# TRIBAL SUPREME COURT PROJECT MEMORANDUM

## UPDATE OF SELECTED RECENT CASES

**JULY 19, 2023**

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).

Since the last update, the Court has issued decisions in three Indian law cases: Brackeen v. Haaland, (21-380), consolidated with *Texas v. Haaland* (21-378), *Cherokee Nation v. Brackeen* (21-377), and *Haaland v. Brackeen* (21-376) (Indian Child Welfare Act); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (22-227) (tribal sovereign immunity from suit under the Bankruptcy Code; and *Arizona v. Navajo Nation* (21-1484) consolidated with *Department of the Interior v. Navajo Nation* (22-51) (breach of trust and water rights). These cases and other selected Indian law cases are detailed further below.

## INDIAN LAW CASES DECIDED BY THE SUPREME COURT

In its October 2022 Term, the Court decided three cases, and Granted, Vacated, and Remanded a fourth case:

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

**Petitioners**: Individual non-Indians, State of Texas, United States, and four Indian tribes
**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
**Decided**: June 15, 2023

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 argued 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 principle. Texas also argued 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 argued that Congress had the authority to enact ICWA, that ICWA does not violate the anti-commandeering principle, 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 Tribes and 62 Tribal and Indian organizations in support of the United States and the Four Tribes.

In deciding these 4 consolidated cases, the Court upheld the constitutionality of ICWA. Writing for a 7-2 Court, Justice Barrett (joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson) rejected all of Petitioners' challenges to the law—some on the merits and others for lack of standing. Justice Gorsuch joined the majority opinion in full but wrote separately to provide additional historical context for ICWA. His concurrence was joined in part by Justices Sotomayor and Jackson. Justice Kavanaugh wrote a separate concurrence to note that he viewed the equal protection challenges to the law as "serious." Justices Thomas and Alito each filed a dissenting opinion.

The Court rejected the assertion that Congress did not have authority to enact ICWA under

Article I of the U.S. Constitution, and instead reaffirmed that Congress has "plenary and exclusive" power in the Indian affairs context. It also held that none of the challenged provisions of ICWA—active efforts, reporting and expert testimony requirements, or placement preferences—violated Tenth Amendment anti-commandeering principles. The Court held that because ICWA's active efforts and expert testimony requirements apply "evenhandedly" to states and private parties, they pose no anti-commandeering problems. The Court also held that ICWA properly preempts certain state laws.

The Majority did not address the equal protection or non-delegation challenges to ICWA, finding that the Individual and State Petitioners in this case lacked standing to raise those claims. Specifically, the Individual Petitioners failed to demonstrate their alleged injuries were redressable because any order from a federal court would not be binding on the state courts, which apply ICWA's placement preferences. Texas also had no standing because it lacks *parens patriae* authority to sue the Federal Government and has experienced no concrete and particularized injury itself.

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

**Petitioner**: Lac du Flambeau Band of Lake Superior Chippewa Indians
**Subject Matter**: Tribal sovereign immunity from suit under the Bankruptcy Code
**Lower Court Decision**: A divided panel of the U.S. Court of Appeals for the First Circuit held that the Bankruptcy Code abrogates tribal sovereign immunity from suit in bankruptcy proceedings
**Decided**: June 15, 2023

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.

The Court held that the Bankruptcy Code unambiguously abrogates the sovereign immunity of all governments, including federally recognized tribes. Justice Jackson authored the majority opinion which was joined by Chief Justice Roberts, and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Barret, with Justice Thomas writing a concurrence and Justice Gorsuch filing a dissent.

The Court agreed that the clear statement rule was the appropriate standard for determining whether Congress had abrogated tribal sovereign immunity. The Court then analyzed the

text and purpose of the Bankruptcy Code to determine whether that standard was met. Section 106(a) of the Code abrogates the sovereign immunity of "governmental units" and Section 101(27) defines the term "governmental unit." The Court read this definition as Congress intending to be comprehensive—incorporating subdivisions and components of various governments—and including a catchall phrase "other foreign or domestic governments." The Court's analysis focused on the catchall phrase, which it found was intended to include "all governments in §101(27)'s definition, whatever their location, nature, or type." To support this conclusion, the Court cited the provisions of the Code that offer debtors a fresh start by discharging and restricting their debts in an "orderly and centralized" fashion support a broad reading of its applicability. The Court also stated that there is little doubt that tribes generally qualify as "governments." Thus, since the Code "unequivocally abrogates immunity of all governments, categorically," and given that "[t]ribes are indisputably governments", the Court held that "§ 106(a) unmistakably abrogates their sovereign immunity too."

Justice Thomas's concurrence agreed with the majority's judgment but critiqued the doctrine of tribal sovereign immunity itself. Justice Gorsuch's dissent interpreted the catchall phrase "other foreign or domestic government" differently than the Majority and therefore would have found that Congress failed to surpass the bar set by the clear-statement rule.

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

**Petitioners**: State of Arizona, State of Nevada, State of Colorado, the Metropolitan Water District of Southern California, and the U.S. Department of the Interior
**Subject Matter**: Breach of Trust and Water Rights
**Lower Court**: The U.S. Court of Appeals for the Ninth Circuit held that the Navajo Nation could amend its complaint to allege a breach of trust for equitable relief for the United States' failures to address the Nation's water needs in the Lower Colorado River Basin
**Decided**: June 22, 2023

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. Nine amicus briefs were filed in support of Respondent Navajo Nation.

The Court ruled against the Nation, holding that the Nation could not state an equitable claim for breach of trust against the United States for failing to secure or identify the Nation's federally reserved *Winters* water rights in the lower basin of the Colorado River. Writing for

a 5-4 Court, Justice Kavanaugh (joined by Chief Justice Roberts and Justices Thomas, Alito, and Barrett) wrote that while the United States holds the Nation's water rights in trust, the Nation cannot bring suit to require the United States to assess the extent of those rights or plan to secure them. Instead, the Court found that, in general, the United States is not a typical trustee in that its trust obligations are "bare" unless statutes or treaties specify otherwise. The Court stated that it is for Congress and the President to enact laws to "assist the citizens of the western United States, including the Navajos, with their water needs."

Because the Nation asserted a breach of trust claim, the Court stated that under *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), the Nation must establish that the text of its treaties or an act of Congress or the President imposed a specific fiduciary duty on the United States. Analyzing the text of the Nation's treaties, the Majority found no such "rights-creating or duty-imposing" language that would require the United States to take any affirmative steps to help secure water for the Nation. With regard to the United States' role representing tribes in the *Arizona v. California* (Colorado River) litigation, the Court cited *United States v. Navajo Nation*, 556 U.S. 287 (2009), to reiterate that a breach of trust claim cannot be premised on federal control alone and here the Nation failed to identify the required express acceptance of a trust duty.

Justice Thomas joined the majority opinion in full but wrote a concurrence to discuss the "general trust relationship between the United States and the Indian people." Justice Gorsuch filed a dissent joined by Justices Sotomayor, Kagan, and Jackson. The dissent critiqued the majority opinion's reasoning and suggested that the *United States v. Jicarilla Apache Nation* line of cases should be cabined to cases requesting monetary damages, not equitable relief. The dissent also noted that based on this decision, courts should generally grant future requests by tribes to intervene in litigation that may affect their water rights.

## 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.

## SELECTED PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

**BIRD INDUSTRIES, INC. V. THE TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION (23-19)**
**Petitioners**: Private corporation and individual owner of the corporation
**Petition Filed**: July 3, 2023
**Subject Matter**: Tribal sovereign immunity from suit
**Lower Court**: U.S. Court of Appeals for the Eighth Circuit
**Recent Activity**: Response waived July 17, 2023
**Upcoming Activity**: Awaiting request for response or scheduling for Conference

A private corporation and the corporation's individual owner demanded arbitration alleging fraud and theft based on business agreements they had with a business entity of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (Tribe). The arbitrator determined that tribal immunity from suit had not been waived by an arbitration clause in an agreement because the waiver had never been approved by the Tribe's Business Council. The corporation and individual then brought a civil RICO claim in federal district court again alleging fraud and theft, and that tribal sovereign immunity from suit was waived by the arbitration clause. The district court dismissed on the grounds of non-waived tribal sovereign immunity from suit. The U.S. Court of Appeals for the Eighth Circuit affirmed, agreeing that the waiver was invalid because it was never approved by the Tribe.

**CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS V. CITY OF PHILADELPHIA (22-137)**
**Petitioners**: Private organizations
**Petition Filed**: May 18, 2023
**Subject Matter**: Standing to challenge public holiday
**Lower Court**: U.S. Court of Appeals for the Third Circuit
**Recent Activity**: Response waived June 9, 2023
**Upcoming Activity**: Scheduled for Conference September 29, 2023

Private Italian American organizations sued the City of Philadelphia (City) in federal district court under 42 U.S.C. § 1983, alleging a violation of the U.S. Equal Protection Clause for rescinding the City's recognition of Columbus Day as a holiday and recognizing Indigenous Peoples Day. The district court found that the plaintiffs had no standing because they failed to plead an injury-in-fact (an invasion of a legally protected interest) and dismissed the complaint for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Third Circuit affirmed, agreeing that redesignation of a public holiday is not an invasion of a legally protected interest.

## KLAMATH IRRIGATION DISTRICT V. U.S. BUREAU OF RECLAMATION, ET AL. (22-1116)

**Petitioners**: Private water users
**Petition Filed**: May 11, 2023
**Subject Matter**: Federal Rule of Civil Procedure 19 (Required Joinder of Parties)
**Lower Court**: U.S. Court of Appeals for the Ninth Circuit
**Recent Activity**: Extension to Respond granted July 11, 2023.
**Upcoming Activity:** Responses due August 21, 2023.

Private water users filed a declaratory action in federal district court against the U.S. Bureau of Reclamation (Bureau), challenging the Bureau's operating procedures to maintain specific lake levels and instream flows to comply with the Endangered Species Act and to safeguard the federal reserved water rights of the Hoopa Valley and Klamath Tribes (Tribes) in the Klamath River Basin. The Tribes intervened as of right, but then moved to dismiss the action on the ground that they were required parties who could not be joined due to their sovereign immunity from suit. The district court found that the Tribes were required parties that could not be joined involuntarily because of their asserted sovereign immunity from suit and dismissed the action. The U.S. Court of Appeals for the Ninth Circuit affirmed, agreeing that the action would imperil the Tribes' reserved water and fishing rights, and that the Tribes were required parties who could not be joined due to their sovereign immunity from suit.

## MARTIN V. SANDOVAL COUNTY, NEW MEXICO, ET AL. (22-1133)

**Petitioners**: Private landowners
**Petition Filed**: May 15, 2023
**Subject Matter**: New Mexico Rule of Civil Procedure 19 (Required Joinder of Parties)
**Lower Court**: New Mexico Court of Appeals
**Recent Activity**: Extension to Respond granted June 20, 2023
**Upcoming Activity:** Responses due July 21, 2023

Private landowners sued Sandoval County, New Mexico, alleging that the County took their private property by inverse condemnation by blocking the road on which the landowners had an easement to a National Forest. The road is within the boundaries of the Pueblo of Cochiti (Pueblo), controlled by the Pueblo, and the Pueblo cancelled the easement. The district court found that the Pueblo was a required party that could not be joined involuntarily because of its asserted sovereign immunity from suit and dismissed the action. The New Mexico Court of Appeals affirmed, and the New Mexico Supreme Court declined to review the case.

## SAUK-SUIATTLE INDIAN TRIBE V. CITY OF SEATTLE (22-955)

**Petitioner**: Sauk-Suiattle Indian Tribe
**Petition Filed**: March 28, 2023
**Subject Matter**: Federal court jurisdiction
**Lower Court**: U.S. Court of Appeals for the Ninth Circuit
**Recent Activity**: Brief in Opposition filed July 7, 2023; Reply filed July 12, 2023.
**Upcoming Activity:** Awaiting scheduling for Conference

The Sauk-Suiattle Indian Tribe (Tribe) sued the City of Seattle (City) in state court, alleging

that the City's hydropower electricity generating facility (the Gorge Dam) was blocking fish-bearing streams in violation of state and federal law, and seeking declaratory and injunctive relief only under state law. The City removed the case to federal district court. The federal district court denied the Tribe's motion to remand the case back to state court, finding that the federal district court had jurisdiction because the Tribe's claims raised substantial federal questions. The federal district court then found that it lacked jurisdiction over the Tribe's claims under the Federal Power Act (FPA) and dismissed the case. The federal district court found that the Tribe's action essentially was a collateral attack on a Federal Energy Regulatory Commission's decision to allow the City to operate the Dam without a fishway requirement, and under the FPA only federal appeals courts, not district courts, can review such challenges. The U.S. Court of Appeals for the Ninth Circuit affirmed that remand was properly denied and that dismissal for lack of subject matter jurisdiction was proper in light of the FPA. The Ninth Circuit noted that remand to the state court would be futile because under the FPA, the state court also would lack jurisdiction over the challenge to the FERC decision.

### 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:** Response due August 2, 2023.

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.

## SELECTED 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.

## 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**: Certiorari denied December 12, 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**: Petition denied on June 26, 2023.

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.

### 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 argued 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 ejectment 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.

### SMITH V. UNITED STATES (22-796)

**Petitioner**: Johnny Ellery Smith, a tribal citizen
**Petition Filed**: February 22, 2023
**Subject Matter**: Federal prosecution of an Indian for a crime in Indian country under state law
**Lower Court**: U.S. Court of Appeals for the Ninth Circuit
**Recent Activity**: Certiorari denied March 20, 2023.

Confederated Tribes of Warm Springs citizen Johnny Ellery Smith was indicted by the federal government for the Oregon crime of eluding an officer, and the alleged conduct occurred on the Warm Springs Reservation. The government asserted jurisdiction to prosecute Mr. Smith under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and the General Crimes Act (GCA), 18 U.S.C. § 1152. The federal district court denied Mr. Smith's motion to dismiss for lack of jurisdiction, and the U.S. Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit upheld jurisdiction under the ACA alone, holding that Indian reservations qualify as federal lands under the ACA. Alternatively, the Ninth Circuit held that the ACA is a general federal law that applies to Indian lands via the GCA, and no GCA exceptions applied in this case. Mr. Smith sought further relief from federal jurisdiction after the Supreme Court's decisions in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020) and *Oklahoma v. Castro Huerta*, 142 S.Ct. 2486 (2022), but the Ninth Circuit again affirmed denial of relief, declining to revisit its earlier holdings.

## SULGROVE V. SPOKANE INDIAN TRIBE, UNITED STATES, DAWN MINING CORP., STATE OF WASHINGTON, AND CHRISTOPHER NEWHOUSE (22-655)

**Petitioners**: Individual non-Indian landowners and a landowners' association
**Petition Filed**: January 10, 2023
**Subject Matter**: Article III standing and right the right of non-parties to appeal
**Lower Court**: U.S. Court of Appeals for the Ninth Circuit
**Recent Activity**: Certiorari denied March 20, 2023.

In the 1970s and 1980s, at the instigation of the United States, a federal district court determined water rights in a basin, including the federally reserved water rights of the Spokane Indian Tribe and other water claimants. Certain groundwater and other water users, including those of Petitioners, were expressly excluded from the district court judgment, thus allowing them to make limited use of water under state issued rights free from federal enforcement. In 2006 the federal government sought reexamination of the exclusion. In 2019, the district court granted the federal parties' motion for amendment, and notice was given to all affected landowners and water users with an opportunity to object or be bound. The district court denied Petitioners' objections and amended the judgment to make their uses part of the judgment and subject to federal enforcement. Petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit and the Ninth Circuit affirmed.