Native American Cases To Watch In 2023

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Summary

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In addition to ICWA's fate, Native American law practitioners are focused on litigation over the Navajo Nation's claim to water from the Colorado River and the latest attempt by Oklahoma to expand its criminal authority in Indian Country.

Here is a look at the major cases that attorneys will be watching in 2023.

Texas, White Parents Challenge ICWA at High Court

In one of the most significant cases of its entire 2022-23 term, the Supreme Court is considering a broad challenge to the Indian Child Welfare Act, which imposes a number of procedural requirements on state courts in adoption or foster cases involving Native American children with a goal of keeping the children with Native American families.

Indigenous activists have argued that overturning ICWA, as Texas and several white families are urging, could undermine vast amounts of federal Indian law, including statutes that direct the U.S. government to provide tribes with health care and other social resources.

The justices did not clearly reveal their leanings at a Nov. 9 oral argument in the case, Haaland et al. v. Brackeen et al., but spent more than three hours probing ICWA's preferences for placing Indian children in other Indigenous households.

Texas and the other challengers call those rules racially discriminatory since they disadvantage non-Native homes and claim they're an illegal expansion of congressional power under the so-called Indian Commerce Clause in the

Constitution. ICWA's opponents say the 1978 law also violates the 10th Amendment by forcing federal rules on state courts and agencies that orchestrate custody proceedings.

But the Indian Child Welfare Act remains a "vital" part of federal law, according to Leonard R. Powell, an associate at Jenner & Block LLP who helps represent the four tribes leading the defense of the statute.

Powell, a member of the Hopland Band of Pomo Indians, noted that Congress enacted ICWA in response to alarmingly high rates at which Indigenous children were being taken from their communities — a trend driven, in part, by government efforts to assimilate them into American Christian society. Although the law has helped, Powell said, federal regulators found in 2016 that Native children were still being removed from their homes at disproportionate rates.

"If ICWA fell, it's too obvious to say that things would be much worse," he said. "You have a problem that needs even more of a solution, and you're taking away the solution we have."

The threat of an adverse ruling stretches far beyond child-custody issues, though.

Powell, like many other Native-rights advocates, warned that invalidating ICWA on the basis of equal protection or Article I limitations would undermine many commitments the U.S. government has made to American Indian tribes. Tribes rely on "differential treatment" from federal authorities to secure all sorts of resources, he said, since health care, housing and education-related aid depend on tribal affiliation.

"You can't really have an Indian law without drawing some sort of classification tied to Indian status," he said.

Much of the federal government's dealings in Native communities would not be valid under a reading of the Indian Commerce Clause that restricts congressional action solely to economic issues, as Texas and ICWA's other opponents suggest, Powell said.

"If you read their briefs and you take their logic to what I think is the inevitable conclusion," he said, "then a huge amount of what Congress has done falls into serious question."

Kristen Carpenter, director of the American Indian Law Program at the University of Colorado Law School, said the decision before the justices is straightforward from her perspective as a law professor.

"This is a federal statute, enacted by Congress for the benefit of Indians. Congress has plenary power in Indian Affairs. The status of tribes and tribal members is a political one," Carpenter said. "Under the whole body of federal Indian law, ICWA is constitutional and fully within the prerogative of Congress."

A ruling that partially chips away at ICWA is difficult to imagine, Carpenter said, but has happened before. In 2013, a 5-4 court found in Adoptive Couple v. Baby Girl that a Cherokee father who had not been the custodial parent of his child could not rely on ICWA to block the child's adoption.

"It's hard for me to see why the Supreme Court would chip away at the statute, but I imagine it could," Carpenter said.

The consolidated cases are Haaland et al. v. Brackeen et al., case number 21-376, in the Supreme Court of the United States.

Navajo Seek Colrado River Rights

The Supreme Court is slated to hear another high-profile Indian law case in which the Navajo Nation has spent two decades trying to draw water from the Colorado River under a pair of 19th-century treaties it says create a federally protected claim to the resource.

The high court granted certiorari in early November after the U.S. government and a coalition of Southwestern states warned that expanding the tribe's rights would threaten a delicate water distribution arrangement amid historic drought conditions in the region.

At issue is a procedural ruling by the Ninth Circuit, which found last year that the Navajo Nation deserves a chance to amend its 2003 lawsuit arguing the U.S. Department of the Interior owes the Navajo a full review of the tribe's water needs. But the Supreme Court could exercise its original jurisdiction — reserved in the 2006 case

Arizona v. California — and rule on the merits, according to Thomas Sansonetti, a partner at Holland & Hart LLP whose practice covers natural resources and environmental law.

Sansonetti, a former assistant attorney general in the U.S. Department of Justice's Environment and Natural Resources Division, said the Navajo suit is especially contentious because of the drought conditions that have reduced the Colorado River's flow by some 20% over the past century.

"When you've got a finite resource that's dwindling, there are inevitably going to be winners and losers," he said.

The Navajo Nation, whose reservation is the largest in the country at some 17.5 million acres, already pulls water from tributaries of the Colorado River that are often seen as a more valuable supply because they are upstream of the worst shortages.

But the tribe is well-positioned to tap the mainstream if its claim is legitimate, according to Sansonetti, since distribution priority is based on chronological factors and the Navajo argument is rooted in an 1868 treaty ratified before many Southwestern states were even established. Navajo leaders say the federal government, in that document and an 1849 treaty, provided a "basic guarantee" to help make the tribe's arid land agriculturally viable.

The water-rights case is a rush against the clock, too, with the parties to a 1922 compact over the Colorado River's distribution — seven U.S. states, including Arizona and California — set to renegotiate the deal before it expires in three years.

"Earning a seat at that table is what the Navajo Nation really wants," Sansonetti said, noting that the tribe may try forcing the Interior Department to represent it in negotiations.

Ultimately, the litigation could prompt Congress to intervene and dictate an equitable distribution of the Colorado River, he added. That balance would need to accommodate the various states, municipalities, tribes, industrial users and agricultural interests that rely on the river, according to Sansonetti.

"If you turn on the faucet and no water comes out, then everyone's going to go to the blackboard and perhaps start from scratch," he said.

The case is Arizona et al. v. Navajo Nation et al., case number 21-1484, in the Supreme Court of the United States.

City Tells 10th Circ. It Can Prosecute Reservation Indians

A Choctaw Nation citizen's attempt to overturn a $150 speeding ticket levied on tribal land has made its way to the Tenth Circuit, where the appellate court will consider whether a century-old law gives municipalities power to prosecute local law violations in Indian Country.

In April, U.S. District Court Judge William P. Johnson tossed Justin Hooper's challenge to the 2018 speeding ticket that was issued in Tulsa, Oklahoma, within the Muscogee Nation and prosecuted in municipal court. Judge Johnson of the District of New Mexico, who was assigned several Oklahoma cases including Hooper's, reasoned that the 1898 Curtis Act gives localities jurisdiction over local law violations.

While Judge Johnson bemoaned that the act was passed "largely for the shameful purpose of weakening tribal sovereignty by abolishing tribal courts," he said the law still grants municipalities authority to enforce local code against all residents — including Native Americans.

The litigation is yet another clash over criminal jurisdiction in the Sooner State, which since 2020 has been at the center of two U.S. Supreme Court decisions on criminal jurisdiction in tribal territory.

The Tenth Circuit case contains echoes of the justices' June ruling in Oklahoma v. Castro-Huerta, which gave states and the federal government concurrent jurisdiction over crimes committed by non-Indians against Indians on reservation land. The decision pared down the Supreme Court's 2020 ruling in McGirt v. Oklahoma, which affirmed that the Muscogee Nation reservation remains Indian Country — a ruling later extended to the Cherokee, Chickasaw, Choctaw and Seminole nations.

While the Castro-Huerta case involved Oklahoma's criminal prosecution of a non-Native in a child neglect case involving his stepdaughter, an Eastern Band of Cherokee Indians member, Hooper's challenge looks to affirm that only tribes and the federal government have jurisdiction over Indians in Indian Country.

"There was previously really never any question about whether tribes have exclusive jurisdiction in Indian Country over Indian defendants, concurrent with the federal government and the Major Crimes Act," said Sarah Murray, an attorney and shareholder at Brownstein Hyatt Farber Schreck LLP.

The City of Tulsa told the Tenth Circuit in August that it "has always had criminal jurisdiction over all races of criminal violators including Indians" because Tulsa incorporated pursuant to the Curtis Act — a law the city said has never been amended or repealed.

If the court sides with Tulsa to uphold the Curtis Act, "that will have a very, very major impact," Murray said, potentially extending beyond questions of local law and criminal jurisdiction to create confusion "about what constitutes tribal lands for the purposes of taxation or natural resources law, or other areas."

An overturning of the Curtis Act, on the other hand, would align more with the status quo, Murray said. In either outcome, she foresees the case heading to the high court.

"I think that Castro-Huerta was certainly a way of altering McGirt without explicitly overturning very recent Supreme Court precedent, and I think that this would probably end up the same way," Murray said.

Oral arguments in the case are slated for Jan. 17, 2023.

The case is Hooper v. City of Tulsa, case number 22-5034, in the U.S. Court of Appeals for the Tenth Circuit.

U.S., Seminole Tribe Push for Expansive Sports Betting Pact

Native American law practitioners also have their eyes on a D.C. Circuit suit in which the federal government is pushing for a controversial gaming compact that would essentially give the Seminole Tribe full control of the online sports betting market in Florida.

That agreement, which the Interior Department allowed to take effect last year, was later vacated by a federal judge, who ruled that a provision allowing the tribe to accept bets placed from outside its reservation is a violation of the Indian Gaming Regulatory Act.

The Interior Department, joined by Florida and Seminole officials on appeal, is backing a different interpretation of the invalidated pact, saying it directed — rather than required — the state to authorize off-reservation sports betting as long as it is routed through servers on tribal land. IGRA does not regulate "many of the directly related subjects a state and tribe may elect to discuss in a compact," federal authorities said in August, adding that, "To the extent [it] does not govern those subjects, agreements on those subjects cannot violate IGRA."

But that reading "goes far beyond what IGRA was designed to create," according to gaming law expert Daniel Wallach, who said the 1988 statute sought to establish a level playing field for tribal and nontribal gambling providers.

Wallach, the founder of Wallach Legal LLC, called it a "fiction" that IGRA cedes jurisdiction to Native American tribes on a wide range of gaming-related topics, as the Seminoles contend. A ruling for the tribe, he said, "essentially opens up the possibility, or the likelihood, of tribes in other states to utilize the same compact language to secure sports-betting monopolies."

"It would turn IGRA on its head," he added.

Seminole officials have warned, however, that upholding the trial court's vacatur would pose a financial threat to Indigenous communities across the country.

That ruling, issued by U.S. District Judge Dabney L. Friedrich of the District of Columbia in November 2021, would block tribes from keeping up with technological advances in the gaming industry by outlawing bets placed outside Indian Country, according to the Seminoles. The Florida tribe, which operates a Hard Rock Hotel & Casino near Fort Lauderdale, is asking the D.C. Circuit to let it intervene in the federal proceedings to defend the vacated compact.

Even that question has big implications for tribal gaming and the sports betting industry, Wallach said, since the Seminole Tribe could try asserting its sovereign immunity to torpedo the lawsuit.

Seminole leaders want only to block "any judicial review" of their gaming authority, he conteded, arguing that IGRA gives outside entities an "implicit" right to challenge such agreements.

"A decision curtailing that right could have long-term, adverse consequences on the ability of third parties to challenge [tribal gaming] compacts," Wallach said. "It would set a terrible precedent."

The case is West Flagler Associates Ltd. et al. v. Debra Haaland et al., case number 21-5265, in the U.S. Court of Appeals for the District of Columbia Circuit.

9th Circ. Will Rethink Ariz. Copper Mine on Sacred Site

An Apache nonprofit is getting another chance to defend sacred land in Arizona's Tonto National Forest against a proposed copper mine after the Ninth Circuit agreed to rethink the case.

The Ninth Circuit announced in November that its judges will reconsider a land swap between the U.S. federal government and mining firm Resolution Copper that Apache Stronghold, a San Carlos, Arizona, Apache nonprofit, warns would imperil their religious liberties.

The group in September urged the court to undo the land exchange for the Resolution Copper mine, arguing the deal would swallow Oak Flat — a sacred site that has for centuries been central to Apache religious worship, the group says — into a 1,100-foot deep crater. The Ninth Circuit's en banc review comes after the same court in June upheld the land swap, passed as a provision in the federal 2014 National Defense Authorization Act, when it ruled the mining project didn't meet the standards for a Religious Freedom Restoration Act infraction.

Although the destruction wouldn't deny Apaches a government benefit or impose a penalty — as the RFRA's "substantial burden" threshold requires — Apache Stronghold has argued Oak Flat's destruction would make their religious worship impossible.

A circuit court ruling in favor of the nonprofit would "apply RFRA the way it's meant to be applied," Carpenter of the University of Colorado Law School said.

"If the Ninth Circuit took this opportunity to correct its errors in the past, I think that would give effect to the congressional language and intent of RFRA," she said.

The U.S. Department of Agriculture countered in September that court precedent outlined in the 2008 Ninth Circuit decision in Navajo Nation v. U.S. Forest Service is clear: A burden under the RFRA occurs through "the coercion or sanction the government applies to the plaintiff, not the effect of the government's action on the plaintiff's religious exercise."

A case involving similar questions for Native American religious practice is pending before the Supreme Court, as a group led by two tribal elders petitioned the justices in October to hear a case that aims to restore a sacred Indian site razed during the widening of an Oregon highway.

"There are lots and lots of these cases at varying stages of administrative procedure or litigation around the country," Carpenter said. "It's definitely possible that one of them might end up before the U.S. Supreme Court, which does seem to be interested in religion cases, generally, in the contemporary period."

The case is Apache Stronghold v. USA et al., case number 21-15295, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Jill Coffey.