



Report of the Chairperson

John J. Lemire

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The American Indian Law Section began the 2003-2004 year with the Business meeting held in conjunction with the Annual Meeting of the State Bar, September 12, 2003. Outgoing Chairperson Melissa Pope gave a Council update, after which annual elections were held and several bylaw amendments were passed. Another decision made by our members was to continue its contribution to the Access to Justice Fund. This Fund's Development Campaign benefits civil legal services for Michigan's low-income families. Because of our Section's commitment to such activities and following our Native tradition, the contribution was designated for Michigan Indian Legal Services. As a result of this and other donors, Michigan Indian Legal Services received a grant to help disseminate material on the Michigan Indian Child Welfare Act. Finally, the 2003 Tecumseh Peacekeeping Award was presented to Kathryn Tierney, Bay Mills Indian Community Attorney, for her significant service to the Native community.

After the business meeting, the American Indian Law Section presented a program by Kathryn Tierney, "Taxation Issues in Indian Country". Along with her presentation

and personal observations and anecdotes, Ms. Tierney provided a detailed outline with applicable federal, state, and case law. Everyone agreed that the presentation was informative and helpful and demonstrated the complexity of the relationship of Indian Country and the various governments.

Upon taking the gavel, I indicated my desire to shift the focus of the Section for this term. In the recent past, the Section was responsible for efforts on disseminating and clarifying information on the Indian Child Welfare Act to Courts, Social Workers, and other interested persons and groups. The Section is still a repository for such knowledge, and through its various members in their daily professional occupations dispenses advice as needed. The Section will continue its commitment to all aspects of the integrity of the Native family, keeping in mind the uniqueness of its place in the law. The Section further is prepared to continue its involvement in cultural activities as requested. This being said, I desired to look at perhaps more mundane aspects of our roles as lawyers. In many instances in our practices, we are presented with clients who may be

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Report from the Chairperson

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Native and wish to start or maintain businesses, or those who would like to connect with Native businesses. The Native American Business Alliance, as well as the Michigan Minority Business Development Council were contacted for possible presentations, and have indicated a willingness to share their expertise. Arrangements for their participation are in progress.

Shortly after taking office, I had the distinct pleasure of attending the President's Dinner hosted by the State Bar of Michigan's Access to Justice Development Campaign. This dinner is generally held to honor the outgoing President of the State Bar, as well as introduce the incoming President. This function was well attended by all the luminaries of the Bar, including Governor Granholm, and served to emphasize the commitment to assist legal services.

About the same time, I received an inquiry from a staff attorney of Michigan Indian Legal Services, requesting comment and discussion on a proposed Court rule change affecting MICWA. As I thought about the process, I was struck by the difficulty in putting such a labor into practice. The time, effort, and potential expense could be great, and whether successful would depend on numerous factors. In the past, I had the experience of perusing our Section as well as other Section's web pages on the State Bar of Michigan's website. Many of the larger Sections had comprehensive web pages, including recent developments in the law etc., but also something referred to as "listserv". As I came to find out, the listserv was a service of the Bar allowing members of a group to discuss issues through the use of their e-mail function on

their computers. The method was as immediate as e-mail, and the Bar was willing to assist in setting it up through their Information Technology department. Indeed, as it turned out, the State Bar was extremely helpful in initiating this service. Our first project was to place its availability on the Section's web page. This can be seen by going to the State Bar's web site and clicking "Sections." However, the process, like many other aspects of our computer age, had a "learning curve" that is still being mastered. This Chairperson has probably become a stone in the moccasin of the Bar personnel because of the necessity of "passwords" and "administrators", and other such verbiage. But the effort is worthwhile, if only because it is the communication resource of the 21st Century. If this method is not perfected in my term, I hope to continue the effort until it is a functional part of our Section. This also applies to our Section web page, where recent developments in the law, or announcements can be posted. The potential of the computer cannot be ignored, and was recently acknowledge by the Michigan Supreme Court, which, when soliciting official comment on a proposed Administrative Order, would allow same by e-mail response. In addition, the State Bar has recently announced the addition to the *Bar Journal* of a service called "Section Briefs" wherein each Section can give latest news in 75 words or less. This Brief can be forwarded to the Bar by e-mail for inclusion in the hard copy Journal.

All of the above represents a con-

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2004 Case Summaries

Angela Bilen; Krysten Niemiec, University of Detroit, Indian Law Practicum, Instructor,
Professor Kathryn J. Scotta

Tribal Recognition

The Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094 (District of Columbia Cir. 2003)

The Mashpee Tribe filed a formal letter of intent for recognition in 1980. In 1990 the Tribe filed its petition with the Bureau of Indian Affairs (BIA). In 1991, the Branch of Acknowledgment and Recognition (BAR) sent Mashpee a letter requesting additional information. Mashpee responded four and a half years later and in 1996, the BAR notified Mashpee that its petition was on the 'ready' list. As of 2001, there were 10 petitioners on that list and it was estimated that it could take 15 years to resolve all those petitions. Frustrated by the delay, Mashpee filed suit claiming unreasonable delay in violation of Administrative Procedure Act (APA). The District of Columbia Circuit Court remanded the case back to the district court to determine whether the delay was unreasonable. The Circuit Court determined that the issue to be decided by the District Court will be "whether the time the BIA is taking to act upon the Mashpee's petition satisfies the 'rule of reason.'" The Circuit Court directed the district court to look at the complexity of the task, the significance of the outcome and the resources available.

Jurisdiction

State of Engineer, of the State of Nevada v. South Fork Bank of the Te-Moak Tribe of Western Shoshone Indians of Nevada, 339 F.3d 804 (9th Cir. 2003)

Case involves the Humboldt Decree, decided over 70 years ago by Nevada's Sixth Judicial District Court

that dealt with an Indian reservation created by five ranches purchased by the U.S. The Tribe was the beneficial owner and the government the owner in fee. The Decree was created as a result of the Nevada process that determines and enforces the right to the use of water in the river systems. Prior to litigation, the U.S. paid the state-levied assessments on behalf of the Tribe and in return the Tribe allowed the state water commissioner onto the reservation to ensure that all parties to the Humboldt decree were receiving their share of the water. Then the government stopped paying the assessments and the Tribe arrested the commissioner when he entered Tribal lands. Suit was filed by Nevada against the Tribe for violating the Humboldt decree and the U.S. joined, then removed to federal court. State and federal courts enjoined each other from proceeding. The federal District Court held that although it had concurrent jurisdiction, it would abstain. All parties appealed. The issue was whether a state court that has adjudicated a water decree retains exclusive jurisdiction over its administration. The U.S. Court of Appeals for the Ninth Circuit found that "if there are specific jurisdictional bars elsewhere that prevent the district court from asserting jurisdiction, the general removal provision cannot overcome the jurisdictional defect." The first jurisdictional 'hurdle' was the doctrine of prior exclusive jurisdiction. The Court held that the party's interests were based in the property and thus the action was *quasi in rem*, making the doctrine applicable. The Court then looked at whether the McCarran Amendment, 43 U.S.C. § 666(a), applies to the Humboldt Decree and held that the

McCarran amendment applies, that the U.S. suit had been waived, and that the Amendment affirmed the jurisdictional limitation as stated by the doctrine of prior exclusive jurisdiction. The Court affirmed the District Court's order of remand.

Property

Chickaloon-Moose Creek Native Association, Inc. v. Norton, 360 F.3d 972 (4 Cal. Daily Op. Serv. 1649, 2004)

Native village corporations (Villages) created pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA) brought actions contesting the Department of the Interior's decision regarding which lands would be conveyed to the corporations for reconveyance to the Villages. Problems that arose in the execution of ANCSA that led the parties to enter into ancillary agreements are at the core of the case. The Interior decided, pursuant to its construction of the Agreements, that all lands listed in Appendix A of the Agreements must be transferred before any lands in Appendix C could be made available to the Villages. The Villages contested, believing that the Agreements did not create this requirement. The Court held that the Agreements required that Appendix A lands be exhausted before Appendix C lands could be made available for transfer to the Villages. The Villages argued that the Agreements were ambiguous, and as such, the canons of construction required that it be construed liberally in favor of the Indians. The Court found, however, that the Agreements were not ambiguous and that the plain language precluded conveyance of

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Appendix C lands while Appendix A lands were still available.

United States v. Hess, 348 F.3d 1237, 2003

The United States, on behalf of the Southern Ute Tribe, brought an action to determine the ownership of gravel located on land acquired through an exchange patent that reserved all interest in minerals in trust for the Tribe. The U. S. argued that the reservation of mineral rights included the gravel that underlay the majority of the property in question. The Court found that the content of federal law on this issue should be resolved by incorporation of the law of the state in which the property was located, per the Supreme Court decision in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 1979. The Court adopted the Colorado decisions of *Farrell v. Sayre*, 129 Colo. 368, 1954 and *Morrison v. Socolofsky*, 43 Colo. App. 212, 1979, as controlling. These cases created two principles applicable to the issue presented: 1) if a majority of a property is underlain with gravel and the gravel cannot be mined without disturbing the property's surface, a general reservation of all minerals does not include gravel, and 2) this rule can be overcome if it is found that the parties to the contract intended for the reservation to include gravel. After applying the rules from *Farrell* and *Morrison*, the Court held that any mining of the gravel would disturb the surface of the property, and as such the gravel was not included in the general reservation of minerals. The Court then held the exception to this rule did not apply as there was evidence that the government was aware of the presence of the gravel on the property but considered it commercially useless at the time of the exchange patent and thus, it had no reason to include the gravel in its res-

ervation of mineral rights to be held in trust for the Southern Ute Tribe. The Court held that the rights to the gravel rested with Hess.

City of Roseville v. Norton, 348 F.3d 1020 (358 U.S. App. D.C. 282, 2003)

The City of Roseville and others brought an action challenging the decision of the Secretary to take a particular parcel of land into trust for the purpose of operating a casino benefiting the Auburn Indian Band, a tribe restored to federally recognized status. The plaintiffs alleged that the decision violated the Indian Gaming Regulatory Act (IGRA) and that the Auburn Tribe's recent acquisition of land under (AIRA) does not constitute a "restoration of lands" under § 20(b)(1)(B)(iii) of IGRA. Plaintiffs asserted the Auburn Band did not own the land given to them under AIRA before losing their federal recognition and the land given to the Tribe was too different from the Tribe's former lands to be considered a "restoration" of that former reservation. As the Secretary did not make determination of restoration or get the governor's consent, plaintiffs alleged violations of IGRA. The Court found that the Secretary's taking into trust lands for the purpose of giving them to the Auburn Indian Band, constituted a restoration within the meaning of IGRA even though the lands were not located on the Tribe's former reservation. The Court noted that the purpose of IGRA is to promote tribal economic development and self-sufficiency, and that in this particular case, the restoration of lands compensates the Tribe not only for what it lost by the act of termination, but also for the opportunities it lost in the interim. As such, the Secretary was not required to obtain the consent of the governor

or make a threshold determination before allowing the Tribe to go forward with its plans for a casino.

Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003)

In the 1990's the Oneida Indian Nation of New York began to reacquire parcels in open market transactions that once belonged to the Tribe. Some parcels were located within the Indian reservation and contained businesses operated by the Oneida, thus not subject to taxation. They refused to pay property tax and collect sales tax on merchandise sold within those businesses. The City of Sherrill purchased these properties at a tax sale and then recorded deeds to these properties. The issue was the appropriateness of the taxation. The Court of Appeals, Second Circuit, looked at the definition of Indian Country and the effect of the Buffalo Creek Treaty on the Oneida's property rights to determine whether the property was currently subject to taxation. The Court held that the parcels that had been owned by non-Indians in the time when the government acknowledged the Tribe and when the Tribe reacquired the parcels, they remained a part of Indian Country and were thus not subject to tax. The Court also made it clear that such scenarios will be considered on a case-by-case basis and that no single determination necessarily sets the precedent for future reacquired property.

Cobell v. Norton, 283 F.Supp.2d 66 (District of Columbia, 2003)

Beneficiaries of IIM trust accounts brought a class action suit alleging breach of fiduciary duty in management of accounts against the Secretary and other federal officials.

The Court broke the suit into two phases, the first phase, known as the “fixing the system” phase, focuses on bringing the management of the trust into compliance. The first trial found the defendants in breach and required the defendants to come into compliance. In the second trial, the Court found the Interior Secretary and Assistant Interior Secretary of Indian Affairs to be in civil contempt of court, in their official capacities, because the Court and the Defendants were no closer to compliance. The Court considered whether further injunctive relief was necessary and in the Phase 1.5 trial, and found that a structural injunction may be appropriate but may be subject to appeal.

In 2003, the Court issued a structural injunction and laid out six specific requirements under the injunction addressing the general provisions and specifically stated that the Defendants were “enjoined from failing to implement fully and within the times prescribed each of the provisions of this Order” and that the “Interior Defendants shall administer the Trust in compliance with applicable tribal law and ordinances.” The Court then addressed historical accounting methods and required defendants to “provide plaintiffs with an accurate accounting of all money in the Trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.” The Court next laid out requirements for compliance with fiduciary obligations, requesting defendants to implement the Comprehensive Plan, except to the extent that any portion was inconsistent with this opinion. The Court then laid out a timetable and addressed the issue of a Judicial Monitor. Lastly, the Court retained jurisdiction over the matter until December 21, 2009.

On January 28, 2004, the Court of Appeals, District of Columbia Circuit, granted the defendants’ motion for stay pending appeal and that the District Court’s Order “Issuing Structural Injunction” be stayed pending resolution of this appeal.

On March 15, 2004, the U.S. District Court issued several opinions regarding several issues. The Court ordered, *inter alia*, 1) that the agencies of the DOI, under a preliminary injunction, disconnect all computer systems from the Internet until a future order for reconnection was granted; 2) that beneficiaries were entitled to depose the BIA former chief appraiser who had admitted to the Special master that he erased all appraisal information, but that the plaintiffs must tailor their document requests to stay within the scope of the litigation; and 3) that the disqualification of the special master was not warranted because Interior “failed to set forth the facts or evidence required to support its claim that the Special Master acted in a manner inconsistent with his role as a judicial officer.”

On March 24, 2004, the U.S. Court of Appeals granted the motion for a temporary stay, and held that the District Court’s preliminary injunction filed March 15, 2004 be stayed pending further order of the Court. On April 1, 2004, the Court of Appeals granted the motion to consolidate the appeals. On April 7, 2004, it granted the administrative stay be dissolved, the motion for stay pending appeal be granted, and that the District Court’s preliminary injunction be stayed to the extent that “the injunction requires disconnection from the internet of ‘Information Technology systems’ that were connected as of that date.”

Immunity of Tribal Officials

Penn v. United States, 335 F.3d 786 (8th Cir. 2003)

The plaintiff was not enrolled as a member of any Indian tribe, but lived on land within the Standing Rock Sioux Indian Reservation. She had worked as chief prosecutor until she was fired and then worked for Tender Hearts Against Family Violence, a nonprofit corporation serving the reservation. The co-director of Tender Hearts petitioned for a Traditional Custom Restraining Order alleging that the plaintiff had a gun, made threats against tribal officials, and filed a multimillion-dollar lawsuit against the Tribe. The Judge granted the petition without hearing. The order excluded plaintiff from the reservation for thirty days. The Sioux County Sheriff assisted in serving the order. Plaintiff filed suit for damages against four individuals claiming that they violated her constitutional right to due process by serving and executing the tribal court order. The U.S. Court of Appeals, Eighth Circuit, held that the defendants were entitled to absolute quasi-judicial immunity and that tribal jurisdiction is limited when it comes to non-members, but is broadest with respect to nonmembers who voluntarily involve themselves in tribal activities. The Court also found that the tribal judge was not acting in clear absence of jurisdiction when he issued the order and that the defendants need not decide whether to disobey a court order or be haled into court to answer for damages.

National Historic Preservation Act – Ancestral Burial Sites

Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003)

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The Narragansett Tribe sought to enjoin the Warwick Sewer Authority from proceeding with a sewer construction project because of possible desecration of ancestral burial sites. The district court denied preliminary injunction. The Tribe appealed and argued that the Authority failed to consult adequately with the Tribe as required by § 106 of NHPA, that the Authority should use different dig methods and allow members of the Tribe to serve as monitors. Section 106 provides that “planners of a federally supported project must take into account its effect on any area eligible for inclusion in the National Register of Historic Places.” The US Court of Appeals, First Circuit, found that the Authority had kept the Tribe informed and adjusted its plans to accommodate the Tribe’s concern. The Court held that the Tribe failed to carry its burden in showing the preliminary injunction should have been granted. The Court thus affirmed the district court’s denial of a preliminary injunction.

Statutory Procedure

Pit River Tribe v. Bureau of Land Management, 2004 WL 415224 (E.D. California, Feb. 13, 2004)

The Pit River Tribe brought suit against the Bureau of Land Management (BLM) and Forest Service after they released a joint Record of Decision (ROD) approving the Fourmile Hill Project, which involved the building of a geothermal power plant within the Tribe’s ancestral homeland. The land in question, however, was not Tribal land, it was land owned by the U.S. and used by the Tribe for many spiritual purposes. The Tribe brought several claims stating that the National Environmental Policy Act (NEPA), National

Historic Preservation Act (NHPA), APA, the Geothermal Steam Act, and the National Forest Management Act were violated by the many decisions made in the course of this project. They also argued that the U.S. violated its trust obligation. The U.S. District Court, Eastern District of California, held that the BLM and the Forest Service complied with all procedural requirements as laid out by the individual statutes. The Court reaffirmed its position to review compliance with these procedures and not review the substance of the agency’s decision. The Court granted the defendant’s motion for summary judgment and denied the Tribe’s motion.

State Application of Cigarette Tax

Narragansett Indian Tribe of Rhode Island v. State of Rhode Island, 296 F.Supp.2d 153 (2003)

The Narragansett Indian Tribe of Rhode Island opened a smoke shop on settlement lands and sold unstamped and untaxed cigarettes to the general public, including non-members of the tribe, at prices lower than minimums set by state law. Finding that the sales were in violation of state law, the Rhode Island State Police confiscated the unstamped cigarettes. The issue before the U.S. District Court in Rhode Island was whether the Tribe could operate a smoke shop on settlement lands, unfettered by the State cigarette tax laws. The Court held operation of the Smoke Shop “directly and primarily affects non-members,” and “is not inherently governmental or political in nature” and thus the Tribe is subject to the obligations imposed by the tax. The Court further held that avoiding such obligations is

not a right of sovereignty and that the State may enforce the tax by lawful entry onto the settlement lands and that the Tribe must conform to State law if it wishes to continue selling cigarette products.

Natural Resource Damages Under CERCLA

Coeur d’Alene Tribe v. Asarco, Inc., 280 F.Supp.2d 1094 (2003)

The United States, the State of Idaho, and the Coeur d’Alene Indian Tribe brought action under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) against mining companies for damages resulting from mining activities over the past 100 years at the Bunkerhill Superfund site. The U.S. District Court in Idaho decided seven instrumental issues to the Coeur d’Alene case. The Court held that the plaintiffs had established liability and that the plaintiffs established the claims for response costs and for damages both under CERCLA and the Clean Water Act (CWA) and ordered the damages phase of the trial to begin on May 11, 2004.

Gaming

Artichoke Joe’s California Grand Casino v. Norton, 353 F.3d 712, (3 Cal. Daily Op. Serv. 11, 2003)

Plaintiffs brought an action challenging the validity of compacts allowing tribes to conduct class III gaming on Indian land while this type of gaming is prohibited elsewhere in the state. Plaintiffs alleged violations of the Indian Gaming Regulatory Act (IGRA) and denial of equal protection. The Court held that the California state law that authorized

class III gaming only by Indian tribes on Indian lands complied with the provisions of IGRA. The Court looked to the language of the Act and IGRA as a whole, and found it ambiguous as to whether states had to permit non-Indian class III gaming before executing compacts and whether Congress intended tribes to fall within the scope of “any person, organization, or entity.” The Court relied on the presumption that directs that ambiguous statutes created for the benefit of Indian tribes be construed liberally and in favor of the Indians and held that California’s law allowing class III gaming to be conducted exclusively on Indian land was not a violation of IGRA.

The Court addressed plaintiffs’ equal protection claim and found that neither IGRA nor the California law violated equal protection and that Congress and California’s distinction between Indian and non-Indian were political, not racial, classifications. Using a rational-basis analysis, the Court held that Congress has a legitimate interest in encouraging tribal autonomy and economic development, and that IGRA is rationally related to this legitimate purpose.

First Amendment

Gonzalez v. Litscher, 79 Fed. Appx. 215, 2003 WL 22429350 (7th Cir. (Wis.) 2003)

Gonzalez, an inmate of a highly secure prison facility, filed suit under 42 U.S.C. § 1983 alleging that the prison’s restrictions on his Native American religious practices violated the First and Fourteenth Amendment. Gonzalez was not permitted to possess a medicine bag, ceremonial drum, smoking pipe, or feathers. In determining that the plaintiff failed

to prove a Free Exercise violation, the Court employed a test articulated in *Tarpley v. Allen County, Ind.*, 312 F.3d 895, 898 (7th Cir. 2002). *Tarpley* provides that prison regulations that infringe on an inmate’s exercise of religion are permissible if they are reasonably related to a legitimate objective. Four factors were determinative: 1) the rational relationship between prison’s applied policy, and legitimate government interest, 2) the existence of alternate means, 3) the effect of accommodating the inmate’s rights, and 4) the existence of alternatives to the regulation in question. The Court held that several legitimate reasons existed for the restriction on religious property, such as potential use as a weapon or the ability of such items to secrete contraband and noted that Gonzalez was allowed alternative means of worship. Gonzalez’s Fourteenth Amendment claim of disparate treatment among inmates due to religious belief was held to be unfounded and unsupported by evidence.

Natural Arch and Bridge Society v. Alston, 2004 WL 569888 (10th Cir. Utah) 2004

Plaintiffs appealed a District Court decision dismissing their claims that the management policies and practices of the National Park Service, which discourage non Native American visitors to areas within Rainbow Bridge National Monument as contrary to the Establishment Clause. The circuit court found that the plaintiffs lacked standing, as they suffered no damages. The Court held that the Park’s policy called for voluntary compliance but did not prevent people from disregarding that request. Thus, the policy could not amount to a violation of the Establishment Clause.

Sovereignty

United States v. Lara, 124 S.Ct. 1628 (U.S., April 19, 2004)

Lara was an enrolled member of the Turtle Mountain Band of Chippewa Indians and married to a member of the Spirit Lake Tribe. They lived on the Spirit Lake Reservation. The Spirit Lake Tribe issued an order excluding plaintiff from the reservation. He ignored the order and was detained by federal officers, striking one of the officers. He was subsequently prosecuted in Spirit Lake Tribal Court and served 90 days in jail. The U.S. then charged Lara with assaulting a federal officer. The issue was whether Congress has power to relax restrictions on the exercise of a tribe’s inherent legal authority regarding crime and punishment. The Supreme Court held that Congress possesses the power to lift restrictions on the tribes’ criminal jurisdiction over non-member Indians. The Court further held that Spirit Lake’s prosecution of Lara did not amount to an exercise of federal power and the Tribe acted in its capacity as a separate sovereign. The Court ruled that the Double Jeopardy Clause does not prohibit the federal government from proceeding with prosecution on charges arising from the same circumstances as were tried in tribal court.

State of Washington v. Moses, 37 P.3d 1216 (Wash. 2002)

Moses was a member of the Tulalip Indian Tribes who shot and killed a number of elk at night on private property. Both the State of Washington and the Tulalip brought criminal charges against Moses. The issue was

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whether the State's double jeopardy statute barred the county from prosecuting Moses after he was convicted in Tribal Court. The Court looked to the historic context of the statute and legislatures' actions to conclude that tribes were not "another State or Country" within the meaning of the statute. Moses' conviction was not barred and the Court held that tribes are not among the sovereigns included in the scope of the statute.

Krystal Energy Company v. Navajo Nation,
357 F.3d 1055
(42 Bankr. Ct. Dec. 144, 2004)

Krystal Energy Company, plaintiff, brought an adversary action against the Navajo Nation in a bankruptcy proceeding. The Navajo Nation asserted sovereign immunity. The Court held that Congress abrogated tribal sovereign immunity when it enacted § 106 of the Bankruptcy Code but recognized that immunity from suit is integral to the sovereignty and self-governance of Indian tribes. However, it also noted that tribal sovereign immunity is not absolute and that Congress' abrogation of sovereignty must be unequivocally expressed in explicit legislation, and may not be simply implied. The Court held that tribes are domestic dependent nations and, as such, are a domestic government within the meaning of § 106 even though the definition did not specifically include Indian tribes. The Court concluded that Congress was legislating in light of prior Supreme Court holdings as well as employing the common use of the term 'foreign or domestic government' when it enacted § 106. As such, it is clear that Indian tribes were intended to be included in

the term and the Navajo Nation could not assert immunity from this suit.

Winnebago Tribe of Nebraska v. Stovall,
341 F.3d 1202, 2003

Plaintiffs, the Winnebago Tribe of Nebraska, manufacture motor fuel on their reservation and sell it to other tribes for retail sales. The plaintiffs entered into a sales agreement with the Sac & Fox, Iowa, and Kickapoo Tribes of Kansas. The fuel was sold to the Kansas Tribes on the Winnebago reservation in Nebraska and then transported to the Kansas reservations. The State of Kansas sought to impose a fuel tax. Plaintiffs asserted immunity from the tax as a federally recognized Indian tribe, and refused to pay. The State made a second unsuccessful attempt at collection of the tax, and then began seizing tribal property without notice and initiated criminal proceedings. The District Court granted injunctive and declaratory relief, and the State appealed citing Younger doctrine of abstention from hearing cases in which State criminal proceedings were being heard. The Court of Appeals affirmed but held that the Younger compliance with criteria was not complete. The State next argued that the District Court abused its discretion in granting a temporary restraining order and preliminary injunction. The Court held that the District Court applied proper legal standards, was not arbitrary, capricious or unreasonable in granting the injunction and restraining order and that there was no abuse of discretion. The State's final argument was that its Eleventh Amendment immunity barred the injunction. The Court held that the State's immunity is

not applicable when prospective relief is sought and the complaint alleges an ongoing violation of federal law. The Court held that as the plaintiffs' complaint met both of these criteria, the State could not assert immunity.

South Florida Water Management v. Miccosukee Tribe of Indians,
124 S.Ct. 1537, 2004

The Miccosukee Tribe and others, respondents, brought an action against South Florida Water Management District, contending that appellants were required to obtain a discharge permit under the National Pollutant Discharge Elimination System (NPDES). Appellants operated a pump that moves water drained from urban, agricultural, and residential development areas to a large undeveloped wetland area. The issue was whether the operation of the pump constituted the discharge of a pollutant within the meaning of NPDES as the water being pumped into the wetlands contains high levels of phosphorous. The appellants argued that the two areas are actually one body of water under NPDES because of the close hydrological connections between them, and as such no permit is required. The District Court granted summary judgment in favor of the respondents, determining that the bodies of water were distinct, as the transfer of water from one to the other would not have occurred without the aid of the pump. The Supreme Court vacated the District Court's grant of summary disposition holding that there existed genuine issues of material fact. The case was remanded for further development as to the status of the bodies of water as unitary or distinct. ♦

Legislative Update: Federal Legislature

If you would like to obtain additional information, check the following websites:

<http://indiansenate.gov> or

<http://thomas.loc.gov/>

Indian Trust Asset and Trust Fund Management and Reform Act of 2003

Management of trust funds under the Department of the Interior pursuant to the Indian Self-Determination Act.

Sponsored by McCain, Bill S175

Indian Tribal Surface Transportation Improvement Act of 2003

Sponsored by Campbell, Bill S281

Authorize consolidation of substance abuse programs provided by Tribes.

Sponsored by Campbell, Bill S285

Encourage contracting by tribes for the management of Federal land.

Sponsored by Campbell, Bill S288

Improve the Bureau of Indian Affairs Federal acknowledgment process.

Sponsored by Campbell, Bill S297

Amend part E of title IV of the Social Security Act to provide equitable access for foster care and adoption services for Indian children in tribal areas.

Sponsored by Daschle, Bill S331;

Sponsored by Camp, Bill HR443

Recruit and retain individuals to teach in Tribal Colleges or Universities.

Sponsored by Daschle, Bill S378;

Sponsored by Hooley, Bill HR365

Establish, re-authorize, and improve energy programs relating to Tribes.

Sponsored by Bingaman, Bill S424

Establish procedures for the acknowledgment of Indian tribes.

Sponsored by Dodd, Bill S462

Provide grants to ensure full and fair participation in certain decision-making processes of the Bureau of Indian Affairs.

Sponsored by Dodd, Bill S463

Native American Capital Formation and Economic Development Act of 2003

Establish a Native American-owned financial entity to provide financial services to American Indians.

Sponsored by Campbell, Bill S519

Indian Land Leasing Act of 2003

To amend the Act to extend leases of restricted Indian land.

Sponsored by Campbell, Bill S521

Amend the Energy Policy Act of 1992 to assist Tribes in developing energy resources.

Sponsored by Campbell, Bill S522

American Indian Probate Reform Act of 2003

Amend the Act to improve probation of trust and restricted land.

Sponsored by Campbell, Bill S550

Establish the Native American Health and Wellness Foundation.

Sponsored by Campbell, Bill S555

Amend the Indian Health Care Improvement Act.

Sponsored by Campbell, Bill S556

Elevate the position of Director of the Indian Health Service to Assistant Secretary for Indian Health.

Sponsored by McCain, Bill S558;

Sponsored by Nethercutt, Bill HR151

Native American Languages Act Amendments Act of 2003

To provide for language survival schools.

Sponsored by Wilson, Bill S575; Bill HR2690

Amend the Homeland Security Act of 2002 to include Tribal consultation.

Sponsored by Inouye, Bill S578

Amend the Transportation Equity Act for the 21st Century to provide for additional funding for Indian reservation roads.

Sponsored by Bingaman, B ill S725; Bill 2331



Amend part A of title IV of the Social Security Act to re-authorize and improve the operation of temporary assistance to needy families programs operated by Indian tribes.

Sponsored by Baucus, Bill S751; Bill HR2770

America's Better Classroom Act of 2003

Amend the Internal Revenue Code to expand the incentives for the construction and renovation of public schools.

Sponsored by Rockefeller, Bill S856

State and Local Reservist First Responders Assistance Act of 2003

Authorize grants to reimburse Indian tribes for costs relating to the mobilization of Reserves who are first responder personnel of tribes.

Sponsored by Lautenberg, Bill S921

Chronic Wasting Disease Support Act of 2003

Provide for multi-agency effort to research chronic wasting disease and methods to control the spread to deer and elk herds.

Sponsored by Allard, Bill S1036

Violence Against Children Act of 2003

Provide enhanced Federal assistance in preventing and prosecuting crimes of violence against children.

Sponsored by Boxer, Bill S1123; Bill HR2539

Continued on page 10

Legislative Update - Federal

Continued from page 9

Establish the Office of Native American Affairs within the Small Business Administration, to create the Native American Small Business Development Program.

Sponsored by Johnson, Bill S1126

Chronic Wasting Disease Financial Assistance Act of 2003

Authorizes grants to tribal governments.

Sponsored by Allard, Bill S1366; Bill HR2636

American Indian Trust Fund Management Reform Act Amendments Act of 2003

Additional reforms.

Sponsored by McCain, Bill S1459; Bill HR2981

Tribal Colleges and Universities Head Start Partnership Act

Amend the Head Start Act to provide grants to Tribal Colleges and Universities to increase post-secondary degrees in early childhood education.

Sponsored by Bingaman, Bill S1469

Native American Entrepreneurs Act of 2003

Establish the Native American Entrepreneurs Program and provide \$3,000,000 in grants for training and technical assistance.

Sponsored by Bingaman, Bill S1488

Amend the Internal Revenue Code of 1986 to provide for the treatment of tribes as State governments for issuing tax-exempt governmental bonds.

Sponsored by Campbell, Bill S1526; Bill HR1421

Indian Tribal Development Consolidated Funding Act of 2003

Establish coordination of Federal funds for economic development.

Sponsored by Campbell, Bill S1528

Amend the Indian Gaming Regulatory Act to include provisions relating to

the payment and administration of gaming fees.

Sponsored by Campbell, Bill S1529

Indian Trust Payment Equity Act of 2003

To provide for the payment of amounts owed to Tribes and individuals.

Sponsored by Daschle, Bill S1540

Amend the Internal Revenue Code of 1986 to enhance the economic future of Native Americans.

Sponsored by Johnson, Bill S1542

Amend the National Minority Media Opportunities Act, to include American Indians in broadcast stations used to serve language minorities.

Sponsored by Kennedy, Bill S1563

Re-authorize the Native American Programs Act of 1974.

Sponsored by Inouye, Bill S1565

Ensure that Federal Programs provide efficient and effective services to Tribes.

Sponsored by Campbell, Bill S1600

Department of Health and Human Services Tribal Self-Governance Act of 2003

Transfer to Tribes the control of certain programs and services.

Bill S1696

Provide a voluntary alternative process to reach settlement of *Cobell v. Norton*.

Sponsored by Campbell, Bill S1770

Amend the Native American Housing Assistance and Self-Determination Act of 1996 to improve housing programs.

Sponsored by Johnson, Bill S1802

American Indian Lands Title Report Commission Corrections Act

Amend section 501 of the Act to provide for the Lands Title Report Commission for Indian trust lands.

Sponsored by Bereuter, Bill HR28

Recognize and honor the achievements

and contributions of Native Americans and establish a paid legal public holiday in honor of Native Americans.

Sponsored by Baca, Bill HR167

Indian Reservation Jobs and Investment Act of 2003

Amend the Internal Revenue Code to provide tax credits for Indian investment and employment.

Sponsored by Shadegg, Bill HR388

Require each agency in the Department of the Interior to consider whether actions have any disparate impact on a racial, ethnic, or religious minority.

Sponsored by Andrews, Bill HR654

To provide for and approve the settlement of certain land claims of the Bay Mills Indian Community.

Sponsored by Miller, Bill HR831

Authorize the Health Resources and Services Administration, the National Cancer Institute, and the Indian Health Service to make grants for cancer and chronic diseases.

Sponsored by Menendez, Bill HR918

Code Talkers Recognition Act

Authorize the gold medals to Native Americans who served as Code Talkers during foreign conflicts.

Sponsored by Granger, Bill HR1093

Amend the Small Business Act to expand and improve the assistance provided by Small Business Development Centers to Indian tribe members.

Sponsored by Udall, Bill HR1166

Amend title 38, USC, to extend guaranteed housing to Native American veterans.

Sponsored by Faleomavaega, Bill HR1190

Create a commission on Internet gambling, licensing, and regulation.

Sponsored by Conyers, Bill HR1223

Native Act to Transform Imagery in Various Environments

Authorize the Secretary of Education to make grants to assist schools to discontinue use of a derogatory or discriminatory name or depiction as a team name, mascot, or nickname.

Sponsored by Pallone, Bill HR1246

Diabetes Prevention Access and Care Act

Promote and improve the care of individuals with diabetes for the reduction of health disparities.

Sponsored by DeGette, Bill HR1916

Native American Sacred Lands Act
Protect sacred Native American land from significant damage.

Sponsored by Rahall, Bill HR2419

Indian Health Care Improvement Act Amendments of 2003

Improve the services and facilities of health programs.

Sponsored by Young, Bill HR2440

Native American Education Equity Act

of 2003

Establish assistance programs to institutions of higher education.

Sponsored by McIntyre, Bill HR2484

Amend the Internal Revenue Code to treat Tribes the same as State governments.

Sponsored by Crane, Bill HR2675

Make technical amendments to the Indian Child Welfare Act of 1978.

Sponsored by Young, Bill HR2750

Provide for land claims of the Sault Ste. Marie Tribe of Chippewa Indians.

Sponsored by Dingell, Bill HR2793

Native American Veterans Cemetery Act of 2003

Amend title 38 USC, to provide for the eligibility of Indian tribal organizations for grants for the establishment of veterans cemeteries on trust lands.

Sponsored by Udall, Bill HR 2983

Amend the Indian Self-Determination and Education Assistance Act to re-designate the American Indian Education Foun-

ation as the National Fund for Excellence in American Indian Education.

Sponsored by Renzi, Bill HR3504

Amend the Indian Gaming Regulatory Act to require State legislature approval of new gambling facilities and to provide for minimum requirements for Federal regulation of Indian gaming.

Sponsored by Shays, Bill HR3745

Authorize the Secretary of Agriculture and the Secretary of the Interior to enter into an agreement with Indian tribes meeting certain criteria to carry out projects to protect Indian forest land.

Sponsored by Pombo, Bill HR3846 ♦

Listserv Update

Chair-Elect, Angela Sherigan

Our listserv is up and running! The list-serv is an e-mail based member benefit that allows our members to receive messages from the Council, ask questions, share information, share stories, make referrals, and much more. It is currently an open forum, so anything Indian related is fair game. Sign up today at <http://groups.michbar.org> if you are not already signed up. See you there!

How to Join the List-Serv

1. Go to the State Bar web page: www.michbar.org
2. Click on Sections
3. Click on American Indian Law (from the drop box)
4. On the left side of the page, click Listserv
5. Click Join the Listserv
6. Fill out the form and click subscribe

Legislative Update: State Legislature

If you would like to obtain additional information, check the following website: www.michiganlegislature.org.

Implements provisions from the State/Tribal Tax Agreements.

Sponsored by Gilbert, SB164;
Sponsored by Ward, HB 4292

Appropriations for community and junior colleges for fiscal year 2003-2004, including funding for Michigan Tuition Waiver program.

Sponsored by Switalski, Bill SB322;
Sponsored by Sak, Bill HB4412

Provides for law enforcement training, and mandates officers and cross-deputized tribal officers to attend racial diversity courses.

Sponsored by Thomas III, Bill SB335

Winnings from a casino or racetrack are to be included as taxable income. Amends sec. 110 of 1967 PA 281(MCL206.110).

Sponsored by Emerson, Bill SB408; Sponsored by Bieda, Bill HB4556

Legislative approval of a compact with an Indian tribe that includes a provision allowing for gambling.

Sponsored by Cropsey, Bill SB452

Personal protection order effective and enforceable anywhere within state when signed by Judge, including on tribal lands by tribal enforcement officers.

Sponsored by Patterson, Bill SB892

Provides for personal protection orders, and issuance of after one incident of stalking and enforcement by tribal courts.

Sponsored by Wojno, Bill HB4066

Appropriations for the family independence agency for the fiscal year 2003-2004 funding for 50% foster care costs.

Sponsored by Kolb, Bill HB4423;
Sponsored by Johnson, Bill SB283

Creates a Michigan land bank for receiving tax reverted property and other property for economic development, except casinos.

Sponsored by Tobocman, Bill HB4485

Income tax credit for caring for senior citizen in home.

Sponsored by Shaffer, Bill HB4512



Amends the Income Tax Act to include in the taxable income of nonresidents casino winnings.

Sponsored by Steve Bieda, Bill HB4556

Provides a personal income tax exemption for foster children.

Sponsored by Woodward, Bill HB4672

Provides for the manner of approval of compacts made between Michigan and Tribes and prohibits the construction and operation of casinos on certain land.

Sponsored by Fulton Sheen, Bill HB5189 ♦

Notice

Applications are invited for 2004 grants from the Access to Justice Fund.

Total estimated funds available are up to \$35,000.

It is anticipated that several grants will be awarded from this total amount for **one-time, innovative** projects.

See www.msbf.org/grants/atj for:

- ATJ Grant Instructions and Criteria
- AOJ/ATJ Application Form

Submit applications electronically by August 20, 2004 to msbf@msbf.org.

The Access to Justice Fund supports civil legal services for low-income persons in Michigan. ♦



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Cultural Corner

Melissa L. Pope

The American Indian Law Section Newsletter always contains important legal information in it. It has legislative updates, case summaries, and section business. Through Cultural Corner, I have attempted to also give a glimpse of Native cultures, traditions, and religions. While I plan to continue contributing to this special section of the AILS Newsletter, I would like to focus this article on the resources that are available to you to gain a deeper understanding of how Native world views influence interactions with both Indian and mainstream legal systems.

In my opinion, the best place to start is with Vine Deloria, Jr. Without a doubt, one of the greatest Native writers of our time, Vine Deloria, Jr. gives a straight forward telling of Indian country, Indian politics, Indian activism, traditional Indian legal systems, Indian experiences with the mainstream legal system and, if it's possible, more. While I recommend any of his books, two of my personal favorites are *Custer Died for Your Sins* and *God is Red*. If fiction is your preference, there are many selections that feature Native characters and themes (no, this does not include the romance novels with the word savage in the title ☺) so take a moment to look through the Native American section of your favorite bookstore or library the next time you are looking for something

to read.

If you don't have time to read a book, rent a movie. While my favorite, *Powwow Highway*, is not available in many video stores, there are others that are well worth the time. An excellent docudrama is *Incident at Oglala*, which explores the murder of two FBI agents on the Pine Ridge Reservation, the trials of the men accused of these murders, and the efforts to free Leonard Peltier, one of the few Native Americans listed as a political prisoner by Amnesty International.


For a more dramatic interpretation of similar events in *Incident at Oglala*, watch *Thunderheart*. In addition to bringing various political issues to the forefront, it also does a wonderful job of sharing Indian humor with mainstream society. Another good film is *Dance Me Outside*. You can also look at documentaries, such as *How the West was Lost*, *More than Bows and Arrows*, and the most recent *In Whose Honor*.


And don't forget, the new AILS List-serv is a wonderful place to discuss your opinions of books and films. I look forward to reading your reflections! ♦





Vine Deloria, Jr.

Media Details


 **God is Red**
Paperback: 352 pages
Publisher: Fulcrum Publishing; 30th Annv edition (September 1, 2003)
ISBN: 1555914985


 **Custer Died for Your Sins**
Paperback: 278 pages
Publisher: University of Oklahoma Press; Reprint edition (April 1, 1988)
ISBN: 0806121297


 **Powwow Highway**, 1992
 Directed by Jonathan Wacks
 Run time: 88 Minutes

 **Incident at Oglala**, 1992
 Directed by Michael Apted
 Narrated by Robert Redford

 **Thunderheart**, 1992
 Directed by Michael Apted
 Run time: 119 Minutes

 **Dance Me Outside**, 1995
 Directed by Bruce McDonald
 Run time: 84 Minutes

 **How the West was Lost**
 video release 1998

 **More than Bows and Arrows**
 N. Scott Momaday
 video release 1985

Report from the Chairperson

Continued from page 2

certed effort by the Bar and Sections to improve communication among their respective members. The observations of the Bar (and myself) are that the Sections with effective communication resources can only benefit everyone including the public we serve. However, in our busy professional lives, it is often difficult to contact other members, particularly *en masse*. I can personally attest that the State Bar of Michigan has given it a very high priority.

Tom Myers, Council member, attended a Bar meeting on creating more Specialty designations. I am sure he will provide an update at the annual

meeting. Angela Sherigan, Chair-elect, attended the Bar leadership Conference in June. The Section was invited to contribute to the *Bar Journal* articles of interest on Native American issues. This newsletter includes case summaries as well as legislative updates for our professional consumption. As Chairperson I have received calls from assorted parties and was able to refer them to appropriate resources. I am extremely grateful to all that have assisted in carrying out the duties of our Section.

Our annual meeting is scheduled for Thursday, September 30, 2004 at the Lansing Center from 2 to 5 p.m.

The Bar has informed Section chairs that they will again have an exhibit hall for goods and services useful to attorneys and their offices. I will also have the honor of presenting the Tecumseh Peacekeeping Award to Jim Keedy, of Michigan Indian Legal Services. I have known Jim for many years, and am familiar with his efforts on behalf of Native Americans. I look forward to seeing our Section members in the fall. ♦

State Bar Members Applaud Michigan Law Online

Michigan attorneys are taking advantage of Michigan Law Online, a new valuable research tool from the State Bar of Michigan and the Institute of Continuing Legal Education (ICLE). More than 3,900 members have registered for the free service, which is updated daily and is available at all times to active members of the State Bar of Michigan.

Michigan Law Online provides immediate online access to Michigan Supreme Court opinions (1942-present), Michigan Court of Appeals published opinions (1965-present) and unpublished opinions (from

2003), Michigan Supreme Court orders (1966-present), current Michigan Court Rules and amending orders (1995-present) and the Michigan Rules of Professional Responsibility. Cases are searchable by keyword, date, docket number, case citation, party name, and opinion author.

Initial feedback regarding the tool has been positive. Users have praised the site's user-friendliness, particularly the "print citation" feature that allows members to use citations without re-formatting them, and a separate function that allows users to see other cases that cite a case being viewed.

ICLE has already sent Michigan Law Online login information and passwords to State Bar members with valid e-mail addresses on file. Members who have received login information and passwords may visit www.icle.org/ScriptContent/mlo.cfm to begin using Michigan Law Online immediately. Members who have not received login information and passwords or need assistance should contact ICLE at 1-877-229-4350 or mlo@icle.law.umich.edu. ♦

State Bar Annual Meeting Slated for Sept. 30 - Oct. 1, 2004

The State Bar of Michigan's 69th Annual Meeting has been scheduled for September 30 to October 1, 2004, at the downtown Lansing Center and Radisson Hotel. This year's program is being held in conjunction with the Governor's Task Force on Children's Justice, chaired by Michigan Supreme Court Justice Elizabeth Weaver. The task force is celebrating its 10th anniversary this year.

The president of the American Bar Association (ABA), Dennis W. Archer, will be the keynote speaker at the noon luncheon on Thursday, September 30. Mr. Archer, who is the chairman of Dickinson Wright PLLC, a Detroit-based law firm, is the first African American and the first person of color to head the ABA.

A special dinner will be held that evening from 6 p.m. to 7:30 p.m. to

honor State Bar of Michigan 2004 awards recipients. Afterwards, a Capitol Celebration to commemorate the 125th anniversary of the State Capitol will be held, with tours of the building and opportunities to meet Bar members who are leaders in the Senate and House of Representatives.

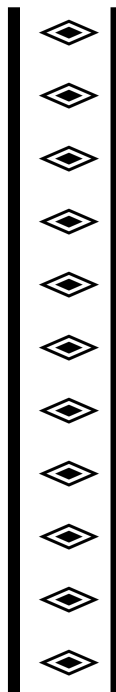
Other featured speakers at the Annual Meeting are: Dr. R. Dale Lefever from the University of Michigan Medical School, who has conducted more than a thousand leadership and management development programs for judges, court administrators, prosecuting and defense attorneys and others in the justice system; Dr. Kyle Pruett, an internationally respected child psychiatrist and parenting expert; and Dr. James Garbarino, coordinator of the Family Life Development Center and Professor of Human Development at

Cornell University, who has authored or co-authored 18 books.

On Friday, October 1, Michigan Supreme Court Chief Justice Maura Corrigan will swear in the 70th president of the State Bar, Nancy J. Diehl. During the course of the two-day event, Board of Commissioners and Representative Assembly meetings, as well as Section and group programs and university receptions, will take place. An added attraction is the return of exhibitors this year after a one-year hiatus. As in previous years, a 5K walk and run, the Race for Justice, will be held in conjunction with the Annual Meeting. For more information about the Annual Meeting, please contact State Bar Events Coordinator, Caryl Markzon at (517) 346-6371. ♦

The American Indian Law Section Annual Meeting will be held at 2:00 p.m. on Thursday, September 20, 2004 at the Lansing Center in Lansing, Michigan.

The meeting will be followed by the presentation of the *2004 Tecumseh Peace Keeping Award* to James Keedy, Executive Director of Michigan Indian Legal Services. Please join us for the presentation and a reception in honor of Mr. Keedy's extraordinary contributions to American Indians.



SBM

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