

## Judge Removed from Indian Trust Case for Saying Interior Dept. Is Racist

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Last year, a federal judge – a Texan appointed by Republican President Reagan – was removed from a longstanding case of state crime involving an accounting of how much is owed to Native Americans for oil drilling and mining on reservations. Judge Lamberth wrote in a published opinion that the Dept of Interior was "a dinosaur -- the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the pathetic outpost of the indifference and anglocentrism we thought we had left behind."

Many critical criminologists would readily agree, but part of what makes this interesting is that the judge's opinion is based on his experience dealing with the Dept of Interior for many years. It seems his experience lead him to the truth, at which point he gets dismissed for being biased. The Court of Appeals found that an impartial observer would doubt that the Interior Dept could get a fair hearing. According to their opinion, Judges are allowed to dislike parties to proceedings, and the Court of Appeals even agrees with substantial aspects of his characterizations. But the notion that Judge Lamberth's opinion "extends beyond historical racism and all but accuses *current* Interior officials of racism" casts doubt on his neutrality.

While this is an example of what happens 'when the facts are biased' this episode provides a window into the larger Indian Trust Case, which represents a serious contemporary example of state crime. Indeed, the case provides a compelling vantage point to examine state crime, race, colonialism and empire. This brief article excerpts portions of *Cobell v Kempthorne* [No. 05-5269, 2006], which is available along with other court opinions, briefs, and media articles at <http://www.indiantrust.com/>.

Keep in mind that Lamberth is the district court judge who has been hearing this matter for almost ten years, and that there are about 3,000 docket entries (appeals, orders, etc) surrounding this litigation. The Court of Appeals is overturning the ninth decision of his in the last six years and removing Lamberth from this case, but in no way has sympathy for the Dept of Interior.

*Background: 100 years of mismanagement and malfeasance*

The US government, through the Interior Dept, collects royalties from mining and oil drilling on Indian reservations and is supposed to distribute the money to Native Americans. But they have been doing what the court says was/is such a "hopelessly inept" job that Indians filed a class action to get them to do an audit and take an actual accounting of how much is owed to the native people. Almost ten years later, the case is still active and no where near resolution.

The Court of Appeals notes that "[t]he trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long." Although "[t]he

level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case,” they also noted “so too is the magnitude of government malfeasance and potential prejudice to the plaintiffs’ class.”

(Yes, these are the judges removing the other judge for being biased.)

The Court of Appeals quotes extensively from Lamberth's opinion, and I'll do the same. Lamberth wrote:

At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

The Indians who brought this case are beneficiaries of a land trust created and maintained by the government. The Departments of the Interior and Treasury, as the government’s Trustee-Delegates, were entrusted more than a century ago with both stewardship of the lands placed in trust and management and distribution of the revenue generated from those lands for the benefit of the Indians. Of course, it is unlikely that those who concocted the idea of this trust had the Indians’ best interests at heart—after all, the original General Allotment Act that created the trust was passed in 1887, at

a time when the government was engaged in an “effort to eradicate Indian culture” that was fueled, in part, “by a greed for the land holdings of the tribes[.]” But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our “modern” Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind. (p 14-16)

In the conclusion of the "Factual History," Lamberth noted:

The entire record in this case tells the dreary story of Interior’s degenerate tenure as Trustee-Delegate for the Indian trust—a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy—the end of which is nowhere in sight. Despite the breadth and clarity of this record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief the Indians so desperately need. It is against this background of mismanagement, falsification, spite, and obstinate litigiousness that this Court is to evaluate the general reliability of the information Interior distributes to IIM account holders.

In his discussion, Lamberth says of the Dept of Interior's attitude of disrespect for him and the proceedings:

Unfortunately, it is also unsurprising from a defendant that this Court has charged with “setting the gold standard for arrogance in litigation strategy and tactics.” [Cobell v. Norton (2005).] This Court has played host to countless pleadings from clinically insane litigants and prison inmates but has rarely seen such a disrespectful tenor in a court filing.

*Dept of Interior information ‘may be unreliable’*

At immediate issue is an order of Judge Lamberth requiring the Dept of Interior to include on all correspondence on all topics to Indians a notice that "any" information about the trust "may be unreliable." Lamberth writes:

Interior does not dispute the factual predicates of the plaintiffs' argument. Interior concedes that all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable. Of course, anything other than a concession of this point would be laughable in light of the record in this case. The factual record, composed of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust, is certainly clear enough and smattered with a sufficient number of specific abuses to satisfy the . . . standard for relief. If Interior cannot even ascertain the number of existing IIM account holders, how can any of its more complicated calculations, such as land appraisals, be trusted? If Interior is willing to deceive this Court, why would anyone think that Interior would hesitate to lie to the Indians? (p 19)

Lamberth then speculates on why the Dept of Interior is so difficult to deal with - and it is here when he partly gets into trouble with the Appeals Court as they found the motive to be unimportant to the merits of the issues before the court. However, one can fully understand after years of proceedings and thousands of motions wondering what was going on with the government agency. Lamberth wrote:

While it is undeniable that Interior has failed as a Trustee-Delegate, it is nevertheless difficult to conjure plausible hypotheses to explain Interior's default. Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps Interior as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the processes of implementation. [footnote 15 presents evidence in favor of this interpretation] The government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble.

On numerous occasions over the last nine years, the Court has wanted to simply wash its hands of Interior and its iniquities once and for all. The plaintiffs have invited the Court to declare that Interior has repudiated the Indian trust, appoint a receiver to

liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship. The Court may eventually do all these things—but not yet. Giving up on rehabilitating Interior would signal more than the downfall of a single administrative agency. It would constitute an announcement that negligence and incompetence in government are beyond judicial remedy, that bureaucratic recalcitrance has outpaced and rendered obsolete our vaunted system of checks and balances, and that people are simply at the mercy of governmental whim with no chance for salvation. The Court clings to a slim and quickly receding hope that future progress may vitiate the need for such a grim declaration.

Lamberth expresses hope that justice will prevail by having the court force the executive branch to do the right thing. He doesn't want to reward incompetence by taking the matter out of its hands; they made the mess, they should fix it. Ironically, by removing him from the case, the Appeals Court said that if the government can frustrate the judge enough that he loses it a bit, then the government is rewarded with a new judge.

Lamberth continues:

This hope is sustained in part by the fact that the Indians who brought this case found it in themselves to stand up, draw a line in the sand, and tell the government: Enough is enough—this far and no further. Perhaps they regret having done so now, nine years later, beset on all sides by the costs of protracted litigation and the possibility that their efforts may ultimately prove futile; but still they continue. The notice requirement established by the Court today represents a significant victory for the plaintiffs. For the first time in the history of this case, the majority of Indian beneficiaries will be aware of the lawsuit, the plaintiffs' efforts, and the danger involved in placing any further confidence in the Department of the Interior. Perhaps more importantly, the Indians will be advised that they may contact class counsel for guidance on their trust-related concerns. This likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust; it will also open an avenue to relief for individuals throughout Indian country whose suffering might otherwise be buried forever in a bureaucratic tomb.

Real justice for these Indians may still lie in the distant future; it may never come at all. This reality makes a statement about our society and our form of government that we should be unwilling to let stand. But perhaps the best that can be hoped for is that people never forget what the plaintiffs have done here, and that other

marginalized people will learn about this case and follow the Indians' example. (p 20-23)

*The 'decision speaks for itself'*

The *Washington Post* article that tipped me off to this decision had a quote from a Dept of Interior spokesman saying, "[decision speaks for itself](#)." Having read the Court of Appeals opinion, I agree and include the following from the Appeals Court about the Dept of Interior:

- Although [Lamberth's] opinion contains harsh—even incendiary—language, much of that language represents nothing more than the views of an experienced judge who, having presided over this exceptionally contentious case for almost a decade, has become “exceedingly ill disposed towards [a] defendant” that has flagrantly and repeatedly breached its fiduciary obligations. We ourselves have referred to Interior’s “malfeasance,” “recalcitrance,” “unconscionable delay,” “intransigen[ce],” and “hopelessly inept management.” (p 28-9)
- To be sure, Interior’s deplorable record deserves condemnation in the strongest terms. Words like “ignominious” and “incompeten[t]” (the district court’s) and “malfeasance” and “recalcitrance” (ours) are fair and well-supported by the record. (p 30)
- In *Cobell VI*, we recognized that “the federal government has failed time and again to discharge its fiduciary duties,” resulting in a serious injustice that has persisted for over a century and that cries out for redress. (p 33)

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The new judge has ordered a trial that started in October 2007 to hear in open court the government’s progress on the actual audit and its methods for completing the accounting. This stage is also likely to be contentious given what an earlier opinion noted was “the ‘egregious’ failure of defendants to produce documents, in violation of a Court order ‘was only compounded by the Treasury Department’s contemporaneous destruction of documents potentially responsive to the court’s production order, and the failure of government officials to apprise the court or the plaintiffs of the defendants’ unwillingness and self-inflicted inability to comply with the production orders’” ([Corbell v Norton](#) 96-1285, 2005).

## NOTES

For more info, see the brilliantly done [IndianTrust.com](#), which contains a nice summary of the case and links to the opinions and orders. See also Eric Weiss, "[At U.S. Urging, Court Throws Lamberth Off Indian Case](#)" *Washington Post* July 12, 2006, p A13. (*free registration required for web access*).

This article is a revised version of an entry on <http://PaulsJusticeBlog.com>