

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

### UPDATE OF RECENT CASES

MAY 9, 2022

The Tribal Supreme Court Project (Project) is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy, and prepare briefs, especially when considering a petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (<http://sct.narf.org>).

Since the last update, the Court has granted two additional cases: *Oklahoma v. Castro-Huerta* (21-429) (state criminal jurisdiction in Indian country), and *Haaland v. Brackeen* (21-376) (Indian Child Welfare Act). *Castro-Huerta* was argued on April 27, 2022, and we expect the Court to hand-down its decision before it departs for its summer recess. *Brackeen* will be argued sometime in the October Term 2022. We are also awaiting decisions in *Denezpi v. United States* (20-7622) (Double Jeopardy) and *Ysleta del Sur Pueblo v. Texas* (20-493) (Indian gaming). These cases are detailed further below.

### PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in the following cases:

#### DENEZPI V. UNITED STATES (20-7622)

**Petitioner:** Merle Denezpi, an individual Indian

**Petition Filed:** March 31, 2021

**Subject Matter:** Double jeopardy

**Lower Court Decision:** The Tenth Circuit affirmed the district court's criminal conviction.

**Recent Activity:** Argued on February 22, 2022

**Upcoming Activity:** Court's decision forthcoming

Petitioner Merle Denezpi is a Navajo Nation citizen and was convicted of a tribal law assault-and-battery charge by the Court of Indian Offenses of the Ute Mountain Ute Agency and served 140 days of imprisonment. Six months later, a federal grand jury indicted him on one count of aggravated sexual abuse in Indian country. He moved to dismiss the indictment, claiming that it violated the Double Jeopardy Clause because he was convicted of the same offense in the Court of Indian Offenses. The district court denied the motion to dismiss, and he was convicted after a trial. The Tenth Circuit affirmed, holding that the Double Jeopardy Clause was not violated because the "ultimate source" of Mr. Denezpi's prosecution in the Court of Indian Offenses was the tribe's inherent sovereignty. The court reasoned that

Congress's creation of the court provided a forum through which the tribe could exercise its power of self-governance.

### **YSLETA DEL SUR PUEBLO V. TEXAS (20-493)**

**Petitioner:** Ysleta del Sur Pueblo

**Petition Filed:** October 9, 2020

**Subject Matter:** Indian gaming

**Lower Court Decision:** The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Texas.

**Recent Activity:** Argued on February 22, 2022

**Upcoming Activity:** Court's decision forthcoming

The State of Texas sued the Ysleta del Sur Pueblo ("Pueblo"), seeking to enjoin it from engaging in certain gaming as a violation of Texas law. In 1987, Congress passed an act restoring federal recognition of the Pueblo, which provided that the Pueblo may not conduct gaming that is prohibited under Texas law. Congress subsequently passed the Indian Gaming Regulatory Act ("IGRA"), which is more permissive of tribal gaming operations than the Pueblo's restoration act. Texas and the Pueblo have disagreed ever since about whether the restoration act or IGRA control the Pueblo's gaming operations. In 1993, the Fifth Circuit sided with Texas and held that the restoration act controlled. In the instant lawsuit, Texas argued that the Pueblo's games violated Texas law. Relying on its 1993 case, the Fifth Circuit agreed and held that "the Restoration Act 'govern[s] the determination of whether gaming activities proposed by the [ ] Pueblo are allowed under Texas law, which functions as surrogate federal law.'"

### **OKLAHOMA V. CASTRO-HUERTA (21-429)**

**Petitioner:** State of Oklahoma

**Petition Filed:** September 21, 2021

**Subject Matter:** State criminal jurisdiction in Indian country

**Lower Court Decision:** The Oklahoma Court of Criminal Appeals concluded that state lacked jurisdiction to prosecute

**Recent Activity:** Argued on April 27, 2022

**Upcoming Activity:** Court's decision forthcoming

Castro-Huerta, a non-Indian, was convicted in Oklahoma state court of offenses stemming from the neglect of an Indian child. His conviction was on appeal when the U.S. Supreme Court decided *McGirt v. Oklahoma*, and the Oklahoma Court of Criminal Appeals remanded to the trial court for a determination of whether Oklahoma possessed jurisdiction over the crime. The trial court concluded that it did not because there was an Indian victim and the crime occurred within the Cherokee Nation reservation. The Oklahoma Court of Criminal Appeals affirmed, and the U.S. Supreme Court granted review on the question of whether a state possesses concurrent jurisdiction over crimes that the United States may prosecute pursuant to 18 U.S.C. § 1152. Several petitions that raise the same or related questions are list below under "Petitions for a Writ of Certiorari Pending."

**Brackeen v. Haaland (21-380); Texas v. Haaland (21-378); Cherokee Nation v. Brackeen (21-377); Haaland v. Brackeen (21-376)**

**Petitioners:** The United States, four Indian tribes, State of Texas, and individual non-Indians, State of Texas, United States, and four Indian tribes

**Petition Filed:** September 3, 2021

**Subject Matter:** Indian Child Welfare Act

**Lower Court Decision:** The Fifth Circuit Court of Appeals affirmed in part, and reversed in part, the district court's conclusions that the Indian Child Welfare Act was unconstitutional.

**Recent Activity:** Petitions granted

**Upcoming Activity:** Opening Briefs due May 26, 2022

A Texas couple wishing to adopt an Indian child, and the State of Texas, filed suit against the United States and several of its agencies and officers in federal district court claiming that the Indian Child Welfare Act ("ICWA") was unconstitutional. They were joined by additional individual plaintiffs and the States of Louisiana and Indiana. Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively the "Four Tribes") intervened as defendants, and Navajo Nation intervened at the appellate stage. The district court held that much of ICWA was unconstitutional, but the Fifth Circuit, sitting en banc, reversed much of that decision. However, the Fifth Circuit did affirm the district court on some of its holdings that specific sections of ICWA violated the Fifth Amendment's equal protection guarantee and the Tenth Amendment's anti-commandeering principle. Specifically, the Fifth Circuit by an equally divided court affirmed the district court's holding that ICWA's preference for placing Indian children with "other Indian families" (ICWA's third adoptive preference, after family placement and placement with the child's tribe) and the foster care preference for licensed Indian foster homes violated equal protection. The Fifth Circuit also concluded that the Tenth Amendment's anti-commandeering principle was violated by ICWA's "active efforts," "qualified expert witness," and record keeping requirements, and an equally divided court affirmed the district court's holdings that placement preferences and notice requirements would violate the anti-commandeering principle if applied to State agencies. Finally, the Fifth Circuit also held that certain provisions of the ICWA Final Rule, specifically those related to the provisions that the Court had found to be unconstitutional, violated the Administrative Procedure Act.

The United States, the Four Tribes, Texas, and the non-Indian individuals each filed petitions for review at the U.S. Supreme Court. The United States and the Four Tribes seek review of the Fifth Circuit's finding of unconstitutionality based on Equal Protection and anti-commandeering and the corresponding findings of APA violations, and assert that the individual plaintiffs lack standing. In its petition, Texas asserts that Congress acted beyond its Indian Commerce Clause power in enacting ICWA and that ICWA creates a race-based child custody system in violation of the Equal Protection clause. Texas claims that ICWA violates the anti-commandeering principle and that its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress. The individual plaintiffs focus their petition more narrowly on equal protection and anti-commandeering claims.

## PETITIONS FOR A WRIT OF CERTIORARI PENDING

The following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

### ALEXANDER V. GWITCHYAA ZHEE CORPORATION (21- 1393)

**Petitioner:** Clarence and Demetrie Alexander

**Petition Filed:** April 29, 2022

**Subject Matter:** Alaska Native Claims Settlement Act

**Lower Court Decision:** The district court issued summary judgement in favor of Alaska Native Village Corporation and tribal government, and the Ninth Circuit affirmed.

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due May 31, 2022

This case concerns land conveyed to an Gwitchyaa Zhee Village Corporation (the “Village Corporation”) pursuant to the Alaska Native Claims Settlement Act. To comply with its Section 14(c)(1) reconveyance obligations, the Village Corporation prepared survey drawings and maps. Clarence and Demetrie Alexander (the “Alexanders”) are Alaska Natives who have approved reconveyance claims. They contend that the survey prepared by the Village Corporation improperly conveys portions of their parcels to the Gwitchyaa Zhee Tribe (the “Tribe”). The Village Corporation and Tribe sued to eject the Alexanders from the disputed areas. The district court concluded that Alexanders had no legal estate in the disputed areas because any challenges to the boundaries were barred by the statute of limitations, and that the Alexanders did not have a valid adverse possession claim. The Ninth Circuit affirmed.

### ALBRECHT V. RIVERSIDE COUNTY (21-1298)

**Petitioner:** Non-Indian lessees of land held in trust for Indian tribe

**Petition Filed:** March 28, 2022

**Subject Matter:** State taxation in Indian country

**Lower Court Decision:** After a bench trial, a California state court ruled in favor of defendant county government, and the Court of Appeal of California affirmed.

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due May 18, 2022

Several non-Indian lessees of tribal and individual Indian trust lands challenged the validity of possessory interest taxes imposed by the local county government. After a bench trial, the trial court ruled in favor of the defendant county government. On appeal, the state appellate court concluded that the taxes were not expressly preempted by the Indian Reorganization Act, nor were they impliedly preempted under tests developed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Williams v. Lee*, 358 U.S. 217 (1959).

### BECKER V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (21-1340)

**Petitioner:** Lynn Becker, a non-Indian contractor for the Tribe

**Petition Filed:** April 11, 2022

**Subject Matter:** State civil adjudicatory jurisdiction on-reservation

**Lower Court Decision:** The United States District Court for the District of Utah denied the Tribe's injunctive relief, and the Tenth Circuit reversed.

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due June 10, 2022

Lynn Becker, a non-Indian, sued the Ute Indian Tribe of the Unitah and Ouray Reservation ("Tribe") in state court for an alleged breach of contract stemming from his work marketing and developing the Tribe's mineral resources on its reservation. The Tribe sued Mr. Becker and the Utah state court judge hearing the matter in federal court challenging the state court's subject-matter jurisdiction and seeking injunctive relief. The district court denied the Tribe's motion for a preliminary injunction, and the Tribe appealed. The Tenth Circuit reversed. It concluded that the state court lacked jurisdiction because a substantial portion of the relevant conduct occurred on the Tribe's reservation and that PL-280 did not vest in the Utah state courts civil adjudicatory jurisdiction for on-reservation disputes with an Indian party.

### **TREPPA V. HENGLE (21-1138)**

**Petitioner:** Sherry Treppa, Chairperson of the Habematolel Pomo of Upper Lake Executive Council

**Petition Filed:** February 16, 2022

**Subject Matter:** Tribal sovereign immunity; arbitration

**Lower Court Decision:** The United States District Court for the Eastern District of Virginia denied a motion to dismissed the suit and the Fourth Circuit affirmed.

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due May 18, 2022

Plaintiffs were individuals who received short-term loans from online lenders owned by the Habematolel Pomo of Upper Lake (the "Tribe"). The borrowers defaulted and brought a class action suit against the lender and others, including Tribal officials in their official capacity, claiming that they were not obligated to repay the loans because they violated Virginia usury laws. The defendants moved to compel arbitration under the terms of the loan agreements and to dismiss the complaint, among other reasons, based on tribal sovereign immunity. The district court held that the arbitration provisions were unenforceable because they were a prospective waiver of the borrowers' federal rights, and that sovereign immunity did not apply. The Fourth Circuit affirmed, holding that the arbitration agreements were unenforceable and that tribal sovereign immunity does not bar a claim against tribal officials for prospective injunctive relief for violations of state law occurring off-reservation.

### **PETITIONS RELATED TO MCGIRT V. OKLAHOMA**

**Petitioner:** State of Oklahoma

**Petitions Filed:** Beginning August 6, 2021; ongoing.

**Subject Matter:** Criminal Jurisdiction in Indian country

**Lower Court Decisions:** The Oklahoma Court of Criminal Appeals applied *McGirt* to vacate all of the respondents' criminal convictions.

**Recent Activity:** *Oklahoma v. Castro-Huerta*, granted.

Oklahoma filed more than 50 petitions seeking review of Oklahoma Court of Criminal Appeals decisions vacating convictions of people convicted of crimes in state court that were subject to federal jurisdiction under either the Major Crimes Act or the General Crimes Act. All early petitions urged the court to reverse *McGirt* as well.

The first of these petitions was *Oklahoma v. Bosse*, in which Oklahoma challenged the Court of Criminal Appeals' grant of post-conviction relief to a non-Indian defendant convicted of a crime against an Indian victim. In addition to asking that *McGirt* be overruled, Oklahoma argued (1) the State had concurrent criminal jurisdiction over the defendant, and (2) *McGirt* should not be available to vacate a conviction already final at the time it was decided.

Oklahoma followed *Bosse* with several similar petitions, all explicitly relying on *Bosse* and falling into one of four categories: (1) those involving only Indian defendants pursuant to the Major Crimes Act ("MCA"), (2) those involving Indian defendants under the General Crimes Act ("GCA"), (3) those involving Indian defendants under both the MCA and GCA, and (4) those involving non-Indian defendants and an Indian victim under the GCA. The petitions involving convictions under the General Crimes Act not only urge the Court to overrule *McGirt*, but also assert that the state retains concurrent jurisdiction with the federal government over GCA offenses.

Oklahoma voluntarily withdrew its petition in *Bosse* after the Court of Criminal Appeals held in *State ex rel. Matloff v. Wallace* that *McGirt* cannot be applied retroactively in state post-conviction relief proceedings to invalidate convictions. Following *Matloff*, the retroactivity arguments in *Bosse* and several of the supporting petitions filed after *Bosse* are moot. At least one defendant raised the retroactivity argument in a petition, *Parish v. Oklahoma* (21-467), which was denied.

After withdrawing *Bosse*, Oklahoma filed a similar petition involving a non-Indian defendant and Indian victim in *Oklahoma v. Castro-Huerta* (21-429). That petition asked that *McGirt* be overruled and asserted concurrent state jurisdiction, but did not ask the court to rule on the retroactivity issue presented in *Bosse*. The Court granted *Castro-Huerta*, but only on the concurrent jurisdiction question.

Finally, in *Oklahoma v. Sam* (21-1214) and *Oklahoma v. Wadkins* (21-1193), Oklahoma raises the question of what requirements must a criminal defendant satisfy to qualify as an "Indian" under the MCA.

The various petitions are detailed below.

(1) Petitions involving an Indian defendant whose offense(s) could be prosecuted under the Major Crimes Act:

**OKLAHOMA V. SAM (21-1214)**

**Petition Filed:** March 7, 2022

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due May 10, 2022

**OKLAHOMA V. WADKINS (21-1193)**

**Petition Filed:** March 2, 2022

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due May 10, 2022

(2) Petitions involving an Indian victim and non-Indian defendant whose offense(s) could be prosecuted under the General Crimes Act:

**OKLAHOMA V. SIMS (21-1102)**

**Petition Filed:** February 8, 2022

**Recent Activity:** Petition filed

**Upcoming Activity:** Brief in opposition due June 1, 2022

**OKLAHOMA V. WHITE (21-1058)**

**Petition Filed:** February 1, 2022

**Recent Activity:** Scheduled for April 14, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. BRAGG (21-1009)**

**Petition Filed:** January 18, 2022

**Recent Activity:** Scheduled for April 22, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. BAILEY (21-960)**

**Petition Filed:** December 30, 2021

**Recent Activity:** Scheduled for April 22, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. PURDOM (21-959)**

**Petition Filed:** December 30, 2021

**Recent Activity:** Scheduled for March 4, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. ROTH (21-914)**

**Petition Filed:** December 21, 2021

**Recent Activity:** Scheduled for March 25, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. COFFMAN (21-772)**

**Petition Filed:** November 24, 2021

**Recent Activity:** Scheduled for February 18, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. MILLER (21-643)**

**Petition Filed:** November 2, 2021

**Recent Activity:** Scheduled for January 21, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. JONES (21-451)**

**Petition Filed:** September 23, 2021

**Recent Activity:** Scheduled for January 21, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. MCDANIEL (21-485)**

**Petition Filed:** October 1, 2021

**Recent Activity:** Scheduled for January 21, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. MIZE (21-274)**

**Petition Filed:** August 25, 2021

**Recent Activity:** Scheduled for January 21, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**OKLAHOMA V. WILLIAMS (21-265)**

**Petition Filed:** August 24, 2021

**Recent Activity:** Scheduled for March 25, 2022, conference. No action taken by the Court. Being held pending the outcome of *Castro-Huerta*.

**TERRY V. OKLAHOMA (21-7379)**

**Petition Filed:** March 16, 2022

**Recent Activity:** Scheduled for May 12, 2022, conference

**PETITIONS FOR A WRIT OF CERTIORARI DENIED**

**SNOQUALMIE INDIAN TRIBE V. WASHINGTON (21-1248)**

**Petitioner:** Snoqualmie Indian Tribe



**Petition Filed:** March 15, 2022

**Subject Matter:** Res judicata, tribal hunting and gathering rights

**Lower Court Decision:** The United States District Court for the Western District of Washington dismissed the suit and the Ninth Circuit affirmed.

**Recent Activity:** Petition denied on April 25, 2022

The Snoqualmie Indian Tribe sued the State of Washington, and other agencies and officials, seeking a declaration that it was signatory to Treaty of Point Elliott and that it possesses off-reservation hunting and gathering rights. The district court dismissed action, concluding that the question had been settled in the negative in prior litigation. The Ninth Circuit affirmed. The Samish Indian Nation intervened on appeal, and its separate cert petition, *Samish Indian Nation v. Washington* (21-1127), was denied on March 21, 2022.

### **KLICKITAT COUNTY V. CONFEDERATED TRIBES OF THE YAKAMA NATION (21-906)**

**Petitioner:** Klickitat County, Washington

**Petition Filed:** December 20, 2021

**Subject Matter:** Reservation boundaries

**Lower Court Decision:** The United States District Court for the Eastern District of Washington issued declaratory judgment in favor of the Tribe.

**Recent Activity:** Petition denied on April 18, 2022

Confederated Tribes and Bands of the Yakama Nation (the “Tribe”) sued Klickitat County (the “County”) and County officials for declaratory and injunctive relief, alleging that county lacked jurisdiction to prosecute juvenile for an incident that took place within reservation. The district court issued declaratory judgment in favor of the Tribe, and the County appealed. The Ninth Circuit affirmed, holding that the tract in question was within the Tribe’s reservation created by treaty, and that Congress did not subsequently express its intent to abrogate the treaty and exclude the tract.

### **PENOBSCOT NATION V. FREY (21-838); UNITED STATES V. FREY (21-840)**

**Petitioners:** Penobscot Nation and the United States

**Petition Filed:** December 7, 2021

**Subject Matter:** Treaty fishing rights

**Lower Court Decision:** The First Circuit affirmed the district court’s holding that the tribe’s reservation included certain islands, but not waters or submerged lands.

**Recent Activity:** Petition denied on April 18, 2022

Penobscot Nation (the “Tribe”) sued the State of Maine, seeking declaratory judgment regarding the boundaries of Tribe's reservation and tribal fishing rights on the Penobscot River. The United States intervened as plaintiffs, and municipalities and others intervened as defendants. The United States District Court for the District of Maine held that the Tribe’s reservation included river’s islands but not its waters, and that the Tribe possessed fishing rights in the river. A panel of the First Circuit Court of Appeals affirmed in part and vacated in part. The First Circuit granted en banc review, and held that the Tribe’s reservation did not include the main stem of the river, nor its submerged lands.

### **CABALLERO V. UNITED STATES (21-1048)**

**Petitioner:** Cesar Caballero

**Petition Filed:** January 27, 2022

**Subject Matter:** Federal recognition

**Lower Court Decision:** The United States District Court for the Eastern District of California dismissed counter-claims against the Tribe.

**Recent Activity:** Petition denied on March 28, 2022

The Shingle Springs Band of Miwok Indians (the “Tribe”) sued Cesar Caballero, alleging misappropriation of the Band’s name in violation of the Lanham Act. Mr. Caballero made counter-claims premised on the assertion that the Tribe’s federal recognition was improper. The district court dismissed these counter-claims as raising non-justiciable political questions. The Ninth Circuit affirmed.

### **HAWKINS V. HAALAND (21-520)**

**Petitioners:** Several private landowners

**Petition Filed:** October 8, 2021

**Subject Matter:** Water rights

**Lower Court Decision:** The D.C. Circuit affirmed the district court’s dismissal of the suit.

**Recent Activity:** Petition denied on March 21, 2022

Petitioners are ranchers who utilize water from the upper Klamath River basin in Oregon, where the Klamath Tribes (the “Tribes”) possess superior water rights to support their hunting, fishing, trapping and gathering rights reserved to them under an 1864 Treaty with the United States. The Tribes entered into a Protocol Agreement with the United States regarding how and when water calls will be made. The ranchers are challenging its validity, asserting that the agreement unlawfully delegates to the Tribes’ the United States’ ability, as the Tribes’ trustee, to make water calls. The D.C. Circuit held that the agreement does not delegate federal authority, but instead recognizes the Tribes’ own authority to control their water rights. Further, because federal law does not require the United States to concur in the Tribes’ enforcement of their water rights, the D.C. Circuit court determined that invalidating the agreement would not remedy any of Petitioners’ alleged injuries. Consequently, the Petitioners failed to establish standing to bring the suit.

### **SAMISH INDIAN NATION V. WASHINGTON (21-1127)**

**Petitioner:** Snoqualmie Indian Tribe

**Petition Filed:** March 15, 2022

**Subject Matter:** Res judicata, tribal hunting and gathering rights

**Lower Court Decision:** The United States District Court for the Western District of Washington dismissed the suit and the Ninth Circuit affirmed.

**Recent Activity:** Petition denied on March 21, 2022

The Snoqualmie Indian Tribe sued the State of Washington, and other agencies and officials, seeking a declaration that it was signatory to Treaty of Point Elliott and that it possesses off-reservation hunting and gathering rights. The district court dismissed action, concluding that the question had been settled in the negative in prior litigation. The Ninth Circuit affirmed. The Samish Indian Nation intervened on appeal,

and sought review of questions relating to the district court’s jurisdiction when sovereign immunity is asserted and whether a dismissal based on issue preclusion is a “merits” dismissal.

**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS V. WHITMER (21-769)**

**Petitioner:** Little Traverse Bay Bands of Odawa Indians, a federally recognized tribe

**Petition Filed:** November 23, 2021

**Subject Matter:** Reservation status

**Lower Court Decision:** The Sixth Circuit affirmed the district court’s summary judgment against the tribe.

**Recent Activity:** Petition denied on February 28, 2022

The Little Traverse Bay Bands of Odawa Indians (the “Tribe”) sued the State of Michigan, seeking a declaration that the Treaty of 1855 created a reservation and for injunctive relief preventing the state from taking action inconsistent with that reservation status. The district court issued summary judgment in favor of the state, concluding that the treaty did not create a reservation. The Sixth Circuit Court of Appeals affirmed, holding that the relevant treaty did not create “federal superintendence” sufficient to create a reservation.

**JAMESTOWN S’KLALLAM TRIBE V. LUMMI NATION (21-913)**

**Petitioner:** Jamestown S’Klallam Tribe, a federally recognized tribe

**Petition Filed:** December 21, 2021

**Subject Matter:** Treaty fishing rights – usual and accustomed fishing places

**Lower Court Decision:** District Court ruled that Lummi Nation possessed a right to fish in the contested waters.

**Recent Activity:** Petition denied February 22, 2022

This is a dispute between the Jamestown S’Klallam Tribe and the Lummi Nation over usual and accustomed fishing places in the Strait of Juan de Fuca. The district court ruled that the Lummi Nation possessed a right to fish in some portion of the contested area, and the Ninth Circuit reversed and remanded for an entry of judgement declaring that Lummi Nation’s usual and accustomed fishing area includes the entire contested area.

**BIG SANDY RANCHERIA ENTERPRISES V. BONTA (21-678)**

**Petitioner:** Big Sandy Rancheria Enterprises, a tribally owned company

**Petition Filed:** November 8, 2021

**Subject Matter:** Preemption of state regulation

**Lower Court Decision:** The Ninth Circuit affirmed the district court’s dismissal of the suit.

**Recent Activity:** Petition denied on February 22, 2022

Big Sandy Rancheria Enterprises, a Section 17 corporation owned by the Big Sandy Rancheria of Western Mono Indians, sued the State of California, seeking a declaration that California’s Complementary Statute, Licensing Act, and Cigarette Tax Law were preempted by federal law and tribal sovereignty, and an injunction preventing the State from enforcing those laws against it. The district court granted defendants’ motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. The Ninth Circuit

affirmed, holding that the Tribe's corporation was not an "Indian tribe or band" within the meaning of exception to Tax Injunction Act conferring federal jurisdiction over claims brought by an Indian tribe and that California was not preempted from regulating the tribal corporation's off-reservation cigarette sales. It also concluded that the Indian Trader Statutes did not preempt the State from regulating the corporation's off-reservation cigarette sales.

**DAKOTA ACCESS V. STANDING ROCK SIOUX TRIBE (21-560)**

**Petitioner:** Dakota Access, a non-Indian corporation

**Petition Filed:** September 20, 2021

**Subject Matter:** National Environmental Policy Act; treaty rights

**Lower Court Decision:** The D.C. Circuit affirmed district court's judgment for the tribes, and reversed the district court's order to drain the pipeline of oil.

**Recent Activity:** Petition denied on February 22, 2022

This case arises from the U.S. Army Corps of Engineers' granting of an easement to construct a section of the Dakota Access Pipeline under the Lake Oahe, which was created by damming the Missouri River upstream from the Standing Rock Sioux Reservation. Four tribes challenged the decision, asserting, among other things, that the Army Corps violated the National Environmental Policy Act by not preparing and environmental impact statement (EIS) prior to granting the easement. The D.C. Circuit affirmed the district court's conclusion that the Corps' analysis of the oil spill risk was inadequate, and thus required the Corps to prepare an EIS. In addition, the D.C. affirmed the district court's conclusion that this error necessitated vacating the easement issued by the Corps notwithstanding the fact that by this time the pipeline had been installed beneath the lake and was operating. However, the D.C. Circuit reversed the district court's order to drain the pipeline of oil, instead remanding for consideration of whether certain factors necessitating injunctive relief were present.

**SELF V. CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA (21-477)**

**Petitioner:** Jason Self and Thomas Lindquist, individual non-Indians

**Petition Filed:** September 29, 2021

**Subject Matter:** Tribal sovereign immunity

**Lower Court Decision:** The California Court of Appeals affirmed the trial court's dismissal.

**Recent Activity:** Petitions denied on February 22, 2022

The Cher-Ae Heights Indian Community of the Trinidad Rancheria (the "Tribe") owns a parcel of coastal property in fee simple. Two individuals who use the beach for recreation and a kayaking business sued the Tribe in California state court, claiming that the Tribe might illegally block their beach access in the future. The Tribe had formally requested that the Department of the Interior take the land into trust for the benefit of the Tribe. Because it was coastal property, the land-into-trust process required a review under the Coastal Zone Management Act to ensure, among other things, that beach access was preserved consistent with state law. The Bureau of Indian Affairs determined that it was, and California's Coastal Commission concurred. Based on the Tribe's sovereign immunity, the state trial court quashed the service of process and dismissed the complaint with prejudice. The California Court of Appeals affirmed, holding that the real property exception to common law sovereign immunity does not apply.

### **TANNER V. CAYUGA NATION (21-749)**

**Petitioner:** Howard Tanner, a municipal government official

**Petition Filed:** November 19, 2021

**Subject Matter:** IGRA; Indian lands

**Lower Court Decision:** The Second Circuit affirmed the district court's summary judgment against the municipal government.

**Recent Activity:** Petition denied on January 10, 2022

The Cayuga Nation (the "Tribe") filed suit, seeking a declaratory judgment that Indian Gaming Regulatory Act ("IGRA") preempted application of a municipality's gaming ordinance to tribal gaming operations. The United States District Court for the Northern District of New York entered summary judgment in favor of the Tribe. The Second Circuit affirmed, holding that the parcel in question was "Indian land," and, therefore, IGRA preempted application the municipality's gaming ordinance.

### **STAND UP FOR CALIFORNIA V. DEPARTMENT OF THE INTERIOR (21-696)**

**Petitioner:** Stand Up For California!, a nonprofit organization

**Petition Filed:** November 10, 2021

**Subject Matter:** Federal recognition, land-into-trust

**Lower Court Decision:** The United States District Court for the District of Columbia issued summary judgment in favor of the Department of the Interior and the Ninth Circuit affirmed.

**Recent Activity:** Petition denied on January 10, 2022

Nonprofit organization and individuals challenged the Department of the Interior's ("DOI") decision to take land into trust for the benefit of Wilton Rancheria, alleging that it lacked authority to do so because the federal government once terminated its relationship with the Tribe – notwithstanding that the relationship was later re-established. The United States District Court for the District of Columbia granted summary judgment in favor of DOI, and the D.C. Circuit affirmed.

### **HAGGERTY V. UNITED STATES (21-516)**

**Petitioner:** Justin Haggerty

**Petition Filed:** October 4, 2021

**Subject Matter:** Federal criminal jurisdiction

**Lower Court Decision:** The Fifth Circuit affirmed petitioner's criminal conviction

**Recent Activity:** Petition denied on January 10, 2021

Pursuant to 18 U.S.C. Sec. 1152, Justin Haggerty ("Mr. Haggerty") was convicted in federal court of vandalizing tribal property on the Tigua Indian Reservation. Section 1152 extends federal criminal jurisdiction into Indian country, except for those crimes where there is both an Indian perpetrator and Indian victim. He pled not guilty and moved to dismiss the indictment. When his motion was denied, he stipulated to facts that later became the basis of his conviction. Neither the indictment nor the stipulation alleged any facts about whether or not he was Indian. Mr. Haggerty asserts that under Section 1152, the government must plead and prove that both the perpetrator and victim are Indians. The Fifth Circuit rejected this argument and held that this is an affirmative defense, which must be proven by the defendant.

### **GRAND RIVER ENTERPRISES SIX NATIONS V. BOUGHTON (21-279)**

**Petitioner:** Canadian corporation owned by Canadian First Nations members

**Petition Filed:** August 23, 2021

**Subject Matter:** Constitutional law

**Lower Court Decision:** The Second Circuit affirmed the trial court's motion to dismiss.

**Recent Activity:** Petition denied on January 10, 2022

Grand River Enterprises Six Nations ("GRE") is a Canadian corporation owned by Canadian First Nations members. GRE sued the Commissioner of the Connecticut Department of Revenue Services, claiming that the reporting requirements it imposes on certain tobacco manufacturers violates the commerce clause, the supremacy clause, and the Fourteenth Amendment's due process clause. The district court granted the state's motion to dismiss, and the Second Circuit affirmed.

### **CLAY V. COMMISSIONER OF INTERNAL REVENUE (21-237)**

**Petitioners:** James Clay and Audrey Osceola

**Petition Filed:** August 13, 2021

**Subject Matter:** Federal income tax

**Lower Court Decision:** The Eleventh Circuit Court of Appeals affirmed the United States Tax Court's decision upholding tax deficiency notices.

**Recent Activity:** Petition denied on October 12, 2021

Petitioners are citizens of the Miccosukee Tribe of Indians of Florida. They received per capita payments from the tribe and did not include the amounts of those payments in their gross income for federal income tax purposes. The Internal Revenue Service audited Petitioners and issued notices of deficiency for several tax years. Petitioners challenged the notices in tax court, claiming that the Miccosukee Settlement Act exempted the payments from their gross income, or, alternatively, that income derived from tribal lands are tax exempt. In affirming the Tax Court's rejection of these arguments, the Eleventh Circuit concluded that the income at issue was derived from the tribe's gaming revenue and not from land leases. It held that the Settlement Act did not exempt income derived from gaming revenue, but only income derived from the specific transactions addressed by the Settlement Act.

### **LEDFORD V. EASTERN BAND OF CHEROKEE INDIANS (20-8455)**

**Petitioner:** April Ledford

**Petition Filed:** June 30, 2021

**Subject Matter:** Indian Civil Rights Act, Tribal Sovereign Immunity

**Lower Court Decision:** The Fourth Circuit affirmed the district court's dismissal of the complaint

**Recent Activity:** Petition denied on October 4, 2021

The plaintiff sued the Eastern Band of Cherokee Indians in federal district court, claiming that it violated the Indian Civil Rights Act by terminating a life estate she held in a parcel of on-reservation property. The district court dismissed the complaint based on the Tribe's sovereign immunity. The Fourth Circuit Court of Appeals affirmed, but modified the district court's order to require that the complaint be dismissed with prejudice.

### **JAMUL ACTION COMMITTEE V. SIMERMEYER (20-1559)**

**Petitioner:** Jamul Action Committee, a non-Indian community group

**Petition Filed:** May 11, 2021

**Subject Matter:** Tribal sovereign immunity

**Lower Court Decision:** The Ninth Circuit held that tribal sovereign immunity barred suit against the tribe.

**Recent Activity:** Petition denied October 4, 2021

A non-Indian citizens group sued to enjoin the construction of a casino by Jamul Indian Village (“JIV”), asserting that the tribe was not federally recognized and that the site was not “Indian land” eligible for gaming under the Indian Gaming Regulatory Act. The district court dismissed the suit based on failure to join a required party and tribal sovereign immunity. The Ninth Circuit affirmed, holding that JIV possessed sovereign immunity from suit, it was the real party in interest, and it was a required party that could not be joined due to its immunity from suit.

### **PERKINS V. COMMISSIONER OF INTERNAL REVENUE (20-1388)**

**Petitioner:** Alice Perkins, an individual Indian

**Petition Filed:** March 31, 2021

**Subject Matter:** Federal taxation

**Lower Court Decision:** The Second Circuit affirmed the United States Tax Court’s issuance of summary judgment in favor of the Commissioner of Internal Revenue.

**Recent Activity:** Petition denied on October 4, 2021

Alice Perkins, a member of the Seneca Nation, and her husband mined gravel on land owned by the Seneca Nation and allotted by the tribe to another tribal member. They did not pay federal income taxes on revenues from the gravel mining operation, asserting that the 1794 Treaty of Canandaigua and the 1842 Treaty with the Seneca exempted from federal taxation income derived directly from land owned by the Seneca Nation. The Second Circuit concluded that provisions in the Treaty of Canandaigua guaranteeing “free use and enjoyment” of certain lands did not prevent the United States from imposing taxes on individual income derived directly from those lands. And while the court acknowledged that 1842 Treaty with the Seneca contained an agreement “to protect such of the lands of the Seneca ... from all taxes,” the court concluded that the broader purpose and context of that provision was to prevent specific taxes by the State of New York, not the United States.

### **Denied Petitions Related to *McGirt v. Oklahoma*:**

#### **OKLAHOMA V. FOSTER (21-868)**

**Petition Filed:** December 10, 2021

**Recent Activity:** Petition denied March 21, 2022

**OKLAHOMA V. OLIVE (21-961)**

**Petition Filed:** December 30, 2021  
**Recent Activity:** Petition denied March 7, 2022

**OKLAHOMA V. VINEYARD (21-798)**

**Petition Filed:** November 30, 2021  
**Recent Activity:** Petition denied February 28, 2022

**OKLAHOMA V. MCCURTAIN (21-773)**

**Petition Filed:** November 24, 2021  
**Recent Activity:** Petition denied February 28, 2022

**CANNON V. OKLAHOMA (21-6680)**

**Petition Filed:** December 20, 2021  
**Recent Activity:** Petition denied February 22, 2022

**HARVELL V. OKLAHOMA (21-6650)**

**Petition Filed:** December 17, 2021  
**Recent Activity:** Petition denied February 22, 2022

**BRUNER V. OKLAHOMA (21-6610)**

**Petition Filed:** December 14, 2021  
**Recent Activity:** Petition denied February 22, 2022

**LAY V. OKLAHOMA (21-6549)**

**Petition Filed:** December 7, 2021  
**Recent Activity:** Petition denied February 22, 2022

**JENKINS V. OKLAHOMA (21-6529)**

**Petition Filed:** December 6, 2021  
**Recent Activity:** Petition denied February 22, 2022

**LEON V. OKLAHOMA (21-6528)**

**Petition Filed:** December 6, 2021  
**Recent Activity:** Petition denied February 22, 2022



**BROWN V. OKLAHOMA (21-6507)**

**Petition Filed:** December 3, 2021  
**Recent Activity:** Petition denied February 22, 2022

**COLE V. OKLAHOMA (21-6494)**

**Petition Filed:** December 2, 2021  
**Recent Activity:** Petition denied February 22, 2022

**HANSON V. OKLAHOMA (21-6464)**

**Petition Filed:** December 1, 2021  
**Recent Activity:** Petition denied February 22, 2022

**GOODE V. OKLAHOMA (21-6462)**

**Petition Filed:** December 1, 2021  
**Recent Activity:** Petition denied February 22, 2022

**RYDER V. OKLAHOMA (21-6432)**

**Petition Filed:** November 29, 2021  
**Recent Activity:** Petition denied February 22, 2022

**OKLAHOMA V. SHRIVER (21-985)**

**Petition Filed:** January 11, 2022  
**Recent Activity:** Petition denied February 22, 2022

**PACHECO V. OKLAHOMA (21-923)**

**Petition Filed:** December 22, 2021  
**Recent Activity:** Petition denied February 22, 2022

**GORE V. OKLAHOMA (21-883)**

**Petition Filed:** December 15, 2021  
**Recent Activity:** Petition denied February 22, 2022

**OKLAHOMA V. LITTLE (21-734)**

**Petition Filed:** November 17, 2021  
**Recent Activity:** Petition denied February 22, 2022

**OKLAHOMA V. YARGEE (21-705)**

**Petition Filed:** November 15, 2021  
**Recent Activity:** Petition denied February 22, 2022

**OKLAHOMA V. PERALES (21-704)**

**Petition Filed:** November 15, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. LEATHERS (21-646)**

**Petition Filed:** November 2, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BALL (21-644)**

**Petition Filed:** November 2, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. MARTIN (21-608)**

**Petition Filed:** October 26, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. COTTINGHAM (21-502)**

**Petition Filed:** October 5, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. FOX (21-488)**

**Petition Filed:** October 5, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. MARTIN (21-487)**

**Petition Filed:** October 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. SHRIVER (21-486)**

**Petition Filed:** October 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. MCCOMBS (21-484)**

**Petition Filed:** October 1, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BECK (21-373)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. COOPER (21-372)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. JONES (21-371)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. STEWART (21-370)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. EPPERSON (21-369)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BECK (21-373)**

**Petition Filed:** September 8, 2021

**Recent Activity:** Petition denied on January 24, 2022

**OKLAHOMA V. BALL (21-327)**

**Petition Filed:** September 1, 2021

**Recent Activity:** Petition denied on January 24, 2022

**OKLAHOMA V. SIZEMORE (21-326)**

**Petition Filed:** September 1, 2021

**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. JANSON (21-325)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. SPEARS (21-323)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. JOHNSON (21-321)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. PERRY (21-320)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BALL (21-327)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. GRAYSON (21-324)**

**Petition Filed:** August 23, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. HARJO (21-322)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BAIN (21-319)**

**Petition Filed:** September 1, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. HOWELL (21-259)**

**Petition Filed:** August 23, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. DAVIS (21-258)**

**Petition Filed:** August 23, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. STARR (21-257)**

**Petition Filed:** August 23, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. JACKSON (21-255)**

**Petition Filed:** August 20, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. MITCHELL (21-254)**

**Petition Filed:** August 20, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. HATHCOAT (21-253)**

**Petition Filed:** August 20, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. KEPLER (21-252)**

**Petition Filed:** August 20, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. BROWN (21-251)**

**Petition Filed:** August 20, 2021  
**Recent Activity:** Petition denied January 24, 2022

**OKLAHOMA V. NED (21-645)**

**Petition Filed:** November 2, 2021  
**Recent Activity:** Petition denied January 24, 2022

**WHITE V. OKLAHOMA (21-6331)**

**Petition Filed:** November 18, 2021  
**Recent Activity:** Petition denied January 18, 2022

**BENTLEY V. OKLAHOMA (21-6301)**

**Petition Filed:** November 16, 2021  
**Recent Activity:** Petition denied January 18, 2022

**DAVIS V. OKLAHOMA (21-6030)**

**Petition Filed:** October 20, 2021  
**Recent Activity:** Petition denied January 10, 2022

**COMPELLEEBEE V. OKLAHOMA (21-6018)**

**Petition Filed:** October 19, 2021  
**Recent Activity:** Petition denied January 10, 2022

**PARISH V. OKLAHOMA (21-467)**

**Petition Filed:** September 29, 2021  
**Recent Activity:** Petition denied January 10, 2022

**CANNON V. OKLAHOMA (21-6440)**

**Petition Filed:** November 18, 2021  
**Recent Activity:** Petition dismissed (Joint stipulation to dismiss the petition) December 9, 2021

**JOHNSON V. OKLAHOMA (21-5681)**

**Petition Filed:** September 15, 2021  
**Recent Activity:** Petition denied November 10, 2021

**CHRISTIAN V. OKLAHOMA (20-8335)**

**Petition Filed:** June 16, 2021  
**Recent Activity:** Petition denied October 18, 2021

**OKLAHOMA V. BOSSE (21-186)**

**Petition Filed:** August 10, 2021  
**Recent Activity:** Petition dismissed (Joint stipulation to dismiss the petition) September 10, 2021

**CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT**

As always, the NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Accounting, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: Melody McCoy, NARF Senior Staff Attorney, (303) 447-8760 ([mmccoy@narf.org](mailto:mmccoy@narf.org)) or Colby Duren, NCAI Policy and Legal Director, (202) 466-7767 ([cduren@ncai.org](mailto:cduren@ncai.org)).**