IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members, Plaintiffs, v. STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity of Commission of the Alaska Department of Revenue and JOHN MALLONEE, in his official capacity of Director of the Alaska Child Support Services Division, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Oct 25, 2011 Case No. 1JU-10-376 CI

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, the Central Council of Tlingit and Haida Indian Tribes of Alaska ("Tribe") is a federally recognized Indian Tribe. This case presents important questions concerning the Tribe's jurisdiction to adjudicate child support in its tribal court. The Tribe seeks injunctive and declaratory relief finding that its tribal court has subject matter jurisdiction over child support cases concerning tribal member children, and requiring the State of Alaska to give recognition to tribal child support orders in such cases.

Both parties move for summary judgment. The facts are generally not in dispute; the motions present questions of law. Having considered the parties' memoranda and exhibits, and the arguments of counsel presented at oral argument, the Tribe's motion for summary

judgment is granted, and the State's motion for summary judgment is denied, for the reasons set forth below.[1]

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and a party is entitled to a judgment as a matter of law.[2] The party moving for summary judgment "has the initial burden of offering admissible evidence showing both the absence of any genuine dispute of fact and the legal right to a judgment."[3] Once that burden is satisfied, the non-moving party, in order to prevent the entry of summary judgment, must produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence.[4]

B. Child Support

As society changed during the nineteenth and early twentieth century, American courts created, for the first time in Anglo-American common law, a legally enforceable duty on the part of parents to financially support their children.[5] This development stemmed from a

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[1] Plaintiff's request for the court to take judicial notice of the briefing in *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) is denied. The briefing in *Tanana* does not establish any fact which would bring it within Evidence Rule 201, nor is it legal authority within the scope of Rule 202. Judicial notice is, therefore, inappropriate. However, these materials are the sort of persuasive matter which parties routinely – and quite appropriately – submit in support of legal arguments. These materials are entirely appropriate to submit for the court's consideration, and they will be made a part of the record without any need to resort to judicial notice. Defendant's motion to strike is denied for the same reasons.

[2] Alaska Rule of Civil Procedure 56.

[3] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

[4] *Id.*

[5] *See generally*, 108 Yale L.J. 1123, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law* (1999).

recognition of the correlation between divorce, poverty, and dependency on the part of children of divorcing families (or, more generally, families involving a parent absent from the home).[6]

With the advent of modern welfare programs later in the twentieth century came a realization that the failure of noncustodial parents (often fathers) to provide financial support to their children drove those children into poverty and inflated the welfare rolls. By 1974 it could be said that:

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving [Aid to Families with Dependent Children], 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.[7]

Until then, child support establishment, collection, and enforcement had largely been left to the States.[8]

In 1974, Congress adopted Title IV-D of the Social Security Act, which required each state, as a condition of receiving federal funds for its welfare program, to create a child support enforcement system available both to welfare recipients and non-recipients.[9] The federal government, through its IV-D reimbursement plan, pays most of the cost of this system.

As part of this federal program, participating child support enforcement agencies are overseen by the federal Office of Child Support Enforcement ("OSCE"). Federal law establishes a variety of requirements that states are required to comply with in order to receive federal IV-D funding.

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[6] *Id.*
[7] *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565 (11th Cir. 1989), *quoting* Social Services Amendments of 1974, S. Rep. 93-1356, 93rd Congress, 2d Session 42 (1974).
[8] *See, e.g.*, 73 Mich. Bar Journal 660, *Federalization of Child Support: Twenty Years and Counting* (July 1994).
[9] P.L. 93-647; 42 USC §§661-665.

In 1996, as part of the federal welfare reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), states were required to adopt the Uniform Interstate Family Support Act ("UIFSA"), which sets out procedures for recognition of child support orders from other states.

UIFSA was initially promulgated by the National Conference of Commissioners on Uniform State Laws in 1992, and was adopted in Alaska in 1995.[10] The purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders, and to eliminate the problem of multiple child support orders from different jurisdictions.[11]

The UIFSA requires states to recognize child support orders from other "states." Although the uniform act included Indian tribes within the definition of "states," the language including Indian tribes was omitted by the Alaska legislature when it adopted UIFSA in 1997.[12]

When Congress enacted PRWORA in 1996, it required states to enact the official version of UIFSA, which includes Indian tribes within the definition of "states."[13] The State of Alaska twice requested an exemption from this requirement in 2008, but each request was rejected by the federal Department of Health & Human Services.[14] After the second denial, the State was warned that continued failure to enact a conforming statute risked loss of over $60

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[10] AS 25.25.101 *et seq.*; SLA 1995, ch. 57.
[11] Am Jur 2d Desertion, §73 (2011); *Hamilton v. Foster*, 620 N.W.2d 103 (Neb. 2000); *Linn v. Delaware Child Support Enforcement*, 736 A.2d 954 (Del. 1999). *See also*, *Bartlett v. State, Dept. of Revenue*, 125 P.3d 328, 331 (Alaska 2005) (UIFSA requires states to enforce other state's judgments "in order to create uniformity in interstate judgments.").
[12] SLA 1995, ch. 57 §4.
[13] 42 USC §666(f).
[14] Exhibit 4 to Plaintiff's Motion for Summary Judgment.

million in federal funds for IV-D and Temporary Assistance to Needy Families ("TANF") programs (the successor program to Aid to Families with Dependent Children).[15]

Faced with this threat, the Alaska Legislature amended UIFSA in 2009 to conform to the definition of "states" in the official text.[16] In doing so, the Legislature adopted intent language clarifying that it was not the Legislature's intention to confer additional jurisdiction on tribal courts:

> (a) It is the intent of the legislature that, in order to bring Alaska into conformity with the nationwide Uniform Interstate Family Support Act (UIFSA), as approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of that date by the National Conference of Commissioners on Uniform State Laws, it is necessary to amend AS 25.25.101 to include "an Indian tribe" and "the United States Virgin Islands" in the definition of "state."
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> (b) The proposed changes made in AS 25.25.101(19) under sec. 3 of this Act are conforming amendments that will result in procedural changes in Alaska for enforcement and modification of child support orders from other jurisdictions. UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order. In adopting UIFSA conforming amendments, the legislative intent is
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> > (1) to remain neutral on the issue of the underlying child support jurisdiction, if any, for the entities listed in the amended definition of "state";
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> > (2) not to expand or restrict the child support jurisdiction, if any, of the listed "state" entities in the amended definition; and
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> > (3) not to assume or express any opinion about whether those entities have child support jurisdiction in fact or in law.[17]

UIFSA requires a tribunal of this state to recognize the "continuing, exclusive jurisdiction" of a tribunal of another state that has issued a child support order under a law

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[15] *Id.*
[16] AS 25.25.101(19), amended by SLA 2009, ch. 45 §3.
[17] 2009 SLA ch. 45 §1.

substantially similar to UIFSA.[18] Article 5 of UIFSA requires Alaska's Child Support Services Division ("CSSD") to take steps to administratively enforce child support orders from other states without the need to file an independent court action in an Alaska court.[19] If an order from another state is contested in Alaska, UIFSA provides that CSSD "shall" register the order in an Alaska court under the procedures set forth in article 6 of UIFSA.[20] Resort to the registration procedure avoids the need to file an independent court action in Alaska to seek recognition of a foreign judgment as a matter of comity.[21]

The State correctly points out that the ability to use these UIFSA procedures for a tribal court support order depends upon whether the tribal court has jurisdiction to issue child support orders. UIFSA does not confer jurisdiction on tribal courts; it merely requires recognition of tribal court support orders if the tribal court has jurisdiction.

Thus the outcome of this case hinges on the basic question of jurisdiction: does the Tlingit Haida tribal court have jurisdiction to enter child support orders concerning children who are tribal members?

C. Tribal Court Jurisdiction – *John v. Baker*

Indian tribes possess inherent powers of self-government which predate the arrival of European settlers and the founding of the United States.[22] Tribes "retain those fundamental

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[18] AS 25.25.205(d).
[19] AS 25.25.501-507.
[20] AS 25.25.507(b); AS 25.25.601-614.
[21] *See generally,* Exhibit 3 to Plaintiff's Motion for Summary Judgment, SOA pp. 0115-0116 (Steinberg letter).
[22] *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status."[23]

While tribal sovereignty is not absolute, "until Congress acts, . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[24] The United States Supreme Court has articulated a "core set of sovereign powers that remain intact even though Indian nations are dependent under federal law; in particular, internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers."[25]

These principles are well established in the context of an Indian tribe occupying a reservation in the lower 48 states. Indian tribes possess broad sovereignty in Indian country. In Alaska, however, the Alaska Native Claims Settlement Act ("ANCSA") largely extinguished Indian country.[26]

In *John v. Baker*, the Alaska Supreme Court held that Alaska tribes retain the power to adjudicate custody disputes concerning tribal member children "by virtue of their inherent powers as sovereign nations."[27] The court in *John v. Baker* found that this power does not depend upon the existence of Indian country, but rather stems from the tribe's interest in "preserving and protecting the Indian family as the wellspring of its own future."[28] As such,

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[23] *Merrion v. Jicarilla Apace Tribe*, 455 U.S. 130, 146 (1982).
[24] *Merrion*, 435 U.S. at 323.
[25] *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).
[26] *Alaska v. Native Village of Venetie Tribal Government (Venetie II)*, 522 U.S. 520 (1998).
[27] 982 P.2d at 748-49.
[28] *Id.* at 752.

the power to adjudicate custody disputes over Alaska Native children is necessary "to protect tribal self-government or to control internal relations."[29]

It was unclear from the Supreme Court's first *John v. Baker* opinion (*John v. Baker I*) whether the holding extended to the question of whether Alaska Native tribes have authority to decide child support as well as child custody. In its third opinion in *John v. Baker* (*John III*), the Supreme Court clarified that it did not intend to decide this question in *John v. Baker I*. The court in *John III* declined, for procedural reasons, to reach the question presented in this case – whether tribal courts have jurisdiction over child support issues.[30] This is, therefore, a question of first impression.

D. Child Custody and Child Support

It is clear under Alaska law and procedure that the issues of child custody and child support are closely intertwined. The Supreme Court emphasized this point in *McCaffery v. Green*,[31] a case dealing with interstate child support jurisdiction.

Ms. McCaffery and Mr. Green were divorced in Texas. The Texas court awarded McCaffery custody of the children and ordered Green to pay child support. Four years later, McCaffery moved to Alaska with the children. Green moved to Oregon. Neither parent retained connections to Texas.

Three years after moving to Alaska, McCaffery moved in an Alaska court to modify the visitation and child support provisions of the Texas decree. Green objected on the basis of jurisdiction.

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[29] *Id.*
[30] *John v. Baker*, 125 P.3d 323 (Alaska 2005).
[31] 931 P.2d 407 (Alaska 1997).

The trial court found that it had jurisdiction to modify the Texas decree as to custody and visitation under the statute then in effect, the Uniform Child Custody Jurisdiction Act ("UCCJA"), but found that the court was without jurisdiction as to child support.

The Supreme Court reversed, holding that the court had jurisdiction to consider both custody or visitation, and child support. In doing so, the court noted that it "simply makes sense" for a court that has jurisdiction to consider custody and visitation to also have jurisdiction to consider child support:

> An Alaska court is already deciding issues of custody and visitation. A visitation determination inherently affects the amount of child support owed by the obligor parent. Alaska Civil Rule 90.3(a)(3) specifically links the two issues: a court may allow an obligor parent to reduce child support payments up to fifty percent for any period in which that parent has extended visitation of over twenty-seven consecutive days. This rule recognizes that a parent's own expenses are greater (and the other parent's expenses less) when that parent exercises visitation rights. To decide custody and visitation issues without being able to make the logically concomitant support modification could result in an imbalance between visitation allowed and support owed.[32]

The court went on to note that issues of support and custody are intertwined, quoting the view of one commentator on this point:

> Dissolution of marriage determines status and does not carry with it any inevitable consequences. The parties are not presumed to have any ongoing obligation to one another. Therefore, in a divorce action it is conceptually justifiable to sever the economic issues from the status issues and require personal jurisdiction to resolve the former. In contrast, divorce does not extinguish a parent's obligation to his or her children. While the amount of monthly payments is certainly a subject of frequent dispute, the fact remains that the noncustodial parent can reasonably anticipate being liable for some amount of child support. The parent's obligation to support the child is not merely related to the status determination; it is an inevitable concomitant of custody decisions.[33]

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[32] 931 P.2d at 413-14 (emphasis added).
[33] *Id.* at 414, *quoting* Monica J. Allen, Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions, 26 Fam. L. Q. 293, 307 (1992).

Additionally, Alaska's court rules require the court to consider child support any time it makes a custody decision. Civil Rule 90.3(e) requires all parents seeking to litigate custody issues to file information regarding their income for child support purposes. Child support depends not upon the amount of time the child actually spends with each parent, but rather upon what is in the custody order.[34]

The court in *John v. Baker* clearly established that the tribal court has jurisdiction to decide issues of custody and visitation as to children who are members of the tribe. It would be an odd result if a state court which was called upon to decide custody were required to decide child support, but a tribal court deciding custody were barred from deciding support for lack of jurisdiction. But that would be the result of the State's position. This result would provide a substantial deterrent for parents to bring custody disputes to tribal courts, since tribal courts could not decide all of the issues in the case. It would also open the door to procedural manipulation, since a parent wanting to adjudicate custody without risking an adverse child support order could file in tribal court.

Parents have a broad range of rights and responsibilities with respect to their children. The duty to provide financial support for one's children is just one of a parent's responsibilities. Parents have a duty to keep their children safe, to provide them with food, clothing, shelter, and medical care, and to ensure that they go to school.

A court deciding child custody may make decisions that affect the full range of each parent's rights and duties. A court may enter orders in a custody case having to do with all of the parents' duties, including but not limited to child support. A court may order a parent to

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[34] *Turinsky v. Long*, 910 P.2d 590, 595 (Alaska 1996).

take the child to school, or to the doctor, or to see a counselor, or to church. A parent may be prohibited from exercising some of the duties of a parent, or may be required in a custody order to exercise those duties.

According to the State's position, a tribal court has the jurisdiction to adjudicate each and every one of the rights and responsibilities of the parents of a tribal member child, except for the parents' duty to provide monetary support for the child. Under this argument, child support is merely a debt between the parents, which has no relation to any tribal interest. This position fails to recognize the "paramount duty" of parents to support their children.[35] This duty is not simply a debt to the other parent, but is integral to the statutory and common-law duty parents have to their children.[36]

In arguing that child support is merely a social welfare program, the State views this question only through the lens of administrative child support enforcement. This argument views child support as only a way for governments to recoup welfare payments from noncustodial parents.[37] But the duty to pay child support long predates enactment of social welfare legislation. This duty is integral to the parent child relationship. The ability to ensure that noncustodial parents support their children may be the only thing keeping those children out of grinding poverty. This duty cannot be characterized as merely a debt between parents. Nor can it be characterized only as an after-effect of the enactment of social welfare legislation in the twentieth century.

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[35] *See, e.g., Kestner v. Clark*, 182 P.3d 1117, 1122-23 (Alaska 2008).
[36] *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987).
[37] State's memorandum in opposition to summary judgment and in support of cross-motion for summary judgment at 6-8, 12 (". . . child support developed as a broad, national social welfare program.").

The determination and enforcement of the duty of parents to support a child who happens to be a tribal member is no less a part of the tribe's internal domestic relations than the decision as to which parent the child will live with, which school the child will attend, or any of the other important decisions that custody courts make every day. Ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe – like that of any society – requires no less.

In my view, the determination of child support is an integral part of a custody determination. To the extent that the Supreme Court found in *John v. Baker* that tribes have jurisdiction over custody determinations, I conclude that this jurisdiction, to be meaningful, must extend to adjudication of child support.

To the extent that the State argues that the holding of *John v. Baker* is in question as a result of subsequent federal decisions, that argument was undercut by the Alaska Supreme Court's decision in *State v. Native Village of Tanana*,[38] in which the court reaffirmed *John v. Baker*'s "foundational holding" that a sovereign tribe's inherent powers of self-government include "inherent authority to regulate internal domestic relations among its members," and that this authority was not divested by ANCSA's elimination of Indian country in Alaska.[39] It is not for this court to reject the Supreme Court's holding in *John v. Baker*.[40]

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[38] 249 P.3d 734 (Alaska 2011).
[39] *Id.* at 750.
[40] I am not persuaded that *Montana v. United States*, 450 U.S. 544 (1981), a case having to do with a tribe's authority to regulate the activities of non-members on private land, calls the Alaska Supreme Court's later holding in *John v. Baker* into question. *Montana* has to do with a tribe's authority to regulate the conduct of non-members, and does not delineate a tribe's authority to adjudicate domestic relations cases involving children who are members of the tribe. I find *Montana* to be distinguishable.

Here, of course, the tribal court seeks to decide only child support and not custody. The fact that a court has chosen not to exercise the full extent of its jurisdiction, however, does not divest the court of jurisdiction. In my view, *John v. Baker* confers jurisdiction on the tribal court to decide both custody and support. The tribal court does not forfeit its jurisdiction merely because it chooses not to decide issues of custody.

E. Personal Jurisdiction

I have concluded that the tribal court has subject matter jurisdiction over issues of child support as to children who are members of the tribe (or eligible for membership). This case does not require the court to decide the issue of personal jurisdiction, which must be decided on a case by case basis.

The United States Supreme Court held in *Kulko v. Superior Court*[41] that the Due Process clause of the Fourteenth Amendment was violated when a California court heard a custody modification and child support claim against a father who lived in New York, when that father did not have the "minimum contacts" with the State of California which are required under *International Shoe Co. v. Washington.*[42]

Statutes such as the UCCJEA or UIFSA impose geographical limitations on the jurisdiction of state courts. Reservation boundaries impose geographical limitations on the jurisdiction of tribal courts in the lower 48 states. Because of the extinguishment of Indian country in Alaska, the Tlingit Haida Tribal court has no such geographical limitation on its jurisdiction. The tribe claims jurisdiction based solely on the child's membership. Under this framework, the tribal court could claim jurisdiction to enter a support order for a tribal member

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[41] 436 U.S. 84 (1978).
[42] 326 U.S. 310, 316 (1945).

child, against a nonmember parent, even in a case in which neither the parents nor the child have ever been to Alaska or set foot on the Tribe's traditional lands.

One could imagine a hypothetical case in which both parents live in a far away state, and all the necessary witnesses as to the issue of child support would be located in the parents' state of residence. The obligor parent would have to defend himself or herself in a far away court with which he or she has no connections. In such a hypothetical case, the exercise of jurisdiction by the tribal court may well violate due process, based on the holding in *Kulko*.

It is not necessary to decide the precise outer limits of the court's jurisdiction to decide this case. There is no suggestion that any of the particular cases at issue here involve a claim of jurisdiction that would run afoul of *Kulko*.

F. Other Practical Difficulties

The State has identified a number of practical problems with concurrent state and tribal jurisdiction. I recognize the validity of many of these concerns. These practical complications are inevitable with a system of dual sovereignty. I further recognize that many of these problems will be difficult to solve. Because I believe the conclusions reached in this decision are a necessary consequence of the Supreme Court's holding in *John v. Baker*, however, I believe the solution to these problems lies somewhere other than in this court.

G. Remedies

Based on the foregoing conclusions, I find that the Tribe is entitled to summary judgment on its first, second, and third causes of action, and I will enter a declaratory judgment declaring that the Tribe possesses inherent rights of self-governance that include subject matter jurisdiction to adjudicate child support for children who are members of the Tribe or eligible

for membership in the Tribe, and an injunction requiring the State of Alaska, Child Support Services Department to comply with UIFSA and applicable federal and state regulations.

There are several issues that require additional briefing. The first is whether these conclusions require summary judgment on the constitutional and §1983 claims set out in plaintiff's fourth and fifth causes of action. And the second is the precise language of the injunctive relief that should be granted. In particular, how broadly should the injunction be phrased as to future cases.

In addressing this second question, I would ask the parties to specifically address the question of how (or whether) to address possible questions about personal jurisdiction, under *Kulko* or other authority, in crafting an injunction.

Finally, the parties should address the question of whether, based on the conclusions set out in this order, the court should enter final judgment in this case. If so, the parties should state their positions on what that judgment should be (consistent with the conclusions reached in this order).

The plaintiff should submit a memorandum on these points, along with a proposed form of order, in thirty (30) days. The defendant should submit its memorandum thirty (30) days form the date of service of the plaintiff's memorandum. The plaintiff may submit a reply memorandum fifteen (15) days from the date of service of the defendant's memorandum.

III. CONCLUSION

As discussed above, I find that the Tlingit Haida Tribal court has subject matter jurisdiction to enter child support orders concerning tribal member children. The plaintiff's

motion for summary judgment is, therefore, GRANTED. The State's cross motion for summary judgment is DENIED.

Entered at Juneau, Alaska this 25 day of October, 2011.

Philip M. Pallenberg
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 25th day of October, 2011.

Holly Handler	Mary Ann Lundquist
☒ Court box	☒ Court box

Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg