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I. The Cases (incorporated pdf's)

2. The Board's motion for summary judgment is HEREBY DENIED as moot. (doc. # 12)
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5. The Board's motion for leave to file a supplemental brief is DENIED. (doc. # 39)

LET JUDGMENT BE ENTERED ACCORDINGLY.

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH; and Black Hills Museum of Natural History Foundations, Inc., a nonprofit corporation, Plaintiffs,

v.

The UNITED STATES of America, DEPARTMENT OF JUSTICE, Defendant.

Civ. No. 92-5070.

United States District Court,
D. South Dakota, W.D.

Feb. 3, 1993.

After fossilized skeleton of dinosaur was discovered on land held in trust by the United States for sole benefit of Indian owner, owner sold rights to excavate fossil to geological research institute. After excavation, institute transferred rights to fossil to museum foundation. Subsequently, federal officers seized fossil as part of investigation into alleged violations of the Antiquities Act. Geological institute and museum foundation filed complaint in nature of quiet title action asserting permanent ownership. Plaintiffs also sought injunctive relief for possession pendente lite asserting that government's storage of fossil was causing irreparable damage to rare specimen of tyrannosaurus rex. The District Court denied preliminary injunction and plaintiffs appealed. The Court of Appeals, 967 F.2d 1237, remanded for determination of proper custodianship. On remand, the District Court named the South Dakota School of Mines and Technology as custodian pendente lite. Plaintiffs again appealed. The Court of Appeals, 978 F.2d 1043, affirmed and remanded. On remand, the District Court, Battey, J., held that: (1) federal question jurisdiction existed over ownership issue, and (2) embedded fossil was an "interest in land" within meaning of statute restricting alienation of such interests in lands held in trust for Indians, and failure of Indian owner to apply to the Secretary of the Interior for removal of restrictions contained in trust deed, or for approval of sale, rendered sale of fossil null and void.

Judgment in favor of defendant and against plaintiffs; complaint dismissed.

1. Federal Courts ⇐195

District court had federal question jurisdiction to determine ownership of fossil taken from Indian trust land within boundaries of reservation, under statute conferring original jurisdiction over all civil actions arising under the Constitution, laws and treaties of the United States. 28 U.S.C.A. § 1331.

2. Federal Courts ⇐191

Nonfrivolous claim of right or remedy under federal statute is sufficient to invoke federal question jurisdiction. 28 U.S.C.A. § 1331.

3. Federal Courts ⇐191

Statutory grant of jurisdiction under federal question statute will support claims founded upon federal common law as well as those of statutory origin. 28 U.S.C.A. § 1331.

4. Statutes ⇐217

In defining legislative intent it is necessary to consider legislation in its histori-

cal context and not as if it were passed today.

5. Indians ⇐13(1)

The General Allotment Act contemplates protection for Indian beneficiaries along the lines afforded to beneficiary of a spendthrift trust; trust property is not accessible to creditors, at least until after trustee has delivered it, free of encumbrance, to beneficiary. Indian General Allotment Act, 25 U.S.C.A. §§ 331–348.

6. Indians ⇐10, 15(2)

Indian lands are governed solely by federal law and where legal title to such land is held in trust by the United States, any attempt at conveyance or alienation must conform to requirements of federal law; thus, alienation of restricted Indian lands may only be accomplished pursuant to Congressional authorization and according to rules and regulations prescribed by the Secretary of the Interior. 25 U.S.C.A. § 483.

7. Indians ⇐15(2)

Fossilized skeleton of a tyrannosaurus rex dinosaur embedded in Indian trust land within boundaries of reservation was an "interest in land" within meaning of statute authorizing Secretary of the Interior to remove restrictions against alienation upon application of Indian owners, and to approve conveyances, and failure of Indian owner to make application to the Secretary for removal of restrictions contained in trust deed or for approval of sale, rendered sale of fossil null and void. 25 U.S.C.A. § 483.

See publication Words and Phrases for other judicial constructions and definitions.

Patrick Duffy, Bangs, McCullen, Butler, Foye & Simmons, Rapid City, SD, for plaintiffs.

Kevin V. Schieffer, U.S. Atty., Sioux Falls, SD, for defendant.

MEMORANDUM OPINION

BATTEY, District Judge.

NATURE AND PROCEDURAL HISTORY

This matter comes before the Court on cross motions for summary judgment filed pursuant to Fed.R.Civ.P. 56.

The case has had a somewhat convoluted and checkered past. It has resulted in two decisions [1] of the Eighth Circuit Court of Appeals involving motions for possession of the tyrannosaurus rex skeleton known by the nickname "Sue."

RELEVANT FACTS

The facts upon which this Court's decision will be based are simple and straightforward. They are as follows:

1. The parties are disputing possession and ownership of a fossilized skeleton of a tyrannosaurus rex dinosaur approximately 65 million years old.

2. The fossil was taken from Indian trust land within the exterior boundaries of the Cheyenne River Sioux Tribe Reservation of South Dakota. The legal description of the land from which the fossil was taken is Section 32, Township 15 North, Range 18 East, Ziebach County, South Dakota.

3. Legal title to the land is held by the United States in trust status for Maurice A. Williams, an Indian. The instrument creating the trust status was a trust patent deed dated September 23, 1969. It is set forth fully as follows:

340 22652

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting.

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that, pursuant to the Act of June 18, 1934 (48 Stat.

1. *Black Hills Institute of Geological Research v. United States Dept. of Justice,* 967 F.2d 1237 (8th Cir.1992) (*Black Hills I*); *Black Hills Institute of Geological Research v. United States Dept. of Justice,* 978 F.2d 1043 (8th Cir.1992) (*Black Hills II*).

984), a trust patent issue to Maurice A. Williams, a Cheyenne River Indian, for the following described land:

Black Hills Meridian, South Dakota

T. 14 N., R. 18 E.,

Sec. 4, Lots 1, 2, 3, and 4, S½N½, and SW¼;

Sec. 5, Lot 1;

Sec. 21, NE¼

T. 15 N., R. 18 E.,

Sec. 32, All;

Sec. 33, All.

The area described contains 1,959.05 acres.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, hereby declares that it does and will hold the land above described (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to the said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476) has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Billings, Montana, the TWENTY-THIRD day of SEPTEMBER in the year of our Lord one thousand nine hundred and SIXTY-NINE and of the Independence of the United States the one hundred and NINETY-FOURTH.

By /s/ Eugene H. Newell
Manager, Montana Land Office.

Patent Number 40–70–0051

The instrument provides that the United States is to hold the land for a period of twenty-five years in trust for the sole use and benefit of Maurice A. Williams, and at the expiration of said period, the United States would convey the same by patent to Maurice A. Williams or his heirs in fee. The tract became known in the Bureau of Indian Affairs records as 340 (reservation number) 6309 (tract number). The document is a "trust patent" document.[2] The trust status will expire on September 23, 1994.

4. The fossil was discovered on August 12, 1990, by employees of plaintiff Black Hills Institute of Geological Research (BHIGR). It was observed with portions of the fossil protruding from beneath the surface. Excavation of the fossil was commenced by BHIGR on August 14, 1990, with the removal completed on September 1, 1990.

5. On August 27, 1990, BHIGR issued a check to Maurice Williams for $5,000, alleging that it was "for title to the fossil and the right to excavate the fossil from his land."

6. BHIGR removed the fossil without the knowledge or consent of the agencies of the United States. No permit or other permission was obtained from the United States Department of Interior or other governmental agency for either the excavation or the removal of the fossil.

ISSUE

The ultimate issue is whether BHIGR obtained ownership to the fossil while the land from which it was excavated was held by the United States in its trust capacity.

2. The land index of the Bureau of Indian Affairs listed "trust patent" as a type of document referring to this instrument and distinguished it from other types of documents such as restricted fee patent, deed to nontrust status, deed to restricted status, deed to trust status, fee patent, mortgages, leases, and other BIA designations.

DISCUSSION

I

COURT'S JURISDICTION

The Court sua sponte raised the issue of its jurisdiction [3] to determine ownership of the fossil based upon the changing posture of the pleadings. The complaint filed May 22, 1992, sought to quiet title to the fossil under 28 U.S.C. § 2409a(a) (Quiet Title Act).[4] The Black Hills Museum of Natural History Foundation, Inc., a nonprofit corporation (created by the officers of BHIGR), was added as party plaintiff on May 26, 1992. Following the decision in *Black Hills I* on June 26, 1992, (finding the Court has anomalous jurisdiction to determine temporary custody), plaintiffs on July 31, 1992, filed a second amended complaint urging the Court to exercise this general equitable jurisdiction and its federal question jurisdiction (28 U.S.C. § 1331).[5]

The Court ordered the parties to submit an appropriate memorandum of law addressing the applicability of 28 U.S.C. § 2409a(a) and the cases of *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir.1975) and *State of Florida, Dep't of Business Regulation v. United States Dep't of Interior*, 768 F.2d 1248, 1254 (11th Cir.1985).

In their memorandum of law, plaintiffs urge the Court that its "anomalous jurisdiction" which it had in the posture of determining temporary custody should also apply on the issue of permanent ownership. Plaintiffs state, "But Plaintiffs have, with the filing of a second amended complaint, cast this action solely as one for the return of personal property to which Plaintiffs have a superior *possessory* right to that of the Government." (Docket # 115). Plaintiffs further urge that "Plaintiffs have not sought a determination under 2409a(a) to 'quiet title' to the fossil, ..." By this amendment plaintiffs have abandoned any right of action under that statute.

There is a basic legal difference between exercising anomalous jurisdiction for the purpose of determining temporary custody (as the Court did in *Black Hills I*) and exercising anomalous jurisdiction for the purpose of determining the permanent possessory or ownership rights to the fossil. A permanent possessory right to the fossil is subsumed within the context of ownership. It is axiomatic that one cannot assert permanent possession as against the rightful owner absent a contract or agreement providing otherwise. The Court must therefore decide the issue of ownership.

[1-3] This issue involves the application and interpretation of various federal statutes concerning Indian trust lands. It is on this basis that the Court finds it has federal question jurisdiction under 28 U.S.C. § 1331. A nonfrivolous claim of a right or remedy under a federal statute is sufficient to invoke federal question jurisdiction. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 n. 6, 102 S.Ct. 2202, 2206 n. 6, 72 L.Ed.2d 639 (1982). The statutory grant of

3. The Court had previously exercised its general equity jurisdiction known as "anomalous jurisdiction" to determine a temporary custodian for the dinosaur bones pending final disposition on this main action to determine ownership. *Black Hills I* at 1239. The fossil now rests temporarily at the South Dakota School of Mines and Technology. *Black Hills II* at 1044.

4. **§ 2409a Real property quiet title actions**

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. **This section does not apply to trust or restricted Indian lands,** nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(Emphasis added.)

While the complaint did not cite this statute, it appeared that it was the only statutory basis for an action to quiet title in federal court. The statute by its very terms did not apply to trust or restricted Indian lands. This appears to be why plaintiffs abandoned this ground as supporting jurisdiction.

5. 28 U.S.C. § 1331 provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

jurisdiction under 28 U.S.C. § 1331 will support claims founded upon federal common law as well as those of a statutory origin. *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 105 S.Ct. 2447, 2450, 85 L.Ed.2d 818 (1985).

28 U.S.C. § 2409a does not provide an independent ground for jurisdiction in this case. *See, e.g., Spaeth v. United States Secretary of Interior,* 757 F.2d 937, 942 (8th Cir.1985).

II

GENERAL RULES OF LEGISLATIVE INTENT AS APPLIED TO INDIANS

[4] The underlying rule is that congressional intent controls. *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). In judicial construction "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection in good faith." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). (*Rosebud* was a case involving congressional intent as to disestablishment of a part of the reservation.) In divining the legislative intent it is necessary to consider the legislation in its historical context and not as if it were passed today. *Ute Indian Tribe v. Utah,* 716 F.2d 1298, 1303 (10th Cir.1983).

A sale of allotted land in violation of federal law is void and confers no right upon the wrongdoer. *Ewert v. Bluejacket,* 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922). An allottee may not be barred by statute of limitations or laches from bringing suit to establish that title has been retained. *Mottaz v. United States,* 753 F.2d 71 (8th Cir.) *rev'd on other grounds,* 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1985). *Mottaz* further held that Congress has not repudiated its policy of protecting Indian land by providing that claims against the United States for title to wrongful alienation allotments are barred by statute of limitations. *Mottaz* cited the case of *Haymond v. Scheer,* 543 P.2d 541 (Okla.1975).

In *Haymond* it was held that where an Indian holds legal title to lands with restriction against alienation, the title may be transferred only under rules and regulations prescribed by the Secretary of the Interior. Indian General Allotment Act, §§ 1–5, 25 U.S.C. §§ 331–348. *Haymond* was an action to quiet title to a railroad right of way which had been alienated without the consent of the government of the United States. It involved the conveyance of an easement of way for railroad purposes. *Haymond* held that a conveyance of allotted restricted lands made in violation of a federal statute authorizing the alienation of such lands is against public policy, absolutely void, and in no manner can any right, title, or interest in such land be acquired under such conveyance. The Oklahoma Supreme Court cited *Bailey v. Banister,* 200 F.2d 683 (10th Cir.1952); *United States v. Gilbertson,* 111 F.2d 978 (7th Cir.1940); *Heckman v. United States,* 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912).

[5] The General Allotment Act contemplates protection for the Indian beneficiaries along the lines afforded to the beneficiary of a spendthrift trust; trust property is simply not accessible to creditors, at least until after the trustee has delivered it, free of encumbrance, to the beneficiary. *Keechi v. United States,* 604 F.Supp. 267 (D.D.C.1984).

[6] Indian lands are governed solely by federal law and, where legal title to such land is held in trust by the United States, any attempted conveyance or alienation must conform to the requirements of federal law. *Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County,* 540 F.Supp. 592, *aff'd in part, rev'd in part,* 719 F.2d 956 (8th Cir.1982). Accordingly, alienation of restricted Indian lands may only be accomplished pursuant to congressional authorization and according to rules and regulations prescribed by the Secretary of the Interior. *Id.*

III

TRUST STATUS OF INDIAN LANDS

The trust deed to Maurice A. Williams was authorized by the Indian Reorganiza-

tion Act of 1934, 48 Stat. 984, codified at 25 U.S.C. §§ 461–479. The Indian Reorganization Act of 1934 (IRA) ended the previous federal policy of allotment. 25 U.S.C. § 461 provides that "On or after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."

Although the practice of allotment of Indian lands ceased under the IRA, nonetheless federal law continued to provide that trust patents could be issued. 25 U.S.C. § 348. The United States held the land of Maurice Williams in such trust capacity under the trust patent deed dated September 23, 1969. The terms contained within the deed provided for a restriction against alienation for twenty-five years (expiring September 23, 1994).

One practical effect of property held by the United States in trust for Maurice A. Williams was that the land was exempt from state and local taxation. *See, e.g., Leading Fire v. County of Gregory,* 89 S.D. 121, 230 N.W.2d 114 (1975); 25 U.S.C. § 465; *Lebo v. Griffith,* 42 S.D. 198, 173 N.W. 840 (S.D.1919) (the state cannot tax Indian lands that are held in trust by the United States). The IRA sharply restricted the right to alienate allotments subject to it. Felix S. Cohen, *Handbook of Federal Law* 621 n. 101 (1982).

IV

THE APPLICATION OF 25 U.S.C. § 483

[7] 25 U.S.C. § 483 provides:

§ 483. Sale of land by individual Indian owners

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or **interests in lands** held by individual Indians under the provisions of sections [461 to 479—Indian Reorganization Act] of this title, or subchapter VIII of this chapter. (Emphasis added.) Accordingly, if this embedded fossil was an "interest in land," then by the very terms of the statute the restriction against alienation could only be removed pursuant to the terms of the statute.

Under 25 U.S.C. § 483 Maurice Williams could not remove the restrictions against alienation contained in the trust patent, nor could he convey an interest in the land without the approval of the Secretary of the Interior. The Secretary of the Interior provided regulations to implement section 483. 25 C.F.R. Part 152—**Issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands.**

It is undisputed that Williams did not make application to the Secretary of the Interior for a removal of the restrictions contained in the trust deed, nor did he secure approval for sale of any interest in his land to plaintiffs. Failure to do so rendered the sale null and void. *United States v. Walters,* 17 F.2d 116 (D.Minn. 1926); *Bailey v. Banister,* 200 F.2d 683 (10th Cir.1952). Plaintiffs acquired no right to either ownership or possession of the fossil. If proper application had been made, the decision of the Secretary would be subject to judicial review as with any administrative decision. *See also* Felix S. Cohen, *Handbook of Federal Law* 167, 615, 623 (1982).

Plaintiffs urge the Court to find that this embedded fossil was neither "land nor an interest in land." Their position is that Maurice Williams was entitled to enter into a contract for its excavation and removal from his trust land. The Court is unpersuaded.

25 C.F.R. provides in part:

§ 152.22 Secretarial approval necessary to convey individual-owned trust or restricted lands or land owned by a tribe.

(a) Individual lands. Trust or restricted lands, ... or any interest therein, may not be conveyed without the approval of the Secretary. Moreover, inducing an Indian to execute an instrument purporting to convey any trust land

or interest therein, or the offering of any such instrument for record, is prohibited and criminal penalties may be incurred....

§ 152.23 Applications for sale, exchange or gift.

Applications for the sale, exchange or gift of trust or restricted land shall be filed in the form approved by the Secretary with the agency having immediate jurisdiction over the land. Applications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interests of the owner or owners or as under conditions set out in § 152.25(d).

V

WAS THE FOSSIL AN INTEREST IN LAND?

The Court has found no case authority specifically holding that a paleontological fossil such as the fossil "Sue" embedded in the ground is an "interest in land." [6]

To address the issue of whether or not the fossil is personal or real property, the following definitions found in the South Dakota Codified Laws are helpful in the Court's analysis:

43-1-1. Property defined. In this code, the thing of which there may be ownership is called property.

43-1-2. Classes of property. Property is either:

(1) Real or immovable; or

(2) Personal or movable.

43-1-3. Real and personal property distinguished. Real or immovable property consists of:

(1) Land;

(2) That which is affixed to land;

(3) That which is incidental or appurtenant to land;

(4) That which is immovable by law.

Every kind of property that is not real is personal.

43-1-4. Land as solid material of earth. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

The Court finds that the embedded fossil was an interest in land as defined by these provisions and therefore subject to the requirements of 25 U.S.C. § 483 and the Code of Federal Regulations.

VI

PROTECTION OF INDIANS

The Court's finding that the embedded fossil was "land or an interest in land" and its removal subject to the rules and regulations of the Secretary of the Interior is consistent with the intent of Congress to protect Indian lands from improvident alienation. This fossil was described by witnesses in *Black Hills II* as a "priceless" paleontological find. The testimony at the evidentiary hearing in *Black Hills II* indicated that a "copy" of the fossil could be sold for $100,000 after it had been carefully preserved and curated (the process of preparing for viewing).

There are a number of statutes which indicate congressional intent to protect the Indians against acquisition of their land or interests in land. A nonexhaustive list of examples of statutes requiring approval of the Secretary of the Interior is as follows:

(1) The Secretary of the Interior is authorized to grant permission to the state or local authorities for the opening of public highways through allotted lands which have not been alienated. 25 U.S.C. § 311.

(2) Leases for farming and grazing purposes are subject to the approval of the superintendent or other officer in charge of the reservation under such rules and regulations as the Secretary may prescribe. 25 U.S.C. § 393.

(3) Allotted lands may be leased for mining purposes as may be advisable by the

6. Plaintiffs assert that the fossil, upon its severance, became personal property and thus not subject to the restriction against alienation. The Court believes such a position misses the point. The status of the fossil and the law applicable to it must be viewed *before* severance and not *after* severance.

Secretary of the Interior under the rules and regulations. 25 U.S.C. § 396.

(4) The Secretary of the Interior may approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted. 25 U.S.C. § 396e.

(5) With respect to the general necessity to obtain consent to alienation, 25 U.S.C. § 392 provides as follows:

> 25 U.S.C. § 392. **Consent to or approval of alienation of allotments by Secretary of Interior**
>
> Whenever, in any law or treaty or in any patent issued to Indian allottees for lands in severalty pursuant to such law or treaty, there appears a provision to the effect that the lands so allotted cannot be alienated without the consent of the President of the United States, the Secretary of the Interior shall have full power and authority to consent to or approve of the alienation of such allotments, in whole or in part, in his discretion, by deed, will, lease, or any other form of conveyance, ...

(6) Finally, with respect to the claim of a non-Indian about the right to property in which an Indian may be a party on one side, the burden of proof rests upon the non-Indian whenever the Indian shall make out a presumption of title from the fact of previous possession or ownership. 25 U.S.C. § 194.

CONCLUSION

The Maurice Williams land is trust land, held by the United States in trust status. By the terms of the trust patent and the laws and regulations of the United States, an alienation by sale of an interest in land must be with the consent of the Secretary of the Interior. Maurice Williams did not make application for consent to the removal of the embedded fossil. BHIGR was equally responsible to insure that consent was obtained in compliance with federal law. Without such consent, the attempted sale of the fossil "Sue" embedded within the land is null and void. BHIGR obtained no legal right, title, or interest in the fossil as severed since the severance itself was contrary to the law. It would have been a relatively simple matter to have applied for the removal of the alienation restraint. Had there been such an application and Secretarial approval, all these months of contention could have been avoided.[7] Plaintiffs must assume much of the fault caused by their failure to conform their conduct to the federal laws and regulations. Plaintiffs should have investigated the status of the land involved. They ran the risk of this unlawful taking of the fossil from Indian land by not having done so.

Judgment of dismissal of plaintiffs' complaint is entered contemporaneously with the filing of this memorandum opinion.

JUDGMENT

In accordance with the memorandum opinion filed this date, it is hereby

ORDERED that judgment is entered in favor of defendant and against plaintiffs. Plaintiffs' complaint is dismissed.

Juan RODRIGUEZ, Plaintiff,

v.

UNITED AIRLINES, INC. a corporation; Does One through Twenty, inclusive, Defendants.

No. C-91-1714 MHP.

United States District Court, N.D. California.

July 14, 1992.

Former employee filed racial discrimination claim and employer moved for sum-

7. The United States and its representatives have been the subject of much public and private vilification for the action in reclaiming the possession of this fossil. The fact that the government was entitled to possession always seems to be overlooked.

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH; Black Hills Museum of Natural History Foundation, Inc., a non-profit corporation, Plaintiffs,

Joseph M. Butler, Appellant,

v.

SOUTH DAKOTA SCHOOL OF MINES AND TECHNOLOGY, Appellee,

United States Department of Justice, Defendant.

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH; Black Hills Museum of Natural History Foundation, Inc., a non-profit corporation, Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, Appellee.

Nos. 93-1600, 93-1602.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 11, 1993.

Decided Dec. 15, 1993.

Order Denying Rehearing and Suggestion for Rehearing En Banc Feb. 2, 1994.

Research institute sought order requiring United States to return to it a Tyrannosaurus rex fossil which United States seized after institute excavated fossil from land held in trust for individual Indian by United States. Following affirmance of denial of preliminary injunction, 967 F.2d 1237, and on remand after further appeal, 978 F.2d 1043, the United States District Court for the District of South Dakota, Richard H. Battey, J., 812 F.Supp. 1015, entered judgment in favor of United States. Institute appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) fossil was "land" rather than "personal property" before it was excavated and thus United States held fossil in trust for Indian who was beneficial owner of land and who failed to obtain approval of Secretary before selling fossil to institute, and (2) district court abused its discretion in imposing Rule 11 sanctions against attorney for naming mining school as party to action which was initially brought as quiet title action.

Affirmed in part; reversed in part.

1. Federal Courts ⇐195, 243

In suit by research institute against Department of Justice, district court had federal question jurisdiction to determine ownership of fossil of Tyrannosaurus rex taken from Indian trust land, under statute conferring original jurisdiction over all civil actions arising under Constitution, laws and treaties of United States; complaint by research institute alleged facts sufficient to bring case within statute waiving government's sovereign immunity in cases challenging agency action and seeking relief other than money damages. 28 U.S.C.A. § 1331; 5 U.S.C.A. § 702.

2. Federal Courts ⇐232

District courts have jurisdiction, under statute conferring original jurisdiction over all civil actions arising under Constitution, laws and treaties of United States, to hear cases falling within consent to suit under statute waiving government's sovereign immunity in cases challenging agency action and seeking relief other than money damages. 28 U.S.C.A. § 1331; 5 U.S.C.A. § 702.

3. Federal Civil Procedure ⇐881

In suit in which research institute sought order requiring government to return fossil of Tyrannosaurus rex found on Indian trust land to institute, Court would determine ownership and not merely possession of fossil; by stating that it paid beneficial owner of trust for fossil, institute alleged that it owned fossil outright, not that it leased it or had some possessory interest amounting to less than full ownership.

4. Indians ⇐15(2)

Attempted sale of Indian trust land is void and does not transfer title if it violates requirement that, outside permitted transactions, beneficial owner of land must secure prior approval of Secretary of Interior in order to make such sale. Indian Reorganization Act, § 4, 25 U.S.C.A. § 464; 25 U.S.C.A. § 483.

5. Indians ⇐10, 15(2)

Fossil of Tyrannosaurus rex found on Indian trust land was "land" rather than "personal property" before it was excavated by research institute, and thus, under statutes prohibiting sale of Indian trust lands and giving Secretary of Interior discretion to remove such prohibitions, United States held fossil in trust for Indian who was beneficial owner of land and who failed to obtain approval of Secretary before selling fossil to institute; fossil was found embedded in land and was ingredient comprising part of solid material of earth under South Dakota law. Indian Reorganization Act, § 4, 25 U.S.C.A. § 464; 25 U.S.C.A. § 483.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Courts ⇐430

Court of Appeals could refer to state property law for guidance where Congress provided no definition of "land" applicable to statutes prohibiting sale of Indian trust lands and giving Secretary of Interior discretion to remove restrictions against alienation of such lands. Indian Reorganization Act, § 4, 25 U.S.C.A. § 464; 25 U.S.C.A. § 483.

7. Indians ⇐13(1)

Seizure by United States of Tyrannosaurus rex fossil, which was found on land held in trust for individual Indian by United States, and which was purportedly sold by Indian to research institute, was proper exercise of United States' trust status under General Allotment Act (GAA); absence of statutory scheme governing fossils did not compel conclusion that United States had only limited trust duties where fossils were involved. Indian General Allotment Act, 25 U.S.C.A. § 348.

8. Indians ⇐15(1)

Policy considerations did not favor conclusion that sale of Tyrannosaurus rex skeleton to research institute, by beneficial owner of Indian land held in trust by United States, was void; despite legislative trend supporting tribal self-determination, statutory scheme reflected Congress' desire to protect beneficial owners of trust land. Indian General Allotment Act, 25 U.S.C.A. § 348; Indian Reorganization Act, § 4, 25 U.S.C.A. § 464; 25 U.S.C.A. § 483.

9. Indians ⇐15(2)

Court of Appeals could not remand case for nunc pro tunc approval of sale to research institute, by beneficial owner of Indian land held in trust by United States, of Tyrannosaurus rex fossil, since beneficial owner made no application for approval of conveyance of trust land as required by statute. 25 U.S.C.A. § 483.

10. United States ⇐126

United States had standing to claim trust ownership of Tyrannosaurus rex fossil found on Indian trust land, even though neither Secretary of Interior nor beneficial owner of land were parties to action; beneficial owner was not necessary party, and United States could claim trust title without Secretary being named because trust patent named United States as trustee.

11. Searches and Seizures ⇐25.1

United States' seizure, without predeprivation hearing, of Tyrannosaurus rex fossil from institute which found fossil on Indian trust land, which seizure occurred after institute had added value to fossil by excavating it, did not violate institute's due process rights; institute had no interest in fossil, and fact that fossil was found within boundaries of Indian reservation should have alerted institute that United States might have some interest in fossil. U.S.C.A. Const.Amend. 5.

12. Federal Civil Procedure ⇐2771(15)

District court abused its discretion in imposing Rule 11 sanctions against attorney for naming, as party in action to quiet title to fossil seized by United States, mining school at which Tyrannosaurus rex fossil was stored following seizure; naming school was not baseless in that school had interest in fossil that quiet title action could affect, case law on issue of when possession would justify suing possessor was sparse, and attorney assented to dismissal of school as party when school represented it would not assert separate interest in fossil. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

13. Federal Courts ⇐813

Court of Appeals reviews district court's imposition of Rule 11 sanctions for abuse of

discretion. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

14. Federal Civil Procedure ⇐2769

District court's task, in determining whether Rule 11 sanctions should be imposed, is to ascertain whether attorney met objective reasonableness standard. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

15. Federal Civil Procedure ⇐2771(15)

Improperly naming party in suit justifies Rule 11 sanctions when joining the party is baseless or lacking in plausibility. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

16. Quieting Title ⇐49

In order to afford complete relief in quiet title action, court may order that defendant relinquish possession of subject property to plaintiff.

On Order Denying Petition for Rehearing

17. Searches and Seizures ⇐84

Predeprivation hearing was not required for United States to seize Tyrannosaurus rex fossil from institute which found fossil on Indian trust land, as institute did not own fossil. U.S.C.A. Const.Amend. 5.

Joseph Butler, Rapid City, SD, argued (Mark F. Marshall on the brief), for appellant Butler in No. 93–1600.

Patrick Duffy, Rapid City, SD, argued (Mark F. Marshall, on the brief), for appellant Black Hills Institute in No. 93–1602.

Gene N. LeBrun, Rapid City, SD, argued (Edward J. Shawaker and David C. Shilton of Washington, DC, on the brief), for School of Mines in No. 93–1600.

Edward Shawaker, Washington, DC, argued (Ted L. McBride, Robert A. Mandel, Myles E. Flint, and David C. Shilton, on the brief), for appellee U.S. in No. 93–1602.

Before JOHN R. GIBSON, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

Black Hills Institute of Geological Research and Black Hills Museum of Natural History Foundation (collectively, "Black Hills") appeal the district court's [1] judgment in favor of the United States. The district court found that the United States holds title to a valuable Tyrannosaurus rex skeleton ("the fossil" or "Sue") in trust for Maurice Williams ("Williams"), an individual Indian who is the beneficial owner of trust land on which Black Hills discovered the fossil. Joseph M. Butler appeals separately from the district court's order imposing Rule 11 sanctions on Butler for naming an improper party as a defendant. We affirm the district court's judgment that the United States holds trust title to the fossil and reverse its Rule 11 order.

I. BACKGROUND

This case is before us for the third time. The factual background is uncomplicated. Black Hills collects and restores fossils for display in museums. In August 1990, Black Hills was excavating fossils in western South Dakota. Sue Hendrickson, a researcher working on the project, discovered Sue on Williams' ranch while on break. Since 1969, the United States has held this ranch land in trust for the sole use and benefit of Williams, an Indian. Two days after the discovery, Black Hills scientists began excavating Sue, the most complete and valuable Tyrannosaurus rex skeleton known to man, from Williams' land. At some point during the excavation, Black Hills purported to purchase from Williams the right to excavate Sue for $5000. After excavation, Black Hills moved the ten tons of bones to Hill City, South Dakota, where scientists began the laborious process of restoring the fossil.

In May 1992, however, federal officers seized Sue and moved her to the South Dakota School of Mines and Technology ("School of Mines"). The United States attorney for South Dakota ordered the seizure on the ground that Black Hills' removal of Sue from Williams' land violated federal criminal statutes relating to federal lands. Black Hills then brought suit in district court to quiet title to Sue. In conjunction with this action, it sought a preliminary injunction for possession of the fossil pending the outcome

1. The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

of the suit. After the district court denied Black Hills a preliminary injunction, Black Hills moved under Eighth Circuit Rule 8A to this court for an order granting it custody of Sue pending appeal of the injunction denial.

In *Black Hills Institute of Geological Research v. United States Department of Justice*, 967 F.2d 1237, 1241 (8th Cir.1992) (*Black Hills I*), we found that the district court had anomalous jurisdiction over the temporary custody issue and remanded for a determination of the proper temporary custodian. The district court concluded that Sue should remain at the School of Mines pending disposition of the case on the merits. In *Black Hills Institute of Geological Research v. United States Department of Justice*, 978 F.2d 1043, 1045 (8th Cir.1992) (*Black Hills II*), we affirmed the district court's custody order, dismissed with prejudice Black Hills' appeal of the preliminary injunction denial, and remanded the case for proceedings on the merits. Meanwhile, Black Hills amended its complaint by abandoning the quiet title theory of its case and instead seeking only an order requiring the United States to return Sue to it.

On remand, the district court found that it still had to determine ownership of Sue despite Black Hills' amended complaint because "[a] permanent possessory right to the fossil is subsumed within the context of ownership." 812 F.Supp. 1015, 1018 (Feb. 3, 1993). It then concluded that it had federal question jurisdiction under 28 U.S.C. § 1331 because the case involved the application of federal statutes relating to Indian trust lands. Reaching the merits, the district court found that Sue was an interest in land under the trust land statutes. Because Williams failed to receive the Secretary of the Interior's ("the Secretary") approval for his attempted sale of Sue to Black Hills, the court reasoned, the transaction was void and the United States retained title to Sue in trust for Williams. Black Hills now appeals.

II. DISCUSSION

A. Subject Matter Jurisdiction

[1, 2] The first issue we must address is the district court's basis for subject matter jurisdiction over this case. We find that the district court had general federal question jurisdiction under 28 U.S.C. § 1331. Black Hills' complaint alleged facts sufficient to bring the case within 5 U.S.C. § 702's broad waiver of sovereign immunity. Section 702 waives the federal government's sovereign immunity in cases challenging agency action—here, the Department of Justice's seizure of Sue—and seeking relief other than money damages.[2] *See* 5 U.S.C. § 702; *Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir.) (holding that § 702's waiver of sovereign immunity is not limited to cases brought under the Administrative Procedure Act), *cert. granted*, — U.S. —, 114 S.Ct. 342, 126 L.Ed.2d 307 (1993); *Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that the term "agency action" "was clearly intended to cover the full spectrum of agency conduct"). District courts have jurisdiction under § 1331 to hear cases falling within § 702's consent to suit. *See Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977) (holding that § 1331 confers jurisdiction on federal courts to review agency action "subject only to preclusion-of-review statutes created or retained by Congress").

B. Ownership of the Fossil

[3] We now reach the merits of the case. We must first decide precisely what issue is before us. Initially, Black Hills sued the government to quiet title to Sue. Black Hills' second amended complaint abandoned the quiet title action and sought an order requiring the government to return the fossil. Black Hills argues that the district court erred because it determined ownership, an issue Black Hills claims that it did not raise in the second amended complaint. According to Black Hills, the district court "only

2. Section 702 provides that its waiver of sovereign immunity does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Under 28 U.S.C. § 2409a(a), Congress waived the government's sovereign immunity in suits seeking to quiet title to real property. Section 2409a(a), however, "does not apply to trust or restricted Indian lands." *Id.* Thus, § 2409a retains sovereign immunity for suits seeking to quiet title to Indian trust lands. Section 2409a(a) does not "expressly or impliedly forbid[] the relief which is sought" here because Black Hills seeks the return of what is now personal property, not a determination of title to Indian trust land.

had jurisdiction to determine whether [Black Hills] or the Department of Justice was entitled to possession of the fossil." Appellant's Br. at 41.

In the second amended complaint, however, Black Hills stated that it "paid Williams $5000 in exchange for Sue. [Black Hills] scientists wrote a check to Williams on August 27, 1990, which he accepted and cashed in full payment for Sue." 2d Amended Compl., ¶ II, at 1. Thus, Black Hills alleged that it owned the fossil outright, not that it leased it or had some possessory interest that did not amount to full ownership. In light of this allegation, we can only construe its request that the district court order the "United States to return the fossil to [Black Hills]" as a claim for permanent possession of Sue. *Id.* at 5. Determining whether Black Hills is entitled to permanent possession necessarily requires determining which party actually owns the fossil. Thus, we must determine whether the transaction between Williams and Black Hills transferred title of Sue to Black Hills.

The ownership issue depends on our construction of several statutes governing Indian trust land. Sue Hendrickson discovered the fossil on land to which the United States holds legal title in trust for Williams, an individual Indian. Under the trust instrument, the United States will hold the land "in trust for the sole use and benefit of" Williams until the trust relationship expires on September 23, 1994. The United States acquired the land pursuant to the Indian Reorganization Act of 1934 ("the IRA"), *see* 25 U.S.C. § 465, and issued the trust patent to Williams pursuant to a provision of the General Allotment Act of 1887 ("the GAA"), *see* 25 U.S.C. § 348.[3] Until the trust expires in 1994, Williams is a beneficial owner of the land, retaining certain judicially-recognized rights but lacking the absolute right to dispose of the land as he pleases.

[4] Other provisions of the IRA reflect the limits of Williams' interest in his trust land. Section four of the IRA, subject to several exceptions not relevant here, prohibits the "sale, devise, gift, exchange, or other transfer of restricted" Indian trust lands. *Id.* § 464 (codifying § 4 of the IRA). On application of Indian owners, however, the Secretary has discretion "to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under [the IRA]." *Id.* § 483; *see also* 25 C.F.R. § 152.22 (1993) (providing that "[t]rust or restricted lands ..., or any interest therein, may not be conveyed without the approval of the Secretary"); *id.* § 152.23 (describing the application and approval process). These statutes and regulations establish a scheme by which beneficial owners of Indian land such as Williams may alienate all or part of their interest before their trust instruments expire. Outside of the permitted transactions not applicable here, the only way such owners may alienate an interest in their trust land is by securing the prior approval of the Secretary. An attempted sale of an interest in Indian trust land in violation of this requirement is void and does not transfer title. *See Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir.1985), *reversed on other grounds*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986).

Here, Black Hills claims that it purchased the right to excavate Sue from Williams for $5000. Williams did not apply to the Secretary for prior approval of this transaction nor did the Secretary ever approve it. All parties agree that the fossil is now personal property because it has been severed from the land. In *Starr v. Campbell*, 208 U.S. 527, 534, 28 S.Ct. 365, 367, 52 L.Ed. 602 (1908), however, the Supreme Court held that timber from Indian trust land that the beneficial owner sold was subject to the trust patent's restraint on alienation even though the timber became personal property after the purchaser severed it from the land.[4]

3. The IRA ended the federal government's policy of allotting tribal land in severalty to individual Indians. *See* 25 U.S.C. § 461. Under 25 U.S.C. § 335, however, provisions of the GAA continue to apply "to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians," "[u]nless otherwise specifically provided." The relevant GAA provision that applies here is 25 U.S.C. § 348, which governs the trust relationship between the government and the individual Indian.

4. The Supreme Court has held that a beneficial owner of Indian trust land could sell timber from his land without violating the restraint on alienation because "the cutting [wa]s incidental to the

[5] Thus, the relevant inquiry for purposes of assessing the validity of the transaction is whether the fossil was personal property or land before Black Hills excavated it. If it was land within the meaning of the relevant statutes and regulations, the transaction between Williams and Black Hills is void and the United States holds Sue in trust for Williams because the trust continued in Sue when she became personalty. *Cf. United States v. Brown*, 8 F.2d 564, 566 (8th Cir.1925) (explaining in the context of Indian trust land that "no change of form of property divests it of a trust[;] [a] substitute takes the nature of the original and stands charged with the same trust"), *cert. denied*, 270 U.S. 644, 46 S.Ct. 210, 70 L.Ed. 777 (1926).

[6] Whether the fossil was "land" within the meaning of both 25 U.S.C. § 464 and 25 U.S.C. § 483 is a matter of federal law. Because Congress has provided no definition of "land" applicable to these statutes, however, we may refer to state property law for guidance. *See United States v. Certain Real Property at 2525 Leroy Lane*, 910 F.2d 343, 349 (6th Cir.1990) (discussing federal forfeiture statutes), *cert. denied*, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 676, 99 S.Ct. 2529, 2542, 61 L.Ed.2d 153 (1979) (finding that state property law controlled title dispute between Indian and non-Indian claimants to land even though issue was ultimately one of federal law). South Dakota law denominates two classes of property: "[r]eal or immovable" property and "[p]ersonal or movable" property. S.D. Codified Laws Ann. § 43–1–2. "Real or immovable property consists of: (1) Land; (2) That which is affixed to land; (3) That which is incidental or appurtenant to land; (4) That which is immovable by law. Every kind of property that is not real is personal." *Id.* § 43–1–3. "Land," in turn, "is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." *Id.* § 43–1–4.

We hold that the fossil was "land" within the meaning of § 464 and § 483. Sue Hendrickson found the fossil embedded in the land. Under South Dakota law, the fossil was an "ingredient" comprising part of the "solid material of the earth." It was a component part of Williams' land, just like the soil, the rocks, and whatever other naturally-occurring materials make up the earth of the ranch. Black Hills makes several arguments to the contrary, none of which we find persuasive. That the fossil once was a dinosaur which walked on the surface of the earth and that part of the fossil was protruding from the ground when Hendrickson discovered it are irrelevant. The salient point is that the fossil had for millions of years been an "ingredient" of the earth that the United States holds in trust for Williams. The case very well might be different had someone found the fossil elsewhere and buried it in Williams' land or somehow inadvertently left it there. Here, however, a Tyrannosaurus rex died some 65 million years ago on what is now Indian trust land and its fossilized remains gradually became incorporated into that land. Although it is movable, personal property now, at the time Hendrickson discovered the fossil it was part of Williams' land and thus is subject to § 464 and § 483. As in *Starr*, 208 U.S. at 534, 28 S.Ct. at 367, where an Indian sold timber constituting 15/16 of the value of the land, we would render the statutory restraint on alienation here essentially meaningless if Williams could transfer the right to excavate a priceless fossil derived from otherwise nondescript land without the Secretary's permission. Because he did not seek the Secretary's approval, we hold that Williams' attempted sale to Black Hills is void [5] and that the United States holds Sue

preparation of [the] land for agricultural uses." Felix S. Cohen, *Handbook of Federal Indian Law*, at 539 n. 94 (1982 ed.) (citing *United States v. Paine Lumber*, 206 U.S. 467, 473–74, 27 S.Ct. 697, 699–700, 51 L.Ed. 1139 (1907)). The Court distinguished *Paine*, however, in *Starr*. In *Starr*, the Court found the timber subject to the restraint on alienation because the timber constituted 15/16 of the value of the land and the land was "timber land" unsuitable for farming. 208 U.S. at 534, 28 S.Ct. at 367. Holding otherwise, the Court reasoned, would reduce the restraint on alienation to "small consequence." *Id.* Thus, *Paine* does not apply here because Sue was a valuable part of the land and nothing in the record suggests that she was excavated to clear the land for farming or other similar purposes.

5. There is an ongoing dispute between Williams and Black Hills regarding this transaction. We intimate no opinion as to the remedies Black Hills may have under state law as to its $5000 payment to Williams. Moreover, because Black Hills does not argue that it acquired anything

in trust for Williams pursuant to the trust patent.

[7] Black Hills argues, however, that the trust relationship between Williams and the United States does not govern the fossil. It claims that the government's trust duties over Williams' land are limited to safeguarding the land base of the reservation through restricting alienation of the land and preserving the land's tax-exempt status. The government's seizure of the fossil, it asserts, exceeded the scope of the trust because no statutes regulate the management of fossils on Indian trust land and personal property such as the fossil is unrelated to the land base. Black Hills cites *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), for support.

In *Mitchell I*, individual Indians sued the United States for mismanaging timber resources on trust land of which they were the beneficial owners. The Supreme Court found that the GAA, the statute under which the Indians had received their beneficial interests in the land, did not "impose any duty upon the Government to manage timber resources." 445 U.S. at 542, 100 S.Ct. at 1353. Rather, the GAA created only a "limited trust relationship" that sought "to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *Id.* at 542, 544, 100 S.Ct. at 1353, 1354. In *Mitchell II*, however, the Court found that, even though the GAA was not a basis for liability, the United States could be liable for damages for mismanaging the timber because an elaborate statutory and regulatory scheme imposed fiduciary duties on the government relating to the management of timber resources on Indian trust land. 463 U.S. at 226, 103 S.Ct. at 2972. *Mitchell I* and *Mitchell II*, Black Hills claims, together compel the conclusion that the trust relationship between the government and Williams does not encompass the attempted sale of Sue because the absence of a statutory scheme governing fossils means that the government has only limited trust duties where fossils are involved. The limited duty of preventing alienation of the land, it argues, does not include preventing sales of fossils.

We reject the Black Hills' argument that the *Mitchell* cases suggest that the government exceeded the scope of its trust relationship with Williams. First, the fiduciary duties of the government to beneficial owners of trust land, the issue that the *Mitchell* cases addressed, and the ability of beneficial owners to alienate trust land, the issue here, are different questions. Thus, that there are no statutes or regulations specifically governing the sale of fossils is not important. The absence of such regulation only suggests that the government could not be liable in damages to Williams for breaching alleged fiduciary duties relating to the management of fossils on his land. It does not, however, affect the validity of Williams' attempted sale of the fossil to a third party because there *are* statutes and regulations governing the alienation of interests in Indian trust land, such as fossils. Moreover, the Court's holding in *Mitchell I* that the GAA imposed only limited trust duties on the government does not help Black Hills. Indeed, Congress enacted the GAA to prevent alienation of Indian trust land. 445 U.S. at 542, 100 S.Ct. at 1353. Because the fossil was part of Williams' trust land and he failed to secure approval for his attempted sale of the right to excavate it, we hold that the United States' seizure of the fossil was a proper exercise of its trust status under the GAA.[6] Finally, nothing in either *Mitchell* case suggests that Congress intended that the goal of preventing alienation of the land not apply to interests in such land, like fossils, that become personal property when severed from the land.

[8] Black Hills next argues in effect that holding Williams' sale invalid is bad policy. It asserts that Williams was competent to

less than title to Sue, we need not decide whether Williams could have leased Sue or transferred other rights to Black Hills.

6. The government seized the fossil pursuant to a search warrant as part of a criminal investigation. Black Hills argues that the government cited violations of the Antiquities Act as one basis for the seizure knowing that the Act did not apply. We need not evaluate the government's articulated rationale for the seizure, however, because we conclude that the seizure was within the scope of the trust relationship with Williams.

sell the fossil even if it was an interest in land and that finding the sale invalid would undermine the current legislative trend favoring tribal self-determination. These points are matters of policy for Congress to consider, not federal courts. The current statutory scheme reflects Congress's desire to protect beneficial owners of Indian trust land like Williams regarding disposition of interests in such land. *See* 25 U.S.C. §§ 348, 464, 483; *see also Tooahnippah v. Hickel*, 397 U.S. 598, 609, 90 S.Ct. 1316, 1323, 25 L.Ed.2d 600 (1970) (explaining that the GAA's legislative history "reflects the concern of the Government to protect Indians from improvident acts or exploitation by others"). Congress may very well determine that the historic practice of shielding beneficial owners from their own improvident decisions, unscrupulous offerors, and whatever other evils the enacting Congresses contemplated decades ago is no longer wise.[7] Until it does, however, we are bound to apply the statutes and regulations forbidding such owners from alienating trust land without the Secretary's approval.

[9, 10] Black Hills and *amici curiae* the Libertarian Party of South Dakota and the National Libertarian Party make several other brief arguments. First, we reject *amici*'s suggestion that we remand the case to the Secretary to consider *nunc pro tunc* approval of the sale. The statute provides that "application of the Indian owners" is a prerequisite to the Secretary's approval of conveyances of trust land. 25 U.S.C. § 483. The Secretary may not consider the transaction at issue here because Williams has never submitted an application. Moreover, we reject Black Hills' argument that the United States lacks standing to claim trust ownership of Sue because neither the Secretary nor Williams are parties. Williams is not a necessary party, *see Heckman v. United States*, 224 U.S. 413, 444, 32 S.Ct. 424, 434, 56 L.Ed. 820 (1912), and the United States may claim trust title without the Secretary because the trust patent names it as trustee.

[11] We also reject Black Hills' claim that the district court's decision violated its due process rights because the government seized the fossil without a pre-deprivation hearing and because Black Hills added value to Sue that it will be unable to recoup. Because we find that Black Hills has no interest in Sue, we reject its claim that the lack of a pre-deprivation hearing violated its rights. Moreover, although it is unfortunate that Black Hills spent a great deal of time and resources adding value to a fossil it does not own, concluding that Black Hills' transaction with Williams is void does not deprive Black Hills of due process where it had no interest in the fossil and it could have taken any number of steps to protect itself in the first place. At the very least, for instance, that the fossil was embedded in land located within the boundaries of the Cheyenne River Sioux Indian Reservation should have alerted Black Hills to the possibility that the federal government had some interest in Sue. Because it did not, however, we hold that the United States holds Sue in trust for Williams pursuant to the trust patent.

C. Rule 11 Sanctions

[12] Counsel for Black Hills, Joseph Butler, challenges the district court's order imposing sanctions under Fed.R.Civ.P. 11[8] on him for naming the School of Mines as a defendant in the first amended complaint. The court awarded the School of Mines attorney's fees because it found that the school was not a proper defendant to Black Hills' quiet title action,[9] reasoning that the school had "no conceivable basis to assert any rights

7. Congress has already eliminated many of the protections earlier statutes provided for Indians. Section 483 itself, for instance, allows Indians to apply to the Secretary for removal of alienation restrictions. Thus, the statutes reflect the trend toward Indian self-determination. Although it has diminished the practice of protecting Indians, however, Congress has not completely eliminated it. Williams was free to request that the government end the trust or that he be allowed to alienate his land, but he did not. Because he did not, the vestiges of protection that remain still apply.

8. The amendments to Rule 11 that went into effect on December 1, 1993, do not affect our analysis.

9. As we noted above, Black Hills' second amended complaint sought the return of Sue and abandoned the quiet title claim. At issue here is the district court's decision to sanction Butler for naming the School of Mines a defendant in the case when Black Hills was asking the court to quiet title.

to the fossil" and "was nothing more than a mere depository of the fossil." D.Ct.Mem. Op. and Order at 3–4 (Sept. 8, 1992).

[13–15] We review the district court's imposition of sanctions under Rule 11 for an abuse of discretion. *Miller v. Bittner*, 985 F.2d 935, 938 (8th Cir.1993). The district court's task is to ascertain whether the attorney met the objective reasonableness standard. *Id.* (citations omitted). Improperly naming a party in a suit justifies Rule 11 sanctions when "joining the party [is] baseless or lacking in plausibility." *Community Elec. Serv. of Los Angeles v. National Elec. Contractors Assoc.*, 869 F.2d 1235, 1245 (9th Cir.) (citing *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.1987)), *cert. denied*, 493 U.S. 891, 110 S.Ct. 236, 107 L.Ed.2d 187 (1989).

We find that Butler's decision to name the School of Mines as a defendant here was not baseless or lacking in plausibility. Initially, Black Hills framed its case as a quiet title action. At the time Black Hills named it a defendant in the first amended complaint, the School of Mines was in possession of Sue. The district court, citing 74 C.J.S. *Quieting Title* § 54, found that the School of Mines had no "material subsisting interest" in Sue because it possessed her merely as an agent for the government and thus was not a proper party. D.Ct.Mem.Op. and Order at 3. The court's analysis of the merits of the School of Mines' status as a proper party would have been the correct inquiry on a motion to dismiss. It was not, however, the correct inquiry on a motion for Rule 11 sanctions.

Rather, as *Community Electric Service* suggests, the focus in the Rule 11 context should be on the plausibility of including the School of Mines as a party at the complaint stage. We think that the School of Mines' possession of Sue, albeit as a "depository" for the government, gave Black Hills a plausible argument that the School of Mines had a sufficient interest in the property to be named as a defendant in a quiet title action. Indeed, the district court itself noted that "in some circumstances possession of the object in dispute may be enough to justify suing the possessor in a quiet title action." *Id.* Case law on this issue is sparse and we will not force Butler to bear the burden of Rule 11 sanctions where it is unclear precisely in what "circumstances" possession is enough to sue the possessor. *Cf. Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir.1990) (reversing award of Rule 11 sanctions where plaintiff's claim, although ultimately unsuccessful, involved "the complexities of New York long arm jurisprudence"), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991). Butler had a plausible claim that the School of Mines' possession gave it the "material subsisting interest" in Sue needed to render it a proper party in the case.

[16] Moreover, regardless of whether the School of Mines asserted an ownership interest in Sue, the fact remains that it retained possession of her. There is ample authority for the proposition that the court in a quiet title action, in order to afford complete relief, may order that a defendant relinquish possession of the subject property to the plaintiff. *See* 74 C.J.S. *Quieting Title* §§ 96, 108 (1951). Thus, naming the School of Mines as a defendant here was not baseless because the school clearly had an interest in Sue—possession—that a quiet title action could affect; failure to include the School of Mines might have required Black Hills to bring an entirely different action to enforce its right to possession if the court found that it had such a right. Once the School of Mines represented in open court that it would abide by any order the district court made and would not assert any separate interest in Sue, counsel for Black Hills immediately assented to dismissal of the school from the case. *See* Status Conference Tr. at 16. Thus, we hold that the district court abused its discretion in imposing Rule 11 sanctions on Butler. Although naming the School of Mines as a defendant in the first amended complaint ultimately proved to be unnecessary, Butler acted reasonably under the existing facts and law.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court that the United States holds Sue in trust for Williams pursuant to the trust patent, and we reverse the district court's order imposing Rule 11 sanctions on Joseph Butler.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Feb. 2, 1994.

(No. 93-1602)

The suggestion for rehearing en banc is denied.

[17] The petition for rehearing by the panel is also denied with the following explanation. In its petition for rehearing, Black Hills Institute of Geological Research (Black Hills) relies on *United States v. Good*, —— U.S. ——, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), for the claim that it was entitled to an adversary hearing before the Department of Justice seized the fossil "Sue" from it. In *Good*, it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing. *See id.* at ——-——, 114 S.Ct. at 496. This fact distinguishes *Good* from the instant case, where the panel determined that Black Hills did not own the property in question. *See Black Hills Inst. of Geological Research v. United States Dep't of Justice*, 12 F.3d 737, 742–43 (8th Cir.1993).

UNITED STATES of America, Plaintiff–Appellee,

v.

Arthur James WESSELS, Defendant–Appellant.

No. 93–2678.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 11, 1993.

Decided Dec. 16, 1993.

Rehearing and Suggestion for Rehearing En Banc Denied Feb. 9, 1994.

Defendant was convicted in the United States District Court, Southern District of Iowa, Charles R. Wolle, Chief Judge, of conspiracy to distribute marijuana, of conspiracy to distribute methamphetamine, and of using and carrying firearm in relation to drug trafficking crime, and he appealed. The Court of Appeals, Susan Webber Wright, District Judge, sitting by designation, held that: (1) evidence supported convictions; (2) indictment was not fatally defective; (3) no double jeopardy violation occurred; (4) defendant was not entitled to jury instruction on abandonment of conspiracy; (5) statutory penalties were properly applied; but (6) court should not have taken judicial notice of type of methamphetamine involved.

Affirmed and remanded for further findings.

1. Conspiracy ⇐24.15

Mere inactivity does not end a conspiracy.

2. Conspiracy ⇐44.2

Defendant has burden to prove that he withdrew from conspiracy.

3. Conspiracy ⇐47(12)

Substantial evidence supported conclusion that defendant had not withdrawn from conspiracy to distribute methamphetamine and, thus, supported conviction, despite defendant's contention that, by the time he was arrested all other participants had been arrested, had ceased their activities, or had withdrawn from conspiracy; searches of defendant's dwelling revealed marijuana, drug notes, scale, and several weapons, and not all participants were in custody or had affirmatively withdrawn from conspiracy at time of first search.

4. Weapons ⇐17(4)

Substantial evidence supported conviction for carrying and using firearms in relation to drug trafficking offense; during searches of defendant's dwelling, police found marijuana, drug notes, scale, and three loaded firearms, one of which was located about three feet away from the marijuana.

5. Criminal Law ⇐1144.13(3), 1159.2(5)

Jury verdict must be sustained if there is substantial evidence, taking view most favorable to government, to support it.

6. Indictment and Information ⇐176

There was no fatal variance between indictment which charged defendant with using and carrying firearms in relation to drug

II. Selected Federal Statutes Cited in 12 F.3d 737

(1) 25 U.S.C.A. § 348

Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void[.] . . .

(Feb. 8, 1887, c. 119, § 5, 24 Stat. 389; Mar. 3, 1901, c. 832, § 9, 31 Stat. 1085; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100; Nov. 7, 2000, Pub.L. 106-462, Title I, § 106(a)(2), 114 Stat. 2007; Oct. 27, 2004, Pub.L. 108-374, § 6(c), 118 Stat. 1805; May 12, 2006, Pub.L. 109-221, Title V, § 501(b)(2), 120 Stat. 344.)

(2) 25 U.S.C.A. § 5108

(Formerly cited as 25 USCA § 465 [and is so cited in 12 F.3d 737])

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians. . . .

Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

(3) 25 U.S.C.A. § 5107

(Formerly cited as 25 USCA § 464 [and is so cited in 12 F.3d 737])

Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved[.] . . .

(June 18, 1934, c. 576, § 4, 48 Stat. 985; Sept. 26, 1980, Pub.L. 96-363, § 1, 94 Stat. 1207; Nov. 7, 2000, Pub.L. 106-462, Title I, § 106(c), 114 Stat. 1991; Oct. 27, 2004, Pub.L. 108-374, § 6(d), 118 Stat. 1805; Dec. 30, 2005, Pub.L. 109-157, § 8(b), 119 Stat. 2952; May 12, 2006, Pub.L. 109-221, Title V, § 501(b)(1), 120 Stat. 343.)

(4) 25 U.S.C.A. § 5134

(Formerly cited as 25 USCA § 483 [and is so cited in 12 F.3d 737])

Sale of land by individual Indian owners

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of the Act of June 18, 1934 (48 Stat. 984), or the Act of June 26, 1936 (49 Stat. 1967).

(May 14, 1948, c. 293, 62 Stat. 236.)

III. The 2012 Regulations of the Bureau of Indian Affairs

(1) U.S. Department of the Interior, Indian Affairs Manual**,** Part 59 Environmental and Cultural Resources Management, Chapter 7 Paleontological Resources (incorporated pdf)

INDIAN AFFAIRS
DIRECTIVES TRANSMITTAL SHEET

(modified DI-416)

DOCUMENT IDENTIFICATION NUMBER	SUBJECT	RELEASE NUMBER
59 IAM 7		# 10-32
FOR FURTHER INFORMATION Division of Environmental and Cultural Resources Management	**Paleontological Resources**	DATE APR 30 2012

EXPLANATION OF MATERIAL TRANSMITTED:

This chapter establishes policy on the specific requirements and responsibility of Indian Affairs (IA) headquarters and field staff for the protection and management paleontological resources on Indian lands.

Weldon B. Loudermilk
Acting Deputy Assistant Secretary – Indian Affairs (Management)

FILING INSTRUCTIONS:

Remove: None

Insert: 59 IAM 7 (New)

1.1 Purpose. This chapter establishes policy on the specific requirements and responsibility of Indian Affairs (IA) headquarters and field staff for the protection and management paleontological resources on Indian lands.

1.2 Scope. This policy is specific to imbedded fossils on all Indian lands as defined.

1.3 Policy. It is the policy of IA that:

A. Before any person excavates or removes any imbedded fossil from Indian lands, Bureau of Indian Affairs (BIA) issue a permit under the authority of the Secretary of the Interior. No permit is required for exploration or surface collecting of non-imbedded fossils; however, these exempted activities are subject to tribal jurisdiction and/or landowner consent.

B. Permits adhere to 25 C.F.R. 162.100 *et seq.*; are subject to compliance with the National Environmental Policy Act of 1969; National Historic Preservation Act of 1966 (as amended through 2000), Section 106; and Endangered Species Act 1973, Section 7; and must not include any sale or transfer of title.

C. The BIA ensure applicants: (1) are professional or commercial collectors; (2) have the written consent of the tribal government for tribally-owned Indian land; or have not less than the applicable percentage of the title-holders interest for individually owned Indian land, as required by 25 U.S.C. 2218 (b); and make a good faith effort to notify all interest title-holders in individually owned land; (3) arrange with the consenting parties the return or disposition of fossils recovered, where no sale of the fossils is intended (such arrangements shall be included in the terms and conditions of the permit); (4) notify any land lessees in the proposed permit area and/or, in the case of individually owned Indian land, the tribe having jurisdiction over that land; and (5) if necessary, obtain a bond sufficient to cover the cost for full restoration of any area damaged by the excavation and any associated activity (e.g., transporting materials to and from the excavation).

D. After ensuring the elements of 1.3 C. have been met, permits will be issued as letters of authorization from the Regional Director addressed to the qualified permittees, and will include the following basic elements:

(1) A brief description of the type of activity permitted;

(2) A definition of the land area where the permitted activity will occur;

(3) A time frame under which the permit is valid;

(4) A clear statement of the disposition of any fossils recovered; and

(5) Any other terms and conditions relevant to the specific lands under consideration.

E. All sales of imbedded fossils from Indian lands must be approved under the authority of the Secretary by the respective Regional Director. Fossils to be sold are subject to 25 C.F.R. 152.17 and appraisals under 25 C.F.R. 152.24. The BIA may advertise the

sale of fossils on behalf of an Indian landowner, in agreement with the procedures in 25 C.F.R. 152.26-29. The BIA is not required to assist with, nor accept any liability for marketing, preparing, storing, packing, shipping, transporting or handling any fossils.

1.4 Authority. The authority and responsibility for paleontological resources appears in the following laws, regulations and legal decisions and opinions.

A. Statutes

(1) The Paleontological Resources Preservation Act of 2009. 47 U.S.C. 470aaa (applies to Federal lands and not Indian lands).

(2) The National Environmental Policy Act of 1969. 42 U.S.C. 4321 *et seq.*

(3) 16 U.S.C. 470 *et seq.* The National Historic Preservation Act of 1966 (as amended, through 2000) Section 106.

B. Guidance

(1) 25 C.F.R. 152 Issuance of Patents in Fee, Certificates of Competency, Removal of Restrictions, and sale of Certain Indian lands.

(2) 25 C.F.R. 162 Leases and Permits, Section 100 et seq.

(3) 41 C.F.R. 201 Federal Information Resources Management.

(4) 381 DM 1 Origination of Records and Information. Directives Management.

(5) Black Hills Institute of Geological Research v. United States, 812 F.Supp.1015, 1021 (D.S.D 1993)

(6) Black Hills Institute of Geological Research v. United States, 12 F.3d 737, 742 (8th Cir.1993), cert. denied, 115 S.Ct.61 (1994)

(7) Solicitor's Opinion, Field Solicitor, Santa Fe to State Director, Bureau of Land Management (BLM), Santa Fe: Fossil Ownership – Severed Surface and Mineral Estate, November 22, 1978.

(8) Solicitor's Opinion, Associate Solicitor, Energy and Minerals to Director, BLM: Paleontological Resources on Public Lands, January 17, 1986

(9) Solicitor's Opinion, Field Solicitor, Pacific Northwest Region to Area Director, BIA, Billings: Applicability of the 1906 Antiquities Act to Fossil Collecting on the Blackfeet Reservation, January 30, 1991.

(10) Solicitor's Opinion, Field Solicitor, Pacific Northwest Region to Area Director, BIA, Billings: Fossil Removal on Individual Indian Trust lands on the Blackfeet Reservation, May 21, 1996.

(11) Solicitor's Opinion, Associate Solicitor, Division of Indian Affairs to Acting Deputy Commissioner, Indian Affairs: Review of Paleontological Policy of the Bureau of Indian Affairs, July 12, 2002.

1.5 Responsibilities.

A. Assistant Secretary - Indian Affairs discharges the duties of the Secretary with the authority and direct responsibility to protect and preserve Indian trust assets. Provides program and budget support for IA programs and operations ensuring they are in compliance with relevant statutes and Departmental directives.

B. Director, Bureau of Indian Affairs ensures appropriate organizational arrangements, resources, and personnel are available to implement paleontological resources management and protection. Reviews and approves or disapproves Region specific permitting procedures.

C. BIA Regional Directors issue permits, approve sales and otherwise implement the provisions of this policy at the Regional level. Regional Directors may, as appropriate, delegate these functions to Agency Superintendents or Field Office Directors.

D. BIA Agency Superintendents and Field Office Directors may approve sales and otherwise implement the provisions of this policy at the Agency or Field Office level when delegated the authority by their Regional Director.

1.6 Definitions.

A. Fossil. Any remains, impressions or traces of organisms preserved in or on the earth's crust. This definition does not include (a) fossil fuels, such as gas, oil or coal; (b) objects which were carved or sculpted from fossils by humans; (c) objects of antiquity as defined in the Antiquities Act of 1906 (16 U.S.C. 431-433); (d) archaeological resources as defined in the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470bb(1) Section 3(1); or (e) cultural items, as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001) Section 2.

B. Imbedded. If a fossil cannot be moved from its location without the aid of a tool or instrument including, but not limited to, a penknife, nail file, stick or hand held rock then it is imbedded. For the purposes of this policy, if any part of a fossilized organism is imbedded, the entire organism is considered imbedded.

C. Indian lands. Lands of Indian tribes or Indian individuals which are either held in trust by, or subject to restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or Indian individual. Fossils are considered part of the surface estate.

D. Paleontological resources. Fossils for the purposes of this policy.

E. Permit. Used the same as "lease," in 25 C.F.R. 162.101; a written agreement between Indian landowners and a tenant or lessee whereby the tenant or lessee is granted a right to possession of Indian land for a specified purpose and duration.

F. Person. For the purposes of this policy, means an individual, corporation, partnership, trust, institution, association, or any other governmental or private entity.

G. Professional collector. A person who excavates or collects paleontological resources solely for the purpose of scientific study or public education, and who is academically qualified or associated with an institution that is qualified to conduct scientific studies or educate the public.

H. Commercial collector. A person who excavates and/or collects paleontological resources for the purpose of selling or marketing them to another person.

[Note: The statute cited at the end of this regulation, which is called "The Paleontological Resources Preservation Act of 2009" with the reference 47 U.S.C. 470aaa, is, in fact, a section of the Omnibus Federal Lands Management Act of 2009, which is found in 16 U.S.C. 470aaa et seq. As the citation notes it does not apply to "land of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States." You need not be concerned with this statute, except for the following provision and that only by way of contrast with what the 2012 regulation requires or allows:]

(2) 16 U.S.C. § 470aaa-3. Collection of paleontological resources

(a) Permit requirement.

(1) In general. Except as provided in this subtitle [16 USCS §§ 470aaa et seq.], a paleontological resource may not be collected from Federal land without a permit issued under this subtitle [16 USCS §§ 470aaa et seq.] by the Secretary.

(2) Casual collecting exception. The Secretary shall allow casual collecting without a permit on Federal land controlled or administered by the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service, where such collection is consistent with the laws governing the management of those Federal land and this subtitle [16 USCS §§ 470aaa et seq.].

(3) Previous permit exception. Nothing in this section shall affect a valid permit issued prior to the date of enactment of this Act [enacted March 30, 2009].

(b) Criteria for issuance of a permit. The Secretary may issue a permit for the collection of a paleontological resource pursuant to an application if the Secretary determines that--

(1) the applicant is qualified to carry out the permitted activity;

(2) the permitted activity is undertaken for the purpose of furthering paleontological knowledge or for public education;

(3) the permitted activity is consistent with any management plan applicable to the Federal land concerned; and

(4) the proposed methods of collecting will not threaten significant natural or cultural resources.

(c) Permit specifications. A permit for the collection of a paleontological resource issued under this section shall contain such terms and conditions as the Secretary deems necessary to carry out the purposes of this subtitle [16 USCS §§ 470aaa et seq.]. Every permit shall include requirements that--

(1) the paleontological resource that is collected from Federal land under the permit will remain the property of the United States;

(2) the paleontological resource and copies of associated records will be preserved for the public in an approved repository, to be made available for scientific research and public education; and

(3) specific locality data will not be released by the permittee or repository without the written permission of the Secretary.

(d) Modification, suspension, and revocation of permits.

(1) The Secretary may modify, suspend, or revoke a permit issued under this section--

(A) for resource, safety, or other management considerations; or

(B) when there is a violation of term or condition of a permit issued pursuant to this section.

(2) The permit shall be revoked if any person working under the authority of the permit is convicted under section 6306 [16 USCS § 470aaa-5] or is assessed a civil penalty under section 6307 [16 USCS § 470aaa-6].

(e) Area closures. In order to protect paleontological or other resources or to provide for public safety, the Secretary may restrict access to or close areas under the Secretary's jurisdiction to the collection of paleontological resources.

IV. Selected South Dakota Statutes

(1) South Dakota Codified Laws § 15-2-1

Commencement of civil actions limited by prescribed periods--Manner of objecting to commencement

Civil actions can only be commenced within the periods prescribed in this title after the cause of action shall have accrued except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer or other responsive pleading.

Source: South Dakota Code 1939 & Supp 1960, § 33.0201.

(2) South Dakota Codified Laws § 15-2-3.

Cause of action based on fraud accruing on discovery or notice

In an action for relief on the ground of fraud the cause of action shall not be deemed to have accrued until the aggrieved party discovers, or has actual or constructive notice of, the facts constituting the fraud.

Source: SDC 1939 & Supp 1960, § 33.0235; SL 1961, ch 178.

[Note: The South Dakota courts have refused to expand this statute beyond what it says.]

(3) South Dakota Codified Laws § 15-2-13

Contract obligation or liability--Statutory liability--Trespass--Personal property--Injury to noncontract rights--Fraud--Setting aside corporate instrument

Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:

(1) An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in §§ 15-2-6 to 15-2-8, inclusive, and subdivisions 15-2-15(3) and (4);

(2) An action upon a liability created by statute other than a penalty or forfeiture; excepting those mentioned in subdivisions 15-2-15(3) and (4);

(3) An action for trespass upon real property;

(4) An action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property;

(5) An action for criminal conversation or for any other injury to the rights of another not arising on contract and not otherwise specifically enumerated in §§ 15-2-6 to 15-2-17, inclusive;

(6) An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery;

(7) An action to set aside any instrument executed in the name of a corporation on the ground that the corporate charter had expired at the time of the execution of such instrument.

Source: SDC 1939, § 33.0232 (4); SL 1941, ch 151; SL 1945, ch 144; SL 1945, ch 145, § 1; SL 1947, ch 153, § 2; SL 1953, ch 198, § 1.

[Note: You may assume that none of the exceptions is of any possible relevance.]

(4) South Dakota Codified Laws § 15-3-1

Seizin or possession within twenty years required for action to recover real property or possession

No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

Source: South Dakota Code 1939 & Supp 1960, § 33.0217.

SDCL § 15-3-14
(5) South Dakota Codified Laws § 15-3-14.

Tolling of statute during disability--Time for commencement of action after removal of disability

If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or service out of the same, be, at the time such title shall first descend or accrue, either:

(1) Within the age of twenty-one years;

(2) Mentally ill; or

(3) Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life;

the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability, but such action shall not be commenced, or entry, or defense made after that period.

Source: SDC 1939 & Supp 1960, § 33.0227.

(6) South Dakota Codified Laws § 43-1-1

Property defined

In this code, the thing of which there may be ownership is called property.

Source: CivC 1877, § 159; CL 1887, § 2675; RCivC 1903, § 182; RC 1919, § 252; SDC 1939, § 51.0201.

(7) South Dakota Codified Laws § 43-1-2

Classes of property

Property is either:

(1) Real or immovable; or

(2) Personal or movable.

Source: CivC 1877, § 162; CL 1887, § 2678; RCivC 1903, § 185; RC 1919, § 255; SDC 1939, § 51.0101

(8) South Dakota Codified Laws § 43-1-3

Real and personal property distinguished

Real or immovable property consists of:

(1) Land;

(2) That which is affixed to land;

(3) That which is incidental or appurtenant to land;

(4) That which is immovable by law.

Every kind of property that is not real is personal.

Source: CivC 1877, §§ 163, 167; CL 1887, §§ 2679, 2683; RCivC 1903, §§ 186, 190; RC 1919, §§ 256, 260; SDC 1939, § 51.0102.

(9) South Dakota Codified Laws § 43-1-4

Land as solid material of earth

Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

Source: CivC 1877, § 164; CL 1887, § 2680; RCivC 1903, § 187; RC 1919, § 257; SDC 1939, § 51.0103.

(10) South Dakota Codified Laws § 43-1-5

Appurtenant to land defined--Mining machinery and equipment

A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat, from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.

Source: CivC 1877, § 166; CL 1887, § 2682; RCivC 1903, § 189; RC 1919, § 259; SDC 1939, § 51.0105.

(11) South Dakota Codified Laws § 43-1-6

Law governing real property

Real property within this state is governed by the law of this state, except where the title is in the United States.

Source: CivC 1877, § 217; CL 1887, § 2733; RCivC 1903, § 240; RC 1919, § 310; SDC 1939, § 51.0401.

(12) South Dakota Codified Laws § 43-1-7

Law governing personal property

If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicile.

Source: CivC 1877, § 359; CL 1887, § 2875; RCivC 1903, § 382; RC 1919, § 470; SDC 1939, § 51.0801.

(13) South Dakota Codified Laws § 43-3

[Chapter 43-3 of the South Dakota Codified Laws contains 21 sections derived from South Dakota's version of the Field Code of 1877. You may assume that the effect of these provisions is to make South Dakota's law of future interests equivalent to that of the 'modern' common law as defined in the first part of the exam. In arguing a case before a South Dakota court, you would probably use a slightly different vocabulary from that of the common law of other states, but for purposes of the exam you may use the more usual vocabulary. You are, after all, writing for an Illinois lawyer.]

(14) South Dakota Codified Laws § 43-5-8

Rule against perpetuities not in force

The common-law rule against perpetuities is not in force in this state.

Source: Statutes at Large 1983, ch 304, § 4.

[You may assume that prior to 1983, the common-law Rule Against Perpetuities was in force in South Dakota.]

(15) South Dakota Codified Laws § 53-8-2

Contracts required to be in writing--Statute of frauds.

The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

(1) An agreement that by its terms is not to be performed within a year from the making thereof;

(2) An agreement made upon consideration of marriage, other than a mutual promise to marry;

(3) An agreement for sale of real estate or an interest therein, or lease of the same, for a period longer than one year. However, this does not abridge the power of any court to compel specific performance of any agreement for sale of real estate in case of part performance thereof; and

(4) An agreement for a loan of money or for an extension of credit, which agreement may be enforced by a beneficiary for whom the agreement was made, including, but not limited to, vendors of agricultural goods, services or products. A loan or an extension of credit made pursuant to § 51A-12-12 or chapter 54-11 is specifically exempt from the provisions of this section.

Source: CivC 1877, §§ 920, 993; CL 1887, §§ 3544, 3617; RCivC 1903, §§ 1238, 1311; RC 1919, §§ 855, 856; SDC 1939, § 10.0605; SL 1985, ch 381.

[South Dakota does not have any general statute about the form of deeds to real estate. What little authority there is on parole (oral) grants of land applies § 53–8–2(3).]

(16) Recording and Marketable Title

[South Dakota has a recording system, of the 'pure notice' type. It also has a Marketable Title Act, which would probably require the recording of any outstanding future interests in the land within 23 years of the time when the marketability of the title was to be determined. (Otherwise, the title would be 'marketable' without the future interest and the holder in due course would take free of the future interest.)]

(17) Probate Code

[Note: South Dakota adopted the Uniform Probate Code in 1995. You may assume that its provisions were in effect at all relevant times in this problem, and that they are same as those in the *Materials* beginning on p. S302.]

THE END