possession of a monetary obligation owed to an obligor, as defined by the income-withholding law of the Klamath Tribes, to withhold support from the income of the obligor.

(u) "Initiating Tribe or State" means a Tribe, Tribal organization, or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to the Klamath Tribes Child Support Enforcement Office or Tribal Court.

(v) "Initiating tribunal" means the authorized tribunal in an initiating Tribe. Tribal organization, or State.

(w) "Issuing Tribe or State" means a Tribe or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding Tribe. Tribal organization, or State for purposes of establishment, enforcement. or modification of a child support order.

(x) "Issuing tribunal" means the authorized tribunal in an initiating Tribe. Tribal organization, or State.

(y) "Klamath Indian Reservation" means all lands held in trust by the United States for the benefit of the Klamath Tribes as part of the Klamath Indian Reservatiun.

(z) "Klamath tribal member" means an individual duly enrolled with the Klamath Tribes in accordance with the Constitution and laws of the Klamath Tribes.

(aa) "Klamath Tribes Child Support Enforcement Office-means the Office established pursuant to section 29.06 and that serves as the Tribal IV-D agency pursuant to 45 CFR Part 309.

(bh) "The Manager" means the Director for the Klamath Tribes Child Support Enforcement Office or any of his/her authorized representatives in child suppo1i. proceedings.

(cc) "Non-cash" support means support provided to a family in the nature of good and/or services, rather than in cash, but which nonetheless, has a certain and specific dollar value.

(dd) "Obligee" means an individual or agency to which child support is owed on behalf of a child.

(ee) "Obligor" means a parent who is required to pay child support to a person or agency on behalf of a child.

(ff) "Office"means the Klamath Tribes Child Support Enforcement Office or its equivalent in any other tribal government or state from which a w1itten requ e>t for establishment or enforcement of a support obligation is received.

(gg) "Order to withhold" means an order or other legal process that requires a withholder to withhold support from the income of an obligor.

(hh) "Parent" means the natural, biological or adoptive parent of a child.

(ii) "Paternity index" means the likelihood of paternity calculated by computi ng the ratio between:

!. The likelihood that the tested man is the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is the father of the child; and

2. The likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is not the father of the child.

(jj) "Past support" means the amount of child support that could have been ordered and accumulated as arrears against a parent, where the child was otherwise not supported by the parent and for which period no valid support order was in effect.

(kk) "Probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability.

(ll) "Public assistance" means monetary assistance benefits provided by the Klamath Tribes, any other Indian tribe or state that are paid to or for the benefit of a child. Such payments include cash payments under Title IV-A of the Social Secu1ity Act, a tribal or state general assistance program, or the federal Supplemental Security Income program.

(mm) "Register" means to record or file a child support order or jud gment detenni ni ng parentage in the appropriate location for the recording and filing of such order or judgment.

(nn) "Registering tribunal" means a tribunal in which a support order is registered.

(oo) "Responding Tribe or State" means an Indian tribe, Tribal organization or state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating Tribe or State under this Ordinance or a law substantially similar to this Ordinance.

(pp) "Responding tribunal" means the authorized tribunal in a responding Tlibe, Tribal organization or State. The responding tribunal for the Klan1ath Tribes is the Klamath Tribes Child Support Enforcement Office or the Klamath T1ibal Court as set forth in this Ordinance.

(qq) "Social Services Department" means the Social Services Department of the Klamath Tribes and programs operated thereunder, including, but not limited to the Temporary Assistance to Needy Families program and the General Assista nce program.

(rr) "Tribal Council" means the elected Tribal Council of the Klamath Tribes established under Article VII of the Constitution of the Klamath Tribes;

(ss) "Tribal Court or Court" means the Tribal Court of the Klamath Tribes Judicial Branch established under Article V of the Constitution of the Klamath Tribes.

(tt) "Tribal member" means an individual that is an enrolled Klamath member, or an individual that is enrolled with another federally recognized Indian tribe in accordance with the laws of such tribe.

(uu) "Tribe or State" means any Tribe, or Tribal organization within the exterior boundaries of the United States, a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the Jaws of the United States, and any foreign governments. that have enacted a law or established procedures for the issuance and enforcement of child support orders that are substantially similar to Klamath Tribes proceedings for recognition and enforcement of foreign orders.

(vv) "Tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to detem1ine parentage.

(ww) "Withholder" means any person who disburses income to the obligor and includes but is not limited to an employer, conservator, trustee or insurer of the obligor.

,J U RISDICTION

29Jl5 Jurisdiction.

(a) The Klamath Tribes Tribal Court and Klamath Tribes Child Support Enforcement Office shall have personal and subject matter jurisdiction over the establishment. modification and enforcement of child support and any associated proceedings. including but not limited to establishment of paternity and location of noncustodial parents, related to the purpose for which this Ordinance is established.

(b) The Tribal Court and, as applicable the Klamath Tribes Child Support Enforcement Office, has, but is not limited to, personal jurisdiction over the following, for purposes of enforcing the provisions of this Ordinance, and any associated matters:

1. Enrolled members of the Klamath Tribes;
2. Persons who consent to the jurisdiction of the Court by one of the following:
   (i) Filing an action;
   (ii) Knowingly and voluntarily giving written consent to jurisdiction of the Court;

(iii) Entering a notice of appearance in an action without conu m:11tl y filing an express written reservation of issues concemi ng personal jurisdiction, or filing a motion to dismiss for lack of jurisdiction within 30 days of entering the notice of appearance;

(iv) Appearing in an action without concurrentl y filing an express written reservation of issues concerning personal jurisd iction, or filing, within 30 days of such appearance, a motion to dismiss for lack of jurisdiction;

3. Persons who are the parent or guardian of an emolled Klamath tribal member or the parent or guardian of a child eligible for enrollment with the Klamath Tribes;
4. Persons who have legally enforceable rights in any jurisd iction to visitation or custody of a child that is in any way a subject of the proceeding and the child is an enrolled member of the Klamath Tribcs. eligible for emollment with the Klamath Tribes;
5. Persons who are alleged to have engaged in an act of sexual intercourse on the Klamath Indian Reservation with respect to which a child that is ei ther an emolled member of the Klamath Tribes, or eligible for enroll ment \\ i th the Klamath Tribes, may have been conceived; and/or
6. Applicants for and recipients of Temporary Assistance to Need y Famil y benefits through the Klamath Tribes, whether the head of household. dependent, or other household member.

(c) Continuing jurisdiction.

1. In every action under this Ordinance where there is jurisdicti on, the Tribal Court, and as applicable the Klamath Tribes Child Support Enforcement Office, shall retain continuing jurisdiction over the parties.
2. Consent cannot be withdrawn once given, whether such consent was given expressly or impliedly.
3. Personal jurisdiction cannot be defeated by relocation after jurisdiction is established.
4. Personal jurisdiction cannot be defeated by voluntary relinqui shment nf enrollment and membership with the Klamath Tribes.

(d) The Child Support Enforcement Office shall have jurisdiction over persons and entities as provided for in, and as necessary to carry out the provisions ot this Ordinance, for purposes of establishing paternity, establishing, modifying and enforcing child support orders, and performing associated activities. Challenges to the jurisdiction of the Child Support Enforcement Office shall be presen ted the Child Support Enforcement Office and certified to the Klamath T1ibes Tribal Court for decision. Appeals of Tribal Court determinations of jurisdicti on may be

appealed to the Klamath Tribes Supreme Court in accordance wi th the laws of the Klamath Tribes.

KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT OFFICE

29.6 Establishment of Child Support Enforcement Office.

(a) There is established a Child Support Enforcement Office to be operated und er the Klamath Tribes Judicial Branch. This Office is the Klamath T1ibes Tri hal IV-D agency pursuant to 45 *CPR* Part 309 and is the entity primarily responsible for providing support enforcement services described in this Ordinance. The Chi Id Support Enforcement Office shall provide services relating to the establ ishmen t ot paternity or the establishment, modification, or enforcement of child suppo11 obligations, and location of noncustodial parents, as appropriate, with respect to any child, obligee or obligor determined to be within the jurisdiction of the Klamath Tribes.

(b) When responsible for providing support enforcement services, and there is sufficient evidence available to support the action to be taken, the Chi ld Support Enforcement Office shall perform, but not be limited, to the followi ng:

J. Carrying out the policy and traditions of the Klamath Tribes regardi ng child support obligations;
2. Operating the Klamath Tribes Tribal IV-D Pro1;ram;
3. Accepting all applications for IV-D services and promptly providing IV-D services;
4. Establishing child support orders in compliance with Klamath T1ibes chi ld support guidelines and formulas;
5. Establishing paternity for child support purposes;
6. Initiating and responding to child support modification proceed ings and proceedings to terminate support orders;
7. Enforcing established child support orders and obligations;
8. Establishing and enforcing obligations to provide medical insurance coverage for children;
9. Establishing and enforcing obligations to provide chi ld care expenses for children;
I0. Collecting child support;
11. Accepting offers of compromise or partial or total charge-off of chi Id support arrearages;
12. Distributing child support payments;
13. Maintaining a full record of collection and disbursements made;

14. Establish or participate in a service to locate parents utilizing all sources of available information and records, and to the extent available, the Fedcral Parent Locator Service;
15. Maintaining program records in accordance with section 29.07 (a).
16. Establishing procedures for safeguards applicable to all confident i al information handled by the Child Support Enforcement Office. that arc designed to protect the privacy rights of the parties, incl uding:
    1. Safeguards against unauthorized use or disclosure of info1111ation relating to proceedings or actions to establish paternity, to locate a noncustodial parent, or to establish, modify, or enforce suppmt. or to make or enforce a child custody determination;
    11. Prohibitions against the release of infonnation on the wherea bouts of I party or the child to another party against whom a protective order with respect to the former party or the child has been entered:
    n1. Prohibitions against the release of infonnation on the whereabouts of 1 party or the child to another person if the Office has reason to believe that the release of the infonnation to that person may resul t in physical or emotional harm to the party or the child.
    1v. Any mandatory notification to the Secretary that the Office has reasonable evidence of domestic violence or child abuse agai nst a party or the child and that the disclosure of such infonnation could be harmful to the party or the child.
    v. Procedures in accordance with any specific safeguard ing regulations applicable to Tribal IV-D prob›rams.
    vi. Procedures under which sanctions must be imposed for the unauthorized use or disclosure of infonnation.
17. Publicizing the availabili ty of child support enforcement services available, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained, and publicizing the availability of and encouraging the use of procedures for voluntary establishment of paternity and child support;
18. Ensuring compliance with the provisions of applicable federal laws. including, but not limited to 42 U.S.C. 651 to 669 and 45 C.F.R. Chapter III.

(c) The Child Support Enforcement Office shall establish rules, procedures and fonns for carrying out its responsibilities and authority under this ordinance. All part ies to child support proceedings shall comply with the rules and proced ures adopted by the Office, and shall utilize the proper forms prepared by the Office.

29.7 **Record Maintenance.**

(a) The Child Support Enforcement Office shall maintain all records necessary for the proper and efficient operation of the program, including records regarding:

1. Applications for child support services;
2. Efforts to locate noncustodial parents;
3. Actions taken to establish paternity and obtain and enforce support:
4. Amounts owed, arrearages, amounts and sources of support collections. and the distribution of such collections;
5. Office IV-D program expenditures;
6. Any fees charged and collected, if applicable; and
7. Statistical, fiscal, and other records necessary for reporting and accountability required by federal law.

(b) The Office shall comply with the retention and access requirements at 45 CFR 74.53, including the requirement that records be retained for at least seven years.

COOPERATIVE ARRANGEMENTS AND AGREEMENTS

29.8 Cooperation With Other JV-D Tribal and State agencies.

The Klamath Tribes Child Support Enforcement Office shall extend the full rang<: of services available under the Klamath Tribes approved IV-D plan to respond to all requests from, and cooperate with, other Tribal and State IV-D agencies.

29.9 Cooperative Agreements.

The Child Support Enforcement Office may enter into cooperative agreements and/or arrangements with other Tribal and State jurisdictions and agencies to provide for cooperative and efficient child support enforcement services. The Klamath Tribes Tribal Council must approve government-to-government cooperative agreements.

NOTICES AND FINDINGS OF FINANCIAL RESPONSIBILITY

29.10 0 Parties.

The following are parties to child support proceedings in the Klamath Tribal Court or within the Child Support Enforcement Office:

(a) The Klamath Tribes, acting by and through the Child Support Enforcement Office;

(b) Custodial and noncustodial parents, whether natural or adoptive, whose parental rights have not been legally terminated;

(c) Persons with physical custody of a child for whose benefit a suppmi order or an order establishing paternity is sought, is being modified or is bei ng enforced;

(d) A male who is alleged to be the father of a child when an action is i nitiated to establish, modify or enforce a support or paternity order;

(e) Tribal or state agencies that have a vested interest in the outcome of the proceeding in accordance with Child Support Enforcement Office ruJes and procedures. and or by approval of the Klamath Tribal Court;

(f)) Any other person the Klamath Tribal Court has joined as a party pursuant to Court order.

29.1I Proceeding By Minor Parent.

A minor parent, or a guardian or other legal representative of a minor parent may mai ntain a proceeding on behalf of or for the benefit of the minor's child.

29.12 Administrative Notice and Finding of Financial Responsibility.

(a) At any time after the Klamath Tribes is assigned support rights. a public assistance payment is made, or a request for child support enforcement services is made by an individual or another Tribe or State child support enforcement agency, the Manager may, if there is no existing child support order, issue a notice and finding of financial responsibility. The notice shall incl ude the following:

I. Name and date of birth for the child for whom support is to be paid;
2. Notice that the addressee is presumed to be the parent of the child. Where paternity has not already been legally established, the notice shall include the statements set forth at subsection (b).
3. Name of the person or agency having physical custody of the child for whom support is to be paid;
4. Itemization of assumed income and assets held by the parent to whom the notice is directed;
5. Anticipated amount of monthly support for which the parent will be responsible;
6. Anticipated past amount of support for which the parent will be responsible;

7. Whether the parent will be responsible for obtaining health care coverage for the child where it is available to the parent at a reasonable cost:
8. Notice that failure to respond to the Notice may lead to a finding of legal paternity for purposes of child support, where paternity has not already been established;
9. Notice that failure to respond to the Notice may lead to an award of child support and health care coverage being issued against the parent for the amount stated in the notice.
10. Notice that if the parent or other party objects to all or any part of the notice and finding of financial responsibility, the party must submit to the Child Support Enforcement Office, within 30 days of the date of service, a written response setting forth his or her objections.
1J. Notice that if the person does not submit a written objection to Joy paii of the notice, the Manager may enter an order in accordance with the notice and finding of financial responsibility.

(bJ Where paternity has not already been legally established, the notice shall also include the following:

I. The name of the child's other parent;
2. An allegation that the person is the parent of the child for whom suppo1i is owed;
3. The probable time or period of time during which conception took place: and
4. A statement that if the alleged parent or the obligee does not timely send to the Office issuing the notice a written response that denies paternity and requests a hearing, then the Manager, without further notice to the alleged parent, or to the obligee, may enter an order that declares and establishes the alleged parent as the legal parent of the child for child supprn1 purposes.

29.13 No Objection to Administrative Notice and Finding of Financial Responsibility; Issuance of Administrative Order.

Where no timely written response setting forth objections to the notice and finding of financial responsibility, or timely appeal of the second notice and finding of financial responsibility, is received by the Office, the Manager may enter an order in accordance with the notice, and shall include in that order:

(a) Name and birth date of the child for whom support is to be paid:

(b) Finding of legal paternity for purposes of child support;

(c) The amount of monthly support to be paid, with directions on the manner of payment;

(d) The amount of past support to be ordered against the parent;

(e) Whether health care coverage is to be provided for the child;

(f) Name of the person or agency/entity to whom support is to be paid; and

(g) A statement that the property of the parent is subject to collection action, including but not limited to wage withholding, garnishment and liens and execution thereon.

29.14 Timely Objection to Administrative Notice and Finding of Financial Responsibility; Negotiation Conference.

Where the Office receives a timely written response setting forth objections, the Office shall schedule a negotiation conference with the alleged obligor to occur within 15 days from the date that the written objections were received. If the Office and the obligor reach full agreement to the terms of a support award, such agreement shall be entered into the terms of a stipulated order for support. If the Office and obligor do not reach a full agreement as to the amount of child support and other provisions of the notice and finding of financial responsibility (excepting paternity), the Office shall issue a st,cond notice and finding of financial responsibility within 15 days from the date of the negotiation conference. If the Office and the obligor do not reach agreement as to paternity, the Office shall certify the matter to the Tribal Court for hearing on the issues in dispute.

29.15 Second Administrative Notice and Finding of Financial Responsibility.

The second notice and finding of financial responsibility shall include the following:

{a) The infonnation set forth at Section 29.12, subsections {a)(l-7);

(b) Notice that if the parent or other party objects to all or any part of the second notice and finding of financial responsibility, the party must file an appeal with the Tribal Court, copied to the Klamath Tribes Child Support Enforcement Office. within 30 days of the date of service;

(c) Notice that if the parent does not file an appeal within 30 days of the date of service, the Manager may enter an order in accordance with the second notice and

finding of financial responsibility consistent with the requirements of section 29.13.

29.16 Manner of Service.

(a) The following notices and documents must be served by personal service, or by certified mail, return receipt requested, with delivery restricted to the addressee:
1. Notices and findings of financial responsibility served to the obligor:
2. Requests to modify of a child support order;
3. Orders to show cause alleging failure to comply with support order, unless other manner of service is expressly authorized by the Court:

(b) The following notices and documents may be served by regular mail:
I. Notices and findings of financial responsibility served to the obligee.
2. Responses denying paternity and requesting a hearing sent by the Office *to* the obligee.

(c) When service is authorized by regular mail, proof of service may be by notation upon the computerized case record by the person who made the service and shall include the address to which the documents were mailed, a description of the documents and the date that they were mailed. If the documents are returned as undeliverable, that fact shall also be noted on the computerized case record. If nn new address for service by regular mail can be obtained, service shall be by certified mail, return receipt requested or by personal service upon the obligee.

(d) When a case is referred for action to the Klamath Tribes Child Support Enforcement Office from another state or tribe, the Office shall accomplish service on the obligee by sending the documents to the initiating agency, by regular mail. Tue initiating agency shall then make appropriate service upon the obligee.

29.17 Filing Order With Court. Effective as Tribal Court Judgment.

Upon issuing a child support order, or modified child support order, the Manager shall cause a tiue copy of the order to be filed in the office of the Clerk for the Tribal Cou1i, along with a certificate of service of the order upon the parties to the proceeding. Such filing shall render the order effective as a Tribal Court order and judgment.

29.I8 Administrative Child Support Orders Final.

Administrative child support orders and findings of paternity issued in accordance with this Ordinance are final and action by the Office to enforce and collect upon the orders. including anearages, may be taken from the date of issuance of the orders.

29.19 Appeals of Child Support Enforcement Office Action.

(a) Appeals of orders issued by the Office based upon a notice and finding of financial responsibility shall be presented to the Tribal Cou1t within 30 days of the date of service of the notice. All issues presented for appeal to the Cou1i shall be reviewed de novo.

(b) Challenges to the jurisdiction of the Child Support Enforcement Office lti take action for or against a person shall be brought before the Klamath Tribes Tribal Court. The issues of jurisdiction shall be reviewed by the *C*omi de novo.

(c) In any hearing, the Klamath Tribes Rules of Civil Procedure and Rules of Evidence shall apply, to the extent that they are not inconsistent with the provisions of this Ordinance.

PARENTAGE

29.20 Mother-Child Relationship.

A woman is considered the mother of a child for child support purposes where:

(a) The woman gave birth to the child;

(b) The woman legally adopted the child; or

(c) The woman has been adjudicated to be the mother of the child by a cot1ti of competent jurisdiction.

29.21 Father-Child Relationship.

A man is considered the father of a child for child support purposes where:

(a) There is an unrebutted presumption of paternity;

(b) The man and the child's mother have executed an acknowledgment of paternity;

(c) The man legall y adopted the child; or

(cl) The man has been adjudicated to be the father of the child by a coui1 of competent jurisdiction.

29.22 **Establishing Paternity.**

(a) An action to establish paternity for child support purposes may be in it iated for any child up to and including 18 years of age.

(b) In an action to establish child support for a minor child, the Manager ma y enter an order of paternity where there is:

I. Presumption of Paternity. A man is presumed to be the natural father of a child for purposes of child support if:

(i) He and the child's natural mother are or have been married to each other and the child is born during the marriage;

(ii) He and the mother of the child are or were married to each Qther and the child is born within 300 days after the marriage is interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation;

(iii) He and the mother of the child married each other in apparent compliance with the law before the birth of the child, notwithstanding later determination of possibl e invalidi ty of the marriage, and the child was born during the purported mania ge. or within 300 days after it was interrupted or tenni nated by death. annulment, declaration of invalidity, divorce. or d ecree of separation; or

(iv) He and the mother married each other in apparent compl iance w i th the law after the birth of the child, and he vol untarily asserted h is paternity of the child, where such assertion is noted in a record filed with a tribal or state agency charged with mai ntain ing bi1ih records.

2. Voluntary acknowledgment of paternity in accordance with section 29.23.

3. Failure to file an objection to allegation of paternity in a Notice and Finding of Financial Responsibility.

29.23 **Execution of Acknowledgment of Paternity.**

(a) An acknowledgment of paternity must:

I. Be signed under penalty of perjury by the mother and the father by a man seeking to establish his paternity.

2. State that the child whose paternity is being acknowledged does not have a presumed father and does not have another acknowledged or adjudicated father.

3. State whether there has been genetic testing and, if so, that the acknowledging man's claim of patemity is consistent with the results of the testing.
4. State that the signatories understand that the acknowled gment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only in accordance with the provisions set forth in section 29.29.

29.24 Denial of Paternity.

A presumed father may sign a denial of his paternity. The denial is valid only if:

(a) An acknowledgment of paternity signed, or otherwise authenticated. by anotlwr man is filed pursuant to section 29.23; or,

<b) The denial is signed, or otherwise authenticated, under penalty of perjury: and

(cl The presumed father has not previously:
1. Acknowledged his paternity, unless the previous acknowledgment has heen lawfully rescinded or successfully challenged; or
2. Been adjudicated to be the father of the child, unless the previous adjud icat ion has been lawfully vacated, reversed, or successfully challenged.

29.25 Objection to Allegation of Paternity.

(a) Where a man has filed a timely written denial or objection to an Office allegation of paternity, or if the Manager determines that there is a valid issue with respect to paternity of the child, the Manager shall certify the matter to the Tribal Comi for a dete1mination based upon the contents of the file and any evidence which may be produced at trial.

(b) The certification shall include true copies of the notice and find ing of fina ncial responsibility, the return of service, the denial of paternity and req uest fr>r hearing or appeal, and any other relevant papers.

(c) When a party objects to the entry of an order of paternity and blood tests result in a cumulative paternity index of 99 or greater, notwithstanding the party's objection, evidence of the tests, together with testimony of a parent. is a sufficient basis upon which to presume paternity for purposes of establishing temporary child support pending final determination of paternity by the Court.

29.26 01·der for Testing.

(a) The Office may order genetic testing only if there is an allegation of paterni ty stating facts establishing a reasonable probability of the requisite sexual C•Jntact and there is no acknowledged or adjudicated father, or such acknowled gement or adjudication has been lawfully reopened or challenged.

(b) Genetic testing of a child shall not be performed prior to birth without the consent of the mother and the alleged father.

29.27 Requirements for Genetic Testing.

(a) Genetic testing must be of a type reasonably relied upon by experts in the fi eld of genetic testing and performed in a testing laboratory accredited by:
1. The American Association of Blood Banks, or a successor;
2. The American Society for Histocompatibility and lmmunogenetics, or a successor to its functions; or
3. An accrediting body designated by the Federal Secretary of Health and Human Services.

(b) A specimen used in genetic testing may consist of one or more samples. or a combination of samples, of blood, buccal cells, bone, hair, or other bod y ti ssui; or fluid. The specimen used in the testing need not be the same kind for each individual undergoing genetic testing.

(c) Based on the ethnic or racial group of an individual, the testing laboratory shal I determine the databases from which to select frequencies for use in calculation of the probabili ty of paternity. lfthere is disagreement as to the testing laboratory" s choice, the individual objecting may require the testing laboratory to recalculate the probability of paternity using a different ethnic or racial group, or may engage another testing laboratory to perform the calculations.

29.28 Genetic Testing Results.

(a) A man is rebuttably identified as the father of a child if the genetic testing results disclose that:
I. The man has at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and
2. A combined paternity index of at least I00 to I.

(b) A man who is rebuttably identified as the father pursuant to subsection (a) may rebut the genetic testing results only by other genetic testing in accordance with

section 29.27 that excludes the man as the genetic father of the child. or identifies another man as the possible father of the child.

(c) lf more than one man is identified by genetic testing as the possible father of the child. the men may be ordered to submit to further genetic testing to identi fy the genetic father.

29.29 Reopening Issue of Paternity.

(a) No later than one year after an order establishing paternity is entered by the Office, and if no genetic parentage test or challenge by court adjudication has been completed, a party may apply to the Manager to have the issue of patemi1y reopened. Upon receipt of a timely application, the Manager shall order the mother and the male party to submit to parentage tests. The person havi ng physical custody of the child shall submit the child to a parentage test.

(b) Where no genetic parentage test has been completed, a person detenni ned to be the father may apply to the Manager to have the issue reopened for challengi ng determination of paternity after the expiration of one year upon clear evidence n l" fraud, duress, or material mistake of fact.

(c) If a party refuses to submit to the genetic parentage test. the issue of paternity shall be resolved against that party by an appropriate order of the Cou1t upon the motion of the Manager.

(d) Child support paid before an order is vacated under this section shall not he returned to the payer.

29.30 Genetic Testing When Specimens Not Available.

(a) Subject to 29.30(b), if a genetic-testing specimen is not available from a man who may be the father of a child, for good cause and under circumstances considered by the Office or the Court to be just, the following individuals may he orJered to submit specimens for genetic testing:

I. The parents of the man;
2. Brothers and sisters of the man;
3. Other children of the man and their mothers; and
4. Other relatives of the man necessary to complete genetic testi ng.

(b) Issuance of an order under this section requires a finding that a need for genet ic testing outweighs the legitimate interests of the individual sought to be tested.

29.31 Proceeding Before Birth.

A proceeding to determine parentage may be commenced before the bi1th of the chilJ. but may not be concluded until after *the* birth of the child. Genetic testing specimens shall not be collected until after the birth of the child, except under extraordinary circumstances and upon the consent of both the mother and the alleged father.

29.32 Full Faith and Credit.

Full faith and credit shall be given to an acknowledgement of paternity or denial of paternity effective in another tribe or state if the acknowledgment or denial has been signed and is in compliance with the law of the other jurisdiction.

29.33 Establishment of Mother-Child Relationship and Paternity For Child Support Purposes Only.

(a) The establishment of a mother-child relationship, or of paternity made pursuant to this Ordinance shall be for purposes of child support only. The detennination of parental relationships made pursuant to this Ordinance shall not be considered conclusive for purposes of enrollment, the eligibility for which is governed by the Constitution of the Klamath Tribes and the Klamath Tribes Enrollment Ordinance.

(b) This section does not prohibit a party to a parentage proceeding being adjudic<ited by the Tribal Court from joining the issue of paternity for purposes of detennining possible eligibility for enrollment in accordance with Klamath Tribal law and procedures.

RULES OF PROCEDURE AND EVIDENCE

29.34 Rules of Civil Procedure and Evidence.

To the extent not in conflict with the procedures of this Ordinance, the Klamath Tribes Rules of Civil Procedure and Evidence shall apply to all proceedings herein.

29.35 Special Rules of Evidence and Procedure.

(a) Jn any proceeding to establish, enforce, or modify a support obligation, cxtrin:;ic evidence of authenticity is not required for the admission of a computer printout of the Manager that may reflect *the* employment records of a parent, the suppo11 payment record of an obligor, the payment of public assistance, the amounts pnid.

the period during which public assistance was paid, the persons receiving or having received assistance and any other pertinent information, if the printout bears a seal purporting to be that of the Manager and is certified as a true copy by 01iginal, facsimile, or scanned signature of a person purporting to be an employee of the Manager. Printouts certified in accordance with this section constitute piima facie evidence of the existence of the facts stated therein.

(b) The Child Support Enforcement Office may subpoena financial records and other information needed to establish paternity or to establish, modify or enforce a support order. Service of the subpoena may be by certified mail.

(c) Persons or entities that fail to comply with a subpoena issued under this section without good cause are subject to a civil penalty.

(d) The physical presence of the parties may not be required for the establishment. enforcement, or modification of a support order or order determining parentage.

(e) A velified petition, affidavit, or document substantially complying with federally mandated forms and documents incorporated by reference in any of them, not excluded under the hearsay rule if given in person, are admissible in evidence if given under oath by a party or witness residing in the territory of another Tribe or State.

(f) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record is evidence of the facts asse1ted in it, and is admissible to show whether payments were made.

(g) Copies of bills for testing parentage and for prenatal and postnatal health care of the mother and child furnished to the adverse party at least 20 days before trial are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(h)) Documentary evidence transmitted from another Tribe or State to the Klamath Tribes by facsimile, or other means that does not provide an original writing may not be excluded from evidence on an objection based on the means of transmission.

(i) In a proceeding under this Ordinance, the Court may permit a party or witness residing in the territory of another Tribe or State to be deposed or to testify hy telephone, audiovisual means or other electronic means at a designated tnhunal or other location in that Tribe or State. The Court shall cooperate ' ith tribunals of

other Tribes or States in designating an appropriate location for the deposition or testimony.

(j) A privilege against disclosure of communications between spouses does not apply in a proceeding under this Ordinance.

(k) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this Ordinance.

CHILD SUPPORT GUIDELINES

29.36 Establishing Child Support Guidelines.

Klamath Tribes Child Support Guidelines shall be prepared by the Klamath Tiibes Child Support Enforcement Office and presented for review and approval by the Klamath Tribes Tribal Council. The guidelines shall be reviewed and considered for updating at least once every three years to ensure that their application results in the determination of appropriate child support amounts. The guidelines shall make provision for imputed income and establish any specific bases for deviation from the guidelines.

(a) In establishing the guidelines, the Office shall take into consideration the following:

1. All earnings, income and resources of each parent, including real and personal property;
2. The earnings history and potential of each parent;
3. The reasonable necessities of each parent;
4. The educational, physical and emotional needs of the child for whom the support is sought;
5. Preexisting support orders and current dependents;
6. Non-cash contributions including fuel, clothing and child-care:
7. Other criteria that the Office determines to be approp1iate.

(b) All child support shall be computed as a percentage of the combined Gross Income of both parents.

(c) The guidelines may anticipate certain circumstances of deviation from the standard formula upon consideration of, but not limited to the following:

1. Costs of a health benefit plan incurred by the obligor or the obiigee:
2. Social security or apportioned Veteran's benefits paid to the child. ur to a representative payee administering the funds for the child's use and benefit, as a result of the obligor's disability or retirement:

3. Survivors' and Dependents' Education Assistance under 38 U.S.C. Chapter 35 paid to the child, or to a representative payee for the benefit of the child as a result of the obligor's disability or retirement.

29.37 **Guidelines Presumed Correct.**

(a) There is a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award that would result from the application of the guidelines is the correct amount of the child support obligation in any proceeding for the establishment or modification of a child supp01i obligation.

(b) Rebutting the presumption requires a written finding on the record that the application of the guidelines would be unjust, inequitable, unreasonable. inappropriate under the circumstances in a particular case. or not in the best interest of the child. The following factors shall be considered in a challenge to strict adherence to the guidelines:

1. Evidence of other available resources of a parent;
2. Number and needs of other dependents of a parent;
3. Net income of a parent remaining after withholdings required by law or as a condition of employment.
4. Special hardships of a parent, including but not limited to. medical circumstances of a parent and extraordinary visitation transportation costs affecting his or her ability to pay child support;
5. The needs of the child, including extraordinary child care costs due to special needs;
6. Evidence that a child who is subject to the support order is not living with either parent or is a "child attending school."

29.38 **Income.**

(a) Standard for determination of income. All income and resources of each parent's household shall be disclosed and considered when detennining the child suppo1i obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic supprnt obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(b) Ve1ification of income. Tax returns for the proceeding two years and cuITent pay stubs shall be provided to verify income and deductions. Other sufficient information shall be required for income and deductions that do not appear nn ta» returns or paystubs. The Office shall have authority to conduct lawfol discovery

in accordance with the methods set forth in this Ordinance, the Klamath Tribes Child Support Enforcement Rules and Procedures, and the Klamath Tribes Ruks of Civil Procedure, to verify income of the parents.

(c)) Income includes the following:

J. Salaries;
2. Wages;
3. Commissions;
4. Deferred compensation;
5. Contract-rel ated benefits;
6. Dividends;
7. Gifts;
8. Prizes
9. Royalties;
I0. Per capita payments, including payments received as a share of profits due to membership in an Indian tribe, including, but not limited to gaming revenue distributions;
11. Gambling winnings;
l2. Interest;
l3. Trust income;
l4. Severance pay
15. Annuities;
16. Capital gains;
17. Pension or retirement program benefits;
18. Workers' compensation;
19. Unemployment benefits;
20. Spousal maintenance actually received;
2 J. Bonuses;
22. Social security benefits; and
23. Disability insurance benefits.

(d) The following are excluded as sources of income that shall be disclosed. but shall not be included in gross income:

l. Income from a spouse or significant other who is not the parent of the child;
2. Income from other adults in the household;
3. Public assistance payments, including Temporary Assistance for Needy Families, Supplemental Security Income, General Assistance, and food stamps;
4. Foster care payments;
5. Child care assistance benefits.

29.39 Income Deductions.

Deductions will be made from the obligor's total income to assess monthly income from which the child support obligation will be based:

(a) Mandatory union or professional dues;

(bl Court-ordered spousal maintenance payments to the extent actually paid:

(c) Court ordered child support.

29.40 Imputed Income.

Income will be imputed to an obligor parent when the parent is voluntarily unemployed or voluntarily and unreasonably underemployed. The Child Suppo11Guidelines shall set forth the standards for determining and applying imputed income.

29.41 Rcbuttable Presumption of Inability to Pay Child Support When Receiving Certain Assistance Payments.

(a) A parent who is eligible for and is receiving cash payments under Title JV·A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted.

(b) Each month, the Social Services Department shall identify those persons receiving cash payments under the programs listed in subsection (a) that are administered by the Social Services Department and provide that infomiation tn the Manager. Ifbenefits are received from programs listed in subsection (a) of this section that are administered by another tribe, state, or federal agency, tile obligor shall provide the Manager with written documentation of the benefits.

(c)) Within 30 days following identification of persons under subsection (b) of this section, the Office shall provide notice of the presumption to the obligee and obligor and shall inform all parties to the support order that, unless a party objects as provided in subsection (d) of this section, child support shall cease accruing beginning with the support payment due on or after the date the obligor first begins receiving the cash payments and continuing through the last month in which the obligor received the cash payments. The Office shall serve the notice on the obligee by certified mail, return receipt requested, and shall ser\'e th<:
notice on the obligor by first class mail to the obligor.

(d) A party may object to the presumption by sending an objection to the Office within 30 days after the date of service of the notice. The objection must describe the resources of the obligor or other evidence that might rebut the presumption of inability to pay child support. Upon receiving an objection, the Ofticc shall present the case to the Tribal Court for determination as to whether the presumption has been rebutted.

(e) If no objection is made, or if the Tribal Court finds that the presumption has not been rebutted, the Office shall discontinue billing the obligor for the pe1iod of time described in subsection (c) of this section and no arrearage shall accrue for the period during which the obligor is not billed.

(fl Within 30 days after the date the obligor ceases receiving cash payments under a program described in subsection (a) of this section, the Office shall provide notice to all parties to the support order:

1. Specifying the last month in which a cash payment was made:
2. Stating that the payment of those benefits has tenninated and that by operation of law billing and accrual of support resumes.

(g) Receipt by a child support obligor of cash payments under any of the programs listed in subsection (a) of this section shall be sufficient cause to allow the Office or the Tribal Court to issue a credit and satisfaction against child support arrearage for months that the obligor received the cash payments, absent good cause to the contrary.

29.42 **Child Support Payments.**

(a) Each child support order shall specify that the support payments be made either to the Child Support Enforcement Office, or to the person or agency to whom 1s receiving the payments for the child.

(b) In any case where the obligee receives public assistance from the Klamath Tribes or other tribal or state agency, or has previously received public assistance ti1r which assignment has been made and has not been completely satisfied. pa1111ents shall be made to the Child Support Enforcement Office.

(c) The parties affected by the child support order shall immediately info1111 thc Child Support Enforcement Office of any change of address. employment. or of other conditions that may affect the admirustration of the order.

29.43 **Health Insurance.**

(a)) In any order for child support, either the custodial or non-custodial parent or both, shall be required to maintain or provide health insurance coverage, including medical and dental, for the child that is available at a reasonable cost.

I. Insurance premiums for the child shall be added to the base child suppo1i obligation. If the insurance policy covers a person other than the child. only that portion of the premium attributed to the child shall be allocated and added to the base child support obligation.

2. If the obligee pays the medical insurance premi um, the obligor shall pay the obligor's allocated share of the medical insurance premium to the obligee as part of the base child support obligation.

(b) Health insurance coverage required under this section shall remai n in effect until the child support order is modified to remove the coverage requiremen t. tht' coverage expires under the terms of the order, or the child reaches the age of majority or is emancipated, unless there is express language to the contra ry i n the order.

(c) A parent who is required to extend health insurance coverage to a child under this section is liable for any covered health care costs for which the parent recei ves direct payment from an insurer.

(d) This section shall not be construed to limit the authority of the Child Support Enforcement Office, or the Court, to enter or modify support orders containi ng provisions for payment of uninsured health expenses, health care costs, or insurance premi ums which are in addition to and not inconsistent with this section.

(e) A parent ordered to provide health insurance coverage shall provide to t he other parent or the Child Support Enforcement Office proof of such coverage. or proof that such coverage is not available at a reasonable cost within twenty days of the entry of the order or immediately upon notice of unavailability.

(fJ Every order requiring a parent to provide health care or insurance coverage is subject to d irect enforcement as provided under this Ordinance.

29.44 Medical Expenses.

Reasonable and necessary medical, dental, orthodontic, optometric, psychological, or any other physical or mental health expenses of the child incurred by either parent and not reimbursed by insurance may be allocated in the same proportion as the parents' Adjusted Gross Income as separate items that are not added to the base child support

obligation. If reimbursement is required, the other parent shall reimburse the parent who incurs the expense within thirty (30) days of receipt of documentation of the expense.

29.45 Child-Care Expenses.

The Office or the Court may include in a child support order payment of child care expenses. Such payment shall be allocated and paid monthly in the same proportion as base child support where such expenses are necessary for either or both parents to be employed, seek employment, or attend school or training to enhance employment income.

INCOME WITHHOLDING AND GARNISHMENT

29.46 Payment of Support by Income Withholding.

(a) Except as provided in section 29.47, all child support orders established by the Klamath Tribes Child Support Enforcement Office and the Klamath Tribe Trihal Court shall include a provision requiring the obligor to pay suppm1 hy income withholding regardless of whether support enforcement senices are being provided through the Klamath Tribes Child Supp011Enforcement Office.

(b) The Child Support Enforcement Office shall initiate income withholding hy sending the noncustodial parent's employer a notice using the standard Federal income withholding form.

(c) When an arrearage exists and notice of the delinquent amount has been given to the obligor, the Tribal Court, upon application, shall issue a withholding order upon the ex parte request of a person holding supp01t rights or the Child Support Enforcement Office Manager.

(d) In the case of each noncustodial parent against whom a support order is or has been issued or modified, or is being enforced, so much of his or her income must be withheld as is necessary to comply with the order.

(e) In addition to the amount to be withheld to pay the current month's obligation, the amount withheld must include an amount to be applied toward liquidation of any overdue support.

(f) The total amount to be withheld for current month's obligations and overdue support shall not exceed the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. !673(b)).

(g) The only basis for contesting a withholding is an error in the amount of cunent or overdue support, or in the identity of the alleged noncustodial parent.

(h) Improperl y withheld amounts shall promptly be refunded.

(i) Income withholding shall be promptly terminated in cases where there is no longer a current order for support and all arrearages have been satisfied.

29.47 Exceptions To Income Withholding Requirement.

(a) The Manager or the Court shall grant an exception to income withholdi ng req uired under section 29.46 where:

1. Either the custodial or noncustodial parent demonstrates, and the tiihu na l enters a written finding, that there is good cause not to requi re income withholding (Good cause shall include, but not be limited to. com;i di:ra tion of whether the obligor has paid in full any arrears owed, and has cm n pl ied with the terms of previous withholding exceptions); or,
2. A signed written agreement is reached between the noncustodi al and custodial parent, which provides for an alternative arrangement, and is reviewed and entered into the record by the tribunal

(b) Where immediate income withholding is not in place, the income of the noncustodial parent shall become subject to withholding, at the earliest, on t he date on which the payments which the noncustodial parent has failed to make under a child support order are at least equal to the support payable for one month.

29.48 Employer Notification Requirement.

Em ployers must notify the Klamath Tribes Child Support Enforcement Office prompt l y when the noncustodial parent's employment is terminated with the employer. Notification shall include the noncustodial parent's last day of employment. last know n address, and the name and address of the noncustodial parent's new employer i f known. Such notification shall occur regardless of whether termination of employmrn t was voluntary or involuntary.

29.49 Employer Penalties.

(a) Any employer who discharges a noncustodial parent from employment. refuses to employ, or takes disciplinary action against any noncustodial parent bccau;e of withholding pursuant to a child support order shall be fined in the amount of one-thousand dollars ($1,000.00).

(b) An employer that fails to withhold income in accordance with the provisions of the income withholding order shall be liable for the accumulated amount the employer should have withheld from the noncustodial parent's income.

29.50 Processing Withholding Orders.

The Child Support Enforcement Office is responsible for receiving and processing income withholding orders from states, tribes, and other entities, and ensuring that orders are properly and promptly served on employers within the Klamath Tribe's jurisdiction.

29.51 Allocation of Withheld Amounts.

The Child Support Enforcement Office shall allocate withheld amounts across multiple withholding orders to ensure that in no case shall allocation result in a withholding for one of the support obligations not being implemented.

29.52 Garnishment of Per Capita Payments.

(a) Per capita payments may be garnished and applied to child support arrearages unless a child support order has specified tile amount of arrearages owed and the obligor is current with an arrearage payment schedule approved by the Oftice or the Court. Action for garnishment of per capita payments may be brought by any party to the proceeding and shall be done in accordance with this section. Kbmath tribal law, or the law of any other applicable jurisdiction.

(b) Requests for garnishment of Klamath Tribes per capita payments shall be presented to the Tribal Court and shall include the following:

1. A sworn statement by the party, stating the facts authorizing issuance of the garnishment order;
2. A description of the terms of the order requiring payment of support and/or arrearages, and the amount past due, if any; and,
3. A sworn statement that written notice has been provided to the obligor and the Office at least fifteen days prior to the party filing the request for garnishment.

(c) If an obligor is subject to two or more attachments for child support on account of different obligees, and the amount of the per capita payment to be garnished is not sufficient to respond fully to all of tile attachments, the obligor's per capita payment available for garnishment shall be apportioned among the various obligecs equally.

(d) Upon receipt of a request for garnishment of a Tribal Member's per capita payment that complies with this section, the Court shall issue a garnishment order indicating the amount to be garnished. The Clerk of the Court shall forward a copy of the order to all parties to the proceeding within five days of the entry of the order.

(e) Garnishment of Klamath Tribal member per capita payments is limited to 50% of the per capita payment pursuant to the Klamath Tribes Revenue Allocation Plan. This limit shall remain in effect unless and until the Revenue Allocation Plan is amended to provide for a different amount, which revised amount shall he complied with.

MODIFICATION AND TERMINATION

29.53 Grounds for Modification and Termination.

A child support order may be modified or terminated in accordance with the following·

(a) Substantial change of circumstances. Any party to the proceedings may iniltate a request with the Manager for modification or termination of a child support order based upon a substantial change of circumstances. Such proceeding shall be in accordance with the procedures established by the Manager.

1. Except as provided for in subparagraph (2) of this section, if a child support award, or modification of award, is granted based upon substantial change in circumstances, twenty-four months must pass before another request for modification is initiated by the same party based upon a substantial change of circumstances.
2. The Child Support Enforcement Office may initiate proceedings at Jny time to modify an order of child support in cases of substantial!y changed circumstances if public assistance money is being paid to or for the benefit of the child.
3. Voluntary unemployment or voluntary underemployment by itself, is not a substantial change of circumstances.

(b) Emancipation and death. Unless otherwise agreed in w1iting or expressly provided in the order, provisions for the support of a child are tenninated hy emancipation of the child, by the death of the parent obligated to support th<: child, or by the death of the child.

(c) Maniage and re-maniage to each other. Unless expressly provided hy an order nf the Child Support Enforcement Office, or the Court, the support provisions of the order are terminated upon the marriage to each other of parties to a paternity

order, or upon remarriage to each other of the parties to the child support proceeding. Any remaining provisions of the order, including provisions establishing paternity, remain in effect unless otherwise expressly provided in the order.

(d) Compliance with support guidelines. A support order may be modified one year or more after it has been entered without showing a substantial change of circumstances in order to add an adjustment in the order of support consistent with updated Klamath Tribes child support guidelines.

(e) Child is eighteen. A child support order automatically terminates when a child reaches eighteen years of age unless the order provides that continued suppo1t is necessary to assist the child through completion of High School.

({) Child support orders may only be modified as to installments accruing suhsi;qucni to the request for modification unless the request for modification is based upon an automatic termination provision.

29.54 Request to Modify Child Support Order.

Any time the Support Enforcement Office is providing support enforcement services 111 accordance with this Ordinance, the obligor, the obligee, the party holding the support rights or the Manager may submit a request to modify the existing order pursuant to this section.

(a) The request shall be in writing in a form prescribed by the Manager. and shall:
1. set out the reasons for modification;
2. state whether there exists a support order, in any tribal or state jurisdiction. involving the child, other than the order the party is moving to modify:
3. state, to the extent known, whether there is pending in this state or any other jurisdiction any tYPe of support proceeding involving the child:
4. state whether there exists a support order, in any tribal or state jurisdicti on. involving the child, other than the order the party is moving to modify:
5. provide any other information requested by the Manager;
6. provide a certification as to the truth of the infonnation provided in the request under penalty of perjury.

(bl The requesting party shall serve the request upon all patties to the proceeding, including the obligor, the obligee, the party holding the support rights and the Manager.

(c) The nonrequesting parties have 30 days to resolve the matter by stipub1ed agreement or to serve the requesting party and all other parties by regular mail with a written response setting forth objections to the request, and a request for hearing.

(d) Upon receipt of a written response submitted by a nonrequesting pa1ly setting forth objections to the request for modification and requesting a heari ng. the Manager shall forward the request for modification to the Tribal Court for detennination.

(e) When the moving party is the Manager and no objections and request for hea1ing have been served upon the Manager within 30 days of perfecting service of the request on all parties, the Manager may enter an order granting the mod ification request.

(f) When the requesting party is other than the Manager, and no objections and request for hearing have been served upon the moving pa11y or the Manager within 30 days of perfecting service, the requesting party may submi t to 1he Manager a true copy of the request, certificates of service for each partv scTved. along with a certification that no objections or req uest for heari ng have be(!11 served on the requesting party. Upon receipt of the copy of the request. certificates of service and certification from the requesting paiiy, the Manager shall issue an order granting the modification request.

(g) A request for modification made under this section does not stay the Manager from enforcing and collecting upon the existing order unless so ordered by the Comt.

29.55 **Incremental Adjustment.**

If an adjustment to a child support order is modified to increase the award by more than thirty percent and the change would cause a significant hardship, the adjustment maybe implemented in two stages, the first at the time of the entry of the order and the second six months from the entry of the order.

COMPLIANCE AND ENFORCEMENT

29.56 **Failure to Comply With Support Order.**

(a) Ifan obligor fails to comply with a support order, a petition or mollon may be filed by a party to the proceeding to initiate a contempt action in the Court. If the Court finds there is reasonable cause to believe the obligor has failed to compl y

with a support order, the Court may issue an order to show cause requiri ng the obligor to appear at a certain time and place for a hearing, at which time the obligor may appear to show cause why the relief requested should not be grante<l. A copy of the petition or motion shall be served on the obligor along with the order to show cause.

(b) Ifthe obligor contends at the hearing that he or she lacked the means to comply with the support order, the obligor shall establish that he or she ex ercised due diligence in seeking employment, in conserving assets, or otherwise m renderi ng himself or herself able to comply with the order.

(c) The Court retains continuing jurisdiction and may use a contem pt action to enforce a support order until the obligor satisfies all duties of suppoti, incl uding arrearages that accrued pursuant to the support order.

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29.57 Arrearages.

Anearagcs shall include any monies, in-kind or traditional support recognized by the Child Support Enforcement Office to be owed to or on behal f of a child to satisfy a chil d suppoti obligation or to satisfy in whole or in part arrears or delinquency of such obligation. whether denominated as child support, spousal support, or maintenance. Arrearages also include medical and child-care support obligations.

29.58 Compromise and Charge-off.

(a) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to the Klamath Tribes up to the total amount of public assistance paid to •.>r for the benefit of the persons to whom the support was incuned.

(b) The Child Support Enforcement Office may execute offers of compromi ;e of disputed claims or may grant partial or total charge-off of child suppo1i arrears owed to any other tribe or state up to the total amount of public assi stance paid lo or for the benefit of the persons to whom the support was incurred in accordance with agreements entered into between the Klamath Tribes and the tribe or state to which the child support arrearage collection rights have been assigned.

(c) U pon concurrence of the Child Support Enforcement Office, the Office may execute offers of compromise of disputed claims or may grant partial or total

charge-off of child support arrears owed to a parent obligee agreeing to compromise or partial or total charge-off.

(d) The obligor may execute a written extension or waiver of any statute that may bar or impair the collection of the debt and the extension or waiver shall be effective according to its terms.

29.59 Charge-Off Requests

Charge-off requests shall be in writing and in accordance with the rules and procedures established by the Office.

29.60 Factors.

tn considering an offer of compromise, or request for partial or total charge-off, the Child Support Enforcement Office shall consider the following factors:

(a) Error in law or bona fide legal defects that materially diminish chances of collection;

(b) Collection of improperly calculated arrears;

(c) Substantial hardship;

(d) Costs of collection action in the future that are greater than the amount to be charged off;

(e) Settlement from lump sum cash payment that is beneficial to the tribe or state considering future costs of collection and likelihood of collection;

(t) Tribal custom or tradition.

29.61 Substantial Hardship.

When considering a claim of substantial hardship, the Office should consider, but not be limited to the following factors:

(a) The child on whose behalf support is owed is reunited with the obligor parent because the formerly separated parents have reconciled or because the child has been returned to the parent from foster care or care of another.

(b) The obligor parent is aged, blind or disabled and receiving Supplemental Security income, Social Security, or similar benefits.

(c) The mother of the child is seeking charge-off of debt accrued on behalf of a child who was conceived as a result of incest or rape and presents evidence of rape or incest acceptable to KTCSE.

(d) Payment of the arrears interferes with the obligor's payment of current support to a child living outside the home.

(e) The obligor has limited earning potential due to dependence on seasonal employment that is not considered in the child support order. illiteracy or limilcd English speaking proficiency, or other factors limiting employability or earning capacity.

(f) The obligor's past efforts to pay child support and the extent of the obligor's participation in the child's parenting.

(g) The size of the obligor's debt.

(h) The obligor's prospects for increased income and resources.

29.62 Violation of Charge-Off Agreement.

When the obligor violates the terms of a conditional charge-off agreen1ent. the Office, after notice and opportunity for a hearing, may enter an order providing:

(a) Any amount charged off prior to the violation shall remain uncollectible:

(b) Re-establishment of collection for further amounts that would have been charged off if not for the violation;

(c) That the obligor may not reinstate the terms of the charge-off agreement by renewed compliance with its terms, unless the Office agrees to reinstate the conditional charge-off upon a finding of good cause for the violation.

RECOGNITION, ENFORCEMENT AND MODIFICATION OF FOREIGN CHILD SUPPORT ORDERS; EXERCISE OF JURISDICTION IN SIMULTANEOUS PROCEEDINGS

29.63 Full Faith and Credit.

The Kl amath Tribes recognize and shall enforce child support orders issued by other Trihes. Tribal organizations, States and foreign governmental entities in accordance w i th the requirements of the Full Faith and Credit for Child Support Orders Act, 28 U .S.C. 17388, whether such orders are administrative or judicial in nature.

29.64 Requests for Establishment, Recognition and Enforcement.

All requests for establishment, recognition and enforcement of child suppo1i urders and associated proceedings shall be presented by a party to the case, or a Tribe or Stale tribunal, to the Klamath Tribes Child Support Enforcement Office for processi ng.

29.65 **Simultaneous Proceedings.**

ta) The Child Support Enforcement Office and Klamath Tribal Court may exercise jurisdiction to establish a support order if the application for assistance is filed with the Child Support Enforcement Office after a petition or comparable pleadi ng is filed in another Tribe or State tribunal only if:

1. The application for assistance is filed with the Child Suppoti Enforcement Office before the expiration of the time allowed in the other Tribe or State tribunal for filing a responsive pleading challenging the exercise of jurisdiction by the other Tribe or State;

The contesting party timely challenges the exercise of jurisdiction i n the other Tribe or State; and

3. If relevant, the Klamath Tribes is the home T1ibe of the child.

(b) The Klamath Tribes Child Support Enforcement Office and Tribal Court may not exercise jurisdiction to establish a support order if the application for assistance i> filed before a petition or comparable pleading is filed in another Trihe or State i r

I. The application, petition or comparable pleading in the other Tribe or State is filed before the expiration of the time allowed for filing a responsive pleading challenging the exercise of jurisdiction by the Klamath Tribes;

2. The contesting party timely challenges the exercise of jurisdict ion i n the Klamath Tribes; and,

3. If relevant, the other Tribe or State is the home tribe or state of the child.

29.66 **Continuing, Exclusive Jurisdiction to Modify Child Support Order.**

(a) The Klamath Tribes shall have continuing, exclusive jurisdiction over a chil d support order entered by the Klamath Tribes for the benefit of a child who is an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, until all of the parties who are individuals have filed wri tten

consents with the tribunal of another Tribe or State to modify the order and transfer continuing, exclusive jurisdiction.

(b) The Court may not exercise its continuing, exclusive jurisdiction lo modify the order if the order has been lawfully modified by a tribunal of another Tribe or State. TIle Klamath Tribes shall recognize the continuing, exclusive jurisdiction of a tribunal of another Tribe or State that has lawfully issued a child support order.

(c) If a Klamath Tribes child support order is lawfully modified by a ttibuna l of another Tribe or State, the Klamath Tribes loses its continuing, exclusi ve jurisdiction with regard to prospective enforcement of the order issued and may only:

1. Enforce the order that was modified as to amounts accruing before the modification;
2. Enforce nonmodifiable aspects of that order;
3. Provide other appropriate relief for violations of that order that occuned before the effective date of the modification.

(d) A temporary support order issued ex parte or pending resolution of a iu1isdict iunal conflict does not create continuing, exclusive jurisdiction in the issuing tri bunal.

Z9.67 **Initiating and Responding Tribunal of the Klamath Tribes.**

(a) The Klamath Tribes Child Support Enforcement Office shall serve as the initiating tribunal to forward proceedings to another Tribe or State and as a responding tribunal for proceedings initiated in another Tribe or State.

(b) The Child Support Enforcement Office may serve as an initiating tribuna l to request a tribunal of another Tribe or State to enforce or modi ty a support order issued by the Klamath Tribes.

(cl The Klamath Tribes Child Support Enforcement Office, provided it has continuing, excl usive jurisdiction over a support order, shall act as the respondi ng tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the Klamath Tribes does not reside in the issui ng Tribe or Statejurisdiction, in subsequent proceedings, the Klamath Tribes tlibunal may seek assistance to obtain discovery and receive evidence from a tribu nal of another Tribe or State.

(d) If the Klamath Tribes lacks continuing, exclusive jurisdiction over a child support order, or a spousal support order, it may not serve as a responding tri bunal to modify a child support or spousal support order of another Tribe or State.

29.68 **Determination of Controlling Order.**

(a)) !f a proceeding is brought under this Ordinance, and one tribunal has already issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Ordinance, and two or more child support orders have been issued by tribunals of this Tribe or another T1ibe or State with regard to the same obligor and child, the following rules shall be used tL> determine which order to recognize for purposes of continuing, exclusive jurisdiction:

1. If only one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, the order of that tribunal controls and must be recognized.
2. If more than one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, an order issued by a tribunal in the current home tribe or State of the child controls, and must be recognized. but if an order has not been issued in the current home Tribe or State of the child, the order most recently issued controls and must be recognized.
3. If none of the tribunals, except the Klamath Tribes, would have continuing, exclusive jurisdiction under this Ordinance, the Klamath Tribes shall issue a child support order, which controls and must be recognized.

29.69 **Child Support Orders For Two or More Obligees.**

ln responding to multiple registrations or requests for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and differcnt individual obligees, at least one of which was issued by a tribunal of another Tribe <>r State, such orders shall be enforced in the same manner as if multiple orders had been issued.

29.70 **Application of Law of the Klamath Tribes.**

Except as otherwise provided in this Ordinance, a responding tribunal of the Klamath Tribes:

(a) Shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in the Klamath Tribes and may exercise all powers and provide remedies available in those proceedings: and

{b) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of the Klamath Tribes.

29.71 Duties as Initiating Tribunal.

(a) Upon the receipt of an application or petition authorized by this Ordinance, the Child Support Enforcement Office shall forward three copies of the application or petition and its accompanying documents:
1. To the responding tribunal in the responding Tribe or State; or
2. If the identity of the responding tribunal is unknown, to the information agency of the responding Tribe or State with a request that the application or petition and documents be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) As the Initiating tribunal, the Child Support Enforcement Office and/or Klamath Tribal Court shall issue any certificates or other documents, make findings, specify the amount of support sought, and provide any other documents necessary to satisfy the requirements of the responding Tribe or State.

29.72 Duties and Powers as Responding Tribunal.

(a) When the Klamath Tribes Child Support Enforcement Office receives an application, petition or comparable pleading from an initiating tribunal. the Child Support Enforcement Office shall take appropriate action, in accordance with the provisions of this Ordinance, to assist the initiating tribunal, which may include initiation of proceedings to accomplish one or more of the following:
1. Issue or enforce a support order, modify a child support order or take action to establish parentage;
2. Registration of initiating tribunal's order with the Klamath Tribes Tribal Court for recognition and enforcement;
3. Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
4. Order income withholding;
5. Enforce orders by civil contempt;
6. Set aside property for satisfaction of the support order;
7. Place liens and order execution;
8. Order an obligor to keep the tribunal informed of the obligor·s cun-ent residential address, telephone number, employer, address of employment and telephone number at the place of employment:
9. Order the obligor to seek appropriate employment by specified methods:
10. Award reasonable attorney's fees and other fees and costs;

I 1. Garnish per capita payments; and
12. Grant any other available remedy.

(b) The Klamath Tribes responding tribunal shall include in a support order issued pursuant to this section, or in the documents accompanying the order, the calculations on which the support order is based.

(c) Ifthe Klamath Tribes tribunal issues an order pursuant to this section. it shall send a copy of the order by first-class mail to the applicant/petitioner and the respondent, any other party, and to the initiating tribunal, if any.

29.73 Inappropriate Tribunal.

If an application, petition, or comparable pleading is received by the Klamath Trib<'s Child Support Enforcement Office and the Office deems it is an inappropriate tribunal. it shall forward the pleading and accompanying documents to an appropriate tiibunal in another Tribe or State and notify the applicant/petitioner by first-class mail where and when the application or pleading was sent.

29.74 Credit for Payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another Tribe or State must be credited against the amounts accruing or accrued for the same period under a support order issued by the Klamath Tribes.

29.75 I!:mployer's Receipt of Income-Withholding Order of Another Tribe or State.

An income-withholding order issued in another tribe or jurisdiction may be sent by first-class mail to the obligor's employer without first filing a request for assistance with the Klamath Tribes Child Support Enforcement Office.

29.76 Employer's Compliance With Income-Withholding Order of Another Tribe or State.

(a) Upon receipt of the income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued by another jurisdiction that appears regular on its face as if it had been issued the Klamath Tribes.

(c)) Except as otherwise inconsistent with section *29.46(f),* the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order that specify:

1. The duration and the amount of periodic payments of cmTent child support, stated as a sum certain;
2. Medical support, whether in the form of periodic cash payment. stated as J sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
3. The person or agency designated to receive payments and the address to which the payments are to be forwarded;
4. The amount of periodic payments of fees and costs for a suppo1i enforcement agency, the issuing tribunal and the obligee's atl0rney, stated as sums certain;
5. The amount of periodic payments of arrearages and interest on anearages, stated as sums certain.

29.77 **Administrative Enforcement of Order.**

(a) A party seeking assistance to enforce a support order or an income-withholding order, or both, issued by a tribunal of another tribe or jurisdiction shall send the documents required for registering the order set forth at section 29.79 t0 the Klamath Tribes Child Support Enforcement Office.

(b) Upon receipt of the documents, the support enforcement agency shall regiskr the order with the Court, and consider, if appropriate, use of any administrative procedure authorized by the laws of the Klamath Tribes to enforce a support urJcr or an income-withholding order, or both.

29.78 **Contest by Obligor.**

(al An obligor may contest the validity or enforcement of an income-withholding order issued by another Tribe or State and received directly by a Tribal employer in the same manner as if a tribunal of the Klamath Tribes had issued the order.

(b) The obligor shall give notice of any contest to:

J. The support enforcement agency providing services to the obligee.
2. Each employer that has directly received an income-withhold ing order: and
3. The person or agency designated to receive payments in the income-withholding order, or if no person or agency is designated. to the obligcc.

REGISTRATION FOR ENFORCEMENT AND MODIFICATION

29.79 Registration of order for enforcement; procedure.

(a) A support order or income-withholding order of another Tribe or State may be registered in the Klamath Tribes by sending the following documents and information to the Klamath Tribes Child Support Enforcement Office for registering;

1. A letter of transmittal to the Child Support Enforcement Office requesting registration and enforcement;
2. Two copies of all orders to be registered, including any modification of an order;
3. A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;
4. The name of the obligor and, if known:
   i. The obligor's address and social security number;
   ii. The name and address of the obligor's employer and any other source of income of the obligor;
   iii. A description and the location of property of the obligor in this state not exempt from execution; and
   iv. The name and address of the obligee and. if applicable, the agency or person to whom support payments are to be remitted.
5. Any other information requested by the Child Support Enforcement Office.

(b) Upon receipt of a request for registration and necessary supporting documentation, the Child Support Enforcement Office shall cause the order to he registered, together with one copy of the supporting documents and information. regardless of their form.

29.80 Effect of registration for enforcement.

(a) A support order or income-withholding order issued by another tribe or state is registered when the order is filed in the Tribal Court.

(b) A registered order issued in another tribe or jurisdiction is enforceable in the same manner and is subject to the same procedures as an order issued by the Court.

(c) Except as otherwise provided for in this Ordinance, a tribunal of the Klamath Tribes shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

29.81 Choice of Law.

The law of the issuing Tribe or State governs the nature, extent, amount and duration of cu1Tent payments and other obligations of support and the payment of an-earages under the order.

29.82 Notice of Registration of Order.

(a) When a support order or income-withholding order issued in another Ttib or State is registered, the Child Support Enforcement Office shall notify the nonregistering party. Notice must be given by first-class, certified or registered mail or by any means of personal service authorized by the law of the Klamath Tribes. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

I. That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of the Klamath tribes;
That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after the date of mailing or personal service of the notice;

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

4. Of the amount of any alleged arrearages.

(c) Upon registration of an income-withholding order for enforcement. the Child Support Enforcement Office shall notify the obligor's employer pursuant to the income-withholding laws of the Klamath Tribes.

29.83 Procedure to Contest Validity or Enforcement of Registered Order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in the Klamath Tribes shall request a hearing before the Tribal Court within 20 days after the date of mailing or personal service of notice of the registration. The nonregistering party may seek to vacate the registration. to assert any defense to an allegation of noncompliance with the registered orckr. w contest the remedies being sought or the amount of any alleged mTearages.

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

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the Court shall schedule the matter for hearing and give notice to the parties, including the Child Support Enforcement Office, by first-class or electronic mail of the date, time and place of the hea1ing.

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

1. The issuing tribunal lacked personal jurisdiction over the contesti ng party:
2. The order was obtained by fraud;
3. The order has been vacated, suspended, or modified by a later order:
4. The issuing tribunal has stayed the order pending appeal ;
5. There is a defense under the law of the Klamath Tribes to the remedy sought;
6. Full or partial payment has been made;
7. The statute oflimitation precludes enforcement of some or all of the arrearages;

(e) Ifa party presents evidence establishing a full or partial defense to the validity or enforcement of the order, the Court may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. All remedies available may be used to enforce an uncontested portion of the registered order under the laws of the Klamath T1ibes.

(1) If the contesting party does not establish a defense to the validity or enforcement of the order, the Court shall issue an order confirming the order.

29.84 Confirmed Order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could hJvc been asserted at the time of registration.

29.85 Registration For Modification

A party or support enforcement agency seeking to modify, or to modify 11n<l enforce. " child support order issued in another Tribe or State shall register that order with the Klamath Tribes in accordance with the procedures of this Ordinance if the order has not

been registered. A request for modification in accordance with the terms of this Ordinance may be submitted at the same time as the request for registration, or later. The request for modification must specify the grounds.

29.86 Effect of Registration for Modification

(a) The Klamath Tribes may enforce a child support order of another Tribe or State registered for purposes of modification, in the same manner as if the order had been issued by the Klamath Tribes, but the registered order may be modified only if after notice and hearing, the Klamath Tribes Child Support Enforcement Department or Tribal Court finds, in accordance with the provision of this Ordinance, that:

I. The following requirements are met:

1. The child, the individual obligee and the obligor do not reside i11 the issuing tribe orstate;
11. The requesting party who is a nonresident of the T1ibe seeks modification; and
111. The respondent is subject to the personal jurisdiction of the Klamath Tribes; or

2. The child or a party who is an individual is subject to the personal jUiisdiction of the Court and all of the parties who are individuals have filed a written consent in the issuing tribunal for the Klamath Tribes to modify the support order and assume continuing, exclusive jurisdichon over the order.

(b) Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tJibunal of the Klamath Tribes and the order may be enforced and satisfied in the same manner.

(c) The Klamath Tribes may not modify any aspect of a child suppo1i order thut 111av not be modified under the law of the issuing Tribe or State. If two or more tribunals have issued child support orders for the same obligor and child. the order that controls and must be so recognized under the provisions of this Ordinance. establishes aspects of the order that are nonrnodifiable.

(d) On issuance of the order modifying a child support order issued in another Trihe or State, a tribunal of the Klamath Tribes becomes the tribunal having continuing:. exclusive jurisdiction.

DISTRIBUTION OF CHILD SUPPORT COLLECTIONS

29.87 **Prompt disbursement of collections.**

The Klamath Tribes Child Support Enforcement Office shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The Offoc shall furnish to a requesting party or tribunal of another jurisdiction a certified statement by the custodian of the record of the amounts and dates of all payments received.

29.88 **Distribution of child support collections.**

(aJ The Child Support Enforcement Office shall, in a timely manner:

1. Apply collections first to satisfy current support obligations, except that any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Supp01i Enforcement Office must be applied to satisfy child support anearages.
2. Pay all support obligations to the family unless the family is cunently receiving or foITOerly received assistance from the Tribal TANF probTam and there is an assignment of support rights to the Tribe's TANF agency, or the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from another state or tribal IV-D agency.

(b) Cunent recipient of Klamath Tribal TANF. Ifthe family is currently recci vini; assistance from the Tribal TANF program and has assigned support rights to the Tribe and:

I. There is no request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Suppori Enforcement Office may retain collections on behalf of the family. not to exceed the total amount of Tribal TANF paid to the family. Any ren1aining collections shall be paid to the family.

2. There is a request for assistance in collecting suppori on behalf of the family from a State or other Tribal IV-D agency, the Child Suppori Enforcement Office may retain collections, not to exceed the total amount of Tribal TANF paid to the family. Any collections exceeding the total anlount of Klamath Tribal TANF paid to the family shall be distributed i11 one of the following manners:
   (i) The Child Support Enforcement Office may send any remaining collections, as appropriate, to the requesting State lV-D agency for lawful distribution, or to the requesting Tribal JV-D agency for lawful distribution; or
   (ii) The Child Support Enforcement Office may contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to

detennine appropriate distribution under 45 CFR 309.I 15. and distribute collections as directed by the other agency.

(c) Former recipient of Klamath Tribal TANF. lf the family fonnerly received assistance from the Klamath Tribal TANF program and there is an assignment of support rights to the Tribe, and:

1. There is no request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must pay current support and any arrearages owed to the family to the family and may then retain any excess collections, not to exceed the total amount of Tribal TANF paid to the family. Any nmaining collections must be paid to the family.
2. There is a request for assistance in collecting suppo11from a State l'r other Tribal IV-D agency under 45 CFR 309.120, the Child Supp01i Enforcement Office must:
   1. Send all support collected, as appropriate, to the requesting State •.ir other Tribal IV-D agency for lawful distribution; or,
   n. Contact the requesting State IV-D agency to detem1ine appropriate distribution under section 457 of the Act or the other Tribal lV-D agency to determine appropriate distribution under 45 CFR 309.l I 5, and distribute collections as directed by the other agency.

(d) Requests for assistance from State or other Tribal IV-D agency. lfthere is no assignment of support rights to the Klamath Tribes as a condition of receipt of Klamath Tribal TANF and the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from a state or another Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:

1. . Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
2. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal JV-D agency to determine appropriate distribution under 45 CFR 309.I 15, and distribute collections as directed by the other agency.

29.89 Federal income tax refund offset collections.

Any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.

MISCELLANEOUS

29.90 Stays.

Child support orders issued by the Child Support Enforcement Office and/or the Tribal Court may not be stayed pending appeal unless there is substantial evidence showing tlwt the obligor would be irreparably harmed and the obligee would not.

29.91 Mistake of fact.

Except as otherwise expressly provided in this Ordinance, a parent may be prospectively relieved from application of the terms of an administrative order issued by the Child Support Enforcement Office, or an order of the Tribal Court, upon proof of a mistake of fact. the truth of which would render the order void or otherwise invalid. when such mistake is brought forward within one year of its discovery and could not have been discovered before such time with reasonable diligence.

29.92 Cessation of Collection Efforts.

An obligee may request the Child Support Enforcement Office to cease child support collection efforts if it is anticipated that physical or emotional harm will be caused to the parent or caretaker of the child, or to the child for whom support was to have been paid.

29.93 Confidentiality of Records.

Child support records. including paper and electronic records. are confidential and may be disclosed or used only as necessary for the administration of the program. Office employees who disclose or use the contents of any records in violation of this section .1re subject to discipline, up to and including dismissal from employment and civil penalty. Program administration includes, but is not limited to:

(a) Extracting and receiving information from other databases as necessary to perform the Office's responsibilities;

(b) Comparing and sharing information with public and private entities as necessary to perform the Office's responsibilities, to the extent not othe1wise prohibited by applicable Federal Jaw or Klamath Tribes Child Support Enforcement Pro1;ra111 Rules and Procedures;

(c) Exchanging information with tribal or state agencies administering programs under Title XIX and Part A of Title IV of the Social Security Act as necessary for the Office and the tribal and state agencies to perform their responsibilities under state and federal Jaw.

29.94 No Waiver of Sovereign Immunity.

No provision in this Ordinance expressly or impliedly waives the sovereign immunit y of the Klamath Tribes, the Klamath Tribes Judiciary, or its officials, agents or employees. nor is intended to operate as consent to suit.

29.95 Effective Date.

This Ordinance shall be effective upon adoption and approval of the General Council in accordance wi th General Council Resolution.

29.96 Amendment or Repeal.

ll1is Ordinance, and any section, part and word hereof, may be amended or repealed by a Resol ution adopted by majority vote of the Klamath Tribes Tribal Council in accord ance with the Constitution of the Klamath Tribes.

29.97 Severability.

Should any provision set forth in this Plan, or the application thereof to any person nr circumstance, be held invalid for any reason whatsoever by a court of competent jurisdiction, the full remainder of such provision or the application of the provision tu another person or circUillstance shall not be effected thereby.

Certification

We. the undersigned, Tribal Council Chainnan and Secretary of the Klamath Tribes. do hereby ce1iify that at a Tribal Council meeting held on the _24th_ day of_____April_. 2008_ with a quorum pre the Tribal Council took action and duly amended this Plan by a vote of

-2-if-.-- for, opposed, and ;?., abstentions by Gael'irl Council Resol ution 2008 —-

-- O¢:.r/ ——————————————

Joe-,
Chai nnan
fhe Klamath Tribes

Torina Case
Secretary
The Klamath Tri es

LEGISLATI VE HISTORY

I. Title 4. Chapter 29 originall y adopted and approved by General Council on February __23rd_. 2008 pursuant to General Council Resolution No. 2008-00I__.

The Klamath Tribes

Tribal Council

TRIBAL COUNCIL RESOLUTION #2008-ll

TRIBAL COUNCIL RESOLUTION APPROVING THE KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT ORDINANCE AND RECOMMENDING TO GENERAL COUNCIL FOR APPROVAL

Whereas, The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and

Whereas, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & Vll, Section IV E) as approved and/or adopted by the General Council amended on November *25,* 2000; and

Whereas, The Klamath Indian Tribes Restoration Act of August 27, 1986 (P.L. 99-398) restored to federal recognition of the Sovereign Government of the Tribes' Constitution and By-laws; and

Whereas, The Klamath Tribes Tribal Council is the elected governmental body of the Tribes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the general guidance of the General Council (Constitution, Article Vll, Section I; Tribal Council By-laws, Article I); and

Whereas, The Klamath Tribes has a compelling interest in protecting the welfare of Tribal members and children within the jurisdiction of the Klamath Tribes; and

Whereas, The Tribes wishes to establish Tribal law that sets forth a fair and equitable process for establishing, modifying and enforcing child support orders and performing related activities, including establishment of paterni ty and locating noncustodial parents, to help provide for the care of children;

501 Chiloquin Blvd. – P.O. Box 436 – Chiloquin, Oregon 97624
(541) 783-2219 – Fax (541) 783-3706

Now therefore be it resolved, that the Tribal Council approves of the attached Child Support Enforcement Ordinance and directs that it be forwarded to the Klamath General Council for consideration and recommendation of its adoption as Title 4, Chapter 29 of the Klamath Tribes Tribal Code.

Certification

We, the undersigned, Tribal Council Chairman and Secretary of thlamath Tribes, do hereby certify that at a scheduled Tribal Council meeting held on the ..21- day of Nb!W.O.fl'r' , 2008, the Tribal Council duly adopted this resolution by a vote of 1 for, / opposed, and / abstentions.

Joseph Kirk
Chairman
The Klamath Tribes

Torina Case
Secretary
The Klamath Tribes

THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
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THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
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GENERAL PROVISIONS

29.1 Authority.

This Child Support Ordinance is adopted pursuant to the authority vested in the Klamath Tribes General Council by virtue of its inherent sovereignty as an Indian tribal government and Article VI of the Constitution of the Klamath Tribes that provides that the General Council has the power to adopt and enforce ordinances providing for the maintenance oflaw and order, and to exercise all other reserved powers.

29.2 Purpose.

The purpose of this Child Support Enforcement Ordinance is to establish a fair and equitable process for establishing, modifying and enforcing child support orders and performing related activities including establishment of paternity, and locating noncustodial parents, to help provide for the care of children.

29.3 Policy.

It is the policy of the Klamath Tribes that all parents, both custodial and non-custodial, have an equal obligation to support their children. The Tribes are responsible for establishing governmental laws, procedures and guidelines for the equitable allocation of financial responsibility between parents for children's support where necessary.

29.4 Definitions.

For purposes of this Ordinance, the term

(a) "Acknowledged father" means a man who has established a father-child relationship under section 29.21 or 29.22.

(b) "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.

(c) "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term does not include a presumed father, or a man whose parental rights have been terminated or declared not to exist.

(d) "Assignee" means an individual or agency that has been assigned the right to collect child support from the parent obligor.

(e) "Child" means any person under the age of eighteen years. In accordance with the terms of this Ordinance, "child" may also include a person over the age of eighteen years who has not yet completed High School, but shall never mean a person over the age of twenty.

(f) "Child support order" and "child support obligation" mean a judgment, decree, or order, whether temporary, final or subject to modification, issued by a court of competent jurisdiction, tribunal or an administrative agency for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing jurisdiction, or of the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement, and which may include related costs and fees, interest and penalties, income withholding, attorneys' fees, and other relief.

(g) "Certify" means to present to the Tribal Court for determination.

(h) "Custodial parent" means a parent having the care, physical custody and control of a child or children.

(i) "Custodian" means any person who is not a parent, having the care, physical custody and control of a child or children.

(j) "court" means any court having jurisdiction to determine the liability of persons for the support of a child.

(k) "De novo" means independent review and consideration of all issues.

(1) "Determination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity, adjudication by the court, adoption, or other method for determining parentage set forth at sections 29.20 and 29.21.

(m) "Disposable income" means that part of the income of an individual remaining after the deduction from the income of any amounts required to be withheld by law except laws enforcing spousal or child support and any amounts withheld to pay medical or dental insurance premiums.

(n) "Employer" means any entity or individual that engages an individual to perform work or services for which compensation is given.

(o) "General Council" means the General Council of the Klamath Tribes with such powers that exist by virtue of the inherent sovereignty of the Klamath Tribes and as specified in the Constitution of the Klamath Tribes.

(p) "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. The term includes an analysis of one or a combination of the following:

1. Deoxyribunucleic acid; and
2. Blood-group antigens, red-cell antigens, human-leukocyte antigens, serum enzymes, serum proteins or red-cell enzymes.

(s) "Home Tribe or State" means the Tribal Reservation or Indian country of a Tribe, or territory of a State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading or application for support assistance and, if a child is less than six months old, the Tribal Reservation or Indian country of a Tribe, or territory of a State in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence is counted as part of the six-month or other period.

(t) "Income-withholding order" means an order or other legal process directed to an obligor's employer or other third party in possession of a monetary obligation owed to an obligor, as defined by the income-withholding law of the Klamath Tribes, to withhold support form the income of the obligor.

(u) "Initiating Tribe or State" means a Tribe, Tribal organization, or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to the Klamath Tribes Child Support Enforcement Office or Tribal Court.

(v) "Initiating tribunal" means the authorized tribunal in an initiating Tribe, Tribal organization, or State.

(w) "Issuing Tribe or State" means a Tribe or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding Tribe, Tribal organization, or State for purposes of establishment, enforcement, or modification of a child support order.

(x) "Issuing tribunal" means the authorized tribunal in an initiating Tribe, Tribal organization, or State.

(y) "Klamath Indian Reservation" means all lands held in trust by the United States for the benefit of the Klamath Tribes as part of the Klamath Indian Reservation.

(z) "Klamath tribal member" means an individual duly enrolled with the Klamath Tribes in accordance with the Constitution and laws of the Klamath Tribes.

(aa) "Klamath Tribes Child Support Enforcement Office" means the Office established pursuant to section 29.06 and that serves as the Tribal IV-D agency pursuant to *45* CFR Part 309.

(bb) "The Manager" means the Director for the Klamath Tribes Child Support Enforcement Office or any of his/her authorized representatives in child support proceedings.

(cc) "Non-cash" support means support provided to a family in the nature of goods and/or services, rather than in cash, but which nonetheless, has a certain and specific dollar value.

(dd) "Obligee" means an individual or agency to which child support is owed on behalf of a child.

(ee) "Obligor" means a parent who is required to pay child support to a person or agency on behalf of a child.

(ff) "Office" means the Klamath Tribes Child Support Enforcement Office or its equivalent in any other tribal governrnent or state from which a written request for establishment or enforcement of a support obligation is received.

(gg) "Order to withhold" means an order or other legal process that requires a withholder to withhold support from the income of an obligor.

(hh) "Parent" means the natural, biological or adoptive parent of a child.

(ii) "Paternity index" means the likelihood of paternity calculated by computing the ratio between:

1. The likelihood that the tested man is the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is the father of the child; and
2. The likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is not the father of the child.

(jj) "Past support" means the amount of child support that could have been ordered and accumulated as arrears against a parent, where the child was otherwise not supported by the parent and for which period no valid support order was in effect.

(kk) "Probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability.

(ll) "Public assistance" means monetary assistance benefits provided by the Klamath Tribes, any other Indian tribe or state that are paid to or for the benefit of a child. Such payments include cash payments under Title IV-A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program.

(mm) "Register" means to record or file a child support order or judgment determining parentage in the appropriate location for the recording and filing of such order or judgment.

(nn) "Registering tribunal" means a tribunal in which a support order is registered.

(oo) "Responding Tribe or State" means an Indian tribe, Tribal organization or state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating Tribe or State under this Ordinance or a law substantially similar to this Ordinance.

(pp) "Responding tribunal" means the authorized tribunal in a responding Tribe, Tribal organization or State. The responding tribunal for the Klamath Tribes is the Klamath Tribes Child Support Enforcement Office or the Klamath Tribal Court as set forth in this Ordinance.

(qq) "Social Services Department" means the Social Services Department of the Klamath Tribes and programs operated thereunder, including, but not limited to the Temporary Assistance to Needy Families program and the General Assistance program.

(rr) "Tribal Council" means the elected Tribal Council of the Klamath Tribes established under Article VII of the Constitution of the Klamath Tribes;

(ss) "Tribal Court or Court" means the Tribal Court of the Klamath Tribes Judicial Branch established under Article V of the Constitution of the Klamath Tribes.

(tt) "Tribal member" means an individual that is an enrolled Klamath member, or an individual that is enrolled with another federally recognized Indian tribe in accordance with the Jaws of such tribe.

(uu) "Tribe or State" means any Tribe, or Tribal organization within the exterior boundaries of the United States, a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the Jaws of the United States, and any foreign governments, that have enacted a Jaw or established procedures for the issuance and enforcement of child support orders that are substantially similar to Klamath Tribes proceedings for recognition and enforcement of foreign orders.

(vv) "Tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

(ww) "Withholder" means any person who disburses income to the obligor and includes but is not limited to an employer, conservator, trustee or insurer of the obligor.

JURISDICTION

29.5 Jurisdiction.

(a) The Klamath Tribes Tribal Court and Klamath Tribes Child Support Enforcement Office shall have personal and subject matter jurisdiction over the establishment, modification and enforcement of child support and any associated proceedings, including but not limited to establishment of paternity and location of noncustodial parents, related to the purpose for which this Ordinance is established.

(b) The Tribal Court and, as applicable the Klamath Tribes Child Support Enforcement Office, has, but is not limited to, personal jurisdiction over the following, for purposes of enforcing the provisions of this Ordinance, and any associated matters:

1. Enrolled members of the Klamath Tribes;
2. Persons who consent to the jurisdiction of the Court by one of the following:
   (i) Filing an action;
   (ii) Knowingly and voluntarily giving written consent to jurisdiction of the Court;

(iii) Entering a notice of appearance in an action without concurrently filing an express written reservation of issues concerning personal jurisdiction, or filing a motion to dismiss for lack of jurisdiction within 30 days of entering the notice of appearance;

(iv) Appearing in an action without concurrently filing an express written reservation of issues concerning personal jurisdiction, or filing, within 30 days of such appearance, a motion to dismiss for lack of jurisdiction;

3. Persons who are the parent or guardian of an enrolled Klamath tribal member or the parent or guardian of a child eligible for enrollment with the Klamath Tribes;
4. Persons who have legally enforceable rights in any jurisdiction to visitation or custody of a child that is in any way a subject of the proceeding and the child is an enrolled member of the Klamath Tribes, eligible for enrollment with the Klamath Tribes;
5. Persons who are alleged to have engaged in an act of sexual intercourse on the Klamath Indian Reservation with respect to which a child that is either an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, may have been conceived; and/or
6. Applicants for and recipients of Temporary Assistance to Needy Family benefits through the Klamath Tribes, whether the head of household, dependent, or other household member.

(c) Continuing jurisdiction.

1. In every action under this Ordinance where there is jurisdiction, the Tribal Court, and as applicable the Klamath Tribes Child Support Enforcement Office, shall retain continuing jurisdiction over the parties.
2. Consent cannot be withdrawn once given, whether such consent was given expressly or impliedly.
3. Personal jurisdiction cannot be defeated by relocation after jurisdiction is established.
4. Personal jurisdiction cannot be defeated by voluntary relinquishment of enrollment and membership with the Klamath Tribes.

(d) Declination. The Judge of the Tribal Court, at his or her discretion, may decline to assume jurisdiction over one or more parties in the best interest of the Court, or for the convenience of one or more of the parties involved. Any declination shall be made after a hearing on the pertinent facts and shall be supported by written findings of fact specifying the basis for declination. Upon entry of an order of declination of jurisdiction, the matter shall be dismissed in its entirety for lack of jurisdiction.

(e) The Child Support Enforcement Office shall have jurisdiction over persons and entities as provided for in, and as necessary to carry out the provisions of, this Ordinance, for purposes of establishing paternity, establishing, modifying and enforcing child support orders, and performing associated activities. Challenges to the jurisdiction of the Child Support Enforcement Office shall be presented the Child Support Enforcement Office and certified to the Klamath Tribes Tribal Court for decision. Appeals of Tribal Court determinations of jurisdiction may be appealed to the Klamath Tribes Supreme Court in accordance with the laws of the Klamath Tribes.

KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT OFFICE

29.6 Establishment of Child Support Enforcement Office.

(a) There is established a Child Support Enforcement Office to be operated under the Klamath Tribes Judicial Branch. This Office is the Klamath Tribes Tribal IV-D agency pursuant to 45 CFR Part 309 and is the entity primarily responsible for providing support enforcement services described in this Ordinance. The Child Support Enforcement Office shall provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, and location of noncustodial parents, as appropriate, with respect to any child, obligee or obligor determined to be within the jurisdiction of the Klamath Tribes.

(b) When responsible for providing support enforcement services, and there is sufficient evidence available to support the action to be taken, the Child Support Enforcement Office shall perform, but not be limited, to the following:

1. Carrying out the policy and traditions of the Klamath Tribes regarding child support obligations;
2. Operating the Klamath Tribes Tribal IV-D Program;
3. Accepting all applications for IV-D services and promptly providing IV-D services;
4. Establishing child support orders in compliance with Klamath Tribes child support guidelines and formulas;
5. Establishing paternity for child support purposes;
6. Initiating and responding to child support modification proceedings and proceedings to terminate support orders;
7. Enforcing established child support orders and obligations;
8. Establishing and enforcing obligations to provide medical insurance coverage for children;

9. Establishing and enforcing obligations to provide child care expenses for children;
10. Collecting child support;
11. Accepting offers of compromise or partial or total charge-off of child support arrearages;
12. Distributing child support payments;
13. Maintaining a full record of collection and disbursements made;
14. Establish or participate in a service to locate parents utilizing all sources of available information and records, and to the extent available, the Federal Parent Locator Service;
15. Maintaining program records in accordance with section 29.07 (a).
16. Establishing procedures for safeguards applicable to all confidential information handled by the Child Support Enforcement Office, that are designed to protect the privacy rights of the parties, including:
    1. Safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, to locate a noncustodial parent, or to establish, modify, or enforce support, or to make or enforce a child custody determination;
    11. Prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered;
    111. Prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the Office has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child.
    1v. Any mandatory notification to the Secretary that the Office has reasonable evidence of domestic violence or child abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child.
    v. Procedures in accordance with any specific safeguarding regulations applicable to Tribal IV-D programs.
    v1. Procedures under which sanctions must be imposed for the unauthorized use or disclosure of information.
17. Publicizing the availability of child support enforcement services available, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained, and publicizing the availability of and encouraging the use of procedures for voluntary establishment of paternity and child support;
18. Ensuring compliance with the provisions of applicable federal laws, including, but not limited to 42 U.S.C. 651 to 669 and 45 C.F.R. Chapter III.

(c) The Child Support Enforcement Office shall establish rules, procedures and forms for carrying out its responsibilities and authority under this ordinance. All parties to child support proceedings shall comply with the rules and procedures adopted by the Office, and shall utilize the proper forms prepared by the Office.

29.7 Record Maintenance.

(a) The Child Support Enforcement Office shall maintain all records necessary for the proper and efficient operation of the program, including records regarding:
1. Applications for child support services;
2. Efforts to locate noncustodial parents;
3. Actions taken to establish paternity and obtain and enforce support;
4. Amounts owed, arrearages, amounts and sources of support collections, and the distribution of such collections;
5. Office IV-D program expenditures;
6. Any fees charged and collected, if applicable; and
7. Statistical, fiscal, and other records necessary for reporting and accountability required by federal law.

(b) The Office shall comply with the retention and access requirements at 45 CFR 74.53, including the requirement that records be retained for at least seven years.

COOPERATIVE ARRANGEMENTS AND AGREEMENTS

29.8 Cooperation With Other IV-D Tribal and State agencies.

The Klamath Tribes Child Support Enforcement Office shall extend the full range of services available under the Klamath Tribes approved *N-D* plan to respond to all requests from, and cooperate with, other Tribal and State IV-D agencies.

29.9 Cooperative Agreements.

The Child Support Enforcement Office may enter into cooperative agreements and/or arrangements with other Tribal and Statejurisdictions and agencies to provide for cooperative and efficient child support enforcement services. The Klamath Tribes Tribal Council must approve government-to-government cooperative agreements.

NOTICES AND FINDINGS OF FINANCIAL RESPONSIBILITY

29.10 Parties.

The following are parties to child support proceedings inthe Klamath Tribal Court or within the Child Support Enforcement Office:

(a) The Klamath Tribes, acting by and through the Child Support Enforcement Office;

(b) Custodial and noncustodial parents, whether natural or adoptive, whose parental rights have not been legally terminated;

(c) Persons with physical custody of a child for whose benefit a support order or an order establishing paternity is sought, is being modified or is being enforced;

(d) A male who is alleged to be the father of a child when an action is initiated to establish, modify or enforce a support or paternity order;

(e) Tribal or state agencies that have a vested interest in the outcome of the proceeding in accordance with Child Support Enforcement Office rules and procedures, and or by approval of the Klamath Tribal Court;

(f) Any other person the Klamath Tribal Court has joined as a party pursuant to Court order.

29.11 Proceeding By Minor Parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.

29.12 Administrative Notice and Finding of Financial Responsibility.

(a) At any time after the Klamath Tribes is assigned support rights, a public assistance payment is made, or a request for child support enforcement services is made by an individual or another Tribe or State child support enforcement agency, the Manager may, if there is no existing child support order, issue a notice and finding of financial responsibility. The notice shall include the following:

1. Name and date of birth for the child for whom support is to be paid;
2. Notice that the addressee is presumed to be the parent of the child. Where paternity has not already been legally established, the notice shall include the statements set forth at subsection (b).
3. Name of the person or agency having physical custody of the child for whom support is to be paid;

4. Itemization of assumed income and assets held by the parent to whom the notice is directed;
5. Anticipated amount of monthly support for which the parent will be responsible;
6. Anticipated past amount of support for which the parent will be responsible;
7. Whether the parent will be responsible for obtaining health care coverage for the child where it is available to the parent at a reasonable cost;
8. Notice that failure to respond to the Notice may lead to a finding oflegal paternity for purposes of child support, where paternity has not already been established;
9. Notice that failure to respond to the Notice may lead to an award of child support and health care coverage being issued against the parent for the amount stated in the notice.
10. Notice that if the parent or other party objects to all or any part of the notice and finding of financial responsibility, the party must submit to the Child Support Enforcement Office, within 30 days of the date of service, a written response setting forth his or her objections.
11. Notice that if the person does not submit a written objection to any part of the notice, the Manager may enter an order in accordance with the notice and finding of financial responsibility.

(b) Where paternity has not already been legally established, the notice shall also include the following:

1. The name of the child's other parent;
2. An allegation that the person is the parent of the child for whom support is owed;
3. The probable time or period of time during which conception took place; and
4. A statement that if the alleged parent or the obligee does not timely send to the Office issuing the notice a written response that denies paternity and requests a hearing, then the Manager, without further notice to the alleged parent, or to the obligee, may enter an order that declares and establishes the alleged parent as the legal parent of the child for child support purposes.

29.13 No Objection to Administrative Notice and Finding of Financial Responsibility; Issuance of Administrative Order.

Where no timely written response setting forth objections to the notice and finding of financial responsibility, or timely appeal of the second notice and finding of financial

responsibility, is received by the Office, the Manager may enter an order in accordance with the notice, and shall include in that order:

(a) Name and birth date of the child for whom support is to be paid;

(b) Finding of legal paternity for purposes of child support;

(c) The amount of monthly support to be paid, with directions on the manner of payment;

(d) The amount of past support to be ordered against the parent;

(e) Whether health care coverage is to be provided for the child;

(f) Name of the person or agency/entity to whom support is to be paid; and

(g) A statement that the property of the parent is subject to collection action, including but not limited to wage withholding, garnishment and liens and execution thereon.

29.14 Timely Objection to Administrative Notice and Finding of Financial Responsibility; Negotiation Conference.

Where the Office receives a timely written response setting forth objections, the Office shall schedule a negotiation conference with the alleged obligor to occur within 15 days from the date that the written objections were received. If the Office and the obligor reach full agreement to the terms of a support award, such agreement shall be entered into the terms of a stipulated order for support. If the Office and obligor do not reach a full agreement as to the amount of child support and other provisions of the notice and finding of financial responsibility (excepting paternity), the Office shall issue a second notice and finding of financial responsibility within 15 days from the date of the negotiation conference. If the Office and the obligor do not reach agreement as to paternity, the Office shall certify the matter to the Tribal Court for hearing on the issues in dispute.

29.15 Second Administrative Notice and Finding of Financial Responsibility.

The second notice and finding of financial responsibility shall include the following:

(a) The information set forth at Section 29.12, subsections (a)(l-7), and (b);

(b) Notice that if the parent or other party objects to all or any part of the second notice and finding of financial responsibility, the party must file an appeal with the Tribal Court, copied to the Klamath Tribes Child Support Enforcement Office, within 30 days of the date of service;

(c) Notice that if the parent does not file an appeal within 30 days of the date of service, the Manager may enter an order in accordance with the second notice and finding of financial responsibility consistent with the requirements of section 29.13.

29.16 Manner of Service.

(a) The following notices and documents must be served by personal service, or by certified mail, return receipt requested, with delivery restricted to the addressee:
1. Notices and findings of financial responsibility served to the obligor;
2. Requests to modify of a child support order;
3. Orders to show cause alleging failure to comply with support order, unless other manner of service is expressly authorized by the Court;

(b) The following notices and documents may be served by regular mail:
1. Notices and findings of financial responsibility served to the obligee.
2. Responses denying paternity and requesting a hearing sent by the Office to the obligee.

(c) When service is authorized by regular mail, proof of service may be by notation upon the computerized case record by the person who made the service and shall include the address to which the documents were mailed, a description of the documents and the date that they were mailed. If the documents are returned as undeliverable, that fact shall also be noted on the computerized case record. If no new address for service by regular mail can be obtained, service shall be by certified mail, return receipt requested or by personal service upon the obligee.

(d) When a case is referred for action to the Klamath Tribes Child Support Enforcement Office from another state or tribe, the Office shall accomplish service on the obligee by sending the documents to the initiating agency, by regular mail. The initiating agency shall then make appropriate service upon the obligee.

29.17 Filing Order With Court. Effective as Tribal Court Judgment.

Upon issuing a child support order, or modified child support order, the Manager shall cause a true copy of the order to be filed in the office of the Clerk for the Tribal Court,

along with a certificate of service of the order upon the parties to the proceeding. Such filing shall render the order effective as a Tribal Court order and judgment.

29.18 Administrative Child Support Orders Final

Administrative child support orders and findings of paternity issued in accordance with this Ordinance are final and action by the Office to enforce and collect upon the orders, including arrearages, may be taken from the date of issuance of the orders.

29.19 Appeals of Child Support Enforcement Office Action.

(a) Appeals of orders issued by the Office based upon a notice and finding of financial responsibility shall be presented to the Tribal Court within 30 days of the date of service of the notice. All issues presented for appeal to the Court shall be reviewed de novo.

(b) Challenges to the jurisdiction of the Child Support Enforcement Office to take action for or against a person shall be brought before the Klamath Tribes Tribal Court. The issues of jurisdiction shall be reviewed by the Court de novo.

(c) In any hearing, the Klamath Tribes Rules of Civil Procedure and Rules of Evidence shall apply, to the extent that they are not inconsistent with the provisions of this Ordinance.

PARENTAGE

29.20 Mother-Child Relationship.

A woman is considered the mother of a child for child support purposes where:

(a) The woman gave birth to the child;

(b) The woman legally adopted the child; or

(c) The woman has been adjudicated to be the mother of the child by a court of competent jurisdiction.

29.21 Father-Child Relationship.

A man is considered the father of a child for child support purposes where:

(a) There is an unrebutted presumption of paternity;

(b) The man and the child's mother have executed an acknowledgment of paternity;

(c) The man legally adopted the child; or

(d) The man has been adjudicated to be the father of the child by a court of competent jurisdiction.

29.22 Establishing Paternity.

(a) An action to establish paternity for child support purposes may be initiated for any child up to and including 18 years of age.

(b) In an action to establish child support for a minor child, the Manager may enter an order of paternity where there *is:*

I. Presumption of Paternity. A man is presumed to be the natural father of a child for purposes of child support if:

(i) He and the child's natural mother are or have been married to each other and the child is born during the marriage;

(ii) He and the mother of the child are or were married to each other and the child is born within 300 days after the marriage is interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation;

(iii) He and the mother of the child married each other in apparent compliance with the law before the birth of the child, notwithstanding later determination of possible invalidity of the marriage, and the child was born during the purported marriage, or within 300 days after it was interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation; or

(iv) He and the mother married each other in apparent compliance with the law after the birth of the child, and he voluntarily asserted his paternity of the child, where such assertion is noted in a record filed with a tribal or state agency charged with maintaining birth records.

2. Voluntary acknowledgment of paternity in accordance with section 29.23.

3. Failure to file an objection to allegation of paternity in a Notice and Finding of Financial Responsibility.

29.23 Execution of Acknowledgment of Paternity.

(a) An acknowledgment of paternity must:

1. Be signed under penalty of perjury by the mother and the father by a man seeking to establish his paternity.
2. State that the child whose paternity is being acknowledged does not have a presumed father and does not have another acknowledged or adjudicated father.
3. State whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing.
4. State that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only in accordance with the provisions set forth in section 29.29.

29.24 Denial of Paternity.

A presumed father may sign a denial of his paternity. The denial is valid only if:

(a) An acknowledgment of paternity signed, or otherwise authenticated, by another man is filed pursuant to section 29.23; or,

(b) The denial is signed, or otherwise authenticated, under penalty of perjury; and

(c) The presumed father has not previously:
I. Acknowledged his paternity, unless the previous acknowledgment has been lawfully rescinded or successfully challenged; or
2. Been adjudicated to be the father of the child, unless the previous adjudication has been lawfully vacated, reversed, or successfully challenged.

29.25 Objection to Allegation of Paternity.

(a) Where a man has filed a timely written denial or objection to an Office allegation of paternity, or if the Manager determines that there is a valid issue with respect to paternity of the child, the Manager shall certify the matter to the Tribal Court for a determination based upon the contents of the file and any evidence which may be produced at trial.

(b) The certification shall include true copies of the notice and finding of financial responsibility, the return of service, the denial of paternity and request for hearing or appeal, and any other relevant papers.

(c) When a party objects to the entry of an order of paternity and blood tests result in a cumulative paternity index of 99 or greater, notwithstanding the party's

objection, evidence of the tests, together with testimony of a parent, is a sufficient basis upon which to presume paternity for purposes of establishing temporary child support pending final determination of paternity by the Court.

29.26 Order for Testing.

(a) The Office may order genetic testing only if there is an allegation of paternity stating facts establishing a reasonable probability of the requisite sexual contact and there is no acknowledged or adjudicated father, or such acknowledgement or adjudication has been lawfully reopened or challenged.

(b) Genetic testing of a child shall not be performed prior to birth without the consent of the mother and the alleged father.

29.27 Requirements for Genetic Testing.

(a) Genetic testing must be of a type reasonably relied upon by experts in the field of genetic testing and performed in a testing laboratory accredited by:
1. The American Association of Blood Banks, or a successor;
2. The American Society for Histocompatibility and Immunogenetics, or a successor to its functions; or
3. An accrediting body designated by the Federal Secretary of Health and Human Services.

(b) A specimen used in genetic testing may consist of one or more samples, or a combination of samples, of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen used in the testing need not be the same kind for each individual undergoing genetic testing.

(c) Based on the ethnic or racial group of an individual, the testing laboratory shall determine the databases from which to select frequencies for use in calculation of the probability of paternity. If there is disagreement as to the testing laboratory's choice, the individual objecting may require the testing laboratory to recalculate the probability of paternity using a different ethnic or racial group, or may engage another testing laboratory to perform the calculations.

29.28 Genetic Testing Results.

(a) A man is rebuttably identified as the father of a child if the genetic testing results disclose that:

1. The man has at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and
2. A combined paternity index of at least 100 to 1.

(b) A man who is rebuttably identified as the father pursuant to subsection (a) may rebut the genetic testing results only by other genetic testing in accordance with section 29.27 that excludes the man as the genetic father of the child, or identifies another man as the possible father of the child.

(c) If more than one man is identified by genetic testing as the possible father of the child, the men may be ordered to submit to further genetic testing to identify the genetic father.

29.29 Reopening Issue of Paternity.

(a) No later than one year after an order establishing paternity is entered by the Office, and if no genetic parentage test or challenge by court adjudication has been completed, a party may apply to the Manager to have the issue of paternity reopened. Upon receipt of a timely application, the Manager shall order the mother and the male party to submit to parentage tests. The person having physical custody of the child shall submit the child to a parentage test.

(b) Where no genetic parentage test has been completed, a person determined to be the father may apply to the Manager to have the issue reopened for challenging determination of paternity after the expiration of one year upon clear evidence of fraud, duress, or material mistake of fact.

(c) If a party refuses to submit to the genetic parentage test, the issue of paternity shall be resolved against that party by an appropriate order of the Court upon the motion of the Manager.

(d) Child support paid before an order is vacated under this section shall not be returned to the payer.

29.30 Genetic Testing When Specimens Not Available.

(a) Subject to 29.30(b), if a genetic-testing specimen is not available from a man who may be the father of a child, for good cause and under circumstances considered by the Office or the Court to be just, the following individuals may be ordered to submit specimens for genetic testing:

1. The parents of the man;

2. Brothers and sisters of the man;
3. Other children of the man and their mothers; and
4. Other relatives of the man necessary to complete genetic testing.

(b) Issuance of an order under this section requires a finding that a need for genetic testing outweighs the legitimate interests of the individual sought to be tested.

29.31 Proceeding Before Birth.

A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after the birth of the child. Genetic testing specimens shall not be collected until after the birth of the child, except under extraordinary circumstances and upon the consent of both the mother and the alleged father.

29.32 Full Faith and Credit.

Full faith and credit shall be given to an acknowledgement of paternity or denial of paternity effective in another tribe or state if the acknowledgment or denial has been signed and is in compliance with the law of the other jurisdiction.

29.33 Establishment of Mother-Child Relationship and Paternity For Child Support Purposes Only.

(a) The establishment of a mother-child relationship, or of paternity made pursuant to this Ordinance shall be for purposes of child support only. The determination of parental relationships made pursuant to this Ordinance shall not be considered conclusive for purposes of enrollment, the eligibility for which is governed by the Constitution of the Klamath Tribes and the Klamath Tribes Enrollment Ordinance.

(b) This section does not prohibit a party to a parentage proceeding being adjudicated by the Tribal Court from joining the issue of paternity for purposes of determining possible eligibility for enrollment in accordance with Klamath Tribal law and procedures.

RULES OF PROCEDU RE AND EVIDENCE

29.34 Rules of Civil Procedure and Evidence.

To the extent not in conflict with the procedures of this Ordinance, the Klamath Tribes Rules of Civil Procedure and Evidence shall apply to all proceedings herein.

29.35 Special Rules of Evidence and Procedure.

(a) In any proceeding to establish, enforce, or modify a support obligation, extrinsic evidence of authenticity is not required for the admission of a computer printout of the Manager that may reflect the employment records of a parent, the support payment record of an obligor, the payment of public assistance, the amounts paid, the period during which public assistance was paid, the persons receiving or having received assistance and any other pertinent information, if the printout bears a seal purporting to be that of the Manager and is certified as a true copy by original, facsimile, or scanned signature of a person purporting to be an employee of the Manager. Printouts certified in accordance with this section constitute prima facie evidence of the existence of the facts stated therein.

(b) The Child Support Enforcement Office may subpoena financial records and other information needed to establish paternity or to establish, modify or enforce a support order. Service of the subpoena may be by certified mail.

(c) Persons or entities that fail to comply with a subpoena issued under this section without good cause are subject to a civil penalty.

(d) The physical presence of the parties may not be required for the establishment, enforcement, or modification of a support order or order determining parentage.

(e) A verified petition, affidavit, or document substantially complying with federally mandated forms and documents incorporated by reference in any of them, not excluded under the hearsay rule if given in person, are admissible in evidence if given under oath by a party or witness residing in the territory of another Tribe or State.

(f) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record is evidence of the facts asserted in it, and is admissible to show whether payments were made.

(g) Copies of bills for testing parentage and for prenatal and postnatal health care of the mother and child furnished to the adverse party at least 20 days before trial are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(h) Documentary evidence transmitted from another Tribe or State to the Klamath Tribes by facsimile, or other means that does not provide an original writing may

not be excluded from evidence on an objection based on the means of transmission.

(i) In a proceeding under this Ordinance, the Court may permit a party or witness residing in another the territory of another Tribe or State to be deposed or to testify by telephone, audiovisual means or other electronic means at a designated tribunal or other location in that Tribe or State. The Court shall cooperate with tribunals of other Tribes or States in designating an appropriate location for the deposition or testimony.

(j) A privilege against disclosure of communications between spouses does not apply in a proceeding under this Ordinance.

(k) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this Ordinance.

CHILD SUPPORT GUIDELINES

29.36 Establishing Child Support Guidelines.

Klamath Tribes Child Support Guidelines shall be prepared by the Klamath Tribes Child Support Enforcement Office and presented for review and approval by the Klamath Tribes Tribal Council. The guidelines shall be reviewed and considered for updating at least once every three years to ensure that their application results in the determination of appropriate child support amounts. The guidelines shall make provision for imputed income and establish any specific bases for deviation from the guidelines.

(a) In establishing the guidelines, the Office shall take into consideration the following:

1. All earnings, income and resources of each parent, including real and personal property;
2. The earnings history and potential of each parent;
3. The reasonable necessities of each parent;
4. The educational, physical and emotional needs of the child for whom the support is sought;
5. Preexisting support orders and current dependents;
6. Non-cash contributions including fuel, clothing and child-care;
7. Other criteria that the Office determines to be appropriate.

(b) All child support shall be computed as a percentage of the combined Gross Income of both parents.

(c) The guidelines may anticipate certain circumstances of deviation from the standard formula upon consideration of, but not limited to the following:

1. Costs of a health benefit plan incurred by the obligor or the obligee;
2. Social security or apportioned Veteran's benefits paid to the child, or to a representative payee administering the funds for the child's use and benefit, as a result of the obligor's disability or retirement;
3. Survivors' and Dependents' Education Assistance under 38 U.S.C. Chapter 35 paid to the child, or to a representative payee for the benefit of the child as a result of the obligor's disability or retirement.

29.37 Guidelines Presumed Correct.

(a) There is a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award that would result from the application of the guidelines is the correct amount of the child support obligation in any proceeding for the establishment or modification of a child support obligation.

(b) Rebutting the presumption requires a written finding on the record that the application of the guidelines would be unjust, inequitable, unreasonable, inappropriate under the circumstances in a particular case, or not in the best interest of the child. The following factors shall be considered in a challenge to strict adherence to the guidelines:

I. Evidence of other available resources of a parent;
2. Number and needs of other dependents of a parent;
3. Net income of a parent remaining after withholdings required by law or as a condition of employment.
4. Special hardships of a parent, including but not limited to, medical circumstances of a parent and extraordinary visitation transportation costs affecting his or her ability to pay child support;
5. The needs of the child, including extraordinary child care costs due to special needs;
6. Evidence that a child who is subject to the support order is not living with either parent or is a "child attending school."

29.38 Income.

(a) Standard for determination of income. All income and resources of each parent's household shall be disclosed and considered when determining the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support

obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(b) Verification of income. Tax returns for the proceeding two years and current pay stubs shall be provided to verify income and deductions. Other sufficient information shall be required for income and deductions that do not appear on tax returns or paystubs. The Office shall have authority to conduct lawful discovery in accordance with the methods set forth in this Ordinance, the Klamath Tribes Child Support Enforcement Rules and Procedures, and the Klamath Tribes Rules of Civil Procedure, to verify income of the parents.

(c) Income includes the following:

1. Salaries;
2. Wages;
3. Commissions;
4. Deferred compensation;
5. Contract-related benefits;
6. Dividends;
7. Gifts;
8. Prizes
9. Royalties;
10. Per capita payments, including payments received as a share of profits due to membership in an Indian tribe, including, but not limited to gaming revenue distributions;
11. Gambling winnings;
12. Interest;
13. Trust income;
14. Severance pay
15. Annuities;
16. Capital gains;
17. Pension or retirement program benefits;
18. Workers' compensation;
19. Unemployment benefits;
20. Spousal maintenance actually received;
21. Bonuses;
22. Social security benefits; and
23. Disability insurance benefits.

(d) The following are excluded as sources of income that shall be disclosed, but shall not be included in gross income:

1. Income from a spouse or significant other who is not the parent of the child;

2. Income from other adults in the household;
3. Public assistance payments, including Temporary Assistance for Needy Families, Supplemental Security Income, General Assistance, and food stamps;
4. Foster care payments;
5. Child care assistance benefits.

29.39 Income Deductions.

Deductions will be made from the obligor's total income to assess monthly income from which the child support obligation will be based:

(a) Mandatory union or professional dues;

(b) Court-ordered spousal maintenance payments to the extent actually paid;

(c) Court ordered child support.

29.40 Imputed Income.

Income will be imputed to an obligor parent when the parent is voluntarily unemployed or voluntarily and unreasonably underemployed. The Child Support Guidelines shall set forth the standards for determining and applying imputed income.

29.41 Rebuttable Presumption of Inability to Pay Child Support When Receiving Certain Assistance Payments.

(a) A parent who is eligible for and is receiving cash payments under Title IV-A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted.

(b) Each month, the Social Services Department shall identify those persons receiving cash payments under the programs listed in subsection (a) that are administered by the Social Services Department and provide that information to the Manager. If benefits are received from programs listed in subsection (a) of this section that are administered by another tribe, state, or federal agency, the obligor shall provide the Manager with written documentation of the benefits.

(c) Within 30 days following identification of persons under subsection (b) of this section, the Office shall provide notice of the presumption to the obligee and

obligor and shall inform all parties to the support order that, unless a party objects as provided in subsection (d) of this section, child support shall cease accruing beginning with the support payment due on or after the date the obligor first begins receiving the cash payments and continuing through the last month in which the obligor received the cash payments. The Office shall serve the notice on the obligee by certified mail, return receipt requested, and shall serve the notice on the obligor by first class mail to the obligor.

(d) A party may object to the presumption by sending an objection to the Office within 30 days after the date of service of the notice. The objection must describe the resources of the obligor or other evidence that might rebut the presumption of inability to pay child support. Upon receiving an objection, the Office shall present the case to the Tribal Court for determination as to whether the presumption has been rebutted.

(e) If no objection is made, or if the Tribal Court finds that the presumption has not been rebutted, the Office shall discontinue billing the obligor for the period of time described in subsection (c) of this section and no arrearage shall accrue for the period during which the obligor is not billed.

(f) Within 30 days after the date the obligor ceases receiving cash payments under a program described in subsection (a) ofthis section, the Office shall provide notice to all parties to the support order:

1. Specifying the last month in which a cash payment was made;
2. Stating that the payment of those benefits has terminated and that by operation of law billing and accrual of support resumes.

(g) Receipt by a child support obligor of cash payments under any of the programs listed in subsection (a) ofthis section shall be sufficient cause to allow the Office or the Tribal Court to issue a credit and satisfaction against child support arrearage for months that the obligor received the cash payments, absent good cause to the contrary.

29.42 Child Support Payments.

(a) Each child support order shall specify that the support payments be made either to the Child Support Enforcement Office, or to the person or agency to whom is receiving the payments for the child.

(b) In any case where the obligee receives public assistance from the Klamath Tribes or other tribal or state agency, or has previously received public assistance for

which assignment has been made and has not been completely satisfied, payments shall be made to the Child Support Enforcement Office.

(c) The parties affected by the child support order shall immediately inform the Child Support Enforcement Office of any change of address, employment, or of other conditions that may affect the administration of the order.

29.43 Health Insurance.

(a) In any order for child support, either the custodial or non-custodial parent, or both, shall be required to maintain or provide health insurance coverage, including medical and dental, for the child that is available at a reasonable cost.

I. Insurance premiums for the child shall be added to the base child support obligation. If the insurance policy covers a person other than the child, only that portion of the premium attributed to the child shall be allocated and added to the base child support obligation.

2. If the obligee pays the medical insurance premium, the obligor shall pay the obligor's allocated share of the medical insurance premium to the obligee as part of the base child support obligation.

(b) Health insurance coverage required under this section shall remain in effect until the child support order is modified to remove the coverage requirement, the coverage expires under the terms of the order, or the child reaches the age of majority or is emancipated, unless there is express language to the contrary in the order.

(c) A parent who is required to extend health insurance coverage to a child under this section is liable for any covered health care costs for which the parent receives direct payment from an insurer.

(d) This section shall not be construed to limit the authority of the Child Support Enforcement Office, or the Court, to enter or modify support orders containing provisions for payment of uninsured health expenses, health care costs, or insurance premiums which are in addition to and not inconsistent with this section.

(e) A parent ordered to provide health insurance coverage shall provide to the other parent or the Child Support Enforcement Office proof of such coverage, or proof that such coverage is not available at a reasonable cost within twenty days of the entry of the order or immediately upon notice of unavailability.

(t) Every order requiring a parent to provide health care or insurance coverage is subject to direct enforcement as provided under this Ordinance.

29.44 Medical Expenses.

Reasonable and necessary medical, dental, orthodontic, optometric, psychological, or any other physical or mental health expenses of the child incurred by either parent and not reimbursed by insurance may be allocated in the same proportion as the parents' Adjusted Gross Income as separate items that are not added to the base child support obligation. Ifreimbursement is required, the other parent shall reimburse the parent who incurs the expense within thirty (30) days of receipt of documentation of the expense.

29.45 Child-Care Expenses.

The Office or the Court may include in a child support order payment of child care expenses. Such payment shall be allocated and paid monthly in the same proportion as base child support where such expenses are necessary for either or both parents to be employed, seek employment, or attend school or training to enhance employment mcome.

INCOME WITHHOLDING AND GARNISHMENT

29.46 Payment of Support by Income Withholding.

(a) Except as provided in section 29.47, all child support orders established by the Klamath Tribes Child Support Enforcement Office and the Klamath Tribes Tribal Court shall include a provision requiring the obligor to pay support by income withholding regardless of whether support enforcement services are being provided through the Klamath Tribes Child Support Enforcement Office.

(b) The Child Support Enforcement Office shall initiate income withholding by sending the noncustodial parent's employer a notice using the standard Federal income withholding form.

(c) When an arrearage exists and notice of the delinquent amount has been given to the obligor, the Tribal Court, upon application, shall issue a withholding order upon the ex parte request of a person holding support rights or the Child Support Enforcement Office Manager.

(d) In the case of each noncustodial parent against whom a support order is or has been issued or modified, or is being enforced, so much of his or her income must be withheld as is necessary to comply with the order.

(e) In addition to the amount to be withheld to pay the current month's obligation, the amount withheld must include an amount to be applied toward liquidation of any overdue support.

(f) The total amount to be withheld for current month's obligations and overdue support shall not exceed the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 *V.S.C.* 1673(b)).

(g) The only basis for contesting a withholding is an error in the amount of current or overdue support, or in the identity of the alleged noncustodial parent.

(h) Improperly withheld amounts shall promptly be refunded.

(i) Income withholding shall be promptly terminated in cases where there is no longer a current order for support and all arrearages have been satisfied.

29.47 Exceptions To Income Withholding Requirement.

(a) The Manager or the Court shall grant an exception to income withholding required under section 29.46 where:

I. Either the custodial or noncustodial parent demonstrates, and the tribunal enters a written finding, that there is good cause not to require income withholding (Good cause shall include, but not be limited to, consideration of whether the obligor has paid in full any arrears owed, and has complied with the terms of previous withholding exceptions); or,

2. A signed written agreement is reached between the noncustodial and custodial parent, which provides for an alternative arrangement, and is reviewed and entered into the record by the tribunal

(b) Where immediate income withholding is not in place, the income of the noncustodial parent shall become subject to withholding, at the earliest, on the date on which the payments which the noncustodial parent has failed to make under a child support order are at least equal to the support payable for one month.

29.48 Employer Notification Requirement.

Employers must notify the Klamath Tribes Child Support Enforcement Office promptly when the noncustodial parent's employment is terminated with the employer. Notification shall include the noncustodial parent's last day of employment, last known address, and the name and address of the noncustodial parent's new employer if known.

Such notification shall occur regardless of whether termination of employment was voluntary or involuntary.

29.49 Employer Penalties.

(a) Any employer who discharges a noncustodial parent from employment, refuses to employ, or takes disciplinary action against any noncustodial parent because of withholding pursuant to a child support order shall be fined in the amount of one-thousand dollars ($1,000.00).

(b) An employer that fails to withhold income in accordance with the provisions of the income withholding order shall be liable for the accumulated amount the employer should have withheld from the noncustodial parent's income.

29.50 Processing Withholding Orders.

The Child Support Enforcement Office is responsible for receiving and processing income withholding orders from states, tribes, and other entities, and ensuring that orders are properly and promptly served on employers within the Klamath Tribe's jurisdiction.

29.51 Allocation of Withheld Amounts.

The Child Support Enforcement Office shall allocate withheld amounts across multiple withholding orders to ensure that in no case shall allocation result in a withholding for one of the support obligations not being implemented.

29.52 Garnishment of Per Capita Payments.

(a) Per capita payments may be garnished and applied to child support arrearages unless a child support order has specified the amount of arrearages owed and the obligor is current with an arrearage payment schedule approved by the Office or the Court. Action for garnishment of per capita payments may be brought by any party to the proceeding and shall be done in accordance with this section, Klamath tribal law, or the law of any other applicable jurisdiction.

(b) Requests for garnishment of Klamath Tribes per capita payments shall be presented to the Tribal Court and shall include the following:

I. A sworn statement by the party, stating the facts authorizing issuance of the garnishment order;

2. A description of the terms of the order requiring payment of support and/or arrearages, and the amount past due, if any; and,

3. A sworn statement that written notice has been provided to the obligor and the Office at least fifteen days prior to the party filing the request for garnishment.

(c) If an obligor is subject to two or more attachments for child support on account of different obligees, and the amount of the per capita payment to be garnished is not sufficient to respond fully to all of the attachments, the obligor's per capita payment available for garnishment shall be apportioned among the various obligees equally.

(d) Upon receipt of a request for garnishment of a Tribal Member's per capita payment that complies with this section, the Court shall issue a garnishment order indicating the amount to be garnished. The Clerk of the Court shall forward a copy of the order to all parties to the proceeding within five days of the entry of the order.

(e) Garnishment of Klamath Tribal member per capita payments is limited to 50% of the per capita payment pursuant to the Klamath Tribes Revenue Allocation Plan. This limit shall remain in effect unless and until the Revenue Allocation Plan is amended to provide for a different amount, which revised amount shall be complied with.

MODIFICATION AND TERMINATION

29.53 Grounds for Modification and Termination.

A child support order may be modified or terminated in accordance with the following:

(a) Substantial change of circumstances. Any party to the proceedings may initiate a request with the Manager for modification or termination of a child support order based upon a substantial change of circumstances. Such proceeding shall be in accordance with the procedures established by the Manager.

1. Except as provided for in subparagraph (2) of this section, if a child support award, or modification of award, is granted based upon substantial change in circumstances, twenty-four months must pass before another request for modification is initiated by the same party based upon a substantial change of circumstances.
2. The Child Support Enforcement Office may initiate proceedings at any time to modify an order of child support in cases of substantially changed circumstances if public assistance money is being paid to or for the benefit of the child.

3. Voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

(b) Emancipation and death. Unless otherwise agreed in writing or expressly provided in the order, provisions for the support of a child are terminated by emancipation of the child, by the death of the parent obligated to support the child, or by the death of the child.

(c) Marriage and re-marriage to each other. Unless expressly provided by an order of the Child Support Enforcement Office, or the Court, the support provisions of the order are terminated upon the marriage to each other of parties to a paternity order, or upon remarriage to each other of the parties to the child support proceeding. Any remaining provisions of the order, including provisions establishing paternity, remain in effect unless otherwise expressly provided in the order.

(d) Compliance with support guidelines. A support order may be modified one year or more after it has been entered without showing a substantial change of circumstances in order to add an adjustment in the order of support consistent with updated Klamath Tribes child support guidelines.

(e) Child is eighteen. A child support order automatically terminates when a child reaches eighteen years of age unless the order provides that continued support is necessary to assist the child through completion of High School.

(f) Child support orders may only be modified as to installments accruing subsequent to the request for modification unless the request for modification is based upon an automatic termination provision.

29.54 Request to Modify Child Support Order.

Any time the Support Enforcement Office is providing support enforcement services in accordance with this Ordinance, the obligor, the obligee, the party holding the support rights or the Manager may submit a request to modify the existing order pursuant to this section.

(a) The request shall be in writing in a form prescribed by the Manager, and shall:
   I. set out the reasons for modification;
   2. state the telephone number and address of the party requesting modification;
   3. state, to the extent known, whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child;

4. state whether there exists a support order, in any tribal or state jurisdiction, involving the child, other than the order the party is moving to modify;
S. provide any other information requested by the Manager;
6. provide a certification as to the truth of the information provided in the request under penalty of perjury.

(b) The requesting party shall serve the request upon all parties to the proceeding, including the obligor, the obligee, the party holding the support rights and the Manager.

(c) The nonrequesting parties have 30 days to resolve the matter by stipulated agreement or to serve the requesting party and all other parties by regular mail with a written response setting forth objections to the request, and a request for hearing.

(d) Upon receipt of a written response submitted by a nonrequesting party setting forth objections to the request for modification and requesting a hearing, the Manager shall forward the request for modification to the Tribal Court for determination.

(e) When the moving party is the Manager and no objections and request for hearing have been served upon the Manager within 30 days of perfecting service of the request on all parties, the Manager may enter an order granting the modification request.

(f) When the requesting party is other than the Manager, and no objections and request for hearing have been served upon the moving party or the Manager within 30 days of perfecting service, the requesting party may submit to the Manager a true copy of the request, certificates of service for each party served, along with a certification that no objections or request for hearing have been served on the requesting party. Upon receipt of the copy of the request, certificates of service and certification from the requesting party, the Manager shall issue an order granting the modification request.

(g) A request for modification made under this section does not stay the Manager from enforcing and collecting upon the existing order unless so ordered by the Court.

29.55 Incremental Adjustment.

If an adjustment to a child support order is modified to increase the award by more than thirty percent and the change would cause a significant hardship, the adjustment may be

may be implemented in two stages, the first at the time of the entry of the order and the second six months from the entry of the order.

COMPLIANCE AND ENFORCEMENT

29.56 Failure to Comply With Support Order.

(a) If an obligor fails to comply with a support order, a petition or motion may be filed by a party to the proceeding to initiate a contempt action in the Court. If the Court finds there is reasonable cause to believe the obligor has failed to comply with a support order, the Court may issue an order to show cause requiring the obligor to appear at a certain time and place for a hearing, at which time the obligor may appear to show cause why the relief requested should not be granted. A copy of the petition or motion shall be served on the obligor along with the order to show cause.

(b) If the obligor contends at the hearing that he or she lacked the means to comply with the support order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the order.

(c) The Court retains continuing jurisdiction and may use a contempt action to enforce a support order until the obligor satisfies all duties of support, including arrearages that accrued pursuant to the support order.

ARREARAGES

29.57 Arrearages.

Arrearages shall include any monies, in-kind or traditional support recognized by the Child Support Enforcement Office to be owed to or on behalf of a child to satisfy a child support obligation or to satisfy in whole or in part arrears or delinquency of such obligation, whether denominated as child support, spousal support, or maintenance. Arrearages also include medical and child-care support obligations.

29.58 Compromise and Charge-off.

(a) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to the Klamath Tribes up to the total amount of public assistance paid to or for the benefit of the persons to whom the support was incurred.

(b) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to any other tribe or state up to the total amount of public assistance paid to or for the benefit of the persons to whom the support was incurred in accordance with agreements entered into between the Klamath Tribes and the tribe or state to which the child support arrearage collection rights have been assigned.

(c) Upon concurrence of the Child Support Enforcement Office, the Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to a parent obligee agreeing to compromise or partial or total charge-off.

(d) The obligor may execute a written extension or waiver of any statute that may bar or impair the collection of the debt and the extension or waiver shall be effective according to its terms.

29.59 Charge-Off Requests

Charge-off requests shall be in writing and in accordance with the rules and procedures established by the Office.

29.60 Factors.

In considering an offer of compromise, or request for partial or total charge-off, the Child Support Enforcement Office shall consider the following factors:

(a) Error in law or bona fide legal defects that materially diminish chances of collection;

(b) Collection of improperly calculated arrears;

(c) Substantial hardship;

(d) Costs of collection action in the future that are greater than the amount to be charged off;

(e) Settlement from lump sum cash payment that is beneficial to the tribe or state considering future costs of collection and likelihood of collection;

(t) Tribal custom or tradition.

29.61 Substantial Hardship.

When considering a claim of substantial hardship, the Office should consider, but not be limited to the following factors:

(a) The child on whose behalf support is owed is reunited with the obligor parent because the formerly separated parents have reconciled or because the child has been returned to the parent from foster care or care of another.

(b) The obligor parent is aged, blind or disabled and receiving Supplemental Security income, Social Security, or similar benefits.

(c) The mother of the child is seeking charge-off of debt accrued on behalf of a child who was conceived as a result of incest or rape and presents evidence of rape or incest acceptable to KTCSE.

(d) Payment of the arrears interferes with the obligor's payment of current support to a child living outside the home.

(e) The obligor has limited earning potential due to dependence on seasonal employment that is not considered in the child support order, illiteracy or limited English speaking proficiency, or other factors limiting employability or earning capacity.

(f) The obligor's past efforts to pay child support and the extent of the obligor's participation in the child's parenting.

(g) The size of the obligor's debt.

(h) The obligor's prospects for increased income and resources.

29.62 Violation of Charge-Off Agreement.

When the obligor violates the terms of a conditional charge-off agreement, the Office, after notice and opportunity for a hearing, may enter an order providing:

(a) Any amount charged off prior to the violation shall remain uncollectible;

(b) Re-establishment of collection for further amounts that would have been charged off if not for the violation;

(c) That the obligor may not reinstate the terms of the charge-off agreement by renewed compliance with its terms, unless the Office agrees to reinstate the conditional charge-off upon a finding of good cause for the violation.

RECOGNITION, ENFORCEMENT AND MODIFICATION OF FOREIGN CHILD SUPPORT ORDERS; EXERCISE OF JURISDICTION IN SIMULTANEOUS PROCEEDINGS

29.63 Full Faith and Credit.

The Klamath Tribes recognize and shall enforce child support orders issued by other Tribes, Tribal organizations, States and foreign governmental entities in accordance with the requirements of the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B, whether such orders are administrative or judicial in nature.

29.64 Requests for Establishment, Recognition and Enforcement.

All requests for establishment, recognition and enforcement of child support orders and associated proceedings shall be presented by a party to the case, or a Tribe or State tribunal, to the Klamath Tribes Child Support Enforcement Office for processing.

29.65 Simultaneous Proceedings.

(a) The Child Support Enforcement Office and Klamath Tribal Court may exercise jurisdiction to establish a support order if the application for assistance is filed with the Child Support Enforcement Office after a petition or comparable pleading is filed in another Tribe or State tribunal only if:

1. The application for assistance is filed with the Child Support Enforcement Office before the expiration of the time allowed in the other Tribe or State tribunal for filing a responsive pleading challenging the exercise of jurisdiction by the other Tribe or State;
2. The contesting party timely challenges the exercise of jurisdiction in the other Tribe or State; and
3. If relevant, the Klamath Tribes is the home Tribe of the child.

(b) The Klamath Tribes Child Support Enforcement Office and Tribal Court may not exercise jurisdiction to establish a support order if the application for assistance is filed before a petition or comparable pleading is filed in another Tribe or State if:

1. The application, petition or comparable pleading in the other Tribe or State is filed before the expiration of the time allowed for filing a responsive pleading challenging the exercise of jurisdiction by the Klamath Tribes;

2. The contesting party timely challenges the exercise of jurisdiction in the Klamath Tribes; and,
3. If relevant, the other Tribe or State is the home tribe or state of the child.

29.66 Continuing, Exclusive Jurisdiction to Modify Child Support Order.

(a) The Klamath Tribes shall have continuing, exclusive jurisdiction over a child support order entered by the Klamath Tribes for the benefit of a child who is an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, until all of the parties who are individuals have filed written consents with the tribunal of another Tribe or State to modify the order and transfer continuing, exclusive jurisdiction.

(b) The Court may not exercise its continuing, exclusive jurisdiction to modify the order if the order has been lawfully modified by a tribunal of another Tribe or State. The Klamath Tribes shall recognize the continuing, exclusive jurisdiction of a tribunal of another Tribe or State that has lawfully issued a child support order.

(c) If a Klamath Tribes child support order is lawfully modified by a tribunal of another Tribe or State, the Klamath Tribes loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued and may only:
1. Enforce the order that was modified as to amounts accruing before the modification;
2. Enforce nonmodifiable aspects of that order;
3. Provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

(d) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

29.67 Initiating and Responding Tribunal of the Klamath Tribes.

(a) The Klamath Tribes Child Support Enforcement Office shall serve as the initiating tribunal to forward proceedings to another Tribe or State and as a responding tribunal for proceedings initiated in another Tribe or State.

(b) The Child Support Enforcement Office may serve as an initiating tribunal to request a tribunal of another Tribe or State to enforce or modify a support order issued by the Klamath Tribes.

(c) The Klamath Tribes Child Support Enforcement Office, provided it has continuing, exclusive jurisdiction over a support order, shall act as the responding tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the Klamath Tribes does not reside in the issuing Tribe or State jurisdiction, in subsequent proceedings, the Klamath Tribes tribunal may seek assistance to obtain discovery and receive evidence from a tribunal of another Tribe or State.

(d) If the Klamath Tribes lacks continuing, exclusive jurisdiction over a child support order, or a spousal support order, it may not serve as a responding tribunal to modify a child support or spousal support order of another Tribe or State.

29.68 Determination of Controlling Order.

(a) If a proceeding is brought under this Ordinance, and one tribunal has already issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Ordinance, and two or more child support orders have been issued by tribunals of this Tribe or another Tribe or State with regard to the same obligor and child, the following rules shall be used to determine which order to recognize for purposes of continuing, exclusive jurisdiction:

1. If only one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, the order of that tribunal controls and must be recognized.
2. If more than one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, an order issued by a tribunal in the current home tribe or State of the child controls, and must be recognized, but if an order has not been issued in the current home Tribe or State of the child, the order most recently issued controls and must be recognized.
3. If none of the tribunals, except the Klamath Tribes, would have continuing, exclusive jurisdiction under this Ordinance, the Klamath Tribes shall issue a child support order, which controls and must be recognized.

29.69 Child Support Orders For Two or More Obligees.

In responding to multiple registrations or requests for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another Tribe or

State, such orders shall be enforced in the same manner as if multiple orders had been issued.

29.70 Application of Law of the Klamath Tribes.

Except as otherwise provided in this Ordinance, a responding tribunal of the Klamath Tribes:

(a) Shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in the Klamath Tribes and may exercise all powers and provide remedies available in those proceedings; and

(b) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of the Klamath Tribes.

29.71 Duties as Initiating Tribunal.

(a) Upon the receipt of an application or petition authorized by this Ordinance, the Child Support Enforcement Office shall forward three copies of the application or petition and its accompanying documents:
1. To the responding tribunal in the responding Tribe or State; or
2. If the identity of the responding tribunal is unknown, to the information agency of the responding Tribe or State with a request that the application or petition and documents be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) As the Initiating tribunal, the Child Support Enforcement Office and/or Klamath Tribal Court shall issue any certificates or other documents, make findings, specify the amount of support sought, and provide any other documents necessary to satisfy the requirements of the responding Tribe or State.

29.72 Duties and Powers as Responding Tribunal.

(a) When the Klamath Tribes Child Support Enforcement Office receives an application, petition or comparable pleading from an initiating tribunal, the Child Support Enforcement Office shall take appropriate action, in accordance with the provisions of this Ordinance, to assist the initiating tribunal, which may include initiation of proceedings to accomplish one or more of the following:
1. Issue or enforce a support order, modify a child support order or take action to establish parentage;

2. Registration of initiating tribunal 's order with the Klamath Tribes Tribal Court for recognition and enforcement;
3. Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
4. Order income withholding;
5. Enforce orders by civil contempt;
6. Set aside property for satisfaction of the support order;
7. Place liens and order execution;
8. Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment and telephone number at the place of employment;
9. Order the obligor to seek appropriate employment by specified methods;
10. Award reasonable attorney's fees and other fees and costs;
11. Garnish per capita payments; and
12. Grant any other available remedy.

(b) The Klamath Tribes responding tribunal shall include in a support order issued pursuant to this section, or in the documents accompanying the order, the calculations on which the support order is based.

(c) Ifthe Klamath Tribes tribunal issues an order pursuant to this section, it shall send a copy of the order by first-class mail to the applicant/petitioner and the respondent, any other party, and to the initiating tribunal, if any.

29.73 Inappropriate Tribunal.

Ifan application, petition, or comparable pleading is received by the Klamath Tribes Child Support Enforcement Office and the Office deems it is an inappropriate tribunal, it shall forward the pleading and accompanying documents to an appropriate tribunal in another Tribe or State and notify the applicant/petitioner by first-class mail where and when the application or pleading was sent.

29.74 Credit for Payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another Tribe or State must be credited against the amounts accruing or accrued for the same period under a support order issued by the Klamath Tribes.

29.75 Employer's Receipt of Income-Withholding Order of Another Tribe or State.

An income-withholding order issued in another tribe or jurisdiction may be sent by first-class mail to the obligor's employer without first filing a request for assistance with the Klamath Tribes Child Support Enforcement Office.

29.76 Employer's Compliance With Income-Withholding Order of Another Tribe or State.

(a) Upon receipt of the income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued by another jurisdiction that appears regular on its face as if it had been issued the Klamath Tribes.

(c) Except as otherwise inconsistent with section 29.46(f), the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order that specify:

1. The duration and the amount of periodic payments of current child support, stated as a sum certain;
2. Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
3. The person or agency designated to receive payments and the address to which the payments are to be forwarded;
4. The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal and the obligee's attorney, stated as sums certain;
5. The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

29.77 Administrative Enforcement of Order.

(a) A party seeking assistance to enforce a support order or an income-withholding order, or both, issued by a tribunal of another tribe or jurisdiction shall send the documents required for registering the order set forth at section 29.79 to the Klamath Tribes Child Support Enforcement Office.

(b) Upon receipt of the documents, the support enforcement agency shall register the order with the Court, and consider, if appropriate, use of any administrative procedure authorized by the laws of the Klamath Tribes to enforce a support order or an income-withholding order, or both.

29.78 Contest by Obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued by another Tribe or State and received directly by a Tribal employer in the same manner as if a tribunal of the Klamath Tribes had issued the order.

(b) The obligor shall give notice of any contest to:
1. The support enforcement agency providing services to the obligee.
2. Each employer that has directly received an income-withholding order; and
3. The person or agency designated to receive payments in the income-withholding order, or if no person or agency is designated, to the obligee.

REGISTRATION FOR ENFORCEMENT AND MODIFICATION

29.79 Registration of order for enforcement; procedure.

(a) A support order or income-withholding order of another Tribe or State may be registered in the Klamath Tribes by sending the following documents and information to the Klamath Tribes Child Support Enforcement Office for registering;
I. A letter of transmittal to the Child Support Enforcement Office requesting registration and enforcement;
2. Two copies of all orders to be registered, including any modification of an order;
3. A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;
4. The name of the obligor and, if known:
   t. The obligor's address and social security number;
   11. The name and address of the obligor's employer and any other source of income of the obligor;
   iii. A description and the location of property of the obligor in this state not exempt from execution; and
   1v. The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.
5. Any other information requested by the Child Support Enforcement Office.

(b) Upon receipt of a request for registration and necessary supporting documentation, the Child Support Enforcement Office shall cause the order to be

registered, together with one copy of the supporting documents and information, regardless of their form.

29.80 Effect of registration for enforcement.

(a) A support order or income-withholding order issued by another tribe or state is registered when the order is filed in the Tribal Court.

(b) A registered order issued in another tribe or jurisdiction is enforceable in the same manner and is subject to the same procedures as an order issued by the Court.

(c) Except as otherwise provided for in this Ordinance, a tribunal of the Klamath Tribes shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

29.81 Choice of Law.

The law of the issuing Tribe or State governs the nature, extent, amount and duration of current payments and other obligations of support and the payment of arrearages under the order.

29.82 Notice of Registration of Order.

(a) When a support order or income-withholding order issued in another Tribe or State is registered, the Child Support Enforcement Office shall notify the nonregistering party. Notice must be given by first-class, certified or registered mail or by any means of personal service authorized by the law of the Klamath Tribes. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

1. That a registered order is enforceable as of the date ofregistration in the same manner as an order issued by a tribunal of the Klamath tribes;
2. That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after the date of mailing or personal service of the notice;
3. That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and
4. Of the amount of any alleged arrearages.

(c) Upon registration of an income-withholding order for enforcement, the Child Support Enforcement Office shall notify the obligor's employer pursuant to the income-withholding laws of the Klamath Tribes.

29.83 Procedure to Contest Validity or Enforcement of Registered Order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in the Klamath Tribes shall request a hearing before the Tribal Court within 20 days after the date of mailing or personal service of notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, to contest the remedies being sought or the amount of any alleged arrearages.

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

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the Court shall schedule the matter for hearing and give notice to the parties, including the Child Support Enforcement Office, by first-class or electronic mail of the date, time and place of the hearing.

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

1. The issuing tribunal lacked personal jurisdiction over the contesting party;
2. The order was obtained by fraud;
3. The order has been vacated, suspended, or modified by a later order;
4. The issuing tribunal has stayed the order pending appeal;
5. There is a defense under the law of the Klamath Tribes to the remedy sought;
6. Full or partial payment has been made;
7. The statute of limitation precludes enforcement of some or all of the arrearages;
8. The order was issued in violation of the Indian Child Welfare Act.

(e) If a party presents evidence establishing a full or partial defense to the validity or enforcement of the order, the Court may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. All remedies available may be used to enforce an uncontested portion of the registered order under the laws of the Klamath Tribes.

(f) If the contesting party does not establish a defense to the validity or enforcement of the order, the Court shall issue an order confirming the order.

29.84 Confirmed Order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

29.85 Registration For Modification

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another Tribe or State shall register that order with the Klamath Tribes in accordance with the procedures of this Ordinance if the order has not been registered. A request for modification in accordance with the terms of this Ordinance may be submitted at the same time as the request for registration, or later. The request for modification must specify the grounds.

29.86 Effect of Registration for Modification

(a) The Klamath Tribes may enforce a child support order of another Tribe or State registered for purposes of modification, in the same manner as if the order had been issued by the Klamath Tribes, but the registered order may be modified only after notice and hearing, the Klamath Tribes Child Support Enforcement Department or Tribal Court finds, in accordance with the provisions of this Ordinance, that:

I. The following requirements are met:

1. The child, the individual obligee and the obligor do not reside in the issuing tribe or nation;

11. The requesting party who is a nonresident of the Tribe seeks modification; and

m. The respondent is subject to the personal jurisdiction of the Klamath Tribes; or

2. The child or a party who is an individual is subject to the personal jurisdiction of the Court and all of the parties who are individuals have filed a written consent in the issuing tribunal for the Klamath Tribes to modify the support order and assume continuing, exclusive jurisdiction over the order.

(b) Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order

issued by a tribunal of the Klamath Tribes and the order may be enforced and satisfied in the same manner.

(c) The Klamath Tribes may not modify any aspect of a child support order that may not be modified under the law of the issuing Tribe or State. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized under the provisions of this Ordinance, establishes aspects of the order that are nonmodifiable.

(d) On issuance of the order modifying a child support order issued in another Tribe or State, a tribunal of the Klamath Tribes becomes the tribunal having continuing, exclusive jurisdiction.

DISTRIBUTION OF CHILD SUPPORT COLLECTIONS

29.87 Prompt disbursement of collections.

The Klamath Tribes Child Support Enforcement Office shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The Office shall furnish to a requesting party or tribunal of another jurisdiction a certified statement by the custodian of the record of the amounts and dates of all payments received.

29.88 Distribution of child support collections.

(a) The Child Support Enforcement Office shall, in a timely manner:

1. Apply collections first to satisfy current support obligations, except that any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.
2. Pay all support obligations to the family unless the family is currently receiving or formerly received assistance from the Tribal TANF program and there is an assignment of support rights to the Tribe's TANF agency, or the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from another state or tribal IV-D agency.

(b) Current recipient of Klamath Tribal TANF. If the family is currently receiving assistance from the Tribal TANF program and has assigned support rights to the Tribe and:

1. There is no request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Support Enforcement Office may retain collections on behalf of the family, not to

exceed the total amount of Tribal TANF paid to the family. Any remaining collections shall be paid to the family.

2. There is a request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Support Enforcement Office may retain collections, not to exceed the total amount of Tribal TANF paid to the family. Any collections exceeding the total amount of Klamath Tribal TANF paid to the family shall be distributed in one of the following manners:
   (i) The Child Support Enforcement Office may send any remaining collections, as appropriate, to the requesting State IV-D agency for lawful distribution, or to the requesting Tribal IV-D agency for lawful distribution; or
   (ii) The Child Support Enforcement Office may contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.115, and distribute collections as directed by the other agency.

(c) Former recipient of Klamath Tribal TANF. If the family formerly received assistance from the Klamath Tribal TANF program and there is an assignment of support rights to the Tribe, and:

1. There is no request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must pay current support and any arrearages owed to the family to the family and may then retain any excess collections, not to exceed the total amount of Tribal TANF paid to the family. Any remaining collections must be paid to the family.
2. There is a request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:
   1. Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
   11. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.1 15, and distribute collections as directed by the other agency.

(d) Requests for assistance from State or other Tribal IV-D agency. Ifthere is no assignment of support rights to the Klamath Tribes as a condition of receipt of Klamath Tribal TANF and the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from a state or

another Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:

1. Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
2. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.115, and distribute collections as directed by the other agency.

29.89 Federal income tax refund offset collections.

Any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.

MISCELLANEOUS

29.90 Stays.

Child support orders issued by the Child Support Enforcement Office and/or the Tribal Court may not be stayed pending appeal unless there is substantial evidence showing that the obligor would be irreparably harmed and the obligee would not.

29.91 Mistake of fact.

Except as otherwise expressly provided in this Ordinance, a parent may be prospectively relieved from application of the terms of an administrative order issued by the Child Support Enforcement Office, or an order of the Tribal Court, upon proof of a mistake of fact, the truth of which would render the order void or otherwise invalid, when such mistake is brought forward within one year of its discovery and could not have been discovered before such time with reasonable diligence.

29.92 Cessation of Collection Efforts.

An obligee may request the Child Support Enforcement Office to cease child support collection efforts if it is anticipated that physical or emotional harm will be caused to the parent or caretaker of the child, or to the child for whom support was to have been paid.

29.93 Confidentiality of Records.

Child support records, including paper an electronic records, are confidential and may be disclosed or used only as necessary for the administration of the program. Office

employees who disclose or use the contents of any records in violation of this section are subject to discipline, up to and including dismissal from employment and civil penalty. Program administration includes, but is not limited to:

{a) Extracting and receiving information from other databases as necessary to perform the Office's responsibilities;

(b) Comparing and sharing information with public and private entities as necessary to perform the Office's responsibilities, to the extent not otherwise prohibited by applicable Federal law or Klamath Tribes Child Support Enforcement Program Rules and Procedures;

(c) Exchanging information with tribal or state agencies administering programs under Title XIX and Part A of Title IV of the Social Security Act as necessary for the Office and the tribal and state agencies to perform their responsibilities under state and federal law.

29.94 No Waiver of Sovereign Immunity.

No provision in this Ordinance expressly or impliedly waives the sovereign immunity of the Klamath Tribes, the Klamath Tribes Judiciary, or its officials, agents or employees, nor is intended to operate as consent to suit.

29.95 Effective Date.

This Ordinance shall be effective upon adoption and approval of the General Council in accordance with General Council Resolution.

29.96 Amendment or Repeal.

This Ordinance, and any section, part and word hereof, may be amended or repealed by a Resolution adopted by majority vote of the Klamath Tribes Tribal Council in accordance with the Constitution of the Klamath Tribes.

29.97 Severability.

Should any provision set forth in this Plan, or the application thereof to any person or circumstance, be held invalid for any reason whatsoever by a court of competent jurisdiction, the full remainder of such provision or the application of the provision to another person or circumstance shall not be effected thereby.

Certification

We, the undersigned, Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a General Council meeting held on the d..31!i day of febw.all Y , 200_2 with a quorum present, the General Council took action and duly adopted this Plan by a vote of 55 for, '-/ opposed, and I/ abstentions by General Council Resolution 200?-00/

Jo . k
Chairman
The Klamath Tribes

Torina Case
Secretary
The Klamath Tribes

LEGISLATIVE HISTORY

1. Title 4, Chapter 29 originally adopted and approved by General Council on February d?f:!_, 2008 pursuant to General Council Resolution No. 2008-00!_.

The Klamath Tribes

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EXECUTIVE COMMITTEE RESOLUTION 99-66

RESOLUTION SUBMITTING TO THE GENERAL COUNCIL FOR FINAL ACTION: (1}ORDINANCES IMPLEMENTING *THE* KLAMATH TRIBAL COURTS, AS ESTABLISHED BY ARTICLE V OF THE CONSTITUTION AND BY-LAWS FOR THE KLAMATH TRIBES (2} THE REPEAL OF THE CHILD WELFARE ORDINANCE; AND (3) PHASED-IN APPROACH FOR IMPLEMENTING THE KLAMATH TRIBAL COURTS.

WHEREAS the Klamath Tribes are a sovereign Indian tribal government, recognized as such by the Secretary of the Interior of the United States of America ("Secretary"); and

WHEREAS the Constitution and By-Laws for the Klamath Tribe ("Constitution") was duly approved, adopted, and most recently amended on August 17, 1996 by the membership of the Klamath Tribes; and

WHEREAS Article I of the Constitution provides that the General Council shall be comprised of all eligible voters of the Klamath and Modoc Tribes and Yaahooskin Band of Snake Indians; and

WHEREAS the General Council is the governing body of the Klamath Tribes by the authority of Article VI of the Constitution; and

WHEREAS Section I of Article VI of the Constitution authorizes the General Council to adopt ordinances providing for the maintenance of law and order; and

WHEREAS, pursuant to Article VII of the Constitution, the Tribal Executive Committee is elected by the General Council to act on its behalf for the execution of the day-to-day government and business of the Klamath Tribes; and

WHEREAS Section I of Article V of the Constitution establishes the Klamath Tribes Judiciary, consisting of the Klamath Supreme Court and the Klamath Tribal Court, Klamath Juvenile Court, Klamath Peacemaker Court and such other lower courts that the Tribes may establish from time to time (collectively, "Tribal Courts"); and

WHEREAS to enhance and to promote the effective exercise of the sovereign powers of the Klamath Tribes over their territory, including persons, activities, and resources within that territory, the Executi ve Committee finds that it is in the best interest of the Tribes to implement Article V of the Constitution by enacting ordinances governing the administration, practices, and procedures of the Klamath Tribal Courts; and

WHEREAS to implement fully Article V of the Constitution and to enhance and to promote the effective exercise of the sovereign powers of the Klamath Tribes over its children, the Executive Committee finds that it is in the best interest of the Tribes to enact a Juvenile Ordinance governing the administration, practices, and procedures of the Juvenile Court in child custody matters; and

WHEREAS, by Executive Committee Resolution No. 99-08, dated March 23, 1999, the Executive Committee of the Klamath Tribes approved of various ordinances pertaining to the administration, procedures, and practices of the Klamath Tribal Courts; and

WHEREAS to reduce duplication and to update tribal law regarding the care and protection of children, by Executive Committee Resolution 99-08, dated March 23, 1999, the Executive Committee detennined that it is in the best interest to repeal the Child Welfare Ordinance and to replace it with an updated Juvenile Ordinance; and

WHEREAS Section 1X of Article V of the Constitution, which establishes the Klamath Tribes Judiciary, calls for General Council approval of ordinances implementing the Klamath Tribal Courts and, accordingly, the Executive Committee believes that such ordinances should be submitted to the General Council for approval and ratification; and

WHEREAS the Executive Committee finds that it is in the best interest of the Klamath Tribes to implement the Klamath Tribal Courts under an orderly, phased-in approach that will accommodate those steps necessary for the operation of the Tribal Courts including, but not limited to the provision of adequate funding, the election of a Tribal Court Judge, the provision of essential infrastructure and staff for the Tribal Courts, and the coordination of affected departments, commissions, and agencies within the Klamath Tribes; and

WHEREAS the Executive Committee believes that, under the phased-in approach, priority should be given to implementation of the Juvenile Ordinance and that, until further authorized by the Executive Committee or the General Council, the Klamath Tribal Courts should not be authorized to accept or hear any matters except those arising under or pertaining to the Juvenile Ordinance.

NOW, THEREFORE, BE IT RESOLVED, that the following ordinances, attached hereto and approved by the Executive Committee pursuant to Executive Committee Resolution 99-08, dated March 23, 1999, shall be submitted to the General Council for consideration and final approval:

(1) Tribal Court Ordinance, to be codified as Chapter 11 of Title 2 of the Klamath Tribal Code;

(2) Rules of Civil Procedure, to be codified as Chapter 12 of Title 2 of the Klamath Tribal Code;

(3) Rules of Evidence, to be codified as Chapter 14 of Title 2 of the Klamath Tribal Code;

(4) Juvenile Ordinance, to be codified as Chapter 15 of Title 2 of the Klamath Tribal Code; and

(5) Rules of Appellate Procedure, to be codified as Chapter 16 of Title 2 of the Klamath Tribal Code.

BE IT FURTHER RESOLVED that the Executive Committee, as set forth in Executive Committee Resolution No. 99-08, dated March 23, 1999, recommends that the General Council approve and ratify the repeal of the Child Welfare Ordinance and replacement ofit with the Juvenile Ordinance; *provided* that such repeal and replacement shall become effective at such time that the Executive Committee determines by resolution that the Juvenile Court is established and prepared to begin accepting matters authorized under the Juvenile Ordinance.

BE IT FURTHER RESOLVED that Executive Committee hereby recommends to the General Council that the development and general functioning of the Klamath Tribal Courts shall be implemented pursuant to an orderly, phased-in approach under the direction of the Executive Committee, with an initial priority being given to those steps needed for the Juvenile Court to begin adjudicating the matters authorized under the Juvenile Ordinance.

BE IT FURTHER RESOLVED, in accordance with the phased-in approach for implementing the Klamath Tribal Courts, the Executive Committee recommends to the General Council that, until further authorized by the Executive Committee or the General Council, the Klamath Tribal Courts should not be authorized to accept or hear any matters except those arising under or pertaining to the Juvenile Ordinance.

BE IT FINALLY RESOLVED that all of the foregoing actions and recommendations of the Executive Committee be submitted promptly to the General Council for consideration and final action.

CERTIFICATION

We, the undersigned, as the duly elected Chairman and Secretary of the Klamath Tribes, do hereby certify that at a regular meeting of the Executive Committee of the Klamath Tribes held on the 23rd day of November, 1999, where a quorum was present, the Executive Committee duly adopted the foregoing resolution by a vote of 8 for and 0 against, with 1 abstaining.

Allen Foreman, Chairman
The Klamath Tribes

Torina Case, Secretary
The Klamath Tribes

KLAMATH TRIBES

CHILD WELFARE ORDINANCE

Klamath Tribal Code S s.01

(a) Purpose

The purpose of this ordinance is to protect the children and families of the Klamath Tribes by establishing procedures in child welfare matters.

(b) Policy

rn child welfare matters it is the policy of the Klamath Tribes that:

(1) There is no resource that is more vital to the continued existence and integrity of the Klamath Tribes than its children;

(2) rt is important to promote and strengthen the unity and security between the Klamath child and his or her natural family, to prevent the unwarranted removal of Klamath children from their homes, and to promote and strengthen the stability of Klamath families;

(3) If removal of the child from the family is necessary, then the primary considerations in placement of a Klamath child are to insure that the child is raised within the Klamath culture, that the child is raised within his/her family if possible, and that the child is raised as an Indian;

(4) If reunification of the immediate family is not possible, then long term placement without termination of parental rights is the strongly preferred approach of the Tribes;

(5) Cooperative intergovernmental relations are to be encouraged between the Klamath Tribes and the State of Oregon and other states and tribes in child welfare matters involving Klamath families and children;

(6) supportive child welfare and family services that respect the traditions and the cultural values of the

Tribes are to be made available to Klamath children and families;

(7) The right of Klamath children to know and learn their culture and heritage by experiencing that culture on a daily basis is to be preserved;

(8) To fully implement the provisions of the Klamath Tribes-state of Oregon Indian Child Welfare Agreement.

(c) Authority of Klamath Tribes Oyer Child Welfare Matters

The Tribes shall exercise the authority of the Indian Child Welfare Act of 1979 and it's amendments (if any) for the protection of the children identified in the Act and the Tribal-state Agreement entered into with the State of Oregon.

(1) The Child Welfare Placement board of the Klamath Tribes has the authority to start the process of enrollment of eligible children with the approval of the biological parents, to provide services, to place children, to approve and license foster homes, to monitor and to direct the ICWA outreach Specialist, to work with other governments and agencies affecting Klamath children and families, and to intervene in child custody proceedings in other forums.

(2) The Child Welfare Placement Board and ICWA Specialist shall make regular monthly reports (either written or oral) to the Klamath Tribes Executive Committee.

(d) Definitions

(1) "Active efforts" is the level of services that the agency seeking to remove a Klamath child from his/her home must provide to the Klamath family in an effort to prevent the removal of the child. At a minimum, "active efforts" must include case planning specifically tailored and designed to meet the current and ongoing needs of the individual Klamath family and Klamath child in order to improve the conditions in the parents' home so that the removal of the child from the home can be prevented or if the child has been removed

from the home so that the child may be returned to his/her home.

(2) "Executive Committee" shall mean the Executive Committee of the Klamath Tribes.

(3) "Extended familyi• means a person who has reached the age of eighteen years old and who is the child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin or stepparent. The Klamath Tribes may also exercise it cultural custom of recognizing other relatives, no matter the degree of relationship into the definitions of extended family as defined by the Indian Child Welfare Act of 1979.

(4) "ICWA outreach Specialist" is a tribal employee in the Tribal counseling and Family service Program who servs as the contact person for the Tribes on child welfare matters; provides services to tribal children and families on child welfare matters; and serves as the staff member of the Child Welfare Placement Board of the Tribes.

(5) "Indian Foster Home" is a foster home in which at least one parent who has reached the age of 18 years is an enrolled member of a federally recognized tribe.

(6) "Klamath child" is any unmarried person who is under age eighteen and is either (a) a member or is eligible to be a member of the Klamath Tribes or (b) is the biological child of a person who is a member of or eligible to be a member of the Klamath Tribes, and is not enrolled in another tribe.

(7) "Klamath Indian Foster Home" is a foster home in which at least one parent who has reached the age of 18 years is enrolled or eligible to be enrolled in the Klamath Tribes.

(8) "Placement Board" is the Child Welfare Placement Board composed of at least five (5) tribal members and the

Tribes' ICWA Specialist. It is established according to the provisions of the Klamath Tribes' Committee Ordinance and subject to the provisions of that ordinance except as provided herein.

(9) "Tribal-State Agreement" is the agreement entered into by the state of Oregon and the Klamath Tribes pursuant to Section 1919 of the Indian Child Welfare Act of 1979, 25 u.s.c. § 1919 and O.R.S. §190.110(2).

_(e) Child Welfare Placement Board

The Child Welfare Placement Board shall consist of six (6) members enrolled tribal members which shall be three (3) women and three (3) men.

These individuals shall:

1. be of good character and habits;
2. have a suitable temperament;
3. possess knowledge of the Klamath Tribes and its cultural heritage, customs and traditions;
4. be at least 18 years of age;
5. maintain abstinence form alcohol and drugs while serving on the Placement Board.

The Board shall be appointed by the Tribal Chairman for a two (2) year term and individuals may be reappointed. The Board will follow other rules as provided for in the Tribes' Committee Ordinance.

(f) Authority of ICWA outreach Specialist and Tribal Counseling and Family Service Program

The ICWA outreach Specialist and Tribal Counseling and Family Service Program staff shall perform the delegated child welfare functions stated in this ordinance, in addition to other tasks assigned/delegated by appropriate authority. The ICWA Outreach Specialist and Tribal Counseling and Family Service staff are tribal personnel and shall be subject to all tribal management rules and regulations in the same manner as other tribal employees.

(g) Duties of the ICWA Outreach Specialist

The ICWA outreach Specialist shall be responsible for the following:

(1) providing tribal services to Klamath children and their families;

(2) advising the Placement Board, Executive Committee and other jurisdictions of the needs of Klamath families and children for child welfare services and advocating the provision of such services from tribal, state, federal, and private resources;

(3) assisting other Klamath tribal programs and programs affecting Klamath children and families;

(4) gathering information on foster homes, shelter care facilities, and adoptive homes, and recommending approval to the Placement Board on the licensing and certifying of such homes and facilities;

(5) carrying out all duties as prescribed in Sections (q) and (r); and

(6) applying for Indian Child Welfare Act grants;

(7) informing the Bureau of Indian Affairs of the officially designated agent for service of the Klamath Tribes in child custody proceedings;

(8) performing other child welfare duties as deemed necessary by the Placement Board or Executive Committee, or General Manager; and,

(9) appearing in other forums as the Klamath Tribal official representative, including but not limited to appearances pursuant to the Tribal-State Agreement.

(h) Authority to Approve and License Foster Homes

(1) The Placement Board is authorized to license foster homes of tribal members within the state of Oregon.

(2) In licensing and certifying a home for foster care pursuant to the Tribes• authority, the ICWA Outreach Specialist and Tribal counseling and Family service Program staff shall use the criteria established by the Klamath Tribes. Such criteria need not be reduced to writing and should be flexible enough to allow for variation when dictated by the situation; provided, however, that the baseline criteria for foster homes and foster parents set out in this ordinance, sections (j), (k), and (1), must be applied as is.

(3) The foster care inspector is authorized to make a complete investigation to determine the adequacy of the foster care home. The inspector is authorized to examine not only the potential foster care parents and any other tribal member who is familiar with the applicants and is familiar with the type of care they provide to their children, but also any other sources of information including state, federal, or tribal agencies.

(i) Procedures for Approval of Foster Homes

(1) The required information about the foster home and the foster family should be gathered by the Social Services staff.

(2) Either the ICWA Specialist or prospective foster parents may file an application for license of a foster home. The Tribal counseling and Family Service Program develop an application form and make copies available to interested tribal members.

(3) The Placement Board and Tribal counseling and Family Service Program shall make every effort to complete the license processing for foster homes applications within ninety (90) days of receipt of application at Tribal Office.

(4) The Klamath Tribes may recognize state foster home licensing as meeting foster home requirements of the Klamath Tribes.

(j) Foster Care Home Baseline Requirements

(1) The home shall be constructed, arranged and maintained so as to provide for the health and safety of all occupants. The ICWA Outreach Specialist and Tribal Counseling and Family service Program staff may, upon twenty-four (24) hours notice, inspect a foster home/care dwelling at any time.

(2) Heating, ventilation, and light shall be sufficient to provide a comfortable, airy atmosphere. FUrnishings and housekeeping shall be adequate to protect the health and comfort of the foster child.

(3) Comfortable beds shall be provided for all members of the family. Sleeping rooms must provide adequate opportunities for rest. All sleeping rooms must have a window of a type that may be opened readily and may be used for evacuation in case of fire.

(4) Play space shall be available and free from hazards which might be dangerous to the life or health of the foster child.

(k) Foster Family Baseline Requirements

(1) All members·of the household must be in such physical and mental health that will not adversely effect either the health of the child or the quality and manner of his or her care.

(2) Members of the foster family shall be of good character and habits. A foster family shall not be licensed if any member of the family living in the home or any person living in the home has ever been convicted of a sex offense or has received felony convictions within the last three (3) years. Exceptions concerning non-sexual felony convictions may be made if adequate information is provided indicating that a change of character has occurred.

(3) The person in charge of the foster home shall be of suitable temperament to care for the children, shall

understand the special needs of the child as an Indian person and shall be capable of bringing the child up as an Indian person who is well adjusted and able to get along both within the tribal community and in the surrounding non-Indian community as well.

(4) Foster parent(s) shall be responsible, mature individual(s) who are, in the view of most community members, of good character. Foster parent(s) must be at least eighteen (18) years old, but there is no upper age level provided the Foster parent has the physical and emotional stamina to deal with the care and nurturing of a foster child.

(5) The foster parent(s) must be willing, when necessary, to cooperate with the biological parents or other members of the child's family and must be willing to help the family re-establish the necessary family ties. The foster parent(s) must be willing to cooperate with the Child Welfare Placement Board, the Tribal Counseling and Family Service Program staff and the Children's Service Division of the State of Oregon.

(6) A foster home need not necessarily have two foster parents. A foster home with a single foster parent may be licensed provided that foster parent displays the outstanding qualities necessary to raise a foster child.

(7) The foster parent(s) must have an income sufficient to care for all individuals in the foster home. The state stipend can be considered when determining the financial ability of the foster care parents.

(8) Any time a pre-school foster child is placed in a foster home there must be at least one (1) foster parent present at all times. For school age children the foster parent(s) must show the arrangements which will be made for those periods of time when both foster parents are employed and the child is out of school. Infants and young children shall never be left alone without competent supervision.

(9) Without specific approval by the Placement Board, a foster home shall not be licensed whenever any member of the family is mentally ill or on convalescent status from a mental hospital or is on parole or probation or is an inmate of a penal or correctional institution.

(l) Tribal Expectations of Foster Parents

(1) The daily routine of a foster child shall be such as to promote good health, rest and play habits.

(2) The responsibility for a foster child's health care shall rest with the foster parents. In case of sickness or accident to a child, immediate notice shall be given to the foster care inspector or tribal social services staff. Foster care parent(s) may consent to surgery or other treatment in a medical emergency.

(3) The foster parent(s) shall not subject the child or any parent of the child to verbal abuse, derogatory remarks about himself, his natural parents or relatives, or to threats to expel the child from the foster home. No child shall be deprived of meals, mail or family visits as a method of discipline. When discipline or punishment must be administered, it shall be done with understanding and reason. The method of punishment will be that which is accepted by the people of the Klamath Indian community. At no time will corporal punishment be administered as a form of discipline.

(4) The foster parent(s) shall sign an agreement with the Tribes which shall include a copy of Sections (j), (k), and (1) of this Ordinance. The agreement shall clearly state that the foster parent(s) understands that the child or children are placed with the family for foster care and not for adoption. The agreement shall further state that the family will accept Klamath Tribes' decision to remove the child from the foster family.

(5) The foster parent(s) shall notify Tribal Social Services of accidents, medical, out of state visits and other matters affecting the well being of the foster child.

(m) Letter/Certification of Approval/Approval Agreement

certification of the Klamath Tribal foster home shall not be final until a letter of approval is issued by the Tribes and a foster care agreement is signed by the foster parent(s) and the Tribes. This agreement shall include:

(1) the date of approval;

(2) the number of foster children or the specific placement for which the home was approved;

(3) that the home is approved for a specific period of time (generally not to exceed one year) unless there are changes in the home or residence in which case the Agreement expires as of the date of the move;

(4) the expiration date of the approval; and,

(5) the provisions of Sections (j), (k), and (1) of this Ordinance.

(n) cancellation of Approval of Foster Home

The foster home approval shall be canceled if any of the following occur:

(1) the foster family changes residence;

(2) there is any material change in the condition of the home or the family such that the home no longer meets the tribal approval standards;

(3) the foster home declines to continue to be a foster home; or,

(4) one year has elapsed since the home was approved.

(o) List of Approved Homes

The Child Welfare Placement Board shall provide the state with a list of tribal foster homes and shall update the list on a quarterly basis.

(p) Decision to Intervene in Child custody Proceedings

In determining whether the Tribes should intervene in a child custody proceeding, the ICWA outreach Specialist and Placement Board shall consider the following factors:

(1) Whether the proceeding will take place outside Oregon, whether funds are available to allow the Tribes to appear in the proceeding, and whether a representative of another Indian Tribe or other organization is able to intervene on behalf of the Tribes;

(2) Whether tribal participation would be in the best interest of the child and the Tribes and the family; and,

(3) Whether the child is a Klamath child as defined by this ordinance and the tribal enrollment ordinance.

(q) Authority to Intervene in Court Proceedings

The ICWA Outreach Specialist, after consultation with the Placement Board, is authorized to make the decision whether or not to intervene in a child custody court proceeding. The ICWA outreach Specialist is authorized to sign the intervention motion, appear in court, and sign other documents submitted to the court.

(r) Notice of Child Custody Proceeding

The Child Welfare Placement Board is designated to receive notice of child custody proceedings involving a Klamath child. Upon receipt of such notice, the ICWA Specialist shall acknowledge receipt, verify the enrollment or eligibility for enrollment of the child, request the relevant information from the state or other agency, and investigate the circumstances of the child.

In the event that the Tribes decides to intervene in the case, the Tribes will make every effort to file a motion to intervene within twenty {20) days of receipt of written notice.

(s) Review of Case by Placement Board

(1) As soon as possible, the ICWA Outreach Specialist shall present a report and recommendation on the case to the Placement Board regarding what action the Tribes might take in the case.

(2) Within ten (10) days after receiving the notice, the ICWA outreach Specialist shall make every reasonable effort to report to the agency in writing of the Tribes' decision regarding the following:

(A) Whether the child referred to in the notice is a Klamath child;

(B) Whether the Tribes will intervene in the proceeding;

(C) Recommendations as to case planning and placement of the child.

(3) The ICWA outreach specialist shall immediately apply for enrollment of any parents and children involved in a custody proceeding who are eligible for enrollment in the Klamath Tribes but are not then enrolled as members, except if eligible for enrollment in another federally recognized tribe and if the parents agree to enrollment of the child.

(4) The ICWA outreach Specialist shall participate in the state or other agency process and assist in development of the child welfare plan for the child and his or her family.

(t) Preparing/Monitoring the Child Welfare Plan

In the monitoring and evaluation of any case plan involving a Klamath child by tribal staff or the Placement Board, the plan should be evaluated in light of these underlying principles:

(1) If removal of the child from the family is necessary, then the primary considerations in placement of a Klamath child are to insure that the child is raised within the Klamath culture, that the child is raised within his/her family if possible, and that the child is raised as an Indian;

(2) If reunification of the immediate family is not possible, then long term placement without termination of parental rights is the preferred approach, where the preferred approach does not necessarily mean that the Tribes is totally opposed to adoption and such adoption is based on each individual case;

(3) Supportive child welfare and family services that respect the traditions and the cultural values of the Tribes are to be made available to Klamath children and families;

(4) The right of Klamath children to know and learn their culture and heritage by experiencing that culture on a daily basis is to be preserved; and,

(5) Active efforts by governmental agencies involved must be made before a Klamath child is removed from his/her home or before a determination is made that the child cannot be returned to his/her family home. At a minimum, the agency's actions must demonstrate that the agency has engaged in working with the Klamath family to design and implement the necessary services and programs to improve the conditions in the family home in order to prevent the removal of the child or in instances in which the child has been removed, to return the child to the family home and that these efforts have been fully implemented by the agency and the family and that these efforts have failed. There must be documentation of these efforts and the reasons that the efforts have failed before the Placement Board can approve removal of the child from the home or determining that the child cannot be returned to the home.

(6) In all instances, removal of the child from his/her home is the final alternative.

(u) Placement Preferences

(1) Pursuant to the Tribes' authority as affirmed at 25 U.S.C. § 1915(c), and the Tribal-State Agreement, Section

V, the Tribes hereby adopts the following placement preferences for use by tribal and state courts in placing a Klamath child outside the home of his or her parent(s) or custodian:

(2) For foster care or pre-adoptive placement, in order of priority:

(A) A member of the Klamath child's extended family;

(B) A Klamath Indian foster home licensed or approved by the Klamath Tribes.

(C) An Indian foster home licensed or approved by the Klamath Tribes.

(D) An Indian foster home certified by the state;

(E) A non-Indian foster home licensed, approved, or certified by the state or the Tribes and agreed to on a case by case basis;

(F) An institution for children approved by the Klamath Tribes or operated by an Indian organization which has a program suitable to meet the Klamath child's special needs.

(G) In cases where Klamath children are placed in non-Klamath foster homes, a mandatory culture training will be provided by the Klamath Tribes.

(3) For adoptive placements in order of priority:

(A) a member of the Klamath child's extended family;

(B) other members of the Klamath Tribes; or

(C) other Indian families.

(4) In the case of either adoptive or foster care placement of a Klamath child, the Executive Committee may by resolution, upon recommendation of the Placement Board, alter the placement preferences set forth in this section,

provided that such placement is the least restrictive setting appropriate to the particular needs of the child.

(v) Confidentiality

All information gathered by the Klamath Tribal Social Services staff regarding foster families, Klamath child welfare cases, and services to Klamath families shall be confidential. This information may be shared with the Placement Board, Executive committee, state, federal, or tribal agencies involved with the Klamath child or family provided that those agencies have a mechanism for keeping the information confidential. The Tribes shall comply with the confidentiality requirements of the Federal Privacy Act, 5 u.s.c. §552(a) as provided by the State-Klamath Agreement, Section II, E. The restrictions on disclosure of information contained in Executive Committee Resolution, 91-030 are waived to the extent necessary for the ICWA Specialist, the Child Welfare and the Tribal Counseling and Family Service Program staff and the Placement Board to carry out their duties under this ordinance.

(w) Anonvmity

In voluntary adoptive placements the ICWA Placement Board and Tribal Counseling and Family Service Program shall honor the parent's request for anonymity but such request shall not override the basic right of a Klamath child to be raised within Klamath culture or Native American culture nor shall it override the Tribes' rights to notice and participation in planning for a Klamath child.

(x) Conflict of Interest

The Tribal counseling and Family Service Program staff and members of the Placement Board may not participate in any child welfare matters or proceedings that involve a member of his/her immediate family. For purposes of this provision, the term "immediate family" shall be defined as provided in the Klamath Committee Ordinance, Section 10, page 3 or the appropriate section and page when and if that ordinance is amended.

(y) Persons Qualified to be Expert Witness

The ICWA outreach Specialist shall on issues of tribal customs of child rearing, parenting and the role of extended family members in raising children and to testify as expert witnesses prepare a list of persons qualified as a general matter to perform psychological, social and drug and alcohol evaluations of Klamath children or parents. These lists shall be submitted to the Placement Board and Executive Committee for approval. After approval, these lists will be provided to the State of Oregon, and as appropriate to other state, and tribal, or federal agencies.

(z) Severability

In the event that any provision of this ordinance is held to be unconstitutional by a court of competent jurisdiction, such provision shall be severed from the ordinance and the remaining provisions shall remain in full force and effect. In the event that the Tribal-State Agreement is terminated, all references to said Agreement shall be severed and the remainder of this ordinance shall remain in full force and effect.

(aa) Sovereign Immunity

Nothing in this ordinance shall be construed to have waived the sovereign immunity of the Klamath Tribes.

(bb) Amendments to Child Welfare Ordinance

The Klamath Tribes Executive committee may make amendments, if necessary, to this ordinance and will present such changes to the General Council at the General council meeting following the changes.

CERTIFICATION OF ADOPTION

Pursuant to action of the Klamath General council on this 27th day of February, 1993, the attached Klamath Tribes Child Welfare Ordinance was adopted, for an interim period to begin immediately and to terminate upon final adoption by the General Council, by the members of the Klamath Tribes by a vote of 58 in favor, five (5) opposed and 12 abstentions.

Charles E. Kimbel Sr.
Tribal Chairman, Klamath Tribes

Barbara Kirk
Tribal Secretary, Klamath Tribes

Public Law 280

Excerpt from the Tribal and State Jurisdiction to Establish and Enforce Child Support Administration for Children and Families, Office of Child Support Enforcement, 2005

Public Law 280 In 1953, at the height of the termination and assimilation era,[1] Congress passed Public Law 280, which significantly affected Tribal jurisdiction by introducing State criminal authority into Indian country. Historically, State courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and non-Indians. Jurisdiction was limited to the Tribes or Federal government. Public Law 280 initially provided for the mandatory transfer to five States[2] of jurisdiction over criminal offenses committed by or against Indians in the area of Indian country listed opposite the named States or territory. It also gave those States jurisdiction over civil causes of actions between Indians or to which Indians were parties, which arose in those areas of listed Indian country. In 1958 Congress added Alaska as a sixth mandatory State.[3] There was no requirement that the Tribes consent to such transfer of jurisdiction to the listed States. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court declined to answer whether Public Law 280 conferred exclusive or concurrent jurisdiction on States. However, the consensus of lower Federal courts, many State courts, and the Solicitor's Office within the Department of the Interior is that Indian nations retain concurrent jurisdiction under Public Law 280.[4] A major consequence of Public Law 280 is that Indian nations lose exclusive jurisdiction over non-major offenses committed by one Indian against another Indian.

Other States not listed among the mandatory States had the option of assuming Public Law 280 jurisdiction. Congress granted permission for such States to assume civil or criminal jurisdiction "at such time and in such manner" as the people of the State by affirmative legislative action, should decide to assume. If such a State had a constitution or statutes disclaiming jurisdiction in Indian country, Public Law 280 authorized the State to amend those laws, if necessary, in order to remove any legal impediment to the assumption of civil or criminal jurisdiction. The Tribes exempted from the State assumption of jurisdiction were Tribes that had legal systems and organizations perceived as functioning in a "satisfactory manner."

By 1958, as a result of amendments to Public Law 280 and implementing State legislation, 16 States had acquired Public Law 280 jurisdiction.[5] However, said jurisdiction in most of these States was limited to (1) less than all of the Indian reservations in the State, (2) less than all of the geographic areas within an Indian reservation, or (3) less than all subject matters of the law.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited the extension of Public Law 280 jurisdiction. No State can now acquire Public Law 280 jurisdiction over Indian country unless the Tribe consents by a majority vote of the adult Indians voting at a special election. The amendments also provide explicitly for partial assumption of jurisdiction. It is therefore possible for a State to have Public Law 280 jurisdiction but not with every Tribe located in the State or not over every subject area. The ICRA also authorized the United States to accept a "retrocession" or return of jurisdiction, full or partial, previously acquired by a State under Public Law 280, but only at the request of

the State. Tribes could not insist upon retrocession. Several States, such as Nebraska, Washington, Wisconsin, and Minnesota, have retroceded their Public Law 280 jurisdiction over various Tribes.

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[1] The Termination Era ran from approximately 1945 to 1961.

[2] California, Minnesota (except for Red Lake Reservation), Nebraska, Oregon (except for Warm Springs Reservation), and Wisconsin (except for Menominee Reservation).

[3] An exception within Alaska is the Metlakatla Reservation.

[4] *See* Jimenez & Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 AU L. Rev. 1627 (1998).

[5] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

Full Faith & Credit of Tribal & State Protection Orders

(excerpt from publication of National Council of Juvenile & Family Court Judges)

Full Faith and Credit

Since 1994, the federal Violence Against Women Act (VAWA) (18 U.S.C. § 2265) has required every jurisdiction in the United States to recognize and enforce valid protection orders.

These jurisdictions include:

☐ A state and its political subdivisions;

☐ A tribal government;

☐ The District of Columbia; and

☐ A commonwealth, territory, or possession of the U.S. (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and U.S. Virgin Islands).

What Are the Elements of an Enforceable Order?

A protection order from another jurisdiction that has these elements must be afforded a presumption of enforceability:

☐ The respondent has been given notice and an opportunity to be heard, or, in the case of an *ex parte* order, the respondent will be given notice and an opportunity to be heard within a reasonable time, consistent with the requirements of due process.

☐ The issuing court had personal and subject matter jurisdiction to issue the order.

☐ The order has not expired.

Query: Must Tribal protection orders be registered (i.e., filed with the State Court as a "foreign judgment") in order to be enforced? (Answer: NO)

ORS 24.105:
Definitions for ORS 24.105 to 24.125, 24.135 and 24.155 to 24.175. In ORS 24.105 to 24.125, 24.135 and 24.155 to 24.175 "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

ORS 24.190re: FOREIGN RESTRAINING ORDERS

24.190 Foreign restraining orders. (1) For the purposes of this section:
(a) "Foreign restraining order" means a restraining order that is a foreign judgment as defined by ORS 24.105.
(b)(A) "Restraining order" means an injunction or other order issued for the purpose of preventing:
(i) Violent or threatening acts or harassment against another person;
(ii) Contact or communication with another person; or
(iii) Physical proximity to another person.
(B) "Restraining order" includes temporary and final orders, other than support or child custody orders, issued by a civil or criminal court regardless of whether the order was obtained by filing an independent action or as a pendente lite order in another proceeding. However, for a civil order to be considered a restraining order, the civil order must have been issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection. (Note that this definition is very broad.)
(2)(a) Except as otherwise provided in paragraph (b) of this subsection, immediately upon the arrival in this state of a person protected by a foreign restraining order, the foreign restraining order is enforceable as an Oregon order without the necessity of filing and continues to be enforceable as an Oregon order without any further action by the protected person.
(b) A foreign restraining order is not enforceable as an Oregon order if:
(A) The person restrained by the order shows that:
(i) The court that issued the order lacked jurisdiction over the subject matter or lacked personal jurisdiction over the person restrained by the order; or
(ii) The person restrained by the order was not given reasonable notice and an opportunity to be heard under the law of the jurisdiction in which the order was issued; or
(B) The foreign restraining order was issued against a person who had petitioned for a restraining order unless:
(i) The person protected by the foreign restraining order filed a separate petition seeking the restraining order; and
(ii) The court issuing the foreign restraining order made specific findings that the person was entitled to the order.
(3)(a) A person protected by a foreign restraining order may present a true copy of the order to a county sheriff for entry into the Law Enforcement Data System maintained by the Department of State Police. Subject to paragraph (b) of this subsection, the county sheriff shall enter the order into the Law Enforcement Data System if the person certifies that the order is the most recent order in effect between the parties and provides proof of service or other written certification that the person restrained by the order has been personally served with a copy of the order or has actual notice of the order. Entry into the Law Enforcement Data System constitutes notice to all law enforcement agencies of the existence of the restraining order. Law enforcement agencies shall establish procedures adequate to ensure that an officer at the scene of an alleged violation of the order may be informed of the existence and terms of the order. The order is fully enforceable as an Oregon order in any county or tribal land in this state.
(b) The Department of State Police shall specify information that is required for a foreign restraining order to be entered into the Law Enforcement Data System.

(c) At the time a county sheriff enters an order into the Law Enforcement Data System under paragraph (a) of this subsection, the sheriff shall also enter the order into the databases of the National Crime Information Center of the United States Department of Justice.

(4) Pending a contempt hearing for alleged violation of a foreign restraining order, a person arrested and taken into custody pursuant to ORS 133.310 may be released as provided in ORS 135.230 to 135.290. Unless the order provides otherwise, the security amount for release is $5,000.

(5) ORS 24.115, 24.125, 24.129, 24.135, 24.140, 24.150 and 24.155 do not apply to a foreign restraining order.

(6) A person protected by a foreign restraining order may file a certified copy of the order and proof of service in the office of the clerk of any circuit court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the circuit court in which the foreign judgment is filed, and may be enforced or satisfied in like manner. The court may not collect a filing fee for a filing under this section. [1999 c.250 §1; 2003 c.737 §§74,75; 2011 c.595 §117]

FAQ's re: Tribal /State Law Family Law Issues

(Many Thanks for answers to:
Brent Leonhardt, Attorney for Confederated Tribes of the Umatilla Indian Reservation)

- **Protective Orders:** Can a state court issue a protective order (Family Abuse Prevention Act (FAPA), Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), Sexual Abuse Protective Order (SAPO), civil Stalking order) against a tribal member living on a tribal reservation within Oregon?

Answer: for tribes subject to Oregon's civil PL 280 jurisdiction, yes. This includes CTUIR. For those not subject to Oregon's civil PL 280 jurisdiction it may turn on whether the events giving rise to the basis for the order occurred in Indian country (arguably no jurisdiction) or outside of Indian country (arguably jurisdiction even if the person happens to live on rez).

Can a tribe issue a protective order against a non-tribal member?

Answer: Yes, if the other typical requirements for significant contacts exist. 18 usc 2265e.

Does it make a difference where the incident(s) occurred (i.e., tribal vs. non-tribal land)?

Answer: As long as it was in Indian country, no. 18 USC 2263e.

How do state courts find out if a tribal court has entered a protective order--and vice-versa?

Answer: Check NCIC for some tribal court orders (CTUIR has direct access now, and all of our protection orders are in the federal criminal database system), for others contact the tribal court and tribal police (I would contact both to make sure). Tribes have more limited access to databases, and it depends on whether the state allows a given tribal court to obtain the information (I don't think Oregon does for a non-criminal justice agency or for non-criminal justice purposes). CTUIR court can through the TAP program provided they are reflected in the federal criminal database system (NCIC).

And is there any progress or change re: tribes' ability to have tribal protective orders entered into LEDS or NICS? (I'm aware of issues with state law enforcement refusing to enforce tribal protective orders since they cannot be verified via LEDS/NICS--are there issues with tribal police enforcing state court protective orders? Any change in this over last year?)

Answer: State law requires sheriffs to enter the order if they are presented to them provided they meet federal full faith and credit requirements and there is proof of service. However, there has been discussion as to whether the person who is protected has to be the one to provide it to the Sheriff. This is disturbing to CTUIR. We had started working on this issue and a potential fix, but what was being considered would have further endangered the victim (requiring an affidavit from them approving its entry into the system). At that point we pushed to get direct federal access that has resulted in the new federal Tribal Access Program at USDOJ. Through that, CTUIR is able to put all orders in NCIC. State law enforcement should not be refusing to enforce tribal orders if they meet full faith and credit requirements any more than they refuse to enforce state of Washington orders. I'm not aware of tribal police refusing to enforce state protection orders provided the orders in question meet federal full faith and credit requirements.

- **Other Family Law issues (not including juvenile court matters):** Do tribes issue dissolution/custody/parenting time/paternity/child support judgments?

  If so, must both parties be tribal members?

  Are these enforceable/enforced by state courts?

  Are there any restrictions on state courts issuing dissolution/custody/parenting time/paternity/child support judgments involving tribal members (including property issues)?

  Do tribes enforce family law state court judgments?

Answer: It depends, and analysis can be complex just like all non-Indian tribal civil jurisdiction questions. Having said that, this is an excellent resource on family law issues and jurisdiction in Indian country: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&ved=0ahUKEwjztp2W4O7NAhVW5WMKHf21Cxg4ChAWCD4wBQ&url=http%3A%2F%2Fwww.acf.hhs.gov%2Fsites%2Fdefault%2Ffiles%2Focse%2Fim_07_03a.doc&usg=AFQjCNF351fY0b5SOKyO4aUMZJ8yQfPc2Q

MEMORANDUM

TO: UTCR Committee

FROM: Amy Benedum, JFCPD Program Analyst
On behalf of: Oregon Tribal/State Judicial Forum

SUBJECT: Proposed Change to UTCR 3.170

DATE: August 1, 2016

The Indian Child Welfare Act, 25 U.S.C. §1911(c), gives Indian tribes the right to intervene in and participate in any state child custody proceeding involving an Indian child from that tribe. Intervention has been held in numerous cases to be critical for a Tribe to present its position and protect its interest in tribal member children. Unfortunately, while the ICWA confers this right on Tribes, it does not provide any funding to carry it out. It is difficult for many Tribes to find or allocate the resources necessary to participate in every ICWA case that is identified; no dedicated sources of funding exist.

This problem is particularly acute for out-of-state ICWA cases. Indian tribes from other states seeking to exercise their rights by intervening and participating in Oregon child custody proceedings encounter a high burden due to provisions in UTCR 3.170, which requires non-Oregon attorneys to associate with Oregon attorneys and pay a fee to appear *pro hac vice*. The expense for out-of-state Tribes can be substantial, and as a result Tribes sometimes decide not to intervene in an out-of-state ICWA case because they cannot afford the expense of hiring a local attorney in addition to their tribal attorney and paying a $500 fee to the Oregon State Bar. This result undermines the intent and purpose of the ICWA, which is designed to encourage tribal participation in ICWA proceedings.

A partial solution to this issue came from *State ex rel. Juv. Dept. v. Shuey*, 119 Or App 185, 199, 850 P.2d 378 (1993), which concluded that a Tribe can intervene in a state court ICWA proceeding without legal counsel and that the Tribe's critical interest in participating in such proceedings outweighs and preempts the State's interest in having legal counsel represent parties in judicial proceedings. While this ruling is a partial solution to the problem of affording out-of-state legal counsel, it raises other issues. An Indian tribe is most often represented in ICWA proceedings by tribal social workers or case workers. Those employees may know the facts of the case, but they do not know court procedure or the law, and they are at a serious disadvantage in arguing procedural or legal issues before the court. Non-lawyer participation makes the court's job more difficult because of the lack of knowledge. Two years ago, the Indian Law Section of the Oregon State Bar proposed a change to UTCR 3.170 to address the issue, as they believed that Oregon courts would be better served by having a lawyer versed in Indian law and knowledgeable about the Tribe participate in the case, even if that lawyer may not be completely knowledgeable about local legal practice.

The Indian Law Section proposed two changes to UTCR 3.170 to overcome the burden of out-of-state Tribes participating in child custody cases in Oregon. First, their proposed rule change would allow out-of-state legal counsel to participate in a narrow range of ICWA proceedings without associating with local legal counsel. Tribes may still choose to associate with local legal counsel, but they are no longer required to do so. Second, the Section proposed that the application fee of $500 set out at 3.170(6) be waived because it is unnecessary and burdensome. It was the Section's belief that the fee is an improper burden on the right of a Tribe to intervene in a child custody proceeding under the ICWA.

The Tribal/State Judicial Consortium supports these proposed rule changes to UTCR 3.170. It is clear that the intent of the ICWA is to have Indian tribes intervening in state court proceedings involving their tribal children, and any burdens to that intervention found in state law should be changed. The Tribal/State Judicial Consortium believes that these proposed rule changes will increase participation in Oregon ICWA proceedings by out-of-state tribes, and would raise the level of practice in such proceedings by having legal counsel, rather than social service staff, represent the intervening Tribe's interests.

The Tribal/State Judicial Consortium recommends that UTCR 3.170 be amended by adding the following subsection 9:

(9) An applicant is not required to associate with local counsel pursuant to subsection (1)(c) of this section or pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that:

(a) The applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. §1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.*,

(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 U.S.C. §1903; and

(c) The Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law.