

Stephanie Otts:

Okay. Good afternoon. My name is Stephanie Otts. I'm the director of the National Sea Grant Law Center. Thanks so much for joining us today for the next installment in our 2023 webinar series. Today, we're going to do a roundup of ocean, coastal, Great Lakes related Supreme Court cases from the past term and also do a little bit of preview of cases that have been accepted for the next term. So we hope you find this information interesting and again, thanks for joining us.

Just a little bit of introduction. If you're new and not familiar with the National Sea Grant Law Center, we were founded in 2002. We're housed at the University of Mississippi School of Law. We are one of the 34 Sea Grant programs around the country, and our focus is on providing legal research, education, and outreach to the Sea Grant Network and the variety of stakeholders that the network has. If you are interested in learning more, I encourage you to follow us on social media. You can also use the QR code to get to our website and we have lots of information about our research and products and things on there. So please come and check us out.

Just a couple of housekeeping items for the webinar. Participants are currently muted to reduce background noise. We encourage you to use the chat to ask questions at any time. If we see them and can answer them in real time, we will, but there should be time at the end for a full Q and A. You can raise a hand to ask a question verbally at the end if we have a small group and noise is not an issue, but you can use the chat at any time. And as you might've noticed, the webinar is being recorded and it will be shared on the National Sea Grant Law Center's website following the webinar usually early the following week for later viewing. And so you'll be able to share that with anyone else that you think might benefit from our information.

And what's different for this webinar if you've attended earlier ones in the series, is this webinar has been approved by the Mississippi Commission on Continuing Legal Education for one hour of CLE credit. If you are a participant who will be seeking CLE credit, we ask you to submit your information on the Google form that Lauren just shared in the chat and we will also share this again at the end. Of course, you need to participate in the entire webinar to receive one hour of credit. If you are seeking credit in Mississippi, the National Sea Grant Law Center will report that credit for you. So that's why it's really important to fill out the form. Attorneys in other states will have to self-report, but we can provide certificates of attendance or other documentation if needed upon request. So we appreciate you tuning in for the CLE credit if that's why you're here.

So just a preview of what's to come. So as I said it's going to be a rapid fire roundup. We're going to be talking about these seven cases that were heard by the Supreme Court this term and issued opinions on. For some of you, you may be looking at this list thinking, well, what does this have to do with Sea Grant or Ocean, Coastal and Great Lakes resources? But all of the cases have some relevance to either environmental issues, the interplay between federal and state authority or different aspects that we'll be getting into. And some just have really interesting facts, but the law is a little more obscure and we just wanted to share.

So first up is New York, New Jersey. So New York and New Jersey had entered into an interstate compact to address corruption at the Port of New York and New Jersey in 1953. And in doing research for this webinar, discovered that the amount of corruption at the port is supposedly the inspiration for the film *On The Waterfront* with Marlon Brando, which I thought was a pretty interesting tidbit of information. But it was formed so that the two states could work together on port operations, management and law enforcement. And so the compact formed a waterfront commission that was a bi-state commission jointly operated by the two states.

However, by 2018, New Jersey no longer really felt that it wanted to be part of the Waterfront Commission. And so they sought to unilaterally withdraw from the compact. New Jersey cited shifting conditions at the port. One of the major pieces of information that New Jersey often cited was that when the compact was entered into, most of the port operations and activity was happening on the New York side. And now today, most of that has shifted to the New Jersey side and plus the corruption related to the mob and other things is not present there anymore. And so New Jersey just felt that the port would be better managed and operated independently by the two states. However, New York asserted that New Jersey could not leave without their consent and they were not granting that consent, right. So New York was asserting that it could force New Jersey to stay in the compact.

The facts of the case are a little more interesting than the actual legal arguments. It's a pretty straightforward opinion. Unanimous Supreme Court ruled in New Jersey's favor relying on background principles of contract law and state sovereignty. Basically, the court found that neither party intended for the interstate compact to remain in perpetuity. And that in general, contracts where there is ongoing or indefinite performance can be terminated by either party with notice. And so the court found that New Jersey did have a right to unilaterally withdraw from the commission, and that was the basis of the ruling.

So when the ruling came out earlier this year, New Jersey did withdraw from the compact, the Waterfront Commission dissolved and the New Jersey State Police and the port security section assumed the duties of the Waterfront Commission in July, for the New Jersey side of the port. So that's where that is. So that interstate compact that had been there is dissolved and the two states are now independently managing operations and law enforcement on their respective sides of the port. Okay, so now we're going to shift around the National Secret Law Center staff to run through some of the other cases. So I'm going to turn it over to Samantha.

Samantha Hamilton:

Hey y'all. My name's Samantha. I'm going to be talking about the National Pork Producers Counsel versus Ross opinion. So next slide please.

So the standards in which animals raise for food in the United States has gained a lot of attention in recent years. Activists are lobbying for better conditions for animals kept in confinement, but at both the federal and state levels, these standards are pretty lacking. So as of 2022, only 14 states had passed at least one policy addressing poultry, hog or veal calf production or retail sales. And that's in that map at the bottom right. And at the federal level, the Expanded Food Safety Investigation Act, which was sponsored by Representative Rosa DeLauro of Connecticut, was introduced to Congress this year. So it's a little bit of good news, but it's later than it should be. But this act would give the Food and Drug Administration, the FDA, some new power to investigate livestock feedlots and animal confinement facilities and just generally bring animal operations under the purview of the FDA in a higher capacity.

And so this is because of these lax standards, and they relied on a couple different reports when they were introducing this bill. So one was from the CDC, which found that roughly one in six Americans get sick, 128,000 are hospitalized and 3000 die from foodborne diseases each year. Additionally, the World Health Organization released a report identifying growing levels of resistance to antibiotics in humans, which can be attributed in part to their high antibiotic use in concentrated animal feeding operations or CAFOs. So these lax regulations of CAFOs as well as the consolidation of family farms into predominantly industrial agricultural operations has led to this dire need for legislation addressing the standards in which animals raise for food are kept. And that's both to protect the animals and an animal welfare standpoint and consumer protection and getting people or keeping people from getting contaminated and sick.

So one such law is California's Proposition 12. Proposition 12 prohibit the sale in California of whole pork products by a seller who knows or should know that the meat came from a breeding pig or their offspring that was confined in a cruel manner. There's also some specifics for poultry and for veal calves, but those aren't relevant to the lawsuit. But confinement is defined as cruel where the breeding pig has less than 24 square feet of space, or if it cannot lie down, stand up, fully extend its limbs and turn around freely. So nearly 63% of California voters voted in favor of Prop 12. So it passed despite some spirited debates surrounding the costs and benefits of the requirements imposed on pork producers that were selling in the state. So following Prop twelve's adoption, two industry organizations, the National Pork Producers Council, which is based out of Iowa, and the American Farm Bureau Federation filed a lawsuit on behalf of their members claiming that Prop 12 violates the dormant Commerce Clause of the US Constitution.

Now, the dormant Commerce Clause is the negative implication of the Commerce Clause, and it acts as a prohibition against states passing legislation that discriminates against or excessively burdens interstate commerce. So because most of the pork consumed in California comes from out of state by quite a big majority, the organizations were arguing that Prop 12 is an example of California regulating interstate commerce beyond its authority to do so. So both the California District Court and the Ninth Circuit Court of Appeals dismissed the case. They held that the two organizations failed to state a claim, but the Supreme Court did accept the case and they ultimately agreed with the lower courts affirming the dismissal. Next slide please.

So in a five four opinion, which was pretty fractured and complicated, Justice Gorsuch rejected the two main arguments made by the organizations. Their first argument according to Justice Gorsuch interpreted existing case law to create what's called an extra territoriality doctrine, sorry, it's a very hard word to say, which would prohibit enforcement of state laws, which might not be purposely discriminatory, but they have the practical effect of controlling commerce outside the state.

So again, in this case, because California imports most of its pork from out-of-state producers, the organizations argued that Prop 12's impacts would mostly be felt by entities outside the state. And they argued that that made it unconstitutional. Now, the court refused to adopt these arguments. They concluded that it would be an overreach of their authority to question state laws that just touch interstate commerce like this one does.

And then the second argument, the court rejected in a plurality and they said that Proposition 12 is unconstitutional under the balancing test enumerated in *Pike v. Bruce Church*. So the Pike Test, which requires that in order for a state law to be constitutional, the burdens that the law imposes on out-of-state commerce must not be clearly excessive in comparison to the local benefits. So, some of the justices rejected this argument because they believed that the organizations didn't prove that the burdens to the out-of-state actors would be clearly excessive of the benefits. A couple other justices rejected the argument because they said that it's impossible to compare economic burdens to intangible benefits like prevention of contamination and health and stuff like that, such as in this case it'd be comparing apples to oranges. But for whatever reason, the court did reject the argument and so they dismissed the claim.

But why do we care? The case does have broad implications for how states can effectively require producers of food animals, even if they're out of state, to abide by humane and hygienic practices in order to sell their products in state. So while this case is focused on enshrining humane practices for pork, the same rationale can easily be used for enshrining humane aquaculture practices as that industry continues to grow and as more of the fish that we're eating and seafood that we're eating is coming from aquaculture farms. So that's how it relates to ocean and coastal law.

Stephanie Otts:

Great. Thanks, Samantha. Up next is one of the big ones with Sackett versus EPA and Catherine Janasie, one of our senior research councils is going to talk about that.

Cathy Janasie:

Hi everyone. So yeah, you can go to the next slide, Steph. So the Sackett case was a big Clean Water Act case that came out this year. And the issue specifically in the case was whether or not the Ninth Circuit had used the proper test for determining whether wetlands are waters of the United States under the Clean Water Act. So the case specifically was looking at wetlands and how they're included. And on the right hand, I have just two different statements from the Clean Water Act, and the first is its purpose, to restore and maintain the chemical, physical, and biological integrity of the nation's water. That's the policy statement. It's often quoted in decisions that are looking at the Clean Water Act. That second statement is the policy which came into play with the majority opinion in this case, and that policy speaks to the rights of the states. And so a big tension in this case is that land use is traditionally a state power. And so then how can we justify regulating land use with federal regulation of waters under the Clean Water Act? So next slide, Stephanie.

So just for background information, the Clean Water Act requires permits for discharges from point sources. There's two different permit programs. The 402 National Pollutant Discharge Elimination system permit deals with discharges of a pollutant from point sources like pipes like we see in the top picture. And then the second program is the one that's at issue in the case for Sackett, and that's the 404 dredger fill permit. And so the requirement of a property owner to get a permit from the Army Corps of Engineer or the relevant state agency if they're discharging dredge or fill material into a covered water. And I have highlighted here that if you do these activities without a permit, you are subject to potential civil and criminal penalties for violations. And that risk of penalties was another thing that played a big role in the decision for the majority. So next slide.

So jurisdictional requirements for a permit, you need three separate things. And if you don't have all three of these, you don't need a permit under the act. So a permit is needed for an addition of any pollutant to a navigable water from a point source. And what's at issue in the Sackett case is our wetlands covered can be considered navigable waters. And the pictures I have there are from the Fish and Wildlife Service, it's a collage they put together of all the different types of wetlands that they are. And so wetlands can really look a lot of different ways, and there's been a lot of tension since the Clean Water Act was passed about what wetlands can be regulated under the act. So next slide.

So at issue with Sackett is, what is the scope of that term, navigable waters? It's defined in the statute as waters of the United States sometimes called WOTUS, but that's a statutory term. And since it's its statutory term, that means that the EPA and the Army Corps can define what WOTUS means through rulemaking, which they have done. And what's important to this case is that their definition regarding wetlands has been in place since '1977. So through many different political administrations, Republican, Democratic, and so it's been in place a while.

What's important to think about what the Clean Water Act, Samantha just talked about the Commerce Clause, but the regulatory hook for the Clean Water Act is also the Commerce Clause. And so any water that's covered has to be linked to interstate commerce somehow. And so what that means is federal jurisdiction isn't limitless, that we can't regulate every water body under the Clean Water Act. The federal government just doesn't have that power under the Constitution. And those of you who have a background with the definition of navigability for public trust doctrine or admiralty, this definition of navigable waters is different. It's a different test.

And then hitting on just that point again, which is a big tension in this case, it's that land use is a traditional state power. So how are we going to look at wetlands to regulate them under the act? Now, the Supreme Court has looked at wetland cases in the past and they have spoken in the past and said, we believe that the act should go beyond what are truly navigable waters, but how far they could stretch that term is what's been in disagreement for decades since the act's been passed. So next slide.

So the big case, which is really relevant to the Sackett decision was Rapanos versus The United States in 2006. And this was a plurality opinion, so no majority rule came out of it, but we get two tests that are relevant for Sackett. And the first was Justice Scalia's test, which said that waters of the United States could only include relatively permanent standing or flowing bodies of water and wetlands could only be covered under the act if they had a continuous surface connection to bodies that are waters of the United States in their own right. That test was used by some courts who said that they would use either Justice Scalia's or Justice Kennedy's test, but it was not the test that most courts went to.

Most courts use Justice Kennedy's test, which is known as the significant nexus test. And what Justice Kennedy did was create this ad hoc test that would look at each water body and say, "Does the wetland have the right nexus with the statutory phrase, navigable waters if either alone or in combination with similarly situated lands in the region, they significantly affect the chemical, physical, and biological integrity." So we consider them navigable. Going back to that purpose statement of the act he's using directly the language from the statute, is it going to affect the chemical, physical and biological integrity of the waters? So next slide, Steph.

So the Sackett case had to do with this piece of property that was off Priest Lake in Idaho. And I have here two different pictures because it really highlights how that case was framed. And so the picture on the left, those are the Sackett's, that's their piece of property. They were represented by the Pacific Legal Foundation and they presented themselves as this dry piece of property that was back from the lake, didn't have any water on it. And so why should they be regulated under the Clean Water Act?

The EPA and other parties were saying that they should be regulated. This is a picture from the National Resources Defense Council looked at it as a wider view to say, "Okay, your properties in the middle of this system, it's the middle of these wetlands that are draining into a creek that's going into this bigger navigable lake, and that's why we think it should be covered." So next slide, Steph.

So Sackett's a really pretty interesting opinion because it's a nine all opinion. So that was a unanimous opinion by the court, but what we get with that are three different concurring opinions. And the nine justices only agreed on two different points. First, they all agreed that the Sackett's property was not covered by the Clean Water Act and that the significant nexus test from Justice Kennedy and Rapanos is not the correct test for determining when wetlands are covered. And this map here I think is good to give an idea of what's going on here as we talk about what the majority rules. Is that the Sackett is in that piece of wetlands and then that arrow point over and down is the navigable creek that they're connected to, that's draining into the lake. But what's also present is there's houses between their property and the lake. There's a road that has to be crossed between their property and the lake, and those factors play a big role in what the majority decides. So next slide, Stephanie.

So we get this rule from the majority opinion, which was five justices that joined it, and they said for an adjacent wetland to be covered by the Clean Water Act, we're going to go back to what Justice Scalia said in that Rapanos decision. They're going to say the adjacent water body is a WOTUS, so a relatively permanent body of water connected to traditional interstate navigable waters. And the wetland needs to have a continuous surface connection with the water making it difficult to determine where the water ends and the wetland begins. And because of that continuous surface connection requirement, the Sackett's property gets taken out. And so it's not going to be covered by the act.

Majority had several concerns when they wrote the opinion. So the first was that piece, we want to preserve state rights and the ability to regulate land use. So they thought this piece of property was too far away from that navigable Priest Lake to be covered and that it should just be regulated by the state and local governments. They also talk a lot about the burden on property owners to get a permit under the Clean Water Act. And then that threat of potential criminal penalties played a huge role. Before I wrap up, I just want to point out that two of the concurrences that were written would've loosened the rule. They said that second piece of the majority rule is too narrow. They say they would've liked it if it was a road or a [inaudible] or something separated from the wetland to the navigable water, they would still have jurisdiction. But with this majority rule, we've got pretty narrow about what wetlands are going to be covered under the Clean Water Act now. So I'll go on to the next case.

Stephanie Otts:

Great. Thanks Cathy. So next up is Tyler v. Hennepin County and Terra Bowling, another one of our senior research councils is going to take that one.

Terra Bowling:

All right, thanks Steph. You can move on to the next slide. So I'm going to talk about Tyler versus Hennepin County. So in this case, there was a woman named Geraldine Tyler. She owned a condo in Hennepin County, Minnesota, and in '2010, she moved into a senior living community but held onto her condo. After that time, neither she nor her family paid property taxes. And so by '2015 she owed \$2300 in unpaid taxes plus interest and penalties totaling \$15,000. So the county seized her condo and then turned around and sold it for \$40,000. They kept the \$25,000 excess over what she owed. Tyler then filed suit. She said the county had unconstitutionally retained the excess value of her home above her tax debt, violating both the Takings' clause of the Fifth Amendment and the excessive Fines' clause of the Eighth Amendment. So the federal District Court dismissed the suit and the Eighth Circuit affirmed. So next slide please.

The Supreme Court agreed to hear the case, though what they focused on is whether the taking and selling of a home to satisfy a debt to the government and then keeping that surplus value as a windfall violates the Takings' Clause. So the Takings' Clause of the Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation. And this clause is applicable to the states through the 14th Amendment. So next slide please. So the county had two arguments saying that Tyler did not have a property interest in the condo that was protected by the Takings' Clause.

First, they pointed to a Minnesota law that says an owner forfeits her property interest when she falls behind on her property taxes. The county reasoned that under this law, Tyler had no property interest for the state to take. The court said, "Not so fast state law still have to be in line with traditional property law principles and historical practice and the court's precedents." The court cited a long history of governments not being allowed to take property above what was owed, including the Magna Carta. They also cited early US state laws preserving property owner's right to keep a surplus, and then also to US Supreme Court cases that... A taxpayer's right to keep a surplus.

So the court said, "Sorry, Minnesota, but your state law results in a classic taking in which you tried to take or appropriate private property for public use." The county tried to throw out another argument saying that she constructively abandoned her house when she didn't pay her taxes. But the court said that wasn't a good argument either because abandonment requires the surrender or relinquishment or disclaimer of all rights in the property and just failing to pay your taxes is not enough to show that.

Next slide, please. The bottom line is the county keeping the surplus was a taking and that state law is unconstitutional, and here are just some jurisdictions that might be impacted because they have laws similar to Minnesota and they may need to revisit those laws. So what are the implications for coastal properties or coastal states? It just might make it less likely for governments to try and sell the tax delinquent properties because they may make very little in the process, it might not be worth it. The empty houses could also be a drain on local government resources to maintain the property. And those are just some things to consider. And that's all.

Stephanie Otts:

Great. Thanks. Okay. All right. Well, it's circled back to me. I'm up next with Smith v. US. So this is one of the cases I mentioned that when we get to the law, you'll probably be like, "Why are we talking about this case?" But I thought it had some fascinating facts. So Smith v. US involves an individual in Mobile, Alabama who was an angler who ended up using a web application to decrypt or access the data on artificial reefs that is maintained by this company, Strike Lines and Strike Lines sells the coordinates of artificial reefs placed in various locations in the Gulf of Mexico by both commercial and recreational fishermen. Usually private artificial reefs, the locations aren't shared right, because the fishers don't want to give up their prime fishing access. So this person, Timothy Smith, just didn't like that they were selling the data, and so he took action to try to address this situation.

So he was a software engineer in Mobile, Alabama. As I said, he used a web application to access Strike Lines' artificial reef coordinates, and then he started to post on social media that if individuals were interested in having the data, that he would share it via Facebook Messenger. So there was some interactions between Timothy Smith and Strike Lines related to negotiations to get those social media posts taken down. At one point, Timothy Smith offered to take the posts down if Strike Lines would give him their deep grouper data. So then he moved from theft of data to extortion. And so Timothy Smith was indicted in the northern district of Florida and a jury convicted him and sentenced him to 18 months in federal prison for stealing trade secrets. The legal issue in this case had nothing to do with the artificial reefs. It was about whether venue was proper.

And so the Strike Line offices are located in the northern district of Florida. That's where the company contacted law enforcement. But Timothy Smith lived and remained in Mobile, Alabama during all of the relevant events. That's in a different federal district, the Southern District of Alabama. And then in an interesting tweak, the servers that were storing the Strike Lines data were located in Orlando, which is in the middle district of Florida. So Smith was arguing that it was improper to try him in the northern district of Florida when nothing had happened there. And then to follow up on that, since venue was improper, he was asserting that he should be acquitted of the crimes that he was convicted of.

So it was a pretty straightforward case. The district court had dismissed his motions for improper venue. That's how they got through the trial. Generally speaking, defendants have a right to be tried in the district where the crime was committed. So there was some discussion in the court opinions about, well, where did the crime take place? Right? It was clearly in Alabama where Timothy Smith lived. It might also be in the middle district of Florida where the data servers were and where the data was stolen. But on appeal, the Eleventh Circuit agreed that the Northern District of Florida was not the proper venue. And so they agreed with Timothy Smith that venue wasn't proper, but disagreed that the proper remedy was a complete acquittal of that conviction. And so the Eleventh Circuit ruled that the proper remedy was just a new trial in the proper venue so that the federal government could re-prosecute Timothy Smith by filing in the Southern District of Alabama.

So Timothy Smith appealed, again, arguing that the proper remedy for improper venue should be acquittal or full dismissal of the case. The Supreme Court disagreed with Timothy Smith, agreed with the

Eleventh Circuit that when venue for a criminal trial is improper, the conviction should be vacated, but with the possibility of a retrial, right? So I did not see any new stories about whether the federal government is moving things along to retry Timothy Smith in Alabama, but that would be an option of next step for the federal government. So again, we knew this is definitely not environmental ocean, coastal, Great Lakes law, but we thought it would be fun to share the facts of this case that made it all the way to the Supreme Court.

The other one we wanted to touch on was *Haaland v. Brackeen*. This one you may have heard about, this case got a lot of attention because it was a high profile tribal sovereignty case. This is another one you might be wondering why we're talking about because it's a family law case involving a challenge to a federal adoption statute, the Indian Child Welfare Act. And while the specific legal context of the case doesn't directly relate to ocean, coastal or Great Lakes resources, the petitioners were raising a legal claim that posed a significant threat to tribal sovereignty across a wide range of areas including healthcare, education, gaming, and the environment. So there are 574 federally recognized Indian tribes going with the different names, but those are the amount that the federal government recognizes in the United States. And Native American tribes do have unique legal status under federal law. And so often, some folks raise questions about why doesn't that special legal status for tribes violate the Equal Protection Clause under the US Constitution? Right? So the US Constitution generally says that, "Citizens are entitled to equal protection under the law."

So the petitioner's challenge the constitutionality of the Indian Child Welfare Act on four grounds. So they were arguing that it exceeded congressional authority to regulate commerce with Indian tribes. It violated the equal protection clause because it discriminates based on race. They also made some arguments about forcing the states to enforce a federal law or unlawfully delegating legislative authority to the tribes. It was the second claim, the Equal Protection Clause argument that was the most concerning because as I mentioned, it presented a direct threat to a wide variety of tribal rights. And that's because this question of where does the unique legal status of Native American tribes come from? Is it a political classification or as the petitioners were arguing, a racial classification? And so tribes are governmental and political entities. They're not racial groups. So tribal sovereignty is a political classification, not a racial classification.

It's a principle embedded in US law from the very beginning and explicitly recognized by the Supreme Court in *Morton v. Mancari* in 1974. And so in that case, again, the court was just looking at some of the special use status that Native American tribes have under US law. And the Supreme Court held that the federal government's special treatment of Indians is political and non-racial when it can be tied rationally to the fulfillment of Congress's unique obligations towards, the court, at the time said Indians. So the Constitution authorizes Congress in the Commerce Clause to regulate commerce with foreign nations and among the several states and with Indian tribes. So the Commerce Clause recognizes that Indian tribes are like foreign nations or the several states, right? They're an indigenous sovereign nation, right? And so the argument historically has been that the unique status granted Indian tribes under federal Indian law is because of this political classification as a sovereign nation. It is not based on any type of racial classification of Native Americans.

Morton in 1974, the court held that the preference at issue in that case was not directed at a racial group at all, but at members of federally recognized tribes, right? That they're citizens of their tribes. So the Supreme Court in their seven to two opinion held that ICWA is consistent with Congress Article one authority to regulate that commerce with the Indian tribes. And it avoided the issue related to equal protection. The Supreme Court ruled that the petitioners lack standing to bring the Equal Protection Claim.

And so we avoided a broad ruling that many Native Americans were concerned about that would potentially have ruled that the special status afforded Native Americans children and families under ICWA violated the Equal Protection Clause. So we didn't get a ruling about that. So we avoided it, and the opinion was viewed as a victory for tribal sovereignty, but the question still remains. And the equal protection argument could be raised in future cases. And so it's still a threat that's lingering in the background that it's good for everyone to be aware of, but hopefully, at least it was a seven to two opinion affirming traditional precedent when it comes to federal Indian law and the current Native American rights with respect to the foundation of tribal sovereignty. So that is Brackeen. And then we have one more case from this term to talk about, and we'll give it back to Samantha.

Samantha Hamilton:

Hi. So I'm going to be talking about Arizona v. Navajo Nation that centers around the water rights of the Navajo tribe, and whether the federal government has an affirmative duty to secure water for the Navajo Nation under the 1868 Treaty of Bosque Redondo. So a little bit of history first. The Navajo have been in the American southwest since about 1400AD they had a pretty tenuous piece with the Spanish from their arrival in the '1500s until American settlers arrived in the '1840s. And in both '1848 and '1849, the United States invaded Navajo tribal land. After both of those invasions, there were some uneasy peace agreements that followed, but subsequent raid against the Navajo occurred throughout the next 15 years. And finally, in the spring of '1864, the US Army forced roughly 9,000 Navajo men, women, and children, to complete what the Navajo called the Long Walk, which was a more than 300 mile trek to Fort Sumner, New Mexico, or Bosque Redondo for forced internment.

So while they were at Fort Sumner, the government didn't provide adequate food, water, shelter, or protection from white settlers or tribes that were already in the area. So this caused the suffering and the death of thousands of Navajo until four years later when the Treaty of Bosque Redondo was signed in '1868. This created the Navajo reservation on a small portion of the Navajo's original tribal land, which the tribe was allowed to return to on what they call the Long Walk Home. And this is one of the few, in the first instance of a Native American reservation being established on their original tribal land. So not a victory for them at all, but at the time, it was considered a small victory at least, because they got to return to their original tribal land. So the treaty established Navajo as a sovereign nation, and it delineated the land for that reservation, much of which falls in the Colorado River Basin.

And you can see on the map there the varying allocations of land throughout the years by either treaty, statute, executive order, whatever but that '1868 is the original. And that was between 10 to 25% the size of the Navajo's original land. And it didn't include most of the best grazing land in the area, which had been taken over by white settlers after the United States' Scorched Earth campaign and then forced internment of the tribe. So next slide please.

Now, because the reservation is in an area where water scarcity is a prevalent issue, the question of water rights has been a concern since the reservation was established. Supreme Court cases following the establishment of the reservation established and upheld what is called the Reserved Water Rights Doctrine, also called the Winters Doctrine. And that states that the federal government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from various sources such as groundwater, rivers, streams, lakes, and springs that arise on, border, cross underlie, or are encompassed within the reservation.

So this means that treaties establishing reservations must be construed with at least enough water to establish a homeland. And again, that's from the Winters v. The United States case. Now, in light of the ongoing water crisis in much of the Western US, the issue of ensuring water availability for the tribe led them to sue the federal government in a breach of trust claim, based on the view that the '1868 treaty

imposed a duty on the United States to take affirmative steps to secure water for the Navajos, as everyone's wondering if they're going to have enough water to survive. So the nation claimed that because the reservation was intended to be a permanent home for the Navajo, the federal government is then compelled to take "affirmative steps" to secure needed water for the tribe. And so that could be assessing tribal water needs, developing plans to secure the water that they need, and then potentially even constructing water infrastructure to ensure that the tribe is going to continually have enough water to survive.

The nation relied on the government's duty of protection within just a general trust relationship between the tribe and the federal government. And then they emphasized the cannons of construing Indian treaties, which requires the judiciary to interpret treaty language the way that tribal treaty negotiators would've understood it. So they framed this '1868 treaty as creating an ongoing relationship between the federal government and the nation, and then claimed that the federal government was then violating its duty by not ensuring the tribe had access to water on an ongoing basis. Now, the federal government and the states that intervened argued that Indian treaties established rights to resources, so water, land, timber, minerals, and these are just sticks in the bundle of sticks of property rights. Now, the United States District Court for the District of Arizona dismissed the Navajo tribe's complaint, but on appeal, the Ninth Circuit Court of appeals reversed that decision and they cited in favor of the Navajo Nation. Next slide please.

So the Supreme Court did hold in a five four decision that the '1868 treaty establishing the Navajo reservation did reserve the necessary water to accomplish the purpose of the Navajo reservation, but it didn't require the United States to take any affirmative steps to secure water for the tribe. So the court basically agreed with the federal government that the Indian treaties delineate the nation's property rights, but it doesn't establish an obligation of the federal government to fulfill the purpose of the treaties. The court held that in order to maintain this breach of trust claim, the tribe would have to establish among other things, that the text of a treaty, statute or regulation imposed certain duties on the United States. And that was relying on the United States v. Jicarilla Apache Nation, which was another breach of trust case between a tribe and a federal government.

The court held that the federal government owes judicially enforceable duties to a tribe only to the extent that it expressly accepts those responsibilities. And so because the '1868 Treaty of Bosque Redondo didn't contain any language imposing a duty on the federal government to take affirmative steps to secure water for the tribe, the court then refused to infer duties that weren't found in the text. So essentially, this holding upheld the longstanding Winters Doctrine regarding water rights of the Native American tribes, and they do have the right to use water that's already on their reservation, but the court refused to expand protections for the tribe and ensure access to water needed for survival on the reservation.

Stephanie Otts:

Great, thanks, Samantha. Okay, well thanks everyone. So yeah, so that was our whirlwind tour through those opinions. I should have mentioned earlier that we distributed at an advance of the webinar our CLE materials. There are summaries of each of those cases in the materials as well as links to the full Supreme Court opinion, as well as other resources such as the SCOTUSblog post. That's a website that follows the Supreme Court, as well as some [inaudible] articles that the National Sea Grant Law Center has published on those as well. And just in the few minutes that we have left, we wanted to give a preview or sneak peek at two cases that the Supreme Court has accepted so far that we think are of interest or could be of interest to the Sea Grant Network. One is a bit of a technical maritime law case, but then we're going to finish on the big one that we all will be closely watching.

The first one that's been accepted by the Supreme Court is this Great Lakes Insurance v. Raiders Retreat Realty. It's dispute between a yacht owner and an insurance company. So Great Lakes Insurance is a corporation organized in Germany and headquartered in the UK. So it's a European country. Raiders' Retreat is a company incorporated in Pennsylvania. Raiders' Retreat, ran the yacht aground in 2019 in Florida, and they sustained \$300,000 in damages. The dispute arose when the Raiders submitted their claim to their insurance company, Great Lakes Insurance for the damage to the vessel, and Great Lakes denied their insurance claim because Raiders had failed to timely re-certify or inspect the yacht's fire extinguishing equipment. But here's the catch, none of the damage was caused by a fire. So the insurance company found this one thing that Raiders had done wrong with respect to the fire extinguishing equipment and were arguing that that voided the entire insurance policy from the beginning and therefore, they did not have to file this claim.

The legal issue is a narrow one. It involves the choice of law clause in the insurance contract. Great Lakes Insurance, the insurance policy says the choice of law should be New York, Raiders because they're in Pennsylvania is asserting counterclaims based on Pennsylvania law, including bad faith liability. And so Great Lakes is basically saying, "Nope, you can't raise those counterclaims because they're based on Pennsylvania law and the choice of law provision in the insurance contract says New York law should apply." So the district court agreed with the insurance company, but then on appeal up at the Third Circuit, the Third Circuit disagreed and said that a choice of law clause in a maritime insurance contract might be deemed unenforceable if it's contrary to the public policy of the state in which the suit was brought. And I should have mentioned that the suit was filed in Pennsylvania. So the Supreme Court accepted the petition to look at this question presented, is a choice of law clause in a maritime contract unenforceable if it would conflict with public policy in the state being displaced?

So again, it's a narrow opinion or a narrow issue of law related to a maritime contract, although it's not unheard of for rules that the Supreme Court establishes in maritime cases to then eventually bleed over into court opinions in similar situations in non admiralty or non-maritime cases. And so since this involves insurance policies, a ruling here based on a maritime contract could then be used in courts interpreting insurance contracts in other non-maritime cases. So it'll just be something to watch and see how it comes out.

But then finally, the big case that I would argue that everyone in the National Sea Grant Network should be aware of is Loper Bright Enterprises versus Raimondo. So this case started as a commercial fishing industry challenge to an industry funded monitoring program implemented by NOAA under the Magnuson Stevens Act. So this is one of the regulations that this is involving the Northeast Fisheries, but that monitors must be on the fishing vessels for a certain number of trips. And NOAA says that the industry is required to fund a portion of those monitors. And there's a lot of different specific details to that. At both the DC District court and the DC Circuit Court of Appeals found for NOAA and upheld the regulation applying what is known as Chevron Deference. So Chevron sets forth the framework for judicial review of agency interpretations of federal law. So the way the framework works is that if a statute is ambiguous, under Chevron, courts are instructed to defer to an agency's reasonable interpretation of that statute, right?

So here, if the Magnuson Stevens Act is ambiguous about whether NOAA can require industry to fund monitoring programs under Chevron, the courts are supposed to defer to a reasonable interpretation of NOAA regarding their authority under the act. And so that is what both the DC District and Circuit Courts did. In the petition to the Supreme Court. The petitioners specifically asked the court to consider overturning Chevron, which is a landmark administrative law case that has been in place since '1984. A ruling overturning Chevron would be earth-shattering in administrative law. It would shift more power to courts to interpret federal statutes, which one of their several members of the conservative block on

the US Supreme Court have criticized Chevron in recent years. They feel like it has taken too much authority or power away from courts to interpret federal law, which is what they argue the court should be doing.

The impact of overturning Chevron could mean that federal agencies start to lose more challenges to their regulations in court. A study looking at case law from '2003 to '2013 revealed that administrative agencies prevailed or won nearly 25% more often when Chevron Deference is applied compared to when it's not. So when Chevron Deference is applied, according to the study, 77% of the time, the agency succeeded or won on that case. And so if Chevron Deference is no longer there and courts are just interpreting federal statutes on their own, it could mean that the agencies struggle to move forward with some of the regulations that they're doing, especially if they're considered controversial. So this is an extremely important case, clearly for all of us under NOAA to be watching. It will have ripple effects far beyond the Magnuson Stevens Act if the Supreme Court does decide to overturn Chevron.

The oral arguments have not been scheduled yet, but the term starts in October, so it could be scheduled from anywhere from October into early '2024. The Law Center will certainly be tracking this and keeping everybody updated. So, with that, we have almost no time. It took longer than we thought. Certainly, we can stay on a minute or two longer. If you have a question that you would like to add in the chat, please check out the CLE materials that we sent. Lauren has dropped the Google form link into the chat box again for you to report your information if you would like or are seeking to claim CLE credit. And yeah, I hope that you found this webinar interesting. I hope that you will join us for future webinars. And yeah, we'll stay on for just one more minute, but I don't see any questions in the chat. So thanks everyone for joining us.