THE NAVAJO NATION, KNOWN AS AN "INDIAN TRIBE"

by Peter d'Errico

[*Indian Country Today*, 15 April 2009]

On April 6, the U.S. Supreme Court denied the Navajo Nation any compensation for government actions that allowed Peabody Coal to extract millions of tons of Navajo coal at low rates for 45 years. The decision raises deep issues about the meaning and continuing viability of what is known as the "trust doctrine" in federal Indian law.

The original 1964 lease established a maximum royalty rate of 37.5 cents per ton of coal. U.S. Department of Energy historical data show the average market price of coal of all kinds in 1963 was $4.55. Thus, the original royalty rate was 8.24%. The rate was "subject to reasonable adjustment" by the Secretary of the Interior on the 20th anniversary of the Lease and every ten years thereafter. DOE data show that by 1984 the 37.5 cents per ton rate yielded 1 - 2% of gross proceeds, far less than the original 8.24%.

In 1984, the Area Director of the Bureau of Indian Affairs, pursuant to the presumed federal "trust" authority, raised the lease rate to 20% of gross proceeds, as requested by the Navajo Nation. Peabody filed an administrative appeal and requested the Secretary of the Interior to postpone decision or to rule in Peabody's favor. Thereafter, the Secretary and Peabody representatives met privately and the Secretary postponed his decision. The Navajo resumed negotiations with Peabody and a rate of 12-1/2% was agreed to. The Secretary approved the amended rate.

In 1993, the Navajo filed suit against the United States, alleging the Secretary's actions constituted a breach of trust. The Court of Federal

Claims found the Secretary had "violated the most basic common law fiduciary duties owed the Navajo Nation" by acting in Peabody's best interests rather than those of the Navajo. That court nevertheless concluded the breach of trust did not require any compensation, because" the trust relationship necessary for our jurisdiction does not exist."

The record of the case shows the entire leasing arrangement was premised on federal supervisory authority, the core of the so-called "trust doctrine." Under this doctrine, the federal government asserts paramount ownership of and power over Indian lands. The Peabody lease and rates were negotiated in this framework and only became valid after the Secretary's approval.

Leaving aside for the moment the corruption of administrative process by the Secretary's private meeting with Peabody, the question that arises from this case is, "What does the federal trust relationship mean if it provides a presumption of authority over Indian Nations but carries no responsibility to them?"

A trustee is someone who holds property for the benefit of another. If the federal government pretends to control Indian lands as a "trustee," how can it walk away from fiduciary responsibility when Indian lands are exploited for corporate profit? The Peabody lease is not the first or only example of this problem, but the Navajo case brings to our minds a new realization that the "trust doctrine" is not a viable basis for preserving Indian Nations.

"Trusteeship responsibility" in federal Indian law is often said to have begun with John Marshall's suggestion in *Cherokee Nation v. Georgia* (1831) that the relation of the "Indian tribes" to the United States "resembles that of a ward to his guardian."

Courts have given the government wide discretion as "trustee." The Supreme Court said in *Lone Wolf v. Hitchcock* (1903), "We must presume that Congress acted in perfect good faith in the dealings with the Indians...." In *United States v. Mitchell* (1980), the Court came up with the notion that the "trust" relationship might be "bare": In other words, all power and no responsibility. This is what happened in the Navajo case.

Many people, Indian and non-Indian, have failed to understand the evolution of the "trust doctrine." They see it historically as federal protection against state governments. This view produces considerable tension when federal actions undercut the survival of Indian Nations, as in the Navajo case. It is time to see the "trust doctrine" for what it is: a relic of colonial thinking that allowed the federal government to push aside states in the rush to control Indian lands. The doctrine does not protect Indian Nations from the federal government itself.

In the opening sentence of the Court's opinion denying relief to the Navajo, Justice Scalia refers to "the Indian Tribe known as the Navajo Nation." This is a linguistic move that displaces the external reality—the Navajo Nation, an Indigenous People, originally free and independent of the United States—into a legal category—the category of "Indian Tribe," presumably subject to the power of the United States. This linguistic move sets up the cognitive framework that makes the Court's ultimate decision inevitable.

The bottom line is that the United States uses "trust doctrine" to control coal leasing on Navajo lands, while refusing any fiduciary responsibility that is not specifically designated in some other law or statute. This is not a "trust." It is analogous to the old royal prerogative.

The underlying historical and legal relationship between the Navajo Nation and the US involves two distinct parties dealing with each other as separate nations. It is an international relationship, negotiated and set forth in a Treaty. The Navajo have now demonstrated the U.S. federal Indian law "trustee" system cannot protect the basic Treaty relationship.

The U.S. assertion of power without responsibility violates not only the Treaty, but also a variety of international rights and norms. Justice Scalia's statement, "This case is at an end," applies only to the system of federal Indian law. It does not bind the Navajo Nation from taking this case to international tribunals. Indeed, the decision sets the stage for the Navajo to do this. That would be a good move.

CAN FEDERAL INDIAN "TRUST" BE TRUSTED?

By Peter d'Errico

[*Indian Country Today*, 22 April 2009]

The claim of a "trust doctrine" in relation to Native Nations is the most widely cited concept in federal Indian law. It is also widely misunderstood, leading to confusion about the fundamental structure of U.S. - Indian relations. The recent Supreme Court decision denying compensation to the Navajo Nation for decades of underpayment by Peabody Coal under federally approved leases is a case in point.

The case started in the Court of Federal Claims, which found "overwhelming evidence" that the federal government "violated the most basic common law fiduciary duties owed the Navajo Nation" under principles of common law trust. However, the Claims Court concluded that the government's violation of trust was irrelevant because trust duties were not specifically stated in the coal leasing laws.

The case went through extended appeals. The Court of Appeals for the Federal Circuit twice ruled for the Navajo Nation, reversing the Claims Court for failing to find specific trust duties in the coal laws. The Supreme Court reversed the Appeals Court both times and agreed with the Claims Court. According to Justice Scalia in the latest decision, the case is "at an end."

The question arises: What does the federal Indian "trust doctrine" mean in comparison to ordinary trust law? The Court of Federal Claims suggested this comparison in its first decision in the case when it said, "we

find it useful first to measure the government's actions against [the] familiar standard" of the common law of trusts.

A trust involves three elements: property that is subject to the trust, a trustee who administers the property, and a beneficiary in whose interests the trustee acts. A trust creates a relationship between a fiduciary (one in whom faith or trust is placed) who controls a property, and another who is the ultimate owner of that property. This relationship may be defined in a specific document, such as a will, or by certain general principles, such as when an adult has care of a child (which is known as the guardian-ward relation).

Ordinary trust law is rooted in centuries of common law decisions about fiduciary responsibility in a broad range of situations. The law is almost poetic in describing the high standards of fiduciary responsibility in a situation of trust. It has been said, "the duties of a trustee are the highest known to the law."

Benjamin Cardozo, the famous Chief Justice of the Court of Appeals of New York, wrote that a "trustee is held to something stricter than the morals of the market place." He further said that "not honesty alone, but…an honor …most sensitive…is the standard of behavior." On that basis, Justice Cardozo pointed out, "there has developed a tradition that is unbending and inveterate." A high level of conduct for fiduciaries "will not consciously be lowered by any judgment of this court." [*Meinhard v. Salmon* (1928)].

We can now understand why the Court of Federal Claims said of the Navajo case, "Were this a court of equitable jurisdiction considering a private trust, plaintiffs might easily qualify for remedies typically afforded wronged

beneficiaries." The fact that the Court denied relief for the Navajo Nation says that the federal Indian "trust doctrine" is not a true trust.

The "trust doctrine" started in 1831, when Chief Justice John Marshall compared the relationship between the U.S. and the Native Nations to "that of a ward to his guardian" (*Cherokee Nation v. Georgia*). Since the guardian-ward relation is a form of trust law, Marshall's suggestion became the federal Indian "trust doctrine": Indian lands are the trust property, the federal government is the trustee, and the Indians are the beneficiaries (the ones who are supposed to benefit).

Notice there is no specific trust document in federal Indian "trust doctrine." This means that for the trust to exist it must be premised on general legal principles. The principle on which Marshall based his analogy was 'Christian title and supremacy,' a unique aspect of colonialism and not a general principle of trust law.

The federal Indian "trust doctrine" differs from ordinary trust law in another profound way: An ordinary trustee is subject to judicial supervision and the court and trustee are independent from each other. In federal Indian law, the courts have created both the "trust" and the "trustee."

The decision in the Navajo coal case demonstrates how far federal Indian "trust doctrine" is from ordinary trust law. The Claims Court acknowledged that in enacting the coal leasing law, the United States "assumed the responsibility to manage minerals such as coal in a fiduciary capacity." However, the Court said, "The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations." The Court concluded, under "the general, or bare,

trust relationship [in relation to Indians], fiduciary obligations applicable to private trustees are not imposed on the United States."

The "bare trust" is a new twist on "the emperor has no clothes." The U.S. creates a "trust" for Indian lands, making itself trustee, subject to its own supervision, based on a religious supremacy notion. It then takes steps to control the property of the beneficiary, including enacting a law for coal leasing on Indian lands. When the supposed beneficiary, the Navajo Nation, challenges the acts of the trustee, the trustee says there is only a general (and unenforceable) trust—a "bare trust"—and no specific trust obligation regarding the coal leasing.

To rub salt into the wound, the "trustee" says the lack of fiduciary responsibility benefits the beneficiary (the Navajo Nation), by forcing the beneficiary to fend for itself, in the name of "self-determination"! "Implicated in every instance is the delicate balance struck between exercising fiduciary responsibilities and respecting tribal sovereignty and self-determination."

The "trustee" United States has created powers to control Indian lands by means of a "trust doctrine" that cannot be supervised by ordinary trust principles. The Navajo case stands for the proposition that the U.S. trustee only has trust responsibilities if and when it says it has trust responsibilities. That is no trust. It is a rip-off and a fraud.

THE SANDS OF FEDERAL "TRUST"

By Peter d'Errico

[*Indian Country Today*, 29 April 2009]

The recent Supreme Court decision denying compensation for underpaid coal extraction from Navajo lands under federally approved leases ruled the Navajo Nation does not have a "sound basis for its breach-of-trust lawsuit against the Federal Government." How can this be? The "trust doctrine" has been a cornerstone of federal Indian law for nearly 200 years. Is it no longer viable?

The Court said the Navajo case was controlled by two earlier decisions involving the Quinault Nation, wherein federal Indian "trust" was greatly restricted. The first Quinault case, *U.S. v. Mitchell I* (1980), ruled that the "trust doctrine" inherent in the 1887 General Allotment Act, which took all the Quinault land (as well as all other Indian lands) was a "limited trust…that does not impose any duty upon the Government."

Treaties promise "protection" and compensation to Indian Nations in exchange for ceded lands. The General Allotment Act, however, aimed at "breaking up, as rapidly as possible, of all the tribal organizations," as stated in the Congressional Record at the time. Nevertheless, the Court says the U.S. has no fiduciary duty to Nations that were thus broken up and restricted or removed from their homelands.

The second Quinault case, *Mitchell II* (1983), did find a fiduciary duty on the part of the U.S., based on a separate network of laws and regulations that provide "All of the necessary elements of a common-law trust…: a trustee

(the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."

Thus, under current law, the federal Indian "trust doctrine" is deemed a "bare trust," empowering the U.S. to claim title to Indian lands without any corresponding fiduciary responsibility. As the dissenting justices in *Mitchell I* wrote, this means the federal Indian "trust" "is not a trust as that term is commonly understood." The "trust doctrine" has become a way of denying the existence of an actual trust! Now you see it, now you don't.

The federal Indian "trust doctrine" was built on sand from the start. It is not a firm foundation for Indian sovereignty. The time has come to be clear about this and to look for alternatives to articulate the relationship between Native Nations and the U.S.

As initially stated, the "trust doctrine" was only a suggestion, an analogy. Read the language of *Cherokee v. Georgia* (1831) carefully. Notice the qualifying words and phrases: "It **may well be doubted** whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They **may**, more correctly, **perhaps**, be denominated domestic dependent nations. Their relation to the United States **resembles** that of a ward to his guardian."

This analogy served the needs of the United States as it battled the states for control of Indian lands. It allowed the federal government to claim a "special relationship" with Indian Nations that excluded the states. It enhanced the legal position of the federalists, but denied the Cherokee (and all other Indian Nations) recognition of their full sovereign status. In other words, the original "trust doctrine" was a vehicle for undermining Indian sovereignty.

The deeper basis of the "trust doctrine" was a pretense, acknowledged as such by the Court: that Christian "discovery" of Indians is the same as conquest and ownership of Indian lands. Again, read the language carefully. Notice the qualifying words and phrases that show how the Court in *Johnson v. McIntosh* (1823) was manufacturing a new doctrine to suit the purposes of the United States and to deny the full sovereignty of Native Nations:

> **However extravagant the pretension** of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that **the Indian inhabitants are to be considered merely as occupants**, to be protected, indeed, while in peace, in the possession of their lands, but to be **deemed incapable** of transferring the absolute title to others. **However this restriction may be opposed to natural right, and to the usages of civilized nations**, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it **may, perhaps, be supported by reason**, and certainly cannot be rejected by Courts of justice.

Though many people have relied on the federal "trust doctrine" as a way of explaining Native sovereignty, the recent Navajo coal case and the Quinault cases merely state the obvious to those who have studied the doctrine: federal Indian "trust" law is not to be trusted. We have to articulate Native sovereignty in new ways if we are actually going to build Native Nations on a firm basis.

This is an appropriate time to reexamine the relationship between Native Nations and the U.S.: the Supreme Court has gutted the "trust doctrine." Political and economic circumstances have greatly changed over the years

the doctrine has been litigated. Native Nations have valuable resources in a globalized economy. New international political standards and forums exist. These facts point to a need to revisit the basic legal theory of federal Indian law.

Our review of the "trust doctrine" leads to certain questions: What is the path not taken in U.S. Indian law and policy? How may we follow that path to build a firm foundation for Indigenous sovereignty and self-determination on the basis of nationhood and the original free existence of Indian nations and peoples? These are questions for another column.

SOVEREIGNTY PATHS NOT TAKEN

By Peter d'Errico

[*Indian Country Today*, 29 May 2009]

The core of federal Indian law is rooted in a legal doctrine that is not acceptable in American law, namely, religious supremacy—the so-called right of Christian Discovery. The *Johnson v. McIntosh* decision 186 years ago (1823) violated the separation of church and state and set federal Indian law on a path even the Supreme Court itself found problematic.

The Court referred to its Christian Discovery decision as a "pompous claim" and an "extravagant pretension," and added it "may be opposed to natural right, and to the usages of civilized nations" and only "perhaps…supported by reason." But the Court said the doctrine was designed to protect colonizer property from "fierce savages" who were "brave and high spirited" in defense of their independence.

This is a bad pedigree for a legal principle in a system based on the rule of law. The rule of law says government power must be "subordinated to impartial and well-defined principles of law" and "exercised according to mutually understood rules and procedures that are applicable to all members of a society." (*Oxford Dictionary and Reference*)

When we look at federal Indian law with a critical eye, we see it is actually not part of a rule of law system, but rather a colonial imposition and a relic of religious discrimination. This is evident from the Court decision itself.

When we look with a commitment to justice, we cannot avoid the conclusion that the doctrine of Christian Discovery must be expunged from American law. The question is, what doctrine might take its place? The short answer is indigenous sovereignty.

It is important to note the common law had long stated a sovereign may not alienate the territory of the nation. This means the actual decision in *Johnson*—that the Illinois Indians could not sell their lands to private individuals—could have been based on the common law 'inalienability of sovereignty' rather than on the "extravagant pretension" that the Illinois Indians had no sovereignty. This would have acknowledged the Illinois Nation and the United States as legal equals

Chief Justice Marshall, author of the *Johnson* opinion, subsequently supported the existence of indigenous sovereignty and questioned the idea of

Christian Discovery, when he wrote the decision in *Worcester v. Georgia* eight years later. He referred to Discovery as "absurd" and said colonizers could only acquire title "according to the common law" that a sovereign may only transfer lands to another sovereign.

So we see the principle of full indigenous sovereignty is built into two of the three founding decisions of federal Indian law: first as the path not taken and second as a path partially taken. The path was not taken in *Johnson* because of a religious belief that violates the separation of church and state and demeans indigenous peoples. The path was partially taken in *Worcester* where it provided a tool for the federal government to block the state of Georgia.

The other foundation case, *Cherokee Nation v. Georgia*, shows how Marshall rationalized this approach. Having already created a peculiar and "absurd" doctrine in *Johnson*, Marshall said, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." This is called 'pulling yourself up by your bootstraps.'

The *Cherokee Nation* decision goes on to express "doubt" whether indigenous nations have full sovereignty and concludes they "may … perhaps … be … domestic dependent nations" and "Their relation to the United States resembles that of a ward to his guardian." This 'resemblance' quickly became an axiom of federal Indian law, allowing the federal government to have its cake and eat it too—claiming superior title to both indigenous nations and the states.

The point to be remembered is that full indigenous sovereignty exists in and around the foundation cases of federal Indian law, whether by denial or half-acceptance. We need not look further than these cases to see the path not taken at the outset, a path supported by common law principles and by respect for indigenous nations.

As *Worcester* says, Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

Justice Thompson's dissent in *Cherokee Nation* shows the coherence and justice of the path not taken and is proof that the Court was well aware of the path: "Every nation that governs itself … without any dependence on a foreign power is a sovereign state." And a weaker state that allies with a stronger does not thereby cease to be "sovereign and independent."

Justice McLean's concurrence in *Worcester* shows the Justices knew how significant their decision was. He said, "this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country." Indeed.

These cases, despite their built-in peculiarity and ambiguity, quickly became unquestioned by later judges. For example, in 1846, fourteen years after *Worcester*, Justice Taney wrote in *U.S. v. Rogers*, "it would be useless to inquire whether the principle [of Discovery] is just or not." This is the same Taney who said in the *Dred Scott* case (1857) that black people are "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far unfit that they had no rights which the white man was bound to respect." At least he was consistent in his commitment to racist doctrines.

Later decisions elaborated the "peculiar" guardian-ward "resemblance" into a "trust doctrine" with "fiduciary powers." This doctrine continues to be cited today without question about its basis and without pretense of actual fiduciary responsibility, as the Navajo coal case shows. The pretense and absurdity of the foundation become more glaringly obvious. The next question is, how long will Indian Nations put up with it?

ADVOCACY AND CHANGE IN FEDERAL INDIAN LAW

By Peter d'Errico

[*Indian Country Today*, 26 June 2009]

It's a bad sign when a Supreme Court Justice disrespects a young Indian woman, Nazune Menka, when she asked about the Court's *Carcieri v. Salazar* decision against the Narragansett Nation, and worse when the Justice mocks the case itself, calling it "a laugher." Aside from what CBS News calls Scalia's "nasty" style, what allows him to show such mockery and disrespect?

There's a clue in what Scalia apparently said to another Indian questioner. He claimed the U.S. has a right to rule over Indian Nations by "conquest" and all federal Indian law is based on that. In other words, Scalia wants to pretend the same thing the U.S. has been pretending since John Marshall first pretended it in 1823 in *Johnson v. McIntosh*: the "pretension of converting the discovery of an inhabited country into conquest."

The actual basis of federal Indian law, as Marshall's quote shows, is not conquest, but "pretense of conquest," based on "Christian Discovery" and "ultimate dominion." This is what Scalia's comment covers up. Marshall, at least, had the honesty to call it what it was.

An *Indian Country Today* interviewer (May 6) asked John Echohawk, Executive Director of the Native American Rights Fund (NARF), "Is anyone challenging Congress' claim to plenary power over the nations?" He replied: "Yes, but of course under the law of this country, the way all that's been interpreted and the way it's been litigated is the tribes are domestic

dependent nations and that’s just the way things are and you go to court and that’s what they’ll tell you."

NARF's acceptance of the "pretense of conquest" as "that's the way it is" is an ominous sign. It means the most widely recognized group of Indian lawyers is not arguing against the basic discrimination in federal Indian law. No wonder Justice Scalia thinks he can get away with his nastiness and his pretense.

Indian Country needs to strip away the "pretense of conquest" and reveal the underlying reality of federal Indian law: a system designed to suppress sovereignty of Indian nations in keeping with a tradition of Papal Bulls and Christian political theology. Indian Country needs lawyers not afraid to argue for indigenous sovereignty and against the "pretense of conquest through discovery."

Mr. Echohawk demonstrated that NARF is not one of the challengers of pretense when he continued, "the federal government has exclusive authority over all Indians, all tribes under the Constitution, basically, that takes care of everything – if you’re a tribe then you’re under federal jurisdiction, any tribe, anywhere, is under federal jurisdiction. Period."

The culture of acceptance of the pretense of federal Indian law prevails not only at NARF, but also in law schools, even in Indian law programs. The standard approach seems to be to train young lawyers to accept the existing paradigm, rather than question it. The standard approach produces arguments acceptable to judges like Scalia, rather than challenge the discriminatory basis of federal Indian law.

The motivation to fit in has not hampered advocates in other fields. Civil rights lawyers challenged racist precedents dating from slavery and won historic legal change in the middle of the 20th century. It's been more than 50 years since the historic decision, *Brown v. Board of Education*, overturned the doctrine of "separate but equal." Meanwhile, federal Indian law is still bound by racist theological precedents.

The federal government's "trustee" status is being keenly studied across Indian country since the *Carcieri* and *Navajo* decisions. What are Indian lawyers waiting for? Have they given up and merely try to play by racist rules that give Congress "plenary power" over Indian Nations? They should be crafting every possible argument to overturn that racist doctrine.

Let's take a look at what the Supreme Court says about when it's time to overrule a precedent. In *Vasquez v. Hillery* (1986), the Court said it will overturn a precedent that is "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." That set of terms exactly describes the doctrine of "pretense of conquest by discovery."

"Pretense of conquest by Christian Discovery" is "outdated": a decision from 1823. It is "ill-founded": based on racist and religious discrimination. It is "unworkable" as a basis for Native sovereignty. As Steve Newcomb's book, *Pagans in the Promised Land*, shows it is "legitimately vulnerable to serious reconsideration."

In *Leegin v. PSKS, Inc.* (2007), the Supreme Court overturned an anti-trust precedent, saying the old rule had been "called into serious question" and that "respected authorities" suggested the rule "is inappropriate." If corporate lawyers and "respected authorities" had gone along with the old rule instead of arguing against it, the Court would not have overturned it.

In an *ICT* article last September, Charles Trimble wrote, "history must be taught with accuracy and dispassion, as history and not as indoctrination." The same applies to law.

Law is based on argument. The common law system depends on argument. An advocate has the chance to challenge the status quo. The increasing awareness in Indian Country that federal Indian law is not really for Indians is a wake-up call to Indian lawyers and "respected authorities" to dispel the indoctrination of federal Indian law precedents.

No more should anyone say that "plenary power" is just "the way it is." No more should anyone be afraid to tell a court that the "pretense of conquest by discovery" is "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration."

As the Court said in the *Leegin* case, "the common law adapts to modern understanding and greater experience." The point we must remember—and teach our law students—is that the common law only adapts when it is pushed by understanding and experience—pushed by advocates for change.