Indian Law Turf Wars: Contesting Native Lands and History

"Indigenous Perspectives" - Monthly Broadcast on HealthyLife.Net

 # 23– October 27, 2022

For audio podcast: http://www.ecologia.org/news/23.IndianLawTurfWars.mp3 (58 min)

Defend the Sacred[1]

Randy Kritkausky: Greetings, or may I say Bozho in Potawatomi, to those joining us for today's Indigenous Perspectives show. I'm Randy Kritkausky, an enrolled Potawatomi tribal member, and the co-host of Indigenous Perspectives.

Carolyn Schmidt: And I'm Carolyn Schmidt, the other co-host. Indigenous Perspectives originates from Vermont in the United States, and we're located on lands that the Abenaki people call N'dakinna. This is the unceded traditional territory of the Abenaki, who for thousands of years have been stewards of the lands found here and across the border in Québec province in Canada.

Today we welcome Peter d'Errico, discussing issues raised by his new book, *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples.*[2]

---

[1] Image credit: Emma Cassidy/Survival Media Agency https://brewminate.com/wp-content/uploads/2018/06/062318-03-Native-American.jpg Creative Commons license.

[2] *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples,* by Peter d'Errico. Praeger, 2022. https://www.abc-clio.com/products/a6462c/

Peter graduated from Yale Law School in 1968. He was an attorney at Navajo Legal Services *[Dinébe'iiná Náhiiłna be Agha'diit'ahii]* in Shiprock, 1968-1970. Then he was a founding professor of Legal Studies at the University of Massachusetts in Amherst. He taught there for over thirty years, from 1970 through 2002.

Peter has litigated on behalf of Native prisoners' freedom of religion, Mashpee Wampanoag fishing rights, and on behalf of Western Shoshone land rights. And he's also consulted on other Indigenous cases. From 2010-2017, he was a columnist for *Indian Country Today Media Network*. His new book, *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples* (2022), is published by Praeger, and can be obtained from them. So, Peter, welcome to the show.

Peter d'Errico: Thank you very much Carolyn and Randy. It's good to be with you again.

Randy: So, let me just introduce and frame this by saying that your book examines how legal fictions and manipulations come to serve – or, came to serve - the European colonizers of the Western Hemisphere. And it explains how these manipulations and fictions enable foreign nations in their efforts to justify the seizure of 97% of Indigenous lands. Your book is meticulously researched; I want to congratulate you on just how thorough it is, and it documents beautifully accounts of hundreds of years of entrapment of Indigenous people in a web.

So today, Peter is going to discuss if, and the degree to which, centuries-old fictions still dominate the lives of Native Americans. And what Native Americans and Canadian First Nations people are doing to turn the tide of history. We have entitled today's show, "Turf Wars, Contesting Native Lands and History" because we will focus on historic and still unresolved issues of who had legal and moral claims to the turf, the land, of the Western hemisphere. And also because there's a continuing struggle over who controls the intellectual and historical turf, or the historical narrative of colonization in this hemisphere. As we'll see in today's show, the dilemma facing Indigenous peoples is that they cannot resolve one turf struggle without addressing the other.

Carolyn: So, Peter, our first question for you is, how many years did it take for you to fully understand and appreciate the insidiousness and opaqueness of anti-Indian law and its origins? There is some biographical material in the book that sheds lights on this process, but the timeframe is unclear. Can you comment on your journey...

Randy: ...to this book.

Peter: Sure. You know, as I indicate in the book, I had my misgivings when I first started to work with Navajo people, and understood that there's a non-Western way of thinking about law, but also about all of life. And I – the misgivings only increased as I engaged in other work over the years, including as I was teaching about all of this and doing what you have to do when you teach. You're doing an awful lot of research. You're learning more than you're teaching; I'm sure any teacher would agree with that.

But it finally only came together when I started putting the words together that I had, you know, drafted here and there, bits and pieces about this case and that case, and some historical period, and a different historical period. When I started putting it all together, what clicked in my mind was - what is needed and what I then began to put together - was an overarching theory of law, a legal theory that would explain the whole picture. And that's the theory that I call in the book the "theory of legal exception", the sovereign exception. And when that clicked is when the book began to come together.

Randy: So what you're - what you're reflecting is even for someone who's a knowledgeable insider on the law, this is still a torturous journey to get a handle on. Is that correct?

Peter: Absolutely, Randy. The easiest thing when you're a practicing lawyer, actually, is not to raise any of these questions. One of the lines in the book that I quote is the notion that if you want to talk about sovereignty, you're actually introducing a very disturbing concept into an otherwise pretty orderly procedure. The ordinary work day to day of laws, you know, it can - it's very complicated in

some cases, but it's somehow predictable in a way, here's what the arguments can be; here's what they are.

When you talk about a foundational doctrine, when you talk about a - what I, you know, the word jurisprudence really refers to, what's the overall framework in which your thinking is happening, the overall framework in which the arguments are happening - then you're raising something disturbing. And if you're willing to go down that path, you're open, you're going - you're going to be on an adventure.

I don't want to call it a "rabbit hole" like Alice in Wonderland, but you're going to see Alice-in-Wonderland-like phenomena as you realize that contradictions are inherent in the legal field, especially the field that we're talking about, the field of what is formally called Federal Indian law, but as I unpacked it, I realized it's Federal Anti-Indian law. And to see that difference, Federal Indian law, Anti-Indian law, is the whole picture right there. There's a lot of work that goes into that, but it's so easy to just slip into the vernacular and not realize you're dealing with a very troublesome system here.

Randy: Well, thanks - thanks for going over that point again. You've brought that to our attention a year ago on a show, and for months leading up to that show, and we've read drafts of parts of your book and articles. And I have to say, it took us a long time to wrap our heads around the notion of why you're putting Anti-Indian law in front of it. Because you *[most people today]* think "Indian law" is something that either Indians made or something that was made to protect the rights of Indians. And as you thoroughly document, I mean, meticulously document in your book, that's not the way it works.

So your book's title, *Federal Anti-Indian Law*, and the subtitle, *The Legal Entrapment of Indigenous Peoples*, points to a political and social context that is inherently disrespectful at best and possibly racist toward Indigenous peoples. As historians, and for me as an Indigenous person, I sense that what we're up against is, in one sense, a lot less complicated than jurisprudence, which has some rules in court.

But on the other hand, you know, it's even more complicated because we don't see and don't confront the insidious social, economic and cultural foundations of what

you call Federal Anti-Indian law. You said that some of these legal issues are almost too difficult to touch in the court. Well, all this other context, you know, is ruled outside of the purview of the court, but it's central to your argument. Can you talk a little bit about how you came to realize that this is more than, if you'll excuse the expression, just about jurisprudence, that this is a bigger issue in our society?

Peter: Yes. First I do want to say that I use the word jurisprudence in a kind of an older sense; it's referring to philosophy of law. Like, what is law supposed to be about? And in that framework, law is supposed to be about or related to all those other things you were talking about, history and economics and politics, and in addition adding its own framework of rules and argumentation. So it's like a complicated package that's still a kind of a whole, even though it's made up of all these different parts.

So when you start reading cases - and it's not just in cases, probably everybody listening to this program has heard the - and if they haven't, they're going to hear it now - the infamous statement by Pratt, Richard Henry Pratt, who was the founder of the first so-called boarding school, really a kind of a prison for Native children. He said that the whole point, not just of his school, but that the whole point of what he called the "civilizing process" was to "kill the Indian and save the man". That is, to kill everything that was cultural about this person.

Map of some of the reservation land in Oklahoma set aside for the Creek and Seminole Nations upon their forced removal from treaty-guaranteed traditional lands in the East (Georgia, Florida)[3]

[3] https://www.scotusblog.com/2018/11/argument-preview-justices-to-turn-again-to-rules-for-disestablishing-tribal-reservations/ Map with Creative Commons license

And it's why he wanted to pick the children, destroy the language, destroy their sense of history, and destroy their connection to land . That was major, which is what you've already mentioned: the significance of land is what's key here, and how we think about land. And the idea that he pushed was that how Native children think about land had to be changed. They had to be converted in their thinking.

And what I'm trying to get around to - my working around the long way here - is that the ideas that are expressed in those speeches that he made are the same kinds of ideas that are expressed in court opinions, which carry with them, unapologetically, ideas of superiority of the white people, of superiority of Christianity in particular. And not just the inferiority of native peoples, but their - their- in a sense bestiality.

I can use that word because Joseph Story, who was a Supreme Court justice, very famous because he wrote a book that's still regarded as a work, good work of history today, *Commentaries on the Constitution of the United States.* He said that the - and again, unapologetically - that the legal principle involved about land and land ownership was that Native peoples were equivalent to wild beasts! And we don't think that wild beasts own land, they just roam around on it. So we have psychological conceptions, sociological conceptions, conceptions of the development of whole cultures, and peoples, all of that passes right by, in a single sentence, sometimes without any commentary by a judge or by somebody like Pratt.

Sometimes certain parts of it are further evolved and sometimes not. In 1955, in the Supreme Court case of Tee-Hit-Ton Indians versus the United States, Justice Stanley Reed wrote the majority opinion for that, which said that Tee-Hit-Ton did not own their own land. And he just wrote in a single sentence that the white - the white people had sympathy for these poor Indians, who were not capable of owning land. And because the history showed that they really weren't capable of owning land, they only exist on any land that they're allowed to exist on by the federal government. So when you read that, if you break it down sort of clause by clause, you're astounded. You should say, How can, how can the Supreme Court say things like that? Most of the time –

Carolyn: Peter, I may be cuttting you off here, because I wanted to bring up, I think, a really important point that jumped out from your book to me, this whole framework of Indian exceptionalism.

Peter: Yes.

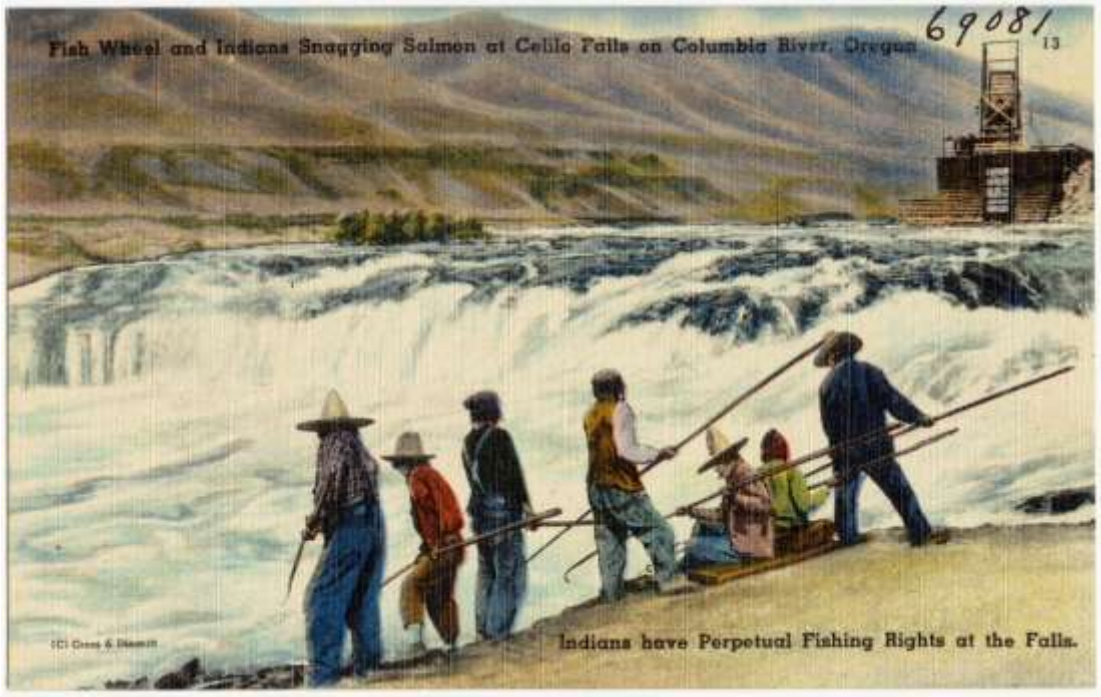
Carolyn: And you talk about how the courts have changed the interpretations of basic legal ideas. Like trust and sovereignty -

Peter: Yes.

Carolyn: - means something different when applied to Indians than to everyone else. It's not just as simple as racism. It's, as you said, trying to break important cultural ties to the land, but it also goes deeper, I think. So can you discuss what's behind this exceptionalism?

Peter: Yes. I'm glad you focused on trust as the prime example. I'm glad, because it's the most common phrase that's used over and over again by lawyers, by non-lawyers, in newspapers, by politicians. "Oh, the federal government has a trust relationship with the Native peoples." And in ordinary English and in ordinary trust law, that is a significant statement. You say you have a trust relationship for somebody. You have a - you can use a fancy word "fiduciary relationship" - you are beholden to the beneficiary. The trustee is beholden to the beneficiary to do what's in the best interest of the beneficiary. And if that trust is violated by the trustee, courts have been, in the long history of the common law, very stern about this, and very strict, that if the trustee violates the rights of the beneficiary, the trustee is wrong. The trustee is held liable for that.

In Federal Anti-Indian law, the trust concept works almost inside out and backwards. Which is to say that in that field of law, Federal Anti-Indian law, the position of the trustee is considered to be one of controlling power over the beneficiary, not responsibility to *[the beneficiary]* except as determined by the trustee. So the trustee can say, well, in fact, this is what the cases have said.



"Indians have Perpetual Fishing Rights at the Falls" postcard, mid-19th century.[4]

Samuel Alito, Supreme Court Judge Samuel Alito, laid this all out in a case recently, that what it really means, that trust relationship, it means that the United States determines what's in the best interest of the so-called Indians in terms of its own needs, its own, the US's needs. It has its own policy goals. So there have been times when its policy goals are, "We want to get rid of reservations, we want to break up the whole land base". At other times its policy goal is: "Oh, we want to allow a certain measure of jurisdiction, like over women in the Women and Children's Act. We want to allow a certain measure of jurisdiction, and if that doesn't work, we're going to take it away."

So it's like a constant experiment with how to manage these people. Now, that has nothing to do with conventional thinking about what a beneficiary is supposed to do in a trust relationship. Nothing at all! So the way exception comes in and explicitly so, it's been, again, in Supreme Court decisions it's been written this way that the

---

[4] Image credit: https://brewminate.com/wp-content/uploads/2018/04/041318-25-Native-American.jpg Creative Commons license. Illustrating article by Monty Mills, JD, titled "Supreme Court Tests Weight of Old Native American Treaties in the 21st Century".

trust doctrine as applied in Federal Anti-Indian law is an exception from normal trust law. It's not normal trust law; it's something different. And over and over again, you'll find statements like this in Federal Anti-Indian law cases that, "well, now the rules of property are this way, but in the case of the Indians, there's an exception; they're dealt with differently."

Or sometimes they won't use the word "exception." You'll say it's "peculiar", or let's say it's "distinctive", or let's say it's "different." It was in parsing all those words that I began to see, Ah, they're talking about something that I can theorize out there. It's *[federal law related to Indians]* been theorized as an exception, a philosophical exception. And once you see that, it just pours out of the cases. You see it over and over and over again. And in the exception - the realm that's in the exception gradually includes everything in the whole field of law. And it means that there's unbounded power. It essentially means that the US as the so-called trustee can do whatever it wants. Who is going to be the judge of that is the US itself! In normal trust law, the trustee is not the judge. There's a court that's the judge, a separate entity that's the judge. *[But]* in the US in relation to Native peoples, the US is both the trustee and the judge in deciding what to do. That's completely abnormal from normal trust law. And it exists because it's in the exception, which is this zone of unregulated, unbounded power.

Carolyn: So Peter, where are the wedges that the different Indian nations in the US and Canada can find to push back? Are there wedges within the law that they are using effectively to advocate and to argue?

Peter: It's a good question. It's also a very tricky question. First of all, there are cases, not a lot, but there are cases where the whole framework has been challenged directly. The Yakama Nation in 2019, I think it was in the Cougar Den case, challenged the whole framework directly right up front. And they, I think they scared the court. They *[the Yakama]* said that you cannot go down that road; you have to just use our treaty, which we have with the United States. And they won the case. And their brief, it's an amicus[5] brief, they weren't even a party, they just came

[5] An "amicus brief" is testimony contributed by a third party (amicus curiae, "friend of the court") in a case, to present additional information to help the court in its decision. Usually such a brief supports one side in the case more than the other.

in as an amicus. And the court referred to that brief several times in trying to get a handle on it. And they steered clear of the critique in the brief of the doctrine of Christian discovery, which we haven't mentioned today, but that's at the core of this exception.

So there are - there have been challenges. Most of the time they, when they have been made directly like that, they have not been successful. Even when lower court judges have said, "This is a very powerful critique, but our hands are tied because the Supreme Court has said that we have to follow this rule, even though the rule seems to us to not be right." So I suggest that when you say, "Well, what can they do?" the very first thing is to stop doing something. The thing to stop doing is to quit pretending. That's basically it.

Quit pretending that this doctrine is helpful. And that's - it may be surprising to hear this, but over and over again, briefs of Native parties in cases in amicus briefs, even from law professors, start off by saying, "Oh, we recognize that the US has total control in this area." Why? Why would you say that? Why wouldn't you say "We recognize the dominant doctrine and we think that it's completely unjustified. Now here's our argument" ? So I would say the very first thing to do is quit doing the thing that is exacerbating the problem.

Randy: That's a really good, really clear response. And I think that's a message that needs to get out, you know, to Native American communities, Native American lawyers, and it's going to make people feel a little bit uncomfortable. But you're speaking the truth, and that's why we have you here today.

Carolyn: So let's - let's pick this up in just a few minutes in Segment Two. Everybody stay tuned.

Segment Two

Carolyn: Welcome back to Indigenous Perspectives. We're speaking with Peter d'Errico. And we're going to pick it up right from where we left off, talking about the problems you've clearly pointed out with Federal Anti-Indian law over the centuries. So, are there reasons why the challenges to this Anti-Indian law aren't happening more often today?

Peter: I think there are some reasons, although I want to start off by saying that I think that it's - there are in fact more critical perspectives coming, but they're still in development, you might say. And I'm hopeful that my book will play an important role in helping to crystallize these. There are challenges to specific doctrines in specific cases. What I try to do in the book is to put together the various challenges to the various elements into a coherent theoretical whole, so that you - so that a person can get a picture of the big picture, as they may attack in a small corner of the law. So having said that, I see, for example, the Yakama amicus brief that I mentioned, as very, very hopeful, and two young lawyers working on that.

I was so impressed working a little bit with them to see how well they understood that really what's going on here is like an abusive relationship. The US is not their protector. The US as a matter of fact, in that particular case, this is another, by the way, example of the contradiction, the exception - the US is supposedly the trustee for the Native nations. The US took the side of Washington State; it actually filed an amicus brief in the case in the Supreme Court against the Yakama. So these young Yakama lawyers working with JoDe Goudy - who was tribal chairman at the time, a really significant person, who I'm happy to know and to work with - they said, "We're not putting up with this abuse any longer." And that's when they filed their amicus brief. So I – I think that I see those kinds of things happening, very hopeful.

I also want to point out that this is not the only time in history of legal change that we see reluctance. The case, in Brown versus Board of Education - which happened by the way, the same year, 13 months before Tee-Hit-Ton but is very famous, whereas Tee-Hit-Ton is almost unheard of for most people - Brown versus Board of Education challenged the racist doctrine of "separate but equal", as you know. And Thurgood Marshall, who led that challenge, later was appointed to the *[Supreme]* Court by Lyndon Johnson. Thurgood Marshall had to deal with the reluctance of many of his colleagues to challenge "separate but equal." There were lawyers, Black lawyers, people in NAACP[6], who were afraid of rocking the boat. They said, if you make the white man mad, he's going to treat us worse. And Thurgood just kept working. It took him months and months and some years to finally develop a

[6] National Association for the Advancement of Colored People, was founded in 1909 and has been consistently active as a Black-led, multi-racial organization in the United States advocating for justice and equal rights for African-Americans through the existing legal system.

coherent attack on that *["separate but equal"]* doctrine that brought together a sufficient number of lawyers that they could actually handle the work.

And I think that we're at a point now where it's possible to imagine something like that happen. It's been called for many times. And I mentioned some of them in the book, when people who - you know, law professors and others - have called for challenges at a theoretical basic level to happen and have said, "We need to have a strategic discussion about this. What's the overriding picture we're trying to deal with, rather than just case by case by case like that?" So it's been called for; there's some examples of it happening, and there's precedent for the reluctance - people being afraid of the power that's available to their adversary, basically.

Randy: So, Peter, I want to say that you're - you're shedding insights into my own personal family life. You know, I've mentioned to you, and I mentioned in my book, that someone we call Great Aunt Emma Goulet Johnson, who was co-founder of the Society of American Indians[7], the first all-Indian organization by and for Indians, *[that]* became the predecessor of the American Indian Movement and others. You know, she was put on display in Chicago in 1893 as a living mannequin in a story about how the Carlisle Indian School was civilizing these young kids. And then she went on to teach at other Indian schools throughout her entire career. She was a brilliant teacher. But, you know, she sat down at the table with and worked side by side with Pratt, and never called into question the ultimate assumptions of the paternalistic and sometimes abusive relationship that she had grown up in, because it was part of the world in which she lived.

So your - your analogy to being in an abusive relationship and finding it hard to extricate yourself and having the courage to say to yourself, "Oh my God, this is what it is, " is I think the gift and the challenge of the book that you're putting before both Indigenous communities and the American public saying, "What is really going on?" And I'm - I congratulate you on having the courage to throw down that question.

[7] Society of American Indians was founded in 1911 to work across tribal lines to advocate for improved conditions for Indians within the United States. It broke up in 1923 because of divisions among its leaders on issues such as the Native American Church and peyote use, whether there should be separate Indian regiments in the US army, and the role of the Bureau of Indian Affairs.

Peter: Thank you, Randy. You know, I had a correspondent send me a note, very appreciative of the book, but saying that he had first expected that I was going to somehow come to a conclusion about, here are the steps, here are the things we need to do. And then he said, the more he thought about it - and as you know, the book actually closes with looking at a global picture, not just U.S. in its lens - he said as he finished that, he gradually realized the time is not yet right for thinking about, Oh, this is step one, step two. It's like the first - getting the time right means getting your eyes open, getting your head around, here's what's actually going on. And it's an overall perspective.

My friend Steve Newcomb, another important figure in the field, uses the phrase repeatedly, the "original free existence of Indigenous peoples". And I think that, that if we can comprehend that, then we've got a place where we can stand in order to see the thing we're going to criticize as wrong.

This is what makes it difficult being a lawyer, by the way. As long as you're within this framework called Federal Indian law, you feel it's like trying to fight your way out of a paper bag. If you can get yourself out of it, which I hope I accomplished by saying it's Federal Anti-Indian law, you get out of it all together. Then you're looking at it from the outside, and it's much easier to see its shape, its history, its weak points, you know, et cetera, all of that.

So for me, that's the first step, and that's what a strategic discussion is all about. You know, I - it's my understanding *[of]* the difference between tactics and strategy is that strategy is having some sense of the big picture. Tactics - like you have the big picture, the mountain: I want to get to the top of the mountain. Tactics is, how do I do it? Do I just try to run straight up or do I zigzag back and forth? Those are complicated discussions to have. And if you can back off and see the mountain, you're much better off than if you're somewhere part way up the mountain, you don't know where you are. And that's what I think the book can do for people is, like, where are we with this? That's step one.

Randy: I think this might be a good point to jump in with a question that a lot of listeners will be having, which is, "Gee, I thought that, you know, helping Indians, is just about getting them civil rights so they can participate equally in the laws of the

United States." So let's take a break and come back and begin with that question, because you have some really important things to say about the difference between civil liberties and the deal with sovereignty.

Carolyn: Stay tuned for Segment Three in just a minute.

Segment Three

Carolyn: Welcome back to Indigenous Perspectives. We're talking with Peter d'Errico on the topic of Federal Anti-Indian law, the Legal Entrapment of Indigenous Peoples.

Randy: So, Peter, at the end of the last segment, we were talking about ways of moving forward and levers of change. Some of our listeners who find this perplexing must be having the experience that you and I and everyone I know had, which is scratching their heads, saying, "Well, gee, isn't this simple? Isn't this just giving Native Americans civil liberties like every other marginalized group wants? If we do that, won't the problem go away?" How do you answer that question?

Peter: It is the extremely important question, because it's so - that viewpoint is so prevalent. And it is, let me just say in a nutshell, it's not only wrong, it's misguided. And now, what do I mean by that? Just to put it in a framework of - to understand what's wrong about it – is, civil rights is an area of law that deals with the equality of citizens of the United States under the US Constitution, so that people are treated equally as subjects of the United States.

Indigenous land and sovereignty issues are not a matter of anything under the Constitution. They stand apart from the Constitution. As the Supreme Court itself has made clear, the Indigenous nations were not part of the constitutional framework. This has been very perplexing in legal theory. It - this part of the discussion is why I talk about the exception - is that the court has also said that even though Native nations are not part of the Constitution, somehow they are subject to the constitutional power of the United States. That's the giant exception at work.

But just to keep it simpler, the point is you're dealing with two completely different areas of law. One of them is equality under the Constitution; one of them is independence from the Constitution. And it's the second one that is extremely important for our purposes, because it's this area of Indigenous peoples' rights, not Indigenous people with no "s ". That, by the way, the "people" and "peoples" was a huge battle in the United Nations during the development of the United Nations Declaration on the Rights of Indigenous Peoples. The US led a group of countries saying, "There are no Indigenous peoples. They have no legal standing in the international world. There's just a lot of Indigenous individual people." Well, they lost that argument in the UN, but they have prevailed in *[mainstream]* people's minds to the extent that very seldom is there a clear line drawn between Native people and Native peoples.

Native people as individuals, you can talk about in terms of civil rights, a person who's a Native person, the extent that they want to utilize constitutional law, they come under civil rights. To the extent that it's Native peoples like the Yakama Nation, the Navajo Nation, they're not subject to that constitutional structure in the same way. Their argument is independent from the Constitution. That's at least the simple legal difference between the two. Which is why it's a mistake to think that, oh, the solution is civil rights. It's not a solution for the independence of Native peoples, for land bases, for land rights, et cetera.

Now, when I said that it also undermines it or is damaging, is that to the extent that these two fields of law get confused in people's minds and in their arguments and in their political programs, the vision of actual Native independence with land is lost; that falls through the cracks. People say, "Oh, well, what we're really talking about here is that Native people should be equal, just like, you know, Black people, or so-called People of Color", or then they throw in all kinds, as you said, of other so-called marginalized groups, minority groups, and comes to be like a big stew, and they're all equal.

Well, no, that's not actually the case. Indigenous peoples as entities, national entities, having their own independent existence, as my friend Steve says, arising from their original free independent existence still exist, whether they're Navajo or Apache, or Yakama or Wampanoag. And what we're concerned with, what I'm

concerned with, what our discussion is concerned with, is the rights of those peoples. So I'm - I'm hoping that, when I work with this in the book, that I'm - that it's clear to people, I've tried to put it in very simple language too, with examples of how civil rights is different from Indigenous rights.

Randy: So when - when Indigenous peoples signed treaties with the United States, you know, they thought they were having their sovereignty guaranteed. On our last show, we talked to a lawyer from Canada who brought us up to date on the fact that a lot of Canadian Indigenous peoples didn't sign treaties, didn't sign away their land or their rights, and they're now getting back huge tracts of land in the Northwest. Now, that's a very different situation in the United States where we have these patchworks of tiny reservations.

But doesn't that once again bring forward this notion of the tragedy and the travesty of being led to believe that by signing a treaty, your sovereignty is being protected, but in fact, it's being given away?

Peter: Yes, As a matter of fact, it's a really great example. Again, another example of the exception - that the extent the Constitution is relevant to Indigenous people's issues - it's in the clause that says, "What is the supreme law of the land?" And the supreme law of the land includes treaties. That's right in the Constitution. So you say, "Well, where does the relationship between the US and Native peoples, where does it - where's the peg in the Constitution that we hang that on?" Oh, it's treaties. Oh, well, then when you look at the cases about treaties, and this was decided as far back as 1903 in the case called Lone Wolf versus Hitchcock, you'd say, "Well, we have a treaty." The Supreme Court says, "Oh, well, that treaty doesn't really mean that it's a binding agreement because the United States can change its mind. Congress can pass a law and violate that treaty, and that law is legal."

That's what the Lone Wolf case said. It took Kiowa land, and the treaty says, "Well, this is your land, undisturbed use forever, et cetera". You know, that kind of treaty language . And the court said, "Well, 'forever' just ended because Congress passed this law." Now, that's - that's the giant exception of thinking about what a treaty means. And it also is an example of where there is a constitutional link, but it's not an equality under - except you can say that it's an equality of - you can say the

treaty is the equality between two nations. And the Constitution recognizes that, as my friend Steven Schwartzberg has pointed out - we've both been together with you all before - that this original understanding of the Constitution and the supreme law of the land was violated early on by the Supreme Court when it came to Indigenous peoples, Indigenous nations. And if you wanted to really be strict about it, you'd say, this is the beginning and the end of the argument: treaties and land.

Randy: Thank you for that clarification. That's a really bold statement, and I think one that listeners can hang their hats on for a few minutes here while we take a break. We'll be back in a minute.

Segment Four

Carolyn: Welcome back to the fourth segment of Indigenous Perspectives.

Randy: So, Peter, in your book, Federal Anti-Indian Law, you begin a - you begin the book by alluding to the end point. And in the final chapter, you dig really deeply into a whole new element of your own personal journey, which is understanding the values of Indigenous cultures and what they have to tell all of us in the mainstream about being human. This is way, way beyond legal contests. Can you talk a little bit about that journey and what relevance you see it has at this moment in our history and in human history? Because this - this is the big question you leave for the reader.

Peter: Yes, thank you. Well, I want to say first that, when we are talking, at least when I'm talking about Indigenous peoples, I don't necessarily mean every single existing Indigenous government. Because the - well, let me say what I do mean is I'm talking about traditional Indigenous governments. So, you know, my experience with the Navajo, I could see there's a clear difference between the traditional leadership and the so-called elected, semi-government-appointed leadership. And that exists across the board, that there's that tension within Indigenous worlds.

What I want to focus on is the teaching that I learned from Philip Deer among others. I've been fortunate to have met people that I consider medicine teachers; Philip Deer was widely understood as a medicine teacher, a Muscogee Creek man. And when someone asked him once about the Indian way of life, he said, "Well, I'm

not really talking about an Indian way of life; I'm talking about a human being way of life." And he insisted that this was the perspective from which we look at reality.

And it's borne out actually by the fact that the original names for most if not all Native peoples, it translates into "the people." So they're speaking as the human beings on the planet and the Indigenous way that - that I'm have been learning from. And I want to say that I've been learning, because I also am not coming to this like some altruist, like "all those poor people needed my help, so I wanted to be a lawyer for them."

It was when I encountered Navajo people in their living together, and I'm living among them, that I realized it's answering questions for me. It's giving me a perspective about a different way of living that's outside that Western model of top down domination, government based on so-called economic growth, and the whole paradigm of extraction to make new products for people, which seems to be the main thing of American life.

Randy: So, just in clarification for our listeners, when you use the word , and the Navajo use the word as "the people" or my tribe uses it – - we Indigenous people; I'm speaking in my Indigenous voice here for a moment - we're not just referring to the two-legged human people, we're referring, you know, to all other creatures. Yes, and it's the way of life of all living together as a community. So, exactly. I'd like you to continue on where you're heading,

Peter: In fact, what you've just put your finger on. So what I come to finally in the end of the book is looking at what does that mean, to realize that all beings are alive? How can you say that? It says it in itself. Rocks are alive, trees are alive, grass is alive, people, two-legged, are alive, bears are alive, deer are alive. Is there anything that's not alive? No, there's, nothing's not alive. You can say the whole planet is alive.

And these are ancient views, and it's those ancient views that were attacked and are still under attack by industrial civilization, by the Christian discovery so-called, colonial domination process *[that]* was to extract wealth. Starting with extracting people from Africa to be slaves, starting with extracting gold and silver in the so-

called new world, starting with extracting land and land resources everywhere that the colonists have settled down. And this has been the agenda now for a few centuries, not for the long haul, not for the thousands of years, the millennia that there have been people alive on the planet, but just in the recent time. And in that recent time, it has brought us as a planet, as people, as a world environment, to its knees.

This is what I think climate instability is really all about. A tipping point has been reached, and we are at a moment when I think it would help us to step back and think, what does it mean to live in a system that's not based on domination, that is based on a recognition of all beings related to each other, and finding the balance there. That's where I feel we are at the moment, best position to understand something.

Randy: So as an Indigenous person, you know, I would flip the subtitle of your book, the legal entrapment of indigenous peoples, and say, it's also about the cultural entrapment of mainstream people. And the degree to which we have embedded Indigenous people in the mainstream legal culture and tried to erase their culture, has actually only further isolated us in a world which is not becoming sustainable. And the path forward, ironically, just might be to legally re-empower Indigenous people on their own lands so that they can show us how we need to live. That's – that's the takeaway I get from your book.

Peter: Yes, well, and that's good. I think one key word there is "we". I - I am always aware when I'm saying "we", what, who is the we? I tend to try to avoid that because the "we" becomes a kind of a mythical concept. And it seems to me that when we're talking "we" the three of us, or "we" the people listening, you know, there are definite groups you can say "we". But talking about it in a larger sense of history and culture, there's always competition about who is the "we". "We the people" - who wrote those words? Certainly not all the people of the United States. They weren't even eligible to dictate those words.

So who are "we, the people"? And - and I think it's backing up into understanding to begin to get a sense of ourselves as living beings among living beings, and that our main agenda is not further extraction, and that anything that further destroys the

so-called environment. When you say "the environment" it sounds like where there's us and there's the environment. But when you think that the environment is all living beings, we're talking about something that requires a different framing, a different set of languages.

And so I'm thinking that this is where I'm hoping that by unpacking the notion that there's something in a legal framework that *[many people have been thinking]* makes sense, and showing that it doesn't make sense, we're able - we're arriving in a moment where we say, "Oh, well, what is the context in which that law exists?" That law exists as part of a framework of domination that has been very destructive, continues to be very destructive, even though over and over again, it promises - just like every other snake oil salesman promises - wonder at the end of the line. "We're going to reach a wonderful state somewhere. Just bear with it; it looks bad now, but it'll get better." It just doesn't seem to work.

Carolyn: Wow, Peter, thank you for that incredibly powerful summary, and we encourage all the listeners to read your book, find out more about all the depth behind this analysis and this critical view of where we are in the United States right now.

Randy: And that book is once again, *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples* published by Praeger. And we can't recommend this book highly enough. Peter, I want to thank you for being on the show and sharing your insights. It's been a year, and I hope we'll do this again within the year.

I want to stay to the listeners that I hope you will take time and give yourself some space to reconnect with your roots in Mother Earth and with your ancestral roots. Before your busy day distracts you from this moment, I encourage you to take a few minutes to reach out and feel the presence of living flora and fauna, and perhaps even that of your ancestors. Allow yourself to touch their presence, capture that moment and hold onto it. And if you will, write to me and let me know about your experience. I can be contacted through my website, at randykritkausky.com where you can also find transcripts and supplemental materials for all Indigenous Perspectives shows, including today's. And I, again, thank you so much for being a listener.

++

"Indigenous Perspectives" monthly podcast is hosted by Randy Kritkausky and Carolyn Schmidt, and broadcast on the fourth Thursday of each month, 12 noon Eastern Time (US & Canada), on HealthyLife.net.

++