



Letter from the Chair

Melissa L. Pope

Table of Contents

Upcoming Events	2
Cultural Corner	3
2006-2007 Case Summaries ...	4
In Remembrance	7
Nominations Open	7

It is my honor to once again serve as the chair of the American Indian Law Section. Since its inception, the members of our section have worked diligently to increase the understanding of the complex issues of American Indian law within the legal profession. One such effort has been in providing American Indian case summaries.

Since the last publication of our newsletter in 2005, courts throughout the United States have considered numerous cases involving American Indians and American Indian nations. In this newsletter, you will find case summaries from the United States Supreme Court, the Sixth Circuit Court of Appeals, and Michigan courts. I wish to take a moment to thank the University of Detroit Mercy American Indian Law Center for having submitted various case summaries before the 2006 newsletter deadline. They have and continue to be a tremendous source of support for

American Indian law in the state of Michigan. I thank them for their tremendous efforts over the years. The case summaries they have provided are noted after the summary. I have provided the remaining summaries with the assistance of the Native American Rights Fund National Indian Law Library, an excellent resource for anyone practicing American Indian law. I encourage our membership to visit their website at www.narf.org.

In spite of our missing the 2006 newsletter, members were still informed of important court decisions and other events, thanks to the efforts of Angela Sherigan in keeping our listserv active.

Another important accomplishment of the section over the past two years has been in assisting spiritual leaders in working with American Indians held in Michigan prisons. Unlike mainstream religions where clergy are supported financially by a congregation, our spiritual leaders do not have a con-

Section Council

Chairperson

Melissa L. Pope

Director of Victim Services

Triangle Foundation

19641 West Seven Mile Road

Detroit, MI 48219-2721

Phone: (313) 537-7000, ext. 112

E-mail: melissa@tri.org

Chairperson-Elect

Lynnmarie Johnson

Secretary-Treasurer

Donna Budnick

Term Expires 2007

James A. Keedy

Katherine J. Scotta

Jeffrey Joseph Stone

Jeffrey J. Wojnecka

Term Expires 2006

Stanette Amy

William J. Brooks

Ronald Douglas

Tom Myers

Ex-Officio

Donna L. Budnick

Sheila Hackett Gaskell

Jacqueline P. Hand

John J. Lemire

James A. Keedy

Melissa Pope

Angela K. Sherigan

Thomas V. Silvia

Commissioner Liaison

Richard L. Cunningham

Supreme Court Representative

Anne-Marie Voice

Letter from the Chair

Continued from page 1

stant and consistent source of income to defray their efforts. Fundraisers held over the past year have assisted American Indian spiritual leaders in reaching out to prisoners in need of spiritual guidance. Their work strengthens American Indian communities by giving these individuals the tools necessary to become productive members of their communities when released.

In addition to the above, we are moving toward the time when planning gets underway for our Annual Meeting and Program. I encourage you to think of topics of interest to you and e-mail them to me at *Mlpope@wowway.com*. We can never have too many suggestions!

Also at the Annual Meeting and Program will be the presentation of the Tecumseh Peacekeeping Award. This award is presented to an individual or organization that has made significant efforts in the advancement of American Indian rights. I encourage you to submit

nominations to me via e-mail.

As we move closer to our Annual Meeting and Program, I encourage each and every one of you to consider running for the council. The previous councils, the core members of the American Indian Law Section, have succeeded in establishing this section—a tremendous task in the face of such a small number of American Indian attorneys and attorneys who practice American Indian law. But the numbers are few, and some have expressed readiness to pass on the growth of the section to new members. Adding new members to a council can often enhance an organization—new people often breathe new life. If you would like to submit your name for the council, please contact me via e-mail or at (313) 909-3634.

Thank you for allowing me to once again serve as your chair. I look forward to seeing you soon.

Melissa L. Pope, chair

Upcoming Events

The Indian Child Welfare Act at 30: Facing the Future

March 16–17, 2007

Michigan State University College of Law Indigenous Law Institute
Register at (517) 432-6955 or online at www.law.msu.edu/indigenous/conf/registration

American Indian Law Day

Friday, March 30, 2007

1 - 4 p.m., 250 Hutchins Hall, University of Michigan, Ann Arbor
Hosted by the Native American Law Student Association

Cultural Corner

An Excerpt from “What is an Indian?” by Ron Douglas

I am proud to be a part of the Saginaw Chippewa Indian tribal community. Many people have asked, “What is an Indian?” or what the difference is between this community and other people. The simple answer or statement about race and our political status is not enough. Yes, we are different. I have thought about how I personally see the community and hope that it is input into a definition or an answer to that question about Indians.

Only a few of the members of the community speak the Ojibwa language. This affects thinking. A few more can understand a little of it. Very few more know our social and political history over the last few millennia, or the ancient social traditions that led to the powwows. Most do not want to admit the holocaust and genocide that took place in the name of civilizing our ancestors. They want to put their anger and frustration over the absolute discrimination against the “noble savage” behind them. Some never heard about it when their parents refused to talk about their treatment in federal schools or hospitals or of their parents’ mockery by early missionaries.

The most important difference is our history and our social and religious mandate to treat every single person in the community as

our equal without consideration of their wealth, power or property that they have amassed. Their honor can never change from the date that they were born. It cannot go up or down. I am responsible to protect that honor in this community while the Anglo Saxon society denies my responsibility to other individuals. This is the biggest difference between an Indian and other societies.

This primary rule led to social clans to assist in performing that protection of an individual’s honor. Nobody is a stranger. This has led to the “Moccasin Trail” that exists in the community as contact must

be maintained. It also prevents one member from acting foolishly by trying to appear more important than any one other member of the community. We are all equals without superiors. This flies in the face of the Roman-inspired society that came here from Europe and requires people to accept local leaders who report to regional and then to national leaders in political or religious groups. Indians cannot accept that any one person is a sinner or a failure or evil. We can only realize that we have not assisted them in existing in their true nature—yet.

Ron Douglas is a founding member of the American Indian Law Section. Keep your eyes open for articles and, hopefully, a book in the near future.

Save the Date

American Indian Law Section

Annual Meeting, Tecumseh Award Presentation and Program

Thursday, September 27, 2007 from 2 - 4 p.m.

Amway Grand Plaza & DeVos Place, Grand Rapids, Michigan

2006-2007 Case Summaries

As of February 19, 2007

United States Supreme Court

BP America v. Burton, et al.,
Docket No. 05-669
(from the NARF
National Indian Law Library)

(from USLW) Administrative payment orders issued by the Interior Department's Minerals Management Service assessing royalty underpayments on oil and gas leases are not covered by the general six-year statute of limitations for government contract actions set out in 28 U.S.C. § 2415(a).



*Gonzales v. Centro Espirita
Beneficiente Uniao do Vegetal*,
Docket No. 04-1084

(from the NARF National Indian Law Library)

A small American sect of a Christian religion based in Brazil that uses hoasca, a controlled substance under the Controlled Substance Act ("Act") in its ceremonies challenged the federal government's general application of the Act prohibiting their use of the controlled substance. The Court held that the government did not demonstrate that it had a compelling interest sufficient to outweigh the right to free exercise of religion.



*Joan Wagnon, Secretary, Kansas Department of Revenue,
et al., v. Prairie Band Potawatomi Nation*,
2005 WL 1520600, Docket No. 04-1740 (from the
NARF National Indian Law Library)

The Court vacated and remanded the holding that permanently enjoined the state of Kansas from applying and enforcing its motor vehicle registration and titling laws.



*Wagnon (Formerly Richards) v. Prairie Band Potawatomi
Nation*, 2005 WL 3285050, Docket No. 04-631 (from
the NARF National Indian Law Library)

(from Westlaw) The Supreme Court, Justice Thomas, held that (1) Chickasaw categorical bar on imposition of legal incidence of state excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization was not applicable; (2) Bracker interest-balancing test for preemption of state taxation of activity on an Indian reservation, which applies when a state asserts taxing authority over the conduct of non-Indians engaging in activity on a reservation, was not applicable; (3) tax was not invalid on theory that it was impermissibly discriminatory because the state exempted from taxation fuel sold or delivered to all other sovereigns; and (4) tax was valid and posed no affront to tribe's sovereignty.

Sixth Circuit Court of Appeals

Keweenaw Bay Indian Community v. Naftaly, 452 F.3d
514, No. 05-1952 (from the NARF
National Indian Law Library)

The court of appeals, Clay, circuit judge, held that the State could not tax real property held in fee simple by an Indian tribe or its members within the exterior boundaries of reservation.



Hoevenaar v. Lazaroff, 422 F.3d 366, Docket No. 03-
4119 (from the NARF National Indian Law Library)

On Remand, the court of appeals, Reeves, district judge, held that the district court failed to give proper deference to the expertise and experience of prison officials on the issue of whether prison regulation was the least restrictive means of furthering compelling governmental security interest.



United States v. State of Michigan, 2005 WL 2033321,
Docket No. 04-1864 (from the NARF
National Indian Law Library)

The United States brought action against the State of Michigan regarding interpretation and enforcement of the 1836 Treaty of Washington. The United States District Court for the Western District of Michigan denied the motion of private property owners to intervene in the phase of the case directed toward determination of usufructuary rights of five Indian tribes under that treaty. The court of appeals, Ryan, circuit judge, held that (1) owners were not entitled to intervene as matter of right; (2) owners' concerns about future management and regulatory issues did not provide basis for mandatory intervention; and (3) district court did not abuse its discretion in denying motion of owners for permissive intervention.

Michigan Cases

Keweenaw Bay Indian Comm. v. Rising, No. 2:03-CV-111, 2005 WL 2207224 (W.D. Mich. Sept. 12, 2005)
(unpublished)

The Keweenaw Bay Indian Community ("KBIC") brought suit against the State of Michigan and Jay Rising, treasurer of the State of Michigan, seeking equitable and compensatory relief for improperly taxing sales of tobacco products and other associated claims. Defendants moved for summary judgment, claiming that the tax was, as a matter of law, a minimal burden.

KBIC owns and operates two gaming facilities in Marquette and Baraga and at each of these facilities, sells cigarettes and tobacco products to tribal members and non-members alike. Michigan required the tribe to pay state tax on their tobacco purchases and then refund the portions of the sales that went to tribal members despite federal authority forbidding taxation on sales to members of an Indian tribe.

In weighing the interests of each party, the court noted that the state interest was strongest when the

controversy deals with non-members on off-reservation land who avail themselves of state benefits. The tribe's interest is strongest when dealing on reservation lands and with members who avail themselves of tribal services. In granting summary judgment to the defendants, the court balanced these interests in favor of the state, and determined that imposing a temporary tax on all tobacco sales to members and non-members alike and refunding the taxes paid by members only constituted a minimal burden on the tribe.

[This case summary provided by the University of Detroit Mercy Indian Law Center under the guidance of Sheila Gaskell.]



Family Independence Agency v. Fried (In re Fried), 702
N.W. 2d 192, 266 Mich. App. 535 (May 2005).

The Michigan Court of Appeals affirmed the trial court's decision not to apply the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. s. 1901 et seq. to parental termination cases in which the minor child is claimed to be an Indian child from a tribe that is not federally recognized. The court predicated this holding on the notion that the determination of whether a child is an "Indian child" under ICWA is a tribal prerogative, to be discerned pursuant to tribal membership criteria, whereas, the determination of whether a tribe is an "Indian tribe" is the prerogative of the court. In exercising this prerogative, the court construed the relevant provisions of ICWA as defining an "Indian tribe" to be a federally recognized tribe only, and as such, the ICWA termination procedures only preempt state custody procedures in cases in which the minor child is either a member or is potentially a member of a federally recognized tribe.

[This case summary provided by the University of Detroit Mercy Indian Law Center under the guidance of Sheila Gaskell.]



Continued on next page

2006-2007 Case Summaries

Continued from page 5

Department of Human Services v. BigJohn (In re Cole), No. 04-631, 2005 WL 3078191 (Dec. 2005).

In an unpublished opinion, the Michigan Court of Appeals reversed in part a trial court order terminating the respondent's parental rights on the grounds that the trial court erred in declining to apply the standard established in the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. s. 1901 et seq., in lieu of the state law standard, in its termination analysis. Noting that the trial court held that the minor child at issue was not an "Indian child" under ICWA, despite the fact that the tribe in which she claimed membership had declared that she was eligible for membership, the court repudiated the trial court's holding, rearticulating the principle of tribal prerogative in ICWA determinations of the membership status of minor children. The court asserted that this tribal prerogative precludes a court from "second-guessing" a tribe's conclusion with respect to whether a minor child qualifies as an "Indian child" under ICWA. Furthermore, the court held that petitioner's expert witness, an assistant general counsel and tribal member, who "was raised with traditional Native American religious practices and had learned traditional practices from her great uncle and the elders of the tribe," was qualified under the ICWA standard to testify as an expert witness in regard to whether "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

[This case summary provided by the University of Detroit Mercy Indian Law Center under the guidance of Sheila Gaskell.]



Taxpayers of Michigan Against Casinos v. Michigan, 268 Mich. App. 226 (2005).

The issue before the court of appeals on remand from the Michigan Supreme Court in this ongoing challenge to the expansion of casino gambling in Michigan was whether amendatory provisions in certain trib-

al-state gambling compacts purporting to empower the governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Article 3, Section 2, of the Michigan Constitution. The court of appeals held that an unconstitutional delegation of power had occurred.

Specifically, the court found unconstitutional the provision in the compact between the State of Michigan and the Little Traverse Bay Bands of Odawa Indians providing for amendment by the governor without legislative approval. Further, the court found unconstitutional the exercise by the governor without legislative approval of the amendatory provision in the compact. This provision, also contained in three other compacts between the State of Michigan and the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi, was deemed void insofar as it grants amendatory power solely to the governor without legislative approval (as a corollary to its decision, the court also held unconstitutional the same provision found in the compacts with the Pokagon Band, the Little River Band, and the Nottawaseppi Huron Potawatomi).

The majority relied on the rule found in *Roxborough v. Michigan Unemployment Compensation Comm.*, 309 Mich. 505 (1944), which generally states that only persons authorized by the state constitution or a statute can make a contract binding the state. Excluded from this definition are authorizations by resolution. In this case, the delegation of authority to amend the compacts was conferred by resolution, a nonstatutory means. Consequently, the amendment of gambling compacts by the governor without legislative approval violated the separation of powers clause of the Michigan constitution.

[This case summary provided by the University of Detroit Mercy Indian Law Center under the guidance of Sheila Gaskell.]

In Remembrance

By Melissa L. Pope

It is safe to say that without the example provided by the writing and the thinking of Vine Deloria, Jr., there likely would have been no American Indian Movement, there would be no international indigenous peoples' movement as it exists today, and there would be little hope for the future of indigenous peoples in the Americas.

— From the Colorado American Indian Movement



Vine Deloria, Jr.

I cannot let this newsletter pass without thanking the Creator for the gift of an extraordinary person who graced American Indian communities with his life—Vine Deloria, Jr. Described in *Indian Country Today* as “the intellectual star of the American Indian renaissance,” Vine Deloria, Jr. was an activist, author, and scholar, to name just a few of his accomplishments. It is not possible to summarize all that he gave to American Indian people—not in a newsletter, not in an article—perhaps in a book. His passing has left a tremendous void. I have devoured his books and, while he was with us, I took every opportunity I could to hear him speak. What I took away from these experiences was to be actively involved in making things better for American Indian people. For our profession, Vine challenged attorneys to develop a strategy to protect our people, protect our land, protect our religions, and protect our traditions. Though he has passed, the challenges are still there, waiting for each of us to try to follow in his footsteps.

Nominations Open

Now accepting nominations for the Tecumseh Peacekeeping Award. This award is presented to an individual or organization that has made significant efforts in the advancement of American Indian rights. The award will be presented at the Annual Meeting and Program. Nominations can be e-mailed to mlpope@wowway.com.



SBM

STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING
306 TOWNSEND STREET
LANSING, MI 48933-2012

www.michbar.org

FIRST CLASS
U.S. POSTAGE PAID
LANSING, MI
PERMIT NO. 191