

United States v. Jicarilla Apache Nation: Its Importance and Potential Future Ramifications

AN UNUSUAL THING happened last year. In spring 2011, the Federal Bar Association's Indian Law Section, in conjunction with the National Congress of American Indians, submitted an amicus brief to the U.S. Supreme Court in *United States v. Jicarilla Apache Nation*, which was pending at the time.¹

Such an action is notable. The U.S. Supreme Court usually decides between two and three cases related to Indian country each year, yet the FBA's Indian Law Section rarely participates in these cases as an amicus party. This is despite the fact that the association's Indian Law Section is one of the strongest proponents of the development of federal Indian law in the country. Why then did the FBA's Indian Law Section decide to submit an amicus brief in *United States v. Jicarilla Apache Nation*? The answer is simple: it was an important case for Indian country. This column will discuss why this case was important for Indian country and will suggest some significant "takeaways" from the Court's decision. The discussion builds on the article written by Dan Rey-Bear and Tim McLaughlin and published in the March-April 2011 issue of *The Federal Lawyer*, which also discussed the importance of the then pending *Jicarilla Apache Nation* case.

Unusual Procedural Posture

United States v. Jicarilla Apache Nation is a notable case not just because of its potential impact on Indian country but also because of its unique procedural posture. *Jicarilla Apache Nation* differs procedurally from most cases decided by the U.S. Supreme Court in that the appeal to the Supreme Court came as a writ of mandamus by the United States to vacate an order requiring the United States to release certain documents in a breach of trust claim brought against the federal government in the Court of Federal Claims.

At issue in the underlying litigation is the federal government's management of the Jicarilla Apache Nation's trust accounts from 1972 to 1992. Asserting the attorney-client privilege and protection of the attorney work product, the federal government declined to turn over 155 documents requested by the Jicarilla Apache Nation. The nation filed a motion to compel production, and the Court of Federal Claims granted the motion in part. The Court of Federal Claims found that

communication relating to the management of the nation's trust funds fell within the "fiduciary exception" to the attorney-client privilege (federal common law), and, as a result, that these documents should be produced. The federal government petitioned the Court of Appeals for the Federal Circuit with a writ of mandamus to prevent disclosure, but the Court of Appeals upheld the decision handed down by the Court of Federal Claims. This, in turn, led to the United States' petition to the U.S. Supreme Court.

A Brief Introduction to Federal Trust Responsibility

Not only is *United States v. Jicarilla Apache Nation* an interesting case from a procedural perspective, but it is also interesting in that the Court's holding in the case has potential important ramifications for Indian country. It was the Jicarilla Apache Nation's position that the requested documents should be produced, because federal trust responsibility in essence served as an exception to the attorney-client privilege and work product protection doctrine asserted by the federal government. The Court's decision in *Jicarilla Apache Nation* builds on several past decisions of the U.S. Supreme Court related to federal trust responsibility. In very broad terms, because the federal government maintains substantial control over assets in Indian country, the concept of federal trust responsibility maintains that the federal government owes a duty of care to Indian country for these assets. Historically, cases involving federal trust responsibility have come up in the context of natural resource management or the management of individual Indians' financial trust accounts.

The first cases in the long line of federal trust responsibility cases were *Cherokee Nation v. Georgia*² and *Worcester v. Georgia*.³ Chief Justice Marshall wrote the decisions in both cases, and, as such, the cases are considered part of the "Marshall Trilogy" often cited in Indian country. In *Cherokee Nation v. Georgia*, the Supreme Court considered whether the Cherokee Nation was sufficiently like a foreign state to warrant original jurisdiction in the U.S. Supreme Court for a dispute between the Cherokee Nation and the state of Georgia.⁴ In holding that the Court did not have original jurisdiction in the matter, the Court explained that Indian tribes "may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of

pupilage. Their relation to the United States resembles that of a ward to his guardian.”⁵

In *Worcester v. Georgia*, the Court reaffirmed that the federal government’s authority in Indian country is exclusive over state intrusion. Underlying both decisions was the idea that, because Indian tribes had in essence surrendered their external sovereignty (as well as land, in many instances), in exchange, the federal government owed the tribes a certain responsibility to ensure that the federal government resolved matters affecting Indian country in the best interest of the tribes. In this regard, federal trust responsibility was based on a contract between the federal government: in exchange for tribal lands and aspects of external tribal sovereignty, the federal government owed a duty of care to Indian tribes. Today, these cases are said to have created a basic or “moral” federal trust responsibility to tribes that is typically not deemed to be legally enforceable by the federal courts.

Later in the 19th century, however, the Supreme Court abruptly switched course in a dramatic way. In *United States v. Kagama*,⁶ the Court, with very little to no precedence to support its conclusion,⁷ held that Congress had “plenary” or absolute control over Indian country. This was a sharp departure from the earlier decisions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, which premised federal control in Indian country as a part of the “contract” between Indian tribes and the federal government.

In the 1980s, the Court revisited the issue of federal trust responsibility in 1980 in *United States v. Mitchell*⁸ (*Mitchell I*) and in 1983 in *United States v. Mitchell*⁹ (*Mitchell II*). In *Mitchell I* the Quinalt Tribe relied on the General Allotment Act in alleging that the federal government had breached its responsibility under the federal trust doctrine to effectively manage the tribe’s natural resources. The Court rejected the tribe’s argument, holding that the General Allotment Act created only a general responsibility for the federal government and did not require the federal government to manage the tribal resources in any specific manner. Responding to the Court’s holding in *Mitchell I*, the tribe again brought suit in *Mitchell II* against the federal government for violations of its trust responsibility to the tribe, but this time the tribe based its claim on a plethora of federal statutes requiring the federal government to manage tribal resources in a certain way. In *Mitchell II*, the Court held that the tribe had established a legally binding federal trust responsibility through the statutes, which directed the federal government to manage the resources at issue.

The Court reaffirmed the *Mitchell II* holding in two subsequent decisions, *United States v. White Mountain Apache Tribe*¹⁰ and *United States v. Navajo Nation*,¹¹ finding that the federal government was financially responsible to tribes for mismanagement of tribal resources when federal statutes clearly established that the federal government was responsible for managing the tribal resources at issue. The *Jicarilla Apache Nation* case is the first time that the Court has revisited federal trust

responsibility explicitly since its decisions in 2003. And, as demonstrated from the foregoing, it is also the first time the Court explored whether federal trust responsibility created an exception to the normal attorney-client privilege and attorney work product protection rule that exists between the federal government and its lawyers.

United States v. Jicarilla Apache Nation: The Decision

As previously explained, the issue before the Court was whether the common law fiduciary exception to the attorney-client privilege applied to the United States when the government was acting in its capacity as trustee for tribal trust assets. In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances. Furthermore, the Court reasoned that “[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a ‘trust,’ see, e.g., 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law.”¹² Ultimately, the Court concluded that, even though common law principles may “inform our interpretation of statutes and determine the scope of liability that Congress has imposed ... the applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary obligations.”¹³

The Court went on to explain that two features must be present in order for the common law fiduciary exception to apply: (1) a “real client” and (2) duty to disclose information regarding the trust. In the *Jicarilla Apache Nation* case, the Court concluded that both factors were absent. First, the Court determined that the Jicarilla Apache Nation was not a real client of the federal government’s attorneys, because the attorneys were not paid by the nation. In addition, the federal government sought advice from its attorneys in its role as a sovereign and not as a fiduciary for the nation. Moreover, the Court determined that the federal government has an interest in its capacity as a sovereign in the administration of the Indian trust accounts separate from the interests of the beneficiaries.

With regard to the second feature that must be present for the fiduciary exception to apply, the Court rejected the nation’s argument that the federal government had a duty to disclose under the applicable statutes, finding instead that “[w]hatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. ... Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.”¹⁴ Based on the foregoing, the Court reversed and remanded the case to the Court of Appeals, leaving it to the Court of Appeals to determine whether the standards for granting the federal government’s writ of mandamus were met following the Court’s decision.

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Accordingly, the Court's decision in *Jicarilla Apache Nation* can be read to mean that common law principles cannot be used to establish a legally binding fiduciary relationship between the federal government and a tribe. Such a relationship can be formed only through the express intention of Congress, as described in a statute or treaty. However, the common law can be used to help inform the scope of the fiduciary relationship between tribes and the federal government. On remand from the U.S. Supreme Court, the U.S. Court of Federal Claims reached this same conclusion in the *Jicarilla Apache Nation* case.¹⁵ Here, the federal government argued that the common law could not be used to determine the scope of its responsibility to the Jicarilla Apache Nation.¹⁶ However, the U.S. Court of Federal Claims rejected this argument, explaining that "[a]s would later be dictated by the Supreme Court, the court thus used common law principles not to establish the fiduciary obligations, but rather 'to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed.' *Jicarilla*, 131 S. Ct. at 2325; see also *White Mountain Apache*, 537 U.S. at 475–76, *Sisk supra*, at 339 ('In the case of a Native American claimant, where the government has assumed pervasive control over Indian assets, the trust doctrine unavoidably overlays and infuses the legal analysis.')."¹⁷

Troubling Developments for Indian Country?

Given the foregoing, why did the FBA's Indian Law Section submit an amicus brief in the *Jicarilla Apache Nation* case?¹⁸ As explained above, federal trust responsibility is an important legal doctrine to Indian country, because it is a tool that Indian tribes can use to correct federal abuses of power. Because the federal government maintains a pervasive and active role in the management of tribal resources, it is critical for tribes to have a legal vehicle through which they can combat federal abuse. In this way, the Court's decision is an important piece of the federal trust responsibility precedent, which has developed over the course of nearly two centuries. The Court's decision may be seen as a further restriction on Indian tribes' ability to successfully pursue claims against the federal government for abuses in management of tribal resources. However, it is also important to note that the common law still plays a role in determining the scope of federal trust responsibility, once such responsibility has been established through explicit statutory language, as explained by the U.S. Court of Federal Claims in *Jicarilla Apache Nation v. United States*.

In addition to potentially further restricting the viability of tribal suits against the federal government based on federal trust responsibility, the Supreme Court's decision in *Jicarilla Apache Nation* is troubling for what it is missing. Missing from the Court's analysis seems to be any mention of the implicit contract between the tribes and federal government, as conceptualized by Chief Justice Marshall in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. That Indian tribes gave up land and aspects of

their external sovereignty to the federal government is undisputed. Yet, the Supreme Court seems to have forgotten that the federal government owes consideration to Indian country in exchange for such valuable concessions. Rather than the actual holding in *Jicarilla Apache Nation*, this omission (or historical ignorance) on the part of (certain members of) the Supreme Court may ultimately prove more troubling for Indian country. **TFL**

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Endnotes

¹131 S. Ct. 2313 (June 13, 2011).

²30 U.S. (5 Pet.) 1 (1831).

³31 U.S. (6 Pet.) 515 (1832).

⁴See Article II, sec. 2 of the original U.S. Constitution.

⁵30 U.S. (5 Pet.) 1 (1831).

⁶118 U.S. 375 (1886).

⁷The following is an example of how the *Kagama* Court reached its conclusion that the federal government had plenary authority without providing legal support for the assertion. The Court explained that "[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." 118 U.S. 375 (1886).

⁸445 U.S. 535 (1980).

⁹463 U.S. 206 (1983).

¹⁰537 U.S. 465 (2003).

¹¹537 U.S. 488 (2003).

¹²*Jicarilla Apache Nation*, 131 S. Ct. at 2323.

¹³*Id.* at 2325 (citing Mitchell II).

¹⁴*Id.* at 2330.

¹⁵*Jicarilla Apache Nation v. United States*, 2011 WL 3796273 (Fed. Cl. Aug. 26, 2011).

¹⁶*Id.* at *5 ("[D]efendant claims that *Cheyenne-Arapaho* was wrongly decided because it employs a common law trust analysis that has been overruled by more recent Supreme Court cases such as *Mitchell II*, *Navajo I*, and the recent decision in this very case, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313. But, there are a number of holes in this argument.").

¹⁷*Id.* at *6.

¹⁸The FBA's Indian Law Section submitted an amicus brief on behalf of the Jicarilla Apache Nation. The Court found the section's position unpersuasive and ruled against the Jicarilla Apache Nation.