



Tatanka Legal Times

The Newsletter of the University
of Colorado School of Law
American Indian Law Clinic

Tatanka Legal Times
2004—2005

Eagle Feather Case Ends Successfully

Chiricahua Apache Joselius Saenz not only received his ceremonial eagle feathers back, but was awarded \$48,818.00 for legal fees incurred in his eight-year odyssey to recover the feathers which were seized in 1996 by the U.S. Department of the Interior Fish and Wildlife Service. The federal agency took the religious items with feather adornment, including a shield, staff, quiver, fan and dream-catcher claiming that Saenz wasn't a member of a federally recognized tribe and lacked a permit under the Bald and Golden Eagle Protection Act. Chiricahua Apaches, involved in

border skirmishes with the U.S. Cavalry in the 1880's, fled south to a mountain stronghold when other Apache bands surrendered. The groups that surrendered were relocated and eventually were recognized by the federal government. Saenz's band was not.

Saenz, represented by the University of Colorado School of Law American Indian Law Clinic and Peter Schoenburg, Esq. of Albuquerque, sued the government under the Religious Freedom Restoration Act.

See **Saenz** page 14.



Pioneer Mountain and Matanuska River outside the Native Village of Chickaloon, Alaska.

Journey to Chickaloon: Seeing Hurdles Not Roadblocks

—By Melissa Bast, 2L

Prior to March of this year, I had never been to Indian Country. The closest I had come was waking up in the back of a blue rental van during a family vacation to the southwest, gazing out the window at a dusty roadside stand along a back road somewhere in the depths of Arizona. I watched, horrified, as my mother triumphantly returned to the van with an "authentic" drum for my six-year-old brother. Two hours and a growing headache later, I vaguely recall making the empty threat that one of us, either myself or the drum, was going to be hurled over the edge of the Grand Canyon if the drumming didn't stop. My father caught my breakdown on videotape, and I vowed never to return to Arizona.

See **Chickaloon** page 11.

The **Tatanka Legal Times** is the student-written newsletter of the University of Colorado School of Law American Indian Law Clinic. Contact us at:

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Greetings from the Director

— By Jill E. Tompkins, Clinical Professor of Law

It won't be long now before the American Indian Law Clinic moves out of the basement! Slated to be completed in July 2006, the new incredibly beautiful state-of-the-art

Wolf Law Building will provide a professional comfortable wing of suites for the Law School's clinical programs. One of the unique features of the building will be a round seminar room that the Building Committee and architects graciously included to make our Native American students, clients and visitors more comfortable. The inclusion of the room, showing sensitivity to the importance of the circle to Native American cultures, is one very visible sign of the University of Colorado's School of Law's commitment to the study, teaching and practice of federal and tribal Indian Law.


In big ways and small, the University of Colorado School of Law's American Indian Law Program, of which the American Indian Law Clinic ("ILC") is an important component, is gaining strength and national prominence. The enclosed brochure which answers the question: "Why Study Indian Law at the University of Colorado?" represents our efforts to make better known the outstanding faculty, student body, and opportunities available to prospective law students interested in receiving a high quality legal education with an emphasis in Indian law. I am working closely with CU's Native American Law Student Association on a proposal to further enhance the program by offering a formal American Indian Law Certificate. (See story on page 7.)

As will be obvious as you read the articles in this triple - edition of the *Tatanka Legal Times* you will see that the Clinic continues to attract the highest caliber of law students—each of whom demonstrated him or herself to be committed, compassionate and creative in the vigorous representation of his/her clients. The Clinic has traditionally been offered as a one semester course, with the option for a student attorney to take a second semester to continue to work on ILC cases. The Spring semester of 2005 saw a full class of students all opt to continue for a second semester. As a consequence, the CU Law faculty approved modifying the ILC course to a year-long course. Over the past year, the ILC has been instrumental in assisting Colorado's courts to improve their compliance with the federal Indian Child Welfare Act ("ICWA"). For the first

time, many state courts are discovering that the Act, and the protections that it provides for Native American children and families, applies in private child custody actions. Although it has not been easy to achieve at times, District Courts in Denver, Adams and Jefferson counties and the Denver Probate Court have all found that ICWA applies in step-parent adoptions, allocation of parental responsibilities actions (where a non-parent is seeking the allocation), private third-party guardianships and even in a protection order case. (See stories on pages 8, 13 and 18). Through the tireless efforts of the student attorneys, with the confidence that they inspire in their clients, the Clinic also has been successful in assisting adoptees to open their Colorado adoption records that might never have been accessible to them by invoking and arguing the applicability of ICWA. (See story on page 4.) Case by case, the ILC student attorneys are helping Native American children maintain or regain their tribal ties while educating state court judges and officials in ICWA.

The need for legal assistance of the poor, especially the Native American community, is at an all time high. The ILC cannot help everyone who comes to it for help, so in response to the unmet need, through a grant from the Colorado Bar Foundation, the Clinic, with the invaluable assistance of Stephanie Zehren-Thomas '05 and Kelly Lohaus, Program Assistant, *A Guide to Colorado Legal Resources* was compiled and circulated statewide. A searchable version of the *Guide* is located at: www.colorado.edu/law/clinics.

We recently found that we were receiving an increasing number of calls from Native Americans residing in the metro-Denver area who were very concerned about their interests in tribal lands. They were confused and alarmed by the possible impact of the changes intended to reduce and curtail further fractionation of Indian lands that would occur once the federal American Indian Probate Reform Act of 2004 was fully implemented in early 2006. Again, the Colorado Bar Foundation has generously funded the Clinic to conduct community education workshops and to publish lay-language guides to understanding the AIPRA and how to protect tribal land interests. (See story on page 25.)

After 13 years, the ILC continues to provide rigorous hands-on training in the practice of Indian law while providing invaluable legal services to the community. Now we are looking forward to our new digs! 



The Indian Law Clinic Experience Brings Home the Reality of Helping Others

—By Elizabeth McCormick, 2L

When I walked into the courtroom in Grand Junction, seeing the flag against the wall, the podium, benches, common architecture to the American courtroom, I remembered the discussion we had had on the first day of Clinic. Professor Tompkins asked us if we could remember why it was that we wanted to go to law school. There were several answers around the table, some noble, some practical. My own answer was that I wanted to make a difference, I wanted to do something positive in the way of Indian law but I wasn't really sure what or how. In fact before getting to law school I really knew nothing about the law. But going into the courtroom that day, I felt it. I felt justice of the ages bearing down on me in the architecture in the flag, in the garb of the judge. It's true that I had participated in Moot Court before and the excitement of talking in public and making a legal argument had overwhelmed me then. But this was more than that. It was the lives of these people looking up to us

as if we had the power to make it right. It was the American justice system and I was a part of it. But more than that, as an intervenor for an Indian tribe, it was us who gave a voice in that system to tribes; in the middle of the flags, the European architecture, we were there. I felt it all at one time.

I suppose anyone who goes to law school would realize they would eventually become a lawyer but I hadn't really thought of it before that moment, when reality poured down on top of me like the snow outside today. And there was also the hurt, the realization that it has taken this long to give tribes a right to have a say in the lives of tribal children. I saw the parents' complete dependence on the system to retain their children, their hope, their despair, their complete naive trust in us and their lawyers as if we had some kind of magic in a phrase or something that make their children come home. Their naïveté, their trust filled the room, and standing


to say my piece, I felt all the more inadequate. But with Professor Tompkins' experience and encouragement beside me I knew we would do our best for the parents, the children, and the tribe. I had the strength for them that they did not have, that I haven't had so many years in so many areas of my own life. I knew that we would do all we could for these despairing strangers, for all these trembling voices in the distance.

As to Professor Tompkins' question about why I went to law school: I say because I want to help people and because I want to do something that I am proud of and now I can answer honestly because I know. I know in a way that drips in the realization of yesterdays, of the helplessness of everyone that lost their children, every child who was displaced, all the families, all the tribes before the Indian Child Welfare Act. And of course of tomorrows filled with paperwork, hours of research,



“As an intervenor for an Indian Tribe, it was us who gave a voice in that system to tribes, in the middle of the flags, the European architecture, we were there. I felt it all once.”



memos due by noon. But also of tomorrows of the reclamation of the future in these children and the tribes that we stand up for when we go to court and announce ourselves as “Intervenor for the Tribe.” 



Opening Adoption Records: A Tale of 3 District Courts

— By Sonja Young, 2L

When district courts around the state interpret federal statutes differently, it is not because they are consciously trying to manipulate clearly written law into something that was not intended by the legislature. Although the occasional event occurs where an activist court manages to change the meaning of a statute, most often the courts are trying to do their best in applying a generally written rule to the specific facts of a case.

The Indian Child Welfare Act, 25 U.S.C. 1901, §1917 states in part: *Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.*

Upon first reading this paragraph, it seems pretty clear that

adopted individuals can petition the court in order to find out what tribe they are affiliated with and the information necessary to enroll in that tribe. However, after seeing how three different courts in Colorado deal with this provision of ICWA, the statute is a lot less clear cut.

The Indian Law Clinic filed a petition with the Boulder District Court on behalf of an Indian man who had been adopted as a child. The petition outlined ICWA and described legally why ICWA overruled state law. The judge first asked for the adoption records to be delivered to the court for scrutiny. However, not long after the order for delivery to the court had been executed, the adoption records arrived in the mail of the Indian Law Clinic. The records were quickly sent off to our client. The entire process was relatively quick and very helpful to our client.

A woman who lives out of state, but was adopted in the Denver-Metro area also came to us for help

in getting more information about her heritage as well. The Indian Law Clinic filed another Petition to Open Adoption Records, this time in Adams County. With this case, however, the judge did not immediately make a ruling on the petition. Instead the clinic heard from the Adams County Clerk who suggested the




clinic try to get the information from the Department of Human Services. The Department of Human Services stated that they would look in the records to see if a tribe was

named, but they would require a signed letter from the adoptee asking for the records. This was a rather interesting development because the woman who is seeking her records had already been in touch with the Department of Human Services numerous times trying to get information and had already received her non-identifying information from them.

Finally, a young man who had also moved out of state was interested in getting his adoption records from the Denver

District Court. Again the Indian Law Clinic filed a petition on his behalf, and again a judge did not rule immediately on the petition. Instead the clinic received another call from a different clerk who explained their procedures. The Denver clerk explained that my client had two choices. He could go through a confidential intermediary, which would cost him at least five hundred dollars. Or he could get the name and contact of someone in the tribe and the court would confidentially send the adoption records to that named person. Because there was no way of my client knowing what tribe he came from without the court opening up the adoption records, it seemed that using the confidential intermediary was his only option.

The uncertainty surrounding the procedure of opening up adoption records under ICWA should be addressed. A state-wide uniform policy should be implemented to ensure that Indian children who have been adopted have a clear and easy way to discover their heritage. 

Update: Recently an Adams District Court Judge reversed the decision of the magistrate and ordered the adoption records of the client to be released to her without a confidential intermediary finding that ICWA superseded state law.



Taking On Clients

— By Julia Morgenthau, 2L



A small, pink slip of tissue-like paper sits in your student attorney mailbox. Although it may only have written on it a single name and phone number with the date called, this slight communication could spawn a large, complex legal relationship with theories and facts that require constant analysis. However, not everyone's problems can be solved by the American Indian Law Clinic (ILC) nor can the ILC represent every person's story. How does the American Indian Law Clinic decide who it will represent and in what areas of the law?

One of the purposes of the ILC's mission statement includes: "to promote the well-being of Native American people and the sovereignty of tribal governments by providing quality legal representation on Indian law issues." The majority of clients that the ILC represents are Native American people in the Denver metropolitan area or individual tribes and tribal courts. The ILC's commitment to service requires that the client be indigent,

according to the federal poverty guidelines, in order to be financially eligible for services. By taking only on clients that would not otherwise be able to afford a private lawyer, the ILC supports the Native American community and, put simply, helps people.

Given the ILC's mission to provide quality legal representation on Indian law issues, the ILC puts priority on taking cases that involve sovereignty issues, preservation of tribal identity, situations involving the federal Indian Child Welfare Act (ICWA), discrimination in certain contexts, preservation of native lands, religious freedom and other Indian law issues. In addition to taking on individual cases, the ILC also undertakes projects that benefit the Native American Community in a more general way such as the Tribal Court project, the Environmental/Natural Resources project and the Tribal Governance Enhancement project. The caseload that each student attorney is assigned provides a variety of Indian law issues, as well as, practical and even courtroom experience that enormously benefit the soon-to-be practicing attorney/student.

After that pink slip comes in and the phone call is returned, taking on a client that meets all of the financial and case specific requirements is a substantial responsibility. Although a client may not necessarily feel differently after they sign an agreement for representation with the ILC, the transforma-

tion of that person into a client of the ILC is undeniable and very critical from a legal perspective. Once that person is legally represented by the ILC, they are cloaked in the privileges and rules of confidentiality and attorney obligations.

As legal advocate for their client, the ILC owes duties of loyalty, confidentiality and zealous advocacy to their client. Under the Colorado Rules of Professional Conduct, withdrawing from representation of a client is not an easy task and is sometimes not allowed by the courts. Therefore, it is imperative that the ILC maintain thorough intake procedures to ensure that it takes on clients who are within its mission to represent and also who are within its logistical powers to represent.

To date, the ILC has clearly been successful in accomplishing its mission of servicing the Native American community of the Denver area and of providing a stimulating and educational clinical experience for its students. In maintaining requirements for eligibility of clients, the ILC is better able to represent its current clients and pursue its mission of service to the community. I personally have benefited from the educational aim of the ILC and would like to wish all of my clients the best; it has been a real pleasure working and learning with you.





ILC Award Winner Peter Rose and Director Jill Tompkins

Marsan, Rose & Wetmore Receive American Indian Law Clinic Award

Each semester the Indian Law Clinic Award is bestowed on “students who excel in client service and classroom participation, and therefore embody the Clinic’s goals of providing the highest quality representation in a rigorous educational environment.” Nominated by their peers, student attorneys Joan Marsan (Fall 2004), Peter Rose (Spring 2004), and Maggie Wetmore (Spring 2005) were selected to receive the award.

The *Tatanka Legal Times* recently caught up with Peter, Joan and Maggie and asked them the following questions:

Q. Why did you go to Law School?

Joan: Formerly a reporter, I wanted to shift from being an observer to being a more active participant in addressing the problems and situations I was writing about.

Peter: There were two principal reasons. The first was in the nature of a personal quest for knowledge, and particularly, to gain a better understanding of the relationship between law and politics.

Maggie: To study environmental policy and hopefully to practice public interest law.

Q. What do you plan to do now with your law degree?

Joan: Work! In whatever capacity I find myself working, I’m sure I’ll have the opportunity to do what I came to law school to do: learn to, more effectively, use my skills in service of others.

Peter: I plan on practicing tax law.

Maggie: I think that I would actually really love to work in an advocacy position either doing hands-on work or policy work—probably in the tribal or environmental context. Right now, I am the owner of a fish market! Who would have thought?

Q. What was it like working in the American Indian Law Clinic?

Joan: It was interesting and challenging. We got to grapple with a broad range of legal issues over the course of the semester, and there was intense research, as well as actual trial practice—so it really covered the gamut.

Peter: The workload varied—there was always a case that needed some attention, and, at times, there were tight deadlines that had to be dealt with. But it was always manageable and never overwhelming.

Maggie: The Clinic was hands down the best experience I had in law school. I was a bit disillusioned by the theoretical focus of law school, and the Clinic gave me an opportunity to feel like there was a wonderful side of law that affects people’s lives.



Spring 2005 ILC Award Winner Maggie Wetmore

See **Award Winners** page 7.



Spring 2004 ILC Award Winner
Joan Marsan

Award Winners

From page 6



Q. What was the best aspect of taking the Clinic course?

Joan: Working with clients. It is the one opportunity, in school, to actually practice law, and it's invaluable to have gotten that experience before being thrown out into the "real world"—the clinic IS the real world.

Peter: Engaging in legal decision-making that had real life and important consequences for the Clinic's clients.

Maggie: Having a working relationship with real people. I really enjoyed my clients.

Q. What was the most challenging aspect of your Clinic work?

Joan: Realizing I was actually going to have to stand up in court and speak on behalf of someone else—thank goodness there was someone vastly more experienced standing next to me in the courtroom.

Peter: For me, it was appearing in court. Even the mock-trial exercises were stressful and challenging.


Maggie: Trying to maintain optimism when you are dealing with serious issues that profoundly affect your client's lives. Sometimes it seems like the world is

against your client (and you.)

Q. Would you recommend the American Indian Law Clinic to prospective students?

Joan: Absolutely.

Peter: Absolutely, as long as the prospective students know that it will not be a passive endeavor. There is a large disconnect between law school classes and practice. The clinics are an essential bridge, both reinforcing and extending lecture-based instruction.

Maggie: Absolutely! I think that the role of clinics is underemphasized and that all third year students should have a mandatory clinic. 

American Indian Law Certificate Program In Development

Spearheaded by members of CU Law's Native American Law Student Association (NALSA), a proposal for an American Indian Law Certificate Program is under development. The School of Law will offer a program of study that leads to a Juris Doctor degree with an emphasis in the area of American Indian law.

The program builds on the existing strengths of our American Indian Law Program by providing students with a formal credential that will be attractive to many potential legal employers, tribes, government agencies as well as employers working on Indian country issues. The certificate will signify Indian law experience beyond what may be normally obtained by law graduates. It is believed that a number of employers desire law graduates with additional in-depth experience in the Indian law field, and that the certificate is an obvious indicator of a CU law graduate's commitment to the field of Indian law.

If approved, the American Indian Law Certificate Program will join the school's existing Tax Certificate and Environmental Policy Certificate Programs.



ILC Helps Native Grandmother Fight for Grandson

—By Peter Rose, 3L (ILC Award Winner)

A grandmother, living in a nearby state, was worried about her daughter and her daughter’s infant son. The grandson had been removed from his mother and placed in a foster home; his mom had hit a rough patch, and was unemployed and living in a shelter with her two older children. The grandmother contacted her daughter’s caseworker, but the caseworker would not discuss the case in any detail with her, nor consider her as a foster or potential adoptive placement, even though she often cared for all the children. All the family members were enrolled in, or eligible to be enrolled in, a tribe.

Frustrated and concerned, she contacted the Indian Law Clinic for assistance. The Clinic agreed to take her case, with the objectives of getting her “in the loop” so that she could help with and reinforce her daughter’s court-ordered treatment plan, and, if reunification of the child with his mother failed, advocating for her as an adoptive placement.

To understand the context of the case, it is necessary to look at the federal Indian Child Welfare

Act, commonly known as ICWA. The preamble to ICWA summarized the Congressional findings in support of the act thus: “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarm-

ingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” ICWA was enacted over twenty-five years ago, but not surprisingly, many older Native Americans still harbor deep suspicious about child welfare agencies.

The substantive provisions of ICWA imposed uniform national standards on the courts and child welfare agencies to protect the rights of Indian children and their families, and to preserve the integrity of their tribes. For example,

when a child welfare case involves the involuntary removal of an Indian child from his or her home, the child’s tribe must be notified, and, subject to several limitations, the case may be transferred to a tribal court. In other respects, ICWA made standards applicable to Indian children that were already considered best

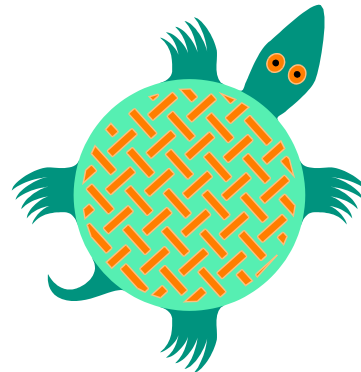
practices for all child welfare cases, at least in some states: heightened due process; “active efforts” to provide services to parents with the primary goal of reunification of families when children are removed; and requirements that expert testimony be heard in support of removal or the termination of parental rights.

Another significant section of ICWA prescribes adoptive placement preferences for Indian children, for instance, in the event that reunification efforts should fail and parental rights are termi-

nated. First preference is to be given to the child’s extended family—a term defined within ICWA by reference to the child’s tribe’s law or custom, or, should none be determinable, encompassing relatives out to second cousins. Further, Colorado law more specifically identifies grandparents as the preferred placement, both as a foster parent and as an adoptive parent.

It seemed, at first blush, that it would be straightforward. My initial thought when I was assigned the case was to contact the caseworker and get her side of the story. As an experienced negotiator but completely novice student attorney, I didn’t want to leap automatically into lawsuit mode; further, as the child of a social worker, I had a high regard for the men and women who work in the trenches of child protective work. Since the Department of Social Services is charged with looking out for the best interests of the children in its custody, I thought there would be little difficulty in making the case to the caseworker that it was in the best interests to have the child’s grandmother involved in the reunification efforts. As it turned out, this was not a workable strategy; neither the caseworker nor the county attorney in charge of the

See **Grandmother** page 9.





Grandmother

(Continued from page 8.)

case would discuss the matter with me because my client was not a party to the case. I had my doubts about the logic of that, since discharging the Department's duties would seem to entail discussing the child's care and disposition with many people who would not be parties to the case. Nonetheless, it was clear that I would have to get my client into the lawsuit as a party, a procedure known as intervention.

Court rules, statutes, and case law interpreting the rules and statutes govern intervention. Research turned up two cases decided by the Colorado Court of Appeals in 1974 that strongly supported a right for a grandmother, and possibly other relatives, to intervene. And, a statute enacted in 1997 by the Colorado legislature created a right for "parents, grandparents, relatives, and foster parents who have had the child in their care for more than three months" to intervene. However, the actual state of the law of grandparent intervention was still ambiguous. Had the later enacted statute overruled the prior case law? Did the legislature intend to have the condition "have had the child in their care for more than three months" apply to just foster parents, or also to parents, grandparents, and relatives? What was meant by three months of

care—consecutive or cumulative, and did it have to be immediately prior to removal?

The key to statutory interpretation is determining the "intent" of the legislature. Based on the cases and the wording of the statute, it seemed almost certain that the statute was intended to codify the holdings of the prior cases—essentially, that parents, grandparents and relatives were entitled to a liberal right of intervention—while also providing a "bright-line" rule for foster parent intervention. Accordingly, I filed a motion

requesting that my client be permitted to intervene, citing the statute specifically but also implicitly invoking the authority of the pre-statute cases.

To my surprise, the County Attorney objected to the motion, and, in my first court appearance as a student-attorney, I had to argue the motion before the magistrate assigned to the case. I argued that the care requirement could not logically be extended to parents, and thus could not also apply to grandparents without a completely arbitrary reading of the statute. Alternatively, I pointed out that there was no conflict between the statute and the prior cases and thus intervention should be

mandatory under the case law. The County Attorney's principal argument was that the care condition must apply to everyone as a matter of grammar and statutory construction. Even more restrictively, she argued that the statute only applied to a caregiver actually caring for the child at the time of intervention. The magistrate seemed most concerned with whether he could draw a distinction between grandparent and relative intervention; he seemed uncomfortable with the idea that even the most distant relatives could claim a right to

intervene under the statute. Ultimately, this seems to have been the deciding factor and, to my chagrin, he denied the motion.

I had only five days to prepare a motion and brief seeking review of the magistrate's order by a district court judge. What had seemed so clear a week earlier now appeared fraught with ambiguity and uncertainty, but working through the brief convinced me that we were right on the law, as well as right on the policy behind the law. The motion and brief went out FedEx just ahead of the deadline. And then began a wait, estimated by the judge's clerk at six weeks. Fortunately, it took less than four weeks

for the judge to decide that the legislature intended the care requirement to apply only to foster parents. The magistrate's order was reversed and my client was now a party to the case.

Of course, in one view this really only puts us in a position that should have been recognized by the Department of Human Services in the first place. As a party, my client has the right to all documents filed in the case, to notice of all hearings and to participate in those hearings. The Clinic can thus more effectively advocate for her interests as a mother and a grandmother. There is no way to predict how the case will come out from this point forward—it is even possible, as I'm writing this, for the judge's order to be appealed by the County—but it is clear that without becoming a party, my client's interests could not have been adequately protected.

The restrictive meaning applied by the magistrate in this case works to seriously hamper the ability of Native American grandparents and extended family members to participate in protecting the integrity of their families. Fortunately, the Clinic experience is that this interpretation is not the norm in other jurisdictions in Colorado. Nonetheless, the ambiguity in the law remains as a potential pitfall exploitable by county attorneys to frustrate the spirit of ICWA and Colorado family law.



[T]he ambiguity in the law remains as a potential pitfall exploitable by county attorneys to frustrate the spirit of ICWA and Colorado family law .



The Resume

—By Brandt Swardenski, 2L

As the first year of law school came to an end, an experience that all but destroyed many egos, I was faced with yet another challenge. Desperately seeking a summer job as a 1L was discouraging enough, but it was something else that dealt the death blow to my ego, the resume. This one page document is supposed to contain all of your life skills and achievements and clearly convey to prospective employers that you are the one for the job. However, without an extensive career history before law school, this mighty document may seem a little sparse.

Some students are fortunate to be able to place that elusive “top 10%” at the top of their resume. For the rest of us, it becomes an exercise in creative writing. The job waiting tables at a Korean restaurant becomes a “cross-cultural experience.” That summer as a camp counselor becomes a “leadership training program.” However, no amount of creative description can make up for that void of legal experience.

With first summer gone and perhaps some sort of

employment under your belt, the resume grows stronger. The line “Summer Associate” or “Summer Law Clerk” fills you and your resume with pride. However, when second summer rolls around, that one line may again seem too weak to keep your resume afloat. Here is where the clinic comes in.

This past year I spent two semesters in the American Indian Law Clinic. I conducted client interviews, drafted motions, prepared witnesses and conducted a trial. Now, proudly holding its place on my resume under Legal Experience is “Student Attorney - American Indian Law Clinic.”

From the beginning of the semester when all those participating in clinic programs went through a swearing-in of sorts, promising before a judge to abide by the Colorado Code of Professional Conduct until the last transfer memos preparing the next

student, you are an attorney, albeit an attorney with that horrible “Student” moniker before it. Nonetheless, the opportunity to stand in court and represent a client serves more to increase your confidence

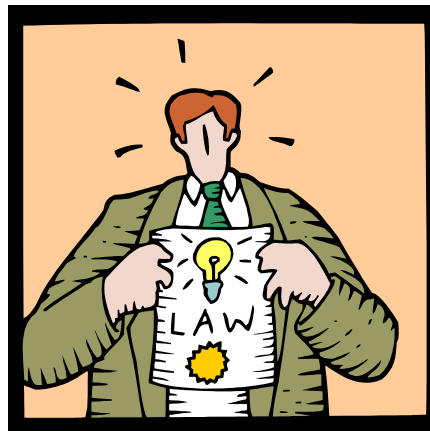
than any special knowledge of future interests or strict liability.

Serving as a student attorney

afforded me the opportunity to practice and practice everything. Pouring over casebooks and legal treatises sharpens your legal mind to a point, but it does nothing to help you find the office of the Clerk of Courts (9th and Walnut – Boulder Justice Center – 1st floor straight back – looks like a ticket counter at Coors Field.) I have spent a great deal of time with my nose between the green covers of the mighty horn books, but nowhere in those books have I come across the heading format for motions in Boulder District Court. Perhaps these seem like small things and in a large part they are small. They are

both a small part of being a lawyer and a small part of a clinic experience. However, in the same way that second job waiting tables was so much easier than the first, having gone through the motions makes any future legal job that much easier, and made me that much more confident.

So this second summer as I prepared my resume, this time with no illusions of a class rank or GPA as a highlight, I went forth into the morass of law students vying for limited positions with just a little more confidence. I had learned one more part of the secret handshake. My resume was not always met with beaming enthusiasm (many employers would still have liked that GPA to be highlight.) However, not one person read past the year of clinic without taking note and inquiring about my experience. This summer I am heading back to Wisconsin to work with a Native American tribe there. I believe I got this opportunity in a large part because of that extra line on my resume, “Student Attorney –American Indian Law Clinic.”





Chickaloon

From page 1.

My journey to Chickaloon Native Village in Alaska took me far away from that dusty roadside stand, into an Indian Country much different from the stories relayed to me by professors over the years and from the accounts of reservation life I had read in books and magazines from time to time. Alaska is different from the lower 48 states in many ways, but especially so when it comes to federal Indian law. There is only one reservation in the state. All other Native lands are held by an array of 13 regional Native corporations and countless Village corporations, charged with the responsibility of developing or maintaining, disposing of or keeping the land for the benefiting corporation members. Some of the corporations have enjoyed monetary success; others struggle to stay afloat, if only to hold onto the land. The Native needs in Alaska are different, too – in a world of long and harsh winters, subsistence living is a key aspect of life. Caribou hunting and salmon fishing aren't pastimes; they are survival. Corporation lands are as patch-worked as the reservation

lands of the lower 48, and tribes lack legally-recognized jurisdiction over land they had traditionally called “home” for hundreds of years.

Chickaloon itself is different from the other Alaska Native tribes. While access to most villages can be gained only by air, Chickaloon is visible from the Glenn Highway, less than an hour outside of Anchorage. The tribal buildings are scattered along the road. The health department and community meeting room are in a building that used to be a pizza parlor. Between the parking lot and the roadway, there are a handful of traditional gravesites. The environmental protection office is in an industrial-looking building, downstairs is the peace officer force. The tribal school, day care, Indian Child Welfare Act office and accounting department are in a maze of brightly colored structures at the base of a hill. One of the buildings is a converted cow shed, outside of which is a solar panel that tracks the sun, providing clean energy for the tribal buildings' needs.

When I arrived at Chickaloon, I was afraid that I only brought bad

news with me. The project assigned to myself and Student Attorney Sonja Klopff, through the Indian Law Clinic, was to draft a water code for the tribe. Because of the jurisdictional issues unique to Alaska, I feared that drafting any code was an exercise in futility. The United States federal government has granted Alaska Native tribes little regulatory control over the land managed by the Regional and Village corporations, and where the tribes in the lower 48 can impose strict controls on reservation lands, the Alaska tribes are not awarded the same opportunity. We had flown nearly four thousand miles to learn more about the tribe, and strategize with them about the next steps we should take toward drafting the code. I was anything but optimistic about the outcome.

Prior to arriving at Chickaloon, everything I knew about federal Indian law, I learned from books and classes. One of the first things Sonja and I did was meet with the environmental code development committee. We voiced our concerns about jurisdictional problems, and inquired about such things as code enforcement and the tribal court system. The next few days were a blur of conference calls with

environmental directors at other tribes, meetings with Chickaloon environmental program staff, and on a more fundamental level, learning about the tribe itself. We looked at maps, saw the land, learned of the tribe's concerns about coal bed methane development and mining activity, and shared stories about lives lived a short 8-hour flight away, but with origins in different parts of the world, in different time.

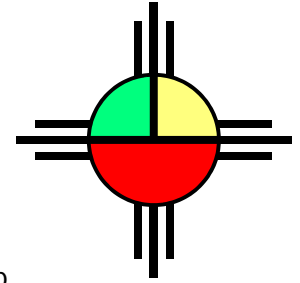
By the time we returned to Boulder, I was both physically and mentally exhausted, but in a very real sense, rejuvenated. No matter how much bad news we offered the tribe, they stood stalwartly by the belief that even though the federal laws didn't permit heightened environmental regulations per se, the tribe had the power to implement such regulations. The tribe helped me realize that jurisdiction, which I considered a roadblock, was really only a hurdle, and it was only a matter of time before that hurdle could be overcome.

Working with the Chickaloon tribe taught me more about federal Indian law in three days than years of studying

See Chickaloon page 14.



Finding an Indian Voice for Culture and History in American Law




—By Catherine Madsen, 2L

My year at the American Indian Law Clinic will undoubtedly hold some of my fondest memories of law school. Not only did I have the opportunity to develop valuable relationships with my peers and supervisor for the year, but I also had the chance to explore the unique and complex nature of Indian law, and see the law through a lens not readily available in the law school classroom.

My interest in American Indian culture and justice was sparked while I was completing my graduate degree in counseling psychology. As part of a holistic program, I had the opportunity to spend a summer in New Mexico studying American Indian and Mexican healing traditions and later worked as a counselor and legal advocate with disadvantaged and culturally diverse communities. Through these experiences, I was able to see firsthand how the American legal system was often ethnocentric in application and unresponsive to social and cultural considerations when administering justice. I saw many families placed in the compulsory bind of having to choose between honoring their traditions or abiding by Anglo legal values. It was experiences such as these that brought me to law school with the goal of affecting legal change for experiences and cultures that are too often misunderstood in our current legal system.

With this background, I was very eager to participate in the American Indian Law Clinic. As a result of this experience, I have been able sample the complexity of federal Indian law, and its unique place in the American legal system. Yet I have also witnessed the tension between achieving the ideals of the American legal thought and the compelling interest of preserving Indian culture. As an illustration, I have observed the tension between the American standard of “best interests of the child” versus the aspiration of cultural preservation proclaimed in the Indian Child Welfare Act (“ICWA.”) Likewise, I also witnessed the strain between the governmental goal of preserving endangered species versus the protection of Indian religious freedom under the Religious Freedom Restoration Act (RFRA).

These experiences have encouraged me to examine the law through a historical and cultural lens to better understand the purposes and goals behind statutes affecting Indians. For example, I appreciate how legislatures, in enacting such statutes as ICWA and RFRA, have tried to recompense the historical injustices against American Indians and recognize the uniqueness of Indian culture and tradition. Yet, as laudable and promising as these efforts have been, I cannot help but feel that much is still missing. I struggled with this question for most of the year; yet when I discovered the answer, it seemed remarkably simple. In short, it seems that one of the greatest difficulties in coalescing American law with Indian culture and traditions of justice is the lack of Indian voice. The fault cannot be attributed to the Indians, but rather the structural and administrative inequalities in the legislative process.

Certainly, legislative acts promoting Indian welfare unquestionably would not have ensued without Indian activism and influence; yet it seems that to effect authentic, lasting, and culturally responsive change, Indians – as well as those genuinely committed to the social and cultural consciousness and equity of Indians – need to play a greater role in the legislative and lawmaking process. In other words, the voice of the Indian should not just be a part of legislative history, but rather a part of the legislature itself. More Indian voices are needed in our legislature to ensure that, not only are Indian views are represented, but that they are appreciated and understood for their uniqueness and contribution to American culture, and not just acknowledged for their difference. Although I am not Indian, I hope to be one of these voices and to be a catalyst for achieving enduring change for Indians in the legal culture. 



What To Do When the Indian Child Welfare Act Is Overlooked

—By Maggie Wetmore, 3L

The Indian Law Clinic takes on cases in an array of substantive areas from tribal code-writing to trial work involving the Indian Child Welfare Act (ICWA). My clinic caseload this past spring involved primarily ICWA cases, two of which had been actively litigated for at least a year prior to our involvement. Coincidentally, both cases involved ICWA outside the context of dependency and neglect, and neither involved Social Services. The two actions were private actions that implicated ICWA, and our role in both was to ensure the full and proper application of ICWA to the proceedings. In one, we represented a biological parent, and in the other, we represented the Tribe. Our involvement in these cases brought to light the importance of applying ICWA early in a proceeding, as well as some of the issues that arise when trying to apply ICWA to a private action.

In one of the cases that had been ongoing for a number of years, ICWA was not applied until late in the proceedings, and even then, the application was spotty at best. The largest problem that we faced upon our involvement in the case was the lack of ICWA compliance in the past. The question that we

faced was how to remediate years of compliance problems so that any further actions in the case would be unassailable as violating ICWA. Because of the years of proceedings in the case and the number of parties that had been involved over the years, starting over from scratch was not a feasible alternative. So, we began looking for alternatives that would remediate the compliance issues while not requiring a rehashing of the years of litigation that had already occurred.

One of the general issues that we faced was how we were to raise the past compliance problems and proposed remedial actions with the Court. What sort of motion would this be? Did we have standing to make it? In addition to the questions associated with how to raise the issues with Court, questions arose every step of the way when considering possible remedial actions. Can you provide remedial notice without having to set a whole new hearing (or three)? Can the Court retroactively find that the standard under ICWA for involuntary placement has been met? And the list went on.

An issue that we faced in both of these private ICWA actions is the applicability of certain provisions of the

Act in private proceedings. One specific example is the ICWA provision requiring active efforts at rehabilitation of the parent-child relationship. This provision is applicable in all ICWA actions and is often satisfied by Social Services in their attempts to keep the family together. But who has the responsibility of making active efforts toward rehabilitation in the context of a private action? It would seem that the party moving for an action that implicates ICWA would have that burden, but what sort of active efforts satisfy the burden in the private context?

These issues are just some of the issues that arise when ICWA is implicated outside the context of dependency and neglect. All of the issues of ICWA compliance could have been avoided had one of the private practitioners, the GAL or even the Court been aware of the Act and comfortable with its application. Non-compliance with ICWA simply makes an action susceptible to attack. In the context of child welfare proceedings, nothing is more important than the decisions of the Court being sound and that the placement of the child is not shaky. Thus, it is in the best interest of all involved that ICWA be applied immediately and con-

“ICWA was federally mandated in consideration of the best interests of Indian children, and its purpose can only be accomplished by careful and thorough application of its provisions.”


sistently by the Court. In addition, all parties should be aware of the complications that arise when ICWA is applied in private proceedings and be prepared to fully educate themselves and the Court not only about the requirements of the Act, but its purpose. ICWA was federally mandated in consideration of the best interests of Indian children, and its purpose can only be accomplished by careful and thorough application of its provisions.





Chickaloon

From page 11.

books could ever have accomplished. Change occurs at its own pace, regardless of the state of federal laws or who is Senator, Congressman or President. Indian Country in Alaska is the prime example. There are tribes that remain as remote now as at the time of Alaskan statehood in 1959, and as far back as anyone can remember. Chickaloon has an office in a converted cow shed next to a state-of-the-art solar panel and an unmatched desire to maintain, and restore, the natural environment. In the grand scheme of things, the solar panel and their yet-to-be-adopted water code are small steps, but they are steps that embody a land ethic rooted much more in morality than any federal law I've encountered. It is a land ethic that, with time, has the potential to be a model for the federal system, rather than a reaction *against* it. 



Student Attorneys Sonja Klopf and Melissa Bast working on location with the Native Village of Chickaloon.

Is your tribe in need of assistance in developing a tribal code?

Call the American Indian Law Clinic at (303) 492-0996.




Chickaloon Village Environmental Protection Program Staff.

Saenz

From page 1.

Counsel for Saenz argued that the government's regulation limiting permits for eagle feathers only to members of federally recognized tribes impermissibly infringed on his right to religious exercise and was not the least restrictive means of advancing the government's interests in preserving eagle populations and protecting Native American culture. "Imposition of the government's single and strictly legal definition of 'Indian tribe' for all purposes – historical, social, ethnic, religious, political and jurisdictional – conflicts with the reality of human experience," wrote the late U.S. District Court Judge Edwin L. Mechem when he ruled in Saenz's favor in 2000.

The government immediately appealed to a panel of the 10th Circuit Court of Appeals. Saenz won again, and the government then appealed to the full 10th Circuit. After the third loss by the government, Saenz sought recovery of legal fees under the Equal Access to Justice Act. Finding that the government's position was not "substantially justified," the court awarded New Mexico counsel \$27,478.38 and the Indian Law Clinic \$8,175.00. A subsequent appeal of the award was dismissed by the 10th Circuit on July 23, 2004.

Two other cases, involving non-Indian sincere practitioners of Native American religion who also possessed ceremonial eagle feathers without a permit, Sam Wilgus of Colorado Springs, CO and Raymond Hardman of Neola, UT, were remanded by the 10th Circuit to the District Court and are still awaiting ruling. 



Code: What Is It Good For?

Developing Environmental Codes for Alaska Native Villages

— By Joan Marsan, 2L

The Supreme Court held in *Alaska v. Native Village of Venetie Tribal Government* that the 1.8 million acres owned by the village's tribal government did not constitute "Indian country," effectively ruling that Alaska tribes lack jurisdiction over their homelands. The Court's decision created a new kind of entity in America: sovereigns without territory.

Alaska natives, however, are intent upon asserting sovereignty and protecting their traditional territory, even if unusually creative solutions are required by the jurisdictional challenges *Venetie* imposed. Many have promulgated codes with an understanding that in Alaska, their policies might simply be accepted if they are made known to other agencies, strictly adhered to by the tribe itself, and function smoothly. And some are developing code with the hope that, if challenged in the distant future, a program that was in existence and running smoothly for years could provide a compelling reason for a court to find that a tribe simply *should* have such territorial jurisdiction recognized.

It might sound like tribal code in Alaska is simply the product of optimistic dreamers. But, despite *Venetie*, those dreamers do have a little legal authority to lean on. They have received assistance in the form of the Alaska Supreme Court's 1999 *John v. Baker* decision, which held that even without territorial jurisdiction, a tribe could assert jurisdiction over members under certain circumstances, particularly those relating to domestic relations and other internal matters. It has been suggested that the decision also leads to the proposition that tribes have jurisdiction to regulate actions of members affecting the environment of the tribal community.


Furthermore, the U.S. Supreme Court's 1981 *Montana v. United States* decision suggested that tribes have a right to assert jurisdiction even over non-Indian persons when they are engaged in activities that threaten the political integrity, economic security or health and welfare of the tribe, regardless of



Alaska natives, however, are intent upon asserting sovereignty and protecting their traditional territory, even if unusually creative solutions are required by the jurisdictional challenges Venetie imposed.

whether the non-Indians are on "Indian country" or are off the reservation.

When *John v. Baker* is paired with the Supreme Court's *Montana* decision, it provides a powerful principle that Alaska's native tribes could regulate the activity of non-members even outside of their territories, if that activity affects the tribal health or welfare, economic security, or political integrity—which is often the case where environmental regulations are concerned. Hence, Alaska tribes could argue that non-Indians who hunt and fish or recreate on tribal lands, or whose activities impact the integrity of tribal lands through pollution, have submitted to tribal jurisdiction, even if that tribal land is not a part of what is traditionally, or legally, recognized as Indian Country.

By developing tribal codes, Alaska native villages are proactively protecting their interests, and their tribal integrity, in the event that the courts ultimately recognize their legitimate interests in protecting their traditional territories. 

Sidebar: *This year, the Indian Law Clinic has assisted the Native Villages of Barrow and Chickaloon with the development of hunting, fishing, land use and water codes.*



The Importance of Tribal Participation in the Creation of Tribal Codes

— By Elizabeth McCormack, 2L

“Tribal participation is essential in the creation of tribal codes. It is the essence of the idea of self government and self-determination.”


This term, I worked on two Tribal Code writing projects, one for the Huron Band of Potawatomi located in Michigan and one for several rancherias forming a joint tribal court in Northern California. Both projects were difficult to make great steps forward in that neither project involved the tribes to the fullest extent possible. I began to wonder why there was seemingly lack of tribal participation and realized that the way the federal government sets up funding for tribal codes is not conducive to the fullest participation by tribes. This funding arrangement is hard to reconcile with the position of the Indian Law Clinic, since it is ILC policy to involve tribal members to the greatest extent possible in both the initial visioning and the process thereafter.

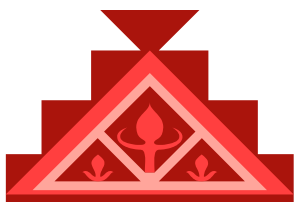
Tribal participation is essential in the creation of tribal codes. It is the essence of the idea of self-government and self-determination. The federal government, in supporting self-government, allows for funding for tribal projects such as code making. However, the United States wishes to make dealings with tribes simple and thus projects such when tribal codes seem to get al-

located to one member. This is contradictory of the term “self-government” because it makes traditional governments and traditional participation by the entire group in planning more difficult than perhaps other methods might be. A top-down structure with the United States in control of funding superimposes a certain structure upon tribes. The lack of ease in participation by tribes should be questioned in terms of self-determination and how much government or at least methodology of creating government is being imposed upon tribes.

Regarding the Huron Potawatomi, one tribal member created the entire tribal code with little to no input from the tribe. It was difficult for him to try to incorporate traditional elements in the code because he had grown up off reservation. He did his best to maintain contacts regarding the code with the tribe and got consent on particular matters from the tribe but the overall structure did not allow for much involvement by the tribe. Regarding the Northern California code project, the code project was ultimately contracted out to an attorney living in Washington who had never been to

the rancherias. In fact, this was her first project in the realm of Indian law. In both cases, projects moved very slowly because of the lack of agreement by tribal members and the lack of consent by the tribes as a whole. Neither project had a committee in place for creating the tribal codes and neither project seemed to have any strong ties to the traditional aspects of the tribes. Therefore, neither project utilized the tribal input desired by and envisioned by the Clinic. Using historically non-Indian methods for creating the code and then traditional methods for consent by the tribes did not seem to come together in these cases.

Because self-government is such an important concept in Indian law, it is important to question the structure of the programs funding these code projects and the federal policies in place that advocate this method of funding. The basic ideology between tribes, at least traditionally, and the federal government is different; therefore, the creation of the codes, even in the planning and the allocation of responsibilities stages should also be different. 





Indian Law Clinic Cases – Never Simple

— By Brandt Swardenski, 2L

Cases that come to the Indian Law Clinic are never simple. Dealing with Native clients necessarily takes you across jurisdictional lines invoking State, Federal and Tribal laws. Cases that come to the clinic often begin simple, but rarely end simply.


One of my cases I was assigned this fall began as a simple problem. A mother wanted to enroll her child in the child's father's tribe. The tribe need verification of the child's lineage included a DNA paternity test. So, the clinic filed a petition in paternity to get a court order and a DNA test finding paternity. The father had signed an unofficial admission to paternity shortly after the child's birth so that the mother could receive services at the local BIA clinic. Therefore, it didn't seem he would contest our case. However, nothing is simple.

The father, who resides out of state, protested the jurisdiction of the Colorado Courts to handle this case and claimed the case should be transferred to tribal court. Extensive research and a well supported memorandum of law later (citing tribal law that they did not take paternity cases), and the court ruled that Colorado did have jurisdiction over both the subject matter and personal jurisdiction as a result of the father's appearance at the first hearing by telephone.

As a result of that ruling, the court ordered the father to submit to genetic testing. He complained that he should not have to pay for the testing, but that issue was eventually resolved. This resolution came almost one year after the original filing of the case. During this long delay, the client's financial situation changed. As a result of this change, she decided to seek child support as part of the paternity action. This is where I inherited the case.

So, the clinic determined that in order to request child support, we would need to file a request to amend our petition in paternity and to file an amended petition. This was done as of late September. In response to our amended pleading, the father decided to file *pro se* a motion for more time so that he could find an attorney. It should be noted that he had filed a similar motion a year prior but had not as of yet found an attorney. In turn, we filed an objection to his motion on the grounds of continued financial hardship to the mother and child and that he had already had ample opportunity to acquire an attorney.

While the court was reviewing both the motion and our objection, the father filed a separate pleading in his home state in which he admitted to paternity and tried to set up a payment plan for child support. The problem was his payment plan called for a lower child support payment than Colorado would likely order and no provision for back payment. Instinctively, there had to be grounds for dismissing such a case. The problem was that the case was outside of Colorado in a state that the clinic is not licensed to practice. Therefore, we could not even reply to the court, let alone get the action dismissed. So, we sought out the help of another Law School's Indian Law Clinic. Thankfully, we found a willing student to file the motion for us in the father's home state. The motion was filed under that state's version of the Uniform Family Support Act which provides grounds for dismissing a child support or custody case when another similar case is active in another state.

The court has finally ruled on the motion for time extension requiring the father to reply in Colorado by early December. However, he is unlikely to reply and so the next twist in the case will be to find a way to use a default judgment to get child support when you have little or no information regarding what the father is earning. Nothing is simple. 



Civil Protection Orders and ICWA Clash


— By Lori Tucker, 2L

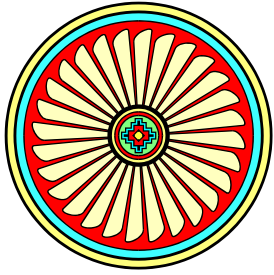
Typically when you think of a civil protection order, it is used to protect women and children from abusive family situations. But in this particular case, a daughter-in-law was trying to use a civil protection order to keep a Native American mother away from her children.

The facts of this case were a Native American mother and her daughter-in-law worked out an agreement for child care for the mother's four young children. The daughter-in-law agreed to keep the four minor children while the mother improved her financial situation and living condition. However, when the mother came to get the children she found herself the subject of a civil protection order. She could not bring her children home. The daughter-in-law had obtained the order so that she could keep her nieces and nephew in her home. The civil protection order alleged that the mother was neglectful toward her children which was untrue. The mother came to the Indian Law Clinic for help to get her children back. The ILC was able to help because the daughter-in-law was trying to make it so that the mother could not have the children returned upon a simple demand—which meets the definition of an Indian "child custody proceeding" under the federal Indian Child Welfare Act ("ICWA").

ICWA helps Indian parents and tribes prevent their native children from being forced into non-Native homes. The Act protects American Indian children by allowing Native American parents to move cases into tribal courts and by placing a preference on transferring children, if necessary, into other relatives' homes and if none available, other Indian homes. Even if cases are not moved into tribal courts, the Act states that the state courts must follow ICWA directives in its proceedings and notify the tribe of any proceeding concerning native children. In certain cases, the tribe may even obtain custody of the child.

In this case, because the children that were listed in the civil protection order are enrolled tribal members, ICWA, a federal law, came into play in State court. While in court, the ILC informed the judge that because Native children were involved, the ICWA applied in this case. The judge ruled that custody of the Native children could not be obtained by the daughter-in-law by instituting a civil protection order against the mother. In essence, he told the daughter-in-law that a protection order was not the proper way to file for custody. He ordered that the children be returned to their mother and kept the civil protection order active between the mother and daughter-in-law for two additional weeks before dismissing the case.

ICWA comes into play in situations where Native American children are being removed out of the Indian parent or guardian's home. While the judge found other grounds to vacate the portion of the protection order regarding custody of the children, the ILC stood ready if necessary to use the protections of ICWA to prevent the children from being separated from the mother, their tribe and their culture. 



The Indian Law Clinic is a client-centered practice. One of the duties that was described to the students when we began this adventure, is that attorneys sometimes need to act as counselor or advisor to their clients. Being forewarned, I expected that there might be some need to counsel a few of my clients. Coming from a Native background, I realized how difficult it might be to get some of the clients to open up and knew that I may have to slow down and listen before they could trust an outsider. I began routine interviews with my clients at the beginning of the term and began to learn about the difficulties they were having. Luckily, a few of my clients were long standing clients of the Indian Law Clinic, and the trust they placed in our program was transferred to me and conversations began in earnest.

It was rare to jump directly into the “important” matters of the case, but rather small talk ensued for a little while and my clients began to speak to me about their families.

In time the trust they placed in me grew and they began to go into the difficulties that they were having within their families. Many times I felt that they were seeking personal advice. I began to juggle the legal information that I was giving them as well as the personal advice regarding their families. I was walking a fine line and had to be careful of what was personal advice or legal advice. This was especially true in a case where the family was considering using legal methods to stop the intra-family dispute.

I had a leg up on a few of my fellow student attorneys in that I have had the luxury of having some alternative dispute resolution classes and grew up near a reservation.

This gave me some insight to the role that I played with my clients. However, even with the experience I brought, it was not enough to help me when I was on the phone with my clients. It was difficult to

restrain myself from telling my clients what to do, but rather I had to help them formulate a decision with which they were comfortable.

The greatest advice I was taught in dealing with clients, and Native Americans in specific, was to slow down. Patience is a virtue and is the most important thing when dealing with clients. It was difficult to listen when I knew there was a stack of work behind me and I needed to act upon the information that my clients were giving me, but the Indian Law Clinic is here

for the clients. I had to take a breath and slow down. When attorneys or counselors rush, we may miss the entire point or the true issue at hand.

After I stopped trying to rush my clients and myself, I began to practice the second most important thing a lawyer can do, listen. I would listen to my clients and offer suggestions to help them. I would attempt to carefully

craft my suggestions so that they could easily discern the difference between a legal option and a personal choice. In the end, I hope I was able to help my clients in more than just the legal matters that were presented. I hope I was able to offer them some peace of mind and an ear that would listen sympathetically to their problems. Most of the time all my clients really needed or wanted was someone in which they could confide their problems. I offered my services as an attorney and they returned the favor by trusting me as a confidant.

The Indian Law Clinic is a small organization with only a handful of student attorneys that can assist with all of the cases and issues that are presented. However, this dedicated group will offer the best legal service that can be provided, and hopefully—with Director Tompkins’ assistance—we can even offer to listen.



“After I stopped trying to rush my clients and myself, I began to practice the second most important thing a lawyer can do, listen.”



Eagle Feathers Permits: A Long-Running Flap is Resolved and How to Apply

— By Robert Retherford, 3L (Winner ILC Distinguished Service Award)

When New Mexico state officials searched the home of Joseluis Saenz, Chiricahua Apache, in 1986, they noticed eagle feathers among the religious items hanging on his walls. Mr. Saenz had received them as gifts and did not have a permit. The feathers were confiscated, and Mr. Saenz only got them back after years in court. The Indian Law Clinic was part of that case, and in March 2004, a District Court Judge awarded attorney’s fees, costs, and expenses that will be divided between the ILC and the New Mexico law firm of Rothstein, Donatelli, Hughes, Dahlstrom & Schoenburg, LLP.

supply, people may wait as long as three years for a whole eagle body and six to nine months for feathers.



prosecution. Second, enrolled members of federally recognized tribes can apply for a free permit, and can request eagle feathers and parts – even entire birds – from the National Eagle Repository in Denver, Colorado. Third, permits are not required when parts of eagles are handed down from generation to another, though it is unclear whether the person who originally had the feather needed a permit. It would be better to get a permit just in case, to avoid Mr. Saenz’s problem.

Eagle feather permits are a complicated and sensitive subject. On the one hand are religious and cultural freedoms, because of the importance of the eagle to American Indian practices. On the other hand are environmental concerns that led Congress to pass the Bald Eagle Protection Act (16 U.S.C. §§ 668-668d) in 1940.

The 10th Circuit Court of Appeals in deciding Mr. Saenz’s appeal noted, however, that no permit is needed for bald eagle parts, nests or eggs acquired before June 8, 1940, or for golden eagle parts, nests or eggs acquired before October 24, 1962. In addition, it is possible to get an exceptions for death ceremonies and other emergencies.

Below are the steps necessary to apply for an eagle feather permit. According to Janell Suazo, chief of the U.S. Fish and Wildlife Service’s migratory bird permit office in Denver, the permits requirements are being revised. As a result, people who want a permit should keep their eyes on the U.S. Fish & Wildlife webpage at:

www.r6.fws.gov/law/eagle.

The current steps for getting a permit are:

Combined with the topic are important questions. For example, who has a right to get a permit? Joseluis Saenz could not get a permit because his tribe is not federally recognized. Another common question is: Why do eagle feathers and parts take so long to get? A Fish and Wildlife official who testified in Mr. Saenz’s case said that, because the demand exceeds the

Some things about permits are clear. First, anyone who does *not* have a permit and, “takes, possesses, sells, purchases, barter, offers to sell or purchase or barter, transports, exports or imports at any time or in any manner a bald or golden eagle, alive or dead; or any part, nest or egg of these eagles” is liable for civil and possibly criminal

1. Complete an application available at <http://forms.fws.gov/3-200-15.pdf>

See **Permits** page 21.



Upcoming Events

September 30, 2005: Faculty Colloquium, Professor Kevin Washburn (*Chickasaw*) from University of Minnesota. (School of Law, Boulder)

October 1, 2005: "Ending Colonial Legacies: Indigenous Visions for the Future." (St. Francis Center, Auraria Campus, Denver)

October 5, 2005: Kicaput (*Yupik*) Dance Performance at CU Boulder. (University Memorial Center if fair, Glenn Miller Ballroom if foul)

October 16, 2005: Colorado Indian Bar Association Red Rock Ramble Run/Walk. (Lyons)

November 7, 2005: Pledge to Diversity Clerkship Program and Diversity Scholarship Information Series. (School of Law, Boulder)

November 11, 2005: Native American Law Students Association Fall Harvest Feast. (Koenig Hall, Boulder)

February 10–11, 2006: National Native American Law Student Association Moot Court Competition. (University of Washington, Seattle)

July 2006: University of Colorado School of Law moves to new Wolf Law Building.

Permits

From page 21.

2. Include the following information:
 - ❖ Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.
 - ❖ State and local area where the taking is proposed to be done, or from whom acquired.
 - ❖ Name of tribe with which applicant is associated.
 - ❖ Name of tribal religious ceremony(ies) for which required.
 - ❖ Attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized

Tribal List Act of 1994, 25 U.S.C. § 479a-1, 108 Stat. 4791 (1994). The certificate must be signed by the tribal official who is authorized to certify that an individual is a duly enrolled member of that tribe, and must include the official title of that certifying official.

3. Send this information to the appropriate Regional Director. You can find this information at the website for the U.S. Fish & Wildlife Service, National Eagle Repository, at <http://www.r6.fws.gov/law/eagle>.

For people in the Mountain States,

Region 6, the address is:

U.S. Fish and Wildlife Service
Migratory Bird Permit Office
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The Crisis of Meth In Indian Country

— By Cathy Madsen, 2L

The problem of methamphetamine ("meth") is a serious and growing concern in the Indian community. Many state, federal and tribal leaders, in fact, refer to it as an "epidemic" in Indian Country. As an illustration, in Tuba City, Arizona, a town inside the Navajo reservation, there were 14 meth-related deaths in 2003. Further, it was found that 12% of the teens in Tuba City were using meth, as well as 17% of residents between the ages of 27 and 45.

Methamphetamine is a highly addictive substance easily made from over-the-counter ingredients like Drano, iodine and ephedrine (e.g., Sudafed). It gives users a rush that can last up to eight hours yet also causes a propensity toward psychotic behavior. It is not uncommon for meth abusers to become violent and endanger not only their own lives, but also those of people around them, especially children. Abusers in the midst of a high can act out aggressively and violently towards others, or, if there are children under their care, become neglectful for days on end.

There are several factors that make meth attractive to abusers in Indian Country and the general community. First, making meth is a relatively simple process and can easily be hidden from law enforcement officials in clandestine laboratories, such as in abandoned cars and caves, and even in briefcases. Second, meth is extremely cheap in comparison to other illicit drugs and even alcohol. A quarter of a gram, which is enough to get a person high for several days, only costs about \$20 to \$40.

The issue of the meth epidemic first became apparent to the Indian Law Clinic (ILC) in the fall of 2004,

when a tribal court judge contacted the clinic about drafting an involuntary commitment code to address the growing crisis of meth on the reservation. Specifically, the tribe was faced with the difficulty of having people come before the court in immediate need of medical assistance to prevent harm to themselves or others, but lacking the legal authority to involuntarily commit such individuals to a medical facility.

“In short, the crisis of meth in Indian Country can no longer be ignored or overlooked.”

As I embarked on this project, I was surprised at the number of questions that arose in effectively developing an involuntary commitment code for the tribe. First of all, in drafting the code it was necessary to know what the tribe has in terms of facilities; if a state facility, does that facility honor "foreign" orders of commitment? Are there qualified professionals available to complete the involuntary commitment assessment? Broader issues included

how to honor and preserve the due process rights of individuals facing involuntary commitment under the tribal code and Indian Civil Rights Act (ICRA), and what tribal-state and/or tribal-federal jurisdictional issues may be encountered?

The next step was to begin researching state statutes and other tribal codes delineating involuntary commitment procedures for alcohol and drug abuse. In this process, I compared and contrasted several state statutes and, interestingly, found the state (within whose boundaries the tribe's reservation is located) statute to best applicable to the

needs of the tribe and the goals of the ILC in ensuring due process rights and demarcating unambiguous definitions and procedures. In addition, I also

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Meth Crisis

(Continued from page 22.)

researched tribal codes at the National Indian Law Library (NILL) in Boulder, Colorado, for comparable codes to gain awareness and knowledge of potential cultural considerations. To my surprise, I was only able to find two tribal codes - Standing Rock Sioux and Eastern Band of Cherokee Indians. Nonetheless, in light of the escalating meth crisis in Indian Country, I do not doubt that in time similar codes will be developed.

In the end, this project raised my awareness as student attorney in several respects. First of all, I became knowledgeable about the pressing crisis of meth in Indian Country. Although I was aware that meth was a problem, I was unaware as to the extent of the emergency. Further, I developed an awareness and skill in developing a code that is culturally competent and addresses the specific needs of a unique community, while ensuring the due process rights of the individual. Lastly, I became acutely aware of the difficulties and obstacles facing tribal court systems - namely the lack of resources that are deeply needed to ensure the continued survival and welfare of the members and to promote the success of tribal courts and law enforcement in Indian Country.

In short, the crisis of meth in Indian Country can no longer be ignored or overlooked. In addition to assisting tribal courts develop codes to assist them in addressing this issue, it is imperative that resources - both monetary and access to personnel - be provided to tribes to combat the escalating meth crisis and its devastating consequences to the abusers, their families and the community at large.



Check out our new publication!
A Guide to Colorado Legal Resources
for Native Americans
 at
www.colorado.edu/law/clinics/ilc

Holistic Lawyering — Focusing on the Big Picture

— By Lori Tucker, 2L

Native American culture and circumstance create the perfect atmosphere for applying holistic lawyering in the American Indian Law Clinic. The first time I heard the term “holistic lawyering,” I was in an Indian Law Clinic class. The Director explained that holistic lawyering is described as a focus on the whole client and not just the legal issues. Holistic lawyering, like holistic medical care, means focusing on the big picture.

My client, a young Native American mother, had asked the Clinic for assistance in regaining custody of her daughter. She had agreed to allow her parents to adopt her daughter while she improved her financial and living conditions. However, a few months after the adoption, she wanted the adoption reversed and her parental rights reinstated. As the case progressed, I noticed my client’s personal strengths. She is educated, has custody of her older child and she loves her daughter. In addition, I also noticed her weaknesses. It was at this point that I realized that my client had other issues that could potentially affect her legal case with the Clinic. At the Director’s encouragement, I applied a holistic lawyering approach and counseled my client on continuing her education and finding a stable home. About a month later, my client called—even though I did not have an update on her case. She proudly informed me that she was in school and was in a stable home environment with her oldest child. I was fortunate that the professional relationship had progressed enough for my client to trust my advice.

I will not witness the outcome because my year in the clinic is over. However, I hope and pray she continues on the path to making what was once a weakness for her, a strength before the eyes of the court.





Balancing of Interests: When Tribal Placements Can't Be Found

— By Julia Morgenthau, 2L

It's the story of a young Indian girl who, more than anything, needs a home and is still awaiting a permanent placement. Her tribe has found several tribal placements for her in California, but she does not want to move from Colorado. The state has found placements with non-Indian families in Colorado, but has not actively sought out Indian families not already listed on their database. Where does the court look when tribal placements cannot be found?

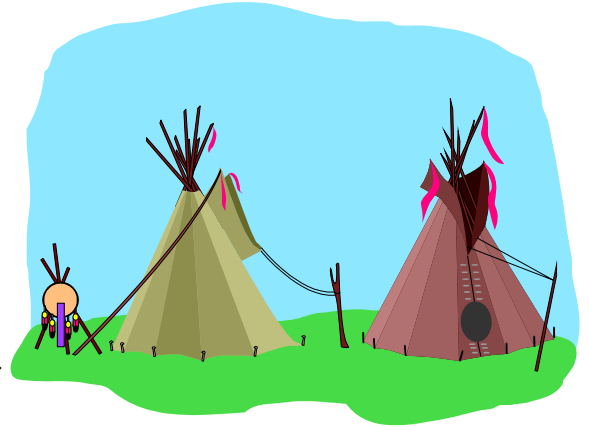
The balancing of interests has begun. The tribe has a significant interest in fostering cultural and tribal ties with the girl. The state has an interest in finding a permanent placement that is in the best interests of the child. Finally, the girl has an interest in finding an Indian home in Colorado near her other siblings. The judge cannot effectively balance these interests without a potential workable Indian placement. Where do you go from here?

The Indian Child Welfare Act (ICWA) requires a court to implement preferences when ordering an adoptive placement. The court should first prefer members of the child's extended family, second, other members of the Indian child's tribe, and third, other Indian families. This


preference clause fails when no family members or adoptive Indian families can be found. ICWA does not create additional obligations for the state to actively find adoptive Indian families within the communities.

In this case, the Colorado state social services posted a request in several adoption databases and noted on this posting that this was an Indian child and that Indian families were preferred. Although the notice gave preference to Indian families, this practice is insufficient in protecting the interests of the tribe and the child in staying culturally connected. This posting only gives notice to those families already on the database. There may be Indian families in the community willing to adopt Indian children but not currently on the adoption database.

There is a current deficiency in the system for Indian children like this young girl, who find themselves faced with the choice of relocating to a distant state or living with a non-Indian family. Each state should be required to actively seek out Indian adoptive placements so as to further the policy goals behind ICWA to preserve and protect Indian tribes and their families.



A recommendation that the states could adopt would be to give notice to the Indian community in that state through their different organizations that adoptive families are needed. This extra step does not put an undue burden on the state, and it helps satisfy the preference requirement enacted in ICWA.

When Indian placements cannot be found, other methods have been adopted by tribes to maintain cultural contact with the Indian children. For example, cultural contracts are written in which non-Indian adoptive parents promise in good faith to promote and foster the Indian child's cultural growth. This could include allowing the child to visit and participate in tribal ceremonies, providing the child with literature on her tribe or allowing other contact with the child's tribe. These cultural contracts are a step in the right direction, however they are not binding. The best way for a child to remain in contact with her culture is to live within it. 



Clinic Awarded Community Education Grant for American Indian Probate Reform Act Workshops

The American Indian Law Clinic of the University of Colorado School of Law has been awarded a \$4,000 grant from the Colorado Bar Foundation, the charitable foundation of the Colorado Bar Association, to conduct a series of community education workshops on the impending implementation of the federal American Indian Probate Reform Act.

The General Allotment Act of 1887 divided tribal lands previously held in common into small tracts held in trust by the United States for individual Indian owners. The "allotments" could be inherited under state laws of intestate succession, or devised by federally-approved wills. Lack of access to lawyers, cultural barriers and other factors made Indian wills uncommon. Generations of intestate succession splintered Indian ownership. Today, the average allotment has 17 owners, holding as tenants in common. Many parcels have hundreds of owners and some shares are so small that if they could be partitioned in kind, they would be smaller than a common book page. Fractionation of tribal lands makes the land virtually useless to the individual owners and tribes alike.

The problem of fractionated interests in Indian land has long held the attention of Congress. Certain escheat provisions of Indian Land Consolidation Act of 1983 and the 1984 amendments were struck down as unconstitutional. After several other unworkable legislative solutions were attempted, a wholesale revision of the entire process was enacted as the American Indian Land Probate Reform Act of 2004 ("AIPRA"). The AIPRA is set to be implemented in whole in April 2006.

The AIPRA is intended to stop the centuries-long fractionation of American Indian tribal lands by restricting inheritance where there is no will and allowing tribes and individual Indians to purchase interest in federal Indian trust land at probate. A complex Act, it is filled with details that one Congressman opined that, "only a probate lawyer and the green eyeshade folks can love."

The grant will provide the funding for the Clinic's student attorneys to conduct two community legal education workshops explaining the impact of the AIPRA, one either at or near the Southern Ute reservation or Ute Mountain reservation in southwestern Colorado, and one in the metro-Denver area where more than 30,000 Native Americans reside. Videotaping of the workshops for broadcast on public television will also be funded. A guide to understanding the AIPRA will be developed and distributed statewide to assist individual tribal members in handling their land interests. The guide and links to the relevant statutes, agencies and tribal offices will be posted on a variety of Native American and legal services organizations' websites, including the Clinic's at <http://www.colorado.edu/law/clinics/ilc>.

Local Denver attorney Dennis Carder of the Silvern Law Offices will begin the training of ILC student attorneys in September 2005. Attorney Carder previously worked with Dakota Plains Legal Services in traveling to the various reservations in South Dakota and conducting tribal education workshops on avoiding land fractionation and promoting consolidation of fractionated interests through will-writing. He will assist the ILC in adapting the workshops for a metropolitan off-reservation Native audience.



1492
Arrival of Columbus



1790
Forced Inland



1830
"Indian Country"



1860
Immigrant Stampede



1890
The Vanquished



2090
Indian Land?



Where Are They Now? ILC Alumni News

We love to hear what former American Indian Law Clinic Student Attorneys are doing now! Give us a call at (303) 735-2194 or drop us a line at: jill.tompkins@colorado.edu and give us the scoop on the latest in your life and career. Here's an update on some American Indian Law Clinic veterans:

Completing her clerkship for Justice Greg Hobbs at the Colorado Supreme Court, **Kate (Schuchter) Burke** moved to Durango, Colorado on September 14, 2005 to work with the firm of Maynes, Bradford, Shipp, Sheftel, LLP, general counsel to the Southern Ute Tribe. She joins fellow ILC alums **Monte Mills** and **Laranne (Arbaugh) Breggy**.

The Federal Bar Indian Law Conference in Albuquerque provided a chance for ILC Alums **Quanah Spencer** and **Robert Retherford** and Director Jill Tompkins to catch up with each other. Quanah has recently left the U.S. Secret Service where he provided personal security to former Secretary of State Colin Powell and will be entering private legal practice. Robert has been busy since graduation—getting married, buying a house, working for DNA People's Legal Services and recently entering private practice. He will be representing parents in dependency and neglect cases, as well as handling some family law and disability matters in both state and Navajo Nation courts.

Karen (Holmes) Shirley and her husband, Jim, are busy working on their Gunnison, Colorado home and training for a Labor Day marathon! Her position as District Manager for the Upper Gunnison River Water Conservancy District keeps her so busy that she "barely has time to think!"

Pamela Emsden and Dale Lyons were married on May 28, 2005 in a "gorgeous ceremony" in Chupadero, New Mexico (just north of Santa Fe). Not doing much Indian law work presently, Pamela hopes to do more in the near future — after maternity leave! Pamela and Dale welcomed little Henry Soren Lyons (6 lbs., 14 oz.) on August 22, 2005.

August, 2005 saw **Sarah Stahelin** leave Anishinabe Legal Services in Northern Minnesota where she served as the staff attorney on the Red Lake Reservation. She hopes to continue to work in Red Lake. Trying to start a non-profit with a co-worker, Sarah hopes to "fill in the gaps in service left by Legal Services due to their restrictions." She still misses Boulder and may return.

Stephanie Zehren-Thomas was awaiting her bar results at press time. She joined the Indian law firm Fredericks, Pelcyer & Hester in Louisville, Colorado where she works alongside fellow CU Law alums **John Fredericks**, **Carla Hoke**, **Niccole Sacco** and **Alivina Lee**. Stephanie and her husband Rodney moved to Denver where they bought their first home.

Crested Butte became a new home community for **Scott Holwick**, his wife Jen and their daughter Eva. He joined a general practice firm of three attorneys, Starr & Associates. At press time however, Scott announced that he and his family would be moving back to Boulder County.

Professor Juliet Gilbert, a member of the ILC Advisory Committee, has left her position as a Clinical Professor of Law teaching the Civil and Immigration Law Clinics to open her own private practice focusing on immigration and consumer law matters. Entering private practice will allow her more flexibility and time to spend with her two daughters.

See **ILC Alumni News** page 27.



ILC Alumni News continued

(From page 26)

Wedding bells rang for **Maggie Wetmore** on September 3, 2005. She, her husband Kevin and her brother-in-law have started a fish market in Bozeman, Montana. Maggie took the Montana bar and is looking for legal positions while awaiting her results.

Cassia Furman joined the firm of Leavenworth and Karp, P.C. in Glenwood Springs, Colorado and even though she is not practicing Indian law, she is enjoying her job—although “working full time is a big transition,” she says. Practicing mostly municipal law, land use planning and real estate, she is able to ski a lot in Aspen and Snowmass as, “we take ‘powder days!’” Cassia bought herself a new condo in Basalt and is dealing with all the joys of being a homeowner for the first time. In addition to getting to know new friends and co-workers, she finds the time to take a painting class at CMC in Glenwood.

Long-time ILC Advisory Board member **Karen Wilde-Rogers** has left her position as Executive Secretary with the Colorado Commission on Indian Affairs to work with the Diabetes Projects Coordinating Center of American Indian and Alaska Native Programs (AIANP), University of Colorado Health Sciences Center. Karen has been accepted by the University of Denver Sturm College of Law, but is not planning to attend immediately.

Atom Ariola-Tirella is pursuing a Master's degree in English here at CU while teaching two courses this term—one on poetry and one on creative writing. He says, “I’m still on the lookout for a public interest law job, so if you come across any entry level Indian Law positions, please let me know.”

The Interior Board of Indian Appeals in Arlington, Virginia has a new Attorney Advisor when **Jennifer Turner** starts her new job. Having recently completed a clerkship with an appellate judge in Annapolis, Maryland, she is very excited about her new position even though she has been warned that there is a backlog of over 100 cases.

Heather Corson and her family are living in Missoula, Montana now where she continues to work for the firm of Decker & Desjarlais based in St. Ignatius, Montana located on the Salish & Kootenai Reservation. She is practicing Indian law full-time and working mostly with tribal housing authorities

Sadly, the law firm of Hoffman, Reilly, Pozner & Williamson does not practice Indian law, but **Lindsay Unruh** is finding it a good place to start her legal career and get her feet wet.

A summer 2006 wedding on the Nez Perce Reservation in Kamiah, Idaho is planned for ILC alum and Advisory Committee member **Anetra Parks** and her fiancé Keith Evanshevski, a psychologist at the University of Wyoming. Anetra continues to practice with Green, Meyer and McElroy in Boulder.

Gwen Broeren is still doing mainly medical malpractice litigation and enjoying it. She was working on getting an ICWA article published. She is very excited about the opening of the new Native American House of the American Indian Studies Program of the University of Illinois.



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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 School of Law. 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 Clinic, the University of Colorado, the State of Colorado or any of the organizations that support the American Indian Law Clinic.

Tatanka Legal Times is the Clinic's free student-written newsletter.

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 School of Law American Indian Law Clinic are funded by private donations. If you wish to support the continuing excellence of the Clinic, your contribution would be greatly appreciated.

Name(s) _____ Graduation Year(s) _____

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