

TRIBAL SUPREME COURT PROJECT MEMORANDUM

UPDATE OF SELECTED RECENT CASES

OCTOBER 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 Fund (NCAI Fund) 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 selected cases that we track on the NARF Project website (<http://sct.narf.org>).

October 2, 2023, was the first day of the Court's October Term 2023. Several pending Petitions were denied. As of this Update, the Court has not accepted any Indian law cases for review. Among the still pending Petitions, the Project is watching closely *Klamath Irrigation District v. United States Bureau of Reclamation*, (22-1116) (Rule 19 Joinder of tribes) and *Becerra v. San Carlos Apache Tribe* (22-250) and *Becerra v. Northern Arapaho Tribe* (22-253) (Indian Self-Determination and Education Assistance Act Contract Support Costs). These selected cases and others are detailed further below.

SELECTED PETITIONS AND OTHER MATTERS PENDING

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: 3 Amicus Curiae Briefs filed in support of Motion

Upcoming Activity: Response due November 9, 2023

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 claims that EPA’s Final Determination essentially vetoes or prohibits the Mine, and seeks a determination that the Final Determination, is 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.

BECERRA V. NORTHERN ARAPAHO TRIBE (22-253)

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

Petition Filed: September 15, 2023

Subject Matter: Indian Self-Determination and Education Assistance Act Contract Support Costs

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

Recent Activity: Response Brief filed October 11, 2023

Upcoming Activity: Awaiting optional Reply Brief and distribution for Conference

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq., permits eligible tribes to contract with the federal government to operate certain federal health care programs 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 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. When they provide health care services to covered individuals, contracting tribes are permitted to collect payment from third-party payors, like private insurers, Medicare, and Medicaid. The U.S. Court of Appeals for the Tenth Circuit held that “contract support costs” includes the cost to tribes of administering and collecting these third-party payments, and IHS also must reimburse tribes for these costs.

BECERRA V. SAN CARLOS APACHE TRIBE (22-250)

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

Petition Filed: September 15, 2023

Subject Matter: Indian Self-Determination and Education Assistance Act Contract Support Costs

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

Recent Activity: Response filed October 11, 2023

Upcoming Activity: Awaiting optional Reply Brief and distribution for Conference

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq., permits eligible tribes to contract with the federal government to operate certain federal health care programs 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 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. When they provide health care services to covered individuals, contracting tribes are permitted to collect payment from third-party payors, like private insurers, Medicare, and Medicaid. The U.S. Court of Appeals for the Ninth Circuit held that “contract support costs” includes the cost to tribes of administering and collecting these third-party payments, and IHS also must reimburse tribes for these costs.

[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: Reply Brief filed October 9, 2023.

Upcoming Activity: Scheduled for Conference October 27, 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: Petition filed

Upcoming Activity: Responses due November 9, 2023

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.

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: Petition filed

Upcoming Activity: Responses due November 15, 2023

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.

SELECTED PETITIONS DENIED OR DISMISSED

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.

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.

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 and the futility doctrine
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 Bands 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. The Petition was dismissed on October 10, 2023.