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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVEN ROGERS-DIAL, an individual; SUZANNE ROGERS-DIAL, an individual; and AUTOMOTIVE SPECIALISTS, LLC, a California Limited Liability Company Plaintiffs, vs. RINCON BAND OF LUISENO INDIANS; BO MAZZETTI; STEPHANIE SPENCER; CHARLES KOLB; STEVE STALLINGS; KENNY KOLB; AND DOES 6-25 Defendants	Case Number: 10 CV 2656 WQH POR **SPECIALLY APPEARING DEFENDANTS MEMORANUM OF POINTS AND AUTHORITIES FOR MOTION TO DISMISS FIRST AMENDED COMPLAINT FRCP 12(b)(1)** Judge: Hon. William Q. Hayes Courtroom: 4, Fourth Floor Date: May 31, 2011 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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I. INTRODUCTION

Plaintiffs allege civil enforcement actions by the Rincon Band of Luiseno Indians (hereafter "Rincon Band" or "Tribe") against landowner Marvin Donius, the non-Indian fee simple owner of property located within the external boundaries of the Rincon Indian Reservation ("Subject Property"), are prohibiting them from utilizing their leasehold interests in a manner promised by Mr. Donius. *See, RMCA v. Mazzetti, et al.,* S. D. Cal. Case No. 09cv2330 (Complaint) at ¶ 3); *Donius v. Mazzetti, et al.*, S. D. Cal. and Case No. 10cv0591; (Complaint) at ¶ 28, true and correct copies of the Complaints are attached hereto as Exhibits "A" and "B" respectively; Judicial Notice Requested). Rather than pursue contractual remedies against Mr. Donius for his breach of lease covenants, Plaintiffs attempt to assert their landowner's legal rights by proxy by seeking relief against the Rincon Band and its elected officials of the Tribe's Council. (*See,* Doc. 11 at ¶ 7, 9-10). Neither the Tribe nor its Officials are parties to the alleged leases, nor did Defendants have any part in creating the contractual rights claimed by Plaintiffs. Defendants recently discovered that the residence to which Plaintiffs' Rogers-Dial claim a legal right to occupy is owned by a third party business and that the Plaintiffs are occupying the *true* owner's residence without authority or consent. (*See,* Doc. 23-1, Durham Declaration at ¶ 6, 13, and Declaration of Kelley Hedges at ¶ 16, a true and correct copy of Hedges declaration is attached hereto as Exhibit "C"; Judicial Notice Requested)[1].

Given their limited and largely fictive legal interests, Plaintiffs lack Art. III. Sec. 2 standing in this proceeding to litigate the *actual* controversy: a dispute between the fee simple owner and the Tribe concerning the Tribe's exercise of civil regulatory jurisdiction over non-

[1] Curiously, several references to Plaintiffs' leases with Donius were made in the First Amended Complaint (*See,* Doc. 11-1) and in Plaintiffs' Motion for Preliminary Injunction (*See,* Doc. 18), yet, Plaintiffs failed to submit their leases as Exhibits.

Indians and activities occurring on the Subject Property. This case also should be dismissed because the aforementioned actual controversy has been litigated and adjudicated by this Court in *RMCA v. Mazzetti et al.,* (09cv2330) and *Donius v. Mazzetti et al,* (10cv059l) (the "Related Cases", incorporated herein by reference). In the Related Cases, this Court determined the Tribe has colorable jurisdiction over non-Indian activities occurring on the Subject Property and dismissed both suits because the landowner failed to exhaust tribal remedies. The *only* material difference between this case and the Related Cases is the substitution of the current Plaintiffs for their landlord. Given the basis for this Court's ruling in the Related Cases, the substitution of current Plaintiffs does nothing to affect this Court's previous determination of colorable tribal jurisdiction.

II. RELEVANT FACTS

1. Specially Appearing Defendant Rincon Band of Luiseno Indians is a sovereign nation recognized by the United States of America. (*See,* Doc. 11 at p. 3).

2. Pursuant to the Tribe's federally approved Articles of Association ("Articles"), the Rincon Tribal Business Committee ("Council"), but no one individual Council member, is empowered to exercise jurisdiction over lands within the exterior boundaries of the Tribe's reservation. Powers of the Council include the power to enact ordinances to effectuate the Tribe's inherent sovereign powers. (*See,* Declaration of Bo Mazzetti at ¶ 2 ("Mazzetti Dec1."), Exh. "1" (Tribe's Articles, at §§ 1, 6), a true and correct copy of Mazzetti's declaration is attached hereto as Exhibit "D"; Judicial Notice Requested).

3. Specially Appearing Defendants, Bo Mazzetti, Stephanie Spencer, Charlie Kolb, Steve Stallings and Kenny Kolb are duly elected Council members. *(See, Id.* at par 3). Bo Mazzetti is the current Tribal Chairman. *(See, Id.* at ¶ 1).

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4. The Subject Property, owned in fee simple by non-Indian Mr. Donius (and allegedly by Rincon Mushroom Corporation of America ("RMCA")), is located within the exterior boundaries of the Rincon Indian Reservation at 33777 Valley Center Road, Valley Center, California ("Subject Property") and directly across the street from Harrah's Rincon Casino and Resort. *(See*, Exhibit "A" (Complaint) at ¶ 12 and Exhibit "B" (Complaint) at ¶ 3).

5. The Rincon Reservation ("Reservation") is located within the Pauma Valley, an area "that has been threatened and burned by wildfires for many years." (*See*, Declaration of Douglas H. Allen ("Allen Decl.") at ¶ 17(e)), a true and correct copy of Allen's declaration is attached hereto as Exhibit "E"; Judicial Notice Requested). Fires burn through the Reservation - most recently, the "Paradise Creek Fire" in 2003 and "Poomacha Fire" in 2007 - causing significant property damage. (*See, Id.*). The strong winds driving both the Paradise Creek and Poomacha fires came from the east and drove the fire toward the Tribe's Casino and Resort. (*See, Id.*). Under normal prevailing wind conditions, any fire that moves through or originates on the Subject Property will directly threaten the Casino and Resort as well as "other properties, homes and commercial businesses in the Valley area." (*See, Id.* at 17 (h)). The threat posed by land uses on the Subject Property is more than theoretical. During the Poomacha fire, structures and combustible materials on the Subject Property burst into flames that engulfed structures on the Subject Property. (*See*, Declaration of S. Spencer ("Spencer Decl.") at ¶ 4, a true and correct copy of Spencer's declaration is attached hereto as Exhibit "F", Judicial Notice Requested). Airborne burning debris from the Subject Property swept eastward across the street and onto the Casino and Resort grounds, landed on the roof of the Casino and Resort and also consumed one of the storage buildings. (*See*, Exh. "D" *Id.* at ¶ 12). Significantly, at the time of the Poomacha fire, the Casino and Resort served as a community evacuation center for Reservation residents and casino patrons. (*See*, Exh. "F" (Spencer Decl.) at ¶ 5).

6. The Subject Property is located above and adjacent to the Reservation's primary ground and surface water resources. Soils on the Subject Property are sandy loams with moderately rapid permeability and there is no confining layer over the aquifer to protect it from surface contamination. (*See,* Declaration of Rick Minjares ("Minjares Decl.") at ¶ 13, a true and correct copy of Minjeres' declaration is attached hereto as Exhibit "G"; Judicial Notice Requested). The Tribe is dependent upon groundwater from the unconfined aquifer as the sole source of water. (*Id.*) The surface and groundwater threats are real. An EPA-supervised sampling of the Subject Property after the Poomacha Fire revealed heavy metal and petroleum contamination, a byproduct of materials that combusted during the fire. (*See*, Exh. "D" (Mazzetti Decl.) at ¶ 8). These contaminates are consistent with Pre-Poomacha land uses occurring on the Subject Property. (*See, Id. at* ¶ 8, Exh. 6 at p. 1, 2). An EPA supervised clean up yielded 47 tons of contaminated ash, soil and debris that were removed from the Subject Property. (*See, Id.* ¶ 18 at p. 10).

7. Over the years the Tribe, acting through the Tribal Council, has enacted various land use and environmental ordinances, including ordinances regulating commercial development, residential land uses, and electrical services on the Reservation. Shortly after the Poomacha Fire, the Tribe enacted an "Environmental Enforcement Ordinance" authorizing the Rincon Environmental Department to enforce the Tribe's land use and environmental ordinances. The Rincon Band is a member of the Intertribal Court of Southern California ("ICSC"), which provides a forum in which to adjudicate alleged land use and environmental violations. (*See,* (Mazzetti Decl.) Exh. "B", *Id.* at ¶ 17, 26, Exh. "15").

8. Tenants Mr. and Mrs. Rogers-Dial allege that they reside and conduct business upon the Subject Property. (*See,* Doc. 11, at ¶ 5).

9. Tenant Automotive Specialists is a California limited liability company doing business on the Subject Property. (*See*, Doc. 11, at ¶ 6).

10. Rincon Mushroom Corporation of America ("RMCA") and Marvin Donius allege that they collectively exercise complete ownership of and the exclusive right to assert dominion and control over, the Subject Property. (*See*, Exh. "A" (Complaint) at ¶ 12 and Exh. "B" (Complaint) at ¶ 13).

11. Since December 2008, six separate lawsuits have been filed against either the Rincon Tribe directly or against Rincon government officials challenging the Tribe's regulation of land uses on the Subject Property. The first lawsuit was filed by RMCA in California State Superior Court, San Diego County, against San Diego Gas and Electric ("SDG&E") for its refusal to provide electrical service to the Subject Property, even though provision of such service by SDG&E would have been in violation of Tribal law. (*See*, Doc. 21-1 at Exh. "A"). SDG&E Cross-Complained against the Tribe directly. (*See*, *RMCA v. SDG&E* (Cross Complaint), a true and correct copy of the Cross Complaint is attached hereto as Exhibit "H"; Judicial Notice Requested). The Tribe specially appeared and moved to dismiss on sovereign immunity grounds and for failure to join a necessary and indispensable party. (*See*, Doc. 20-1, Exh. "B"). The Court agreed with the Tribe and dismissed the Complaint in its entirety. (*See*, Exh. "D" (Mazzetti Decl.) attached thereto as Exhibit "21").

12. While the motion to dismiss was pending, RMCA filed its First Amended Complaint against members of the Tribe's Council in their individual and official capacities. (*See*, Exh. "D" (Mazzetti Decl.), (First Amended Complaint) attached thereto as Exh. "19"). The Tribal Council members specially appeared and moved to dismiss, arguing that the Tribe's sovereign immunity extended to them with respect to all allegations in the Complaint. (*See*, Doc 20-1, Exh. "C"). The Superior Court dismissed, taking notice of the likely authority of the Tribe to regulate

land uses on the Subject Property to protect against wildfire and groundwater threats and stayed its dismissal for 30 days to allow RMCA to "remove" the case to federal court. (*See*, Exhibit "D" (Mazzetti Decl.) (Order) attached thereto as Exh. "21" at p. 207 of 209).

13. RMCA and Donius subsequently filed two separate actions in the U.S. District Court for the Southern District of California against individual Council members contesting the Tribe's jurisdiction (*See*, (Complaints) Exhibits "A" and "B"). The federal actions were dismissed on September 21, 2010. The Court required Donius and RMCA to first exhaust their tribal remedies because the Tribe has shown "colorable jurisdiction" over non-Indian activities occurring on the Subject Property. *See, Rincon Mushroom Corp. of America v. Mazzetti, et al.*, 2010 WL 3768347 S.D. Cal. September 21, 2010 (Case No. 09cv2330 WQH-POR); *Donius v. Mazzetti, et al.*, 2010 WL 3868363 S.D. Cal., September 21, 2010 (Case No. 10CV591-WQH-POR). In so holding, Judge Hayes determined:

> Defendants [members of the Tribe's Council sued in their individual capacities] have submitted evidence indicating that conduct on the Plaintiff's property pose different threats to the shallow, unconfined aquifer, which is the sole water source for the Tribe's water system and Tribal member groundwater wells. Defendants also have submitted evidence that conditions on the Subject Property during the 2007 Poomacha Fire contributed to the spread of wildfire from that property to Tribal lands across the street on which the Casino is located. Although Plaintiff disputes this evidence, Defendants have shown that conduct on Plaintiff's property plausibly could threaten the tribe's groundwater resources and could contribute to the spread of wildfire on the reservation.... Given the breadth of declaratory and injunctive relief requested by Plaintiff. There is a "colorable or plausible" claim to tribal regulatory and tribal court jurisdiction pursuant to *Montana's* second exception. Although *Montana's* second exception should not be construed in a manner that would swallow the rule or severely shrink it, neither should it be construed in a manner that would eliminate that exception entirely. Because tribal jurisdiction is plausible, principles of comity require federal courts to give tribal courts a full opportunity to determine their own jurisdiction in the first instance. The Court concludes that Plaintiff must exhaust tribal remedies prior to asserting claims in this Court.

Rincon Mushroom Corp. of America v. Mazzetti, et al., 2010 WL 3768347, p. 8-9, S.D. Cal. September 21, 2010 (Case No. 09cv2330 WQH-POR) (internal quotations and

citations omitted). Donius and RMCA have appealed the District Court's decisions to the 9th Circuit. (*Donius* v. *Mazzetti*, 10-56525; *RMCA* v. *Mazzetti* 10-56521, respectively).

14. On April 13, 2009 the Tribe filed a Complaint in the Intertribal Court of Southern California ("ICSC") alleging that Donius had constructed commercial signage on the Subject Property without Tribal Council approval in violation of the Tribe's Signage and Environmental ordinances. (*See*, Doc. 21-1, Exh. "D").

15. On May 27, 2009 Donius specially appeared to contest the Tribe's jurisdiction to enforce its Signage and Environmental ordinances against him. The ICSC upheld the Tribe's jurisdiction and ordered Donius to answer the Tribe's Complaint. (*See*, Exh. "D" (Mazzetti Decl.) (6/2/09 Tribal Court Order) attached thereto as Exhibit "12").

16. Despite being properly noticed, Donius failed to answer the Tribe's Complaint and the Tribe moved for the Entry of a Default Judgment. (*See*, Doc. 20-1, Exh. "E"). On June 27, 2009 the ICSC granted the Tribe's Default Motion and Donius did not appeal. (*See*, Exh. "D" Mazzetti Decl. attached as Exhibit "13" thereto at p. 84 of 209).

17. On January 13, 2010 the Tribe filed before the ICSC a motion for Emergency Order and origination of contempt proceedings against Donius due to the construction of new signage on the Subject Property in violation of the court's Order on Default. (*See*, Declaration of S. Crowell ("Crowell Decl."), a true and correct copy of Crowell's declaration is attached hereto as Exhibit "I").

18. On January 19, 2010 the court ordered Donius to submit development plans to the Tribe for the existing and any new residential, commercial and industrial uses of the Subject Property for approval consideration and to cease and desist from all such development activities on the Property until obtaining Tribal approval. (*See*, Doc. 20-1 at Exh. "F"). The court also directed Donius to show cause why he should not be held in contempt for violating the Court's

June 2, 2009 Order and Judgment. (*Id.* at p. 98 of 165). Despite being properly noticed, Donius failed to appear. At the conclusion of the show cause hearing, the Court entered an order finding Donius in contempt and ordered him, once again, to "cease and desist from all such development activities on the Subject Property until obtaining tribal approval of such development plans." (Exh. "F", (Spencer Decl.) at p. 97 of 165). Donius also ignored this order and continued developing the Subject Property. On August 27, 2010 the Tribe moved the ICSC for a second contempt order and filed a new cause of action coupled with a request for preliminary injunctive relief against RMCA and Donius based on their ongoing activities in violation of tribal law.[2] On September 27, 2010 the ICSC issued a Preliminary Injunction ordering RMCA and Donius to cease all illegal activities on the Subject Property and directed Rincon law enforcement to restrict ingress and egress to prevent ongoing violations of tribal law. (*See,* Doc. 1, Exh. "A"). Finally, the Court set an October 25, 2010 deadline for Donius and RMCA to remove any residential tenants from the Property. [3] (*See*, *Id.* at 2-3).

19. Current Plaintiffs Rogers-Dial and Automotive Specialists waited until Friday, October 22, 2010 to file a Complaint in San Diego County Superior Court, which they coupled with an ex parte request for a temporary restraining order to enjoin the Tribe from enforcing the ICSC Preliminary Injunction. (*See,* Doc. 20-1, Exh. "G"). At the October 22, 2010 hearing, the court denied Rogers-Dial and Automotive Specialists' request for a TRO and set a full briefing schedule and subsequent hearing on whether the court should issue a preliminary injunction. At the November 24, 2010 hearing, the Judge denied Plaintiffs' request for a preliminary injunction,

[2] Based on assertions of RMCA's counsel to Judge Hayes that "RMCA and Donius are one and the same," the Tribe added RMCA as a defendant to the Tribal Court litigation. *(See,* Trans. March 25, 2010 hrn'g at p. 58-59, a true and correct copy of the transcript os attached hereto as Exh. "J").

[3] Tenants repeatedly mischaracterize the Tribal Court Preliminary Injunction, which does not command them to do anything. Instead, the Preliminary Injunction directs Donius and RMCA to cease ongoing violations of tribal law pendente lite. (*See*, Doc 1. Exh. "A").

ruling that there was nothing in the record to suggest that the court has subject matter jurisdiction over the Tribe. (*See*, Doc. 20-1 Exh. "I"). Seeing the handwriting on the wall, the Plaintiffs voluntarily dismissed their Complaint prior to the hearing on the Tribe's motion to dismiss scheduled for January 14, 2011. (*See*, Doc. 20-1 Exh. "J").

20. On December 23, 2010, prior to the dismissal of the latest Superior Court action, Plaintiffs filed the instant case. In their Complaint, Plaintiffs sought a Declaratory Judgment and Injunctive Relief directly against the Tribe. (*See*, Doc.1 at p. 18-19).

21. On January 19, 2011 the Tribe entered a Special Notice of Appearance and filed its Motion to Dismiss for Lack of Jurisdiction, arguing that the Tribe's sovereign immunity deprived the Court of subject matter jurisdiction. (*See*, Doc. 3; Doc. 7).

22. On February 7, 2011, while the Motion to Dismiss was pending, Plaintiffs filed their First Amended Complaint ("FAC"), which mirrors the original Complaint with the singular exception that Plaintiffs allege to have "discovered" the "true names" of Does 1-5 and thus, specifically name each Tribal Council Defendant. (*See*, Doc. 11, at p. 3-5).

23. On March 3, 2011, as a result of Plaintiffs filing the First Amended Complaint, the Court denied the Tribe's Motion to Dismiss as moot. (*See*, Doc. 17).

24. On March 17, 2011, Plaintiffs filed a motion for preliminary injunction, in which they request the Court to enjoin the ICSC Preliminary Injunction. (*See*, Doc. 18). This motion remains pending[4].

25. On April 18, 2011 the Tribe filed an ex parte application seeking to supplement its response in opposition to the pending motion due to newly discovered evidence: a Declaration from the actual owner of the residence occupied by the Plaintiffs (Rogers-Dial) attesting that they

[4] Specially Appearing Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction directly address the likelihood of success on the merits, including addressing arguments supporting the instant Motion to Dismiss. Accordingly, Specially Appearing Defendant's briefing and attendant exhibits are incorporated herein by this reference (*See*, Doc. 19).

have no legal right to occupy the residence. (*See*, Doc. 23). The Court ordered Plaintiffs to respond by April 28, 2011. (*See*, Doc. 24).

III. ARGUMENT

A. Plaintiffs Lack Standing.

To establish Article III standing: (I) a plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendants and not the result of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992); *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976), In addition to this "Constitutional core", the standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction. Some of those self-imposed limits include the general prohibition on a litigant raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. *Allen v. Wright*, 468 U.S. 737,750-51 (1984).

In this case, Plaintiffs cannot establish that their alleged harm is traceable to Defendants. The constitutional requirement of "traceability" demands that the injury must not result from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41-42, 96 S.Ct. at 1926 (citation omitted). Similarly, "it follows that if the injury stems not from the government action disputed, but from an independent source, a federal court cannot provide the plaintiff redress by directing the government to alter its action. The plaintiff, under such circumstances, lacks standing to challenge the particular government

action." *Id.* at 1380. In this case, the injury Plaintiffs' allege is the result of the independent action of a third party: Marvin Donius, and his deliberate decision to ignore tribal judicial process. The holding in *Simon* precludes Plaintiffs from ignoring their obvious claims against their landlord and instead challenging tribal governmental action.

The Plaintiffs similarly cannot demonstrate that a favorable ruling would redress their injury. *Defenders of Wildlife,* 504 U.S. at 560, 112 S.Ct. 2130; *Levine v. Vilsack,* 587 F.3d 986, 991-92 (9th Cir.2009), *Mayfield v. U.S.,* 599 F.3d 964, (9th Cir. 2010). The Tribe did not put the Plaintiffs in a legally tenuous position – their landlord did. Even if the Court ruled in Plaintiffs' favor, there is nothing to stop the landlord from compromising the Plaintiffs' position again by subsequently disregarding Tribal laws. "When prospective redress depends on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict", the Plaintiff will not have standing. *Glanton ex rel. Alcoa Prescription Drug Plan v. Advance PCS, Inc.*, 465 F.3d 1123 (9th Cir. 2006)[5].

Finally, Plaintiffs fail to meet prudential standing requirements that forbid legal claims to rest on third-party interests. Even when a plaintiff alleges injury sufficient to meet the "case or controversy" requirement, a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.[6] *Mothershed* v. *Justices of the*

[5] *Glanton*'s plaintiffs participated in a prescription plan and brought suit against a benefits management company under ERISA § 502(a), 29 U.S.C. § 1132, alleging breach of fiduciary duty. *Id.* at 1124. Plaintiffs argued that if the court found in their favor, the plan's drug costs, contributions, and co-payments would decrease. *Id.* at 1125. The Court found that the alleged injury was not redressable because the court's judgment would not compel the defendants to increase their disbursement of benefits payments. *Id.* The court therefore held that plaintiffs lacked standing under Article III because "any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." *Id.*

[6] In pleadings filed in support of preliminary injunctive relief, Plaintiffs have chosen not to respond to these prudential standing arguments, choosing instead to re allege that they have suffered actual harm as a result of the controversy between their landlord and the Tribe. (*See,* Doc. 22 at p. 2-3). Plaintiffs clearly miss the point: prudential standing requirements exist independently from Constitutionally imposed standing requirements.

Supreme Court, 410 F.3d 602, 610 (9th Cir. 2005) *(citing Warth* v. *Seldin*, 422 U.S., at 499 (1975)). In the case at bar, Plaintiffs argue that the Defendants interfere with their leasehold interests in the Subject Property. (*See*, Doc. 18 at p. 1). However, the Defendants are not party to those leases and thus cannot be sued under them. *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421 (1939) (plaintiff must be in privity with a sovereign to sue the sovereign on a contract claim). The only "rights" exercised by Plaintiffs under their leases flow first through the fee owner of the Property, Marvin Donius, who filed an identical suit against the Defendants and further alleged that he "assigned" his right to sue the Defendants to RMCA, who holds a "carry back" deed of trust to the Subject Property. (*See*, 09cv2330 (Complaint) Doc. 1 at, 11). With no right independent of their alleged leasehold interests to assert, Plaintiffs fall well short of the prudential standing limitation against asserting third party rights.

B. The Tribe's Sovereign Immunity is a Subject Matter Jurisdictional Bar to all Claims.

If the Court determines Plaintiffs have standing, this case nevertheless should be dismissed under 12(b)(1) because the Tribe's sovereign immunity deprives the Court of subject matter jurisdiction. When, as in this case, tribal sovereign immunity is raised as a jurisdictional bar to plaintiff's claims, the plaintiff bears the burden of establishing the court's subject matter jurisdiction. *Unkeowannulack v. Table Mountain Casino*, 2007 WL 4210775, E.D. Cal. Nov. 28, 2007 (NO. CVF071341 AWI DLB), (*citing Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). A motion under Fed. R. Civ. P. 12 (b)(1) can be made on the face of the Complaint or by presenting affidavits or other evidence before the Court and in such case the Court need not presume the truthfulness of the plaintiff's allegations. *See Id., citing, Safe Air for Everyone v Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Fed. R. Civ. P. 12 (b)(1) motion the court may review evidence and resolve factual disputes without converting the motion to dismiss into a

motion for summary judgment. *See Friends of Panamint Valley v. Kempthorne*, 499 F. Supp.2d 1165, 1172 (E.D. Cal. 2007). "When a defendant makes a factual challenge 'by presenting affidavits or other evidence …, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Unkeowannulack v. Table Mountain Casino*, 2007 WL 4210775, p. 3, E.D. Cal. Nov. 28, 2007 (*quoting*, *Safe Air for Everyone v. Meyer*, 373 F.3d at 1039 and *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).

As a federally recognized Indian tribe, the Rincon Tribe enjoys sovereign immunity. *See e.g. Turner v. United States*, 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Great Western Casinos, Inc.*, 74 Cal. App.4th at 1419, 88 Cal. Rptr.2d at 837 (1999)("Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). It is hornbook law that sovereign immunity bars suits directly against a tribe unless a federal statute expressly and clearly waives its immunity, or a tribe agrees, clearly and expressly, to waive its immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)(tribal sovereign immunity is a jurisdictional bar to suit); *United States v. Oregon*, 657 F.2d 1009, 1012-13 (9th Cir. 1981); *Great Western Casinos, Inc.*, 74 Cal. App.4th at 1419 (1999). Tribal sovereign immunity bars suits directly against tribes regardless of whether the activity complained of occurred on or off or the Tribe's reservation. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

In this case, Plaintiffs do not and cannot allege that the Rincon Tribe has waived its immunity from suit on the First Amended Complaint because no such waiver exists. As far as a Congressional waiver, Plaintiffs' casual references to civil rights statutes as a source their claims against the Tribe are belied by the U.S. Supreme Court ruling in *Santa Clara Pueblo v. Martinez*,

436 U.S. 49 (1978), in which the Court squarely reaffirmed that tribes - whose source of sovereignty predates the Constitution - are not subject to the U.S. Constitutional restrictions. Tribes instead are bound by the Indian Civil Rights Act, in which Congress decided to provide only for habeus corpus review by federal courts for claimed violations. *Id.* Consistent with this ruling, courts repeatedly have held that US civil rights statutes do not apply to tribes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (5th and 14th Amendments not applicable to Tribes); *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir.1983) (holding a §1983 action is unavailable "for persons alleging deprivation of constitutional rights under color of tribal law."); *Wheeler v. Swimmer*, 835 F.2d 259, 261-62 (10th Cir. 1987) (holding § 1985(3) provided no independent remedy for claims concerning tribal laws); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (holding *Ex Parte Young* claims "inapplicable in a suit against state officials based on state law.").

In their First Amended Complaint, Plaintiffs substitute members of the Rincon Tribal Council for Doe's 1-5. (Doc. 11, *passim).* However, the Tribe's common law immunity from suit extends to suits against tribal officials for acts taken in their representative capacity and within their authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88, (1949); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Saul v. Larsen*, 847 F.2d 573, 575 (9th Cir. 1988); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,478 (9th Cir. 1985); *see also Unkeowannulack v. Table Mountain Casino*, 2007 WL 4210775, p. 3, E.D. Cal. Nov. 28, 2007 (extending tribal official immunity to president of tribal casino where the individual actions alleged in the complaint fell within the scope of the president's authority).

In their First Amended Complaint, Plaintiffs generally challenge the Tribe's jurisdiction to regulate non-Indian activities on fee lands within the Tribe's reservation. In so doing, Plaintiffs

confront a threshold requirement that they first must exhaust their tribal remedies before challenging the Tribe's jurisdiction in Federal Court.

C. This Case should be dismissed for Plaintiffs' failure to Exhaust Tribal Remedies.

Tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo Tribe v. Martinez*, 436 U.S. 49, 65 (1978). Indeed, the Supreme Court has long held that a plaintiff must first exhaust available tribal remedies before asserting that a tribe lacks jurisdiction in federal court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Where issues of sovereign immunity are involved or there is a direct challenge to the authority of the tribal government and its law, exhaustion is mandatory. *Sharber v. Spirit Mountain Gaming, Inc.* 343 F.3d 974, 976 (9th Circ. 2003); *Middlemist v. Secretary of U.S. Dept. of Interior*, 834 F.Supp. 940, 944 (D. Mont. 1993), *summ aff., Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir. 1994), *cert. den.*, 513 U.S. 961 (1994) (where non-Indian lands were within reservation and claims against tribal officials sought to invalidate tribal ordinance, the litigation "unquestionably ... is a 'reservation affair' which triggers the mandatory exhaustion requirement"). The Supreme Court's tribal exhaustion doctrine is a matter of comity. *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n. 8.

As the Supreme Court explained in *National Farmers*, the tribal exhaustion requirement serves Congress' policies promoting tribal self-determination and the judiciary's preference for conserving judicial resources:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of

> "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

(internal footnotes omitted). 471 U.S. at 486-487 (emphasis added).[7]

Similar to *National Farmers* and *Iowa Mutual*, resolution of the actual controversy in this case will turn on resolution of factual disputes and complex principles of federal law regarding tribal jurisdiction over non-members on fee lands on an Indian reservation. In N*ational Farmers* and *Iowa Mutual* the Supreme Court instructed the District Court to either dismiss or stay the federal action because the tribal court was the appropriate forum to first decide challenges to tribal jurisdiction. *National Farmers*, 471 U.S. at 856, 857; *Iowa Mutual*, 480 U.S. at 976-977.

In their First Amended Complaint ("FAC"), Plaintiffs make no attempt to demonstrate that they first exhausted their tribal remedies prior to seeking federal court review of their broad challenge to the Tribe's jurisdiction. (Doc. 11-1, *passim)*. As with their Landlord in the Related Cases, Plaintiffs appear to be arguing that the Tribe's jurisdiction is "plainly lacking," thus excusing the requirement to exhaust tribal remedies prior to seeking federal court review. (Doc. 11-1, p. 15-16, 19). There are four recognized exceptions to tribal exhaustion:

> (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions" (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay.

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[7] The Supreme Court's admonition in *National Farmers* that tribal exhaustion serves to minimize the risks of "procedural nightmare[s]" is particularly applicable to this case. This suit is but one of six actions filed by RMCA, Donius and Plaintiffs against the Tribe and/or Tribal Defendants in state and federal courts. Given that the tribal court exhaustion doctrine is routinized in federal Indian law jurisprudence, Defendants take sharp exception to the coordinated, duplicative efforts of RMCA, Donius and Plaintiffs to avoid Tribal Court.

White Mountain Apache, 566 F.3d at 847, *citing*, *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).[8]

1. Exceptions to the Exhaustion Requirement do not apply in this Case.

As their landlords did in the Related Cases, Plaintiffs contend that the Supreme Court's ruling in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981) categorically prohibits the Tribe from exercising jurisdiction over non-Indian activities occurring on the Subject Property. *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245 (1981). *Montana v. U.S.* is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445, (1997). In *Montana v. U.S.*, the Supreme Court addressed whether a tribe may regulate hunting and fishing by nonmembers on reservation lands owned in fee by nonmembers ("fee lands") 450 U.S. at 557. The Court held that civil regulation of nonmembers on fee lands is governed by "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id*. at 565, 101 S.Ct. 1245. However, it described two significant exceptions to that general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their Reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. ***A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.***

Montana v. United States, 450 U.S 544, 565 (1981) (emphasis added).[9]

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[8] In the Related Cases, this Court expressly found no evidence showing that the tribe's actions arose from a motive to harass the landowners in an attempt to acquire the Subject Property "on the cheap." *Rincon Mushroom Corp. of America v. Mazzetti, et al.*, 2010 WL 3768347, 2 (S.D. Cal. 2010).

[9] The cases cited herein are part of a growing body of federal common law that interprets the *Montana* exceptions in a manner that render Plaintiffs categorical jurisdictional challenges

In *Montana v. EPA*, the Ninth Circuit upheld EPA's approval of the Confederated Salish and Kootenai Tribes' application for treatment as a state ("TAS") to develop water quality standards under the Clean Water Act applicable to all point source discharges within the Flathead Indian Reservation, including those from non-member fee lands within the Reservation. *Montana v. U.S. Envtl. Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998) ("*Montana v. EPA*"). EPA's approval rested on its conclusion that the tribe had shown inherent authority under the second *Montana* exception justifying regulation of non-Indian fee lands within the Reservation under the tribe's federally approved water quality standards. *Id.* The EPA's approach did not condition tribal eligibility for TAS on evidence that showed that point source discharge of pollutants on non-Indian fee land within the Reservation actually affected tribal waters. Instead a tribe could simply show that there is a potential for such pollution in the future and were such pollution to occur it would have serious and substantial impacts upon the Tribe. *Montana v. E.P.A.*, 971 F. Supp. 945, 952 (D. Mont. 1996). The Ninth Circuit acknowledged that "[w]e have previously recognized that threat to water rights may invoke inherent tribal authority over non-Indians," 137 F.3d at 1141, and it upheld "EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the Reservation, noting 'a water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.'" *Id.* (citation omitted). In the context of contamination of the Tribal water source, the test is not whether the Tribe can show present harm, it is whether the Tribe has shown the potential water contamination would pose a demonstrably serious threat to its core interest. *Montana v. EPA*, 137 F.3d at 952.

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untenable. *See, e.g. Reconciling the Sovereignty of Indian Tribes in Civil Matters with the Montana Line of Cases*, Villanova Law Review Vol. 55: p. 863, Douglas B. L. Endreson (2010).

In *Elliot v. White Mountain Apache,* the Ninth Circuit recognized that tribal regulations concerned with preventing wildfire create a compelling argument that such regulations are intended to secure the tribe's political and economic well-being, because wildfire can result in the destruction of millions of dollars of tribal natural and other resources. *Id.* 566 F.3d at 849-50. The Ninth Circuit's decision in *White Mountain Apache* is directly relevant to this case, and its relevance is not diminished by the fact that the tribe's colorable jurisdiction under the second *Montana* exception was based upon a fire ignited by a non-Indian on the tribe's trusts lands which destroyed millions of dollars of timber resources on tribal lands within its Reservation. In the context of fire safety, the Ninth Circuit expressly eschewed non-Indian fee land/trust land distinction, holding that "even if we applied the two *Montana* exceptions without regard to the Supreme Court's instruction that ownership of the land may be dispositive in some cases, we reach the same conclusions: In the circumstances of this case, we cannot say that that tribal court plainly lacks jurisdiction." *Id.* at 850.

In support of its Motion, Tribal Defendants have submitted evidence establishing: (1) that the shallow, unconfined aquifer underlying the Subject Property provides the sole source of the Tribe's drinking water (2) that soils on the Subject Property are highly permeable and (3) that prior to the 2007 Poomacha fire, Plaintiff used the property in a manner that created serious health risks in the dangerous contamination of over 40 tons of soil, which only recently has been removed from the Subject Property. (*See,* Exh. "G" (Minjares Decl.) at ¶¶ 13-29). The evidence submitted by the Defendants further demonstrates that the area at issue is prone to periodic and significant wildfires. (*See,* Exh. "E" (Allen Decl.) at ¶ 17 e). Since the Poomacha fire, land use activities on the Subject Property continue to pose substantial fire threats. On December 2, 2009, photographs were taken of conditions at the Subject Property, as described by Mr. Doug Allen, a seasoned fire expert who is well familiar with the area:

> I observed drying grass vegetation adjacent to large stacks of wood pallets that are approximately six rows wide and covered about three-fourths of the width of the Subject Property. A grass fire on the Subject Property would rapidly engulf these pallets and produce a major fire event emitting burning embers and fire brands that would threaten neighboring properties; including the Harrah's Rincon Casino and Resort that is located directly across the street from the Subject Property.
>
> Located at the south-west end of the pallet stacks is a make-shift work area comprised-in-part of plywood and other wood materials. I have reviewed a photograph that was taken from within the interior area of this area on December 5, 2008, contained in Rincon EPA compliance files and accompanying a Site Inspection Report prepared by Rincon EPA Compliance Officer, Eric Mendoza, dated December 2, 2009. The make-shift work area structure poses numerous electrical hazards. Several electrical cords string together an array of portable electrical outlets which are used to supply power to various appliances, such as lamp fixtures, a radio, and a nail gun. The electric cords, portable electric sockets, and appliances are not properly installed and are clearly exposed to wind and rain. The use of electrical appliances under such conditions can produce electrical faults that could ignite the surrounding wood pallets and create a life threatening safety hazard.
>
> I have reviewed a photograph that was taken from within an interior area of these stacked palettes on December 5, 2008, from Rincon EPA compliance files. The area encloses an improvised cooking area comprised of a half-drum serving as a fire pit and related and charred wood. Open-flame cooking in this confined space surrounded by wood materials presents an obvious life safety hazard. Because I did not enter the Subject Property during my site visit on May 2, 2010, I could not confirm whether this interior cooking area is still being maintained and used, raising legitimate concerns that this situation and related life safety hazards remain.

Id. Hazardous conditions, documented on the Subject Property since 2008, pose demonstrably serious threats to the Tribe's economic security and health or welfare. (*See,* Exh. "E" (Allen Decl.) at ¶16 -19). Short of actually waiting for non-Indian activities on the Subject Property to contribute to the spread of another fire, the evidence demonstrates that the threats posed by Plaintiffs' unregulated conduct are real.

In *Elliot v. White Mountain Apache,* the Ninth Circuit clarified the test for determining whether a federal case challenging assertions of tribal jurisdiction under the second *Montana* exception must be stayed or dismissed for failure to exhaust tribal remedies when the federal plaintiff alleges, as Plaintiffs appear to be doing in this case, that a tribe "plainly lacks jurisdiction" and thus exhaustion should not be required. Under *Elliot v. White Mountain Apache,*

assertions that tribal jurisdiction is "plainly lacking" are rebutted if the evidence establishes a "plausible" or "colorable" basis for Tribal jurisdiction under the second *Montana* exception. Thus, upon Defendants demonstration of "plausible" or "colorable" jurisdiction, this case must be stayed or dismissed for Plaintiffs' failure to exhaust tribal remedies. *Elliot v. White Mountain Apache*, 566 F.3d at 847. Defendants have presented sufficient evidence to demonstrate that non-Indian activities on the Subject Property pose a "plausible" threat to the Tribe's water resources and fire safety on a reservation plagued by wildfires. *Rincon Mushroom Corp. of America v. Mazzetti*, 2010 WL 3768347, p. 8 (S.D. Cal. 2010).

Because the Tribe's assertion of jurisdiction is "colorable" or "plausible," Plaintiffs must first exhaust tribal remedies prior to seeking federal court review of their jurisdictional challenges. *White Mountain Apache*, 566 F.3d at 848. Importantly, even when there is no pending proceeding in tribal court, a nonmember plaintiff may not sue in federal court asserting that the tribe lacks regulatory authority over nonmembers actions taken on non-Indian land within a reservation without exhausting tribal court remedies. *Burlington N. v. Crow Tribal Council*, 940 F.3d 1239, 1246 (9th Cir. 1991); *see also Sharber v. Spirit Mountain Gaming*, 343 F.3d 974, 976 ("The absence of any ongoing litigation of the same matter in tribal courts does not defeat the tribal exhaustion requirement."). An action is pending in Tribal Court against the Plaintiffs in the Related Cases, *Donius* and *RMCA*, and the *Rincon Tribe v. Donius*, ICSC Case No. Rincon 02972009. Plaintiffs are welcome to file special appearances, amici briefs or intervene in that litigation, and are able to do so without waiving jurisdictional defenses. Additionally, Plaintiffs are welcome to file their own Declaratory Judgment action in Tribal Court challenging the Tribal governments' civil regulatory land over the Subject Property. As with the Related Cases, this case should be dismissed for Plaintiffs' failure to exhaust tribal remedies.

/ / /

2. This Case should be dismissed not stayed.

The Court has the discretion to dismiss or stay this action while Plaintiffs exhaust their tribal court remedies. *Atwood v. Fort Peck Tribal Court Assiniboine,* 513 F.3d 943, 948 (9th Cir. 2008). As with the Related Cases, this case should be dismissed. The harm Plaintiffs allege is ongoing. Consequently, no statute of limitations would bar Plaintiffs from asserting their claims in a later-filed action post-exhaustion. Absent such concerns, dismissal as opposed to stay is appropriate. *Doinus v. Mazzetti, et al.,* 2010 WL 3768363, 6 (S.D. Cal., 2010). *Cf. Sharber v. Spirit Mountain Gaming,* 343 F.3d 974, 976 (9th Cir. 2003) ("Dismissal might mean that plaintiff would later be barred permanently from asserting his claims in the federal forum by the applicable statute of limitations. Under the circumstances, the district court should have stayed, not dismissed the federal action pending the exhaustion of tribal remedies).

V. CONCLUSION

This case should be dismissed because Plaintiffs lack standing. If the Court disagrees and determines Plaintiffs have standing, this case should be dismissed for Plaintiffs failure to exhaust tribal remedies.

April 26, 2011

Respectfully submitted,

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