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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-cr-8209-PCT-GMS Mag. No.: 3:13-mj-04039-MEA **ANSWERING MEMORANDUM OF THE UNITED STATES**

Pursuant to Fed. R. Crim. P. 58(g)(2) and LRCrim 58.2(d), the United States of America (the "Government") hereby responds to Defendant Julian Ismael Loera's (the "defendant" or "Loera") appeal from the judgment and orders issued by United States Magistrate Judge Mark E. Aspey. (Doc. 16.)[1] For the reasons set forth below, the magistrate court's judgment (and the underlying Orders at issue) should be affirmed.

[1] "Doc." refers to the Clerk's Record filed under this case number and will be followed by the pertinent document number. "Mag. Doc." refers to the Clerk's Record in the magistrate court below, and it will be followed by the pertinent document number filed under the magistrate court's case number. "RT" refers to the Reporter's Transcript of proceedings – from the evidentiary hearings on April 19, 2013 (Doc. 5) and May 8, 2013 (Doc. 6) – and will be followed by the page numbers and, where applicable, the line numbers. For the Court's convenience, a Supplemental Excerpts of Record will also be filed, which includes the relevant docket entries from the magistrate court below.

I. INTRODUCTION

The defendant, an alleged "non-Indian," was charged with assaulting his girlfriend, an Indian, on the Fort Mojave Indian Reservation in the District of Arizona. This case involves the question of whether the defendant – who has repeatedly been denied enrollment in the Fort Mojave Indian Tribe (the "Tribe") – is an Indian for purposes of jurisdiction under 18 U.S.C. § 1152. The defendant claims he should be considered an Indian because he has numerous "Indian contacts." The magistrate court disagreed and denied the defendant's motion to dismiss. The defendant eventually pleaded guilty to disorderly conduct, but reserved for appeal the issue of his Indian status.

The magistrate court's judgment should be affirmed, as the court correctly denied the motion to dismiss after conducting in-depth hearings on the nature of the defendant's Indian contacts. There has never been a dispute that the defendant has some Indian contacts. The question is whether those contacts – including the frequency, age, and nature of the contacts – support that the defendant should be treated as an Indian for purposes of jurisdiction under 18 U.S.C. § 1152. They do not.

Here, it is undisputed that: (1) the defendant is primarily of non-Indian (Mexican) descent and does not qualify for enrollment in the Tribe; (2) the defendant has been repeatedly denied enrollment into the Tribe; (3) the Tribe has repeatedly declined to exercise criminal jurisdiction over the defendant as an adult; (4) the defendant has spent much of his adult life living off of the Fort Mojave Indian Reservation, mostly serving time in non-tribal jails or state prisons; (5) the defendant does not have the same rights and benefits under the Tribe's Constitution and By-Laws as an enrolled member; and (6) the defendant has not been treated as a *de facto* member by the Tribe. Thus, this Court should deny the defendant's appeal and respect the Tribe's decision to refer this matter to the United States for criminal prosecution.

II. STATEMENT OF THE ISSUE PRESENTED

Whether the magistrate court erred in denying the defendant's motion to dismiss based on Indian status for purposes of jurisdiction under 18 U.S.C. § 1152.

III. STATEMENT OF THE NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

On February 8, 2013, the defendant was charged by Complaint with assault under 18 U.S.C. § 113(a)(4), which at the time was a Class B misdemeanor. (Mag. Doc. 1.) It was alleged that the defendant, a non-Indian, assaulted, struck, and beat the victim, referred to herein as "R.R.," who is an Indian. (*Id.*) Jurisdiction was premised under 18 U.S.C. § 1152. (*Id.*)

The defendant filed a motion to dismiss based on his claimed Indian status. (Mag. Doc. 10.) The defendant argued that he should be considered an Indian for purposes of jurisdiction under 18 U.S.C. § 1152, thus he asserted that the magistrate court lacked subject matter jurisdiction because Section 1152 "does not extend to offenses committed by one Indian against the person or property of another Indian." (*Id.* at 1.) The Government opposed the defendant's motion to dismiss. (Mag. Doc. 19.)

On April 5, 2013, the parties stipulated to certain facts related to the defendant's motion to dismiss and for trial. (Mag. Doc. 16.) The magistrate court held hearings on the motion on two separate days, April 19, 2013 and May 8, 2013. (Docs. 5, 6.) The magistrate court issued its Order denying the motion to dismiss on July 1, 2013, and the matter was set for a bench trial on August 15, 2013. (Mag. Docs. 29, 30.)

Subsequently, the parties entered another stipulation concerning certain documents and/or information related to the jurisdictional question about the defendant's Indian status. (Mag. Doc. 31.) Those exhibits (Mag. Doc. 31-1, Exhs. A, B, & C) were admitted into evidence for purposes of any hearings and/or trial, and the magistrate court reaffirmed its earlier Order denying the motion to dismiss. (Mag. Doc. 36.)

On August 22, 2013, the parties filed a stipulation/joint motion seeking to allow the filing of a superseding Information charging the defendant with disorderly conduct (Count 1) and assault by striking/beating/wounding (Count 2). (Mag. Doc. 34.) The stipulation/joint motion was granted on August 28, 2013. (Mag. Docs. 37, 38.)

On September 4, 2013, the defendant pleaded guilty to Count 1 of the Information, which alleged a violation of disorderly conduct under state law assimilated under 18 U.S.C. §§ 13 and 1152. (Mag. Docs. 38, 40, 41.) The defendant reserved his right to appeal "this case on the sole issue of whether the defendant is an Indian for purposes of jurisdiction under 18 U.S.C. § 1152." (Mag. Doc. 41 at 3.) The plea was accepted and the judgment and commitment were issued on September 4, 2013. (Mag. Doc. 42.) The defendant's sentence was later modified to time served. (Mag. Docs. 43, 44.)

On September 18, 2013, the defendant timely filed his notice of appeal. (Mag. Doc. 45; Doc. 1.) After the defendant filed his original opening memorandum (Doc. 7), briefing was stayed while the Ninth Circuit reconsidered *en banc* the case of *United States v. Zepeda*, 742 F.3d 910 (9th Cir. 2014). (Doc. 14.) Pursuant to the Government's motion and the Court's Order, the defendant was permitted to file a substitute brief after the opinion on rehearing *en banc* in *Zepeda* was issued. (Docs. 13, 14.)

IV. STATEMENT OF THE FACTS

The magistrate court made detailed findings of fact in its initial Order denying the defendant's motion to dismiss. (Mag. Doc. 29 at 8-14, ¶¶ 1-35.) The magistrate court made additional factual findings in its Order reaffirming its initial Order. (Mag. Doc. 36 at 1-2.) While the Government will detail many of the facts that it believes are important, and it will add facts that were not included in the defendant's opening brief, the Government does not intend to recount every fact from the two days of hearings and stipulations entered into by the parties and accepted by the magistrate court.

The defendant (Loera) was 32 years old at the time of the evidentiary hearings is this case. (RT 145:22-23.) The offense at issue occurred on February 2, 2013 at Lena Michelle Holmes' residence – Holmes is Loera's aunt – which is located in the Arizona Village of the Fort Mojave Indian Reservation. (Mag. Doc. 1; RT 15:7-9, 16:23-25, 18:8-10, 45:14-19.) The victim, R.R., is an adult female Indian. (Mag. Doc. 1; RT 55-56, 179:4-13.) She is an enrolled member of the Fort Mojave Indian Tribe. (RT 60:7-9, 180:4-5.) At the time of the hearings, R.R. had five children. (RT 62-63, 180:6-10;

286:3-11.) One of those children is Loera's son, who is referred to herein as "John Doe." (RT 286:3-9.)[2] At the time of the hearings, neither R.R. nor Loera had custody of R.R.'s children. (RT 181:21-25; 284:22-23.)

The Fort Mojave Indian Tribe is a federally recognized Indian Tribe. (Mag. Doc. 16 ¶ 1.) Loera is a descendant of an enrolled member of the Fort Mojave Indian Tribe, that being his biological mother, Lydia Ruiz. (RT 129:18-19; Mag. Doc. 16 ¶¶ 2, 3.) Ruiz's degree of Indian blood as recognized by the Fort Mojave Tribe is 3/8 Fort Mojave. (RT 175:14-16; Mag. Doc. 16 ¶¶ 2, 3.) Loera's mother testified that the defendant is primarily of Mexican descent. (RT 175:21-24; *see also* RT 69:1-4, 209:15-17, 256:14-19, 257:1-7.) Loera's biological father is non-Indian (*i.e.*, Mexican). (RT 68-69, 139:23-24; 175:9-11, 242:14-16; Mag. Doc. 16 ¶ 4.) The defendant's full name, Julian Ismael Loera, is composed of names from non-Indian relatives. (RT 71:13-16.) Loera has three sisters and one brother – they do not have the same father as the defendant – none of whom are tribal members. (RT 69-70, 182:6-13.)

Loera was denied enrollment in the Fort Mojave Indian Tribe on or about February 11, 2006, because he did not meet the 1/4 Fort Mojave blood quantum criteria that is required by the Tribe. (Mag. Doc. 16 ¶ 6; *see also* RT 53:13-23, 190-91.) According to testimony by his mother, Loera was denied enrollment in the Fort Mojave Indian Tribe on two other occasions. (RT 190:14-21.) According to Loera's aunt, other family members have also been denied enrollment in the Tribe. (RT 53:21-23.) Under the express language of the Fort Mojave Indian Constitution and By-Laws, Loera does not have the same rights as an enrolled member of the Tribe. (Mag. Doc. 16-1 at 13.)

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[2] Loera's son, John Doe, is an enrolled member of the Fort Mojave Indian Tribe. (Mag. Doc. 16 ¶ 5; *see also* RT 34:16-20.) At the time of the hearings, John Doe was approximately three years old, and he did not live with either R.R. or Loera. (RT 56:10-11, 130:12-17; 181:21-25; 284-85.) Loera does not pay child support for John Doe. (RT 182:1-2; 285:2-4.) At the time of the hearings (and before), Loera's mother had custody of John Doe, and she did not live on the Fort Mojave Indian Reservation. (RT 63-64, 65:6-14, 119:9-17, 130:10-17, 157:11-14, 181:21-23.)

At the time of the hearings, Loera was unemployed; however, he has worked in the past for his step-father in a landscaping business. (RT 56:17-25, 178-79; 285-86.) The landscaping business is not affiliated with the Tribe. (RT 57:6-25, 179:1-3.) Loera's step-father is not an enrolled member of a federally recognized Indian tribe, and he too is of Mexican descent. (RT 57:6-17, 130:21-22, 243:1-2.)

Loera was born at a hospital off the Fort Mojave Indian Reservation. (RT 41:22-24, 42:8-10, 120:11-14, 145-46; 147:1-20; 246:18-23.) Loera was raised primarily by his mother, Lydia Ruiz, his aunt, Lena Michelle Holmes, and Ruiz's mother. (RT 15:24-25, 129:18-21;145:8-20, 216:13-23.) Holmes is an enrolled member of the Fort Mohave Indian Reservation, and she lives on the Fort Mojave Indian Reservation in Arizona (which is where the disorderly conduct violation occurred). (RT 36-38, 45.) When Loera was growing up, sometimes he lived off (or just outside of) the Fort Mojave Indian Reservation, but much of the time he stayed on the Fort Mojave Indian Reservation. (RT 18:19-24, 19-20, 145:8-20, 196:2-6.)

Loera is not fluent in the Fort Mojave Indian language. (RT 75:11-25, 173:16-23, 207-08, 254:18-25.) He knows some words – perhaps less than 20 – many of which he taught to himself in prison as a way to pass the time (although he is not certain that he is pronouncing them correctly). (RT 254:18-25, 255:14-21) None of Loera's immediate family members are fluent in the Fort Mojave language. (RT 75-76, 104:6-20, 136:21-22, 173:16-25, 255:1-13.)

Loera attended grade school and most of high school at public schools that were located off the Fort Mojave Indian Reservation. (RT 72:3-21, 73:18-22, 151-52, 251-52.) However, Loera briefly attended high school on the Fort Mojave Indian Reservation. (RT 251-52.) Loera was allowed to attend high school on the Fort Mojave Indian Reservation because he is a descendant of an enrolled member of the Fort Mojave Indian Tribe. (RT 252:2-4.)

When Loera was growing up, he received tutoring or educational services through the Fort Mojave Indian Tribe while he was attending school. (RT 26:12-23, 122-23, 151-

52, 196-98,) He received those services because he was a descendant of an enrolled member of the Tribe. (RT 251:14-16.) Loera has not received such services in more than 17 years. (RT 85:19-24, 152-53, 251:4-13.)

When Loera was growing up, he periodically received a clothing stipend through the Fort Mojave Indian Tribe. (RT 26-27, 153-54, 200-01, 252:5-14.) He received the stipend because he was a descendant of an enrolled member of the Tribe. (RT 154:11-25.) Loera has not received the stipend for more than 17 years. (RT 85-86, 153-54, 252:5-14.)

When Loera was growing up, he played on a basketball team through the Fort Mojave Indian Tribe, and his expenses (*e.g.*, uniforms, etc.) were covered by the Tribe when he played on the team. (RT 28:9-24, 87:4-21, 125-26, 155:8-20.) He was allowed to play on the team because he was a descendant of an enrolled member of the Tribe. (RT 127:19-22; 155:18-20.) Loera has not played on that basketball team for more than 18 years. (RT 155:8-17.)

Loera is permitted to use and/or has used other facilities on the Fort Mojave Indian Reservation – including a golf course, a beach and/or the right to launch a boat, the Recreation Center, and the Cultural Center – because he is a descendant of an enrolled member of the Tribe. (RT 128:5-16, 129:14-17, 203:9-12, 212-13, 214-15, 258:21-25, 259:8-10.) As a descendent, some of these things – for example, the golf course – are free to him. (*See id.*) However, some of these things, such as the Cultural Center and the Tribal gym, are open to anyone (including non-Indians) and have no cost associated with them. (RT 90:1-22, 253:16-23, 254:13-20, 329:19-24, 330:3-8.)

Loera is eligible to receive healthcare treatment from the Ft. Mojave Indian Health Center, which has facilities in Needles, California and Mohave Valley, Arizona. (Mag. Doc. 16 ¶ 8.) The Fort Mojave Indian Health Center is a tribal medical facility, which is operated by the Tribe pursuant to a 638 contract. (*Id.*) To be eligible for treatment at the Fort Mojave Indian Health Center, patients must provide either proof of tribal enrollment in a federally recognized Indian tribe or proof of descendancy from a

federally recognized Indian tribe. (Mag. Doc. 16 ¶ 9.) Loera is eligible to receive healthcare treatment from the Fort Mojave Indian Health Center because he is a descendant of an enrolled member of a federally recognized Indian Tribe. (*Id.*; *see also* RT 283:19-25.) Loera received healthcare treatment at the Fort Mojave Indian Health Center in Mohave Valley, Arizona on several occasions. (*E.g.*, Mag. Doc. 16 ¶ 10; *see also* RT 29:17-20.)

Similarly, Loera is (and was) eligible to receive behavioral health services from the Fort Mojave Indian Tribe Behavioral Health Department. (Mag. Doc. 16 ¶ 11.) To be eligible for treatment at the Fort Mojave Indian Tribe Behavioral Health Department, patients must provide either proof of tribal enrollment in a federally recognized Indian tribe or proof of descendancy from a federally recognized Indian Tribe. (Mag. Doc. 16 ¶ 12.) Loera is eligible to receive behavioral health services from the Fort Mojave Indian Tribe Behavioral Health Department because he is a descendant of an enrolled member of a federally recognized Indian tribe. (*Id.*; *see also* RT 283:19-25.) Loera received services from the Fort Mojave Indian Tribe Behavioral Health Department on numerous occasions (when he was out of jail or prison) between July 2, 2007 and February 23, 2010. (Mag. Doc. 16 ¶ 13.)[3]

The undisputed evidence establishes that all of the services and/or benefits that Loera receives and/or has received from the Fort Mojave Indian Tribe and from the United States are based upon the fact that he is a descendant of an enrolled member of the Fort Mojave Indian Tribe. (RT 202:7-10, 203-04, 205:7-9, 244:1-24, 251:4-16, 252:2-14, 253:1-6, 253:16-23, 254:13-17, 258:23-25, 283:23-25; Mag Doc. 16 ¶¶ 9, 12.)

Loera does not have his own residence on the Fort Mojave Indian Reservation. (RT 101:1-15, 196:10-14, 287:7-16.) At the time of the hearings in 2013, Loera had

[3] Loera testified that he took classes at the Tribe's behavioral health services facility as a condition of his state parole, starting in 2007. Thus, while he admittedly went to a tribal facility for treatment, the reason he went there was because he was ordered to do so because of a state court felony conviction. (RT 243:9-24.)

spent most of the last 10 years in state prison in California on felony assault charges. (RT 19-20, 46-49, 49:12-15, 76:23-24, 79:2-7, 158:10-20, 194:5-18, 246-47.) Loera went to prison for a drive-by shooting, which, according to his aunt, is not a part of the Fort Mojave Indian culture. (RT 77:5-20, 247:16-24.) During that time, Loera was not in a tribal jail, and he was not living on the Fort Mojave Indian Reservation. (RT 77:5-20, 158:10-24, 247:2-15.)

At the time of the evidentiary hearings in this case, Loera was in federal custody in Coconino County, where he was serving a seven-month sentence on a charge of assault that occurred on the reservation in violation of 18 U.S.C. § 111(a). (RT 49:6-8, 158-59, 263:1-12.) Loera admitted that he violated the terms of his federal supervised release, which led to the revocation of his supervised release and his further incarceration on a federal charge. (Exh. 1.)[4]

On November 5, 2012, at an arraignment for criminal charges in the Fort Mojave Tribal Court, the Tribal court dismissed charges against Loera because it did not recognize criminal jurisdiction over him because he was not an enrolled member of a federally recognized Indian tribe. (Mag. Doc. 16 ¶ 14; RT 297-99.) After the dismissal of the criminal case, Loera was given civil violations (*i.e.*, tickets or citations) by the Fort Mojave Tribal Police. (RT 299:5-14, 324-25, 328-29; *see also* Exh. 4.) That incident also involved the same alleged victim as in this case, R.R. (*Id.*)

In February 2013, Loera was sentenced to five days in jail from a misdemeanor charge of resisting arrest, which was prosecuted in the Bullhead City, Arizona Justice Court. (RT 267-69, 325-26.) Loera pleaded guilty to that charge on or about February 7, 2013. (RT 268:15-25; 269:3-13; 325-26; *see also* Exh. 5.) In that case, Loera was arrested by the Fort Mojave Tribal Police – who have Arizona Peace Officer authority

[4] With respect to that incident, criminal charges were originally filed in the magistrate court for an assault by the defendant on R.R. that occurred on the reservation. (Exh. 2.) However, that matter was ultimately resolved by a plea to a new charge that did not implicate the defendant's status as an alleged non-Indian. (Exh. 3.)

(RT 312:3-14) – but Loera was not charged tribally. (RT 267-69, 292-93, 325-26, 327-28.) Instead, he was charged by the state through the Justice Court. (*Id.*) Had Loera been a tribal member, he would have been charged under tribal law instead of state law. (RT 325:19-23.)

The Fort Mojave Tribal Police do not have authority or jurisdiction to charge non-Indians with criminal violations under the Tribal Code.[5] (RT 298-99; *see also* Mag. Doc. 16-1 at 40.) Instead, they can issue non-Indians civil violations under Tribal law, or they can refer the matter for criminal prosecution to either the state or federal authorities. (RT 299:3-4, 313:3-12; *see also* Mag. Doc. 16 ¶ 15.) The Fort Mojave Tribal Code has a section that addresses subject matter jurisdiction. (Mag Doc. 16-1 at 40.) The Tribal code states: "[T]he courts of the Tribe shall have criminal jurisdiction over all offenses prohibited by this Code and ordinances of the Tribe." (*Id.*, Section 102) 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.[6]

The Fort Mojave Tribal Police referred the instant criminal case to the United States Attorney's Office because the Fort Mojave Tribal Court ruled that it does not have criminal jurisdiction over Loera. (Mag. Doc. 16 ¶¶ 14, 15; RT 297:6-19, 298:15-20; *see also* Exh. 6.) The Fort Mojave Tribe – which includes its Tribal court, its prosecutors,

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[5] Prior to the changes to VAWA, Pub. L. No. 113-4, Sec. 204, tribal courts could not maintain criminal jurisdiction over non-Indian defendants. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)(superseded in part by statute). However, tribal courts could (and still can) maintain civil jurisdiction over non-Indian defendants. *Montana v. United States*, 450 U.S. 544, 565 (1981).

[6] 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).

and its police department – does not believe it has criminal jurisdiction over Loera because he is not an enrolled member of the Tribe. (*Id.*)

Since Loera was denied Tribal enrollment on February 11, 2006, no criminal charges against him have been sustained in the Fort Mojave Tribal Court. (*See* RT 263-70, 270: 14-19, 325:6-11.) As an adult, no criminal charges against Loera have been sustained against him in the Tribal court. (RT 176:20-22, 225-26, 263-70, 323-24, 325:6-11, 329:8-11; Mag. Doc. 16 ¶¶ 15, 16; Exhs. 1-6.) As an adult, Loera has not been sentenced on any criminal case through the Fort Mojave Tribal Court. (*Id.*)

V. STANDARD OF REVIEW

"Although jurisdictional questions are ordinarily reviewed *de novo*, when a defendant brings a motion for acquittal in order to challenge the sufficiency of the *evidence* underlying a jurisdictional element," deference is owed to the factual findings. *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009); *but see United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996)(holding that the standard of review of a trial court's decision regarding jurisdiction under 18 U.S.C. § 1152 is a mixed question of law and fact, which is reviewed *de novo*). This Court can affirm for any reason supported by the record. *See, e.g., United States v. Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010)(citing *Griffin v. Arpaio*, 557 F.3d 1117, 1121 (9th Cir. 2009)).

VI. ARGUMENT

A. The Defendant is Non-Indian for Purposes of Federal Jurisdiction.

The test for Indian status considers only two things: "(1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe." *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015)(en banc); *see also United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). A person claiming Indian status must satisfy both prongs. *Bruce*, 394 F.3d at 1223.[7]

[7] "*Bruce* supplies the relevant framework for determining whether a defendant is

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.* 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 his burden, the government has the ultimate burden of persuasion. *Bruce*, 394 F.3d at 1223.

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. *Zepeda* clarified this prong, overruling *Maggi* in part, and held that affiliation with a federally recognized tribe is relevant only to *Bruce's* second prong. 792 F.3d at 1110, 1113. The Ninth Circuit held that *Maggi* incorrectly required federal recognition under both prongs. *Zepeda*, 394 F.3d at 1110-13.

In this case, the Government conceded in the magistrate court that because the defendant's mother is an enrolled member of the Fort Mojave Indian Tribe, the defendant met the first prong. (Mag. Doc. 19 at 8:12-15.) The magistrate court correctly recognized this fact, ruling that the "Defendant has, barely, satisfied the first prong of the Bruce test." (Mag. Doc. 29 at 14:20-21.) The defendant does not challenge this portion of the magistrate court's ruling. (*See generally* Doc. 16.)

The second prong of the *Bruce* test, as modified by *Zepeda*, requires "that the defendant must have a current relationship with a federally recognized tribe." *Zepeda*, 792 F.3d at 1113, 1114. "The criteria are, in declining order of importance: (1)

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an Indian under §§ 1152 and 1153." *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010), *overruled in part by United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015)(en banc).

enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe." *Id.* Each of these criteria must be linked to a federally-recognized tribe. *Id.*

Here, the magistrate court correctly denied the defendant's motion to dismiss. (Mag. Doc. 29 at 32:17-19.) The magistrate court was correct because the Government showed at the hearings/trial, beyond a reasonable doubt, that the defendant is a non-Indian for purposes of jurisdiction under 18 U.S.C. § 1152. (*Id.* at 20:8-13.) Importantly, the Government proved that the defendant is not an enrolled member of the Fort Mojave Indian Tribe – he has been denied membership three separate times – and that his "Indian contacts" are minimal, sporadic, and for the most part old. (*E.g.*, Mag. Doc. 29 at 8, 15-20.) Moreover, the evidence established that the Tribe has repeatedly declined to exercise criminal jurisdiction over the defendant, particularly since he was denied enrollment in the Tribe in 2006. (*Id.* at 8, 14, 20; Mag. Doc. 16 ¶¶ 14, 15; Exhs. 1-6.)

As set forth further below, the defendant's arguments for reversal do not account for the declining level of importance of certain contacts and/or activities, as articulated by the Ninth Circuit in *Bruce*, 394 F.3d at 1223, and *Zepeda*, 792 F.3d at 1114. *See also United States v. Juvenile Male*, 666 F.3d 1212, 1215 (9th Cir. 2012). Additionally, as the Ninth Circuit clarified in *Zepeda*, the defendant's reliance on "old" Indian contacts and/or activities, as well as "generic" Indian contacts and/or activities like sitting in a sweat lodge, are irrelevant, as they do not support "a current relationship with a federally recognized tribe." 792 F.3d at 1113, 1114. Accordingly, for these reasons, and those set forth below, the magistrate court's judgment should be affirmed.

1. The defendant does not meet the first *Bruce* factor.

As recognized by the magistrate court, it is undisputed that the defendant is not an

enrolled member of a federally recognized Indian tribe. (Mag. Doc. 29 at 15:8-10, 19:13-16; Mag. Doc. 16 ¶ 6.) The defendant's denial of enrollment in the Fort Mojave Indian Tribe is the most important factor in determining that the defendant should *not* be considered Indian for purposes of jurisdiction under 18 U.S.C. § 1153. *Bruce*, 394 F.3d at 1223; *see also United States v. Cruz*, 554 F.3d 840, 847 (9th Cir. 2009)("As to the first and most important factor, it is undisputed that Cruz is not an enrolled member of the Blackfeet Tribe or any other tribe.").

The defendant concedes his lack of tribal enrollment in his appeal. (*See* Doc. 16 at 28.) While this factor is not determinative by itself, it nevertheless weighs heavily in favor of the Government's arguments that the defendant should not be considered Indian for purposes of jurisdiction under 18 U.S.C. § 1152.

2. The defendant does not meet the second *Bruce* factor.

Prior to the Ninth Circuit's recent clarifications in *Zepeda*, the second most important factor was "government recognition formally and informally through receipt of assistance reserved only to Indians." *Bruce*, 394 F.3d at 1223. However, the second factor, as modified by *Zepeda*, now requires "government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes." 792 F.3d at 1114.

The defendant seems to argue that *Zepeda's* modification to the second *Bruce* factor weighs in his favor (but now under the third factor) because "Mr. Loera received many benefits reserved for Indians such as free medical care …." (*E.g.*, Doc. 16 at 25-27.)[8] The undisputed evidence established that the defendant did not receive *any*

[8] Notwithstanding the defendant's argument that "Mr. Loera received many benefits reserved for Indians" (Doc. 16 at 25), the defendant argues that *Zepeda's* restated second factor is subsumed by the first factor because the "second prong has created a category populated by no benefits." (Doc. 16 at 26 n.153.) The defendant's argument is incorrect because there are several benefits that are only available to Fort Mojave Tribal members, such as the per capita distribution, eligibility to run for Tribal elections, and voting. (*E.g.*, Mag. Doc. 16-1, Exhibit A.) The magistrate court conducted two days of

assistance available only to members, or those eligible to become members, of a federally recognized Indian tribe. (Mag. Doc. 16-1 at 8-14; RT 96-97, 182-83, 237-38; 300:14-25; Mag. Doc. 29 at 13 ¶ 32; Mag. Doc. 31-1, Exh. A.) Instead, the benefits or assistance that the defendant received, including (but not limited to) medical care, were based on his status as a descendent. (*E.g.*, Mag. Doc. 29 at 8-14, 21; Mag. Doc. 16 ¶¶ 9, 12.) While it would have arguably been a bright line, descendancy is not the test. *E.g.*, *United States v. Cruz*, 554 F.3d 840, 846, 851 (9th Cir. 2009)(recognizing that "Cruz has 'descendant' status in the Blackfeet Tribe as the son of an enrolled member (his mother), which entitles him to use Indian Health Services, to receive some educational grants, and to fish and hunt on the reservation[,]" but reversing his assault conviction under 18 U.S.C. § 1153 because the government did not prove any of the *Bruce* factors). Likewise, receiving free medical care from Indian Health Services ("IHS") is not the test.[9] *See id.* This too would have arguably been a bright line, which would have given certainty to a

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hearings, and the parties submitted numerous exhibits and stipulations. The defendant had ample opportunity to present whatever evidence he wanted, but he failed to present *any* evidence that he has ever received any benefits reserved for Tribal members or those who are eligible to become tribal members. The defendant's counsel argues that he has been "unable to find any examples of benefits available to people who are eligible to be tribal members, but who are not tribal members." *Id.* To prevail on the second factor, the government does not have to prove that other federally recognized tribes sometimes relax their standards and let non-tribal members vote in elections or the like. What is important here is that the Fort Mojave Indian Tribe has not provided *any* of the benefits or assistance of actual tribal membership to the defendant. *Zepeda*, 792 F.3d at 1114. That is, as explained further below, the Tribe has not treated the defendant as a tribal or *de facto* member. *E.g.*, *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996)("Here, Keys' daughter is one-fourth Indian and, as is amply demonstrated by the magistrate judge's findings, has been treated by the Colorado River Indian Tribe and both her parents as a member of the tribe.").

[9] The defendant relies on definitions under the Indian Healthcare Act to assert he is an Indian because IHS services are available to descendant Indians. (Doc. 16 at 35, citing 25 U.S.C. § 1603(13)(A).) Again, reliance on IHS statutes and regulations is misplaced because descendant status is not the test articulated by the Ninth Circuit.

defendant of "the consequences of his crime at the time he commits it." *Zepeda*, 792 F.3d at 1113. But, again, being a descendant and/or qualifying for medical care through the IHS are not the tests articulated by the Ninth Circuit. *Id.* at 1114.

While it did not have the benefit of *Zepeda*, the magistrate court correctly ruled that the defendant did not meet the requirements of the second *Bruce* factor. (Mag. Doc. 29 at 16:1-7.) In doing so, the magistrate court stated that it appears this factor is circular, in that the court had to evaluate the defendant's "'Indian' status by looking to benefits only reserved to 'Indians.'" (*Id.* at 16:27-28.) The magistrate court then asked rhetorically, "What definition is the Court to look to in determining what benefits are reserved solely for 'Indians?'" (*Id.* at 16 n.7.) The Ninth Circuit's clarification of the second factor eliminates the circular reasoning – at least in this case – because there are benefits or assistance in the Fort Mojave Tribe which are reserved specifically for members. Those benefits include being eligible to run for Tribal Council, appointment to committees or commissions, Tribal voting rights, and a stipend or per capita monetary distribution from the Tribe – none of which the defendant was eligible for or received. (*E.g.*, Mag. Doc. 16-1 at 8-14; RT 96-97, 182-83, 237-38; 300:14-25; Mag. Doc. 29 at 13 ¶ 32; Mag. Doc. 31-1, Exh. A.)

Accordingly, notwithstanding the slight modification to the second *Bruce* factor, the magistrate court's conclusion was correct that the defendant did not satisfy the second factor of the second prong of *Bruce*. (Mag. Doc. 29 at 16:1-7.) In that regard, the undisputed evidence establishes that the defendant does not satisfy – whatsoever – the first two factors of the second prong of *Bruce*. It is not a question of burden shifting as the defendant argues (Doc. 16 at 27-29); he simply does not meet the first two factors articulated by *Bruce* and clarified by *Zepeda*.

3. The defendant does not meet the third *Bruce* factor.

The third *Bruce* factor, as clarified by *Zepeda*, requires "enjoyment of the benefits of affiliation with a federally recognized tribe." *Zepeda*, 792 F.3d at 1114. As to the third factor, the magistrate court correctly recognized that the "Defendant produced

evidence that he received benefits reserved to descendants of members of the Fort Mojave Indian Tribe[,]" but that those benefits were as a result of his mother's "political affinity" with the Tribe and not the defendant's affiliation with the Tribe. (Doc. 29 at 16:8-20.) The magistrate further recognized that "Defendant has enjoyed some benefits of tribal affiliation." (*Id.* at 19:16-20.)

In a follow up order issued by the magistrate court after the parties had stipulated to the admission of additional evidence (Mag. Doc. 31), the court "acknowledged in its prior Order [Mag. Doc. 29], and the Government conceded likewise, that Defendant might be eligible to receive some services from the Indian Health Services." (Mag. Doc. 36 at 2:3-6.) However, this acknowledgment did not change the magistrate court's prior analysis. (Mag. Doc. 36 at 2:6-7.) The magistrate court held that, "after balancing all the factors in the Bruce test, … the government has met its burden of proof and shown beyond a reasonable doubt that Defendant is a non-'Indian'." (Doc. 29 at 20:8-13.)

In his appeal, the defendant basically argues that because he received healthcare and behavioral health services from IHS and the Tribe as both a child and as an adult, he should be treated as an Indian for purposes of criminal jurisdiction. (*See* Doc. 16 at 31-37.) Citing no authority, the defendant states: "All of these services are reserved for Indians and Mr. Loera was able to utilize them because of his affiliation with the Fort Mojave Indian Tribe." (Doc. 16 at 31.) He then goes on to show that the qualifications to receive such services include "proof of descendency from a member of a federally recognized Indian Tribe," and the defendant states that he "is eligible to receive healthcare treatment from the Fort Mojave Indian Health Center because he is a descendant of an enrolled member of a federally recognized Indian tribe." (*Id.* at 32.) The defendant also argues that he is able to use certain tribal facilities for free, such as the tribal golf course, the recreational facilities, and the boat launch. (Doc 16. at 38.) Similarly, the defendant argues that as a child he received tutoring services, he participated in a breakfast/lunch program, and he attended summer classes at the Tribal Cultural Department. (*Id.* at 38-39.)

As it did in the magistrate court below, the Government concedes that the defendant is eligible for some benefits or assistance through the Fort Mojave Indian Tribe and IHS. (*E.g.*, Mag. Doc. 16 ¶¶ 8, 13.) However, as correctly recognized by the magistrate court (Mag. Doc. 29 at 16:4-7), there is a distinction between being recognized as an Indian and simply being recognized as a descendant of an Indian. The defendant equates being a descendant of an Indian with being an Indian. (*E.g.*, Doc. 16 at 33, 35.) 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 ("While descendant status does not carry similar weight to enrollment, and should not be considered determinative [citation omitted], it reflects some degree of recognition."); *but see United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011)("we conclude that because LaBuff frequently received healthcare services on the basis of his status as a descendent of an enrolled member, he 'enjoyed' the benefits of tribal affiliation …").

The evidence established via stipulation and at the evidentiary hearings overwhelmingly supports the conclusion that all of the benefits the defendant has received (or that he is eligible for) from the Tribe, as well as from IHS, are based on his status as a descendant of an enrolled member of the Fort Mojave Indian Tribe. (Mag. Doc. 16 ¶¶ 8-13; RT 254:13-17, 283:19-25; *see also* Doc. 29 at 16:8-11.) While this is some recognition of the defendant's status as a descendent, the Tribe has repeatedly declined him membership in the Tribe *and* has declined criminal jurisdiction over him in Tribal court. (*E.g.*, Mag. Doc. 16 ¶¶ 6, 14, 15; Exh. 6; RT 190:14-21.) "A tribe's right to define its own membership for tribal purposes 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). "Indian tribal identity is political rather than racial, and the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians." *Means v. Navajo Nation*, 432 F.3d 924, 934 (9th Cir. 2005). The evidence in this case establishes that the defendant is not a *de facto* member of the Fort Mojave Indian Tribe, and the Tribal Court has clearly indicated that the defendant is not

subject to its criminal jurisdiction. (Mag. Doc. 16 ¶¶ 14, 15; *see also* Exhs. 2-6.) Those decisions by the Tribe should be respected or, at the very least, given significant weight.

The evidence also supports the conclusion that many of the benefits available to descendants on the Fort Mojave Indian Reservation are also available to non-Indians. For example, almost anyone – including non-Indians – can walk into and use the Fort Mojave Cultural Center for free. (RT 24:16-21, 329-30.) Likewise, non-Indians may use the Tribal gym, beach, parks, and library. (RT 90:1-22, 177-78, 330-32.)[10]

In addition, the defendant points to numerous activities in which he claims to have participated, but the bulk of these things occurred more than 15 years ago. (*E.g.*, RT 24:5-7, 82:8-12, 83:1-17, 156:19-23.) *Zepeda* clarified that a defendant's relationship with the federally recognized tribe must be current. 792 F.3d at 1113. Much of the evidence that the defendant presented to the magistrate court concerned contacts and/or things he did as a child. (Doc. 16 at 38-39; *see also* Mag. Doc. 29 at 8-14 ¶¶ 5, 6, 13-17, 21.) *Zepeda* makes clear that all of these "old" contacts are now irrelevant; otherwise, "a defendant could not 'predict with certainty' the consequences of his crime at the time he commits it." *Zepeda*, 792 F.3d at 1113.

Furthermore, while the defendant has at sporadic times taken advantage of the benefits of being a descendant, merely using those benefits is not the same as obtaining benefits through a tribal affiliation. Obtaining benefits and/or services via a tribal affiliation suggests more of a cooperative arrangement as opposed to benefits that are obtained when desired through an alleged entitlement. *E.g.*, Black's Law Dictionary 54 (5th ed. 1979)(The term affiliation "[i]mports less than membership in an organization, but more than sympathy, and a working alliance…. It includes an element of

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[10] As recognized by the magistrate court, the reason that the defendant is able to use the fee-based Tribal facilities for free is based on his mother's political affiliation with the Tribe – not his own. (*See* Mag. Doc. 29 at 11 ¶ 21, 16:15-20.) The same is true for the services the defendant obtained as a child. (*See id.* at 16:18-20.)

dependability upon which the organization can rely…"). The evidence adduced in this case supports that the defendant has not "affiliated" himself with the Tribe to obtain benefits. Rather, the evidence supports that he occasionally takes advantage of benefits from the Tribe – based on his status as a descendant and his mother's affiliation with the Tribe – when it is convenient to him. (*E.g.*, RT 212-13, 258-59.) Further, as repeatedly shown, the defendant creates problems for the Tribal police and courts as opposed to a working alliance. (*E.g.*, Mag. Doc. 16 ¶¶ 14, 15; Exhs 2-6.) The evidence clearly supports that the Tribe does not want an "affiliation" with the defendant. (*See* Mag. Doc 16 ¶¶ 6, 14, 15; Exhs. 5-6.)

Lastly, the defendant's appeal fails to address the undisputed evidence that he is not entitled to any of the rights afforded to Fort Mojave Tribal members under the Tribe's Constitution and By-Laws. (*E.g.*, Mag. Doc. 16-1, Exh. A.) Among other things, the defendant is not entitled to run for Tribal Council, he cannot vote in Tribal elections, and he is not entitled to receive a stipend from the Tribe that is generated from the profits of the various tribal businesses. (*Id.*; *see also* RT 97:11-24, 182-83, 237-38, Mag. Doc. 16-1 at 6, 8, 10, 11.) Moreover, as recognized by the magistrate court (Doc. 29 at 19-20), unlike a tribal member, the defendant can be removed and excluded from the Fort Mojave Indian Reservation. (Mag. Doc. 31-1, Exh. A; RT 300-01.)[11] 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)); *see also Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989)(same).

Accordingly, the defendant does not meet the third clarified *Bruce* factor.

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[11] The defendant points out that the "Tribe has never excluded Mr. Loera." (Doc. 16 at 40.) While this is true – at least so far – it is also true that the Tribe has decided not to exercise criminal jurisdiction over him. (Mag. Doc. 16 ¶¶ 14, 15.) The defendant does not explain why that decision should be given less weight than not excluding him.

4. The defendant does not meet the fourth *Bruce* factor.

The last factor of the second prong concerns the defendant's social recognition as an Indian through residence on a reservation and 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. In short, the defendant claims he should be considered an Indian for purposes of federal jurisdiction because: (1) he was raised on the reservation and has spent most of his life on the reservation; (2) his mother, aunt, son, and the victim of the assault/disorderly conduct are tribal members; (3) he has played shinny; (4) he participated on a tribal basketball team and in some tribal celebrations and rituals; (5) he was housed with Indians and participated in a sweat lodge ceremony while in prison; (6) he has numerous tattoos depicting Native American culture; and (7) he was prosecuted by the Tribe as a juvenile. (Doc. 16 at 39-49.)

While it is true that the defendant has some connections to Indian culture and socialization, it is also true that at the time of the hearings/trial the defendant had spent most of the prior 10 years in prison or jail. (RT 19-20, 46-49, 49:12-15, 76:23-24, 79:2-7, 158:10-20, 194:5-18, 246-47.) Importantly, the defendant was not in an Indian prison or jail for any of that time period. (*See id.*) The magistrate correctly recognized this fact, stating: "By virtue of his own actions, i.e., commission of criminal acts, Defendant has caused his removal from and prevented his return to the reservation for most of his adult life." (Mag. Doc. 29 at 18-19.)

Additionally, although the defendant – who is a convicted felon (RT 246-47) – testified that he primarily stays on the Arizona side of the Fort Mojave Indian Reservation when he is not in jail or prison, his driver's license (issued in October 2012) indicated that he lived at an address that was off of the reservation. (RT 249-50.) The defendant also admittedly gave his state parole officer a different address in California that he only used for "purposes of parole." (RT 194:5-21, 248-49.) Moreover, it is undisputed that the defendant has never had his own residence on the Fort Mojave Indian Reservation. (*E.g.*, RT 287:7-16.) Thus, as correctly recognized by the magistrate court

(Mag. Doc. 29 at 19-20), the defendant's connection to the reservation, particularly since he has been an adult, is minimal at best. It also should be noted that credibility issues as to where the defendant lived are reviewed with deference to the fact finder, which in this case was the magistrate court (Mag. Doc. 29 at 4-5, n.2). *Cruz*, 554 F.3d at 843-44.

This Court should also give little weight to the defendant's connection to family members and his former girlfriend, R.R., who are tribal members. (*See* Doc. 16 at 41.) First, the defendant's mother resides off the Fort Mojave Indian Reservation, and she is married to a non-Indian. (Mag. Doc. 16 ¶ 3; RT 51-52, 57:6-17, 130:21-22, 243:1-2.) While the defendant raises connection with his aunt and cousins (Doc. 16 at 41), the defendant leaves out reference to his sisters, who (like him) are not enrolled members of the Fort Mojave Indian Tribe. (RT 69, 144:8-16, 182:6-13.) Their father, like the defendant's father, was non-Indian. (*Id.*; Mag. Doc. 16 ¶ 4.)

Second, while the defendant has fathered a child who is an enrolled member of the Tribe, the child's enrollment appears to be primarily based on his mother's blood quantum as opposed to the defendant's. (*See* Mag. Doc. 16 ¶¶ 5, 7.) Regardless, the defendant has spent very little time with his son, he does not have custody or even pay child support for his son, and the defendant's son lives off the reservation. (*E.g.*, RT 65:18-21, 158:2-16, 284-85.) There are many non-Indians who have fathered children who are deemed Indians by their respective tribes, but it does not follow that merely fathering an Indian child makes the father an Indian too. (*See* RT 66-67.)

Similarly, the defendant's reliance on his former girlfriend's tribal status is misplaced. (*E.g.*, Doc. 16 at 41.) Dating and assaulting (or disturbing the peace of) a person who is an Indian does not make the defendant an Indian. But more importantly, none of the assaults against R.R. by the defendant were criminally prosecuted in Tribal court. (*E.g.*, RT 225-27, 269-70, 323-29; Mag. Doc. 16 ¶¶ 14, 15; Exhs. 2-4, 6.) What is absolutely clear from this case is that the Tribe has not asserted and maintained criminal jurisdiction against the defendant for his assaults on R.R. (*See id.*) This does not support the defendant's claim of recognition by the Tribe, whether it be social or otherwise.

The defendant also claims tribal recognition through his participation in certain tribal activities, such as playing on the tribal basketball team, participating in tutoring and nutrition services from the Tribe, attending the Fort Mojave days, participating in funeral services, participating in "singing bird" with his cousins, and playing the game of shinny. (Doc. 16 at 41.) However, the defendant does not really tell us how the magistrate court erred. Instead, he just states that "the magistrate judge dismissed all of this evidence of Mr. Loera's social acceptance as an Indian, focusing exclusively on the fact that the tribe had rejected his application for enrollment." (*Id.* at 41.) As recognized by the magistrate court – albeit for a different *Bruce* factor – the descendant benefits from the Tribe's perspective were based on the defendant's mother's affiliation with the Tribe and not the defendant's "affinity with the tribe." (Mag. Doc. 29 at 16:15-20.) Moreover, despite the defendant's claim otherwise, the above-described evidence was considered by the magistrate court. (*E.g.*, Mag. Doc. 29 ¶¶ 13-16, 21, 34 & pp. 18-19.) The reality is that the parties had numerous stipulations (*e.g.*, Mag. Docs. 16, 31), and there were two days of evidentiary hearings in front of the magistrate court. (Mag. Doc. 29 at 3:13-15.) Just like the defendant has not acknowledged every "fact" made in those hearings in his appeal (*e.g.*, RT 140:1-17), the magistrate court did not regurgitate every fact in its analysis. That said, it is clear that the magistrate court completed a thorough analysis of the law, as well as detailed findings of fact. (*See generally* Mag. Docs. 29, 36.)

With respect to his participation on the tribal basketball team and in the tutoring and nutrition programs, it has been well over 15 years since the defendant participated in such activities. (RT 251:8-16.) The defendant was allowed to participate in these things because he was a descendant of a tribal member, not based on his own affiliation with the Tribe. (*E.g.*, RT 254:13-17.) It also should be noted that the defendant did not, for the most part, attend a tribal school. Instead, he attended public schools, which were located off the Fort Mojave Indian Reservation. (RT 103-104, 198-200.)

The defendant argues that he has attended the Fort Mojave days and participated in the singing bird song with his cousins. (Doc. 16 at 41.) The record is clear that these

activities were infrequent and that non-Indians can participate in such activities. (*E.g.*, RT 23-24, 84-85, 137:1-12, 141-42, 176-77, 213:10-21, 218:21-25, 219:1-11, 287:20-22, 288:11-14.) Regardless, the defendant was not permitted to participate in the pageant when he was growing up because he was not an enrolled member of the Tribe. (RT 100-01, 177:7-16, 219:1-8.) Moreover, because he is not a Tribal member, he is traditionally not supposed to use the family's clan name. (RT 178:6-8.) These facts do not show social recognition by the Tribe; they show exclusion. *E.g.*, *LaBuff*, 658 F.3d at 878-79 (recognizing that voting and participating in tribal activities are important for evaluating the fourth factor, although not precluding "social recognition, especially where the defendant has lived his entire life on the reservation.").

With respect to the game of shinny, the record shows that the defendant has played it infrequently – last playing it over 17 years ago – and he does not really even know the rules. (RT 84:2-12, 142:5-6, 259-60.) The record is also clear that non-Indians participate in the game too. (RT 330-31.) Similarly, as correctly recognized by the magistrate court, participation in funeral services is not a uniquely tribal activity. (Mag. Doc. 29 at 19:7-9; RT 138:1-22, 174:3-12.) The record is clear that both Indians and non-Indians participate in such services on the Fort Mojave Indian Reservation. (RT 17:3-12, 106-07, 138:14-21, 230-31.)

The defendant also claims that he self-identifies as an Indian, which he argues the magistrate court ignored. (Doc. 16 at 42-44.) The defendant argues that he was housed with Indians while in prison, he participated in sweat lodge ceremonies while in prison, and he has numerous tattoos depicting Native American culture. (*Id.* at 43-44.) However, the magistrate court addressed these very things in its findings of fact. (Mag. Doc. 29 at 8-14.) The magistrate court also correctly recognized that "[p]articipating in a sweat lodge ceremony while incarcerated, a ritual not considered to be part of Fort Mojave Indian religion or culture, is not a tribal activity." (Mag. Doc. 29 at 19:9-12; *see also* 190:2-13, 212:3-10.)

Furthermore, while the defendant apparently participated in some "Indian" ceremonies while in state custody, he has not participated in such ceremonies since being released from prison. (RT 55:1-5, 258:2-7.) Moreover, how the defendant was housed while he was in state prison in California – *i.e.*, whether he was housed with Indians or non-Indians – does not support his social recognition by a federally recognized Indian tribe. It simply supports a decision made by the California state prison system on how best to deal with the inherent violence in its prisons. (*See* RT 210-11.) There is also nothing in the record to support the tribal affiliation of those persons that the defendant was housed with or how many of them were non-Indian. (*E.g.*, RT 208:20-25, 211:10-11, 257:14-24.) In summary, the "facts" to which the defendant points do not support a current relationship with a federally recognized tribe. *Zepeda*, 792 F.3d at 1113.[12]

With respect to the defendant's tattoos, there is no question that he has many of them. (Mag. Doc. 16 ¶ 18; Mag. Doc. 16-1, Exh. C.) However, the defendant obtained the majority of his tattoos while in state prison in California. (RT 92:13-17, 270:21-25, 272:15-17.) The defendant, who admittedly is not an expert on Native American art, designed them himself. (RT 274-76.) But many of his tattoos do not depict Native American culture. (*E.g.*, RT 92:1-12, 276-79.) Indeed, as recognized by the magistrate court, he has tattoos of Pamela Anderson and Christina Aguilera, who are both well known entertainers. (Mag. Doc. 29 at 11:5-12; *see also* RT 92:1-12, 240-42.) The defendant also has a tattoo of his sister, who is not an enrolled member of the Fort Mojave Indian Tribe. (RT 69-70, 92:3-4, 242:7-9, 278:16-22.) Furthermore, anyone can get a tattoo of just about anything. As such, the defendant's tattoos should be given very little, if any, weight. While they arguably support the defendant's alleged self-identification as an Indian, and perhaps his acceptance in prison culture (where tattooing

[12] The defendant also argues that "the uncontested evidence established that Mr. Loera has social acceptance by the Fort Mojave Tribe." (Doc. 16 at 41.) This argument is without merit. The only witnesses the defendant called, in addition to himself, were his mother and his aunt. They cannot speak for the entire Tribe. (*See, e.g.*, RT 33-34.)

is common or is just something to do), they do not truly support his social acceptance in the Fort Mojave Indian Tribe.

The defendant lastly argues that he was prosecuted criminally by the Tribal court as a juvenile. (Doc. 16 at 44-49.) In large part, the defendant relies on the testimony of two Tribal police officers – Sgt. Matthew Jenkins and Sgt. Craig Anderson, who at different points acted as the Tribal prosecutor – in an attempt to rebut the magistrate court's conclusions that the juvenile proceedings were civil in nature similar to that of 18 U.S.C. §§ 5031, *et seq*. (*Compare* Doc. 16 at 45, 48; *with* Mag. Doc. 29 at 18 n.9; *and* Mag. Doc. 36 at 2:1-3.) However, the defendant takes the officers' testimony somewhat out of context when they allegedly explained "that, in practice, only Native American juveniles are prosecuted for violations of the tribal code and given sentences of incarceration or probation." (Doc. 16 at 48.)

Sgt. Jenkins, who is not an attorney, was less than certain whether juvenile proceedings were considered criminal or civil in nature. (RT 305:21-23, 307-10.) Sgt. Anderson, who also is not an attorney, stated it was sometimes difficult to tell who is Native American (when taking enforcement action on the reservation). (RT 311:21-22, 313:18-20.) Admittedly, Sgt. Anderson testified that he did not believe he could proceed criminally against a juvenile who was not a tribal member. (RT 334:12-21.) More importantly, though, Sgt. Anderson explained the defendant's various juvenile infractions at the second evidentiary hearing. (RT 316-322.) Sgt. Anderson testified that out of all of the defendant's juvenile "charges," only one sought transfer to the criminal court, and that transfer request was denied. (RT 320-21.) It is also important to note that all of the questions posed to Sgt. Jenkins and Sgt. Anderson were done without the benefit of their review of the Tribe's Children's Article. (*See* RT 349-50.) That was supplied to the magistrate court by the parties, and became part of the record, only after the second evidentiary hearing. (Mag. Doc. 31; *see also* Mag. Doc. 36.) Thus, the "evidence" cited by the defendant to rebut the magistrate court's carefully considered decision is really just speculation by the officers. (*See* Doc. 16 at 45, 48.)

Nevertheless, the evidence does establish that the defendant was arrested, cited, and/or adjudicated as a juvenile on several occasions by the Fort Mojave Indian Tribe. (RT 260-62, 316-23; Doc. 17 at 3-5; Doc. 19 at 3-10.) This includes incidents – which occurred more than 15 years ago – where the defendant was placed on juvenile probation and an incident where the defendant was housed in a juvenile facility in Peach Springs, Arizona. (*Id*.) However, in many of the cases referenced by the defendant, the charges were dismissed or the defendant was simply fined by the Tribal Court. (*Id.*) Thus, these incidents should be given little, if any, weight. *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.").

Testimony at the evidentiary hearing also established that many of the defendant's juvenile charges were considered civil infractions from the outset. (*E.g.*, RT 316-23.) Importantly, there was no evidence presented by the defendant that he has a "criminal history" – at least in the sense of an actual criminal conviction – from his conduct as a juvenile. (*See* Doc. 17 at 3-5; Doc. 19 at 3-10.) Again, the testimony established that on one occasion the Tribal court denied a request to transfer the defendant's juvenile proceeding to the criminal court. (RT 320-21.) This in itself supports the magistrate court's conclusion that the defendant's juvenile arrests by the Tribe are not considered criminal. (Mag. Doc. 29 at 18 n.9; *see also* Mag. Doc. 36 at 2:1-3.)[13]

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[13] The defendant also argues "it would not be consistent with the principles of constitutional law or federal Indian law for a tribal court to be able [to] incarcerate non-Indian juveniles when it cannot incarcerate non-Indian adults. (Doc. 16 at 48.) As recognized by the defendant, Indian status is an affirmative defense. (*See id.* at 20.) There was no evidence presented that the Tribe adjudicated the defendant as a juvenile knowing he was not an Indian for purposes of tribal jurisdiction. (RT 316-23.) Regardless, it is undisputed that as a purely legal matter the defendant's juvenile infractions were considered civil in nature under the Tribal code, which was correctly recognized by the magistrate court. (Mag. Doc. 29 at 18 n.9; Mag. Doc. 36 at 2:1-3.) In fact, even the defendant admits that the Tribal code "characterize[s] the juvenile

In summary, the magistrate court's findings on the defendant's juvenile record were thoughtful, detailed, and ultimately correct. (Mag. Doc. 29 at 17-18 & n.9; Mag. Doc. 36.) The record before the magistrate court was supplemented through a stipulation of the parties after the court entered its original order denying the motion to dismiss. (*Compare* Mag. Doc. 29, *with* Mag. Docs. 31, 36.) Included within the additional documents presented to the magistrate court was the Fort Mojave "Children's Article." (Mag. Doc. 31-1, Exh. B.) The Children's Article supports the magistrate court's findings (Mag. Doc. 29 at 18 n.9; Mag. Doc. 36 at 2:1-3) that the defendant's juvenile violations were not considered criminal under the Tribe's code. *See also* 25 C.F.R. § 11.902. Indeed, there is a section under the Children's Article permitting transfer of a juvenile matter to the jurisdiction of the criminal court. (Mag. Doc. 31-1 at 33, Section 20; *see also* RT 320:20-25, denying request to transfer one of the defendant's juvenile case to criminal court.) The defendant presented no evidence that any of his juvenile violations were ever transferred the Tribal criminal court. *See* 25 C.F.R. § 11.907. In that regard, the defendant was not "convicted under the jurisdiction of the tribal courts[]." *LaBuff*, 658 F.3d at 879.

The undisputed evidence establishes that since the defendant was denied tribal enrollment on February 11, 2006, no criminal charges against him have been sustained in

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proceedings as civil in nature." (Doc. 16 at 48.) Moreover the *Bruce* factors were articulated or clarified in 2005. *Bruce*, 394 F.3d at 1224. The defendant's juvenile incidents occurred from about 1994 to 1998. (Doc. 17 at 3-5; Doc. 19 at 3-10.) Regardless, these "old" juvenile proceedings, which happened more than 15 years ago, are irrelevant in light of *Zepeda's* clarification that *Bruce's* second prong requires "a current relationship with a federally recognized tribe." 792 F.3d at 1113. "If a relevant time for determining Indian status were earlier or later, a defendant could not 'predict with certainty' the consequences of his crime at the time he commits it." *Id.* In this case, the defendant was on notice that the Tribe did not consider him to be an Indian for purposes of criminal jurisdiction when he was charged in February of 2013, as the Tribal police had previously referred another case to the U.S. Attorney's Office involving the same victim. (Exhs. 1-3; *see also* Exh. 6.)

the Fort Mojave Tribal Court whatsoever. (*E.g.*, RT 323-24; Mag. Doc. 16 ¶¶ 14, 15; Exh. 6.) Of the defendant's recent Tribal arrests, two were initiated in federal court (including the one at issue here) and one was initiated and resolved in state court. (*E.g.*, RT 323-29; Exhs. 1-6.) Prior to that, the defendant was convicted and sentenced to prison in the state of California. (RT 158:10-20, 194:5-18.) The record clearly shows that the Tribe does not wish to exercise criminal jurisdiction over the defendant (*e.g.*, Mag. Doc. 16 ¶¶ 14, 15; RT 297-98; Exh. 6.), which does not support the defendant's arguments that he has been socially recognized by the Fort Mojave Indian Tribe. The record also establishes that many of the above-referenced "facts" do not support a (1) current relationship (2) with a federally recognized tribe. *Zepeda*, 792 F.3d at 1113.

Accordingly, for the foregoing reasons, the defendant's argument that "[u]ncontroverted evidence established that Mr. Loera met the fourth factor of the second prong of the *Bruce* test" is incorrect. (Doc. 16 at 39.) There is no bright line as the defendant suggests. This was properly recognized by the magistrate court, which found that it was a "close issue." (Mag. Doc. 29 at 19-20.)

B. <u>The Magistrate Court Did Not Incorrectly Shift the Burden.</u>

The defendant argues that the magistrate court incorrectly shifted the burden onto him to prove that he was an Indian. (Doc. 16 at 27-29.) From a practical standpoint – with how the evidence in this matter was presented and to whom – this argument is without merit.

Initially, the defendant had the burden of production on both prongs of the test for Indian status. *Bruce*, 394 F.3d at 1223. The magistrate court correctly recognized this at the beginning of the evidentiary hearings when it allowed the defendant's counsel to go first 'as it was his motion.' (RT 5:2-21; 6:2-6; *see also* RT 223:24-25.) At that point, no orders had been issued and the magistrate court had not decided that the defendant had "met his burden of proof by a preponderance of the evidence that Defendant is 'Indian.'" (Mag. Doc. 29 at 14:8-12.) Thus, there was no improper burden shifting, as it was clearly the defendant's burden of production at that point.

Additionally, this matter was heard (and/or tried) before a magistrate judge. (*See* Mag. Doc. 29 at 4 n.2.) Thus, while the proceedings were arguably bifurcated between the "evidentiary" hearings and the trial, the defendant had an opportunity to put on all the evidence he desired on the issue of his Indian status. (*See* RT 295:6-7.) That included additional evidence submitted by way of stipulation after the evidentiary hearings. (Mag. Docs. 31, 36.) The only evidence that was not presented by the defendant – which was done by agreement of the parties' counsel – pertained to the alleged assault. Given that the matter was being tried before a magistrate judge instead of a jury, there was no need to re-present the same evidence over at "trial." (Mag. Doc. 29 at 4 n.2.) For all practical purposes, as the magistrate court correctly recognized in its Order, the trial started at the beginning of the evidentiary hearings. (*Id.*.)

Importantly, the defendant never requested an opportunity to put any additional evidence into the record – other than the stipulation of the parties that was filed on August 2, 2013, which was submitted after the magistrate court had issued its order denying the motion to dismiss. (*See* RT 336-50; Mag. Docs. 29, 31, 36.) The defendant – who was represented by counsel, had the opportunity to present witnesses and evidence, to cross examine witnesses, to testify, and to present a vigorous defense – got all the process he was due. *E.g., Rock v. Arkansas*, 483 U.S. 44, 51 (1987)("A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense* – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.")(citations omitted). The defendant just does not like the result, which does not support a constitutional violation.

With respect to the specific examples of burden shifting, a brief look at those passages reveals that the defendant's arguments are incorrect. The defendant takes issue with the magistrate court's statement that the "Defendant has not established that he received benefits from the federal government reserved only to Indians." (Doc. 16 at 28-29, citing Mag. Doc. 29 at 16:5-7.) The magistrate court's point was that looking at

benefits "reserved solely for Indians" to determine Indian status – without a starting point as to who is an Indian – is circular. (Mag. Doc. 29 at 16 n.7.) The magistrate court's observation in that regard was correct. *E.g.*, *LaBuff*, 658 F.3d at 877 ("Congress has not defined "Indian" as used in §§ 1152 and 1153."). The Government's argument has been and is that the defendant has not been treated as an Indian. Rather, he has been treated as a descendant of an Indian, which is not the test. (*See*, *e.g.*, Mag. Doc. 19 at 10:2-8.) The magistrate court essentially agreed with the Government's argument – including the evidence adduced by the Government (*e.g.*, RT 251:4-16; 252:2-14; 253:1-6; 253:16-23; 254:13-17; 258:23-25; 283:23-25; Mag. Doc. 16 ¶¶ 9, 12) – noting that the defendant only "presented evidence he received government assistance provided to the descendants of Indians." (Mag. Doc. 29 at 16:4-5.) That is not burden-shifting; it was a thoughtful examination of the evidence and the arguments. Moreover, the defendant's argument has been mooted by *Zepeda's* clarification of the second *Bruce* factor, which now requires "government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes." 792 F.3d at 1114. As discussed above, it is undisputed that the defendant has never received assistance available only to members or those eligible to become members, such as the Tribe's per capita distribution. (*E.g.*, RT 96-97, 182-83, 237-38.)

The defendant also takes issue with the magistrate court's conclusion that the "Defendant has not established sufficient, current, social recognition as an Indian through residence on a reservation and participation in Indian social life." (Doc. 16 at 29, citing Mag. Doc. 29 at 19:22-25.) The defendant argues that it was "error for the magistrate judge to place the burden on Mr. Loera to prove this factor, rather than on the government to disprove it." (*Id.* at 29.) This argument is without merit as the very evidence the magistrate court then refers to in its Order was the evidence adduced by the Government about what rights the defendant does not have and/or has not exercised, as well as the fact that the defendant "has never maintained his own residence on the

reservation." (Mag. Doc. 29 at 19-20.) To that end, it is undisputed that: (1) the defendant has never maintained his own residence on the reservation (RT 287:7-16); (2) he can be excluded and removed from the reservation by the Tribe (Mag. Doc. 31-1, Exh. A); (3) he is ineligible to run for tribal office or vote in tribal elections (Mag. Doc. 16-1 at 8, 12, 14); (4) the Tribe has repeatedly refused to recognize him as a member (Mag. Doc. 16 ¶ 6; RT 190:14-21); and (5) the Tribal court has decided not to exercise jurisdiction over the defendant due to his status as a non-member (Mag. Doc. 16 ¶¶14, 15; Exh. 6).[14] Again, this was not burden-shifting by the magistrate court. It was reliance of evidence adduced by the Government. (Mag. Doc. 29 at 19-20.)

Lastly, the magistrate court's ultimate conclusion was based on a "balancing [of] all the factors." (Doc. 29 at 20:8-9.) It is now clear that the defendant does not meet the first two factors – at all. The magistrate court recognized there was some evidence supporting the third factor, and that it was a close call on the fourth factor. (*Id.* at 16, 19.) Again, this is not improper burden shifting; it is thoughtful analysis. It is also consistent with the "declining order of importance" of the *Bruce* factors. *Zepedea*, 792 F.3d at 1114; *see also Bruce*, 394 F.3d at 1223 ("A person claiming Indian status must satisfy both prongs."). Contrary to the defendant's arguments, simply putting up some evidence of Indian contacts and/or the receipt of some benefits available to descendants is insufficient to meet the *Bruce* factors and to defeat jurisdiction in this case. (*See generally* Doc. 16.) Accordingly, the magistrate court did not err or improperly shift the burden to the defendant.

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[14] As discussed previously, the defendant's driver's license issued in October 2012 supported that at the time of the criminal violation at issue (February 2013) the defendant lived off the reservation with his mother – at least when he was not in prison or jail. (*E.g.*, RT 194:5-21, 249-50.) And, again, it is undisputed that the defendant has never had his own residence on the reservation. (*E.g.*, RT 287:7-16.) These facts – and not the self-serving testimony of the defendant as to where he "stays" and what he considers his "home" (RT 249-50) – do not "support social recognition … through residence on a reservation …." *Zepeda*, 792 F.3d at 1114.

C. Respect for the Tribal Court Decision.

The United States Supreme Court has frequently recognized the federal government's policy of encouraging tribal self-government. *E.g.*, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982). Tribal courts play an important role in tribal self-government, and the federal government encourages their development. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987). As a general rule, federal courts are required to recognize and enforce tribal court judgments under principles of comity. *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002)(citing *Wilson v. Marchington*, 127 F.3d 805, 809-11 (9th Cir. 1997)). "Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Wilson*, 127 F.3d at 809 (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)).

Here, it is undisputed that the Fort Mojave Tribal Court ruled that it did not have criminal jurisdiction over Julian Loera because he is not "tribal person." (Mag. Doc. 16 ¶ 14; *see also* Exh. 6.) The Fort Mojave Tribal Code has a section that addresses subject matter jurisdiction, which in turn relies on federal law (referring to 25 U.S.C. § 1302).[15] (Mag. Doc. 16-1 at 40.) While it is not apparent that the Tribal court conducted the in-depth analysis and evidentiary hearings that the magistrate court conducted on the defendant's status as a non-Indian for purposes of jurisdiction (Exh. 6) – and performing such a case-by-case analysis can be an arduous and time consuming task (*e.g.*, Mag. Doc. 29 at 20 n.10) – "[c]omity does not require that a tribe utilize judicial procedures identical

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[15] The term Indian is defined in 25 U.S.C. § 1301(4), which "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." Thus, the Fort Mojave Tribal Code implicitly refers to the generally-accepted federal test for Indian status, which was articulated by the Ninth Circuit in *Bruce*. 394 F.3d at 1223; *see also Zepeda*, 792 F.3d at 1113.

to those used in the United States Courts." *Wilson*, 127 F.3d at 811.

Thus, this Court should respect the Tribal court's decision that it does not have criminal jurisdiction over the defendant. (Exh. 6.) Whether it actual comity, or just something similar, it is nevertheless respect for the right of the Tribe to determine its own membership and to determine who it can and cannot prosecute. *E.g.*, *LaPlante*, 480 U.S. at 19 ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised … and resolved in the Tribal Courts."). If such decisions are not respected, we run the risk of no jurisdiction accepting responsibility for prosecuting offenders such as Loera.

Because the Tribal court has decided that it does not have criminal jurisdiction over the defendant (Exh. 6) – which appears to be based on the defendant's status as a non-Indian (*see* Mag. Doc. 16 ¶¶ 14, 15) – and because the victim in this case is an Indian (*e.g.*, Mag. Doc. 1), criminal jurisdiction against the defendant in the United States District Court was and is proper under 18 U.S.C. § 1152. *Keys*, 103 F.3d at 761 ("The Federal Enclaves Act provides, among other things, for the prosecution of crimes committed in Indian Country by non-Indians against Indians.")(citation omitted). While the magistrate court did not explicitly agree with the Government's comity argument (Mag. Doc. 29 at 21:14-20) – although it did refer to "a matter of comity" under its "jurisdictional void" analysis (*id.* at 31:10-20) – this Court can affirm for any reason in the record. *Mayweather*, 634 F.3d at 504.

D. Section 1152 Does Not Provide the Defendant With Immunity.

In analyzing the Government's comity argument – as well as the concern of the jurisdictional void – the magistrate court ruled that 18 U.S.C. § 1152 does not grant the defendant immunity from federal prosecution because he is not a tribal member. (Mag. Doc. 29 at 31-32.) The magistrate court referred to the specific issue in this case – where the "Tribe has declined to [criminally] prosecute a defendant who may be an Indian and the Tribe's decision is apparently based solely on the defendant's lack of tribal membership, i.e., the Tribal Court has determined it does not have jurisdiction under its

laws" – one of first impression.[16] (*Id.* at 23:7-15.) Nowhere in the defendant's brief does he counter or otherwise contest the magistrate court's ruling in this regard (*see* Doc. 16), and this is a separate basis on which this Court can affirm.

VII. CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court affirm the judgment and orders of the magistrate court, and any other appropriate relief.

RESPECTFULLY SUBMITTED this 13th day of November, 2015.

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[16] The Ninth Circuit has also recognized the question as a new one: "We therefore can and do leave for another day the challenging question *Bruce* invites: whether a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe, would be subject to tribal court jurisdiction." *Means*, 432 F.3d at 934-35. Importantly, this case also raises the similar question of what happens when a tribe refuses to criminally prosecute a defendant who claims to be Indian, which is complicated by the fact that the defendant (1) is not an enrolled member of any federally recognized Indian tribe and (2) is not eligible for enrollment in any federally recognized Indian tribe. *See id.* at 935 ("*Bruce* concluded, as we do, that "Tribal courts may [internal ellipses omitted] prosecute misdemeanors against Indians who are not members of that tribe.")(emphasis underlined). Again, if the Court accepts the defendant's arguments that he is an "Indian" for purposes of federal criminal jurisdiction, then no court ostensibly has criminal jurisdiction over the defendant for certain misdemeanor crimes committed by him on the Fort Mojave Indian Reservation.

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2015, 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):

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