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The Legal Fiction of Gridiron Cowboys and Indians

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The Legal Fiction of Gridiron Cowboys and Indians

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I. The Tomahawk Athletic League (Introduction)

When the Florida State Seminoles and the Illinois Fighting Illini dropped out of their lucrative football and men’s basketball contracts with the Atlantic Coast Conference and the Big Ten Conference (and their accompanying National Collegiate Athletic Association obligations) in the summer of 2005 to start up their own competing collegiate athletic organization, they challenged the other schools with Native American mascots to join them.1 Within weeks, a dozen schools joined Florida State and Illinois. The Central Michigan Chippewas, Utah Utes, San Diego State Aztecs, Arkansas State Indians, Louisiana-Monroe Indians, Hawaii Warriors, William & Mary Tribe, Southeast Missouri State Indians, Alcorn State Braves, Bradley Braves, and the North Dakota Fighting Sioux signed up. Alumni of schools that had changed their mascots away from Native American themes quickly leaned

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*Assistant Professor, University of North Dakota School of Law. Director, Northern Plains Indian Law Center. Appellate Judge, Pokagon Band of Potawatomi Indians and Turtle Mountain Band of Chippewa Indians. Enrolled Member, Grand Traverse Band of Ottawa and Chippewa Indians. The author wishes to recognize the Hoopa, California seventh and eighth grade football team, whose story of their 2000 season inspired the writing of Part II. The author thanks Wenona Singel, Dr. Donna Brown, Richard and June Fletcher, Zeke, Katie, and Nolan Fletcher, Myriam Jaidi, Dr. Dwayne Jarman, Dr. Leigh Jeanotte, John and Eva Petoskey, and Brian Upton for their continuing inspiration and contributions. The author also wishes to thank the editors of this journal who worked on this piece, and to thank the students who founded this outstanding publication. This piece is part of a series of articles featuring the fictional Lake Matchimanitou Band of Ottawa Indians. See, e.g., Matthew L.M. Fletcher, The Legal Fiction of Lake Matchimanitou Indian School, 13 Am. U. J. Gender Soc. Pol'y & L. 597 (2005).

on school administrations to return to their old ways. Soon, the St. John's Redmen, the Eastern Michigan Hurons, and the Miami of Ohio Redskins joined the new athletic association.

Fearing a football and basketball schedule peppered with the likes of non-powers such as Alcorn State and William & Mary, Florida State and Illinois started tempting other schools drop the NCAA and fill up a proposed Cowboys Division to go with their Indians Division—for without cowboys, how could there be Indians? Suddenly, joining the new league was in vogue.

Many schools without Native American mascots agreed to join, largely due to their own long-standing disputes with the NCAA, but also because maybe they could see what was coming down the pike. Soon the Notre Dame Fighting Irish, the Louisiana-Lafayette Ragin’ Cajuns, the Robert Morris Colonials, the Sacred Heart Pioneers, the Eastern Kentucky Colonels, the Nicholls State Colonels, the La Salle Explorers, the Western Illinois Leathernecks, the Ole Miss Rebels, and the UNLV Rebels petitioned to join the new league. The final schools to join the Cowboys Division were the Oklahoma State Cowboys, the McNeese State Cowboys, the Stetson Hatters, the UC-Santa Barbara Gauchos, and the Wyoming Cowboys.

The members of the new conference, unofficially known as the Tomahawk Athletic League, agreed to play each other exclusively in football and men’s basketball. Part of their mission statement as a league was to declare and preserve their rights to dress up a student as an Indian at football and basketball games and to continue to honor Native Americans, their warrior heritage, and their culture—whether the Indians liked it or not.

The league scheduled four January post-season football bowl games to follow an 11-game regular season—the Crazy Horse Bowl, the Little Big Horn Bowl, the Seventh Cavalry Bowl, and, for a national championship game where the leaders of each division would play, the John Wayne Bowl. For the basketball side, the league provided for a round-robin schedule, with each team playing other teams in its division twice. The championship would be decided by a single-elimination tournament, much like the NCAA’s basketball tournaments, but every team would qualify. The final four teams in the basketball tournament would play over a weekend in a series in April called the Rain Dance.

Because the schools, particularly the big-name schools like Florida State, Notre Dame, Utah, and Illinois, had a huge following, each school in the league expected to rake in far more than they could have made while members of their respective conferences and the NCAA. Instead of being forced to share millions of television
revenue with over 300 Division I schools in basketball and 200 Division I-A and I-AA schools in football, the new Tomahawk League schools only had to share with 30 others. The NCAA and several big conferences filed lawsuits along with rival schools relying on their games with Florida State, Illinois, Notre Dame, and others for football and basketball revenue, but no court would issue an injunction against the new league by the start of the fall 2005 football season.  

In late August, Florida State hosted Utah. A major network broadcast the game on national television opposite the NCAA opener, the Michigan versus Colorado game. The new league prepared expensive promotional television spots featuring digitally animated Indians dressed in war paint and riding horses doing vicious battle with American soldiers dressed in blue cavalry uniforms. With all the hype surrounding the split in major college sports, the Tomahawk League game blew away the NCAA game in ratings. Both Utah and Florida State took home three or four times more revenue than they would have playing in the NCAA structure.  

The Florida State athletic department put together a one-minute television spot to play at halftime discussing the school’s attempts to honor the tradition of Chief Osceola and the never-defeated Seminole Tribe. Leaders of the non-traditional group of Seminoles remaining in Florida appeared on the advertisement with sound bites in support of the university. The last few seconds featured a few shots of the football team—loaded with at least ten players who pro scouts said would play in the National Football League someday—easily scoring a touchdown and sacking the quarterback against a team that looked suspiciously like the Florida Gators, but whose identifying marks were obscured by television magic. Right after the advertisement aired, the Seminole mascot, accompanied by a bevy of new student recruits painted to look like television Indians, snuck up behind and attacked the Utes’ mascot with an armory of toy tomahawks. A scuffle ensued between the two teams as they re-entered the playing field after halftime, with the student dressed as Chief Osceola beating a Ute cheerleader³ with a hard plastic ax. After the stadium security officers regained control, Florida State won by four touchdowns, continuing its fine football tradition.

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II. THE MATCHIMANITOU COUNTY PEE WEE FOOTBALL LEAGUE

No one expected the Matchimanitou Bears to compete in the Matchimanitou County Pee Wee Football League. They never did. Maybe they'd win a couple games a year, but in the ten years the eight-team league had existed, they never qualified for the playoffs where the top four teams advanced. Maybe it was because the team consisted mostly of Lake Manimanitou Band of Ottawa Indians; it was well documented that few of the LMB members had any money. The Band contributed a few hundred bucks a year to the team, but the tribe had no money to pay for new helmets, shoulder pads, or uniforms.

In fact, only a handful of the Matchimanitou Bears had anything that resembled uniforms. The helmets and equipment, much of it 1970s vintage, had been handed down from generation to generation of Matchimanitou teams. When the team hit the field, many of them wearing their grandfathers' old sweatshirts over their cracked shoulder pads; they all looked like they played for separate teams. Because few of the Bears’ parents could afford to take time from work to coach the team, the Bears rarely knew who would show up at games and practices to run them through their drills or call plays. Every game played by the Bears was an away game; they had no field to call their own.

In contrast, the other Pee Wee teams of the Matchimanitou County league had new uniforms every couple of years, stark and blazing reds and blues and violets, matched by clever decals on their state-of-the-art helmets. The parents who organized these players into football teams lived on Lake Matchimanitou, the forty-mile-long body of water that dominated the county, and on the Great Lake that bordered the western edge of the county. Property values on both lakefronts were extravagant and it was not unheard of for a summer cottage to sell for seven figures. Each team was organized through a parents’ booster group, funded through private donations, and coached by a former high school or college football standout.

Few knew that Matchimanitou County exactly matched the borders of the reservation created by the Treaty of Lake Matchimanitou, signed in 1855 by the Lake Matchimanitou Band ogemas and the Michigan Indian agent.Shortly after the

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ogemas signed the treaty, non-Indian speculators rushed in to stake out the best lands on the lakeshore, believing (falsely) that the treaty signing meant that the land in Matchimanitou County was open for public sale. By the time the Matchimanitou Band relocated from their homelands a few hundred miles away in southwestern lower Michigan, all the best land in their reservation had been taken by non-Indians. For the next 150 years, LMB members lived in the stony, sandy, and virtually worthless land between the Great Lake and Lake Matchimanitou, away from the lakefront homes and off the main roads, virtually forgotten by the non-Indians living in the Band’s own reservation. By the time of the Indian New Deal in 1934, even the Band’s trustee—the federal government—had forgotten them.

In the late 1970s, the federal government re-affirmed its recognition of the Lake Matchimanitou Band and began to fund some of the tribe’s government programs. However, the influx of government funds was never enough, and most of the Band’s members remained in poverty. Although Matchimanitou County was far from a metropolitan area and unmarketable as a gaming resort area, the Band slowly began to climb out of a deep hole. In 1990, LMB families got together and petitioned the Matchimanitou County Pee Wee League for a football franchise to call their own.

In 2005, a young man still in high school named Frank Roberts agreed to coach the Matchimanitou Bears. He was a West Matchimanitou High honors student and had been the back-up quarterback with the varsity team until he had been injured in a pick-up game in the spring. He’d never play competitive football again, the doctors said. So in the fall he directed his attention to the eleven- and twelve-year-olds in the dirty gray pajamas.

Frank had been obsessed with football since he was five and, as a former high school quarterback, knew enough about offensive and defensive schemes to put amateur coaches, such as those he’d be opposing in the Pee Wee league, to shame. He had played two seasons at quarterback and safety for the Bears team; his teams won a total of five games in two years but were still considered to be the best Bears teams ever fielded. In the three weeks of practice before the season started in September, he realized his three best players were the girls on the team. In a decision that surprised even himself, he informed the team that the three young


women would start at quarterback and both running back positions on offense and would be his three linebackers on defense.

At the pre-season league meeting, Frank attended on behalf of the Bears. The league drew up a schedule and went over rules changes. Several of the other representatives knew Frank from his days as back-up quarterback of the varsity and some even remembered him from the Pee Wee games years earlier.

The Bears played the Waylandia Razorbacks in their first game. Waylandia was located at the southern tip of Lake Matchimanitou, and the Razorbacks were the defending league champions. The book on them was that all their best players had moved on to high school, so they would be weaker that year. The Bears’ quarterback, Leelu Smallings, scored on the Bears’ first play from scrimmage. On the Razorbacks’ first play, the Bears’ middle linebacker, Tina Wilson, knocked the quarterback on his duff before he could hand the ball off to his halfback. On second down, Leelu stripped the ball from the halfback, Tina recovered the fumble, and Reggie Manitou, the Bears’ undersized nose tackle, picked it up and rumbled in for the score. During the course of the game, the third Indian girl, Mary LaPorte, scored three times on fullback dives. The Bears won 56 to nothing, by far their biggest win in the fifteen years they’d played in the league.

By the end of September, the Bears were 5-0 and had given up only one touchdown, winning each game by an average of forty points. It was clear to even the casual observer that the 2004 Bears team was the class of the league and would likely win the championship going away. The number of Bears supporters after the first big win had steadily increased to the point that, in the fifth game, the number of Indians in the bleachers outnumbered the non-Indians by a ratio of two-to-one.

However, the fifth game featured, for the first time, the use of plastic tomahawks by the supporters of the Bears’ opponents, the Cleland Braves. The Braves’ supporters also played the Florida State University Indian-themed fight song on big boomboxes behind the stands. One younger supporter brought a large poster with a drawing of stylized Indians, rich with stereotypical headdresses and war paint, slaying a bear. During the game, Braves’ supporters loudly generated stereotypical Indian war cries and chants. Frank’s team played through what they


The record revealed that Student B recalled being called names, including “stupid Indian” and that during spearfishing seasons she heard almost daily taunts, including “Indians should be killed, not the fish.” She felt it was hypocritical that the same people who hate the Indian race could shout “Go
considered to be insane behavior and won anyway. Two LMB council members present at the game angrily promised to complain at the league’s monthly meeting, conveniently scheduled for the next Wednesday.

The day before the meeting, the Pee Wee league president, Jefferson Madison, a retired lawyer, left a message with Kathy Paul. Kathy, a LMB council member, was away on official business and did not receive the message in time for the Wednesday meeting. She had been the representative for the Bears Pee Wee team when her son played a few years earlier but was no longer involved in the program. Because the Bears had never officially replaced Kathy as team representative, Jefferson called her with the official notification that the Matchimanitou County Pee Wee League intended to suspend the Bears from post-season play due to several rules violations.

At the Wednesday meeting, Frank and the two LMB council members who had shown up to complain about the Cleland Braves’ fans’ behavior were surprised to hear that, first, their complaints had not properly been phoned in ahead of time to be placed on the agenda (in accordance with league rules), and second, that numerous rules violations by the Bears team were already on the agenda. Frank and the two council members sat and faced the entirely Caucasian league representatives while they read off the litany of abuses.

The first violation seemed silly. Though Frank’s father voluntarily acted as a linesman marking the line of scrimmage at every game he could attend (three of the five so far), little did Frank know that the Bears were obligated under league rules to bring a linesman with them on the road. In the two games Frank’s father didn’t make it, someone from the stands had stood up and done the duty. “No harm, no foul, right?,” suggested Frank. “No,” said the league president, “A rule is a rule.” “Where would we be without them, young man?,” the administrator admonished.

The second violation seemed even more ridiculous. By rule, an adult representative was required to attend each monthly meeting of the league. In the pre-season meeting, only Frank attended on behalf of the Bears. Unfortunately for the Bears, Frank was nine months shy of eighteen years and did not qualify as an adult. As a corollary, the Bears’ failure to update the name and contact information of their team representative violated the rules as well.

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Indians” at athletic events in support of their team. Additionally, one girl was called “the squaw.” She believed the logo taught people how to stereotype. At pep rallies, students would mimic Indian dancing and make stereotypic “war cries.” She also complained that the school district did not teach Indian culture.

Id. (emphasis added).
Frank asked why the administrator didn’t call him, why he had chosen to call someone he knew was no longer the team’s representative, why the league had allowed these violations to pass without comment for so many years, and why Jefferson had decided to surprise the Bears with this news. The administrator said that, by rule, he was required to inform the team’s representative at least 24 hours before the next meeting of any potential rules violations. He did exactly as the rules prescribed.

For the next hour, Frank and the two council members listened to a dozen more rules violations, ranging from uniform and equipment violations to the fact that the Bears had no home field. For probably the first time in competitive sports, several league representatives complained that they had too many home games. No one had ever voiced these complaints to the Bears before, Jefferson acknowledged. They had not done so because, in spite of the pathetic organization the Bears brought to the league, they had remained silent in order to give the team a chance. In short, Jefferson added, it was time to make the Bears follow the rules.

Frank didn’t know what to say. As a senior in high school, he couldn’t debate against a seasoned lawyer like Jefferson. He felt more helpless than he had in the hospital after his knee surgery. The two council members, enraged, complained loudly that the league only brought these issues up because the Bears were finally winning. They argued that the people in the room were bigots. Jefferson, having met with the rest of league separately for an hour before the scheduled time, had counseled the other team representatives to remain silent when the Bears’ representatives became angry.

They did as their lawyer instructed: those feeling righteous staring back stonily at the three Indians, those feeling ambivalent looking away. After a few minutes of letting the two council members have their say, Jefferson added disorderly conduct during a league meeting to the list of rules violations. He then asked for a vote from the league representatives, in accordance with the rules, on whether to suspend the Bears from the playoffs. The league representatives voted 7-0 (Frank, neither an adult nor the official team representative, was forbidden from voting, not that it mattered) to suspend the Bears. Several of the league presidents approached Frank after the meeting to apologize, saying that they didn’t want to do it but that they had no choice.

The next day, dejected, Frank read the league rules for the first time. He had read the last forty pages of the league rulebook, the rules of the games, but not the first ten, thinking that, as merely a coach, he wouldn’t need to know those. He read
that the Bears could appeal the vote by filing a petition with the league, but that if
they lost their appeal, they would be suspended for this year’s playoffs and next
year’s playoffs. He and his father met with the Bears’ players’ parents on Thursday
evening to ask what they wanted to do. Of course they wanted to appeal, but they
were concerned about losing next year’s playoffs too.

At the request of the LMB Tribal Council, the tribe’s General Counsel Bryan
Montana attended the parents meeting. He had read over the rules before the
meeting and it was clear to him that the Bears had no maneuvering room. He
offered to prepare an appeal to the league for the Bears, but said that an appeal to
the same people who denied them once was probably futile. Some parents said they
wanted to go to the courts and file a civil rights claim, but Bryan advised them that
they had very little chance to win because the league was a local, private
organization with no funding from state or federal government sources. Others
argued that the only way the Band had ever gotten anything was through the federal
courts.

In the end, the parents voted narrowly to proceed with an appeal to the league
and not file a federal suit. Bryan believed he could talk to the administrator lawyer-
to-lawyer about the equitable aspects of the Bears’ situation. Many of the parents
knew the league representatives well enough to appeal to them informally to change
their vote. Bryan quickly drafted a letter officially designating an adult as team
representative and asking for a meeting to discuss the Bears’ appeal.

On Saturday, Frank’s team listlessly took the field against the Shelbyville
Rockets, a game located the farthest from where the Bears players lived.
Demoralized, five or six of the players didn’t even show up and, when Mary LaPorte
banged up her knee on a quarterback sweep, they had to finish the first half with 10
players. Rockets supporters brought out the anti-Indian chants and posters in force,
loudly taunting the players virtually the whole game. More than one poster
appeared depicting a swarm of rockets burning Indians riding horseback and
destroying Indian villages. A couple of teenagers dressed in team colors from the
collegiate Tomahawk Athletic League acted out a gruesome scene of slaughter,9
shades of Wounded Knee or Sand Creek, as a halftime show. More than one Rockets

(Durham, J., dissenting) (disagreeing with the majority’s denial of an Indian group’s request for the
Commission to revoke the issuance of license plates bearing variations of the word “Redskin” and noting that
“the Washington Redskins football team (and the would-be owners of the personalized Utah license plates at
issue here) utilize the name and symbol of the genocidal practice of paying white soldiers a bounty for the
bloody skins of murdered Native Americans.”).
parent chided Frank for fielding three girls and, when Mary was injured, they pointedly criticized him for putting the girls in danger. Despite the raucous crowd, the Bears, led by a rested Mary LaPorte, scored two touchdowns in the last few minutes of the game to defeat the Rockets.

On Wednesday, Bryan, Frank, and a dozen or so Bears’ family members met outside Jefferson’s law office where they would present their case. A few of the family members said they didn’t want to risk next year’s season. Mary, Leelu, and Tina would all return for a second season. With any luck, they’d be just as good or better. Also, they’d talked to the parents from the other teams and they could already tell that no one would budge from their earlier vote.

Since Frank would graduate in the spring and planned to attend college, he wouldn’t coach the team the next year. Several parents agreed to learn the rules forward and backward and make sure next year’s team wouldn’t be suspended again. The team would petition the LMB Tribal Council to clear some land and try to make a football field out of it. After this discussion, Bryan and Frank agreed to drop the appeal and notified Jefferson.

In the Bears’ last game, Leelu and Tina scored two touchdowns each. Mary recovered a fumble and recorded four sacks. The Bears won 36-0. Two weeks later, in the league’s championship game, played at a local high school field located within sight of a sacred cluster of trees where the ogemas had met before agreeing to sign the 1855 treaty, the Waylandia Razorbacks defeated the Shelbyville Rockets 14-6 in a rain-soaked, penalty-filled, fumble-fest featuring no Indian players.

III. THE TOMAHAWK ATHLETIC LEAGUE (EPILOGUE)

As the Tomahawk League season gridiron progressed, the new league suffered from the problem of not having enough competition between highly competitive and highly skilled schools. The Illinois victory by nine touchdowns over William & Mary wasn’t televised except by local cable. The viewership for Notre Dame’s seven-touchdown victory over Eastern Kentucky was less than a tenth of that for UCLA’s victory over Washington, televised at the same time. Sports commentators complained that, although Florida State had enough good players—players with the potential to play professionally—they weren’t improving or gaining needed experience against teams like Arkansas State and Miami of Ohio. Moreover, the injury rate was scary for schools like North Dakota, formerly a Division II school, in games against bigger and stronger teams.
By late October, the national television corporations pointedly informed the league that all television contracts would be cancelled unless the quality of competition picked up. Frankly, no one expected that to happen. There wasn’t enough time or enough teams to fit the bill. Everyone expected an ugly repeat of the USFL or, worse, the XFL—except this one would conclude with the corruption of amateur athletes.

That all changed when the new league announced that its players would get paid a percentage of television revenue and that any player from the NCAA was welcome to try out without the penalty of having to sit out a year for transferring. All the television and advertising contracts were renewed when half the Miami of Florida football team stated that they’d be trying out for Florida State, Notre Dame, Illinois, and any other school that would agree to pay them their fair market value. The NCAA, faced with a mass exodus of their best (and most marketable) players, filed suit yet again.

Florida State, champions of the Indians Divisions, and Notre Dame, victors of the Cowboys Division, prepared to square off in the John Wayne Bowl, set in a stadium built for the purpose of hosting that game by several major gaming and resort companies in Las Vegas. Both teams had run roughshod over their limited competition. In fact, the only team to score a touchdown against Florida State was Illinois. Notre Dame had nearly dropped an overtime game to Mississippi, but finished with an unblemished record. The second place finishers, Illinois and Oklahoma State, were to play in the Crazy Horse Bowl in Dallas, Texas, formerly home to the Cotton Bowl. The third place teams, Utah and UNLV, traveled to Miami to play in the Seventh Cavalry Bowl. The fourth bowl, the Little Big Horn Bowl set in Los Angeles, featured Central Michigan and Wyoming.

At the beginning of the winter basketball season, Utah, Hawaii, and Central Michigan announced that they would be returning to the NCAA after the end of the season. The new league’s marketing campaign had offended enough boosters, students, and regents of these schools so that they couldn’t stomach even the great increase in athletic department revenue. The new league responded by immediately agreeing to donate $100 million to the Native American College Fund. Unfortunately for the league, that organization issued a statement refusing the money. Few, if any, national news organizations publicized the refusal, only the donation. Ultimately, the Tomahawk League got the benefit of the public relations bonanza from the donation and still got the keep the hundred million bucks.

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