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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Julian Ismael Loera, Defendant.	Case No.: 3:13-mj-04039-MEA **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The United States (the "Government" or the United States"), by and through its undersigned counsel, hereby responds to and opposes Defendant Julian Ismael Loera's (the "defendant" or "Loera") motion to dismiss for lack of subject matter jurisdiction. (Doc. 10.) In short, the Court should deny the defendant's motion because his status as a non-native has already been decided by the Fort Mojave Indian Tribe (the "Tribe"). The Fort Mojave Tribal Court has previously determined it does not have jurisdiction over the defendant, and this Court should respect the Tribal Court's recent determination in that regard. (*See* Doc. 16 ¶¶ 14, 15.) If this Court rules to the contrary, we could be faced with a situation where both the Tribe and the United States would ostensibly lack subject matter jurisdiction to charge the defendant with certain misdemeanor criminal violations that occur on the Fort Mojave Indian Reservation. As a result, no entity may claim jurisdiction for certain crimes over the defendant.

The Court should also deny the defendant's motion because, as it is believed the facts will show at an evidentiary hearing in this matter, the defendant does not meet the generally accepted test for Indian status. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005)(citations omitted). That is, the facts will support that the defendant is non-native for purposes of jurisdiction under 18 U.S.C. § 1152.[1] Among other things, the defendant is not an enrolled member of the Fort Mojave Indian Tribe, his Fort Mojave blood quantum is less than one-quarter, and he is primarily of Mexican descent. (Doc. 16 ¶¶ 4, 6, 7.) Moreover, the evidence will show that the defendant spent much of his last 10 years or so in prison or jail. Importantly, he was not in a tribal prison or jail during those periods. Likewise, the defendant was not living on the Fort Mojave Indian Reservation during these periods of incarceration.

Accordingly, for the reasons set forth in this brief, as well as the facts set forth in the parties' stipulation (Doc. 16) and the testimony that is anticipated at the defendant's evidentiary hearing, it is respectfully submitted that the defendant has not met his burden of production. As such, the defendant's motion to dismiss should be denied, and the matter should proceed to a trial on the merits.

I. Facts.

On February 8, 2013, the defendant was charged by way of a Criminal Complaint with assault under 18 U.S.C. § 113(a)(4). (Doc. 1.) It was alleged that the defendant, a non-native, assaulted, struck, and beat the victim, referred to herein as "R.R.," who is

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[1] "The Federal Enclaves Act provides, among other things, for the prosecution of crimes committed in Indian Country by non-Indians against Indians." *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996)(citation omitted).

Native American. (*Id.*) Jurisdiction was premised under 18 U.S.C. § 1152, which is sometimes referred to as the Indian General Crimes Act or "IGCA." *Bruce*, 394 F.3d at 1218. It is believed that the evidence will show that this is not the first time that the defendant has assaulted or, at the least, was reported to have assaulted R.R. In fact, the evidence will show that the defendant was previously cited, for a civil offense, by the Fort Mojave Tribal Police for an assault on R.R., which occurred on or about November 4, 2012 on the Fort Mojave Indian Reservation.[2] The defendant was cited with a civil violation under Tribal law because the Fort Mojave Tribal Court did not recognize criminal jurisdiction over the defendant. (*See* Doc. ¶¶ 14, 15.) The parties have also stipulated that the instant offense was brought in federal court "because the Fort Mojave Tribal Court has ruled that it does not have criminal jurisdiction over the defendant." (*Id.* ¶ 15.)

On April 5, 2013, the parties stipulated to certain facts related to the defendant's motion to dismiss, as well as for undisputed issues for trial. (Doc. 16.) In that regard, while the stipulation and the documents attached thereto speak for themselves, the United States concedes (as it must) that the defendant is a descendant of an enrolled member of the Fort Mojave Indian Tribe. (*Id.* ¶ 2.) However, the defendant's birth mother has a relatively low Fort Mojave Indian blood quantum – three-eighths. (*Id.* ¶ 3.) The

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[2] Charges were also previously filed in federal court for an assault by the defendant on R.R. (Citation AZ1/2530001.) However, that matter was ultimately resolved by a plea to a new charge that did not implicate the defendant's alleged status as an alleged Indian, which was filed by way of Information in Case No. CR12-08241-001-PCT-MEA. Thus, the Court did not reach the potential jurisdictional issue in that case that is present in the instant case. The defendant is presently serving a term of incarceration of seven months in the prior case, as his supervised release was recently revoked.

defendant's father is Mexican, and he is not an enrolled member of any federally recognized Indian Tribe. (*Id.* ¶ 4.) The defendant's Fort Mojave blood quantum, as calculated by the Tribe, is only 3/16 Fort Mojave. (*Id.* ¶ 7.)[3] As such, the defendant was denied enrollment in the Fort Mojave Indian Tribe. (*Id.* ¶ 6.) The Fort Mojave Tribe, through its Constitution and By-Laws, requires that descendants be at least one-quarter Fort Mojave Indian blood to be eligible for membership in the Tribe. (*See id.* ¶ 6; *see also* Doc. 16-1 at ecf p. 5.)

The United States also admits that the defendant is eligible for some "benefits" through the Tribe. (*See, e.g.*, Doc. 16 ¶¶ 9, 12.) However, through its Constitution and By-Laws, the Tribe has the authority to provide for "the conditions upon which non-members may enter or remain on the reservation and provide for the removal or exclusion from the reservation of any non-member whose presence may be injurious to the tribal members or to the interests of the Tribe." (Doc. 16-1 at ecf p. 11.) As a non-member, the defendant's Tribal rights, *if* he has any actual "rights" under the Fort Mojave Constitution and By-Laws, are not the same as a Tribal member's rights.[4] By way of example only, the defendant is *not* eligible to be a Tribal Council member or appointed to a subordinate committee or commission, and he is not allowed to vote in Tribal elections. (Doc. 16-1 at ecf pp. 8, 12, 14.) More importantly, under the express language of the Fort Mojave

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[3] It is undisputed that the defendant is primarily of Mexican descent. (*See* Doc. 16 ¶¶ 3, 4, 7.)

[4] In the Preamble of the Constitution and By-Laws of the Fort Mojave Indian Tribe, it states that "the members of the Fort Mojave Tribe … do establish this Constitution and By-Laws for the members of the Fort Mojave Indian Tribe." As a non-tribal member, the Fort Mojave Constitution and By Laws do not apply to the defendant.

Constitution and By-Laws, the defendant does not have the same "rights" as a Tribal member. (Doc. 16-1 at ecf pp. 10.)[5]

The facts will further show that the defendant spent much of the last 10 years in prison or jail. (*See* Exhibit A.) Indeed, it is believed that beginning in or around April 2002, the defendant spent time in a California correctional facility until approximately March of 2007 when he was paroled. He was then returned to custody in or around April 2009 to approximately February 2012 when he was discharged.[6] Similarly, he has recently been in both state and federal custody on various charges. That includes a period of incarceration stemming from an arrest by the Fort Mojave Tribal Police for resisting arrest (5 days in jail) and incarceration on federal charges, where he most recently admitted supervised release violations and was sentenced to seven months in jail. (*See* Case No. CR12-08241-001-PCT-MEA.) The defendant was not in a Tribal jail during these times, and he was not living on the Fort Mojave Indian Reservation or participating in Tribal activities during these periods of incarceration.

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[5] It is believed that the testimony will also show that the defendant does not have a right to live on the Fort Mojave Indian Reservation (*see* Doc. 16-1 at ecf p. 11), he does not have a right to a Tribal allotment on the Reservation, and he does not receive a stipend or per diem from the Tribe like Tribal members received. Similarly, based on custom, it is believed that the evidence will show that the defendant does not have the "right" to use the clan name because he is not a Tribal member and his father is not Indian.

[6] Defendant may have been paroled again during this time period, but it appears as if he was returned to prison in June 2010 until February 2012.

II. Argument.

As an initial matter, the defendant challenges the jurisdiction of this Court to decide this case. (Doc. 10 at 1:20-28.) In other words, the defendant challenges subject matter jurisdiction. (*See id.*) Because it involves a court's power to decide a case, subject matter jurisdiction can never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). However, in some instances, subject matter jurisdiction turns on contested facts. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)(citations omitted). In such a case, it is up to the fact finder to resolve the contested facts. *Id.*[7]

There is no real question that the United States has jurisdiction to charge non-natives with crimes against Native Americans occurring on an Indian Reservation under 18 U.S.C. § 1152. The issue here is whether *factually* the defendant is considered non-native for purposes of jurisdiction under Section 1152. In that regard, as discussed below, there appears to be no bright line test applicable to Native American descendants. Moreover, many of the factors courts looks at are subject to change based on behaviors by a defendant (or the failure to raise factual issues that pertain to jurisdiction).[8] The

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[7] Because the defendant was only charged with a Class B misdemeanor, a petty offense, he is not entitled to a jury trial. *Frank v. U.S.*, 395 U.S. 147, 148 (1969). Thus, this Court is the finder of fact in this case.

[8] By way of example, the United States has waived sovereign immunity under the Federal Tort Claims Act but its waiver is limited by a number of statutory exceptions. 28 U.S.C. § 2680. A court lacks subject matter jurisdiction to impose damages against the United States for those exceptions, and if a court imposed such damages the issue of subject matter jurisdiction could be raised at any time (even for the first time on appeal). *E.g.*, *Nurse v. U.S.*, 226 F.3d 996, 1000-01 (9th Cir. 2000). However, as discussed further below, the issue of Indian status is primarily factual. Indeed, in this case it is the subject of an evidentiary hearing where the Court will consider both live testimony and the parties' stipulations. Generally, while not in the context of a criminal case, the failure

import of this is that in the future, if the defendant is charged again with a crime on an Indian Reservation, depending upon the nature of the charges brought against him, a federal court could once again be faced with the issue of whether the defendant is an Indian or non-native.

The test for Indian status generally considers: "(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian."[9] *Bruce*, 394 F.3d at 1223 (citations omitted).[10] A person claiming Indian status must satisfy both prongs. *Id.* In a case brought by the Government under 18 U.S.C. § 1152, the defendant has the burden of raising his Indian status as a defense and carrying the burden of production for that issue. *Id.* at 1222-23. In such a case, Indian status is in the nature of an affirmative defense. *Id.*

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to contest jurisdictional facts constitutes an admission of those facts. *Schnabel v. Lui*, 302 F.3d 1023, 1032 (9th Cir. 2002). The point of reference to these cases is that the subject matter jurisdiction as to Loera is not necessarily "fixed" or certain as it is in the case of the limited waiver of sovereign immunity with the United States. The issue of Loera's alleged Indian status can ostensibly be re-litigated time and time again, which does not give anyone any certainty (including but not limited to the Tribal Police who have already dealt with Loera on numerous recent occasions). Moreover, Loera cannot "sleep" on his rights with the issue of his alleged Indian status, as his failure to raise jurisdictional facts or assumptions constitutes an admission of those facts. *See id*. While the defendant is raising the issue of his Indian status here, it does not appear that he has done so in his prior criminal cases.

[9] The term Indian is defined in 25 U.S.C. § 1301(4); however, the definition is unhelpful: "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."

[10] "*Bruce* supplies the relevant framework for determining whether a defendant is an Indian under §§ 1152 and 1153." *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010).

The defendant must come forward with enough evidence of his Indian status to permit trier of fact to decide the issue in his favor. *Id.* at 1223. "No court has yet specified the quantum of evidence that must be offered in order to satisfy this production burden." *Id.* Indeed, the Ninth Circuit has recognized that there is a need for a "case-by-case analysis." *Maggi*, 598 F.3d at 1083. Once the defendant meets this burden, "the government retains the ultimate burden of persuasion – or 'the obligation to persuade the trier of fact of the truth of the proposition,' – that the exception … [he] claims is inapplicable." *Bruce*, 394 F.3d at 1223 (citations omitted).

The first prong of the test only requires "'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian." *Bruce*, 394 F.3d at 1223. Because the defendant's mother is an enrolled member of the Fort Mojave Indian Tribe – her blood quantum is three-eighths Fort Mojave (Doc. 16 ¶ 3) – the defendant meets the first prong.[11] *See Bruce*, 394 F.3d at 1223.

The second prong of the test is tribal or federal government recognition of the defendant as an Indian, and it "probes whether the [alleged] Native American has a sufficient non-racial link to a formerly sovereign people." *Id.* at 1224 (citations and internal quotes omitted). "When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: '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.'" *Id.* (citations omitted).

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[11] The parties have stipulated that the Fort Mojave Indian Tribe is a federally recognized Indian Tribe. (Doc. 16 ¶ 1; *see also* Doc 10-2 at ecf p. 4.)

As discussed below, the Government believes that the defendant fails to meet his burden on the second prong. Because a person claiming Indian status must satisfy both prongs, the defendant's motion to dismiss fails. *See Bruce*, 394 F.3d at 1223 (citations omitted).

A. Loera is Not an Enrolled Member of the Fort Mojave Indian Tribe.

The parties stipulated that the defendant was denied enrollment by the Tribe in February 2006 because he did not meet the one-quarter Fort Mojave blood quantum criteria required by the Fort Mojave Indian Tribe. (Doc. 16 ¶ 6.) While not necessarily determinative, the defendant's denial of enrollment in the Fort Mojave Indian Tribe is nevertheless a very important fact in determining that the defendant should *not* be considered Native American for purposes of jurisdiction under 18 U.S.C. § 1153. *See Bruce*, 394 F.3d at 1223 (tribal enrollment is most important factor in determining tribal or federal recognition as an Indian); *see also United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.").

B. There is no evidence that Loera has been recognized, formally or informally, through receipt of assistance reserved only to Indians.

The second most important factor is "government recognition formally and informally through receipt of assistance reserved only to Indians." *Bruce*, 394 F.3d at 1223. The Ninth Circuit has not required evidence of federal recognition. *Id.* at 1224. However, there "must be some evidence of government or *tribal* recognition." *Bruce*, 394 F.3d at 1225 (original emphasis and citing, among other cases, *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996)).

Here, the Government believes that there is no evidence – certainly none presented

so far – that the defendant has been formally or informally recognized by the United States as an Indian. In that regard, there is a distinction between being recognized as an Indian and simply being recognized as a descendant of an Indian. Defendant equates being a descendant of an Indian with being an Indian, citing 25 U.S.C. § 1603(13) as support for that proposition. (Doc. 10 at 4:8-12.) While descendant status does reflect some degree of recognition, it does not carry the same weight as enrollment and is not considered determinative. *Maggi*, 598 F.3d at 1082.

Nevertheless, the Government is unaware of any evidence from the defendant that he has been approved to seek treatment at an Indian Health Services facility (as opposed to a Tribal healthcare facility). The parties have only stipulated that the defendant received medical and mental health services through the Fort Mojave Indian Health Center, which are run by the Tribe pursuant to 638 contract. (Doc. 16 ¶¶ 8-13.) While this is arguably some recognition by the Tribe of the defendant's status as a descendent, at the same time the Tribe has declined the defendant membership in the Tribe *and* has declined criminal jurisdiction over him in Tribal Court. (*Id.* ¶¶ 14, 15.) Likewise, the defendant's arguments that he has job preference and perhaps other "benefits" from the Tribe (*see* Doc 10 at 3-4) are equally unavailing because (again) the Tribe has declined the defendant membership in the Tribe *and* has declined criminal jurisdiction over him in Tribal Court. (*Id.*)[12] "A tribe's right to define its own membership for tribal purposes

[12] Many of the defendant's assertions are unsupported by citations to any apparent evidentiary support. (*See* Doc. 10 at 3-4.) By way of example, the defendant claims that as a descendant he is entitled to preference over non-Indian applicants for tribal employment; however, he concedes that enrolled tribal members receive first preference. (Doc. 10 at 3:20-25.) However, according to the Fort Mojave Human Resources' web page, job priority is given to "Fort Mojave Tribal Members, Spouse[s] of Fort Mojave Tribal Member[s], other Federally Recognized Native American Tribes, Veterans and all

has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n.32 (1978).

Moreover, it is believed that testimony at the evidentiary hearing will establish that many of the things available to descendants on the Fort Mojave Indian Reservation are also available to non-natives. For example, it is believed that literally almost anyone – including non-natives – can walk into and use the Fort Mojave Cultural Center. Similarly, it is anticipated that there will be testimony that the Recreation Center can be utilized in at least some instances by non-natives. These are not benefits reserved only for tribal members. Thus, the Court should give little or no weight to the defendant's arguments of the availability of these things to him for free. (*See* Doc. 10 at 3-4.)

While a bit unclear under which factor it falls under, the defendant argues that he was charged and incarcerated as a juvenile by the tribal court system and served ten days in the BIA jail in Peach Springs, Arizona. (Doc. 10 at 4:1-6.) Currently, there is no admissible evidence to support this assertion. However, a review of Fort Mojave Tribal records disclosed by the defendant's counsel show that the defendant was charged twice by the Tribe in 1994. On one such occasion the defendant was ordered detained for 10 days, but the sentence was suspended for 90 days probation. In the other case the defendant was referred to the Tribal Substance Abuse program for Youth Counseling or

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others." (*See* Exhibit B.) The defendant also never asserts that he has obtained any Tribal employment through his alleged preference, nor used many of the Tribal facilities that are allegedly available to him for free. (*See* Doc. 10 at 3-4.) *E.g., United States v. Cruz*, 554 F.3d 840, 848 (9th Cir. 2009)("While it is true that the BIA is permitted to give preference to Indians when making hiring decisions, [citations omitted], there is no indication in the trial record that Cruz ever received any preferential treatment on the basis of his ancestry.").

treatment. The defendant was also fined $500.00 in a 1997 case. Based on the records disclosed by the defendant from these cases, it appears there were no discussions about jurisdiction from either the Tribe or the defendant in these "juvenile" cases. Regardless, charging the defendant a few times as a juvenile, more than 15 years ago, is not dispositive of Loera's status as an alleged Indian (particularly when no one raised the issue of Tribal jurisdiction). *See Cruz*, 554 F.3d at 851 ("In this context, a showing that a tribal court on one occasion may have exercised jurisdiction over a defendant is of little if any consequence in satisfying the status element in a § 1153 prosecution.").

What is important is that it is believed that there have been no criminal charges brought against the defendant, and sustained by the Tribe, *after* the defendant became an adult (or at least for the last 10 to 15 years). Indeed, on the one occasion when he was arrested and charged under the Tribal Criminal Code, the charges were dismissed because the Tribal Court did did not recognize criminal jurisdiction over the defendant. (Doc. 16 ¶ 14.) This, of course, occurred after the Tribe had denied Loera enrollment. (*See* Doc. 15 ¶¶ 6, 14.)

It should also be noted that the Fort Mojave Tribal Code has a section that addresses subject matter jurisdiction. (Doc. 16-1 at ecf p. 40.) The Tribal Code states: "[T]he courts of the Tribe shall criminal jurisdiction over all offenses prohibited by this Code and ordinances of the Tribe." (*Id.*) The Tribal Code also specifically refers to "Section 202 of Title II, Public Law 90-0284 (82 Stat. 77) enacted by the Congress of the United States on April 11, 1968 …" (*Id.*), which is codified at 25 U.S.C. § 1302. Section 1302 refers to the exercise of a tribe's power of self-government, and with respect to criminal jurisdiction it explicitly applies to "to any person within its jurisdiction." 25 U.S.C. § 1302(a)(8). With certain recent exceptions excluded that are not applicable

here, it is well settled that Indian tribal courts do not have criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)(superseded in part by statute). While the issue of the defendant's Indian status can arguably be re-litigated again and again because it is factually based (with at least some facts that are subject to change), nothing substantial has changed with the defendant's alleged Indian status since the Tribal Court concluded that it did not have criminal jurisdiction over him on November 6, 2012 – except that he has spent even more time away from the Indian Reservation because he has been in jail for much of that time. (*See* Doc. 16 ¶ 14.)[13] Indeed, what the defendant generally points to support his alleged Indian status are things that occurred well in his past. (*See generally* Doc. 16.)

In short, the Government believes that there is no (or at least very little) evidence to support that the defendant received "services reserved only for Indians." *Maggi*, 598 F.3d at 1082 (citing *Cruz*, 554 F.3d at 846). While the defendant received and/or was eligible for some limited "benefits" available to descendants, that is not the same thing as receiving assistance available *only* to Indians. *See id.* Indeed, as discussed further below, the defendant is not entitled to any of the rights afforded to Fort Mojave Tribal members under the Fort Mojave Indian Constitution and By-Laws. (*See, e.g.*, Doc 16-1 at ecf p.

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[13] The United States Supreme Court has recognized that, while not unlimited, Indian tribes have inherent sovereignty independent of their authority arising from their power to exclude. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, among other things, Indian tribes have "the power to punish tribal offenders." *Montana v. U. S.*, 450 U.S. 544, 564 (1981). Because the Fort Mojave Tribal Court has the power to punish tribal offenders, and a trial court has jurisdiction to determine its own jurisdiction, *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 (9th Cir. 1977), the Fort Mojave Tribal Court had "jurisdiction" to determine that it had no subject matter jurisdiction of Tribal criminal charges brought against Loera.

13.) Contrary to his arguments or assertions otherwise, the defendant has not been treated by the Tribe as a member. *E.g.*, *Keys*, 103 F.3d at 761(concluding that where child was shown to have Indian blood and was treated by tribe as a member of the tribe, district court properly found that she was an Indian).

C. The defendant has not received the enjoyment of the benefits of tribal affiliation.

The third factor pertains to the enjoyment of the benefits of tribal affiliation. *Bruce*, 394 F.3d at 1223. As conceded by the Government, there is no question that the defendant is eligible and/or has received some benefits based on his status as a descendent. However, the question arises as to what exactly are the benefits of tribal affiliation? In that regard, the Government points to the Fort Mojave Constitution and By-Laws. (Doc. 16-1, Exhibit A.)

First, under its Constitution, the Fort Mojave Indian Tribe has the authority to exclude and remove Loera from the reservation. (Doc. 16-1 at ecf p. 11.) To that end, it is well settled that "the tribe has the inherent power to exclude non-members from the reservation." *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 410 (9th Cir.1976)(citing *Williams v. Lee*, 358 U.S. 217 (1959)).

Second, there are a whole host of "rights" that Loera does not have because he is not a Tribal member. (Doc. 16-1, Exhibit A.) Indeed, the defendant does not have the right to vote in Tribal elections, he is not eligible to be on the Tribal Council, he is not eligible to be appointed to a subcommittee or a commission, and he is not afforded the same "rights" as a Tribal member. (Doc. 16-1 at ecf pp. 3, 8, 10, 12, 14.) In short, while the defendant may have limited rights to certain benefits because he is a descendent, he has not shown that he has been treated as a member of the Tribe. *E.g.*, *Keys*, 103 F.3d at

761 (concluding where child was shown to have Indian blood and was treated by the tribe and her parents as a member of the tribe, the court properly found she was an Indian).

D. Defendant's alleged social recognition and participation in Indian social life is minimal under the circumstances and should not be given much weight.

The last factor concerns the defendant's social recognition as an Indian through residence on a reservation and participation in his participation in Indian social life. *See Bruce*, 394 F.3d at 1223. It is the least important of the four *Bruce* factors. *Cruz*, 554 F.3d at 848. While the ultimate evidence/testimony remains to be seen, the defendant claims he should be considered an Indian because (among other things): (1) he was raised on the reservation and has spent most of his life on the reservation; (2) his mother and son are Tribal members; (3) he participated on a Tribal basketball team and in some Tribal celebrations and rituals; (4) he has some tattoos depicting Native American culture; and (5) he has "some fluency" in the Fort Mojave language. (Doc. 10 at 4-5.)

Assuming that the defendant establishes testimony to support all of these assertions – the Government concedes that the defendant's mother and son are Tribal members (Doc. 16 ¶¶ 3, 5.) – the Court should give these things little weight. First, the evidence will show that the defendant spent much of his adult life in prison or in jail – and not a tribal jail. During those times the defendant was not living on the Fort Mojave Indian Reservation and participating in tribal life.

Second, while his mother is admittedly a Tribal member, her blood quantum is relatively low. (Doc. 16 ¶ 3.) Whether she participates in Tribal life is also unknown. The defendant also claims he is an Indian because his son is a Tribal member, which appears to largely be as a result of the child's mother's blood quantum. (*See id.* ¶¶ 5, 6.)

Regardless, the defendant has provided no evidence of how much time he spends with his son, whether he has visitation rights with or custody of his son, and whether he provides financial support for his son. There are many non-natives who have fathered children who are deemed Native Americans by their respective tribes, but it does not follow that merely fathering a Native American child makes the father an Indian too.

Third, the Government concedes that the defendant has many tattoos, some of which appear to depict Native American culture. However, the defendant has not offered any testimony or evidence that such tattoos are actually indicative of the Fort Mojave Tribal culture. Moreover, many of his tattoos appear to have nothing to do with Native American culture.

Lastly, it is believed that the defendant is not actually fluent in the Fort Mojave Indian language. The defendant may know some words or phrases, but it is not believed that he is actually fluent in the language. (*See* Doc. 10 at 4:27-28.) Indeed, he does not claim he is fluent, just that he has "some fluency." (*Id*.)

WHEREFORE, the United States respectfully requests that the Court deny the defendant's motion and any other appropriate relief.

RESPECTFULLY SUBMITTED this 18th day of April, 2013.

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s/ Paul V. Stearns

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

Luke Mulligan, Esq.

Counsel for Defendant

s/ Paul V. Stearns, AUSA
U.S. Attorney's Office