DOCKET NO. 10-56521

In the

United States Court of Appeals

For the

Ninth Circuit

RINCON MUSHROOM CORPORATION OF AMERICA,
a California Corporation,

Plaintiff-Appellant,

v.

BO MAZZETTI, JOHN CURRIER, VERNON WRIGHT, GILBERT PARADA, STEPHANIE SPENCER, CHARLIE KOLB, DICK WATENPAUGH,

Defendants-Appellees,

Appeal from a Decision of the United States District Court for the Southern District of California, No. 09-CV-02330 • Honorable William Q. Hayes

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1).

The Panel's decision involves a question of exceptional importance: whether an Indian tribe has inherent authority over non-Indian activities on non-Indian fee lands within its reservation to protect against direct threats to reservation water quality and wildfire safety. The Panel concluded that "these possibilities do not fall within *Montana's* second exception, which requires actual actions that have significantly impacted the tribe." *4/20/2012 Memorandum Decision,* p. 3 (attached and marked as "Exhibit A").

En banc rehearing is also necessary to secure uniformity in the court's decisions. The Panel's determination that tribal jurisdiction only lies *after* the reservation has been engulfed by a fire or *after* reservation waters have been polluted is in direct conflict with the Supreme Court's path marking decision in *Montana v. U.S.,* 450 U.S. 544 (1981) and this Circuit's decisions in *Montana v. U.S. Envt'l. Prot. Agency,* 137 F.3d 1135 (9th Cir. 1998) and *Elliot v. White Mountain Apache,* 566 F.3d at 842 (9th Cir. 2009) (*"Elliot"*). The Panel's conclusion that RMCA was not required to exhaust tribal remedies because tribal jurisdiction was "plainly lacking" also conflicts with the Supreme Court's decisions in *Nat. Farmers Union Insurance Co. v. Crow Tribe,* 471 U.S. 845 (1985) and *Strate v. A-1 Contractors,* 520 U.S. 438 (1997) and this Circuit's decision in *Elliot.*

If allowed to stand, the Panel's decision will imperil core tribal resources and undermine tribal self-sufficiency, thereby substantially diminishing the sovereignty of over 400 federally recognized Indian tribes located within the Ninth Circuit.[1]

II. STATEMENT OF THE CASE

The Rincon Band of Luiseño Indians is a federally recognized Indian Tribe, and the Tribal defendants/petitioners consist of current and former members of the Tribal Council and the Tribe's Administrator. The Tribe, through the Tribal Council and its agencies, exercises inherent governmental authority over its Reservation in the Valley Center area in north San Diego County, California–an area known for its water scarcity and catastrophic wildfires. [SER 75].

RMCA is a non-Indian owned entity and the former owner of an approximate 5-acre parcel of land known as the "Mushroom Farm"[2] [ER 316]. The Mushroom Farm is located within the Tribe's Reservation directly west of, and across from, the Rincon Casino & Resort - the Tribe's principal source of Reservation economic development, and a community evacuation center during wildfires.

[1] The far reaching consequences of the Panel's decision are demonstrated by the significant number of Indian tribes throughout the Ninth Circuit seeking leave to submit briefs as amici curiae in support of this petition for reharing en banc.

[2] RMCA alleges that the Subject Property (the "Mushroom Farm") was sold to Marvin Donius in 1999 pursuant to a deed of sale and buyback arrangement, whereunder Donius took fee title to the Mushroom Farm. [ER 316].

In recent years, two catastrophic wildfires—the 2003 Paradise Creek Fire, and the 2007 Poomacha Fire swept through the Reservation and surrounding communities, causing millions in damages, loss of homes and loss of life. [SER 50-51, SER 46-48, SER 20-22]. The winds driving both fires came from the east and drove the fires from the Mountains westward, across the Mushroom Farm, and onto the Casino & Resort and other tribal trust lands.

During these classic easterly "Santa Ana" wind conditions, any fire that moves through or originates on the Mushroom Farm will directly threaten the Casino & Resort, nearby Tribal governmental offices and tribal member residences. [SER 47]. During the Poomacha fire, an un-permitted 3,000-gallon above ground diesel storage tank and other highly combustible materials on the Mushroom Farm incinerated and were swept by the winds while the winds across the street and onto the grounds and rooftop of the Casino & Resort, which was being used as an evacuation center by tribal members and Resort patrons who were trapped by the fire. [SER 22].

In addition to catastrophic wildfires, water quality impairment poses a serious risk to the Rincon Reservation. The Mushroom Farm is located above and adjacent to the Reservation's primary ground and surface water resources. Soils on the Mushroom Farm are sandy loams with moderately rapid permeability and there is no confining layer over the aquifer to protect it from surface contamination.

[SER 8-9]. The Tribe is dependent on groundwater from the unconfined aquifer underlying the Mushroom Farm for its water supply. [SER 83, SER 8]. The Mushroom Farm is located approximately 300 yards from the north bank of the San Luis Rey River, the only surface water body within the Reservation, in which the Tribe possesses significant federally reserved water rights. [SER 10-11]. The San Luis Rey River extends 40 miles beyond the Reservation through several downstream communities to the Pacific Ocean.

After the Poomacha fire, the U.S. EPA obtained soil samples from the Mushroom Farm, which revealed heavy metal and petroleum contamination. [SER 39-41,168-170]. These contaminants are consistent with land uses on the Mushroom Farm prior to the Poomacha fire, which included: generation of hazardous waste (waste oil and formaldehyde) and storage, labeling and disposal of hazardous waste on-site; storage of “overflowing” 55 gallon waste oil drums and an un –permitted, 3,000 gallon above ground diesel storage tank. [SER 169-170]. The EPA-supervised clean-up yielded 47 tons of contaminated ash, soil and debris that were removed from the Mushroom Farm.[3] [SER 22, 41].

Following the 2007 Poomacha fire, Donius sought to redevelop the Mushroom Farm. [SER 85-88]. The Tribe notified Donius that he was required to

[3] The Panel appears to have been persuaded by RMCA’s argument that the EPA-mandated clean-up demonstrates that no threat remains to the Reservation. Instead, the EPA-mandated clean-up establishes RMCA’s pattern of bad acts that imperil tribal resources. RMCA will be emboldened by the Panel’s decision, which creates an unregulated enclave.

submit a development plan before he could reconnect electrical service and engage in redevelopment, which is required under tribal law for the limited purposes of ensuring that proposed land use activities do not imperil critical Tribal interests.[4] [*Id.*]. Donius refused to submit those plans, and instead caused the Mushroom Farm to be used for commercial dumping and salvaging, wood pallet repair and storage, automotive and recreational vehicle storage, mobile home rentals, and possibly other businesses that Donius and RMCA have not disclosed. [SER 22-25].

The Tribe objected to restoration of electrical service by San Diego Gas and Electric, and initiated tribal court proceedings against Donius and eventually RMCA. In the tribal court proceedings, the Tribe sought to enjoin RMCA and Donius from further redevelopment activities until they submit and receive approval of a development plan by the Tribal Council. [SER 26-36, 49]. Rather than pursue its jurisdictional challenges in tribal court, RMCA filed two

state court challenges to the Tribe's jurisdiction.[5] San Diego County, a cross-defendant in the state court proceedings, joined in the Tribe's motion to dismiss and agreed that the Tribe has jurisdiction to ensure that RMCA's proposed land use

[4] Contrary to RMCA's characterization, this is not a case of a Tribe's attempt to impose general land use regulations or to restrict activities that do not directly threaten the Tribe's critical resources.

[5] In addition to RMCA, Marvin Donius and his sublessees each pursued individual claims against the Tribal Defendants in state court. Similar to RMCA, those claims were dismissed for lack of subject matter jurisdiction. Response Brief, p. 12-18. Similar to RMCA, those plaintiffs filed federal court actions, which were dismissed for failure to exhaust tribal remedies. *Id.* Donius failed to pursue his appeal and this Court dismissed on May 27, 2011. *Donius v. Mazzetti, et al,* No. 10-565 Dkt. 26. Plaintiffs Automotive Specialists and Rogers-Dial did not pursue an appeal.

activities do not imperil critical Tribal interests. [SER 165-166]. The state court proceedings were dismissed for lack of subject matter jurisdiction. Response Brief, p. 12-13.

On October 20, 2009 RMCA filed a complaint in the federal District Court for the Southern District of California. [ER 318-351]. On September 21, 2010 the District Court entered an order dismissing the case, concluding that RMCA must first exhaust its tribal court remedies before seeking federal court review of its challenges to the Tribe's jurisdiction. On April 20, 2012 the Panel issued its four-page memorandum decision reversing the district court, concluding the Tribe's jurisdiction is "plainly lacking."

Meanwhile, between the district court's dismissal order and the Panel's decision, jurisdictional proceedings have continued in tribal court. The tribal court had ordered a discovery and briefing schedule for a threshold evidentiary hearing on the question of whether the facts establish jurisdiction under *Montana's* second exception, and court-ordered discovery has led to evidence of petroleum contamination in the groundwater below the Mushroom Farm. *5/11/12 Motion for Judicial Notice, Exh. A-E.*

III. ARGUMENT

In *Montana v. United States,* the Supreme Court held that tribes generally do not have jurisdiction over non-Indian activities occurring on reservation fee lands,

subject to two important exceptions: (1) "[a] tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements"; and (2) "[a] tribe may also retain inherent power to exercise civil authority over . . . conduct [that] threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." The second "*Montana*" exception is at issue in this case.

Since deciding *Montana,* the Supreme Court has cautioned that the *Montana's* exceptions are limited and cannot be construed in a manner that would severely shrink the general rule. *Strate v. A-1 Contractors,* 520 U.S. 438, 458 (1997). While the Court has hypothesized that interference with the right of a tribe and its members to "make their own laws and be ruled by them" would serve a basis for tribal jurisdiction under *Montana*, the Court does not constrain *Montana's* exceptions to self-governance threats alone. For example, the Court recognizes that tribal jurisdiction lies to protect against direct, demonstrable threats to reservation resources that are critical to a tribe's very subsistence. Chief Justice Roberts, writing for the Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, (cite) (2008), observed:

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent that they do, such

> activities or land uses may be regulated." (citations omitted). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe to justify tribal oversight.

Then, in making the distinction between the sale of land and activity on the land as the basis for tribal jurisdiction, Chief Justice Roberts explained:

> The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out . . . the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases.

Id. 554 U.S. at 336-37.

Consistent with the Supreme Court's decisions in *Montana, Strate* and *Plains Commerce*, this Circuit has ruled that non-Indian conduct that poses a direct threat to core tribal reservation resources falls within *Montana's* second exception. In *Montana v. EPA,* the State of Montana challenged U.S. EPA's decision to grant the Confederated Salish and Kootenai Tribes application for treatment as a state ("TAS") status to develop water quality standards ("WQS") applicable to all point source discharges within the Flathead Indian Reservation, including those from non-member fee lands. *Id.* 137 F.3d at 1138. EPA's approval rested on the tribe's demonstration of jurisdiction under *Montana's*

second exception, which was accomplished by the EPA's "generalized finding" of the importance of water quality upon human health and welfare, coupled with the tribe's demonstration that (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under the Clean Water Act, 33 U.S.C. § 1251 et seq., and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe. *Id.* 137 F.3d at 1138-9. In their application for TAS, the tribe identified several facilities on fee lands within the Reservation that have the potential to impair water quality and beneficial uses of tribal waters, including feedlots, dairies, construction activities and landfills. Thus, EPA required the tribe to demonstrate direct and substantial *threats* to water impairment, as opposed to *actual* water impairment. *Id.* 137 F.3d at 139-40.

While acknowledging that *Montana's* second exception is narrowly applied, this Circuit upheld EPA's determination of tribal jurisdiction. *Id.* 137 F.3d at 140-41. The court noted that "[w]e have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians." *Id.* 137 F.3d at 140-41 (citing *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 52 (9th Cir. 1981). Consistent with *Walton,* this Circuit recognized 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." *Id.* 137 F.3d at 1141.

This Circuit also recognizes that tribal jurisdiction may lie under *Montana's* second exception to protect against wildfire threats. In *Elliot v. White Mountain Apache,* this Circuit recognized that a tribe may enforce regulations designed to prevent wildfire against non-Indians "because wildfire can result in the destruction of millions of dollars of tribal natural and other resources." *Id.* 566 F.3d at 850. Just as water is a unitary resource, the impairment of which can threaten the subsistence of the community, wildfire is a unitary threat because the single act of a non-Indian on fee land can cause catastrophic harm to an entire reservation. Accordingly, although the dispute in *Elliot* arose from a fire ignited by a non-Indian on tribal trust lands, the court declared 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 conclusion: In the circumstances of this case, we cannot say that the tribal court plainly lacks jurisdiction." *Id.* at 850.

The *Walton, Montana v. EPA* and *Elliot* Panels recognized that, whatever the outer boundaries of *Montana* jurisdiction may be,[6] a tribal government retains

[6] As demonstrated in the memorandum of tribal amici, the growing body of *Montana* jurisprudence confirms that while the exceptions are narrow, there is uniformity among the lower courts that tribal jurisdiction lies to protect against demonstrable threats that imperil critical reservation natural recources.

inherent authority over non-Indian activities when necessary to protect core, unitary resources, in which "[t]he actions of one user have an immediate and direct effect on other users.'" *Id.* 137 F.3d at 1141 (quoting *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 52 (1981).

In this case, the district court relied upon *Montana v. EPA* and *Elliot* when evaluating RMCA's claim that the Tribe's jurisdiction was "plainly lacking." Pursuant this Circuit's instruction in *Elliot,* the district court carefully reviewed the record,[7] including actual soil contamination on the Mushroom Farm and actual contribution to the spread of the Poomacha fire, and found the Tribe met its threshold evidentiary burden to demonstrate that RMCA's activities in the Mushroom Farm posed "plausible" threats to reservation water resources and fire safety sufficient to require RMCA to first exhaust tribal court remedies before challenging the Tribe's jurisdiction in federal court. *Elliot v. White Mountain Apache Tribe,* 566 F.3d 838, 848-49 (9th Cir. 2009). The Panel dismissed the district court's findings, concluding that tribal jurisdiction was "plainly lacking" because "these possibilities do not fall within *Montana's* second exception, which requires actual actions that have significantly impacted the tribe." *4/20/2012 Memorandum Decision,* p. 3.

[7] *Infra,* at 2-6.

The Panel's decision cannot be squared with the plain language of *Montana's* second exception, which expressly permits tribal jurisdiction over non-Indian conduct that "*threatens or* has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. U.S.,* 450 U.S. 544, 566 (1981). The Panel's decision is similarly at odds with *Montana v. EPA* and *Elliot,* which both concluded that tribal jurisdiction was plausible and not plainly lacking over non-Indian conduct that threatens water and fire safety on reservation fee lands under *Montana's* second exception.

This Circuit has repeatedly acknowledged that determinations of tribal jurisdiction under *Montana* are "not an easy task." *Elliot v. White Mountain Apache Tribal Court,* 566 F.3d 842 (2009) (quoting *Smith v. Salish Kootenai Coll.,* 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc)). Exceptions to tribal exhaustion should be applied with great care, because they work to deny tribes an opportunity to develop a record in support of tribal jurisdiction in either tribal or federal court in this "murky" area of inherent tribal jurisdiction, which is necessarily factually dependent and involves complex principles of federal Indian law. *Id.* 566 F.3d at 848.[8] If the Panel's decision stands, tribes will be denied an evidentiary hearing to

[8] During oral argument, RMCA's counsel and members of the panel commented favorably to a prior decision of this court, *Ford Motor Co,. v. Todecheene*. 394 F.3d 1170 (9th Cir. 2005). RMCA's counsel also improperly cites to the 2005 opinion in his opening and reply pleadings. That decision was withdrawn, however, because jurisdiction was not "plainly lacking" and was remanded to

demonstrate their jurisdiction until after a non-Indian's "actual actions" result in catastrophic water contamination or wildfire damage. That is not the law of this Circuit.

IV. CONCLUSION

For the foregoing reasons, Tribal defendants/petitioners request the Panel to grant this petition for rehearing, withdraw the April 20, 2012 Memorandum Decision, and enter a decision affirming the district court. If rehearing is denied, Tribal defendants/petitioners request that the petition for rehearing en banc be granted, that a briefing schedule be set, and that oral argument be scheduled.

Dated: May 11, 2012

Respectfully submitted,

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s/Scott Wheat
Scott Wheat

s/Karen Graham
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allow for exhaustion of tribal remedies. *Ford Motor Co., v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 2,717 words.

s/Scott Crowell
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