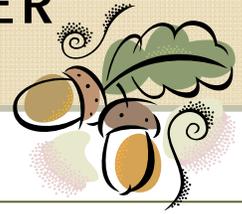


# CALIFORNIA INDIAN LAW NEWSLETTER



California Indian Law Association  
Joanne Willis Newton, Editor

## Message from the President

Wachiiya!

I am pleased to report that California Indian Law Association is now fifty-six members strong. It is gratifying to see a significant and steady growth in our membership over the past four years that I have served on the Board of Directors.

However, we still rely almost exclusively on the dedication of our Directors, all of whom volunteer their time and effort, to keep CILA going and accomplish our objectives. I urge our members to become more actively involved in CILA. For example, consider submitting an article for the next newsletter or join one of our committees, which always welcome participation and input. These are: the Conference Planning Committee, the Scholarship Committee, the Public Relations/Website Committee, the Newsletter Committee, the Youth Outreach Committee, and the State Bar Committee.

Speaking of our dedicated Directors, congratulations to David Clifford, Meredith Drent and Dan Rey-Bear, all of whom were re-elected to the Board in October 2008. There will be three other terms ending in 2010, and I

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encourage our members to attend CILA's annual Indian law conference on October 9, 2009, in Sacramento, to participate in the nomination and voting process (see page 10).

Megwetch,

Joanne Willis Newton  
President



## Significant Indian Law Case Recently Decided by the U.S.

### Supreme Court: *Carcieri v. Salazar* (2009) 129 S.Ct. 1058

On February 24, 2009, the Supreme Court issued an extraordinarily troubling decision, limiting the authority of the Secretary of the Interior under the provisions of the Indian Reorganization Act ("IRA"). This case involved a challenge by the State of Rhode Island to the authority of the Secretary to take land into trust for the Narragansett Tribe under the IRA. The Court held that the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" is unambiguous and limits the authority of the Secretary to only take land into trust for Indian Tribes that were under federal jurisdiction in June 1934, the date the IRA was enacted.

Writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer

and Alito, reversed the decision of the U.S. Court of Appeals for the First Circuit and held that "the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted." In concurrence, Justice Breyer wrote separately to make the point that Indian Tribes federally recognized after 1934 may still have been "under federal jurisdiction" in 1934, particularly where the Interior Department made a mistake about their status or if there was a federal treaty in place. Justice Souter, joined by Justice Ginsberg, concurred in part (holding that the term "now" is unambiguous), but dissented to the Court's straight reversal, finding instead that the case should be remanded to the lower courts to provide an opportunity for the United States and the Narragansett Tribe to pursue a claim that the

See *Carcieri* on page 2.

*Carcieri* from page 1.

Tribe was under federal jurisdiction in 1934. Justice Stevens dissented from the majority's opinion finding "no temporal limitation on the definition of 'Indian tribe'" within the IRA.

The Supreme Court has invoked a strained and circular reading of a few sentences in the Indian Reorganization Act to create different "classes" of Tribes. Given the fundamental purpose of the IRA was to organize tribal governments and restore land bases for Tribes that had been torn apart by prior federal policies, the Court's ruling is an affront to the most basic policies underlying the IRA.

The Court's decision threatens to be destabilizing for a significant number of Indian Tribes. For over 70 years the Department of the Interior has applied a contrary interpretation - that "now" means at the time of application - and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. There are serious questions about the effect on long settled actions as well as on future decisions. If the decision stands, the Interior Department will have to determine the meaning of "under federal jurisdiction" in 1934, an uncertain legal question and one that makes little sense from a policy perspective. By calling into question which federally recognized Tribes are or are not eligible for the IRA's provisions, the Court's ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

The Supreme Court's new interpretation of the Indian Reorganization Act is squarely at odds with Congress' relatively recent direction to the federal agencies that all Tribes must be treated equally regardless of how or when they received federal recognition. In 1994, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act") in part to prohibit the Department of the Interior's attempts to impermissibly "differentiate between federally recognized Tribes as being 'created' or 'historic.'" See H. Rep. 103-781, at 3-4. That same year, Congress enacted an amendment to the IRA, codified at 25 U.S.C. § 476(f), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized Tribe relative to those privileges and immunities available to other Indian Tribes. Congress has also enacted 25 U.S.C. § 2202 which authorizes the Secretary to acquire land in trust for "all tribes." The Court entirely ignored subsequent

Congressional action which made clear Congress' intent that all Tribes should be treated equally under the law regardless of the manner in which the Tribe was recognized or the date on which the Tribe was recognized.

To reverse the Court's damage to Congress' overall policy and intent, an amendment to the IRA is necessary to make clear that the benefits of the Indian Reorganization Act are available to all Indian Tribes, regardless of how or when they achieved federal recognition.

*The foregoing article was reproduced by permission from the Tribal Supreme Court Project, which is part of the Tribal Sovereignty Protection Initiative and staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian Tribes. We encourage Indian Tribes and their attorneys to contact the Project to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases tracked by the Project on the NARF website ([www.narf.org/sct/index.html](http://www.narf.org/sct/index.html)).*

**INTERESTED IN JOINING OUR BOARD?** Three of our Directors' terms are expiring this year. Elections will be held at our annual law conference (see page 10). Please be sure to register for membership and attend our annual conference if you are interested in serving on our Board.

**CALL FOR MEMBERS:** If you would like to become a member of CILA, you may do so by submitting a completed registration form, available at [www.calindianlaw.org/contact](http://www.calindianlaw.org/contact).

# California Needs More Native American CASAs for Native American Children

By Christine Williams



## What is CASA?

A Court Appointed Special Advocate (CASA) is a volunteer who is trained to research and report to a court on a child's best interests in cases where that child or youth has been removed from their home because of abuse or neglect.

"Each day in California, 70 children who have been abused or neglected join the state's population of nearly 80,000 children in foster care. California is home to nearly one-fifth of all foster children in the United States. As dependents of the juvenile court, these children pass through a court system which can leave them frightened, confused and alone."

Today, there are over 5,360 CASA volunteers serving over 8,100 children in California.<sup>2</sup> There are 40 local CASA programs providing services in 43 of California's 58 counties.<sup>3</sup> These programs are non-profit programs and are not run by the county or affiliated with any social services agency. There are also three tribal CASA programs serving the Karuk Tribal Court, the Hoopa Valley Tribal Court and the Yurok Tribal Court.<sup>4</sup>

## Why does CASA improve outcomes for children?

CASA volunteers commit to spending at least one year: 1) establishing a strong, stable connection with a child in foster care, 2) gathering information and making recommendations to the court about the child's best interest, and 3) advocating to make sure the child receives needed services. Too often, a CASA volunteer is the only consistent adult in the life of the child.

The outcome for children at case court closure when the court has appointed a CASA is increased permanency. In 2007, more than half of the closed cases, where a CASA was appointed, resulted in reunification, adoption or guardianship.<sup>5</sup> Permanency for children is supported by the CASA model. Volunteer CASAs build close relationships with, and serve as one-on-one advocates for, children in foster care. Volunteers are recruited and specially trained, then appointed as advocates by a juvenile court.

## Tribal CASA Programs in California and Nationwide

There are 16 tribal CASA programs nationwide.<sup>6</sup> The majority of these programs operate as dual jurisdiction

programs that serve the county court and have a unit that serves the tribal court. At least one of these programs serves one county court and two tribal courts. This model, wherein a tribal court partners with an existing local CASA program to create a tribal unit to serve in the tribal court, is very practical for Tribes who want CASAs in their courts but for whatever reason do not want to create their own separate CASA programs. The cost of running an independent program is always a consideration for any program to be successful, and utilizing an existing CASA program is an efficient way of providing advocates to children in tribal court.

In California the three tribal CASA programs serving the Karuk Tribal Court, the Hoopa Valley Tribal Court and the Yurok Tribal Court are stand-alone programs that primarily serve the tribal courts while a local county CASA Program serves the state court. Just as the dual jurisdiction - county/tribal program model has advantages, there are benefits to a tribal CASA program serving in tribal court as well. The tribal programs reflect the sovereign jurisdiction of the courts they serve. They are naturally equipped to recruit and train volunteers to serve the tribal communities they serve. They are well situated to work with the community partners they need to be successful, namely the tribal court and the tribal social services department.

That is not to say that the tribal CASA model has not had challenges. The tribal CASA programs in California do not receive funding from the California Administrative Office of the Courts like all local-county CASA programs do. Additionally, all the barriers Tribes face in accessing Title IVE funding are passed on to the tribal CASA programs. Thus, tribal CASA programs must engage in active fundraising to create sustainable programs.

In the end, though sometimes challenging, the tribal CASA programs have success in recruiting and training CASA volunteers to serve in the tribal courts, despite economic barriers they have had to overcome. The 2009-2010 fiscal year should bring even more success for the tribal CASA programs in California as they continue to engage in innovative planning and fundraising to grow the programs and serve more children in Tribal Court.

See *CASAs* on page 4.

## President Obama: Springtime for Indian Country?

By Bryan H. Wildenthal, Professor of Law, Thomas Jefferson School of Law (San Diego)



Last October I gave a talk at the University of San Diego Law School about the possible impact of the presidential election on American Indian concerns. I suggested that it might be difficult for many in Indian country to choose between the candidates, given that Senator John McCain (R-Ariz.) had a long record of substantive support for Indian concerns (though alienating many in recent years). Meanwhile, then-Senator Obama, while saying many of the right things, was comparatively a blank slate on Indian issues. Would Obama turn out to be more symbolism than substance? The symbolism was certainly good. In a widely noted episode on the campaign trail, Obama was ceremoniously adopted by a Crow Tribe family with the appropriate name of "Black Eagle." His adoptive name was "One Who Helps People Throughout the Land."

In the wake of President Obama's budget released on February 26, many people in or concerned about Indian country (whether Native or, like myself, non-Native) may feel that was a good omen. Perhaps symbolism is now turning into substance. In Indian policy, as in many other areas, the budget was a dramatic shake-up of the Bush administration's priorities. It remains to be seen what Congress will do with the budget, which is only a proposal by the president, but Obama requested a staggering increase of \$700 million (21%) in funding for the Indian Health Service, compared to 2008 under President Bush. Tribal courts, law enforcement, and education were offered an extra \$100 million.

Perhaps most significant, as highlighted by Rosebud Lakota columnist Kevin Abourezk (Lincoln, Neb., *Journal-Star*, and [ReznetNews.org](http://ReznetNews.org)) is that the National Congress of American Indians helped to persuade the administration to propose \$500 million in tax-exempt bonding authority for tribal governments. This is a fundraising tool long used by state and city governments, and even some private nonprofit schools and other institutions, which Tribes have mostly been unable to access before. Also, the federal stimulus bill passed earlier in February offers large grant opportunities to Indian country. The problem, as Abourezk notes, is whether economically struggling Tribes will be able to effectively take advantage of these new opportunities.

Meanwhile, much attention has focused on President Obama's choice to lead the Bureau of Indian Affairs as Assistant Secretary, under new Interior Department Secretary Ken Salazar. Last week, the administration

announced that the nominee will be Larry EchoHawk, a Pawnee Indian, former State Attorney General of Idaho in the early 1990s (and unsuccessful candidate for governor there in 1994), and more recently a law professor at Brigham Young University in Utah.

EchoHawk's name had been floated informally as the likely choice for several months previously. Some were initially critical of EchoHawk over allegations that he undermined efforts to obtain tribal gaming in Idaho. But he seems to have skillfully mended fences, securing the support of all of Idaho's major Tribes, and generally earning praise from tribal leaders across the country. Given the president's other recent problems in vetting appointees, EchoHawk's long-drawn-out audition was probably wise. Hopefully all will now go smoothly and he will promptly confirmed. After years during which BIA leadership has seemed at a standstill and Indian country's problems have accumulated, there is widespread impatience to see the new team get into place.

All told, 2009 is shaping up to be perhaps the most significant period of change and renewal in U.S. government policy toward Indian country since (dare I say it?) the Nixon administration in the early 1970s.

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**CASAs from page 3.**

### Tribal Children and CASA in California Courts

The CASA model can work for Native children in both state and tribal courts; it improves outcomes for children to have a CASA, so why haven't all of us heard of it? For some reason the CASA message is not reaching Indian Country and this is reflected in the disproportionately low number of Native volunteers serving as CASAs.

### Tribal Children and CASA in California Courts

The CASA model can work for Native children in both state and tribal courts; it improves outcomes for children to have a CASA, so why haven't all of us heard of it? For some reason the CASA message is not reaching Indian Country and this is reflected in the disproportionately low number of Native volunteers serving as CASAs.

See *CASAs* on page 5.

CASAs from page 4.

Of the 72,221 children reported to be in the California foster care system as of July 2007, 1,024 were reported to be Native American.<sup>7</sup> This may seem like a small number to some, however it represents over 2% of the total number of Native American children in California. This makes Native American children the second highest overrepresented population in foster care in California, the first being African American.<sup>8</sup>

According to the Center for Families, Children and the Courts California CASA 2007 Report, CASA volunteers continued to be primarily non-Hispanic white, women over 40 years old.<sup>9</sup> As many as 86% of all CASA volunteers in California are non-Hispanic white.<sup>10</sup> Further, the majority of CASA program staff are non-Hispanic white (64%).<sup>11</sup> Meanwhile Native American volunteers comprise only 1 % of the total number of volunteers in California.<sup>12</sup> However, it is somewhat promising that the report reflects that Native American children are proportionally represented in CASA programs.<sup>13</sup> However the report also reflects that there is only half the number of Native volunteers as there are Native children appointed CASAs.<sup>14</sup>

While the tribal CASA programs in Northern California are a wonderful benefit to the courts they serve and the children in those tribal courts, the majority of Native American children in foster care in California are not in tribal court, they are in State Court. The over 1000 Native American Children in California's juvenile dependency system far outnumber the approximately 54 Native American volunteers recruited and trained statewide to serve in California's Courts as CASAs.

### How Can Tribes Help?

There are several ways Tribes can help ensure every Native American child in the foster care system, tribal or state, has a CASA to advocate in tribal or state court.

#### In State Court:

In addition to all the benefits that CASAs provide on any case, there are benefits in a case in California court involving a Native American child that are specific to Native American children including compliance with the Indian Child Welfare Act (ICWA). CASAs can advocate for tribal specific services for Native children, cultural connections to the child's Tribe and family, and compliance with the ICWA placement preferences. CASAs can also take on the process of securing a child's membership with their Tribe if the child is eligible for membership but not yet a member.

Tribes can partner with the existing county program to improve advocacy for Native American children in their local county court. CASA of Riverside County is currently working to increase and improve advocacy to Native American children in Riverside County by recruiting Native American volunteers and improving training to all volunteers on how to best serve as an advocate to a Native American child. CASA of Riverside is seeking to work with local Tribes to create this training and recruiting model so that it will be successful for the Native American children they are trying to serve. Finally, tribal members can inquire with local county CASA programs about joining the program's board of directors. By having a representative from the local Native American community on the board, the CASA program is sure to improve advocacy for Native American children.

Tribes can encourage tribal members to volunteer as CASA volunteers with local programs. By contacting the local CASA program, Tribes may be able to arrange for recruiting materials to be distributed by the Tribe at an event or in the tribal newsletter or for a live presentation by the CASA program director about becoming a CASA volunteer. Tribes can also provide incentives to tribal employees to complete CASA training, for example some Tribes in Northern California are providing paid leave for employees for a portion of the required training to become a CASA.

#### In Tribal Court:

If a tribe has a court that hears juvenile cases the Tribe can start a Tribal CASA Program. There are successful models for how to get started, and the California CASA Association and the National CASA Association can provide technical assistance and advice for any start-up program.<sup>15</sup> Tribes can also contact existing local programs to partner with them to recruit and train volunteers to serve as advocates in the tribal court.

The success of CASAs for Native American children depends in part on the Native American community involvement with CASA programs. For more information on how you can get involved please visit the California CASA Association website ([www.californiacasa.org](http://www.californiacasa.org)) for information about your local county program or Tribal Program.<sup>16</sup>

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## *U.S. v. Cruz*: Muddying the Waters of Criminal Law

By April Day and Mark Myers



On February 10, 2009, one man was pleased to hear that he was a little closer to freedom: Christopher Patrick Cruz, convicted of an on-reservation assault, successfully argued he was not an Indian. While living in a motel on the Blackfeet Indian Reservation, Cruz, who had been drinking, quarreled with and severely injured an intoxicated fellow guest. Prosecutors charged Cruz with violating 18 U.S.C. § 1153, which federalizes violent crimes committed by an Indian within Indian country. He was convicted after a jury trial.

In *United States v. Cruz*, 554 F.3d 840 (9<sup>th</sup> Cir. 2009), a divided panel of the Ninth Circuit announced a new two-part test to determine who is an Indian when the identity of the defendant is an element of the crime, as it is under § 1153. To convict, the government must prove the defendant (1) has a sufficient degree of Indian blood and (2) has tribal or federal recognition as an Indian.

To determine whether prosecutors have met their burden under the second prong, the *Cruz* court applied four factors previously set forth in *United States v. Bruce*, 394 F.3d 1215 (9<sup>th</sup> Cir. 2005). In declining order of importance, the factors are “(1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.” *Bruce*, 394 F.3d at 1224 (internal citations omitted).

In *Bruce*, the court noted that “enrollment, and, indeed, even eligibility . . . is not dispositive of Indian status.” *Id.* at 1225. The court also recognized that “unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indian *without statutory reference to enrollment.*” *Id.* at 1225 n.6 (emphasis original).

The defendant in *Bruce* raised her Indian status in support of a motion for acquittal, arguing she was wrongly charged under 18 U.S.C. § 1152, covering crimes in Indian country but excluding those committed by Indians against Indians. *Bruce*, who was one-eighth Chippewa, offered evidence that she: (1) was born on an Indian reservation and currently lived

on one; (2) participated in Indian religious ceremonies; (3) on several occasions, was treated in Indian hospitals; and (4) was “arrested tribal” all her life. The trial court, rejecting her defense, pointing out she was not enrolled and no evidence showed the federal government recognized her as an Indian. On appeal, however, the Ninth Circuit focused on tribal recognition.

In relying on *Bruce*’s record of being arrested as an Indian, the Ninth Circuit noted that Tribes have no jurisdiction “to punish anyone but an Indian.” *Id.* at 1227 (citing 25 U.S.C. § 1302(7) and *Oliphant v. Suquamish*, 435 U.S. 191, 191 (1978)). On this basis, the Ninth Circuit held *Bruce* had met her burden of production.

The majority in *Cruz*, reviewing under the deferential “plain error” standard, resoundingly rejected the government’s evidence that *Cruz* was an Indian, concluding that “*Cruz* does not satisfy *any* of the four *Bruce* factors,” and there was “not even a scintilla of evidence” to show he met any factor other than residence on a reservation.

The majority’s reasoning is puzzling. *Cruz*, the son of an enrolled Blackfeet member, lived and attended school on the Blackfeet Reservation from the time he was four years old until he was seven or eight. Although his total Indian blood quantum is slightly less than one-half, his Blackfeet blood quantum is insufficient to qualify him for tribal enrollment. He is, however, recognized by the Blackfeet as a “descendant” and therefore eligible to use Indian Health Services, receive education grants, and hunt and fish on the reservation. As an adult he returned and lived near the reservation, then rented a room in his former hometown on the reservation shortly before the offense.

As a descendant, *Cruz* was subject to the criminal jurisdiction of the tribal court and was at one time prosecuted in tribal court. *Bruce*, on the other hand, was merely arrested by tribal authorities. *Cruz*, unlike *Bruce*, never participated in Indian religious ceremonies or dance festivals. There is no indication either *Cruz* or *Bruce* had a tribal identification card or participated in tribal elections.

Why the government’s evidence was utterly inadequate to show *Cruz* lacked tribal, social, or government

See *U.S. v. Cruz* on page 7.

*U.S. v. Cruz* from page 6.

recognition as an Indian is difficult to reconcile with the factual record. If anything, it would appear the prosecution presented even stronger evidence of recognition as an Indian than Bruce had. Nonetheless, the *Cruz* majority found significant Cruz's shorter residence on the reservation and the fact that although he was eligible for benefits reserved to Indians, he never actually received any. The opinion also emphasized the fact that Cruz, unlike Bruce, did not participate in the religious activities of the Blackfeet Tribe. The majority gave no weight to the fact that Cruz was fraternizing or, more aptly, *socializing* at a motel in his old hometown, which led to the fight in the first place. Even while acknowledging that the first factor is the most important, the majority could have recognized that the fourth factor was met.

The majority acknowledged that it was requiring more evidence in *Cruz* than in *Bruce*, but attributed this to the preponderance standard for a defendant's burden of production for an affirmative defense as opposed to the prosecution's burden of persuasion to prove each element of the crime beyond a reasonable doubt. In a concluding footnote, the majority in *Cruz* explained that future district courts should instruct juries on the *Bruce* factors, and specifically required that the words "in declining order of importance" be used.

In dissent, Chief Judge Kozinski identified tribal identification rather than self-identification as the key to deciding the question is a person an Indian for criminal jurisdictional purposes. He also sharply criticized the *Cruz* majority for requiring the *Bruce* factors be given as part of a complex and unworkable jury instruction.

Kozinski found significant Cruz's status as a descendant entitled to benefits, the fact that he was arrested and prosecuted in tribal court for an earlier crime on the reservation, and the fact that Cruz was living on the reservation when he was arrested. He also described the "declining order of importance" language in *Bruce* as merely descriptive, not prescriptive. He chided the majority for elevating such language to be read as part of *Bruce*'s holding, remarking that earlier precedent on which *Bruce* relied omitted any reference to the declining order of importance.

Kozinski also had strong words for what he considered a jurisprudential blot on Indian law: "The majority engages in vigorous verbal calisthenics to reach a wholly counter-intuitive — and wrong — result. Along the way, it mucks up several already complex areas of the law and does grave injury to our plain error

standard of review. I hasten to run in the other direction."

The dissent also pointedly criticized *Cruz*'s express requirement that juries be instructed in a "rigid multi-part balancing test" as having the effect of "tak[ing] power from juries and district judges and giv[ing] it to appellate judges." Even if prosecutions go ahead using this new instruction, inconsistent and illogical results are likely as juries do their best to discern what it means to weigh the four factors in descending order of importance. The upshot will likely be that no one on a reservation can ever really know what law applies until long after the fact.

Some commentators believe *Bruce* will move the Ninth Circuit to a bright-line rule that would align the test for determining status as an Indian more closely with *Morton v. Mancari*, 417 U.S. 535 (1974). Such a rule, they argue, would at least have the virtue of predictability and easy applicability.

Reading *Bruce* as the *Cruz* majority does widens the gap between criminal activity and criminal law enforcement in Indian country. Perhaps the majority's discomfort with a test that turns in part on a person's race led to *Cruz*'s otherwise inscrutable application of the *Bruce* factors. Judge Reinhardt hints at this in the opinion's opening sentence: "At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not 'an Indian.'"

*Cruz* may undercut Tribes' decisions to retain high blood quantum requirements for membership because now such decisions make prosecuting *violent* crimes that occur on reservations more difficult. Many non-member Indians live on reservations and, because of the retention of high blood quantum requirements for enrollment, many are not eligible for tribal enrollment in any Tribe although admittedly recognized as Indian by the communities in which they live.

Many Tribes, such as the Blackfeet Indian Tribe, recognize and provide benefits to non-enrolled descendants, many of whom live on their reservations. But unless these Tribes can prove a non-enrolled descendant's Indian status, to the *Cruz* standard, they cannot prosecute such a person because Tribes can only exercise criminal jurisdiction over Indians. See *United States v. Lara*, 541 U.S. 193, 221 (2004) (citing *Oliphant*). Although it is possible that tribal courts and federal courts could use different criteria and standards for determining who is an Indian for criminal

See *U.S. v. Cruz* on page 8.

*U.S. v. Cruz* from page 7.

jurisdictional purposes, such a difference in standards may well make tribal court convictions vulnerable to collateral attack in federal courts under habeas review. It may feed into a bias against tribal courts and governments as unreliable and lawless.<sup>2</sup>

It is also very possible federal prosecutors may simply decline the complex task of prosecuting certain violent crimes in Indian country.<sup>3</sup> After all, a defendant charged under either 18 U.S.C. § 1553 (as Cruz was) or under § 1152 (as Bruce was) and whose status as an Indian is open to question can throw up a roadblock to prosecution by arguing he or she should have been charged under the other statute. State prosecutions may not effectively curb crime on reservations.<sup>4</sup> This threat is less serious in California and other Public Law 280 states, but its impact may be felt here.

*Cruz* provides little guidance to federal prosecutors, courts, or juries regarding what evidence is sufficient to meet the “beyond a reasonable doubt” standard. More generally, *Cruz* makes the question of who is an Indian for jurisdictional purposes much harder for courts and juries to resolve.

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*Mark D. Myers is law clerk to the Hon. Larry A. Burns of the U.S. District Court for the Southern District of California. The opinions expressed in this article are solely those of the author in his individual capacity only.*

<sup>1</sup>On Judge Kozinski’s Dissent in *U.S. v. Cruz* (Feb. 11, 2009); <http://turtletalk.wordpress.com/2009/02/11/on-judge-kozinskis-dissent-in-us-v-cruz/>.

<sup>2</sup> See, e.g., Benjamin Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction Over Nonmembers Nearly Two Decades After Duro v. Reina*, 41 Conn. L. Rev. 265, 285–86 (2008) (examining concerns over tribal courts’ respect for criminal defendants’ civil rights).

<sup>3</sup> See *supra* note 1.

<sup>4</sup> Eric Newhouse, *Alleged Sex Offenders Escape Prosecution on Reservations, Cascade County Charges*, Greatfalltribune.com, (Jan. 5, 2009) (documenting unenforceability of state warrants on reservation residents).

Endnotes for *CASAs* from page 5.

<sup>1</sup>California CASA Association Webpage: <http://www.californiacasa.org/CalCASA%20Home%20Page.htm>

<sup>2</sup> CFCC California CASA Programs 2007 Report, December 2008, page 1.

<sup>3</sup> Id.

<sup>4</sup> The tribal programs data is not included in the CFCC California CSA Programs 2007 Report.

<sup>5</sup> CFCC California CASA Programs 2007 Report, December 2008, page 6.

<sup>6</sup> Alaska: 1; California: 3; Colorado: 1; Idaho: 1; Nevada: 1; Oklahoma: 3; Oregon 1; South Dakota: 2; Washington: 3

<sup>7</sup> Needell, B., Webster, D., Armijo, M., Lee, S., Dawson, W., Magruder, J., Exel, M., Glasser, T., Williams, D., Zimmerman, K., Simon, V., Putnam-Hornstein, E., Frerer, K., Ataie, Y., Winn, A., & Cuccaro-Alamin, S. (2008). Child Welfare Services Reports for California. Retrieved March 2, 2009, from University of California at Berkeley Center for Social Services Research website. URL:

<<http://cssr.berkeley.edu/CWSCMSreports/>>

<sup>8</sup> Id.

<sup>9</sup> CFCC California CASA Programs 2007 Report, December 2008, page 5.

<sup>10</sup> CFCC California CASA Programs 2007 Report, December 2008, page 5 (two different methodologies show different results, one shows 68% of volunteers are non-Hispanic white the other shows 86%).

<sup>11</sup> CFCC California CASA Programs 2007 Report, December 2008, page 5.

<sup>12</sup> CFCC California CASA Programs 2007 Report, December 2008, page 5.

<sup>13</sup> It is important to note that the statistics in the CFCC California CASA Programs 2007 Report had significant numbers of children in categories that could overlap with Native American: Multiracial, Other and Unknown. These overlaps could skew data in either the direction of Native children being over or under represented in CASA programs.

<sup>14</sup> CFCC California CASA Programs 2007 Report, December 2008, page 5.

<sup>15</sup> The name “Court Appointed Special Advocate” and “CASA” are trademarks owned by the National CASA Association. In order to operate a program using the name CASA you must apply for membership with the National CASA Association. For more information on starting a CASA program visit the National CASA Program website: [www.casenet.org](http://www.casenet.org)

<sup>16</sup> The California CASA Association’s (CalCASA) mission is to improve the scope, quality, and impact of CASA advocacy in California by strengthening local programs, promoting improvements in advocacy, and sharing the insights and work of CASA volunteers with policy and decision makers.

## ANNOUNCEMENTS

**SPONSORS:** CILA is grateful to **Nordhaus Law Firm LLP** ([www.nordhauslaw.com](http://www.nordhauslaw.com)) for coming forward as our first sponsor for the 9<sup>th</sup> Annual Indian Law Conference (see page 10). We are continuing to raise money for the conference and encourage any other interested persons to become a sponsor. Contact Dan Rey-Bear at [drey-bear@nordhauslaw.com](mailto:drey-bear@nordhauslaw.com).

### **CILA Logo Contest: \$500 Prize!!!**

California Indian Law Association is seeking an original logo for the Association that will embody the principles upon which CILA was founded, including promoting the practice and study of federal Indian law, the achievement of tribal self-determination and the protection of tribal sovereignty. The person who submits the logo that the Board of Directors selects as CILA's official logo will receive a \$500 prize. Multiple submissions are permitted.

The contest is open to members of CILA and non-members alike. The winner will have to submit a signed form certifying that the logo is his or her original creation and relinquishing right to the design beyond the monetary prize. The submission deadline is June 1, 2009.

If you wish to submit a logo or have any questions regarding our contest, please contact David Clifford at [davidclifford1oglala@yahoo.com](mailto:davidclifford1oglala@yahoo.com).

**California Indian Legal Services** is holding its **3<sup>rd</sup> Annual California Tribal Courts Conference** at Harrah's Rincon Casino & Resort on May 20-21, 2009.

This two-day state-wide conference will feature tribal court judges and representatives from many tribal courts in California, tribal leaders, as well as other experts from across the country to present information about court operations, current jurisdictional issues, legal updates, law enforcement and more. Those in attendance can expect to receive a wide range of information and perspective on tribal justice systems throughout California tribal communities. Agenda topics include; PL 280: To Retrocede or Not?; Indian Law Enforcement Reform Act; Jurisdiction & Non-Indians; Alternative Dispute Resolution; as well as breakout sessions including a Tribal Jurisdictional Update; Developing a Tribal Court; ICWA/Dependency in Tribal Court; and the Indian Civil Rights Act. For more information see [www.calindian.org](http://www.calindian.org).

**LAW SCHOOL SCHOLARSHIP:** CILA is proud to continue to offer a scholarship for American Indian and Native Alaskan law school students. Donations are always welcome. Applications for interested law students will be available for the 2009-2010 academic year after June 1, 2009. For further information on how to apply or to donate to the scholarship, please e-mail Christine Williams at [christine@williamsjd.com](mailto:christine@williamsjd.com).

## SAVE THE DATE NOTICE

### Ninth Annual Indian Law Conference

**October 9, 2009**  
**8:30 AM – 5:00 PM**

**Location:** Residence Inn Marriott Sacramento Downtown at Capitol Park, 1121 15<sup>th</sup> Street, Sacramento, California, 95814.\*

**Target audience** includes Indian law attorneys, law students, judicial officers, tribal officials, and interested members of the Native American community or its service providers. MCLE credit will be available.

**Registration Information:** Additional details regarding content, speakers and cost will be announced in the upcoming months. Check [www.calindianlaw.org](http://www.calindianlaw.org) or contact Dan Rey-Bear at [drey-bear@nordhauslaw.com](mailto:drey-bear@nordhauslaw.com) for future updates.

**Sponsorship Opportunities:** The success of our annual Indian law conference is dependent on the generosity of sponsors. If you or your employer are interested in making a donation towards the costs of the conference, please contact Dan Rey-Bear at [drey-bear@nordhauslaw.com](mailto:drey-bear@nordhauslaw.com) or Joanne Willis Newton at (800) 690-1558.

**Special Offer:** Plan ahead! The Residence Inn is offering a reduced room rate of \$139.00 for the nights of October 8 & 9, 2009. To receive this rate, you must make your reservation by September 10, 2009, by calling Marriott reservations at 1-800-331-3131 and letting them know you are booking for the California Indian Law Association conference or online at [www.marriott.com/sacdt](http://www.marriott.com/sacdt) with dedicated group code CILCILA. However, a limited number of rooms are available, so don't delay.

**Reception:** The LaPena Law Corporation will be hosting a reception on the eve of the conference, October 8, 2009. Further details to be distributed with the conference agenda.

Please feel free to disseminate this Save-the-Date announcement to any interested individuals.

\* California Indian Law Association is committed to promoting economic development in Indian Country. This Residence Inn is owned by Three Fires, LLC, an economic coalition of the San Manuel Band of Mission Indians of San Bernardino, the Viejas Band of Kumeyaay Indians of San Diego and the Oneida Tribe of Indians of Oneida, Wisconsin.

## Deadlines for Consultations on Development of Regulations Concerning Tribal Title IV-E Programs Fast Approaching

By Joanne Willis Newton

The enactment of Public Law 110-351 on October 7, 2009, represents a historic victory for Tribes who have been fighting for decades to secure the same federal funding that States receive to support children and families in the foster care system. Tribes, tribal organizations and tribal consortia may now directly apply for and operate Title IV-E Foster Care and Adoption Assistance Programs.

Title IV-E of the Social Security Act is the primary source of federal funding for foster care and adoption assistance. Previously, only States and territories were eligible for direct Federal Title IV-E funding; Tribes had to negotiate with the State to receive such funds.

Tribes may now apply to the Department of Health and Human Services' Administration for Children and Families ("ACF") to operate a Title IV-E program beginning October 1, 2009. Limited funding is also available to Tribes for a one-time grant of up to \$300,000 each year for up to two years. The purpose of such grants is to assist Tribes in developing a Title IV-E plan.

Public Law 110-351 and related information may be found at <http://www.acf.hhs.gov/programs/cb>.

Public Law 110-351 requires the ACF to develop interim final rules after consulting with Tribes and affected States on the law's implementation. These rules must include:

1. procedures to ensure that the transfer of children in foster care from a State Title IV-E plan to a Tribal Title IV-E plan does not affect the children's eligibility for Title IV-E and Title XIX Medicaid; and
2. provisions for the in-kind expenditures from third-party sources permitted for the Tribal share of administration and training expenditures under Title IV-E.

The ADF is in the process of holding Tribal consultations across the country to discuss these topics. These consultations started on March 26, 2009 and are continuing through May 13, 2009. The consultation for Region IX, which includes California, is scheduled for **April 27, 2009**, at 90 7<sup>th</sup> Street, Conference Room B040 and B020, San Francisco. Tribes who wish to attend

must register at least one week in advance by contacting Sally Flanzer, Children's Bureau Regional Program Manager, by phone, (415) 437-8400, or by email, [sally.flanzer@acf.hhs.gov](mailto:sally.flanzer@acf.hhs.gov).

Regardless of whether Tribes participate in a consultation session, they are also invited to submit written comments on-line at <http://www.regulations.gov>, by email to [CBComments@acf.hhs.gov](mailto:CBComments@acf.hhs.gov) or by mail to: Miranda Lynch, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, 1250 Maryland Avenue S.W., 8<sup>th</sup> Floor, Washington, DC 20024. The deadline for the submission of written comments is **May 12, 2009**.

For further information see 74 Fed.Reg. 10920.

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*Joanne Willis Newton has her own Indian law practice in San Diego, the Law Offices of Joanne Willis Newton, a Professional Corporation, and was recently appointed as Chief Judge of the San Manuel Tribal Court. She is a member of the Cree Nation of Chisasibi, located in northern Quebec, Canada. For more information see [www.willisnewtonlaw.com](http://www.willisnewtonlaw.com)*

**NATIONAL INDIAN CHILD WELFARE ASSOCIATION'S 27<sup>th</sup> ANNUAL NATIONAL AMERICAN INDIAN CONFERENCE ON CHILD ABUSE AND NEGLECT:** This year's theme is "Access to Prevention, Protection and Treatment: A Matter of Fairness, Justice and Action." April 19-22, 2009 in Reno, Nevada.

See <http://nicwa.org/conference> for more details about the conference or for registration information.

**California Indian Law Association**

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Christine Williams, Vice President

Michele Fahley, Secretary

Meredith Drent, Treasurer

David Clifford

Angela Medrano

Mark Myers

Dan Rey-Bear

Tim Seward

*For biographies of our directors, see  
[www.calindianlaw.org](http://www.calindianlaw.org).*

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[www.calindianlaw.org](http://www.calindianlaw.org)

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*Would you like to contribute an article or  
announcement for the next newsletter? If  
so, contact Joanne Willis Newton at  
[jwn@willisnewtonlaw.com](mailto:jwn@willisnewtonlaw.com).*