

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF RECENT CASES

OCTOBER 11, 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 purposes of the Project are to promote greater coordination and 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 efforts 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>).

Over the summer, the Court set the oral argument in *Haaland v. Brackeen* (21-376) (Indian Child Welfare Act), and related petitions, for November 9, 2022. On September 28, 2022, the Court held its “long conference” in which it considered more than 1,000 petitions for review that were pending during the Court’s summer recess. Among those considered for review were *Oklahoma v. Sims* (21-1102) (state criminal jurisdiction in Indian country), *Acres v. Marston* (21-1480) (tribal official immunity from suit), *Becker v. Ute Indian Tribe* (21-1340) (tribal court exhaustion and jurisdiction), *Lopez v. Quaempts* (21-1544) (tribal sovereign immunity from suit), and *Mill Bay Members Association v. United States* (21-1542) (trust status of allotted land). On October 3, 2022, the Court issued an Order List from the long conference. The Court granted review, vacated, and remanded in *Oklahoma v. Sims* for further consideration in light of *Oklahoma v. Castro Huerta*, 142 U.S. 1612 (2022). The Court denied review in *Acres*, *Becker*, *Lopez*, and *Mill Bay Members* which leaves the lower court opinions in these cases intact. In its next Order List of October 11, 2022, the Court denied review in *Oklahoma v. Sam* (21-1214) and *Oklahoma v. Wadkins* (201193) (determination of Indian under the Major Crimes Act, 18 U.S.C. § 1153), which leaves the lower court opinions in these cases intact.

October 3, 2022, was the first day of the October Term 2022. With many high-profile cases on the Court’s docket, court-watchers anticipate that this will be another significant Supreme Court term. For Indian law, we are watching closely *Haaland v. Brackeen* (21-376) and related petitions, *Arizona v. Navajo Nation* (21-1484) and *Department of the Interior v. Navajo Nation* (22-51) (water rights), and *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (22-227) (tribal sovereign immunity from suit under the Bankruptcy Code). These cases and others are detailed further below.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

[BRACKEEN V. HAALAND \(21-380\); TEXAS V. HAALAND \(21-378\); CHEROKEE NATION V. BRACKEEN \(21-377\); HAALAND V. BRACKEEN \(21-376\)](#)

Petitioners: Individual non-Indians, State of Texas, United States, and four Indian tribes

Petitions Filed: September 3, 2021

Subject Matter: Indian Child Welfare Act

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

Recent Activity: Response Briefs filed August 12, 2022; Reply Briefs filed October 3, 2022

Upcoming Activity: Oral argument scheduled for November 9, 2022

A Texas couple wishing to adopt an Indian child, and the State of Texas, filed suit in federal court against the United States and several federal agencies and officers claiming that the Indian Child Welfare Act ("ICWA") is unconstitutional. They were joined by additional individual plaintiffs and the States of Louisiana and Indiana. The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (the Four Tribes) intervened as defendants, and the Navajo Nation intervened at the appellate stage. The federal district court held that much of ICWA was unconstitutional, but the U.S. Court of Appeals for the Fifth Circuit, en banc, reversed much of that decision. However, the Court of Appeals affirmed the district court on some holdings that specific sections of ICWA violated the U.S. Constitution's Fifth Amendment's equal protection guarantee and the Tenth Amendment's anti-commandeering principle. Specifically, the Court of Appeals, 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 Court of Appeals 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 Court of Appeals held that certain provisions of the ICWA Final Rule, specifically those provisions that the district court had found to be unconstitutional, violated the Administrative Procedure Act (APA).

The United States, the Four Tribes, Texas, and the non-Indian individuals each filed petitions for certiorari. The Court granted review of all four petitions and consolidated them for further proceedings. Texas and the non-Indian individuals argue that Congress acted beyond its Indian Commerce Clause power in enacting ICWA, that ICWA creates a race-based child custody system in violation of the Equal Protection Clause, and that ICWA violates the anti-commandeering doctrine. Texas also argues that ICWA's implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress. The United States and the Four Tribes argue that Congress had the authority to enact ICWA, that ICWA does not violate the ant-

commandeering doctrine, that ICWA does not violate the Equal Protection Clause, and that Texas' nondelegation challenge should be rejected. Numerous amicus briefs were filed on both sides, including a brief filed on behalf of 497 Indian Tribes and 62 Tribal and Indian Organizations in support of the United States and Four Tribes.

OKLAHOMA V. SIMS (21-1102)

Petitioner: State of Oklahoma

Petition Filed: February 4, 2022

Subject Matter: State criminal jurisdiction over non-Indians in Indian country

Lower Court Decision: The Court of Criminal Appeals of Oklahoma reversed a non-Indian's convictions by the State of Oklahoma on the grounds that the victim was an Indian.

Recent Activity: Certiorari granted, decision below vacated, and case remanded to the Oklahoma Court of Criminal Appeals for further consideration in light of *Oklahoma v. Castro-Huerta*, 142 U.S. 1612 (2022), October 3, 2022

Shaynna Sims, a non-Indian, was convicted in an Oklahoma state court of knowingly concealing stolen property, first-degree burglary, unauthorized dissection, disturbing or interrupting a funeral and unlawful removal of a body part from a deceased. She was sentenced to seven years imprisonment. Post-conviction, an issue arose about whether the victim was an Indian. The State argued that the crimes were against a corpse and a corpse is not an Indian. The Oklahoma Court of Criminal Appeals disagreed, holding that a crime against a corpse is not a victimless crime, and reversed Sims' convictions.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

ARIZONA V. NAVAJO NATION (21-1484); SEE ALSO DEPARTMENT OF THE INTERIOR V. NAVAJO NATION (22-51)

Petitioners: State of Arizona, State of Nevada, State of Colorado, and the Metropolitan Water District of Southern California

Petition Filed: May 17, 2022

Subject Matter: Water rights

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Brief in Opposition filed September 23, 2022; Replies filed October 7, 2022

Upcoming Activity: Awaiting distribution for conference

The Navajo Nation (Nation) sued the federal government alleging violations of the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4321, et seq. and breach of trust regarding management of the Colorado River. The district court dismissed the Nation's NEPA claims for lack of standing and the breach of trust claims based on sovereign immunity from suit. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the NEPA claims but reversed the breach of trust dismissal and remanded to the district court. The Nation sought to amend its complaint, but the district court denied the motion to amend and

dismissed the action for lack of jurisdiction. The Ninth Circuit reversed, holding that the Nation's proposed amended complaint properly states a breach of trust claim for water mismanagement.

DEPARTMENT OF THE INTERIOR V. NAVAJO NATION (22-51); SEE ALSO ARIZONA V. NAVAJO NATION (21-1484)

Petitioners: U.S. Department of the Interior

Petition Filed: July 15, 2022

Subject Matter: Water rights

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Brief in Opposition filed September 23, 2022

Upcoming Activity: Awaiting optional Reply Brief and distribution for conference

The Navajo Nation (Nation) sued the federal government alleging violations of the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4321, et seq. and breach of trust regarding management of the Colorado River. The district court dismissed the Nation's NEPA claims for lack of standing and the breach of trust claims based on sovereign immunity from suit. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the NEPA claims but reversed the breach of trust dismissal and remanded to the district court. The Nation sought to amend its complaint, but the district court denied the motion to amend and dismissed the action for lack of jurisdiction. The Ninth Circuit reversed, holding that the Nation's proposed amended complaint properly states a breach of trust claim for water mismanagement.

BIG HORN COUNTY ELECTRIC COOPERATIVE V. ALDEN BIG MAN (22-62)

Petitioner: Big Horn County Electric Cooperative

Petition Filed: July 19, 2022

Subject Matter: Tribal regulatory and adjudicatory jurisdiction over non-Indian entity

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Petition filed July 19, 2022

Upcoming Activity: Brief in Opposition due November 7, 2022

Big Horn County Electric Cooperative (BHCEC) was sued in Crow Tribal Court by tribal member Alden Big Man for allegedly violating the Tribe's Utility Winter Disconnection Law, which prohibits utility disconnections during winter months without timely and proper prior notice to the residential customer and approval of the Tribal Health Board. Reviewing the decision of the Crow Tribal Court of Appeals upholding the Tribe's right to regulate BHCEC's disconnections and the Tribal Court's right to hear Big Man's claims, the federal district court granted summary judgment to Big Man and the Tribe. The U.S. Court of Appeals for the Ninth Circuit affirmed.

HALVORSON V. HENNEPIN COUNTY CHILDREN’S SERVICES DEPARTMENT (21-1471)

Petitioner: Denise and Henry Halvorson, non-Indian individuals

Petition Filed: March 30, 2022

Subject Matter: State court transfer of child custody proceeding to tribal court

Lower Court: Court of Appeals of Minnesota

Recent Activity: Brief in Opposition filed September 14, 2022; Reply Brief filed September 26, 2022

Upcoming Activity: Scheduled for conference October 14, 2022

Denise and Henry Halvorson were the foster parents to an Indian child. A state district court ultimately determined that, under the Minnesota Indian Family Preservation Act, the child’s placement determination should be determined in tribal court and transferred the case to a tribal court. The Minnesota Court of Appeals affirmed.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS V. COUGHLIN (22-227)

Petitioner: Lac du Flambeau Band of Lake Superior Chippewa Indians

Petition Filed: September 8, 2022

Subject Matter: Tribal sovereign immunity from suit under the Bankruptcy Code

Lower Court: U.S. Court of Appeals for the First Circuit

Recent Activity: Petition filed September 8, 2022

Upcoming Activity: Brief in Opposition due November 14, 2022

Brian Coughlin obtained a short-term consumer financing loan from a lending company owned and operated by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band). Coughlin subsequently voluntarily filed for Chapter 13 bankruptcy and listed his debt on the loan as a nonpriority general unsecured claim. When the Band proceeded to try to collect on the debt, Coughlin sought to enforce the provisions of the Bankruptcy Code that prohibit collections while bankruptcy proceedings are pending. The U.S. Bankruptcy Court agreed with the Band that, under the Bankruptcy Code, tribal sovereign immunity from suit barred Coughlin from enforcing these provisions against the Band. On appeal, a divided panel of the U.S. Court of Appeals for the First Circuit reversed, with the panel majority finding that the Bankruptcy Code abrogates tribal sovereign immunity from suit in actions to enforce the Code’s debtor protection provisions.

SLOCKISH V. U.S. DEPARTMENT OF TRANSPORTATION (22-321)

Petitioners: Native American individuals, and non-Indian non-profit organizations

Petition Filed: October 3, 2022

Subject Matter: Religious freedom

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Petition filed October 3, 2022

Upcoming Activity: Brief in Opposition due November 4, 2022

In 2008 the federal government destroyed a Native American sacred site located on federal

land in Oregon in connection with highway renovation. Native American individuals and non-Indian non-profit organizations challenged the site's destruction as a substantial burden on their religious exercise under the Religious Freedom Restoration Act and sought full or partial remediation of the site. The federal district court concluded that the destruction imposed no substantial burden on the Native Americans' religious exercise. The U.S. Court of Appeals for the Ninth Circuit dismissed the case as moot, finding that the federal government had granted a state agency an easement for highway maintenance, and the state agency already had been dismissed from the case, so the federal courts lacked any power or authority to grant a remedy.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

ACRES V. MARSTON (21-1480)

Petitioner: James Acres, a non-Indian individual

Petition Filed: May 20, 2022

Subject Matter: Tribal official personal immunity from suit

Lower Court: Court of Appeal of California

Recent Activity: Certiorari denied October 3, 2022

James Acres was sued in the Tribal Court of the Blue Lake Rancheria by the Blue Lake Casino, a commercial enterprise of the Rancheria. Acres took issue with the fact that the Tribal Court judge also worked with a private law firm that served as attorneys for the Casino. After Acres sued in federal court to enjoin the tribal court proceedings, the Tribal Court judge recused himself and was replaced. The replacement judge granted summary judgment to Acres. Acres then sued the tribal attorneys and their staff in state court alleging wrongful use of civil proceedings and breach of fiduciary duty. The California Court of Appeal held that the tribal attorneys and their staff were entitled to absolute personal immunity from the claims arising from their work on behalf of the Casino.

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

Petitioner: Lynn Becker, a non-Indian individual

Petition Filed: April 6, 2022

Subject Matter: Tribal court exhaustion and jurisdiction; tribal sovereign immunity from suit

Lower Court: U.S. Court of Appeals for the Tenth Circuit

Recent Activity: Certiorari denied October 3, 2022

This long running case arises from a payment dispute under a contract that Lynn Becker had with the Uintah and Ouray Tribe to develop and market the Tribe's oil and natural gas resources. Becker filed claims against the Tribe in federal court and in state court, arguing that in the contract the Tribe waived tribal exhaustion, tribal jurisdiction, and tribal immunity from suit over claims under the contract. That federal court action was dismissed for lack of jurisdiction. The Tribe filed a federal court action to enjoin the state action, and the state court action was stayed. The Tribe then filed an action in Tribal Court, and Becker

sued in federal court to enjoin the tribal court action. In Becker's federal action, the federal district court held that the Tribe had waived exhaustion and consented to state court jurisdiction, but the U.S. Court of Appeals for the Tenth Circuit reversed and held that tribal exhaustion was required. In the Tribe's federal action, a majority of a different 3-judge panel of the Tenth Circuit held that regardless of the contract, state court jurisdiction over the dispute was improper because the Tribe had never consented to general state jurisdiction under Public Law 280, 25 U.S.C. Secs. 1332 and 1336.

LOPEZ V. QUAEMPTS (21-1544)

Petitioner: Cynthia Lopez, a non-Indian individual

Petition Filed: June 7, 2022

Subject Matter: Tribal sovereign immunity from suit in tort actions

Lower Court: Court of Appeal of California

Recent Activity: Certiorari denied October 3, 2022

A non-Indian individual employed by the Confederated Tribes of the Umatilla Indian Reservation sued the Tribes and tribal employees for fraud, negligence, and unfair business practices. The California Court of Appeal affirmed that tribal sovereign immunity barred these claims and that neither Congress nor the Tribes had waived the Tribes' immunity from the claims. The individual argues that the Tribes waived their immunity from suit because they ratified the alleged misconduct of the tribal employees, and the Tribes therefore are vicariously liable for the employees' actions.

MILL BAY MEMBERS ASSOCIATION V. UNITED STATES (21-1542)

Petitioners: Mill Bay Members Association, a Washington State non-profit corporation, Paul Grondal, and Wapato Heritage, LLC, a Washington State limited liability company

Petition Filed: June 7, 2022

Subject Matter: Equitable estoppel against the federal government as trustee for Indian lands; Trust status of allotted land at the Confederated Tribes of the Colville Reservation

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Certiorari denied October 3, 2022

The Bureau of Indian Affairs (BIA) sued entities and individuals who developed and occupied a Recreational Vehicle Park on allotted land under a lease for trespass after the lease expired and was not renewed. A district court trial resulted in a \$1.4 million judgment against the entities and individuals. The Court of Appeals affirmed that the land was held in trust, the BIA could sue for trespass to and ejection from the land, and the defense of equitable estoppel is not available against the federal government when the government sues as trustee for Indian lands.

OKLAHOMA V. SAM (21-1214); SEE ALSO OKLAHOMA V. WADKINS (21-1193)

Petitioner: State of Oklahoma

Petition Filed: March 2, 2022

Subject Matter: Determination of Indian under the Major Crimes Act, 18 U.S.C. Sec. 1153
Lower Court: Court of Criminal Appeals of Oklahoma
Recent Activity: Certiorari denied October 11, 2022

Emmitt Sam was convicted in an Oklahoma state court of first-degree murder and robbery with a firearm and was sentenced to life imprisonment for the murder and two sentences of seven years imprisonment for the robbery convictions. Post-conviction, the issue arose about whether Sam was an Indian, at least for purposes of the Major Crimes Act, 18 U.S.C. Sec. 1153. The State district court ultimately determined that he was an Indian and dismissed the convictions, and the Oklahoma Court of Criminal Appeals affirmed.

[OKLAHOMA V. WADKINS \(21-1193\); SEE ALSO OKLAHOMA V. SAM \(21-1214\)](#)

Petitioner: State of Oklahoma
Petition Filed: February 25, 2022
Subject Matter: Determination of Indian under the Major Crimes Act, 18 U.S.C. Sec. 1153
Lower Court: Court of Criminal Appeals of Oklahoma
Recent Activity: Certiorari denied October 11, 2022

Robert Wadkins was convicted in an Oklahoma state court of first-degree rape and of kidnapping. He was sentenced to forty years imprisonment. Post-conviction, the issue arose whether Wadkins was an Indian, at least for purposes of the Major Crimes Act, 18 U.S.C. Sec. 1153. The State district court ultimately determined that he was not an Indian. The Oklahoma Court of Criminal Appeals reversed and held that Wadkins was an Indian, at least for purposes of the Major Crimes Act, 18 U.S.C. Sec. 1153.