

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

GORDON RAY MANN, JR.,

Defendant/Appellant.

Dist.Ct.No. CR 08-68-GF-SEH

Ct.Apps.No. 09-30052

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA, GREAT FALLS DIVISION, UNITED STATES
DISTRICT JUDGE SAM E. HADDON, PRESIDING

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INTRODUCTION

A year later, I was still with them.

After wandering all over in constant danger of being killed by white settlers or white soldiers, we come to a place knowed as the Indian Nations.

It was a tract of land by the Washita River that had been give forever to the Indians by the Congress and the President of the United States.

We was safe there.

This was Indian land as long as grass grows and wind blows and the sky is blue.

* * * * *

I reckon right then I come close to turning pure Indian, and I probably would have spent the rest of my days with Sunshine and her sisters.

But sometimes grass don't grow, wind don't blow, and the sky ain't blue.

Jack Crabb, *Little Big Man*

In the film *Little Big Man*, Dustin Hoffman portrays 121 year-old Jack Crabb who claims to be the sole white survivor of Custer's Last Stand. The film begins with a dying Jack Crabb relating various episodes of his life to a historian. Central to that theme is Crabb's adoption by Cheyenne chief Old Lodge Skins when he is orphaned as a young child. Crabb earns the Indian name "Little Big Man" during a battle with another raiding Indian band, and he later saves himself by claiming to be a white man when the Cheyenne are attacked by U.S. Cavalry soldiers. Being a white Indian enables him to experience life from both Indian and non-Indian perspectives as the Indians are driven from their land by white westward expansion. In the scenes preceding the narrative quoted above, Crabb is living with his Cheyenne wife and her sisters when, one winter day, Custer and the 7th Cavalry make a surprise attack on the Cheyenne as they are camped by the Washita River on land that had been given to them "by the Congress and President of the United States." A now-blind and elderly Old Lodge Skins is saved by Crabb, but Sunshine and Crabb's newborn son are killed.

This case is similar to the theme of *Little Big Man*. According to the Government, the Appellant is not an Indian, nor will it recognize him or his tribal members as Indians when it comes to eligibility for benefits such as medical, education, financial, housing, and land. On the other hand, sometimes the grass

don't grow, the wind don't blow, the sky ain't blue, and the Appellant *is* an Indian when it comes to the exercise of federal criminal jurisdiction.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 because the Appellant was charged by Superseding Indictment with the crime of Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1152, 1153(a), and 2241.

This Court of Appeals has jurisdiction under 28 U.S.C. § 1291 since the entry of a Judgment in a Criminal Case is a “final decision” of a District Court.

BAIL STATUS

Gordon Ray Mann, Jr. is serving his sentence of 280 months at FCI Victorville in Adelanto, California. His projected release date is October 20, 2028.

STATEMENT OF THE ISSUES

Whether the District Court erred when denying Defendant's Rule 29 motions. Subsumed within this issue is the question of whether members of the Little Shell Tribe of Chippewa Indians of Montana, a non-federally recognized tribe, are Indians for purposes of federal criminal jurisdiction.

STATEMENT OF THE CASE

On May 22, 2008, Gordon Mann was charged by Indictment with the crime

of Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1153(a) and 2241(c). ER 7; Docket No. 1.

On October 20, 2008, the Government filed a Superseding Indictment charging Mann with the crimes of Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1153(a) and 2241(c) in Count 1, and Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1152 and 2241(c) in Count 2. ER 6; Docket No. 38. The difference between the two charges was that Count 1 alleged that Gordon Mann, an “Indian person,” engaged in a sexual act with E.O. in violation of 18 U.S.C. § 1153(a). To obtain a conviction on Count 1, the Government had to prove beyond a reasonable doubt that Gordon Mann is an “Indian person.”

Count 2 alleged that Gordon Mann engaged in a sexual act with E.O. in violation of 18 U.S.C. § 1152 and 2241(c). Under § 1152, the Government could only obtain a conviction if Gordon Mann is a non-Indian person.

On November 7, 2008, Mann filed his Trial Brief, notifying the District Court that he would defend the charges at trial on the ground that he is a member of the Little Shell Band of Chippewa Indians of Montana which is not a federally recognized tribe of Indians. See, 25 U.S.C. § 479a-1; 25 C.F.R. § 83.2; 25 C.F.R. § 83.5(a); Federal Register Vol. 73, No. 66, pgs. 18553-18558, Friday, April 4, 2008. Because it is not a federally recognized tribe of Indians, there was

no federal criminal jurisdiction over Mann under 18 U.S.C. § 1153(a) as a matter of law. *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993). Docket No. 49.

A jury trial was held on November 18 and 19, 2008. Docket Nos. 58-63. At the close of the Government's case, Mann made his Rule 29 motion, arguing the *LaPier* case and the lack of federal criminal jurisdiction because Mann was a member of the Little Shell Band of Indians, a non-federally recognized tribe of Indians. Mann renewed his motion at the end of his case. The District Court denied both motions on the ground that Indian status was a jury question. The jury returned its verdict of guilty on Count 1, finding that Mann was an Indian person. Docket No. 71.

On November 21, 2008, Mann filed another Rule 29 motion for judgment of acquittal. Docket Nos. 72 and 73. The District Court again denied the motion. ER 1; Docket No. 77.

Sentencing was held on February 9, 2009, at which time the District Court sentenced Mann to a period of incarceration of 280 months. Judgment was entered the same day. ER 5; Docket Nos. 82, 83.

Gordon Mann timely filed his Notice of Appeal on February 10, 2009. ER 4; Docket No. 85.

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STATEMENT OF THE FACTS

The facts are substantially undisputed. Gordon Mann performed oral sex on and fondled the genitalia of an 8-year old boy, E.J.O., while babysitting him.

Mann confessed to that conduct and did not dispute it at trial. ER 2; *Trans.*, 36:24 to 37:10; 38:18-20; 43:8 to 48:7 (Matthew Connelly); 52:13 to 59:9 (Tanya Melton); 80:14 to 88:5 (E.J.O.); 88:9 to 92:9 (Stacey Smiedala); 140:1-21; 142:25 to 143:9; 143:17-21 (Gordon Mann).

He did, however, dispute the federal criminal jurisdiction over him on the basis of his Indian status. He properly notified the District Court and Counsel for the Government of his objection to federal criminal jurisdiction prior to trial. Docket No. 49; *Trans.*, 38:21 to 39:16. During the pretrial conference, the District Court acknowledged his objection and stated that it was well acquainted with *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993) and *United States v. Bruce*, 394 F3d. 1215 (9th Cir. 2005). The District Court stated that it did not view *LaPier* as controlling, and ordered that *Bruce* would apply to the case for purposes of determining whether Mann is or is not an Indian, and that question was for the jury to decide. ER 2, *Trans.*, 11:20 to 14:14.

Gordon Mann is an enrolled member of the Little Shell Tribe of the Chippewa Cree Indians of Montana. The Little Shell Tribe is not a tribe of Indians

that is recognized by the federal government. Whether it is recognized by the federal government or not as a legitimate tribe of Indians, Gordon Mann participates in Indian activities and cultural events such as beading, going to powwows, eating fry bread, and hunting. He believes that he's an Indian and he holds himself out to be an Indian person. *Trans.*, 74:22 to 78:15; 140:22 to 142:24.

Whether he's an Indian in an anthropological, cultural, or ethnohistorical sense, the Indian Health Service hospital in Browning, Montana, does not recognize the Little Shell Tribe. Because the Little Shells are not a federal-government-recognized tribe, they do not receive contract care. Thus, Gordon Mann could only receive direct care for an emergency and urgent care, like a broken leg, and those direct care services would be free. But he cannot be referred out for contract services because he's from the Little Shell Tribe, and the Indian Health Service will not pay for contract services because they don't recognize the Little Shell Tribe. *Trans.*, 65:12 to 74:20, Exhibit 7.

At the close of the Government's case, Gordon Mann moved the Court for a judgment of acquittal on Count 1 pursuant to Fed.R.Crim.P. 29. Mann cited *LaPier, United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974) and the relevant CFR sections listed in his Trial Brief. He argued that because the evidence was that he is a member of the Little Shell Band of Chippewa Indians, he cannot be an

Indian for federal criminal jurisdiction purposes under 18 U.S.C. § 1153(a) as a matter of law. He directly confronted the *Bruce* case relied upon by the District Court, arguing that *Bruce* is distinguishable because it related to an affirmative defense under 18 U.S.C. § 1152 – a statute that clearly does not apply to crimes committed by Indians against Indians. The District Court denied the motion and determined that *Bruce* required the question of Indian status to be made by the trier of fact. *Trans.*, 95:13 to 100:25.

In his case in chief, Mann called Toni Atchison to the witness stand. She works for the Little Shell Tribe of Chippewa Indians. The Little Shell Tribe has 4,800 members with tribal headquarters located in Great Falls, Montana. They have a seven member tribal council, a chairman, and an executive director. They have an enrollment department and keep enrollment records. Nevertheless, the Little Shell Tribe is not recognized by the federal government. That means that the Little Shell Tribe does not receive certain medical benefits, education, federal grants that the other tribes in Montana receive, nor do they have any land. The federally recognized tribes in Montana receive medical, education, housing, financial and land benefits while the Little Shell Tribe does not. *Trans.*, 104:10 to 112:24, Exhibit 5; ER 10.

Gordon Mann had previously been taken to the Indian Health Service on an

emergent basis because he had ingested antifreeze. *Trans.*, 80:3-7; 93:13-21.

Edith Carlson works for the Blackfeet Service Unit Contract Health Services in Browning, Montana. If a service is not provided at the hospital, then that department will send the patient elsewhere if they are eligible. That department pays for their health care if they are eligible. In order to be eligible, a person has to be a member of a federally-recognized tribe or a descendant of a federally-recognized tribe. Ms. Carlson determined that Gordon Mann was not eligible for \$ 64,744.56 worth of contract health services consisting of his Browning IHS emergency room, hospital stay and medicines, because he was not a member of a federally-recognized tribe or a descendant thereof. *Trans.*, 114:3 to 126:5, Exhibits 2, 3, and 4; ER 7, 8, and 9.

John Sinclair is a member and the president of the Little Shell Tribe of Chippewa Indians in Montana. In that capacity he has been involved in petitioning the Department of the Interior to obtain federal recognition of the Tribe. The petition was filed in 1978 and has been pending for 30 years. As a non-recognized tribe, the Little Shell Tribe is treated as a 501(3)(c) non-profit group by the federal government. If the Tribe does ever receive recognition by the federal government, then its members will immediately become eligible for certain health benefits such as contract services, grants, land, education, and housing.

The Little Shell Band is a genuine group of Indians from a cultural point of view. They have pow-wows, buffalo hunts, sweats, and basket socials. However, they are not federally recognized. *Trans.*, 126:6 to 132:24.

Russell Boham is the executive director for the Little Shell Chippewa Tribe. He manages the day to day affairs of the Tribe and has been involved in getting federal recognition of the Tribe. The State of Montana has recognized the Tribe. Historically, the Little Shell Chippewa Tribe was part of the Chippewa Tribe that was forced westward by white expansion on the North American continent. In the process it had entered into several treaties with the federal government. They eventually ended up at Turtle Mountain, North Dakota. That was the last of the Little Shell Tribe's direct relationship with the federal government, because in 1892, their Chief Little Shell refused to sign the "Ten Cent Treaty." As a result, the federal government did not work with Chief Little Shell to get the reduction in land that the tribes had to open up for white settlement and the Little Shell Tribe ended up without a reservation. The Little Shell Tribe is also known as the Buffalo People. A lot of their economy was based solely around the buffalo. They had been hunting in a common area by Sweet Grass Hills for hundreds of years. As a result of Chief Little Shell's refusal to sign the Ten Cent Treaty and the federal government picking other people to work with, and the Little Shell

Tribe ending up without a reservation, they returned to their aboriginal hunting territory that was a common area for all the tribes in northern Montana to hunt.

When the buffalo were all gone, members of the Little Shell Tribe settled in shanty towns outside of Great Falls, Helena, and Butte, and on other reservations such as Fort Belknap, Fort Peck, Blackfeet, and Rocky Boy. They lived there and inter-married with the other tribes, but did not have formal status.

In the early 1900's, tribal leader Joe Dussome began petitioning the federal government for acknowledgment as a legitimate tribe after they realized that they were not going to be part of the Turtle Mountain Chippewa Tribe since the Little Shell Band was not included in the tribal rolls after Chief Little Shell refused to sign the Ten Cent Treaty. Chief Little Shell and all his followers were excluded from what remained of that reservation after the treaty was signed. Consequently, the Little Shell Tribe ended up as a landless Chippewa Tribe in Montana. In 1905 Joe Dussome and others began petitioning the federal government for their own recognition. Since then the Little Shell Band has been a continuous tribe of Indians descended down from Chief Little Shell. *Trans.*, 133:2 to 139:9, Exhibits 502, 503, 504; ER 12, 13, and 14.¹

¹ See also, *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004); *Koke v. Little Shell Tribe of Chippewa Indians, Inc.* (2003), 315 Mont. 510, 68 P.3d 814, 2003 MT 121.

At the close of his case-in-chief, Gordon Mann again renewed his Rule 29 motion as to Count 1, again arguing that *LaPier* and *Bruce* are distinguishable. *Bruce* applies to 18 U.S.C. § 1152 whereas *LaPier* applies to § 1153. He also moved for a judgment of acquittal as to Count 2 because § 1152 does not apply to an offense committed by an Indian against an Indian. *Trans.*, 147:8 to 148:12.

In response, the Government agreed with defense counsel's argument as to Count 2, but left it to the Court's discretion. *Trans.*, 148:14 to 149:1.

The District Court denied the motions, stating that at the heart of the issues related to both counts was the question of whether or not Mann is an Indian person. The District Court stated that issue should be submitted to the trier of fact because it is not an issue that the Court could decide under *Bruce*. Consequently, the District Court submitted the question of Indian status to the jury by giving them a verdict form that required the jury as a matter of first obligation to decide whether the defendant is or is not an Indian person. If the jury decided that he is an Indian person, then it was instructed to reach a verdict on Count One only. If the jury decided in the alternative that the defendant is not an Indian person, the jury was instructed to reach a verdict on Count Two only. When reaching this conclusion, the District Court stated:

And the defendant has taken, at least by way of evidence presented,

the position he cannot be prosecuted under 1153 because he is not a member of an enrolled – he is not an enrolled member of a recognized tribe. Consequently, cannot fit the definition of being an Indian person, at least that's one of his arguments. He, conversely, claims that he is an Indian; and therefore, is excluded from prosecution under 1152.

He cannot be both, in the view of this court. And we're going to have the jury determine which category he falls into. And that is a determination to be made by the jury in the view of this court.

Trans., 149:3 to 150:19; ER 16. While settling jury instructions the District Court stated that it did not believe *LaPier* remained good law in view of *Bruce*:

Well, counsel, I have made my views about the continuing vitality of the *LaPier* case a matter of record in this case. And in my view, the *Bruce* case, while not directly overruling *LaPier*, eviscerates any declarations that appear in the *LaPier* decision that are contrary to the detailed analysis of the entire issue by the court in the *Bruce* opinion.

Trans., 156:22 to 159:8.

The jury subsequently convicted Mann of Count 1 and acquitted him of Count 2. *Trans.*, 189:18 to 191:21; ER 16.

In view of the Court's statements that *LaPier*'s declarations were "eviscerated" by *Bruce*, Mann filed his written motion for judgment of acquittal and asked the Court to set aside the verdict and enter a judgment of acquittal as to Count 1 because *LaPier* remains good law. *Bruce* is distinguishable and not applicable to Count 1 under the facts of the present case. Docket Nos. 72 and 73.

The District Court denied the motion. ER 1; Docket No.77. Gordon Mann now appeals.

SUMMARY OF ARGUMENT

Federal regulation of Indian tribes is rooted in the unique status of Indians as “a separate people” with their own political institutions, and is not to be viewed as legislation of a “ ‘racial’ group consisting of ‘Indians.’ ” *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290.Pp. 1398-1399.

The evidence was uncontroverted at trial that Gordon Mann is a member of the Little Shell Tribe of Chippewa Indians of Montana. The facts and the law establish that the Little Shell Tribe is not recognized as a legitimate tribe of Indians by the federal government. Accordingly, Mann cannot be an “Indian” for purposes of federal criminal jurisdiction under 18 U.S.C. § 1153(a) as a matter of fact and law. See, 25 U.S.C. § 479a-1; 25 C.F.R. § 83.2; 25 C.F.R. § 83.5(a); Federal Register Vol. 73, No. 66, pgs. 18553-18558, Friday, April 4, 2008; *LaPier v. McCormick*, 986 F.2d 303 (9th Cir.1993).

Citing *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974) and *United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701 (1977), the *LaPier* court reasoned that it was the special federal role in regulating the tribes as a “separate people” with their own political institutions that

constituted the foundation for federal criminal jurisdiction over Indians in Indian country. It is therefore the existence of the “special relationship between the federal government and the tribe” in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country. *Id.*, at 305. The Little Shell Band of Chippewa Indians of Montana is not a federally acknowledged tribe of Indians and there is therefore no “special relationship between the federal government and the tribe.” Thus, while Mann may be an Indian in an anthropological or ethnohistorical sense, he is not an Indian for purposes of federal criminal jurisdiction. *Id.*

United States v. Bruce, 394 F3d. 1215 (9th Cir. 2005) arose under 18 U.S.C. § 1152 and not § 1153(a) and spoke in terms of Indian status as an affirmative defense to a charge filed under § 1152. *Bruce* in no way “eviscerated” the reasoning or holding of *LaPier*. *Bruce* is distinguishable and not controlling as to Count 1, which charges a violation of § 1153(a). For that reason, Gordon Mann is not and cannot be an Indian for purposes of § 1153(a) and Count 1.

STANDARD OF REVIEW

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this Court of Appeals reviews the

District Court's denial of the motion de novo. *United States v. Stewart*, 420 F.3d 1007, 1014 (9th Cir. 2005).

The District Court's determination of Indian status under 18 U.S.C. § 1152 is reviewed de novo because it is a mixed question of law and fact. *Bruce*, 394 F.3d at 1218 (citations omitted).

Jurisdictional issues are reviewed de novo. *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004).

ARGUMENT

Mann is not an "Indian" as a matter of law, and there is no federal criminal jurisdiction over him in this case

Count 1 of the Superseding Indictment charged a violation of 18 U.S.C. §1153(a). This statute provides in relevant part:

(a) Any *Indian* who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . [sexual assault] . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (Italics added).

The plain language of the statute applies to crimes committed by an *Indian*. The

law is clear that Gordon Mann is not an Indian subject to § 1153(a) because he is not a member of a federally recognized tribe.

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 557, 8 L.Ed. 483 (1832). They are a separate people possessing the power of regulating their internal and social relations. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

In *Morton v. Mancari*, the Supreme Court held that federal regulation of Indian tribes is rooted in their unique status as “a separate people” with their own political institutions, and is not to be viewed as legislation of a “ ‘racial’ group consisting of ‘Indians.’ ” Federal regulation of “Indians” thus applies only to members of “federally recognized” tribes and excludes many individuals who are racially classified as “Indians.” *Id.*, 417 U.S. at 553, n. 24. In *Mancari*, non-Indian employees of the Bureau of Indian Affairs brought a class action lawsuit challenging as unlawful racial discrimination, an employment preference for qualified Indians in the Bureau provided by the Indian Reorganization Act. The Supreme Court held that the preference did not constitute invidious racial discrimination, but was reasonable and rationally designed to further Indian self-government.

In *United States v. Antelope*, 430 U.S. 641, 647, 97 S.Ct. 1395, 1399 (1977), the Supreme Court relied on *Mancari* for the proposition that federal jurisdiction under the Major Crimes Act does not apply to “many individuals who are racially to be classified as ‘Indians.’ ” The Supreme Court noted that members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act. *Antelope*, 430 U.S. at 646 fn. 7, citing *United States v. Heath*, 509 F.2d 16, 19 (C.A.9 1974) (“While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists”).

In *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976), the Supreme Court held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. The Indian plaintiffs were being denied a benefit or privilege available to non-Indians; nevertheless, a unanimous Court dismissed the claim of racial discrimination:

[W]e reject the argument that denying [the Indian plaintiffs] access to the Montana courts constitutes impermissible racial discrimination.

The exclusive jurisdiction of the Tribal Court does not derive from

the race of the plaintiff but *rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law*. (Italics added.)

Id., 424 U.S., at 390, 96 S.Ct., at 948.

The clear principle underlying the holdings of *Mancari*, *Antelope*, *Fisher*, and *Heath* is that federal regulation of Indian affairs is rooted in Indians' status as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians'" *Morton v. Mancari*, *supra*, at 553 n. 24. That principle was the basis for this court's reasoning in *LaPier v. McCormick*, 986 F.2d 303 (9th Cir.1993), and the District Court erred when ruling that *LaPier* was "eviscerated" by *Bruce*. *LaPier* came before the court on a petition for habeas corpus under 28 U.S.C. § 2254 following affirmance of his convictions for aggravated burglary, aggravated kidnaping, and felony assault by the Montana Supreme Court. He argued that as an Indian, he should have been tried in federal court. However, because he was an enrolled member of the Little Shell Band of Landless Chippewa Indians of Montana, this Court held that his claim to Indian status "fail[ed] the threshold test" of whether the Indian group with which he was affiliated was a federally acknowledged Indian tribe. The Little Shell Band of Landless Chippewa Indians

of Montana is not a federally acknowledged tribe of Indians. Thus, while *LaPier* may have been an Indian in an anthropological or ethnohistorical sense, he was not an Indian for purposes of federal criminal jurisdiction. *LaPier*, 986 F.2d at 306.

So it is in this case. Mann is a member of a tribe that is not recognized by the federal government. See, 25 U.S.C. § 479a-1; 25 C.F.R. § 83.2; 25 C.F.R. § 83.5(a); Federal Register Vol. 73, No. 66, pgs. 18553-18558, Friday, April 4, 2008. Because he was not a member of a federally-recognized tribe or a descendant thereof, he was denied \$ 64,744.56 worth of contract health services. *Trans.*, 114:3 to 126:5, Exhibits 2, 3, and 4; ER 7, 8, and 9. The District Court was completely incorrect on the law when it ruled that *Bruce* eviscerated *LaPier*. *Bruce* arose under 18 U.S.C. § 1152 and not § 1153(a) and spoke in terms of Indian status as an affirmative defense to a charge filed under § 1152. It is distinguishable from *LaPier*. There was no question for the jury to decide when the Little Shell Tribe is not recognized by the federal government as a legitimate tribe of Indians both as a matter of fact and law. The District Court therefore erred when it denied Mann's Rule 29 motions.

CONCLUSION AND PRAYER

The Government cannot deny members of the Little Shell Tribe federal

recognition as legitimate Indians, but at the same time claim that they are Indians.

Grass still grows, wind still blows, and the sky is still blue in the Ninth Circuit.

LaPier is still also good law. Gordon Mann cannot be an Indian for the purpose of federal criminal jurisdiction when his Tribe is not recognized by the Federal Government. The District Court should be reversed, the judgment of conviction should be vacated, a judgment of acquittal should be entered, and Gordon Mann should be released immediately from custody.

STATEMENT OF RELATED CASES

There are no related cases that the undersigned is aware of.

DATED this 27th day of May, 2009.

RESPECTFULLY SUBMITTED:

By: /s/ Palmer Hoovestal

Palmer Hoovestal
Attorney for Appellant
GORDON RAY MANN

CERTIFICATE OF COMPLIANCE

I certify pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Appellant's Opening Brief is proportionately spaced, has a type face of 14 points or more, and contains 4,798 words, excluding the Table of Contents and Table of Authorities.

DATED this 27th day of May, 2009.

RESPECTFULLY SUBMITTED:

By: /s/ Palmer Hoovestal
Palmer Hoovestal
Attorney for Appellant
GORDON RAY MANN

CERTIFICATE OF SERVICE BY CM/ECF

I hereby certify that on the 27th day of May, 2009, I duly served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** on the counsel listed below by CM/ECF to:

E. VINCENT CARROLL
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, MT 59403

By: /s/ Palmer Hoovestal
Palmer A. Hoovestal