

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

### UPDATE OF SELECTED CASES DURING THE OCTOBER 2023 TERM

JULY 19, 2024

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 selected cases we track on the NARF website (<http://sct.narf.org>).

Since the last update, the Court has issued decisions in two consolidated Indian law cases: *Becerra v. San Carlos Apache Tribe*, (22-250), consolidated with *Becerra v. Northern Arapaho Tribe* (22-253) (Indian Self-Determination Act contract support costs). The Court denied or dismissed petitions in twelve cases, leaving intact in most of these cases lower court decisions favorable to tribal interests. At the close of the Court's October 2023 Term, there are no petitions pending selected by the Project for tracking. The selected Indian law cases from the October 2023 Term are detailed further below.

### INDIAN LAW CASES DECIDED BY THE SUPREME COURT

In its October 2023 Term, the Court decided two consolidated cases:

#### [BECERRA V. SAN CARLOS APACHE TRIBE \(22-250\) \(CONSOLIDATED WITH 23-253\)](#)

**Petitioner:** U.S. Secretary of Health and Human Services

**Petition Filed:** September 15, 2023

**Subject Matter:** Indian Self-Determination Act Contract Support Costs

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

**Recent Activity:** Decided June 6, 2024.

#### [BECERRA V. NORTHERN ARAPAHO TRIBE \(22-253\) \(CONSOLIDATED WITH 23-250\)](#)

**Petitioner:** U.S. Secretary of Health and Human Services

**Petition Filed:** September 15, 2023

**Subject Matter:** Indian Self-Determination Act Contract Support Costs

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

**Recent Activity:** Decided June 6, 2024.

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 5301 et seq., permits eligible tribes to contract with the federal government to operate certain federal health care programs and services to eligible individuals. The contracts entitle tribes to the amount of appropriated funds that the U.S. Indian Health Service (IHS) otherwise would have allocated for federal operation of the programs and services. And IHS must pay “contract support costs,” which are funds added to the operational amounts to cover administrative costs that tribes incur with the contracted programs and services. When they provide health care to covered individuals, contracting tribes are permitted to collect revenue from third-party payors, like private insurers, Medicare, and Medicaid. The U.S. Courts of Appeals for the Ninth and Tenth Circuits held that “contract support costs” includes the cost to tribes of expending these third-party revenues on their contracted programs and services, and therefore IHS also must reimburse tribes for these costs.

The Supreme Court affirmed that tribes are entitled to be reimbursed by IHS for contract support costs when the tribes expend revenues collected from third-party payors as part of operating healthcare programs and services they’ve contracted from IHS. Writing for a 5-4 Court, Chief Justice Roberts (joined by Justices Sotomayor, Kagan, Gorsuch, and Jackson) based this holding on the text of the ISDA, and the Tribes’ ISDA contracts with IHS, both of which require the Tribes to collect revenue from third-party payors and spend that revenue to further the relevant healthcare programs under their contracts. Therefore, the Court stated, they are entitled to recoup direct and indirect contract support costs because those costs “were incurred to ‘ensure compliance with the terms of the contract,’ §5325(a)(2), and ‘for the operation of’ and ‘in connection with the operation of’ the ‘Federal program’ they assumed from IHS, §5325(a)(3)(A).” The Court noted these cases do not decide the extent of the flexibility tribes have to spend third-party revenues on the “general

purposes” of their ISDA contracts while still being entitled to contract support costs because, here, both Tribes only spent their third-party revenues directly on the federal programs that they assumed from IHS. Justice Kavanaugh dissented joined by Justices Thomas, Alito, and Barrett.

## **SELECTED PETITIONS FOR A WRIT OF CERTIORARI PENDING**

**NONE AT THIS TIME**

## **SELECTED PETITIONS FOR A WRIT OF CERTIORARI DENIED OR DISMISSED**

**ALASKA V. UNITED STATES (22O157)**

**Petitioner:** State of Alaska

**Motion for Bill of Complaint Filed:** July 26, 2023

**Subject Matter:** Breach of contract; Administrative Procedure Act; Takings

**Lower Forum:** U.S. Environmental Protection Agency

**Recent Activity:** Motion denied January 8, 2024.

In January 2023, the U.S. Environmental Protection Agency (EPA) issued a Final Determination under the Clean Water Act, 33 U.S.C. § 1344(c) (also known as Section 404(c)) that, based on an expected loss of wetlands and streams, concluded that the proposed Pebble Mine (for copper) on state-owned land (about 200 miles southwest of Anchorage) would lead to unacceptable adverse effects on anadromous fishery areas. The Final Determination limits the use of certain waters in the Bristol Bay watershed as disposal sites for the discharge of dredged or fill material associated with the Mine. The State of Alaska filed a Motion for Bill of Complaint alleging the Court’s original jurisdiction under 28 U.S.C. § 1251(b). Alaska claimed that EPA’s Final Determination essentially vetoed or prohibited the Mine, and sought a determination that the Final Determination was arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory jurisdiction, authority, or limitations; a vacation and set aside of the Final Determination; and an injunction from

enforcing the Final Determination.

**BIRD INDUSTRIES V. THE TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION (23-19)**

**Petitioner:** Indian business and individual

**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:** Certiorari denied October 2, 2023.

Bird Industries, Inc. (Bird), an Indian-owned business, entered into commercial agreements with the Three Affiliated Tribes of the Fort Berthold Indian Reservation (Tribes). Disputes between Bird and the Tribes arose under the agreements, and Bird made a demand for arbitration. The Arbitrator found that the Tribes were immune from suit and no waiver had occurred. Bird then sued in federal district court, which also found no waiver because the Tribes had never approved the arbitration / waiver clause in the agreement upon which Bird relied. The U.S. Court of Appeals for the Eighth Circuit affirmed.

**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:** Certiorari denied October 2, 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:** Certiorari denied October 30, 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.

**KLAMATH IRRIGATION DISTRICT V. U.S. BUREAU OF RECLAMATION (23-216)**

**Petitioners:** Private water users

**Petition Filed:** September 5, 2023

**Subject Matter:** Prior exclusive jurisdiction doctrine

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

**Recent Activity:** Certiorari denied January 8, 2024.

Private water users filed a declaratory action in state 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. After the Bureau removed the action to federal court, the water users sought a remand to state court on the ground of lack of federal court jurisdiction and exclusive state court jurisdiction. Remand was denied, and, in a 2-1 panel decision, the U.S. Court of Appeals for the Ninth Circuit affirmed.

**LITTLEFIELD V. DEPARTMENT OF THE INTERIOR (23-839)**

**Petitioners:** Non-Indian individuals

**Petition Filed:** January 26, 2024

**Subject Matter:** Land into trust

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

**Recent Activity:** Certiorari denied April 1, 2024.

Residents of Tauton, Massachusetts sued the U.S. Department of the Interior (Interior) challenging Interior's decision to take into trust 321 acres of land for the Mashpee Wampanoag Tribe. The federal district court held that, under *Carcieri v. Salazar*, 555 U.S. 379 (2009), Interior had authority to determine and properly determined that the Tribe was under federal jurisdiction in 1934 for purposes of taking land into trust for the Tribe. The U.S. Court of Appeals for the First Circuit affirmed.

**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:** Certiorari denied October 2, 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.

### [NO CASINO IN PLYMOUTH V. NATIONAL INDIAN GAMING COMMISSION \(23-854\)](#)

**Petitioners:** Non-Indian non-profit community interest group

**Petition Filed:** February 5, 2024

**Subject Matter:** Land into trust; Indian Gaming Regulatory Act

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

**Recent Activity:** Certiorari denied April 15, 2024.

No Casino in Plymouth, a non-profit community interest group, sued the National Indian Gaming Commission (NIGC) challenging NIGC's decisions approving the Ione Band of Miwok Indians' (Tribe) gaming ordinance and a proposed fee-to-trust transfer of land for the Tribe. The federal district court granted judgment on the pleadings for NIGC and dismissed the complaint. The district court held that, under controlling Ninth Circuit law, the proposed land transfer was valid because the Tribe was federally recognized at the time of the transfer decision. The district court also held that NIGC had jurisdiction to approve the Tribe's gaming ordinance in anticipation of the land transfer. The U.S. Court of Appeals for the Ninth Circuit affirmed.

### [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:** Certiorari denied October 2, 2023.

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 dismissed October 10, 2023.

In 2008 the federal government destroyed a Native American sacred site located on federal land in Oregon (on the slopes of Mount Hood) 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. On October 5, 2023, the parties filed a Joint Stipulation to Dismiss this Petition, based on a negotiated settlement agreement under which the U.S. Department of Transportation will restore the sacred site by planting a new grove of trees and paying for and rebuilding an altar at the location. The Confederated Tribes and Band of the Yakama Nation and the Confederated Tribes of Grande Ronde will have access to the site for ceremonial and cultural use, and an informational sign recognizing the importance of the area will be posted.

### TINGLE V. FLORIDA DEPARTMENT OF HEALTH (23-246)

**Petitioner:** Indian individual

**Petition Filed:** September 12, 2023

**Subject Matter:** Due Process and Equal Protection under U.S. and Florida Constitutions

**Lower Court:** Florida Court of Appeals

**Recent Activity:** Certiorari denied January 8, 2024.

Florida has a constitutional and statutory regulatory framework for regulating medical marijuana. To address claims of past discrimination, recent amendments are intended to address the state's licensure of Black medical marijuana farmers. No similar amendments are provided for Native American farmers. Donovan Craig Tingle, a Native American farmer, alleges that this is discriminatory under the Florida and U.S. Constitutions. The Florida district court disagreed, and the Florida Court of Appeals affirmed.

### WEST FLAGLER ASSOCIATES V. HAALAND (23-862)

**Petitioner:** Non-Indian gaming company

**Petition Filed:** February 8, 2024

**Subject Matter:** Indian Gaming

**Lower Court:** U.S. Court of Appeals for the D.C. Circuit

**Recent Activity:** Certiorari denied June 17, 2024.

West Flagler, Associates, Ltd (West Flagler), a non-Indian gaming company, sued the Secretary of the U.S. Department of the Interior (Secretary), challenging the Secretary's approval of a Gaming Compact between the Seminole Tribe of Florida and the State of Florida which allowed for online sports betting anywhere within the State by deeming the online sports bets as being placed on tribal lands. The federal district court denied dismissal and granted summary judgment to West Flagler. The district court held that the Indian Gaming Regulatory Act (IGRA) does not authorize the Secretary to approve a Compact that provides for gaming off Indian lands. The U.S. Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals held that IGRA allows Compacts to address the alleged off-Indian-lands gaming provisions at issue. The Court of Appeals also rejected West Flagler's Equal Protection Clause argument.