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# Arizona v. Navajo Nation

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**The Majority Opinion**

Last Thursday, the United States Supreme Court issued its opinion in *Arizona v. Navajo Nation*, the third Supreme Court Indian law decision in the last two weeks. Released on the heels of a major tribal victory in the *Haaland v. Brackeen* case upholding the Indian Child Welfare Act, the *Navajo* decision conversely yielded a discouraging result for tribes by making it more difficult for Tribes to enforce the United States' trust responsibility.

At issue in the *Navajo* case was whether the United States was compelled by its trust obligation to the Nation and its 1868 Treaty to take "affirmative steps" to secure water for the Navajo Nation, potentially including such actions as assessing the Tribe's water needs, developing a plan to secure the needed water, and creating infrastructure to deliver that water. The majority opinion, authored by Justice Kavanaugh and joined by Justices Roberts, Thomas, Alito, and Barrett, held that the United States was not compelled to takes such affirmative steps, overturning the Ninth Circuit's earlier ruling in favor of Navajo. Although the Court recognized the Tribe's affirmed right under *Winters v. United States*, 207 U.S. 564, 576–77 (1908) to use any water arising on, bordering, crossing, underlying, or encompassed within the Reservation as "a stick in the bundle of property rights that makes up a reservation," it nonetheless determined that the United States was not obligated to do any more to secure water for Navajo. Indeed, in recounting that the Federal Government had "secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation," Kavanaugh seemed to laud the Federal Government's previous efforts as more than sufficient to fulfill its trust obligation, notwithstanding that the Federal Government impeded the Nation's ability to participate in the adjudication of the Nation's rights to the mainstem of the Colorado River.

The Court acknowledged the existence of the trust relationship between the United States and tribes but explained that to maintain a breach of trust claim and for the Court to compel the United States to fulfill certain duties, the Tribe would have to show that the 1868 Treaty expressly imposed those duties onto the United States and that the United States expressly accepted them. Without such a showing, the Court concluded, it would decline to apply "common law trust principles to infer duties not found in the text of a treaty, statute, or regulation."

Justice Kavanaugh also emphasized the separation of powers principle, suggesting that any potential remedy for the Tribe's water shortage would need to come from Congress or the President—not the courts. Acknowledging that the 1868 Treaty "did not envision and provide for all of the Navajos' current water needs,"

he nonetheless concluded that “it is not the Judiciary's role to rewrite and update this 155-year-old treaty.” Highlighting the sensitive issue of water in the western states, he stressed that “it is particularly important that federal courts not” rewrite the law. Advising that courts “must stay in their proper lane” by interpreting law, Kavanaugh instead suggested Congress or the President could enact change for Navajo by legislating a solution to its water woes.

**The Concurrence and Dissent**

While Justice Kavanaugh's opinion delivers the decision of the Court, the concurrence and dissent are equally deserving of mention—albeit for very different reasons. Taking a position that can only be described as extreme, Justice Thomas's concurrence argues that not only does the trust relationship with the Navajo Nation not impose any affirmative duty on the United States with respect to water, but that such an “amorphous” common law trust relationship should in fact not exist. Standing starkly in opposition to well-settled law, Thomas also posits that the long-standing Indian canons of construction requiring interpretation of certain documents to be understood in favor of tribes, should no longer be in place—and that courts should be restricted to using ordinary rules of statutory interpretation. While no members of the Court joined Justice Thomas's opinion, his concurrence offers a startling reminder as to the continuing potential for diminishment of tribal rights from the Supreme Court.

In sheer contrast, Justice Gorsuch proves himself yet again to be a defender of tribal rights in his eloquent dissent, joined by Justices Sotomayor, Kagan, and Jackson. Spanning nearly twice the number of pages of the majority opinion, Gorsuch grounds his dissent into four principal arguments. First, he asserts that the Court failed to consider the context in which Navajo's suit was brought, which he argues is critical to understanding its claims. Second, Gorsuch concludes that when the historical context is properly considered and general contractual interpretation principles are applied in reading the Treaty, it logically follows that the United States owes the Tribe the duty of assessing what water rights it holds for the Nation.

Third, Justice Gorsuch contends that the Court errs in its reasoning by concluding that the United States owes no affirmative duty to the Tribe. Arguing that the Court erred by “misapprehending” the nature of the Tribe's complaint, he notes that contrary to the majority's characterization of the requested relief, the Tribe “expressly disavows” that the United States is legally obligated to pay for water infrastructure. Adding to what he construes as the Court's misapprehension of the Tribe's Complaint, Justice Gorsuch reasons that the majority also applied the wrong legal framework by analyzing the claim under the Tucker Act, which governs damages claims, when the Tribe was seeking only equitable relief.

Fourth and finally, the dissenting opinion offers a more practical analysis of the case, likening the Tribe's lawsuit as a visit to the Department of Motor Vehicles where one has “waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another.” Lastly, Justice Gorsuch notes that while the Court dismissed the Tribe's Complaint for seeking relief that it found the Tribe was not due, the Court did not preclude the Tribe from making a claim against the United States for interfering with its water rights nor from intervening in a future water rights lawsuit. Thus, Gorsuch concludes his dissent somewhat hopefully, suggesting that “[p]erhaps . . . some measure of justice will prevail in the end.”

**Key Takeaways**

The decision is undoubtedly a loss for tribes, though its precise impacts beyond those on Navajo are not yet clear. Among the potential ramifications are an increasingly heightened burden for tribes who wish to bring a breach of trust claim for equitable relief. If it is not an abdication of the United States' duty as a trustee to fail to secure water for the tribe with the largest reservation in the country—on some portions of which, as Justice Gorsuch notes, over 90% of households lack access to water—it is difficult to envision many scenarios under which this Court would find that such a breach of trust had occurred.

Additionally, it is foreseeable that some could argue that the trust relationship does not obligate the Federal Government to take any actions which it has not explicitly agreed to in a treaty or other legal authority. This position would drastically diminish the trust obligation as it has historically been viewed to the great detriment of tribal governments and their members, particularly for those who do not yet have settled water claims.

While the majority did not—as Justice Thomas did—go so far as to suggest that the trust relationship be eliminated, it raised the bar for breach of trust claims and offered an important reminder that even in the midst of other Indian law victories, the threat of erosion to critical tribal rights remains.

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