

1 protections, notwithstanding the fact that the Property has been fully and completely cleaned up
2 after the Poomacha Fires. On information and belief, the Defendants have failed to produce any
3 evidence supporting their claim of potential harm to the Tribe's underground water resources.

4 Certain actions by Defendants confirms their real intentions relating to the Property. These
5 actions have nothing to do with health and safety, nor with water resources. Instead, these
6 particular efforts to control Plaintiffs relate to issues like proper signage. At least, it appears that
7 Defendants have not yet argued that such issues, like acceptable signage, fall within their claim
8 that the Montana Two exception allows for their claim of jurisdiction.

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10 One example of Defendants' claim of a purported violation by Plaintiffs and Donius related
11 to the Tribe's so-called "signage" ordinance. In that particular dispute, Defendants claimed that
12 that Donius "constructed commercial signage on the [Property] without Tribal Council approval."

13 **D. Defendants' Other Actions Affecting Plaintiffs' Leasehold Interests**

14 As mentioned above, it is believed that Defendants have been engaged for years in an
15 effort to acquire the Property. One such effort was the above-described false environmental
16 hazard claim, which was found by the EPA to be without merit. Now, Defendants are again
17 claiming that the purported environmental damage being caused by leaking oil from impounded
18 vehicles on AUTOMOTIVE SPECIALISTS' Property, which RINCON contends gives the tribe
19 sufficient authority under the second Montana exception.

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21 Donius and Plaintiffs are aware of a series of acts undertaken by Defendants to intimidate
22 and harass these individuals, all for the purpose of permanently forcing Plaintiffs and Donius from
23 the Property.
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1 As another type of example of RINCON'S wrongful conduct regarding the Property, on
2 information and belief, several years ago Donius received an attractive offer for the purchase of
3 his Property. As Donius and the buyer negotiated the final purchase-sale terms, the Defendants
4 caused the deal to fall through by interference from the Defendants. It became further apparent
5 that Defendants would do whatever they could to prevent the Property from being sold to someone
6 outside of the Tribe.

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8 It is respectfully requested that this Court, at least on a temporary emergency basis, issue a
9 TRO barring the Defendants from enforcing the terms of the Injunction next Monday. Plaintiffs
10 further request that this Court set a hearing date as quickly as possible wherein the Court may
11 determine, after hearing arguments from both sides, if the issuance of a preliminary injunction is
12 warranted.

13 In an effort to again interfere with the Plaintiffs rights to use and enjoy their Property, as
14 provided pursuant to their leasehold interests, Defendants are again asserting an argument relating
15 to supposed-environmental harm to acquire jurisdiction, repeating the unsubstantiated claim by
16 Defendants that AUTOMOTIVE SPECIALISTS is causing environmental harm.

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18 As the Court is already aware, Mr. Peterson's Declaration is part of the documents and
19 pleadings filed by Plaintiffs' landlord, Donius, who is represented by separate counsel in Federal
20 court to enjoin RINCON from further actions affecting these non-Indian individuals who are on
21 non-Tribal Land. On information and belief, that case is currently before the Ninth Circuit.
22 (Donius v. Mazzeti, et al., U.S. District Court, Southern District of California, Case No. 10 CV
23 0591.) Unfortunately for the Plaintiffs, however, their fate cannot wait for the outcome of the
24 appellate action.
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1 **III. DEFENDANTS DO NOT HAVE AUTHORITY OVER THE SUBJECT**
2 **PROPERTY OR OVER PLAINTIFFS' LEASEHOLD INTERESTS**

3 Underlying Plaintiffs' contentions is that the Defendants are attempting to assert
4 jurisdiction over Plaintiffs and Donius in violation of federal law, including the civil rights
5 protections that Plaintiffs are entitled to under 42 U.S.C. §§ 1983 and 1985. As explained
6 herein, Defendants' violations of law include the attempt to assert jurisdiction under the second
7 Montana exception by falsely claiming harm to Defendants based upon exaggerated
8 environmental hazards, and other trumped up claims.

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10 **A. RINCON Does Not Have Authority Over Plaintiffs' Leasehold Interests**

11 It has long been established that tribal courts have jurisdiction over a lawsuit based upon a
12 claim that arises on Indian land. Such courts also have jurisdiction over wholly internal tribal
13 affairs, such as membership and property disputes relating to tribal land. However, it has also
14 been long held that tribal civil adjudicative jurisdiction does not extend to activities of non-Indians
15 (i.e. non-Tribal members) on fee (i.e., non-Tribal) lands.

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17 The seminal case in this area is Montana v. United States (450 U.S. 544 (1981), wherein
18 the U.S. Supreme Court held that an Indian Tribe had no authority to regulate hunting and fishing
19 by non-Indians on non-Indian-owned fee land within the reservation. It the Court's ruling, the
20 following general proposition was stated:

21 "The inherent sovereign powers of an Indian tribe do not extend to the activities of non-
22 members of the tribe"... The only exceptions were 1) that a tribe could regulate "activities of
23 nonmembers who enter consensual relationships with the tribe or its members," and 2) that a tribe
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1 could exercise "civil authority over the conduct of non-Indians on fee lands within its reservation
2 when that conduct threatens or has some direct effect on the political integrity, the economic
3 security, or the health or welfare of the tribe." *Id.* at 565-66. With regard to the second
4 *Montana* exception, the Court stated that the exception should be read narrowly." *Id.*

5 In various federal cases since the 1981 *Montana* decision, the limitations of claims of tribal
6 sovereignty have been further addressed. For example, the Ninth Circuit determined in BNSF
7 Ry. Co. v. Ray (9th Cir. 2008) 297 Fed. Appx. 675 (unpublished), wherein an Arizona district
8 court had permanently enjoined the chief judge and court clerk of the Hualapai Tribal Court from
9 taking any further action in a personal injury suit filed in the tribal court by decedents of the
10 automobile passengers. The Ninth Circuit found the injunction to be proper, because the
11 plaintiffs had "alleged an ongoing violation of federal law - the unlawful exercise of tribal court
12 jurisdiction - and had sought prospective relief only, such that tribal sovereign immunity did not
13 bar the action. *Id.* at 677.

14 Numerous other cases on point can be found. For example, in Walleit v. Anderson, (D.
15 Conn. 2000) 198 F.R.D. 20, the court ruled that an attorney for a tribal casino was not entitled to
16 dismissal on sovereign immunity, where allegations of complaint were that the attorney had
17 engaged in conduct violative of plaintiff's constitutional rights, which could not be within the
18 scope of his tribal authority. Case law clearly mandates that the claimed authority by
19 Defendants in this dispute exceeds any power the Defendants could properly assert over these non-
20 Indian Plaintiffs who live and work on non-Indian lands.

21 Perhaps the most clear expression from the U.S. Supreme Court regarding this issue comes
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1 from a decision by Chief Justice Roberts in Plains Commerce Bank v. Long Family Land &
2 Cattle Co. (2008) 128 S.Ct. 2709. In invalidating a \$750,000 judgment entered against a non-
3 member (i.e., non-Indian) bank in the Cheyenne River Sioux Indian Tribal Court, Chief Justice
4 Roberts stated the following:

5 "Given *Montana's* general proposition that the inherent sovereign powers of an Indian tribe
6 do not extend to the activities of non-members of the tribe... and efforts by a tribe to
7 regulate non-members especially on non-Indian fee land, are presumptively invalid." *Id.*
at 2720.

8 Furthermore, Chief Justice Roberts writes in the Plains decision that "Tellingly, with only one
9 minor exception, we have never upheld under Montana the extension of tribal civil authority over
10 non-members on non-Indian land." *Id.* at 2722.

11 The bottom line here is that Defendants do not have regulatory or adjudicative authority as
12 to either these non-Indian Plaintiffs or as to the fee simple land upon which they are tenants.
13 Further, Defendants do not have the authority to subject the Plaintiffs to the jurisdiction of the
14 RINCON Tribal, or to force them to leave their lawful rights to the Property.

15 The controversy concerns the Plaintiffs' rights with respect to their respective leasehold
16 interests on the Property. Specifically, Plaintiffs contend that any prospective or future actual or
17 attempted enforcement against Plaintiffs by Defendants should be found, declared and adjudged
18 facially unconstitutional, unconstitutional as applied, and/or illegal pursuant to applicable
19 provisions of federal and California law. Such provisions requiring this judicial determination to
20 be made include, but are not limited to, the Supremacy Clause of the U.S. Constitution (Art. VI,
21 Clause 2), the Taking, Due Process, and Equal Protection Clauses of the Fifth and Fourteenth
22 Amendments to the Constitution, cognate provisions of the California State Constitution, and
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1 federal civil rights protections afforded by 42 U.S.C. §§ 193 and 1985 (3).

2 Plaintiffs further contend, as previously discussed, that any prospective or future actual or
3 attempted enforcement or other actions by Defendants and/or their representatives with regard to
4 the Tribal Injunction would so clearly exceed and go beyond any authority that can legally or
5 constitutionally be conferred upon Defendants,. so as to be *ultra vires*.

6 This dispute has already escalated to include the destruction by Defendants of Automotive
7 Specialists' own signed, which was lawfully placed on that Plaintiffs' leasehold Property, as
8 described above. There is concern that, as the harm to Plaintiffs worsens, further unrest and
9 anger may occur.

10 The urgency of this matter is apparent. If Defendants continue to enforce the terms of
11 their Injunction, the risk of an escalation of this dispute increases. Needless to say, the emotions
12 and anger on the part of Plaintiffs have recently increased significantly, and have now reached a
13 critical point as Defendants attempt to assert their specious claim of authority over Donius and
14 Plaintiffs, and try to force these parties from the Property.

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17 **IV. AS AN INTERIM MEASURE, THE COURT SHOULD ISSUE A PRELIMINARY**
18 **INJUNCTION TO PREVENT IMMINENT HARM TO PLAINTIFFS**

19 As previously described, unless this Court issues a preliminary injunction preventing
20 Defendants or permanent injunction requiring and ordering Defendants to desist and refrain from
21 any further actual or attempted enforcement, prospectively and in the future, of any and all
22 purported regulatory or adjudicative authority over these Plaintiffs and their leasehold interests,
23 these Plaintiffs will suffer serious and irreparable injury and other damages that are not
24 compensable in money damages or by monetary relief of any nature.

1 The immediate injuries to be sustained by the Plaintiffs should the Court not enjoin
2 RINCON from its actions include the loss of the ROGERS-DIAL home and their business, as well
3 as the destruction of AUTOMOTIVE SPECIALISTS' business being operated on the Property.
4 This latter Plaintiff has already been advised by the California Highway Patrol and the San Diego
5 County Sheriff's Department that the towing and impound agreements between AUTOMOTIVE
6 SPECIALISTS and these law enforcement agencies will be terminated.

7 By contrast, a temporary injunction will not prejudice the Defendants, or cause other
8 provable harm.

9 By this Motion, Plaintiffs request that the Court issue a Preliminary Injunction barring the
10 Defendants from enforcing the terms of the RINCON Injunction as to these Plaintiffs. Plaintiffs
11 have no other adequate or speedy remedy, and the urgent need for injunctive relief is apparent. If
12 Defendants intend to enforce the terms of their Injunction, and continue to try to force the
13 Plaintiffs from entering their Property, including the residence of ROGERS-DIAL, and
14 AUTOMOTIVE SPECIALISTS' business operation, the risk of an escalation of this dispute is
15 great and very real.

16 V. CONCLUSION

17 Unlike the prior lawsuits to come before this Court which had some relationship to this
18 lawsuit, Plaintiffs' Complaint relates to their use and enjoyment of certain real property they are
19 lawfully entitled to by virtue of their leasehold interests. The Injunctive Relief sought by
20 Plaintiffs against Defendants is urgent, and vitally important to the survival of Plaintiffs'
21 respective businesses. If the requested injunctive relief is not granted, and the Defendants are
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1 not stopped from continuing their unlawful activities, the ROGERS-DIAL family will be forced
2 from their home, and all Plaintiffs will face the likely demise of their respective businesses.

3 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their request
4 for a preliminary injunction until this Court can resolve the legal issues underlying this lawsuit.

5 Respectfully submitted,

6 DATED: March 16, 2011

LAW OFFICES OF NEWELL E. CUMMING

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8 By: s/Newell E. Cumming, Esq.

9 Attorney for Plaintiffs Steven and Suzanne
10 Rogers-Dial and Automotive Specialists, LLC
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