

State Bar of Michigan
American Indian Law Section

Summer 2001

Report of the Chair 2001 American Indian Law Section

By Thomas V. Silvia

The year 2001 has been devoted to outreach and liaison activities with other sections, institutions and organizations related to Native Peoples, both here and in Canada, conversation groups, the U.S. Coast Guard, law enforcement, state and federal agencies and others, even including Norway and the European Union. In keeping with the motto of our proposed section logo, "The widest water has two shores," our section enters the new century as the vehicle to travel the distance between opposing points of view, recognized by the word "jimaan" the trade word for canoe among the People of the Three Fires. Our year began with a dual presentation of the medicine pipe for the annual Tecumseh award to Hon. Michael F. Cavanagh of Michigan's Supreme Court and Hon. Michael D. Petoskey, Chief Judge of the Little Traverse Bay Band of Odawa Indians for their work in amending the Michigan Court Rules to permit certification questions by tribal courts and recognition of full faith and credit for tribal court judgments as any state court. The year ends with presentation of the Tecumseh award to Helen Tanner for her contributions to the treaty interpretation underpinning the precedents of Indian Law in Michigan.

Early in the term as chair I was called upon to present proposed language to amend the State Bar bylaws to permit the section to take a position and make public statements in conformance with its traditional voting pattern of acclamation and consensus. The need for such amendment was proposed by the State Bar Government Relations Committee which called a meeting of all section chairs in October 2000 to address the need to comment more timely on proposed legislation and other matters in an era when term limited legislators have shortened the time for commentary to virtually preclude analysis and referral for proposed positions by the sections and the State Bar. Our web page came on-line in January 2001, raising the need to consider a future name change for the section to address the problem of thousands of irrelevant search hits from the subcontinent of India.

As chair I presented a proposed joint program to the Alternative Dispute Resolution Section for the annual meeting incorporating the Peacemakers court operating in our tribal court systems along with dispute resolution traditions in Islamic, Judaic, Buddhist, and Christian ethnic communities with application to closely held family businesses, child custody and neighbor disputes, with heightened realization that electronic commerce may have impact and opportunity in the shrinking global economy informed by these traditions. While the demands of the ADR section's annual

meeting present a state of the law address on developments in arbitration and mediation in a state, federal and international context precluded a joint program this year, the groundwork for a future mid-year meeting devoted to this topic was recognized, as well as the principle that Native American tradition provided the primary American Dispute Resolution process.

In like manner, liaison work with Professor Len Rotman of the University of Windsor, who is presently publishing a book on cross-border issues of those First Nations in Canada with a dual presence as federally recognized tribes in America, led to attendance at the Annual Canada United States Law Institute at Case Western University on the "Impact of Federalism and Border Issues on Canada/US Relations." At this annual conference, the need to address tribal concerns was recognized as a requisite element of NAFTA arbitrations involving fisheries in boundary waters, and potential application to myriad other elements of international trade including environmental, labor, and social issues led to a welcome invitation to send a delegate from our section each year. Underscoring the timeliness and relevance of this liaison work the topic of the Annual meeting "Developing Energy Policy as an Exercise of Tribal Sovereignty," the US/Canada Law Institute adopted the analogous theme for its annual program in April 2002. In follow-up, recognizing the importance of strengthening this liaison, discussions have already commenced between the Canadian Consul General and the Ontario Bar to develop a Canadian/American law section as Godfrey Dillard, Chair 2001 of the International Law Section and myself step down from our positions.

A significant percentage of the Section Council attended Indian Law Day, March 30, 2001, at the University of Michigan for a discussion on how the exercising of tribal sovereignty can be a means for these sovereign rights. Incoming Chair, Sheila Hackett-Gaskell attended the Annual Bench Bar Conference in furtherance of the recently promulgated Model Code for Enforcement of Personal Protection Orders which she and other section members have spent the better part of the last two years working on in a joint state, federal and tribal task force. Plans are underway for a proposed issue of the Michigan Bar Journal devoted at least in part to Indian Law issues. Our newsletter highlighted recent case-law trends in Indian Law as well as the renegotiation of the fishing rights treaty in a renewed spirit of cooperation. Hopefully this trend will carry on through the coming time as the Section comes of age and its newer members take on leadership roles.

Case Summaries

Editor's Note

Drafts of these summaries of recent developments in Indian law were provided by University of Detroit Mercy Professor Jacqueline P. Hand's students: Yvonne Anderson, John Caruso, Krista Hurst, Jennifer Kwapisz and Rebecca Palmer. However, the final versions are those of the editor and do not necessarily reflect the views or opinions of others. Further, these summaries represent a selection of cases decided recently by federal, state and tribal courts and do not purport to be comprehensive, but rather, to provide material which may be of interest to section members.

U.S. Supreme Court Decisions

Klamath Water Users Protective Association v. United States 121 S Ct 1060, 149 L Ed 87 (2001)

The Department of the Interior, Bureau of Indian Affairs (Bureau), and various American Indian tribes, including the Klamath Tribe, corresponded with each other regarding water use from the Klamath River Basin. The Klamath Water Users Association requested the disclosure of these documents under the Freedom of Information Act (FOIA). The Bureau produced some documents, but withheld others, arguing that these documents were exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 552(b)(5). Specifically, it was noted that documents prepared by consultants may be lawfully withheld under this exemption. The U.S. Supreme Court rejected this argument, distinguishing these communication from consultants' reports because tribes "necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone."

The Court also rejected the Government's argument that these communications were exempt because traditional fiduciary standards forbid a trustee to disclose information acquired as a trustee. It reasoned that the government may not be able to fulfill its fiduciary responsibilities and its duty to other citizens when the groups have competing interests. The Court stated that "[a]ll of this boils down to requesting that we read an 'Indian trust' exemption into the statute, a reading that is out of the question."

United States Courts of Appeal

Ninigret Development Corp. v. Narragansett Indian Wetuomack Housing Authority 207 F.3d 21 (1st Cir, 2000)

The Tribal Council of the Narragansett Indian Tribe established the Narragansett Indian Wetuomack Housing Authority (Authority) by tribal ordinance. The Authority contracted with Ninigret Development Corporation (Ninigret) to build a low-income housing development. The Authority canceled the contract following a dispute with Ninigret. The tribal council pursuant to the contract's forum-selection clause, ordered the Authority and Ninigret to appear in tribal court. The tribal council found Ninigret

liable after they failed to appear. Ninigret filed suit in federal court, arguing that the forum-selection clause should not be binding implying that non-Indians cannot receive a fair hearing under tribal jurisdiction.

The first circuit looked at whether it had subject matter jurisdiction to hear the case. It determined that diversity jurisdiction did not exist because a tribe is treated as a stateless person for jurisdictional purposes. The court determined that federal-question jurisdiction did exist because the question of whether a tribal court has jurisdiction over a non-Indian is a federal question. Once subject matter jurisdiction was established, the court explored the issue of whether the tribe had sovereign immunity. The court held that the tribe waived its sovereign immunity when it agreed to forward disputes arising out of the contract to arbitration. The court found the forum selection clause binding and remanded the case because Ninigret had not exhausted its remedies in tribal court.

United States v. White, 237 F3d 170 (2d Cir 2001)

Defendants conditionally pled guilty to one count of failing to report cash transactions of more than \$10,000. Defendants argued that these transactions were exempt because they occurred outside of the United States on the St. Regis Mohawk Nation's reservation.

The court held that the foreign cash transaction exemption did not apply to American Indian reservations because reservations are located within the boundaries of the United States.

Sokaogon Chippewa Community v. Babbitt, 214 F3d 941 (7th Cir 2000)

The Sokaogon Tribe Chippewa Community Mole Lake Band of Lake Superior Chippewa, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Red Cliff Band of Lake Superior Indians, and an individual Native American formed a partnership entitled Four Feathers. Four Feathers filed an application with the Department of the Interior (Interior) to build a casino. The Minneapolis office advised the Bureau of Indian Affairs (Bureau) to approve the application. The Bureau met with Minnesota officials and tribal leaders, including from the St. Croix, and agreed to extend the comment period on the application. The Interior then denied the application. Four Feathers filed this suit. Congressional hearings were held and an Independent Counsel was appointed. Once recommendations were made by the Independent Counsel, a settlement agreement was reached. The St. Croix filed a motion to intervene.

The seventh circuit held that the St. Croix could not intervene as a matter of right in the application process because the tribe did not claim an interest in the procedures used to determine whether the application would be granted. Instead, it sought intervention

merely to block the settlement agreement in anticipation of possible competition with the casino at St. Croix. The seventh circuit also held that the district court did not abuse its discretion in denying as untimely the St. Croix Tribe's motion to intervene because the motion was filed five years after the start of the litigation.

United States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000)

The defendants, members of the Bois Forte Band of Chippewa Indians, were convicted of using motorboats and motor vehicles in a wilderness area, in violation of the federal Boundary Waters Canoe Wilderness Act (Act). Under the Treaty of 1854, between the United States and the Bois Forte Band, the tribe ceded land to the U.S., but reserved usufructuary rights to hunt and fish on the ceded land. The eighth circuit upheld the convictions, stating that while the Act did not destroy the tribes's right to hunt and fish on the ceded land, this reserved right does not include the right to use modern transportation vehicles when hunting and fishing in the areas where they are prohibited by law.

Hagen v Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000)

Non-Native American employees of the Sisseton-Wahpeton Community College (College) filed a race discrimination suit when the College failed to renew one-year contracts with them. When the College failed to answer the complaints, the district court gave a judgement by default. The district court then refused to set aside the default judgement based upon subject matter and sovereign immunity arguments, because the tribe's motion was "too late."

The eighth circuit reversed, holding that the College had sovereign immunity because it was a non-profit organization chartered by the Sisseton-Wahpeton Tribe to provide post-secondary education to tribal members on the Lake Traverse Reservation. The court further held that sovereign immunity may be asserted at any stage of the proceedings.

Manybeads v. U.S., 209 F.3d 1164 (9th Cir. 2000)

The history of this case can be found in *Clinton v Babbitt*, 180 F.3d 1081 (9th Cir. 1999). Manybeads and other members of the Navajo Nation challenged the Accommodation Agreement (Agreement) reached by the Hopi Tribe, the Navajo Nation and representatives of individual Navajo tribal members. The Agreement provided that Navajo families residing on Hopi land could obtain, at no cost, 75 year leases for homes and farmlands within the land awarded to the Hopi by previous court decree. The plaintiffs were dissatisfied with the Agreement and argued that they were being denied religious freedom.

The court of appeals affirmed the district court's judgement of dismissal because the Hopi Tribe is a necessary and indispensable party not named in the lawsuit. The court of appeals reasoned that the U.S., which was representing the individual Navajo tribal members, could not also represent that Hopi Tribe, due to the conflict of interest.

U.S. v. Webb, 219 F.3d 1127 (9th Cir. 2000)

Webb was convicted of two counts of sexual contact with a minor in violation of the Major Crimes Act, 18 U.S.C. 2244, for alleged acts that occurred on allotted lands within the Nez Perce Reservation in Idaho.

Webb moved to dismiss the indictment for lack of jurisdiction based on the theory that the alleged acts were committed on allocated fee simple lands which could not be considered "Indian Country" as defined by 18 U.S.C. 1151.

The court of appeals affirmed the district court's denial of motion to dismiss the indictment on the basis that there was no evidence that Congress intended to diminish the reservation based upon reservation descriptions in the 1863 and 1893 Agreements between the Nez Perce and the United States. Additionally, the court cited ninth circuit and Supreme Court opinions holding "neither allotment, in and of itself, nor the grant of citizenship to Indians holding allotted land under the Dawes Act, revokes the reservation status of such land."

Metcalf v. Makah Indian Tribe, 214 F.3d 1135 (9th Cir. 2000)

The Makah, who reside in Washington on the northwestern Olympic Peninsula, have a 1500-year tradition of hunting California gray whales. Makah ceased whaling in the 1920's due to the near-extinction status of the gray whales. After 1993, the gray whales were removed from the endangered list.

In 1995, the Makah sought approval from the International Whaling Commission (IWC) to resume the hunting of whales at an annual quota of up to five whales. In 1996, the National Oceanic and Atmospheric Administration and the Makah signed an agreement in which the U.S. government committed to make a formal request to the IWC. An environmental Assessment ("EA"), pursuant to the National Environmental Protection Act was completed in 1997.

Congressman Metcalf and others filed a complaint in the U.S. District Court for the District of Columbia, against the federal defendants alleging violations of the National Environmental Policy Act (NEPA), the Whaling Convention Act, and the Administrative Procedures Act in connection with their support of the Makah whaling proposal. In September 1998, the district court denied appellant's motion for summary judgement and granted motion for summary judgment in favor of the federal defendants and the Makah.

The court of appeals reversed and remanded. It concluded that the federal defendants "should not have fully committed to support the Makah whaling proposal before preparing the EA because doing so probably influenced their evaluation of the environmental impact of the proposal." It held that by making such a firm commitment before completing the EA, the EA was not timely and as such violated the NEPA.

Gibson v. Babbitt, 223 F.3d 1256 (11th Cir, 2000)

Plaintiff applied to the United States Fish and Wildlife Service for five bald or golden eagle feathers to use in religious ceremonies. His application was denied because he is not a member of a federally recognized tribe.

The eleventh circuit applied the compelling interest test pursuant to the Religious Freedom Restoration Act, which requires that all substantial burdens on a person's religious freedom be in furtherance of a compelling governmental interest and by the least restrictive means possible. Here, the government's interests conflicted with one duty being owed to the preservation of endan-

continued on page 4

Case Summaries

continued from page 3

gered eagles and the other being owed to fulfilling U.S. obligations to preexisting treaty rights with Native American tribes in furtherance of their religious preservation. The court held that the government had met its burden by requiring that a person must be a member of a federally recognized tribe in order to acquire golden or bald eagle feathers.

Dry v. United States, 235 F3d 1249 (10th Cir 2000)

Plaintiffs, members of the Choctaw Nation, were arrested while distributing literature at a Labor Day Festival held on tribal grounds. Plaintiffs were charged with disturbance of the peace, interfering with a police officer, and resisting arrest offenses in the Choctaw Court of Indian Offenses.

Plaintiffs sued under the United States Constitution, the Federal Tort Claims Act, the Oklahoma Government Torts Claims Act and three nineteenth century treaties between the Choctaw Nation and the United States, naming various federal, tribal and city officials, as defendants. The primary basis for this suit was that the Choctaw Nation exercises contracted federal criminal jurisdiction because the Choctaw citizens did not grant criminal jurisdiction to the tribal government under the 1983 Choctaw Constitution. As such, tribal officers are actually federal officers, thus liable for arrests performed in furtherance of the contract.

The tenth circuit affirmed a trial court dismissal. The court held that “at all times relevant to this action, the tribal defendants acted as agents of the Tribe pursuant to their inherent sovereign power to exercise criminal jurisdiction over intratribal offenses.” Thus, claims under federal law and against federal officials had no basis. Further, the court held that tribal officials are immune from suit for actions in their official capacity.

In re Kaul, 4 P3d 1170 (Kan, 2000)

Plaintiff tribal members challenged a denial of a real property tax exemption for property owned within the Potawatomi reservation. The Kansas Supreme Court held that the land which had been allotted was freely alienable so that all federal restrictions on taxation were removed by the allotment. The land was originally allotted to a Potawatomi Indian who conveyed it to a non-Indian. The Court determined that this converted the land into fee simple title, as a result of which it became freely alienable and as such no longer free from federal taxation. When the land was later conveyed to an enrolled member of the Potawatomi Tribe, the land retained this status and as such remained subject to taxation.

United States District Courts

Petrogulf Corporation v. ARCO Oil and Gas Co., 92 F Supp2d 1111 (D Colo, 2000)

Plaintiff owns and operates over 90% of the working interests covering a gas formation. Part of the land was held in trust by the federal government for the Southern Ute Indian Tribe. The tribe leased its part of the land to defendant for a royalty percentage of the minerals extracted. Defendant filed a request with the Colorado

Oil and Gas Conservation Commission for an exception to state drilling requirements. The exception that was granted resulted in defendants’ operations encroaching on plaintiff’s leasehold. Plaintiff sued in state court and defendant removed to federal court, which granted defendant’s motion to dismiss. The district court applied the tribal exhaustion rule, which provides that a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.

Sac and Fox Nation of Missouri v. Babbitt, 92 F Supp 2d 1124 (D Kan , 2000)

Plaintiffs sued the Secretary of Interior to overturn its decision to take land into trust for the Wyandotte Indian Tribe of Oklahoma. The district court held that the Wyandotte Tribe is a necessary party to the action but, that as a sovereign entity, it could assert sovereign immunity. Since the Wyandotte Tribe claimed sovereign immunity, it could not be joined in the case. Thus, the case was dismissed since the Wyandotte Tribe was a necessary party.

Park Place Entertainment v. Marlene Arquette, 113 F. Supp 2d 322 (ND NY, 2000)

This case was brought before the district court for a determination of the appropriate governmental system to be established on the tribal land of the St. Regis Mohawk Indians, a federally recognized tribe. The issues before the court involved internal tribal power struggles. The court held that it did not have subject matter jurisdiction because there was no federal question.

Tribal Courts

Angus DeVerney v. Grand Traverse Banc of Ottawa and Chippewa Indians, Appellate file 96-10-201-CV-App (2000)

This case is an appeal of an administrative agency action notifying the plaintiff tribal member and his children of their removal from membership due to a tribal constitutional ban on “Dual Enrollment” in two federally recognized Indian Tribes. It was discovered that their enrollment in the tribe in 1978 should have been denied because the parties had enrolled in the Saulte Ste. Marie Band of Indians before the Grand Traverse Band was federally recognized. The plaintiff had mistakenly believed that disenrollment was automatic when they failed to turn in an annual report to the Saulte Ste. Marie Tribe.

The court was asked to interpret ambiguities in the tribe’s constitution and ordinance, as well as matters of agency authority, political questions and timely addition of new plaintiffs. The plaintiffs were properly disenrolled from the other tribe and re-enrolled in Grand Traverse Band in 1998. At issue was the entitlement of plaintiff and his adult children to over \$100,000 in per-capita and federal docket funds distributed between 1996 and 1998 while they were disenrolled.

The trial court ruled for plaintiffs on all claims and ordered the money to be paid to them. In an opinion by Judge Ronald Douglas, the appellate court affirmed, based upon due process requirements, an absence of political issues, and its interpretation of constitutional requirements

**DeYoung v Southbird, Appellate Case
NO 99-11-568-CV-SC (2001)**

This was an appeal of a default judgement in which the trial court granted a petition to attach per capita funds. Defendant asserted that the lack of proper notice for the initial hearing invalidated a later trial order against her. The appellate court affirmed based upon actual notice to the plaintiff and a failure to meet the necessary burden of proof for setting aside a finding of fact.

State Courts

**In the Matter of Dougherty, 236 Mich App 240,599 NW2d
772 (1999)**

Respondent and his wife had three children and were in the process of getting a divorce. Respondents' parental rights were terminated because he pled guilty to sexually abusing his daughter. On appeal, Respondent argues that the state failed to actively reunite him with his child before his rights were terminated, as provided by Section 1912 of the Indian Child Welfare Act (ICWA).

Under section 1912 of ICWA, efforts must be made to prevent the breakup of an Indian family before terminating the rights of a parent. Further, the termination may not be ordered unless evi-

dence, usually expert testimony, proves beyond a reasonable doubt that contact or custody with a parent would result in serious emotional harm to the child or children. The court explained that reunification need not be made unless the termination of rights caused the breakup of the family. In this case, divorce proceedings had been initiated and Respondent was separated from the family by imprisonment before termination began. The court concluded that it cannot be said that the termination divided the family. The court of appeals affirmed, commenting that reunification did not apply to the respondent because the family was already separated when the parental rights were terminated. Further, "{T} he state proved that any relationship with respondent would hurt the children."

In the Matter of N.E. G.H. 245 Mich App 126 (2001)

The trial court's termination of the rights of an Indian father was challenged for failure to provide proper notice under the Indian Child Welfare Act (ICWA). Under ICWA, requirements include notification to the appropriate tribe by registered mail, with return receipt, or if the tribe is unknown, then the Secretary of Interior is to be notified in like manner. Further, once notice is received, the court action must be stayed for at least ten days.

In this case, the petitioner did send proper notice to the Secretary of the Interior. However, neither the court nor the petitioner knew the child's possible tribal affiliation. Further, the lower court failed to stay the termination proceeding until ten days after the notice was received by the Secretary of the Interior. The Court reversed and remanded to the trial court to provide proper notice to the tribe and determine whether the child is an Indian child within the terms of ICWA. □

American Indian Law Section

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American Indian Law Section

Cultural Corner

Melissa L. Pope

The American Indian Law Section Council agreed that it is important to not only educate members of the Section about laws affecting American Indians, but also the histories, cultures, traditions, languages and religions of American Indians. We will start with discussing Pow Wows, since it is Pow Wow season.

Pow Wows evolved from the Grass Dance Societies that formed during the early 1800's. This was a time of great difficulty for American Indians. There was an attempt to assimilate American Indians into American society: American Indians were forced onto reservations; American Indian children were taken from their homes and placed in boarding schools that prohibited American Indian languages and religions; American Indian religions and traditions were even made illegal. The Grass Dance provided the opportunity for American Indians to continue their traditions, as it was one of the few "acceptable" tribal gatherings. These gather-

ings brought together American Indians from all across the United States and Canada, creating an inter-tribal forum. Today, thousands of American Indian families travel throughout North America on what is known as the "Pow Wow Trail."

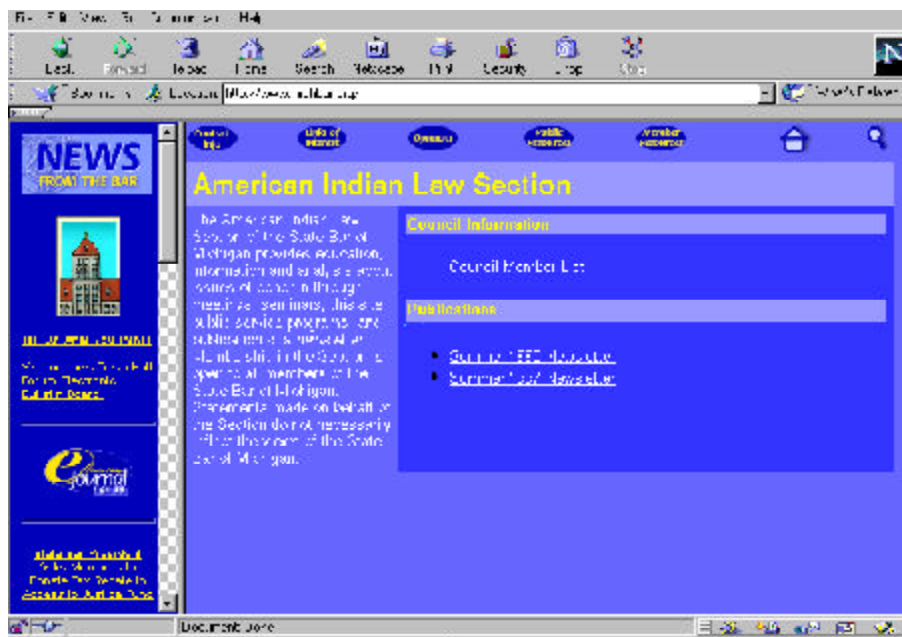
Today, Pow Wows provide an opportunity for non-American Indians to share in the rich cultures that make up Indian country. Spectators are welcome at most Pow Wows and are invited into the dance arena during "Inter-tribals." And, of course, you can purchase American Indian crafts, as well as sample American Indian foods.

If you are interested in finding a Pow Wow close to you, send your name and address to:

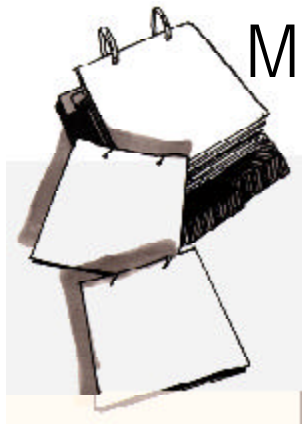
Michigan Indian Quarterly, Capital Tower Building, Suite 800, 110 West Michigan Avenue, Lansing, MI 48913.

Hope to see you on the Pow Wow Trail!

Visit the American Indian Section website at



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Mark Your Calendar!

American Indian Law Section Annual Meeting Program September 13, 2001

Treaty Rights, Great Lakes Fishing Compact: Yesterday, Today, Tomorrow

Program Chair: Angela Sherigan

Program Topics and Speakers

Treaty History

Overview, Hunting & Fishing Treaties & Rights

Helen Hornbeck Tanner, Historian & Senior Research Fellow, Newberry Library

Fishing Compact Terms

John R. Wernet, Jr., Michigan Assistant Attorney General in Charge

Kathryn L. Tierney, Bay Mills Indian Community Tribal Attorney Native American Affairs Division

Overview, Federal Statutes & Treaty-Related Crimes

Lawrence R. Baca, (Invited) Chair, Federal Bar Association, Indian Law Section, Senior Trial Attorney, U.S. Department of Justice, Civil Rights Division

Overview, Michigan Alliance Against Hate Crimes

Cathy Milet Michigan Department of Civil Rights, Special Assistant to the Director

Moderator

Jacqueline P. Hand, Director, University of Detroit Mercy Indian Law Center

**Do you know of anyone interested in joining
the American Indian Law Section?**

**For more information, have them contact the
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Member News

Congratulations to Stanette Amy for her article, "Patents and Taxes, and Poof! It's Gone," featured in the May 2001, *Michigan Bar Journal*.



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