Decisions impacting Indian Country in the 2023 US Supreme Court term

By Sarah Crawford, Reneau J. Longoria and Heather Whiteman Runs Him

During each U.S. Supreme Court term, there are always the "must watch" cases. One cannot easily predict the outcome of these cases - certain opinions are in line with precedent, honoring the doctrine of stare decisis, while others carve new paths and shift landscapes. The 2022-2023 term included three cases that both positively and negatively impact tribes across Indian Country.

The U.S. Supreme Court decision in *Haaland v. Brackeen* surprised many by entirely upholding the constitutionality of the Indian Child Welfare Act and the sovereignty of tribes. The court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* diminished tribal sovereign immunity as it pertains to the U.S. Bankruptcy Code. In *Arizona v. Navajo Nation*, the Supreme Court held that the Navajo Nation could not protect its treaty-based water rights through a breach of trust claim against the federal government. This article will go into more detail on the twists and turns of these three Supreme Court decisions and their impacts on Indian Country.

U.S. Supreme Court Upholds the Constitutionality of the Indian Child Welfare Act

"Kill the Indian…save the man." U.S. Supreme Court Justice Gorsuch used this phrase in his concurring opinion in *Haaland vs. Brackeen* to highlight the federal government's historical views on its duty to forcibly remove Native children from their families stemming from the use of Indian boarding schools to adoption.[1] This particular phrase was the mission statement of the Carlisle Indian Industrial School, an Indian boarding school. Starting in the late 1800's, the federal government utilized Indian boarding schools to assimilate Native children through the use of physical and emotional abuse, thus stripping away these children's cultural practices, language, and identity.

Justice Gorsuch further highlighted the atrocities of the mid-1900's when the use of adoption became a tool for federal and state governments to remove Indian children from their homes and communities to be placed with non-Indian families.[2] The federal government would actively work with organizations to promote the removal of Indian children from their families and tribal communities. State governments advertised the adoption of Indian children. During state court proceedings, Native families were not provided legal counsel and due process. Much like the Indian boarding school era, these children would not have access to their own tribal cultural traditions after they were taken from their family homes.

These two policies were the foundational reasons that Congress passed the Indian Child Welfare Act in 1978 ("ICWA"). In its reasoning for enacting ICWA, Congress highlighted how an "alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[3] Congress further stated that the purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families…"[4]

ICWA squarely focuses on the need to protect tribal culture and heritage, and recognizes that the best practice is to ensure tribes retain self-governance and exert tribal sovereignty over the care and custody of Indian children.[5] ICWA uplifts tribal sovereignty by allowing tribes to intervene in custody cases, assert tribal jurisdiction over these cases, and designate preferences for the placement of Indian children. After dealing with assimilation attempts for well over a century, tribes across Indian Country utilize ICWA to foster and safeguard their tribal cultural ways and practices for the next generations to come.

ICWA has become known as the "gold standard" of child protection systems. ICWA's requirements in child custody proceedings – including termination of parental rights – for a showing of active efforts made to prevent the breakup of an Indian family earned it this high designation. There are many reasons that a child may be removed from the custody of their parent; however, parents have the ability to overcome many of the reasons that lead to these custody issues. ICWA focuses on supporting parents by connecting them with tribal resources, parenting classes, rehabilitation services, therapy, and job training. The goal is to reunite the child with the parent if it is in the best interest of the child.

Despite being a model of custody proceedings, ICWA has been continually challenged. These attacks are aimed at removing protections for Indian children and tribes. The most recent attack came in the U.S. Supreme Court case of *Haaland v. Brackeen*. After years of uncertainty, the U.S. Supreme Court, in a 7-2 ruling, rejected the constitutional challenges against ICWA.

In *Haaland v. Brackeen*, the Petitioners, including a birth mother, foster and adoptive parents, and the State of Texas, filed a suit against the United States. Several tribes also intervened in support of the federal parties in the case. The Petitioners' arguments fall under three categories: that Congress lacks the authority to enact ICWA, anticommandeering, and equal protection. The Supreme Court's ruling, written by Justice Barrett, rejected each challenge brought by the Petitioners.

Regarding the first set of arguments, the Supreme Court held that Congress did not exceed its plenary power in passing ICWA and ICWA does not tread on states'

1 *Haaland v. Brackeen*, 599 U.S. 255, 1642 (2023) (Brackeen).

2 *Id.* at 1645.

3 25 U.S.C. §1901(4).

4 25 U.S.C. §1902.

5 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

authority over family law.[6] Justice Barrett proceeded to list eight well-cited U.S. Supreme Court cases, dating back to 1899, that have held that Congress possesses exclusive, plenary power over Indian tribes and Indian affairs.[7] Further, the Supreme Court stated that the U.S. Constitution's Indian Commerce Clause and the Treaty Clause authorizes Congress to deal with matters relating to Indian affairs.

Secondly, the Supreme Court held that ICWA does not violate the Tenth Amendment's anticommandeering principle.[8] The Petitioners argued that ICWA forces states to follow its federal requirements of active efforts, notice requirements, heightened burden of proof and expert testimony, placement preference, and recordkeeping. Justice Barrett highlighted several cases that supported the Court's conclusion that because ICWA applies evenhandedly to state and private actors it therefore does not implicate the Tenth Amendment.

Finally, the Supreme Court rejected the Petitioners' equal protection challenge to ICWA's placement preference.[9] The Supreme Court found that both the individual petitioners and the State of Texas lacked standing to raise the claims and rejected that challenge.

The U.S. Supreme Court decision in *Haaland v. Brackeen* has ultimately upheld and protected tribal sovereignty and thus the protection of Native children. The decision produced a ripple of relief across Indian Country. This will not be the last attack on ICWA, however, the *Brackeen* decision has unequivocally cemented the legitimacy and importance of the Act and its purpose.

I will simply end with Justice Gorsuch's powerful ending to his concurring opinion: "[i]n adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design."[10]

— Sarah Crawford

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023)

At first glance, the June 15, 2023, decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* ("*Lac*")[1], affirming the First Circuit's decision, and resolving a split in the circuits[2], appears to be a straightforward statement that the Bankruptcy Code applies to tribal creditors. Peeling back the history of the case, as well as the path carved through the heart of the sacred principles of Sovereign Immunity, reveals the significance of the decision.

In 2019, Coughlin filed a motion in the United States Bankruptcy Court of Massachusetts, alleging "catastrophic" damages from alleged emails and calls attempting to collect a Payday Loan in the amount of $1,600.00.[3] In Coughlin's sur-reply in Response to the Motion to Dismiss for Lack of Jurisdiction he argues, for the first time, "that the long line of Supreme Court cases finding that Indian tribes are entitled to sovereign immunity subject only to precise congressional limitations should be overruled."[4] That argument would become the tail that wagged the dog of this case as it evolved even though, as Judge Bailey pointed out, "Coughlin has not stated (overruling precedent that Indian tribes are entitled to sovereign immunity) [as] a basis for that relief."[5]

In 2020, the First Circuit aligned with the Ninth Circuit finding that the language in the Bankruptcy Code was sufficient to find that Congress had "clearly" intended to abrogate tribal sovereign immunity, notwithstanding the detailed, lengthy, historical analysis of precedent by Chief Judge Barron in the dissent.[6] Justice Barron analyzed not only the precedent, but the language throughout legislation clearly identifying when provisions were not subject to the Sovereign Immunity of tribes by clearly stating that fact. *Id.* at 612-626. The fiery debate between the Majority and the Dissent, notes 1-13 vs. 14-19, is uncharacteristic of the First Circuit and clearly illustrates the division of thought in the Circuit, and the Country, over these issues.

In June of 2023, the United States Supreme Court resolved the division in the First Circuit as well as the Circuits across the Nation when it affirmed the First Circuit decision opining, "our analysis of the question whether the Code abrogates the sovereign immunity of federally recognized tribes is remarkably straightforward. The Code unequivocally abrogates the sovereign immunity of all governments, categorically. Tribes are indisputably governments. Therefore, § 106(a) unmistakably abrogates their sovereign immunity too."[7]

The diverse opinions on the issues of tribal sovereignty and construction are also reflected in the Supreme Court's opinion in a dialogue that is woven through the notes and the text as arguments are discussed and criticized.[8] What is even more significant, however, is how this opinion has been used across the circuits over the past three months to further erode the historical principles of sovereign immunity as well as support for a myriad of other arguments.[9]

The impact of the decision in *Lac* may extend beyond Bankruptcy Law and may be used to support challenges to tribal sovereignty and immunity across the board. Careful business planning and compliance will be required as we move forward. The division of the Court here, as in *Haaland v. Bracken*, 599 U.S. 255 (2023), reflects that the conversation is far from over.

— Reneau J. Longoria

Arizona et al. v. Navajo Nation, 599 U.S. 555 (2023)

On June 20, 2023, the Supreme Court issued its decision in *Arizona v. Navajo Nation*, ruling that the Navajo Nation could not assert a claim for breach of trust against the United States for its failure to assess or plan for the fulfillment of the Navajo Reservation's water needs and unquantified rights to water in the mainstream of the lower Colorado River, and to perform certain management roles in relation to the Colorado River in a manner consistent with meeting the unquantified water rights of the Navajo Nation.[11] On Nov. 4, 2022, the court granted *certiorari* to two petitions – one by the United States[12], and another by state and non-Indian water user intervenor-appellants[13] – and consolidated its review of the Ninth Circuit Court of Appeals decision in *Navajo Nation v. Department of Interior*.[14] The Court's ruling overturned the Ninth Circuit decision, but left room for the Navajo to potentially pursue relief through other approaches. Writing for the majority, Justice Brett Kavanaugh

6 *Brackeen* at 1627.
7 *Id.*
8 *Id.* at 1633.
9 *Id.* at 1638.
10 *Brackeen* at 1661.
11 599 U.S. 555(2023.)
12 No. 21-1484.
13 No. 22-51.
14 26 F.4th 794 (2022.)

was joined by the Chief Justice and Justices Alito, Thomas, and Coney-Barrett. Justice Gorsuch wrote a lengthy and detailed dissent, joined by Justices Sotomayor, Kagan, and Jackson.

The history of the case is lengthy, extending back to 2003 when the Navajo Nation brought suit against the Department of Interior and federal officials in federal district court in Arizona, seeking declaratory and injunctive relief. The claims initially asserted by the Nation were based on the National Environmental Policy Act and the Administrative Procedure Act and stemmed from management and allocation decisions in relation to the lower Colorado River. After a lengthy stay for settlement negotiations, which did not ultimately resolve the issues in the case, the trial court granted motions to dismiss the Nation's claims in 2014, largely on standing and sovereign immunity grounds[15].

The Ninth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case back to the lower court.[16] The Nation then moved to file its third amended complaint, adding additional allegations to support its breach of trust claim, as well as new claims based on its 1868 Treaty and the trust responsibility of the United States to the Navajo Nation. The District Court denied the Nation's motion to amend, citing to the United States Supreme Court's retained exclusive jurisdiction over the allocation of water in the lower Colorado River under *Arizona v. California*.[17] The District Court determined that allowing the Nation's amended complaint to go forward "would require this Court to determine the Nation's rights to water from the [Colorado] River."[18] The court found that such a determination was "off limits to any lower court."[19] The Nation renewed its motion to file a third amended complaint, which was also denied by the federal District Court, again citing to the "Supreme Court's reservation of jurisdiction" over allocations of water rights to the lower Colorado River, as well as to limitations on the United States' liability for violations of its trust responsibility to Indian tribes under existing precedent.[20]

In its review of the lower court's decisions on the lack of jurisdiction to review the Nation's claims, the Ninth Circuit Court of Appeals reversed and remanded the case back to the District Court with instructions.[21] The panel decision, authored by Judge Gould, held that jurisdiction over the Nation's asserted breach of trust claim was not barred by the Supreme Court's ongoing authority over allocation questions in *Arizona v. California*; that the claim was not barred by res judicata; and that the Nation's proposed third amended complaint sufficiently stated a breach of trust claim.[22] The Ninth Circuit's decision noted that the Nation did not seek an actual quantification of rights to the Colorado River, and based on that distinction, ruled that the lower court could exercise its jurisdiction to determine the Nation's claims. The Ninth Circuit further ruled that the proposed amendment was not futile, and explored in detail the history of the Navajo Nation's relationship with the United States through its treaties and with respect to water resources. The opinion also noted the importance of water for "healthy human societies" and the correlation between Navajo Nation's water insecurity and the "exacerbation of the risks from COVID-19."[23]

The State Intervenors' and the United States' petition for rehearing *en banc* before the full Ninth Circuit Court of Appeals was denied by the panel.[24] Both the federal defendants and the state intervenors petitioned for *certiorari*. The United States Supreme Court granted *certiorari* on November 4, 2022.[25]

The Court granted *certiorari* as to two questions: (1) whether allowing the Nation to proceed with its claims would violate the Court's retained exclusive jurisdiction in *Arizona v. California*; and (2) whether the Nation could state a cognizable breach of trust claim against the federal trustee based on unquantified implied water rights, consistent with prior precedent on tribal claims for breach of trust.

Briefing was completed on March 3, 2023. Nine briefs by *amici curiae* were submitted in support of the Nation; two *amici curiae* filed briefs in support of the federal and state petitioners.[26] Oral argument was heard on March 20, 2023. Arguments were presented by attorneys for the United States, the State of Arizona, and the Navajo Nation. The Justices' questions ranged from the Nation's treaties with the United States and the extent of the federal government's obligations under those treaties to the *Winters* Doctrine recognizing implied water rights on establishment of a Reservation to drought and the water shortages plaguing the American Southwest, and the Law of the River's reach with respect to questions pertaining to the waters of the Colorado River.[27]

The Court issued its decision on June 22, 2023, ruling largely in favor of the federal government, holding that the trust doctrine does not provide a cause of action – even for non-monetary relief – without specific language in a statute, agreement, or similar pronouncement establishing an enforceable duty on the United States.[28] The Court declined to rule on the question of whether its reservation of exclusive jurisdiction over allocations of Lower Colorado River water in *Arizona v. California* barred the Nation's complaint from being heard by the lower court.[29] Justice Thomas wrote a concurring opinion expressing his ongoing discomfort with the federal government's trust relationship with Indian tribes, characterizing it as "an additional and troubling aspect of this suit."[30] Justice Gorsuch wrote a lengthy dissent, joined by Justices Sotomayor, Kagan, and Jackson, offering a more detailed exploration of the history in question – important context regarding the 1868 Treaty, and the "many steps the Navajo took to avoid this litigation."[31]

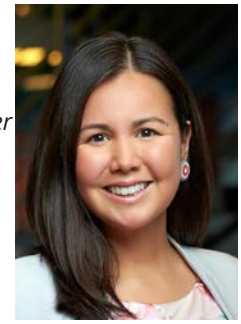
While the Court declined to hold that there was an enforceable trust duty in relation to an implied right stemming from the Nation's treaty with the United

15 34 F. Supp. 3d 1019 (D. Arizona 2014.)
16 876 F.3d 144 (9th Cir. 2017)
17 2018 WL 6506947 (D. Arizona 2018.)
18 2018 WL 6506957, *Id.* at 1 (D. Arizona 2018.)
19 *Id.* at 2.
20 2019 WL 3997370 (D. Arizona 2019).
21 26 F.4th 794 (9th Cir. 2022).
22 *Id.* at 800-803.
23 *Id.* at 802.
24 *Id.* at 799.
25 143 S. Ct. 398 (2022) (granting and consolidating State Intervenors' and federal defendants' Petitions for certiorari.)
26 *See generally* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1484.html (last visited on October 1, 2023.)
27 For a detailed account of the oral argument, see Matthew Fletcher, Justices appear divided over Navajo Nation's water rights, SCOTUSblog (Mar. 21, 2023, 2:13 PM), https://www.scotusblog.com/2023/03/supreme-court-justices-appear-divided-over-navajo-nations-water-rights/
28 599 U.S. 555 (2023).
29 599 U.S. 555 at n.4 ("[W]e need not reach the question of whether particular remedies would conflict with this Court's 2006 decree.").
30 *Id.* at 570-574.
31 *Id.* at 574-599.

States,[32] it also left little doubt about the ongoing viability of the Nation's rights to water sufficient to meet the purposes of its reservation.[33] Indeed, the Court's favorable discussion of tribal water rights as recognized by the *Winters* Court over a century ago indicates that the Navajo Nation's ability to secure and protect its rights to water is not foreclosed, but rather that a different approach or legal theory will be needed to achieve that goal. The limitations on the federal trust doctrine are certainly a setback, and may have broader implications on water rights litigation and settlement negotiations beyond the Navajo Nation, but the water rights reserved by tribal nations through treaties and agreements with the United States remain intact.

— Heather Whiteman Runs Him

***Sarah Crawford** is a tribal member of the Sisseton Wahpeton Oyate located in South Dakota. Sarah is a Managing Associate at Clause Law, PLLC where she works extensively on providing advocacy and in-house counsel for tribes across Indian Country. In this role, Sarah focuses on a number of issues including ICWA, housing, contract law, and code development. She holds a J.D. and Indian Law Certificate from the Sandra Day O'Connor College of Law at Arizona State University. Sarah can be reached at sarah@clauselaw.com.*



***Reneau J. Longoria** Esq. is an enrolled member of The Little Shell Tribe of Montana, born and raised in Montana and has practiced Bankruptcy and Default Litigation in the Northeast including Massachusetts, Maine, New Hampshire, and New York for over 27 years. Reneau is the Managing Member of Doonan, Graves and Longoria LLC, www.dgandl.com, and may be reached at rjl@dgandl.com.*

***Heather Whiteman Runs Him** is an Apsaalooke/Crow citizen from Lodge Grass, Montana. She is the Director of the Tribal Justice Clinic and Associate Clinical Professor at University of Arizona Rogers College of Law where she teaches courses on tribal water rights, tribal courts, and tribal law. Heather previously worked as a senior staff attorney at the Native American Rights Fund in Boulder, Colorado, focusing on domestic and international legal advocacy on the rights of indigenous peoples to water, land, and self-determination, and as Joint Lead Counsel for the Crow Tribe of Montana, where she oversaw a wide variety of legal issues. Heather is admitted to practice in New Mexico, several federal district and appellate courts, and the United States Supreme Court.*

32 *Id.* at 565.

33 *Id.* at 569 ("The 188 treaty reserved necessary water to accomplish the purpose of the Navajo Reservation.").

MONTANA JUSTICE FOUNDATION

THANK YOU TO 2023 ART FOR JUSTICE DONORS

A big **THANK YOU** to everyone who donated auction items for the 2023 Art for Justice silent auction at this year's State Bar of Montana Annual Meeting and for all who bid on the items.

Thanks to you, this year's auction raised $4,545 to benefit access to justice in Montana.

A special thank you to Missoula lawyer and artist Matt Thiel for his yearly efforts organizing and donating art.

2023 ART FOR JUSTICE DONORS

Judge Leslie Halligan & Mike Halligan (4-night stay, Whitefish condo)

Judge Robert L. Deschamps (4-night stay, Flathead Lake condo)

Cindy Thiel donated "Baptist Jazz Singers" framed acrylic painting by artist B. Lopez

Eric Nord donated Untitled 19th Century oil painting by an unknown British artist

Steve Fletcher - "Not Exactly Seeing Eye to Eye" photograph on gallery wrap canvas

Robert and Bonnie Minto - 2 framed original paintings by various artists

Matt Thiel - original "Black and Red" abstract oil painting, original "Blackfoot Evening" framed oil painting, and "Taste of Wine" wine basket

Amy Sings In The Timber - original "I Dream of Painted Ponies" framed drawing

Hilly McGahan - original "View from Waterworks" framed acrylic painting

Marvin Pauls - original "My Montana" framed rubbing

Kay Lynn Lee - original "Sunflowers with Mourning Cloak Butterfly" framed acrylic painting

Greg Munro - original framed graphite figure drawing