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**JOHNSON v. M'INTOSH AND THE SOUTH DAKOTA FOSSIL CASES**

DANA G. JIM\*

Every autumn in American law schools, future attorneys begin their introduction to the study of law by focusing on the four primary concepts of the American legal system: Contracts, Civil Procedure, Torts, and Property. Of the many cases these students will read to start their legal journey, the case of *Johnson v. M'Intosh*<sup>1</sup> is special because it brings up issues of wealth, power and politics.<sup>2</sup> This case gives students a glimpse into America's past and gives students and teachers alike the opportunity to analyze the premises that guide Supreme Court decisions.<sup>3</sup>

This Essay will not spend much time on the technical holding of the case; the law professor can do that in class. Instead, this Essay will focus on the impact of one of *Johnson's* principles on several federal cases concerning "Sue", a Tyrannosaurus Rex.<sup>4</sup> With this discussion, I hope law professors and academia will recognize that *Johnson* and the South Dakota Fossil Cases can

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1. 21 U.S. (8 Wheat.) 543 (1823).

2. See, e.g., Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 51 (1995); Steven Paul McSloy, "Because the Bible Tells Me So": *Manifest Destiny and American Indians*, 9 ST. THOMAS L. REV. 39, 42 (1996); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 310 (1993).

3. See, e.g., Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759, 761 (1997); See also G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE 1815-1835*, at 708-709 (Abridged Ed. Oxford 1991) (stating Marshall's strong beliefs in Republicanism can be observed in the *Johnson* case). See also Monette, *supra* note 2, at 53 n.100.

4. See *Black Hills Inst. v. United States*, 967 F.2d 1237 (8th Cir. 1992); *Black Hills Inst. v. United States*, 978 F.2d 1043 (8th Cir. 1992); *Black Hills Inst. v. United States*, 812 F.Supp. 1015 (D.S.D. 1993); *Black Hills Inst. v. South Dakota Sch. of Mines and Tech.*, 12 F.3d 737 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994); *Black Hills Inst. v. Williams*, 88 F.3d 614 (8th Cir. 1996).

serve as a perfect introduction to the study of property.<sup>5</sup> The life of the lawyer is legal application, legal application and legal application. These cases help the future lawyer learn how to apply the law to the facts.

In *Johnson*, we learned that Indians have rights of occupancy and use of the land under the concept of Indian title.<sup>6</sup> In addition, the case stood for the principle that the federal government had the “exclusive right to extinguish” the Indian title.<sup>7</sup> In other words, the federal government must approve the sale of Indian land. This concept of federal supremacy over the conveyance of Indian lands was codified in the early years of the federal government through the Nonintercourse Acts. Enacted in the early 1790s, these laws rendered void any land sale by Indians if the sale was not made according to “the authority of the United States,”<sup>8</sup> or “treaty or convention entered into pursuant to the constitution . . . .”<sup>9</sup>

These statutes were only the tip of the iceberg. Today, there are numerous federal statutes and regulations that govern transactions that occur on Indian land. For example, federal law mandates that a federal government official, the Secretary of the Interior, make the final decision to grant the following leases on Indian land: farming and grazing leases,<sup>10</sup> mineral leases<sup>11</sup> and oil and gas leases.<sup>12</sup> Another statute is 25 U.S.C. § 483, which governs conveyances of land. It states the following in part:

§ 483. Sale of land by individual Indian owners

*The Secretary of the Interior . . . is authorized in his discretion, and upon application of the Indian owners, . . . to approve conveyances, with respect to lands or interests in lands held by individual Indians . . . .*<sup>13</sup>

The reason for citing to these various statutes is to reinforce the most important concept of *Johnson*: the Sovereign controls Indian land conveyances.<sup>14</sup> There is no better example of illustrating the way this principle

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5. Throughout the year, *Johnson* can be used by the professor to begin discussion of various topics in property law. This helps students to learn legal application. Here are a few examples. Since the interested party in the *Johnson* case is Johnson and Graham’s lessee, what are the rights and duties of a lessee? Later in the year, the professor could describe the chain of title to the land at issue in *Johnson* in order to begin a discussion of the recording system.

6. See *Johnson*, 21 U.S. at 587.

7. See *id.* at 586.

8. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137 at 138 (1790) (current version at 25 U.S.C. § 177 (1994)).

9. Act of March 1, 1793, ch 19, § 8, 1 Stat. 329 at 330 (1793) (current version at 25 U.S.C. §177 (1994)).

10. 25 U.S.C. § 393 (1994).

11. 25 U.S.C. § 396 (1994).

12. 25 U.S.C. §396e (1994).

13. 25 U.S.C. §483 (1994) (emphasis added).

14. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 586 (1823).

of the *Johnson* case has been applied to the present day than by the story of "Sue," the Tyrannosaurus Rex fossil found in South Dakota in the early 1990s.<sup>15</sup>

### I. THE SOUTH DAKOTA FOSSIL CASES

In the hot South Dakota summer of 1990, Sue Hendrickson made a discovery that would change history. It took all of ten minutes.<sup>16</sup>

As an employee for a non-profit company named the Black Hills Institute of Geological Research, Inc., Ms. Hendrickson decided to stay behind at a dinosaur excavation after others left the area due to mechanical problems.<sup>17</sup> She spent this time "poking through the edges of a cliff."<sup>18</sup> Ten minutes later, she came across the most complete Tyrannosaurus Rex fossil ever found.<sup>19</sup> But while this fossil was seen as a paleontologist's dream, it quickly became a legal nightmare to those who found it.

First, the location of the bones became as important as the discovery itself. The bones happened to be found on land held in "trust" by the United States for Mr. Maurice Williams, a member of the Cheyenne River Sioux Tribe.<sup>20</sup> What is trust land, and why should it matter to the lawyer in this case? Recall in *Johnson* the discussion of conquest as a means of acquiring title to Indian land.<sup>21</sup> After a spirited defense of conquest, Chief Justice Marshall states the need of the Indians "to be protected" while "in the possession of their lands."<sup>22</sup> That the Indians need "to be protected" became a major theme in the late 1800s.<sup>23</sup> During this time the federal government allocated tribal land to individual Indians.<sup>24</sup>

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15. For a discussion of "Sue" in the legal literature, see Patrick K. Duffy and Lois A. Lofgren, *Jurassic Farce: A Critical Analysis of the Government's Seizure of "Sue™," A Sixty-Five Million-Year-Old Tyrannosaurus Rex Fossil*, 39 S.D. L. REV. 478, 527-28 (1994) (noting that "the government's original justification for the seizure had no basis in law," as well as other criticisms including a conclusion that the appellate court "used a strained analogy to timber resources in order to characterize Sue™ as land."); see also Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 87 (1996) (reciting the discovery of "Sue," and focusing on the "role tribes should play in the regulation of paleontological resources found on tribal lands." This article also notes several other law review articles focusing on "Sue."); see also WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 361 (mentioning "Sue" in a discussion of Indian allotments).

16. Tara McAndrew, *The Story of Sue*, STATE JOURNAL-REGISTER (Springfield, Ill.), July 3, 1998, (Magazine), at 5A, available at 1998 WL 11283387.

17. See *id.*

18. See *id.*

19. See *id.*

20. Black Hills Inst. v. United States, 812 F.Supp. 1015, 1016-17 (D.S.D. 1993).

21. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823).

22. See *id.* at 591.

23. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 132 (Rennard Strickland et

Under this system of tenure, the title to these allotment parcels would not be held by the Indian possessor. Instead, it would be held by the federal government in “trust” for him.<sup>25</sup> In other words, the United States holds the title to the land, but the Indian receives the land’s benefits.<sup>26</sup> Today, there are 10 million acres of land held in trust by the federal government for individual Indians.<sup>27</sup>

Second, the transaction that followed became critical to the case. After the discovery of these bones, the Institute paid Mr. Williams \$5,000 for title to the fossil.<sup>28</sup> To the layman, this would seem like a simple transaction between the Institute and Mr. Williams. Under the circumstances, however, the savvy lawyer should have asked if the federal government needed to be involved in that transaction.<sup>29</sup> Once it acquired title, the Institute worked for seventeen days to excavate the 65 million year old fossil, which had been nicknamed “Sue” for Ms. Hendrickson.<sup>30</sup> After transporting “Sue” to the Institute’s research center and spending over \$200,000 to restore the fossil,<sup>31</sup> the Institute’s efforts were interrupted by an early morning raid on May 14, 1992, by FBI agents, U.S. Park Rangers and members of the South Dakota National Guard.<sup>32</sup> These officers placed “Sue” in a machine shop at the South Dakota School of Mines and Technology for safekeeping.<sup>33</sup>

The United States Attorney for South Dakota sent these officers on allegations that the Institute had violated the Federal Antiquities Act.<sup>34</sup> Believing “Sue” would be damaged at the school,<sup>35</sup> the Institute sued the federal government in the United States District Court for the District of South

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al. eds., 1982) (stating that a “philanthropic aim of allotment was protection of individual Indian’s land”).

24. *See id.* at 616.

25. *See id.* at 131, 616.

26. *See* CANBY, *supra* note 15 at 234 (stating “[T]he legal title to existing allotments is held by the United States, with the entire beneficial interest being in the individual allottees.”).

27. *See* JACK UTTER, *AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS* 217 (2d ed. Univ. of Okla. 2001).

28. *Black Hills Inst. v. Williams*, 88 F.3d 614, 615 (8th Cir. 1996).

29. *See id.* at 616 (citing *Black Hills Inst. v. South Dakota Sch. Of Mines and Tech.*, 12 F.3d 737, 744 (8th Cir. 1993), which stated the “Institute could have taken any number of steps to protect itself” and that since the fossil was “embedded” in the land the Institute should have noticed “the possibility that the federal government had some interest in the [fossil]”).

30. *Black Hills Inst. v. United States*, 967 F.2d 1237, 1238, 1238 n.2, 1239 (8th Cir. 1992).

31. *Black Hills Inst. v. South Dakota Sch. Of Mines and Tech.*, 12 F.3d 737, 739 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994); *Black Hills Inst.*, 88 F.3d at 615.

32. *Black Hills Inst.*, 967 F.2d at 1239.

33. *Id.*

34. 16 U.S.C. §433 (1994); *see Black Hills Inst.*, 967 F.2d at 1238.

35. *See id.*

Dakota to have the bones returned to them. The court ruled against the Institute stating the bones were lawfully seized.<sup>36</sup>

Here is where the process of legal application in this case begins. The Institute tried another strategy to get “Sue” back. This time the Institute asked the court for the return of *personal property*.<sup>37</sup> Recognizing that ownership is the heart of property, the court focused on ownership of the fossil—to the court, personal property implicated the issue of ownership.<sup>38</sup> Accordingly, the court stated that 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.”<sup>39</sup> This gave the court the opportunity to decide an issue that it earlier had not examined: the issue of “ownership of these bones.”<sup>40</sup>

After noting several decisions that illustrated the federal government’s role in the maintenance and supervision of Indian lands,<sup>41</sup> the court looked to a specific law, 25 U.S.C. §483, which is noted above.<sup>42</sup> The district court focused on the phrase “interest in land”<sup>43</sup> and made the startling conclusion that “Sue” was an interest in land; therefore, the sale of “Sue” was subject to approval by the Secretary of the Interior.<sup>44</sup> How did the court conclude this? The court arrived at this decision by applying South Dakota laws that defined property.<sup>45</sup> According to South Dakota law, real property is made up of “land,” which consists of “the solid material of earth, whatever may be the ingredients of which it is composed, whether soil, rock, or *other substance*.”<sup>46</sup> This meant that “Sue,” a fossil, which is a “substance”, could be defined as “land” since it “composes” part of the earth in South Dakota.<sup>47</sup>

By analyzing this phrase, the district court traced back, without realizing it, to the primary principle of *Johnson*: federal government exclusivity regarding conveyances of Indian land.<sup>48</sup> This is how pervasive the *Johnson* principle is

36. *See id.*

37. *Black Hills Inst. v. United States*, 812 F.Supp. 1015, 1018 (D.S.D. 1993) (emphasis added).

38. *See id.*

39. *See id.*

40. *Black Hills Inst.*, 967 F.2d at 1238.

41. *Black Hills Inst.*, 812 F.Supp. at 1019.

42. *Id.* at 1020; *see supra* text accompanying note 9.

43. *See Black Hills Inst.*, 812 F.Supp. at 1020, 1021.

44. *Id.* at 1021 (citing 25 U.S.C. § 483 (1994); 25 C.F.R. §§ 152.22-152.23).

45. *See id.* (quoting S.D. Codified Laws §§ 43-1-1 to 43-1-4 (Michie 1997)).

46. *Id.* (quoting S.D. Codified Laws §§ 43-1-3, 43-1-4 (Michie 1997)) (emphasis added).

47. Please note that the district court held that “Sue” was an “interest in land.” *See Black Hills Inst.*, 812 F.2d 1015, 1021. However, the appellate court later ruled that “Sue” was simply “land.” *See Black Hills Inst.*, 12 F.3d 737, 742. This does not make a difference for legal application purposes since both terms are treated the same in 25 U.S.C. §483.

48. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 586 (1823).

today. The court glanced back to the facts, noting that Maurice Williams had not applied to the Secretary of the Interior to “secure approval for sale of any interest in land to the [Institute].”<sup>49</sup> Recall that the Institute paid Mr. Williams \$5,000 for title to the fossil.<sup>50</sup> Because Mr. Williams did not get prior approval for sale of the title, however, “the [Institute] acquired no right to either ownership or possession of the fossil.”<sup>51</sup> In the words of the court, the sale was “null and void.”<sup>52</sup> Thus, the Institute did not own “Sue.” But who did? More importantly, who would benefit from “Sue?”

Before finishing this legal journey, it is important to note the legal application that has occurred. Note that both the district court and appellate court have applied a statute, 25 U.S.C. §483, to the facts. For 25 U.S.C. §483 to apply, the courts had to answer two questions. First, was “Sue” “land?”/“interest in land?” Second, if “Sue” was “land?”/“interest in land,” did Maurice Williams apply to the Secretary of the Interior for approval of the sale of Sue to the Black Hills Institute of Geological Research? The appellate court answers these two questions in a way the district court did not. The following excerpt from the appellate decision is worth reading since it demonstrates a well-structured application of law to fact.

We hold that the fossil was “land” within the meaning of . . . §483. Sue Hendrickson found the fossil embedded in the land. Under South Dakota law, the fossil was in “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. . . . 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. . . . 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, the fossil it was part of Williams’ land and thus subject to . . . §483. . . . Because he did not seek the Secretary’s approval, we hold that Williams’ attempted sale to Black Hills is void and that the United States hold Sue in trust for Williams pursuant to the trust patent.<sup>53</sup>

The Institute appealed this decision to the United States Court of Appeals for the Eighth Circuit which not only affirmed the district court’s decision that the Institute did not own “Sue,”<sup>54</sup> but also narrowed the district court’s holding

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49. *Black Hills Inst.*, 812 F.Supp. at 1020.

50. *See supra* text accompanying note 25.

51. *Black Hills Inst.*, 812 F.Supp. at 1021.

52. *See id.* at 1020.

53. *Black Hills Inst.*, 12 F.3d 737, 742-743 (applying S.D. Codified Laws §§ 43-1-2, 43-1-4 (Michie 1997)) (footnotes omitted).

54. *Black Hills Inst. v. South Dakota Sch. of Mines and Tech.*, 12 F.3d 737, 745 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994).

that “Sue” was “land,”<sup>55</sup> and that the United States held “Sue” in “trust” for Mr. Williams.<sup>56</sup> Not pleased with this ruling, the Institute appealed the decision to the United States Supreme Court which denied certiorari on October 3, 1994.<sup>57</sup> “Sue’s” four year journey of ownership had ended.

In the end, the Institute had nothing to show for its work but the pain it suffered from losing court battle after court battle.<sup>58</sup> In fact, the owner of the Institute, Peter Larson, served an eighteen month prison term for charges surrounding the excavation of “Sue.”<sup>59</sup> As for “Sue,” she made a public appearance at Sotheby’s auction house in October of 1997.<sup>60</sup> In a few minutes, she was sold to Chicago’s Field Museum of Natural History Field for \$8.36 million.<sup>61</sup> Interestingly, a group comprising the Field Museum of Chicago, McDonald’s Corporation and the Walt Disney Company financed the winning bid.<sup>62</sup>

After the auction, the public could watch paleontologists prepare the massive Tyrannosaurus Rex at McDonald’s Fossil Preparation Laboratory in Chicago and Disney’s Dinoland U.S.A. Laboratory in Orlando, Florida.<sup>63</sup> In those facilities, people prepared “Sue” for a formal unveiling to mark the year 2000.<sup>64</sup> As for Maurice Williams, the beneficiary of the trust property where “Sue” was found, he became a wealthy beneficiary of the *Johnson* rule when he received the \$8.36 million at Sotheby’s.<sup>65</sup> Remember, the federal government holds mere title to the “land,” but the Indian receives the benefits.<sup>66</sup> Federal officials felt that the auction process was the “best way to get a fair price” for him.<sup>67</sup> After all, it was his “land.” Giving a man a fair price for his “land” is something the “Courts of the conqueror” cannot deny.<sup>68</sup>

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55. *See id.* at 742.

56. *See id.* at 742-743.

57. *Black Hills Inst. v. South Dakota Sch. of Mines and Tech.*, 513 U.S. 810 (1994).

58. In *Black Hills Institute v. Williams*, 88 F.3d 614, 615 (8th Cir. 1996), the court ruled against the Institute in their last lawsuit, in which they were asking to impose a \$209,000 lien against Maurice Williams, owner of the property where Sue was “discovered,” for the work the Institute did to restore the fossil.

59. *See McAndrew, supra* note 14, at 5A.

60. Stevenson Swanson, *Buying T-Rex A Really Big Deal*, NEW ORLEANS TIMES-PICAYUNE, Oct. 12, 1997, at A1, available at 1997 WL 12671506.

61. *See id.*

62. *See McAndrew, supra* note 14, at 5A.

63. *See id.*

64. *See id.*

65. Swanson, *supra* note 55, at A1.

66. *See CANBY, supra* note 23, at 361.

67. *See id.*

68. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (discussing the title that results from conquest).

For the student, there is an important point to keep in mind. The district court case ended with a rebuke to the Institute for not being knowledgeable of the status of Mr. Williams' land. The court declared that if the Institute had taken notice of 25 U.S.C. §483, made an application and waited and received Secretarial approval for the sale of the bones to the Institute, "all the months of contention could have been avoided."<sup>69</sup> Actually, the Institute's lawyers did not have to be aware of §483's statutory language to avoid the legal mess. Instead, the lawyers should have recalled the principle of *Johnson*: the Sovereign controls Indian land conveyances.<sup>70</sup>

## II. CONCLUSION

This Essay can be used by those in academia to aide their students, or perhaps vice-versa, in learning to get beyond the textbook, and to look at "new strategies to practice law . . . ."<sup>71</sup> The aim of this Essay is to show the lingering effects of the *Johnson* case in America. The principles Chief Justice Marshall affirmed more than a century and a half ago still live in the regulations that face Indians and those who deal with them everyday. The story of the "Sue" conveyance illustrates that the issues presented in *Johnson* do not die. Again, *Johnson v. M'Intosh* is a case that many law students read for their first day of law school. Law professors can use the South Dakota Fossil Cases to illustrate many of the concepts discussed in *Johnson v. M'Intosh*.

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69. See *Black Hills Inst. v. United States*, 812 F.Supp. 1015, 1022 (D.S.D. 1993).

70. See *Johnson*, 21 U.S. at 586.

71. See Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 244 n.38 (1991).