

## Honoring the Best Interest of the Child Under the Indian Child Welfare Act

—By Stephanie Chen '10

I was assigned an extremely complicated case that involved an eleven-year-old American Indian boy I will call Jack. Jack, now age 12, has had five different guardians since the age of two. He thought that he had finally found a permanent home with two able and willing guardians that wanted to adopt him. This happy ending fell apart when those guardians, Steve and Kim, filed a petition to terminate their guardianship over Jack.

Upon hearing this sad news, the Judge directed the Clinic to look for a potential home for Jack. Professor Tompkins and I worked closely with Jack's tribe to find potential placements for Jack. Under a federal law entitled the "Indian Child Welfare Act," an Indian child in need of a home should be placed in order of priority: (1) with extended family; (2) with non-related members of the same tribe; or (3) with another Indian family. We uncovered some of Jack's extended relatives in North Dakota and the tribal social worker interviewed them. The family was willing and capable to care for Jack and we set up a visit so that Jack could meet his relatives and his tribe.

We spoke to Jack to ask him what he thought. He said that he did not want to live in North Dakota, but that he would be willing to go for



"Jack", Student Attorney Stephanie Chen and Friend enjoy some bowling.

a visit. The visit was a success. His relatives threw a birthday party for him and invited plenty of tribal members. Jack left with a great impression, feeling that there was an entire group of people that cared for him. Yet, Jack already knew where he wanted to go and whom he wanted to live with. Jack wanted to live in New Stuyahok, Alaska with Steve's son Charlie. Charlie and his wife Linda are teachers, community leaders, and the parents of two lovely girls. We spoke extensively

with Charlie and Linda regarding their ability to care for Jack. We wanted to be sure that Jack would have a stable and loving home, one that would not displace him in a couple of years. Charlie and Linda were adamant that Jack was already considered their family member and that they would fight for him.

Jack's tribe began to feel increasingly more comfortable with Jack's choice of where to live. The Tribe felt that Jack had made an informed decision and that his opinion should be given a lot of weight since unfortunately, he already had been through so many guardians. Ultimately, the Tribe decided that

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## Note from the Director

— By Jill E. Tompkins, Director, American Indian Law Clinic

Much of the focus of 2009 in the U.S. has been on the effects of the economic downturn on America's businesses and citizens. Within the legal profession, layoffs of attorneys ensued as the downturn trickled down into decreased demand for legal work and potential clients increasingly engaged in self-help. Now in its 17th year, the American Indian Law Clinic also found itself receiving an increasing number of calls from American Indians in need of legal services that they could not afford to pay for on their own. Fortunately the University of Colorado has not only continued to support the Clinic, but to further strengthen its American Indian Law Program. The addition of Associate Professor Kristin Carpenter, who will teach Property and American Indian Law to our faculty is additional evidence of our continued growth.

With the awarding of the American Indian Law Certificate to its first three recipients, Sylvia Curley, Carrie Covington Doyle and Melissa Pingley, our long tradition of excellence in Indian law teaching and scholarship and service to Indian Country continues. This edition of the *Tatanka Legal Times* is replete with narratives illustrating the broad range of experience and learning that our student attorneys receive. It is also full of stories of service and renewed dedication to the idea of serving American Indians and tribal nations which brought many of these students to law school in the first place. The latest edition of the law school's publication, *Amicus*, focuses on the alumni who have taken their CU American Indian Law education and put it to work to in varied and important ways. We are very proud that the Steve Moore, Senior Staff Attorney at the Native American Rights Fund and Co-Chair of the American Indian Law Clinic Advisory Committee is featured. See (<http://www.colorado.edu/law/alumdev/AmicusSpring09.pdf>)

The student articles also showcase the special expertise that the Clinic has developed in the implementation of the fed-

eral Indian Child Welfare Act. Although the student attorneys have experienced much success in litigation under the Act, we decided to take a more proactive role on behalf of our tribal clients and to bring our experience and knowledge directly to them in an effort to improve the outcome of these cases for Indian children. The Clinic was awarded a \$5,000 University Outreach Grant to conduct an on-reservation training for the Northern Cheyenne Tribe (a frequent party in Colorado ICWA cases) and to host a community dinner to recruit new tribal foster and adoptive families. The training will be conducted by the 2009-10 class of student attorneys. Though this type of community outreach in Indian Country requires an additional time commitment, it is one of the most meaningful learning experiences that a clinic student may receive. I appreciate my three children, Tate, Elliott and Grace Shibles, for being patient and allowing me the time to take these trips with the class.

American Indian communities have historically been the most impoverished in our country. I continue to be deeply grateful to the Law School in that it continues to support the Clinic and the learning and service that it provides. ❖



*"A clinical experience in Indian law enables Colorado Law to be more competitive in recruiting and training Indian and non-Indian students to the field."*

— Steve Moore, Co-Chair  
Clinic Advisory Committee



Elliott and Tate Shibles



Grace Shibles (center) as Lana the Ladybug with friends.

# Finding the Roots of Federal Indian Law: Treaty-Making at Ignacio High School

—By Alison Flint '09

In early November, the American Indian Law Clinic students piled into a minivan for the long drive to southwestern Colorado. We were headed to the Southern Ute Reservation for the Clinic's annual outreach fieldtrip—this year a will drafting and estate planning workshop for Southern Ute tribal members. As important as estate planning is for tribal members, particularly those with interests in allotted lands, wrestling with the provisions of the American Indian Probate Reform Act is not exactly the most exciting or engaging means of doing service. Several of us were determined to do something more on the reservation, having driven the eight hours. Why not visit with school children while we were there, sharing our experiences and introducing them to the concept of federal Indian law?



*Student attorney Carrie Covington leads treaty-making exercise.*

So what started as a harmless idea to go talk with the young children at the Montessori school metamorphosed into teaching a class at Ignacio High School, thanks in no little part to my fellow student attorney Carrie Covington's former life as a high school history teacher. But when Carrie and I sat down to try to boil centuries of federal Indian law into a fifty-minute lesson plan, we kept coming up short. What would have the most impact inspiring youth from the Reservation to really think about the effect Indian law has on their lives or even to consider pursuing a career in it? How could we do justice to the subject in such a short time and in a way that engaged high school students?

After much hemming and hawing, we arrived at the answer: we had to give them a hands-on opportunity to understand the roots of federal Indian law. If there was a spark to be had from our fifty minutes, it had to come from the treaties. The rest was superfluous at this point—something to learn in the future, should we succeed in inspiring them. This would not be a general discussion of treaties as the roots of federal Indian law, but rather one far more personal and specific. We would recreate the 1868 Treaty with the Utes. And not by hav-

ing them read the treaty or lecturing about it. Instead, the students would have a chance to rewrite history as parties to the negotiations in Washington, DC in the spring of 1868.

And so, with the students playing the roles of the various parties, the U.S. Government began negotiations with the Tabeguache Band of Utes, led by Chief Ouray, the Weeminuche Band, led by Chief Ignacio, the Mouache Band, led by Chief Tierra Blanca, and the Capote Band, led by Chief Severo and Buckskin Charlie. At first hesitant and a bit confused by the strange language we were speaking of treaties, negotiations, and federal Indian law, the students appeared uncomfortable in their roles. Not so different, perhaps, than the Ute negotiators felt in 1868 after the journey by stagecoach to Denver, and then to St. Louis, and then by train all the way to the marble halls of Washington.

But when the leader of the Government's negotiating team suggested that a single reservation was necessary because white settlers and miners needed free access to Ute land, without the threat of conflict, "Buckskin Charlie" stood up and spoke with the utmost seriousness: "Then why don't you put those whites on a reservation?" From there, the negotiations took off, with the leaders of the various bands articulating the sovereign needs and interests of their people.

Unfortunately, fifty minutes was not enough time to reach a comprehensive treaty. But that did not matter because we had accomplished our goal. The students had had a powerful glimpse at what it means to be part of a sovereign nation and a party to a treaty—at the roots of federal Indian law. Roots that, just maybe, inspired some of them to dig a little deeper for their own roots. Roots that must be understood as the basis for all else that follows. And roots that are worth fighting for. ❖



## System Failure? *Observations about the Indian Child Welfare Act and How the Clinic is Helping Implementation*

—By Kathryn Urbanowicz '10

The Indian Child Welfare Act (ICWA) was enacted in 1978 to help prevent the break up of Indian families. It was a powerful legislative response to an alarming practice: for generations Indian children were taken from their Native families with very little or no legal process causing irreparable damage to families and tribes. ICWA provides a heightened level of protection for Native parents when someone seeks to remove their children. It also recognizes that a tribe has an interest in its youth that is separate from the interest of the parents. While the purpose of the Act is clear, and its potential for protecting Indian families and tribes is substantial, ICWA is only successful to the extent that we understand and apply it. It has been disappointing to learn just how much work still needs to be done for ICWA to reach its full potential. The Clinic is taking steps to help.

Many of the cases that the Clinic handles involve ICWA, and most of my cases and projects have involved some confusion or mistake in applying it. Judges have varying degrees of familiarity with ICWA and have the final say in how ICWA is applied. Even though it is an attorney's job to present the court with relevant law, not all judges are receptive to hearing about ICWA issues. At one hearing, my concern about a child's tribe receiving appropriate notice of the proceeding was met with a dismissive response. The magistrate seemed irritated and assured me that she dealt with Indians frequently and that she knew ICWA. Still, there were multiple issues in the case that might have called ICWA compliance into question. At another hearing, a well-meaning judge got ICWA's requirements for voluntary relinquishment of

parental rights confused with involuntary termination of parental rights. This might have resulted in more hardship than necessary for the mother who ultimately relinquished her parental rights.

While ICWA might not be well understood in all court rooms, even getting a case classified as an ICWA case and getting the appropriate tribes involved is an important step in the right direction. The process is riddled with its own challenges, and sometimes yields inaccurate results. In Colorado, the tribal ancestry inquiry forms that caseworkers use vary from county to county. The lack of uniformity presents a barrier to the flow of information. Perhaps more problematic, at least some of the forms are written too ambiguously. This leads to wrong or incomplete answers. In one Clinic case, an ambiguous form resulted in the wrong tribe receiving notice of a child custody proceeding.

Throughout the year, as we discussed these and other barriers to ICWA's success, we tried to brainstorm solutions. Education is a crucial part of the answer. ICWA training for judges, attorneys, and caseworkers is often limited and in order to establish strong institutional knowledge of ICWA, education efforts need to be stepped up. The Clinic is in a good position to contribute to these efforts. My fellow student attorney, Matt Hoppe, and I have been working with Professor Tompkins to develop a clearer, more detailed ancestry inquiry form for caseworkers. We have received the input of a dedicated group of attorneys and caseworkers, and we hope that our form will eventually be used all over Colorado. There is a lot of work to be done for ICWA to operate at full strength in our judicial system, but it is nice to know that we can help. ❖

## Clinic Experience Takes Student from Trial Court to Supreme Court

—By Matt Hoppe '09

When I first started in the American Indian Law Clinic last fall, I was given a list of cases and projects that were already being handled by the Clinic. Each new student attorney was asked to return a preference list of which cases we would like to take on. There were many Indian Child Welfare Act ("ICWA") cases, and perhaps an equal number of other projects, including code and brief drafting projects. I figured I'd be assigned an ICWA case, so I only listed non-ICWA cases on my preference list with the hopes of getting my pick.

I was not assigned any ICWA cases at the outset of the semester, but was assigned to a project, among others, that became an amicus brief in support of a petition for certiorari in the United States Supreme Court in the case, *Navajo Nation et al. v. United States Forest Service*. The case is an important one and involves the Navajo Nation and other Tribes and individuals challenging the U.S. Forest Service's decision to allow for artificial snow making with reclaimed sewage water on the San Francisco Peaks at the Snowbowl Ski Area (within a national forest) in Arizona. These peaks are considered sacred to the Tribes and religious practitioners, and the case will have implications for the future of American Indian religious, spiritual, and cultural practices on federal public lands.

I had the pleasure of working with fellow student attorney Alison Flint on

this project under the supervision of Steve Moore, an attorney with the Native American Rights Fund ("NARF") and Co-Chair of the Clinic's advisory board. With Mr. Moore's guidance, the draft brief went through several iterations and modifications. One aspect of the process of helping with the amicus brief was interesting because it required drafting that deviated from the principal briefs in the case, so as not to be repetitive and to provide the Court with an education on different reasons why it should take the case. The principal brief—the one by the party seeking certiorari—was not actually in our hands at the time we began brainstorming and writing, which meant that we had to both speculate at first what the principal brief would argue, and then modify our brief slightly later on. After many emails, meetings, and drafts, as well as substantial contributions from NARF attorneys and clerks, the brief was filed with the Supreme Court. The Court has not yet decided whether to grant cert.

However, as the fall semester got going, I was quickly assigned to an ICWA case—which would eventually see five full days of hearings during the course of it and thus a year's worth of great courtroom experience. The brief drafting experience was a lot different than my experience working on this case. In the fall semester of 2008, I had the frightening experience of actually delivering an opening statement and closing argument, as well as questioning and cross-examining witnesses. When I walked into the court-

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*"[T]he case will have implications for the future of American Indian religious, spiritual, and cultural practices on federal public lands."*

Sacred  
San Francisco  
Peaks



# The Beauty and Challenges of Multi-Party Appellate Briefing

—By Celene Sheppard '07



One of the more interesting and important aspects of my work in the American Indian Law Clinic was my participation in briefing an important Indian Child Welfare Act case for the Colorado Court of Appeals. When I began my work on this case in the fall of 2006, I knew that the case was factually and legally complex. It involved both an appeal on the application of the Indian Child Welfare Act and the Existing Indian Family Exception and several cross-appeals on the trial court's legal and factual findings.

When I began my student attorney work, I also knew that the child's tribe had used the Indian Child Welfare Act to intervene in the case, but had not participated in all the trial level proceedings, and that the Clinic Director Jill Tompkins had been working with the Colorado Indian Bar Association to organize an amicus brief covering the use of the "Existing Indian Family Exception." What I did not know at that time was that working with the tribal attorneys would be some of the most time-consuming and interesting aspects of my clinic experience.

Initially, my work with the tribes and the amicus attorneys was peripheral to my work on other aspects of the case. I participated in a few conference calls with the amicus attorneys, and waited while the child's tribe retained new attorneys and local pro-bono counsel to work on the case.

When the transcript was finally complete and the briefing time schedule began to tick, however, this organization became more complex. The tribe, the

amicus attorneys, and the Clinic all had restrictive word limits on the opening/answer briefs, and we faced the daunting challenge of dividing up issues so no brief repeated information contained in the other briefs or appeared incomplete when read alone.

The division of briefing tasks resulted in weekly or bi-weekly conference calls. At first I regarded these calls as a task or a slight nuisance: I knew which issues the AILC needed to cover in our brief, and the demands of my own classes, my other cases, and my own brief-drafting seemed more important. As the briefing process continued, however, these conference calls became important for several reasons.

First, I realized that the conference calls resulted in a chance to share (or in my case, acquire) mental and legal resources. The tribe's attorneys and the attorneys who drafted the amicus brief are all extremely competent and successful private practice lawyers. Whenever I encountered a legal ambiguity that had no clear statutory or case law solution, these attorneys were always happy to assist. These attorneys were generous: when I asked one of the amicus attorneys about a case she had used in her brief, she promptly sent me an explanatory email and then a binder full of printed and organized resources. The Tribes' attorney always had paralegals and legal couriers on hand to assist when we came close to filing deadlines.

Second, I realized that working with these attorneys provided me a new and fresh look on some of the legal and factual disputes in the case. In some senses, I had become so immersed in the transcript and in the case that I forgot how strong our briefs would be. Seeing the work of other attorneys and hearing other attorneys react to legal and factual arguments proffered by the opposing counsel solidified my understanding of the legal principles and policy arguments that support our case.

Finally, I realized that, through the briefing process, I was getting my first taste of what it will be like to become a member of Colorado's Indian Law Bar. I look forward to continuing this interesting and collaborative work, and also to practicing law in such an engaged and professional field. ❖

# The Clash of Fire Policy and Native American Religious Freedom in Colorado

—By Ethan Plaut, '07

We all know the problematic impacts of Colorado's wildfire seasons. Coloradans lost houses, forests lost trees, hillsides lost soil, and firefighters even lost lives. At the clinic we learned of a less publicized consequence: American Indian inmates were denied their constitutionally and statutorily protected right to have traditional sweat and pipe ceremonies. For the last several summers, the Governor has issued executive orders banning open burning on all state land in Colorado. Prisoners in Colorado facilities wrote the Clinic describing how officials in the Department of Corrections consistently interpret the Governor's fire bans to mean that no sweat and pipe ceremonies can be allowed on prison grounds.

In my first weeks with the Clinic I knew nothing about these ceremonies and even less about the legal protections for American Indian religious rights. Fellow student attorney Maren Jaffee and I were assigned to the project and as we researched the ceremonies and read letters from inmates, we learned just how important the ceremonies are. They provide a sense of identity, community, strength, and hope. The passionate language in the inmates' letters made it very clear that the state officials were causing tremendous harm by stripping away the ceremonies for a third of each year. Our research and correspondence with the inmates also revealed the questionable nature of this harm. Sweat lodge fires at prisons are fully contained with\*in dirt pits; the grounds for the ceremonies are generally devoid of all vegetation and sometimes surrounded by concrete walls; the ceremonies are either watched by guards or monitored remotely using video cameras. Pipe ceremonies occur in the same barren areas and fire is used merely to light a pipe.

We also learned a great deal about the legal protections for American Indian religious ceremonies based on the United States Constitution, the Religious Land Use and Institutionalized Persons Act, the American Indian Religious Freedom Act, and a Colorado statute specifically aimed at protecting religious rights of American Indian inmates. These laws establish a strict standard before government officials can lawfully infringe on ceremonies

of American Indian inmates: government officials can only substantially impair the ceremonies if necessary to achieve a "compelling" purpose. Even then, the officials must adopt the "least restrictive means" possible in order to achieve that purpose. In other words, even assuming the ceremonies present a real fire danger, they can only be entirely prohibited if there is no other reasonable way to safely continue the ceremonies.

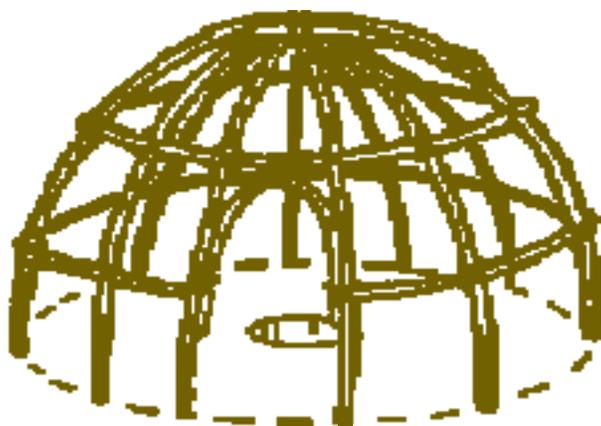
To resolve the problem as quickly as possible, Maren and I sought a specific exemption in future bans for American Indian inmates' religious ceremonies. First, we drafted an exemption that would meet the needs of our inmate clients. We then presented the issue and our proposed solution to Ernest House Jr., the Executive Director of the Colorado Commission on Indian Affairs. Mr. House was very receptive and eventually arranged a meeting to discuss the feasibility of our exemption with the Governor's Chief

Legal Counsel, and the Lieutenant Governor's Deputy Chief of Staff. At that meeting, Mr. House and the Governor's staffers all agreed that the Governor could and should remedy the problem with an exemption in future fire bans. They agreed to check with the Executive Director of the Department of Corrections and then suggest the exemption to the Governor in the event of a fire ban.

We are optimistic that the ceremonies will be allowed this year and we will be following this year's fire season especially closely. We are happy with our progress and also with the lessons we learned reading the inmates letters, researching religious rights of American Indians, and working with politicians to solve the problem as quickly as possible.\* ❖

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\* *Editor's note:* The Governor's Office subsequently required review by the Colorado Department of Corrections. Carrie Covington Doyle took over this work and re-drafted the exemption language after visits to the prisons facilitated by the Department of Corrections. In April 2009, a mutually acceptable version of the exemption to the fire ban was forwarded to the Governor. Fortunately, no fire ban was necessary this past summer.



## Bringing Peace in Litigation

—By S. Jenny Vann '10

As a self-proclaimed avid litigator, “compromise” was a taboo word that I dreaded to hear. For me, it pronounced resignation, surrender, and took out the adrenaline of a good fight in court. To compromise was to “lose gracefully” - a last resort for the faint-hearted. Law school case-reading pedagogy has ingrained in me that in the adversarial legal system, cases either come out for the plaintiff or the defendant, and lawsuits are either lost or won. However, working as a student attorney in the American Indian Law Clinic this year has drastically redefined for me “compromise” in litigation - giving it an entirely new meaning, and changing with it, my perception of what a lawyer’s role should be.

I was assigned to my first dependency and neglect case during my second week at the Clinic. Within days of filing my notice to appear as a student attorney – the Department of Social Services filed for termination of the father’s parental rights. The Department’s goal was for Indian children to be adopted by their non-Indian maternal grandparents. The Tribe to whom the father belonged, represented by the Clinic, immediately petitioned for guardianship. The Department responded with an amended complaint, and the father’s attorney filed a request to cross-examine expert witnesses. Within a month, a termination hearing was scheduled. Due to the im-

plication of the Indian Child Welfare Act (ICWA) and the unusually large number of attorneys represented in the case (a total of eight attorneys and one student attorney), the Court promptly ordered a pre-trial case management conference.

Up until this point in the case, I had been in – if you will – sheer litigation mode. I had carefully and painstakingly garnered the status of the father’s treatment and the paternal grandparents’ living conditions from hundreds of overused cell phone minutes and case-worker reports. I had read and re-read the provisions of the Colorado Revised Statutes 19-3-604 and ICWA. Going into the pre-trial conference, I was determined to win. However, as the court moderator



began the conversation, my presumptuous confidence quickly turned into a shocking reality check. Among us were many well-seasoned Colorado family law attorneys, and they unanimously agreed that with these facts in Colorado under this particular judge - termination was certain and almost inevitable. “But the statutes...” I tried to point out, but the consensus was clear - proving once again that it is often the case in the law that experience triumphs reason. I was flabbergasted: nowhere in the statutes alerted me to the presumption of validity of the county caseworker’s testimony. Nowhere on Lexis Nexis did it tell me that “unfit” can also be decided by judges’ caprice. It was a rude awakening – and I knew it was time to change my strategy.

One can rarely rely on litigation to pro-

duce a win-win result, at best, an equitable one. At the end of the day – through the motions, hearings, and the discovery process – both parties are forced to see their arguments in a clearer light. This was the most important lesson I learned in the Clinic. Instead of indulging in the romanticism of “fighting until the very end,” I redirected my energy after the case management conference to re-evaluating the strength of our case, re-counseling the client on the realities of the court’s “jurisprudence,” and re-thinking non-conventional solutions to the issues at stake. We used the Tribe’s special status as an Intervenor under ICWA to negotiate a Cultural Connectedness Agreement, which required the maternal parents, by contract – in consideration for the Tribe’s forfeiture of right to demand a full termination hearing – to maintain a consistent, ongoing, and meaningful relationship between the children, the Tribe, and the paternal family. The agreement contained provisions for the children’s visits to the reservation, learning the tribal language, interaction with the father and paternal grandparents, and allotted monies from the tribal trust for the children to be managed by the Tribe for strictly cultural purposes. This was the first Cultural Connectedness Agreement drafted in Colorado that provided substantive rights for the Tribe and family members.

When the dynamics of litigation shift from “domination” to “cooperation,” the role of the attorney changes with it as well. I was no longer a catalyst for discontent and strife, but a peacemaker, striving to find a resolution that best reflects the true merits of my case. When attorneys advocate with the “all or nothing” mentality, we often skew

*“Discourage litigation.  
Persuade your neighbors to  
compromise whenever you  
can.*

*As a peacemaker, the lawyer  
has superior opportunity of  
being a good man. There will  
still be business enough.”*

– Abraham Lincoln

reality in our minds, forgetting the weaknesses in our arguments and inflating our strengths until the expectations of the clients become unbridled. Such is the case with many American Indian dependency and neglect cases, where strong cultural arguments are often countered with unfavorable circumstantial evidence.

At the end of this experience in the Clinic, I began to grasp the importance of skillful compromise and the need for peace in litigation. Striving for peace does not mean to stop fighting. On the contrary, it means not only to fight and advocate but to also preserve. It means to work with a wider perspective, a clearer analysis and a more just end in mind. When the Cultural Connectedness Agreement went through, the tribal attorney, who in the beginning phase of the case loathed the idea of compromise, genuinely thanked us for the outcome. She commended us for doing the right thing and for fighting for the Tribe until the very end. We sure did fight, but we also brought a little peace. ❖

## Who Says You Can't Put a Price-tag on an Education?

— By Melissa Pingley '08  
AILC Award Winner '07-08

Who says you can't put a price tag on an education? A lot of people—after all, academic institutions do just that every year. Last fall I thought I was one of them when I decided that my experience as a student attorney in the American Indian Law Clinic (“Clinic”) would be worth *at least* \$15,000. How did I come up with that figure? Well, I was all set to graduate a semester early, and that was the cost of attendance for the Spring semester (the Clinic is a full-year course). Best decision I ever made.

Law school has been such a wonderful experience for me overall, by and large because of my exposure to the Indian law curriculum at the University of Colorado Law School. I am very proud to be one of the first two recipients of Colorado Law's new Indian Law Certificate. The Clinic is the cornerstone of the program. This is where you learn how to serve Indian country not just in theory, but in practice. My only regret looking back is that I wish I could have been in the Clinic for two years!

The bulk of my clinic work this year centered on an Indian Child Welfare Act (“ICWA”) case that arose due to a Colorado county's failure to provide notice to a little girl's tribe when the county initiated child custody proceedings nearly four years ago. The child was eligible for membership in more than one tribe, yet the county chose to send only one of the many potentially concerned tribes any notice of the proceedings. When the little girl was subsequently enrolled in a different tribe than the one that received notice, her real tribe (our client) had to enter the proceedings after nearly two years had passed. This delay not only harmed the tribe, but the child and her family as well.

Here at the Clinic we handle a lot of ICWA cases, for several reasons: (1) Denver has nearly 50,000 Native Americans living in the greater-metro area, (2) ICWA cases are a highly-specialized area of family law that requires a level of expertise found lacking in many general practitioners, and (3) those ICWA practitioners in the area often cannot meet the needs of indigent cli-

ents. Luckily for both our clients and our student attorneys, the Clinic can help to bridge part of that gap in the system between desired legal services and affordability.

From the standpoint of personal gain, my ICWA case has provided me with experiences that many practicing attorneys never see in their entire careers! In one of our cases, we received an adverse ruling at the District Court level, and promptly appealed to the Colorado

Court of Appeals. I co-authored the petition on appeal, and I had the opportunity to argue before that prestigious court. Though just avoiding fainting seemed like a lofty goal at the time, there is no greater confidence boost than surviving my first *real* argument at such a high level. Unfortunately, the three-judge panel upheld the lower court's orders, and we are now awaiting a response from the Colorado Supreme Court as to whether or not they will review the Court of Appeals' decision. We are hopeful that the State's highest court will echo its

previous rulings and the Colorado Legislature's commitment to “consistent application of and compliance with the provisions of [ICWA]...to ensure that proper notice is provided and procedures followed....”

To sum up my Clinic experience, I will leave you with the following:

Total Law School Cost of Attendance:  
\$100,000

Hours Outside of the Classroom for Clinic:  
Nearly 200

Emails to the Clinic Director: Over 300

Minutes Arguing before the Colorado Court of Appeals: 15

Sleepless Nights: At least a dozen and counting...

Value of My Clinic Experience: **Priceless.**

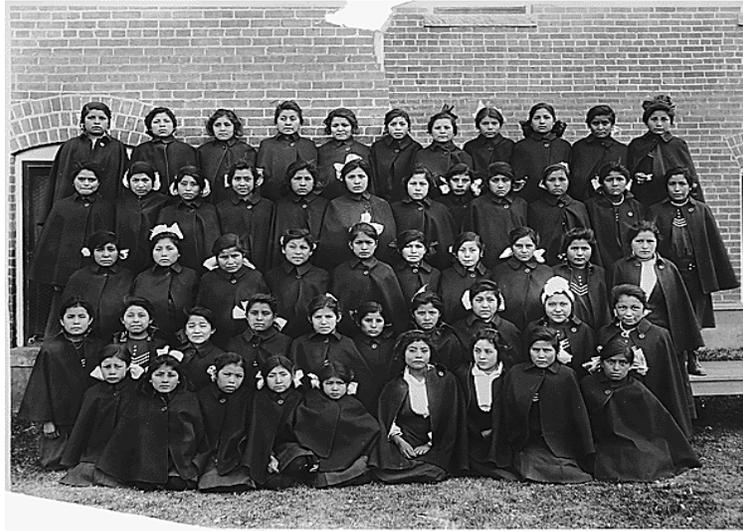


## Focusing on the People Behind the Law

—By Carrie Covington Doyle '09  
AILC Award Winner '08-09

As a law student whose first love is western history, I fell into CU's Indian Law program like an otter in water—happily and naturally. I was originally interested in natural resources law as it related to tribes, but over time my interest turned to the people themselves; family law. Perhaps I was seeking an emotional connection in a field dominated by the notably unemotional federal government. Even more importantly, I was consistently bowled over by tribal members' enduring emotional strength in the face of consistently catastrophic governmental policies. One such policy—the one I've come to see as having the most emotionally fundamental affect on Indian family law, thanks to some wisdom Native American Rights Fund Senior Attorney Don Wharton and University of Denver Professor Robert Golton (the Clinic's founding Director) shared with our class—was the generations of Indian children sent to boarding schools.

Four generations of Indian children were taken from their homes and families and sent off to unlearn their family and tribal history and customs. For these children, the experience involved unspeakable pain, but through resiliency some positives came out of the experience as well. What is more important to articulate is the aspect of boarding schools that goes beyond the years Indian children spent at the schools. Boarding school policy took family from tribes. By removing children, the government took away family and parenthood and prevented future generations from understanding this most fundamental building block of all societies. And they did this, in some cases, for four generations. Advocates for understanding and setting right the continuing impacts of boarding school policy on American Indians emphasize the generational component of such upheaval: how many generations will it take to heal?



*American Indian girls in uniform at Albuquerque Indian School.*

I am grateful for my experience in the American Indian Law Clinic and to Director Jill Tompkins for helping me recognize these crucial pieces of the puzzle. As our class discussed our various cases, most of which had to do with the Indian Child Welfare Act, we were forced to ask hard questions about the importance of ICWA in 2009. ICWA is not perfect, and many of us were conflicted over certain aspects of what I see to be imperfect legislation. But, in the field of Indian law, imperfect legislation is better than none and no one has proved more adept

at helping nudge the law toward justice than tribes and their members. As I see it now, ICWA continues to be relevant and important not least because of the boarding schools' legacy of loss of family.

Taking our collective experiences working on ICWA cases this year, the student attorneys brainstormed ways that we could help facilitate a more effective implementation of ICWA in Colorado. This has led Professor Tompkins to reorient the clinic to bring more focus to our ICWA learning and advocacy. Because it is in its infancy, the shape of the initiative has yet to be determined. But the student attorneys identified a potential role for the clinic in fostering better cooperation between tribes and the state in establishing a database of potential tribal foster families and in providing resources/education about ICWA for tribes, case workers, attorneys, and judges. As a first step, Professor Tompkins has planned an ICWA workshop with the Northern Cheyenne Tribe for next semester. As I head to graduation and a life deeply influenced by my time in the Indian law program at CU Law, I know that such first steps precede important journeys. ❖

# Experiences with the Navajo Nation Tribal Justice System

—By Lisa Yellow Eagle '08



*Navajo Nation Supreme Court (from left to right) Associate Justice Allen Sloan, Chief Justice Herb Yazzie, Associate Justice Eleanor Shirley*

In March 2008, members of the Navajo Nation Peacemaker Division as well as the Navajo Nation Supreme Court came to the University of Colorado Law School to show the law school students, professors, administration, and the Boulder community what a tribal justice system is like. It was an amazing experience to meet both members of a traditional justice system as well the justices in the modern adversarial justice system. The Navajo Nation Peacemaker Division is a world-renowned restorative justice program. The Peacemakers have been a part of the Navajo Nation justice system since “time immemorial.” Although I am half Navajo, I had not experienced a peacemaking session before. I knew however that traditionally we did not have an adversarial system and that the Peacemakers help to facilitate agreement between disputants by allowing all involved to voice their opinion in the matter.

Peacemaking has officially been a part of the Navajo Nation Judicial Branch for the past 20 years. There are 242 certified Peacemakers within the Navajo Nation. Four members of the Peacemaking Division, Gloria Benally, Ruthie Alexius, Russell Thomas and Anslem Bitsoi, held a mock peacemaking session in the Wittemyer Courtroom on March 11, 2008. The mock session was a reenactment of a real session that had taken place previously. The mock session had to do with the equitable distribution of a deceased mother’s possession. Four students, Native American Law Student Association members and American



*Lisa Yellow Eagle*

Indian Law Clinic student attorneys, played the roles of the brothers and sisters of a family that was fighting over the possessions. The mother’s estate included grazing permits, jewelry, cattle, and a truck. The students did an excellent job in portraying the hurt, the jealousy, the uncertainties, the pain that the original family probably went through.

Anslem Bitsoi, was the “official” Peacemaker of the session while the other peacemakers played family roles as well. Mr. Bitsoi laid out the rules of the session. All of the participants had to be respectful and polite, which meant no name-calling. They had to speak to each other in traditional Navajo kinship terms. If a person has to say, “My brother, or my sister, you have hurt me in this manner,” rather than being able to say “You are a stupid idiot, I hate you!” the atmosphere is set for a more well-thought out discussion. Also, people will remember that there are relationships that they should not give up so easily in this respectful atmosphere. There was no defendant, plaintiff, or victims. There were only equals sitting down to work out their problems. It was a fascinating experience to see a traditional form of tribal justice in play.

In 2002, the Traditional Law of the Dine (Navajo) was codified. So, not only do the Peacemakers use traditional Navajo concepts in dispute resolution but so do the Navajo Nation adversarial courts. The Navajo Nation Supreme Court held a live session in the Wittemyer Courtroom on March 12, 2008. The Navajo Nation has one of the most well-known tribal court systems. The Supreme Court Justices review the decisions of the District and Family Courts. The Honorable Chief Justice Herb Yazzie, Associate Justice Eleanor Shirley, and Associate Justice Allen Sloan presided over the session held here. The case that was heard concerned an allotment of land and whether the local grazing committee or the federal government had the jurisdiction to decide a fencing dispute on this allotment. The Navajo Nation Supreme Court hearing was very similar to the Western style court system, which made the differences jump

out at me all the more. First, the judges did not wear robes. They wore nice clothing--a dress-suit for the female justice and nice slacks and shirts for the male justices. The Supreme Court had decided that the black English-style robes were not conducive to their tribal courtroom. Second, during the attorneys' opening arguments, the attorneys introduced themselves in the traditional Navajo way, by identifying their clans. Next, the attorneys introduced their clients to the judges. One of the attorneys also used the Navajo creation story throughout his argument by discussing the similarities and the lessons to be learned from the Creation story. The Chief Justice used a mix of Navajo and English language when addressing the attorneys.

These are not things that a person would see in the everyday American courtroom. It does not seem important to the judges in an American courtroom to know the attorneys' family history and kinship relations, whereas that is what the attorneys in the Navajo Supreme Court are doing when introducing themselves traditionally. Also, in the American courtroom the clients' presence is announced by the attorneys, but they are not formally introduced to the presiding judge or justices as they were in the Navajo setting. Lastly, judges and attorneys in an American courtroom would not go back and forth between two languages. There would probably have to be an interpreter if there was to be a second language spoken in the court session.

This experience was highly educational for all of the viewers. It was an eye-opener for the law school students to see a tribal court in action and to observe the similarities and differences. It was a great experience for those of us studying American Indian law because the traditional tribal laws are so different from the federal Indian law that is the primary focus of our law school classes. Projects like this are a great way to expose the public to tribal courts and Indian Law. There are many people that do not know that tribes have governments, let alone tribal courts, so this was also a project to raise awareness. The experience of bringing these two court systems to the law school, as well as the fundraising process, was a wonderful experience for me. It was not an Indian Child Welfare Act case, or a code writing project, but it was definitely an important learning experience. ❖



*Clinic students participate in mock peacemaking session*

## Landmark Colorado ICWA Case Continues

—By Sylvia Curley'08

American Indian Law Certificate Recipient

In 2005, the American Indian Law Clinic agreed to represent an American Indian mother who hoped to have a stepparent adoption proceeding regarding her three year old son dismissed. She also wanted to be awarded parenting time with her son, which was being denied to her by the child's father and step-mother. The case involved the Indian Child Welfare Act, or ICWA, and it has since become one of the most groundbreaking cases the Clinic has ever taken on.

The case was still open when it was assigned to me in the fall of 2007. I looked forward to having such a challenging case in my workload, but I was also a little overwhelmed when I saw the two file drawers full of documentation in the case file. I knew that many previous student attorneys had done a lot of work on this particular case, and I wanted to make sure our client received the same kind of dedicated representation during my year.

The two student attorneys before me, Celene Sheppard '07 and Ann Rhodes '07, had argued the case before the Colorado Court of Appeals. The primary legal issue was whether the "Existing Indian family Exception," or "EIFE," should be adopted in Colorado. The EIFE is a judicially created exception that has been adopted by a handful of state courts which held that a parent was required to prove how "Indian" their family was before ICWA would be applied. This exception is not found anywhere within the language of ICWA. State courts have adopted this exception to avoid having to apply the strict protections for Indian families that ICWA provides. Celene and Ann also urged the court to find that ICWA, which applies to any "child custody proceeding," also includes private stepparent adoptions. Finally they also argued that the stepparent intending to adopt our client's child had not made active efforts to prevent the breakup of an Indian family, as is required by ICWA.

In September, 2007, the Court of Appeals issued an opinion in which our client prevailed. This was very exciting for the Clinic because the ruling would not just apply to our client, but it had set a precedent

and would now apply to all ICWA cases in Colorado. For a few days, it appeared that we would be able to move on to the allocation of parental responsibilities, in which our client would finally see her child.

Unfortunately it became clear that we still had a long way to go. As soon as the Court of Appeals opinion was released, the stepmother's attorney opposing counsel filed a petition for rehearing, which was denied, and immediately following that, they filed a petition for a writ of certiorari to the Colorado Supreme Court. It is a rare law school experience to assist in the drafting of an opposition brief to the highest court in the state, and preparing the brief was a great learning experience. We looked carefully at the court rules, and Professor Tompkins, my fellow student attorney, Jay Perry and I also consulted with helpful practicing attorneys. We prepared a strategy for the brief and then we drafted and redrafted it until it was ready to go.

I spent the next few months religiously checking the Colorado State Judicial Branch website every Monday morning to see if the Court had ruled yet. After contemplating every possible outcome and second-guessing every argument we had made, in March, 2008, I was happy to finally see the words I had been waiting months to see: "Petition for Writ of Certiorari DENIED." Once again, I hoped that we could begin the allocation of parental responsibilities which would have gained our client parenting time with her son.

Alas, the story is not over yet. The stepmother announced her intention to file a Petition for Writ of Certiorari with the U.S. Supreme Court.\* It is remarkable that the case has come so far, and yet it is evidence of the valuable work that happens in the AILC every day. Many student attorneys have learned a great deal about the law because of this case, and I am fortunate to have been one of them. ❖

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\* *Editor's note:* The stepmother never filed her petition with the U.S. Supreme Court. The Court of Appeals decision that the Colorado Supreme Court declined to disturb is *In re N.B.*, 199 P.3d 16 (Colo.App. 2007) *cert denied* 2008 WL 757927 (Colo.)

## American Indian Law Certificate Recipients

Colorado Law offers an American Indian Law Certificate demonstrating the completion of a concentrated course of study in the legal issues facing America's Native peoples and American Indian tribes. This Certificate is attractive to legal, tribal, and governmental employers, as well as employers seeking to do business with tribes and tribal members. Certificate requirements include: 1) at least 95 credit hours (89 is required for the J.D.), and 2) at least 18 of the 95 credit hours in designated Indian law and related course. A student who satisfies all of the course requirements for a certificate program would be awarded the certificate "with honors" if the student earned at least an 86 cumulative grade point average in the designated courses.



*From left: Dean David Getches, Director Jill Tompkins, Certificate Recipients Melissa Pingley '07 (with Honors) and Sylvia Curley '07.*



*From left: Dean David Getches, Certificate Recipients Carrie Covington Doyle, '09 (with Honors) and Kimberly Perdue, '09 (with Honors) and Director Jill Tompkins*

## American Indian Clinic Awardees

Each year the American Indian Law Clinic Award is given in recognition of excellence in client service and classroom participation, embodying the American Indian Law Clinic's goals of providing the highest quality of representation in a rigorous educational environment. The recipients are nominated by their fellow students attorneys.



*From left: Dean David Getches, 2008-9 Award Winner Carrie Covington Doyle and Director Jill Tompkins*



*From left: Dean David Getches, Director Jill Tompkins, Award Co-Winners Kimberly Perdue '09 and Melissa Pingley '07.*

## The Law is About People: On Being a Student Attorney

—By Jay Perry '09

The first year of law school was unique from any other educational experience I have ever had. In learning how to effectively see and argue any side of a case, I found myself becoming cynical about the process. Whereas at the start I focused too much on the facts of the case, by the end of the year I was almost ignoring them entirely except for a few that held "legal significance." I felt like something was missing though, that what I was studying was too abstract and disconnected. I also felt that while I could perform well on law school exams I had no sense of how I would perform as an actual lawyer. With these thoughts in mind, I decided to enroll in the American Indian Legal Clinic.

What I have learned (or maybe re-learned) in my year as a student attorney is that the law is not just about abstract principles or black letter rules but in the end is about people. Our clients come to us not only seeking our legal opinions but because they need our help in a larger sense. This element required me to be involved in their lives not only in drafting motions or memos but also in talking with them, making phone calls, writing letters, and really focusing on what they needed. The experience of being a student attorney in the clinic was for me an experience of being a lawyer in the fullest sense. This meant that in many cases I was acting more in the role of "counselor." I felt a greater sense of responsibility because at times my clients were really counting on me. Different from reading for class or studying I didn't have the luxury of neglecting my duties.

However, with this responsibility came great reward. I began to feel as though I was helping people with the skills I've learned in law school. Even in something as simple as drafting a power of attorney or writing a demand letter my actions were assisting clients in issues that were of vital importance in their lives, which was at the same time exciting and extremely humbling. I sometimes felt quite nervous before speaking or meeting with a client because I felt that they would somehow see through me, to see that I wasn't a legal ex-

*"As attorneys we enjoy many benefits but we also bear a responsibility to society.*

*By recognizing and embracing this responsibility, we can ensure that what we do is truly 'good work.'"*

pert but in many ways still a confused second-year law student. I began to realize, however, that by just listening to their stories and treating their problems seriously I was providing a service to them. In a legal system that unfortunately has often underrepresented both Indians and people of low income, the clinic's work means something.

I also found another way in which being a student attorney was in many ways the perfect antidote to the first year of law school. By reading mainly judicial opinions authored by our greatest legal minds, we may easily begin to think that our legal system approaches perfection. After a year of being a student attorney in the American Indian Law Clinic, however, any such notion has been dispelled. While I've always known that our legal system, while commendable in many ways has its flaws, I've gotten the chance to experience that firsthand. This has come from experiences like spending the day in a juvenile court or puzzling about how to obtain legal relief for the victims of Indian Boarding Schools. Thus, the experience of being a student attorney has brought me in many ways full circle in my legal education. It has been an important reminder that as attorneys we enjoy many benefits but we also bear a responsibility to society. By recognizing and embracing this responsibility, we can ensure that what we do is truly "good work." ❖

## Finding Fulfillment & Meaning Through Clinical Legal Education

—By Maren Jaffee '07

The day before classes started I sat in my Career Services counselor's office lost and confused. I had not enjoyed my first year of law school much and was beginning to think that law school just was not for me. Given this uncertainty, I visited the office in order to find help in choosing classes. Though my advisor did not know me well, she easily picked up on my lack of enthusiasm. I thought she might advise me to take time off. Instead, she suggested that I sign up for the American Indian Law Clinic ("AILC"). In my confused state I was not exactly sure why she suggested the AILC out of all the clinics that are offered. I now suspect that she recommended the AILC because of the opportunity it provides to find fulfillment and meaning in law school.

I remember thinking how unprepared I felt to work with real people and handle actual cases. I had completed one year in law school but had no idea what a legal memorandum was, let alone know how to write one. I had not been such a great student my first year so I assumed that I was the only student in the clinic who felt such apprehension. I quickly discovered that most of the other students were also uncertain of their competency as a legal representative. Within days, however, we were sworn in and were officially deemed Student Attorneys. Before I had a chance to question the Colorado Bar for authorizing untrained students to practice law, I was on the phone with clients, writing memos and motions, and even appearing in court.

It did not take long to comprehend the fact that my clients were truly relying on me; they did not see me as a student at-

torney who was looking for some experience, but rather as confident attorney who would help them gain custody of their kids or would fight for their civil rights. I realize that if they took me seriously, then I certainly needed to take myself seriously. Of course I recognized that I might make mistakes, some minor and some more significant. Regardless, if I was going to meet with any success at all, I knew I had to believe in my ability to provide quality legal representation.

In time I became more comfortable in my role as a student attorney. While I certainly did not always have the answer for every problem I came across, I learned how to get these answers and how to get them fast. I began to accept the fact that I did not always have an immediate solution and worried less and less about my lack of experience. After eight months in the AILC, I have realized that perhaps being resourceful is what being an attorney is about. This is likely the most valuable lesson I will learn in law school.

I recognize just how important my clinical work is to my legal education. Every attorney will experience unease during those first few weeks of practice. What better way to groom yourself for the job than to face that apprehension ahead of time? Furthermore, think how much easier this experience would be if you did not have to go it alone but instead had a group of other students who are concurrently facing similar fears and anxieties. I truly believe that my experience in the clinic has provided a foundation for not only my work in the clinic, but for my entire career as an attorney. ❖



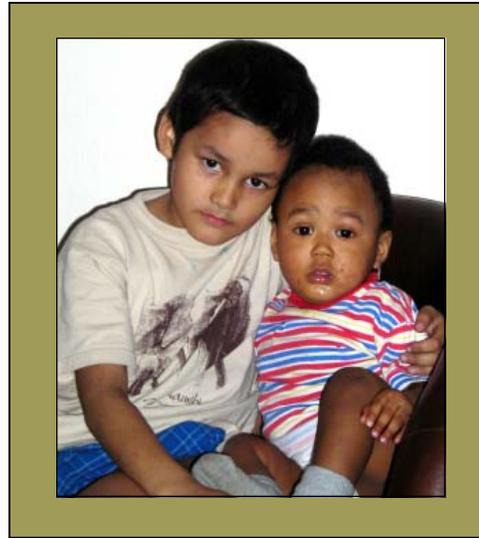
## Adoption: A Privilege Only for the Young?

—By Alison Hall '09

As we sat filling out paperwork to enroll the boys in the Omaha Tribe of Nebraska, Charles and Genevieve Holt reflected on the difficulties they face as they try to adopt their grandsons, both of whom they have raised since birth. In addition to raising their two grandsons, the Holts raised five children together, the oldest of which is now fifty. Their six-year-old grandson was glued to his brand new Play Station, while the fifteen-month-old happily played with blocks near his grandmother's chair. "You know," Charlie reflected, "things have been tough, but I would do it all again to adopt these boys. They mean the world to me." Charles Holt is a man of his word, and if I didn't know him better I might not believe his statement. Do it all again? Charles and Genevieve's quest to adopt their grandsons has been anything but easy -- raising two boys on an extremely tight income, constantly checking their calendar so that they can keep track of appointments with the Department of Social Services and the Court, opening their home to countless visits by strangers in order to assess whether they are fit parents, and finally being told that they are "too old to adopt." Charles, age 76, has heard this statement so many times now that whenever I call with a status update he instinctively asks, "Is the problem my age?"

"No!" I want to say. Under Colorado law, it is prohibited for age to be the sole factor in determining whether an individual can become an adoptive parent. Yet during one home visit the Holts were told that they were "too old." Normally, adoption cases that involve a child who is related to the potential adoptive parents require less steps than if the child were being adopted by complete strangers. In the Holts' case, the Court has required the American Indian Law Clinic to file extra paperwork, provide unusual information about our clients, and pay for additional home studies. Genevieve, age 66, doesn't understand "Why there has been so much trouble?" She asserts that "If we can't adopt these boys they will end up with strangers," an idea that keeps Charlie awake at night.

What would happen to the boys if the Holts can't adopt them? In the popular movie *Juno*, a fifteen-year-old becomes pregnant by the star of the high school cross country team. Both teens are excellent students, attractive, and even talented in music. Juno elects to give her baby up for adoption and effortlessly locates a couple who has simply been "dying for a baby!" The attractive and wealthy adop-



Omaha tribal members Lorenzo and Lawrence Holt

tive parents have carefully prepared a room for the baby's arrival, chocked full of every toy imaginable. But alas, *Juno* is a fiction from Hollywood. Even in this Hollywood movie, the picture perfect couple separate before the baby's birth. The harsh reality is that many children who are eligible for adoption will not be placed in permanent homes. An average of 100,000 children nationwide remain in foster care each year, and adoption agencies struggle to find homes for "hard to adopt" children. Couples often limit their search to babies rather than older children; furthermore, some children in foster care have special needs, a challenge that adoptive parents may or may not be willing to embrace.

The Holts are the only parents that the boys have ever known, and Charles and Genevieve have a back-up plan with a relative and with the Tribe in the event that anything happens to either of them. With the generous *pro bono* assistance of Longmont estate planning attorney Anton Dworak, I helped the Holts to draft wills that contain testamentary guardianship provisions to memorialize their contingency plan. Over the course of this year, I have had the privilege of working with the couple and cannot imagine a more appropriate placement for the boys. Not only because the Holts are wonderful and loving parents, but because the boys will remain attached to their tribal culture under the Holts' care. The couple takes as many trips a year as possible to the Reservation, and one recent trip for the sole purpose of enrolling their grandsons. Genevieve is an Omaha tribal member, and Charlie was adopted by the Tribe after earning his honorary membership by selflessly cooking for the masses at large tribal events. After completing the boys' enrollment forms, Charlie rose from his chair and took a mahogany box out of the closet. A talented ghord dancer, Charlie showed me the honors he received from various national powwows, and his hand painted regalia. "Priceless," he explained. For me, it was. ❖

# Building Tribal Bridges with Cultural Connectedness Agreements

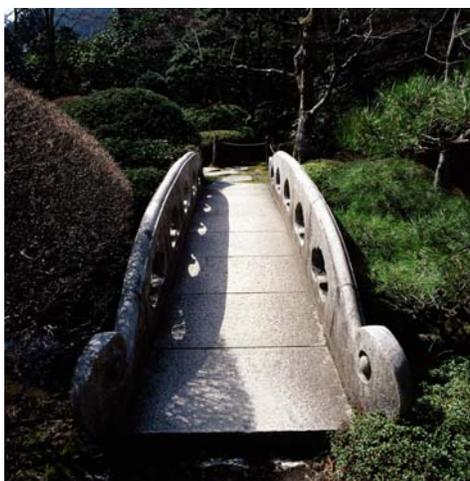
—By Ann Rhodes '07

After a series of failed guardianships, a young Native American boy is placed with a new family that promises him stability, security, love, and possibly, eventual adoption. The boy's new mother is an American Indian who was herself adopted as a young child. After being involved in the case for three years, the boy's tribe approves of the new placement. The only problem is that the mother, while Native American, is not a member of the boy's tribe, or of any tribe. The boy's new home is far from the reservation, and his new family, like all his previous guardians, knows nothing about his tribe. Thus, even when the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., provides its maximum level of protection by placing a needy child in a culturally-sensitive home, a tribe still has no guarantee that its children will be raised in a manner that integrates them with their tribal community and heritage. The American Indian Law Clinic at the University of Colorado Law School has begun using a tool to address these situations. Cultural Connectedness Agreements (CCAs) are innovative contracts between caretakers and tribes that bridge the cultural gap to ensure Native American children will be raised in culturally-aware environments.

A CCA is a written agreement between the child's caretakers and the tribe that ensures the child will be raised with a cultural connection to the tribe. It is a written contract where each side promises to do something in exchange for a corresponding action from the other side. For example, the tribe promises to approve, or at least to refrain from objecting to, an adoption or foster care placement in return for the caretaker's promise to teach the child about his native culture, to keep the tribe informed of the child's progress, and to allow the child to visit with his biological relatives on the reservation at appropriate times. Or a tribe may promise to assist the family in learning about the tribe's culture, language, and history in exchange for the family's promise to take advantage of these opportunities.

The text of a CCA is fairly straightforward. It commonly begins with a list of recitals that set forth the

reasons for establishing the agreement. Recital clauses may state that it is in the child's best interest to be placed in a stable home, that it is in the child's best interest to establish and maintain contact with the tribe, and, if applicable, that the child has special needs. The CCA may then contain a clause stating that the tribe will not object to the placement or the adoption on the condition that the family complies with the requirements of the CCA. The family's obligations are set forth in the body of the agreement and may include commitments to keep the tribe informed of the child's progress; to engage the child in learning his tribal language, culture and heritage; to enroll the child as a member of the tribe; to encourage the child to contact and visit with extended tribal family members; and to become involved with Native American community resources in the family's local area. The CCA is complete when it is signed by the caretakers and a tribal representative.



Because CCAs are contracts, they should be enforceable in court. However, the only practical remedy for a breach would be an injunction, making them somewhat difficult to enforce. The primary benefit of the CCA is not in judicial enforcement, however. The primary benefit derives from the process of establishing the agreement between the tribe and the family. This process illuminates the needs and desires of the tribe, the child, and the new caretakers, allowing everyone to agree on what they each can do to achieve the best interests of the child. If both the tribe and the caretakers are sincere in their efforts, the child is likely to benefit in the long run even if every element of the contract is not fulfilled.

CCAs can be an effective tool for connecting the tribe, the child, and the family. They allow the tribe to establish a cultural bridge to nurture the child's tribal identity even as the new family establishes the bonds that begin healing the child's emotional wounds. ❖

## Developing Rules of Evidence for the Pokagon Band of Potawatomi Indians

—By Kimberly Perdue '08  
AILC Award Winner '07-08

One of the most meaningful opportunities that the American Indian Law Clinic provides to law students is the opportunity to assist Tribal leaders in developing tribal codes of laws. Since 2006, the Clinic had been working with the judicial branch of the Pokagon Band of Potawatomi Indians, located in Dowagiac, Michigan, on writing Rules of Evidence to be used in the Band's trial courts. The Pokagon Band wanted Rules of Evidence that were accessible and understandable to parties who wished to represent themselves, but that also provided structure and accountability to attorneys and judges in the Band's courts. The Band's Constitution includes a provision that the Band's courts must adhere to the code of laws, which suggested to the Band's judiciary that there should be a written set of Rules of Evidence. However, the Band is a traditional Tribe and, therefore, its judiciary also wanted the Rules to be flexible enough to permit the parties and judges to consider the impact of the Band's customary laws and traditions on the admissibility of evidence.

When I began working on this project in the Fall of 2007, my first step was to survey other Indian tribes' rules of evidence to discover how they accounted for customary law. I was also interested in looking at the language of other tribes' rules to determine whether they employed legal terms of art or plain language. Finally, my research considered tribes' own statements explaining their reasons for adopting certain rules and not others. Some Tribes stated that their rules adhered to the Federal or State Rules of Evidence because they wanted to enhance the probability that State or Federal courts would recognize judgments rendered in their Tribal courts. Others stated expressly that they would not be bound by any Federal or State Rule of Evidence. Some Tribes' rules were lengthy and complex, designed to account for a wide variety of evidentiary questions. Other rules were very concise, leaving questions of the admissibility of evidence largely to the trial judges' discretion.

To meet the Band's requirements of a written code that was accessible to *pro se* litigants and flexible enough to permit the influence of customary law and Tribal tradition, we decided to take this project in two directions. I developed a concise, plain language set of rules, modeled in part on the Suquamish Tribe's Rules of Evidence. These rules afforded the Band's trial judges a large amount of discretion. Discretion was important to the trial judges so that they could permit Tribal custom and tradition to enter into judicial proceedings, and also so that the rules retained the flexibility to develop in response to unforeseen evidentiary questions. The plain language rules were also intended to be accessible to persons appearing without an attorney.

A second set of rules, modeled on a template provided by the Michigan Intertribal Justice Center, was far more comprehensive. Though the concise, plain language rules were intended to be the default rules in trial court, they provide that, upon the judge's order or the motion of any party, the more lengthy and comprehensive rules may govern evidentiary questions. The Pokagon Band's judges believed that more comprehensive Rules might be more appropriate for complex litigation, or for when attorneys used to Federal or State rules practice in Tribal court.

For me, the most exciting aspect of this project was the opportunity to work collaboratively with the Pokagon Band's judiciary, of which the Clinic's Director is a member. I learned a great deal about the demands that Tribal courts face and the innovative methods they employ to meet those demands. I hope that these Rules of Evidence will prove useful, over the next few years, to the Pokagon Band and to parties appearing in its courts. ❖

## The American Indian Law Clinic: Not Just Another Class

—By Dena Ivey '07

I am sick and tired of school, but I guess going to school for over a decade will do that to you. When I was 19, I joined the Air Force and upon my discharge (honorable, by the way), drove back home to Fairbanks, Alaska and enrolled in the Alaska Native Studies and Anthropology programs at the University of Alaska Fairbanks. I was intent on reclaiming my Yup'ik heritage, you see, after two generations of shame and self-loathing had stolen it from me. It took me eight years to get that degree, with a couple of years off in there to recover from car accidents and to mourn my father, who had succumbed to lung cancer.

When I received my B.A. in 2003, I had known that I wanted to be an Indian law attorney, and not a peaceful, book-writing, class-teaching anthropologist, for a number of years. The decision in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) had played a significant role in this decision, as I then decided I couldn't, as an anthropologist, stand by and watch while I and my people had our indigenous rights systematically stripped away. I decided to go where I was most needed: you can take the girl out of the Air Force but you cannot take the Air Force out of the girl.

I was accepted to the University of Colorado Law School and began attending classes in fall 2003. I was tired of school even before I cracked open the first textbook. After grades came out for the first semester, I knew I would not be basing my ability to get a job on my grades or rank. Networking would be the way to go for me. Fortunately for me, networking is a big part of Indian law. To this end, I took over the reins of the CU chapter of the Native American Law Students Association (NALSA), which became



my main focus over the following two years. It was through NALSA that I met Jill Tompkins, Director of the American Indian Law Clinic. I found Prof. Tompkins to be a driving force behind my own Indian law aspirations. I was happy, after passing my second-year classes, to enroll as a 3L in the American Indian Law Clinic (AILC).

Before attending law school, I had gained some experience as a legal assistant while still in Fairbanks. During law school, I was very lucky as a 2L to not only have an externship with the Native American Rights Fund, but also a paying job with Greene, Meyer & McElroy, P.C. Networking rocks. Because of this previous experience, I felt that I was able to transition to the world of the AILC rather seamlessly.

And, make no mistake, the AILC is another world. As a law student attending classes and being inundated by legal theory, it's very easy to lose sight of the actual practice of law. The AILC (and indeed, the other CU clinics) brings you back. You handle real clients with real problems. You pore over case files and write briefs that are read by real judges. You bill your time. You get stressed before a hearing. Sometimes you cry. This is Indian law.

I feel bad for those law students who haven't had any clinical experience before graduating. Clinics should be a required part of the law curriculum, as the experience gained in the clinical setting is as important, if not more, as learning Torts or Property or Evidence. Knowing the law is one thing. Practicing law is quite another. I feel that my experiences with the AILC have made my law school experience complete, bad grades notwithstanding. I return to Alaska in four days, confident in the knowledge that I am ready to practice law. And the AILC was a big part in getting me there. ❖

## Honoring the Best Interest

*From page 1.*



*Student Attorney Kathryn Urbanowicz and "Jack" share a laugh.*

there was good cause to deviate from the placement preferences of the federal Act.

The Tribe's decision not to contest Jack's placement is a reminder of the purposes behind the Act. The Act reiterated the fact that tribes have a strong interest in their children. Indian children raised by other American Indians ensure that entire cultures and groups of people will not vanish. In Jack's case however, the Act served a different purpose. The Act empowered Jack's tribe to make a decision based on what it thought was best for the child. Because Charlie and Linda were such a good fit for Jack, and because the Tribe felt confident that they would care for him in the way he deserves, while maintaining his cultural ties, the Tribe decided that there was good cause to deviate from the federal

placement preferences.

What remains important in this situation is that Jack's tribe had a voice to advocate for Jack's future. Further, the Tribe continues to have a voice in Jack's case as Charlie and Linda signed a cultural connectedness agreement stating that the Tribe is to be involved in Jack's future. Charlie and Linda will send pictures and updates on Jack to his extended family members on the reservation, and Jack will receive news from the Tribe through its website. If all continues to go well, Charlie and Linda will formally adopt Jack around May 2010.

This amicable ending is one example where the purposes of the Indian Child Welfare Act, the interests of the Tribe, and those of the non-Indian prospective adoptive parents aligned in the best interests of the child. ❖

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## From Trial to Supreme Court

*From page 3.*

room after a numbing 5:00 a.m. wake up and hour plus commute, we were up against a formidable County Attorney and Guardian Ad Litem, who were very experienced litigators in these types of child custody proceedings, whereas I was speaking in court as an "attorney" for really the first time. The two day trial was exhausting, as a half dozen witnesses crossed the stand and were questioned and cross-examined and re-questioned and re-crossed by four different parties.

After the trial ended, and the court adjourned, the judge casually related from the bench a story about his experience as a student attorney. He told us about a trial he had to conduct—but without the help of his clinical professor who failed to show up in court that day. He congratulated me on doing a good job with the representation (he also noted that Professor Tompkins had played a big role in our representation—no doubt he witnessed our frequent note writing and whispering). That was a rewarding moment. These varied and fulfilling experiences in the practice of Federal Indian Law are what the American Indian Law Clinic is all about. ❖

## Upcoming Events

- 22nd Annual University of Washington Indian Law Symposium, Seattle, WA on September 10-11, 2009. CU Law Clinical Professor Tompkins to present on "Evidentiary Methods for Introducing Tribal Tradition and Custom."
- Biennial meeting of the American Indian Law Clinic Advisory Committee, Room 300, Wolf Law Building, 11:00 to 12:30 p.m. on October 7, 2009.
- "Stopping the Loss of Tribal Children," training on the Indian Child Welfare Act and the Colorado's Children Code on October 23, 2009 from 9:00 a.m. to 1:00 p.m. at Chief Dull Knife College, Lame Deer, MT.
- "Celebrating the Northern Cheyenne Family," community dinner and foster/adoptive family recruitment event, October 23, 2009 from 6:00 p.m. to 8:00 p.m. at the Northern Cheyenne Boys and Girls Club, Lame Deer, MT.
- "The Next Great Generation of American Indian Law Judges Symposium" funded by the University of Colorado Law Review on January 29-30, 2010, Wittemyer Courtroom, Wolf Law Building.
- University of Kansas Tribal Law & Governance Annual Conference, Lawrence, KS on February 4-5, 2010. CU Law Clinical Professor Jill Tompkins to speak on the topic of "Educating Tribal Communities on the American Indian Probate Reform Act."

## Where Are They Now? Update on AILC Alums



*Wedding bells rang for Eric Olson and Christina (Nina) Brown '06 on August 22nd.*

A person's experience as a student attorney can be a challenging one—even stressful — at times. One of the wonderful things that happens though is that bonds form with fellow student attorneys as they work together. Here's some news about our AILC alums.

After a trip to London and Paris, Eric W. Olson proposed to **Christina (Nina) Brown '06** on Pont Neuf on March 24th. They were wed on August 22nd at Blackhawk Church in Madison, WI where they met.

**Gwenda Broeren '01** moved again and switched jobs. She's working in the administration of the Veteran's Administration Illiana Health Care System in Danville, IL and living in Champaign-Urbana. She keeps her attorney skills in practice in ethics and risk management but no current litigation. She is very excited that "The Chief is Out" as the symbol for the University of Illinois!

**Anetra Parks '01** is starting her third year of working at the University of Wyoming College of Law as Director of Law School Career Services. She is married to Dr. Keith Evashevski and has two dogs and two cats.

On July 19, 2007, the family of **Pamela Emsden '03**, her husband Dale Lyons, and Henry Lyons was joined by baby Corinna Clare Lyons.

**Cassia Furman '03** is still working in Glenwood Springs, CO at Leavenworth and Karp, P.C. and enjoying the mountain lifestyle. She thinks the new Wolf Law building is great. She says, "I'm so happy you have a real space to work in with windows and everything—a much more professional and comfortable look for the clinic." We couldn't agree more!

Now living in Carbondale, CO and practicing family law with Petre and Petre in Glenwood Springs, **Cathy Madsen '04** has had a number of Indian Child Welfare Act cases in her role as Guardian Ad Litem and is grateful for her experience in the AILC.

In walking distance from his home, **Robert Retherford '04** is "doing fine" in his own office in Aztec, NM. He does a lot of Indian law on the Navajo Nation and has ICWA as a regular issue in the abuse and neglect cases he's involved in (of 60 cases, about one-third have ICWA implications). He also does some civil practice, including Social Security, which he learned in the Civil Practice Clinic taught by Professor Emeritus Norm Aaronson.

**Maggie (Wetmore) Stein '05** and Kevin Stein welcomed their little boy, Henry Heaton Stein on December 16, 2008.

Maya Isabel Zehren-Thomas came into the world on September 25, 2008 to greet her happy parents, Rodney Thomas and **Stephanie Zehren-Thomas '05**. Stephanie continues to practice at her firm Hester & Zehren in Louisville, CO and serves as a member of the AILC Advisory Committee.

**Brandt Swardenski '06** is enjoying his position as Assistant State Public Defender in Green Bay, WI. His wife Michelle, '06 is clerking for the judges of the Circuit Court. They have two little girls, Emlyn, 3 and Violet, 1 1/2.

The family of John and **Lauren Templeton '06** has really grown in the past few years! Allison first became a big sister to Katelyn on November 15, 2007 and now Lauren is expecting two twin girls.

**Dena Ivey '07** welcomed an adorable new Yup'ik son, Ethan, 8 lbs, 5.4 oz and 21" tall on March 6, 2009.

In November 2008, **Affie Effis '07** joined the Wyoming Attorney General's Office, Water and Natural Resources Division as an Assistant Attorney General. She and her husband, Dennis, bought a house in Cheyenne, WY which they love. Their daughter, Marlo, 20 months, is going to be joined by a little brother or sister in October.

**Celene Sheppard '07** landed her long-desired job as Associate General Counsel for the Ute Mountain Ute Tribe in Towaoc, CO. She and Tim Hawkins are engaged and are planning a Summer 2010 wedding.

August 31, 2009 marked the beginning of **Alison Flint '09's** clerkship with Colorado Supreme Court Associate Justice Gregory Hobbs. ❖



*Anetra Parks '01, Drew and Mattie, at "Dog Day Afternoon" in Washington Park in Laramie, Wyoming.*

## Clinic Advisory Committee

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## American Indian Law Clinic

This newsletter is published by the American Indian Law Clinic, a clinical program of the University of Colorado Law School. The Clinic provides law students the opportunity to represent clients in cases involving federal and tribal Indian law issues in various Colorado, federal and tribal courts. Students also work with select tribes on tribal governance enhancement projects.

Opinions, interpretations, suggestions or conclusions in this publication are solely those of the authors and should not be attributed to the University of Colorado or the State of Colorado.

Tax deductible contributions to the Clinic may be made through the University of Colorado Foundation.



## Support the Work of the American Indian Law Clinic

Many of the expenses of the student attorneys and poor clients of the University of Colorado American Indian Law Clinic are funded by private donations. Due to the State of Colorado's severe budget constraints, courts very rarely waive court fees and costs. If you wish to support the continuing excellence of the Clinic and the work it does for those in need, your contribution would be greatly appreciated.

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Or by mail. Enclosed is my/our tax deductible gift of \$ \_\_\_\_\_ (made payable to *CU Foundation*) to continue the good work of the University of Colorado's American Indian Law Clinic. Send to: American Indian Law Clinic, 404 UCB, Boulder, CO 80309-0404.