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Attorney for Plaintiff RINCON MUSHROOM CORP. OF AMERICA

**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

<p>RINCON MUSHROOM CORPORATION OF AMERICA, a California Corporation, Plaintiff, v. BO MAZZETTI; JOHN CURRIER; VERNON WRIGHT; GILBERT PARADA; STEPHANIE SPENCER; CHARLIE KOLB; DICK WATENPAUGH; DOE CO.; and DOE I and DOE II, Defendants.</p>	<p>) Case No. 09-CV-2330-WQH-OR)) REPLY TO OPPOSITION TO EX PARTE APPLICATION FOR EMERGENCY STAY)) NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT)) Judge: Hon. William Q. Hayes)) Location: Courtroom 14B Suite 1480) 333 West Broadway) San Diego, CA 92101)</p>
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Plaintiff RINCON MUSHROOM CORPORATION OF AMERICA ("RMCA") and MARVIN DONIUS ("Donius") submit the following in reply to Defendants opposition to Plaintiffs' application for an ex parte emergency stay order.

I.

THE APPICATION IS NOT PROCEDURALLY DEFECTIVE

Defendants argue that the ex parte application is procedurally defective, because, in part, Marvin Donius is not a party Plaintiff in the federal action pending before this Court. They contend that since only Donius owns that property, and that

1 RMCA's standing is purportedly "dubious," this Court cannot
2 entertain any relief. This contention is without merit.

3 This Court rejected Defendants' standing argument in its
4 2010 Order dismissing the case for failure to exhaust Tribal
5 remedies. As the Court knows, the Court of Appeals reversed
6 that order and remanded with instructions to stay the case
7 pending RMCA's exhaustion of Tribal remedies. However, this
8 Court's ruling on standing is still valid. It that regard, this
9 Court ruled, after ordering RMCA to show cause why this case
10 should not be dismissed for lack of standing, that RMCA
11 unambiguously had standing to litigate claims of tortious
12 interference by the Tribal Defendants with respect to the use of
13 the subject property, and stated:

14 Plaintiff has established that it has suffered an
15 "injury in fact," in that it has lost income from payments
16 on the promissory note it holds as a result of Donius's
17 inability to use or sell the property. Plaintiff's loss of
18 income is both "concrete and particularized" and "actual"
19 in that Plaintiff has not received payments on the
20 promissory note for over four years. In addition to the
21 **interest Plaintiff has in the land via the promissory note,**
22 due to Donius's default, **Plaintiff has a right of**
23 **possession of the property** which it has agreed not to
24 exercise in exchange for Donius's cooperation in the
25 litigation and a share of the proceeds. Plaintiff has
26 established that there is a causal connection between the
27 injury and Defendants' conduct. Plaintiff has produced
28 evidence that its loss of income is directly traceable to
Defendants' actions in asserting regulatory jurisdiction
over the property and preventing San Diego Gas & Electric
from restoring power to the property. Plaintiff has
established redressability. A declaratory judgment from
this Court in Plaintiff's favor would likely redress the
situation by making clear that the Tribe lacks regulatory
jurisdiction over the property. Such a declaratory
judgment would allow Donius to use or sell the land,
allowing him to pay off the promissory note Plaintiff
holds. Damages would redress Plaintiff's loss of income.

**The Court concludes that Plaintiff has satisfied the
requirements to establish Article III standing in this
matter.** (Emphasis added).

1 (Court Order 9/21/2010). It should be noted that the Tribe
2 still to this day refuses to allow SDG&E to restore power to the
3 subject property, on the false claim that it has regulatory
4 jurisdiction. RMCA still has the right to foreclose on the
5 note, still has a right of possession of the subject property,
6 and still suffers damage in terms of lost income by Donius'
7 inability to make payments on the note as a result of the
8 Tribe's ongoing interference with Donius's use of the subject
9 property. The Tribe's intentions to shut down the property by
10 noon on Monday, June 3, 2019, will further damage RMCA.

11 Also, as this Court observed in its Order of July 26, 2017,
12 denying RMCA's motion to re-open the case:

13 RMCA owned the land in fee simple until 1999, when it sold
14 the land to Marvin Donius, also a non-Indian. RMCA
15 "received as partial consideration...a promissory note in a
substantial amount, together with a 'carry-back' deed of
trust." Donius and RMCA used the land as a "non-tribal
mixed-use commercial facility." (Emphasis added).

16 (Order 7/26/2017).

17 Accordingly, RMCA has standing to request an emergency ex
18 parte order staying enforcement of the judgment. Allowing the
19 Tribe to shut down the property and block any entrance to the
20 property would cause RMCA irreparable damage.

21 Although Donius is not a party-Plaintiff in the federal
22 action, when RMCA returns back to federal court after exhausting
23 its tribal remedies, RMCA will be amending the Complaint to add
24 Donius as an additional party Plaintiff, given all of the
25 subsequent wrongful conduct the Tribal Defendants have engaged
26 in toward both RMCA and Donius since attempting to exhaust their
27 tribal remedies. Donius is a named Plaintiff and a named
Counter-Defendant in the Tribal Court action.

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II.

PLAINTIFF HAS SOUGHT TO EXHAUST ITS TRIBAL REMEDIES

As stated in RMCA's ex parte papers, both RMCA and Donius have requested a stay from the Tribal Trial Court, which was denied, and have requested a stay from the Tribal Court of Appeals, which has not been acted upon.

If the Tribal Court of Appeals does not act on Plaintiffs' motion for a stay by Friday, May 31, 2019, then the Tribe will begin to remove people from the subject property on Monday and block any entrance to it.

III.

PLAINTIFF HAVE ESTABLISHED GROUNDS FOR A STAY

As stated in RMCA's ex parte papers, Plaintiff has established it is entitled to a stay of the judgment based on the four factors set forth in Alliance for Wild Rockies v. Cottrell (9th Cir. 2011) 632 F.3d 1127, 1132. These four facts are:

1. Whether the applicant is likely to succeed on the merits (or in complicated cases has shown serious legal questions regarding the merits);

2. Whether the applicant has shown a likelihood of irreparable harm absent a stay/injunction;

3. Whether the balance of equities tips in plaintiff's favor; and

4. The public interest.

Alliance for Wild Rockies v. Cottrell (9th Cir. 2011) 632 F.3d 1127, 1132.

However, in complicated cases where it is difficult to ascertain whether the movant will likely prevail, a stay/injunction may be issued so long as the movant can show serious legal questions going to the merits and a hardship balance that tips sharply toward the movant, as an alternative

1 to the "probability of success on the merits" factor. Alliance
2 for Wild Rockies, supra at 1131-1134.

3 Here, the balance of equities tips in favor of RMCA. The
4 Tribal Trial Court clearly erred in ruling that the Tribe had
5 regulatory jurisdiction, given that the Tribe failed to meet its
6 burden of proof on that crucial issue, and the Tribal Trial
7 Court completely ignored Montana, supra, in order to give the
8 Tribe the right to regulate activities on the subject property,
9 simply because the Tribal Trial Court felt that the Tribe "ought
10 to."

11 As stated, because Donius is a non-Indian owner of non-
12 Indian fee land, the Rincon Tribe's efforts to regulate him and
13 the activities on his property are "presumptively invalid."
14 Plains Commerce Bank v. Long Family Land & Cattle (2008) 554
15 U.S. 316, 330. The Rincon Tribe's authority to regulate
16 activities on the subject property must conform to the holding
17 of Montana, which provides two exceptions to the general rule
18 that tribes do not possess any authority over activity occurring
19 on non-Indian fee land within their border. The second
20 exception at issue here is that the Tribe may regulate "activity
21 that directly affects the Tribe's political integrity, economic
22 security, health, or welfare." Montana, supra at 566. But the
23 challenged conduct cannot be for any perceived threat or
24 potential adverse effect on the Tribe. Burlington N. R.R. Co. v.
25 Red Wolf (9th Cir. 1999) 196 F.3d 1059, 1064-65. It must be so
26 severe as to "fairly be called catastrophic for tribal self-
27 government." Plains Commerce, supra at 341. The **burden** rests on
28 **the Tribe** to establish this exception. Plains Commerce, supra
at 330.

The Court can read both decisions by the Tribal trial Court
and conclude for itself that the issue of Tribal regulatory
jurisdiction was wrongly decided. The Tribe cannot require RMCA

1 and Donius to first prove to the Tribe that the activities being
2 conducted on the subject property will not pose a catastrophic
3 risk to the political integrity, the economic security, or the
4 health and welfare of the Tribe, by requiring them to submit a
5 business plan for the Tribe's approval, before being allowed to
6 engage in any activities on the subject property. That gives
7 the Tribe complete discretion and control over the property,
8 contrary to Montana, supra, and cases construing it. It
9 unlawfully places the burden on the non-Indian owner of fee land
10 to prove to the Tribe that its activities will not amount to
11 catastrophic consequences.

12 RMCA and Donius did not start the 2007 wildfire that swept
13 across the area, and ultimately destroyed the subject property.
14 Everything was cleaned up with the assistance of the EPA, yet
15 the Tribe used pictures of that aftermath to argue that its
16 water was contaminated as a result. It was not. In 2017, the
17 Tribe's drinking water was tested by RMCA and Donius' experts,
18 and it was determined that the drinking water is not
19 contaminated, and never was. The Tribe's expert reached a
20 similar conclusion. The Tribe's claim that the subject property
21 is a fire hazard and that a fire starting on the property could
22 burn down the casino across the street, was shown at trial to be
23 pure speculation. At no time did the Rincon Fire Department
24 ever cite the property for being a fire hazard, even though the
25 Fire Department is located just a few hundred feet down the road
26 and had visited the site several times over the years. The
27 evidence at trial was uncontested on this issue. Yet, the
28 Tribal Trial Court accepted the Tribe's unsupported claims that
the subject property is a fire hazard. The Tribal Trial Court's
two decisions point to no evidentiary support for the Tribe's
claims of contaminated drinking water or the risk of the Tribe's

1 casino burning down as a result of activities being conducted on
2 the subject property.

3 What the Tribal Trial Court did was to side with the
4 Tribe's insistence on being able to regulate the subject
5 property in order to prevent catastrophic consequences. That is
6 not the law, and it places the cart before the horse. The law
7 clearly provides that the Tribe must first prove these
8 catastrophic consequences or risks, before asserting the right
9 to control the activities on the property. The Tribe cannot
10 claim a right to regulate, or even shut down the property,
11 because RMCA and Donius have not submitted a business plan for
12 its approval or allowed the Tribe to inspect and conduct testing
13 on the property, to look for way that the Tribe might be harmed.
14 A cursory reading of the two Tribal Trial Court decisions shows
15 that the Tribal Trial Court erred it believing the Tribe has
16 this right.

17 Encouraged by these erroneous decisions, the Tribe is now
18 poised to swoop down into the subject property and shut it down.

19 The Tribal Trial Court also committed legal error in
20 determining that the Tribe has the right to regulate activities
21 being conducted on non-Indian fee land owned by a non-Indian,
22 because the Tribe believes the subject property is an "unlawful
23 enclave," when no such exception is provided under Montana. The
24 Tribal Trial Court accepted the Tribe's argument that if the
25 County of San Diego purportedly cannot regulate the subject
26 property, then RMCA and Donius are seeking refuge in an
27 "unlawful enclave," where no one can regulate them for any
28 reason. Even if this were the case (it is not), Montana, supra,
does not provide that as a basis for the Tribe to regulate the
subject property. Indeed, the EPA oversaw the cleanup of the
aftermath of the fire on the subject property in 2008, and

1 concluded that any contaminants in the soil from ash and other
2 hazardous substances were entirely cleaned up.

3 The Tribal Trial Court also committed legal error in
4 rejecting evidence that the Tribe altered its own environmental
5 ordinances to get around the regulatory restrictions under
6 Montana, supra, and used those unlawful environmental ordinances
7 as an attempt to regulate the activities being conducted on the
8 subject property. As a result, the individual Defendant Tribal
9 Council members and Tribal affiliated defendants were acting
10 pursuant to an invalid Tribal ordinance, when they sought to
11 regulate the activities being conducted on the subject property,
12 thereby stripping them of any sovereign immunity.

13 Accordingly, RMCA and Donius are likely to succeed on the
14 merits of the issue of whether the Tribe has regulatory
15 jurisdiction over the activities being conducted on the subject
16 property. If the Tribe does not have regulatory jurisdiction,
17 then it has no right to shut down the subject property and block
18 entrance to it. The status quo of RMCA's right with respect to
19 the subject property needs to be preserved pending its final
20 efforts to exhaust its Tribal remedies.

21 IV.

22 RMCA WILL BE IRREPARABLY HARMED

23 RMCA and Donius conduct a trucking business on their
24 property, and other small activities. None of these activities
25 were shown at trial to cause any harm to the Tribe's drinking
26 water, or to the Tribe's casino across the street.

27 By allowing the Tribe to execute on and implement the
28 Judgment would cause irreparable harm to RMCA and Donius, in
that they would not be allowed to conduct their business and
could not use their property in any fashion. More importantly,
to allow the Tribe to execute on the judgment pending this
appeal, would deprive RMCA and Donius of the right to exhaust

1 their Tribal remedies before repairing back to the federal
2 court.

3 Also, there are other people who will be negatively
4 impacted by the Tribe's efforts to block the entrance to the
5 property and shut down everything.

6 There are families living on the property who will be
7 homeless. There is a nursery on the property that, if left
8 unattended, the plants inside will die, causing severe financial
9 damage to this business. Donius sells those plants to places
10 like the Home Depot and other stores. There is also a pallet
11 business that will be shut down and cause the proprietor
12 financial loss, and in turn losses to Donius and RMCA in lost
13 rental income. There is also a company that stores commercial
14 equipment that will lose daily access to its property, and in
15 turn loss of income to Donius and RMCA.

16 In short, if the Tribe is allowed to shut down the property
17 it will have a ripple effect and negatively impact persons other
18 than RMCA and Donius.

19 **V.**

20 **THERE IS NO PREJUDICE TO THE TRIBE**

21 The RMCA and Donius have been conducting business
22 activities on their property for over 10 years since the Tribe
23 began objecting to its use and harassing them. Throughout this
24 time no catastrophic event, such as a fire or water
25 contamination, has occurred to warrant the Tribe's demand to
26 remove Donius and RMCA from their property. Indeed, as
27 explained the Tribe failed to show any catastrophic risk at
28 trial under Montana, supra. As a result, there will be no
prejudice to the Tribe in having the Judgment stayed pending the
appeal. The Trial Court also waived bond.

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VI.

**THE CONDITION OF THE MAZZETTI PROPERTY SHOWS THE TRIBE IS ACTING
IN BAD FAITH**

The Tribe's explanation about the condition of the Mazzetti property lacks credibility. That property sits on the same water table as the subject property, and is just down the street. It is closer to the Tribe's drinking water tanks than the Donius property. The Tribe has never shut it down or blocked its entrance, as it plans to do with the subject property. Despite allowing Tribal Chairman Mazzetti's family to run their business this way and store wrecked cars and junk on the property in this fashion, the Tribe's drinking water has never been contaminated. If the Tribe was genuinely concerned about the activities on Donius' property impacting its drinking water, it would have shut down the Mazzetti business long ago. But it hasn't.

The picture of the Mazzetti property compared to the picture of the Donius property underscores the Tribe's bad faith and contradicts its claim of an exigent need to shut down Donius' and RMCA's property pending the appeal. The two pictures show that the Donius property is pristine in comparison to the Mazzetti property, and trumps the Tribe's false claim that the activities on the Donius property are a catastrophic risk or threat to its drinking water.

VII.

**REQUEST THAT ANY ORDER GRANTING THIS REQUEST BE GIVEN TO THE
U.S. MARSHALS' OFFICE**

RMCA has already been in contact with the U.S. Marshall's Office to alert them of this issue, and has requested the U.S. Marshall's assistance in keeping the Tribe from taking measures by force in blocking the subject property and attempting to forcibly remove people residing and working on the property.

1 The U.S. Marshall explained, however, that it cannot go out
 2 to the subject property and enforce any order from this Court,
 3 unless the Court sends them the order and provides them with
 4 instructions. RMCA requests therefore, that if this motion is
 5 granted, the Court instruct the U.S. Marshall's Office to
 6 protect RMCA's property and protect those persons living on
 7 and/or working on the property, and that the U.S. Marshall
 8 prevent the Tribe from engaging in any forceful measures to
 9 remove property and persons from the subject property and
 10 prevent the Tribe from blocking access to and from the property,
 11 until further order from this Court. The Tribe has a police
 12 force who carry firearms.

VIII.

CONCLUSION

13 For the reasons stated in RMCA's ex parte papers, and for
 14 the foregoing reasons, RMCA's emergency ex parte motion for a
 15 stay of the Tribal Court Judgement pending its appeal should be
 16 granted.

17 Dated:



18 Manuel Corrales, Jr., Esq.
 19 Attorney for Plaintiff RINCON
 20 MUSHROOM CORPORATION OF
 21 AMERICA

DECLARATION OF MANUEL CORRALES, JR.

22 I, Manuel Corrales, Jr., declare that if called as a
 23 witness in this case I could competently testify as follows:

24 1. I am an attorney at law duly licensed to practice law
 25 in the State of California, the State of New Mexico, and the
 26 State of Utah, and I am the attorney of record for Plaintiff
 27 RINCON MUSHROOM CORPORATION OF AMERICA, INC. herein. I have
 28 personal knowledge concerning the facts set forth herein.

1 2. Attached herewith and marked as Exhibit "6" is a true
2 and correct copy of this Court's Order dated September 21, 2010.

3 I declare under penalty of perjury under the laws of the
4 State of California that the foregoing is true and correct.

5 Executed this 31st day of May 2019, at San Diego,
6 California.

A handwritten signature in blue ink, appearing to read 'Manuel Corrales, Jr.', is written above a horizontal line.

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MANUEL CORRALES, JR.

EXHIBIT “6”

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RINCON MUSHROOM
12 CORPORATION OF AMERICA,

Plaintiff,

13 vs.

14 BO MAZZETTI; JOHN CURRIER;
15 VERNON WRIGHT; GILBERT
16 PARADA; STEPHANIE SPENCER;
17 CHARLIE KOLB; DICK
18 WATENPAUGH; DOE CO.; DOE I;
19 DOE II ,

Defendants.

CASE NO. 09cv2330-WQH-POR
ORDER

20 HAYES, Judge:

21 The matters before the Court are the following motions filed by Defendants: Motion to
22 Dismiss Complaint (Doc. # 17); Ex Parte Application for Request for Judicial Notice (Doc. #
23 45); and Ex Parte Application Requesting Judicial Notice of Supplemental Authorities (Doc.
24 # 50).

25 **I. Background**

26 This action concerns tribal regulation of non-Indian fee simple land located within the
27 boundaries of the reservation of the Rincon Band of Luiseno Mission Indians. Defendants are
28 tribal officials sued in their individual and official capacities. (Compl. ¶¶ 4-5, Doc. # 1).

On October 20, 2009, Plaintiff Rincon Mushroom Company of America (“RMCA”) initiated this action by filing the Complaint. (Doc. # 1).

A. Allegations of the Complaint

In 1982, Plaintiff, a non-Indian corporation, purchased from a non-Indian five acres of land within the exterior boundary of the Rincon Tribal Reservation. *Id.* ¶ 9. In 1960, the property was “allotted and conveyed out of Tribal ownership,” and since that time, “the property continuously has been, and now remains, non-Indian fee land.” *Id.* (quotation omitted). Plaintiff owned the land in fee simple until 1999, when it sold the land to Marvin Donius, also a non-Indian. *Id.* ¶ 11. Plaintiff “receiv[ed] as partial consideration ... a promissory note in a substantial amount, together with a ‘carry-back’ deed of trust.” *Id.* Donius and Plaintiff used the land as a “non-tribal mixed use commercial facility,” leasing parts of the land to various other businesses and residents, and grew mushrooms as well as other produce themselves. *Id.* at ¶ 13. “The property is located in an ‘open’ part of the Rincon Reservation, across a major San Diego County highway ... from the Rincon Tribe’s public casino.” *Id.* ¶ 10.

On March 15, 1960, the Rincon Tribe enacted Articles of Association, which state that the “Rincon Tribal Business Committee ... shall have jurisdiction over the lands within the boundaries of the Rincon Reservation.” *Id.* ¶ 19. “In ... April 2007, ... the Rincon Tribe enacted a Tribal Environmental Policy Ordinance that ... purportedly placed under the governmental jurisdiction of the Tribe the subject parcel, on the asserted basis that the Tribe’s regulatory authority extended to and included all land within the exterior boundaries of the Rincon Reservation.” *Id.* ¶ 20 (quotations omitted). “[T]he Rincon Tribe enacted an Environmental Enforcement Code that as revised on or about July 10, 2007 purported to extend tribal environmental regulatory authority over and as to [the] subject property, on the basis of the Tribe’s claim of such authority over all lands within the exterior boundaries of the Rincon Indian Reservation.” *Id.* ¶ 21 (quotations omitted). “On ... September 30, 2008, these defendants caused the Rincon Tribe to enact a Tribal Court Jurisdiction Ordinance that purported to claim regulatory as well as *in personam* and subject matter adjudicative jurisdiction over non-tribal member plaintiff, non-tribal member Donius, and as to subject non-tribal fee property, ... and also purports to extend the Tribe’s Territorial Jurisdiction over any

1 fee lands within the external boundaries of the Rincon Reservation....” *Id.* ¶ 22 (quotations
2 omitted).

3 The first count of the Complaint seeks a judicial declaration that “any prospective or
4 future actual or attempted enforcement by these defendants of” the above-referenced Articles
5 of Association, Tribal Environmental Policy Ordinance, Environmental Enforcement Code,
6 and Tribal Court Jurisdiction Ordinance is “facially unconstitutional, unconstitutional as
7 applied, and/or illegal, and/or entirely unenforceable, pursuant to applicable provisions of
8 federal and California law, both with respect to plaintiff as well as concerning subject
9 property.” *Id.* ¶ 23(a). “[P]laintiff contends that this Court should find, declare and adjudge
10 that neither the Rincon Tribe nor the above-named Tribal defendants presently have, nor in the
11 future could as a matter of law have, any regulatory or adjudicative authority of any nature
12 whatever over or as to plaintiff and/or over or as to subject property....” *Id.* ¶ 23(d).

13 The second count of the Complaint seeks the issuance of “a mandatory injunction
14 requiring and ordering that the above-named Tribal defendants desist and refrain from any
15 further actual or attempted enforcement, prospectively and in the future, of any and all
16 purported Rincon Tribe regulatory or adjudicative authority over or as to plaintiff and/or over
17 or as to subject property.” *Id.* ¶ 29.

18 “[A]t least four years ago, and continuing to the present date, the Rincon Tribe ... and
19 from time to time the Tribal defendants ... have devised, and have attempted to implement and
20 effectuate, a plan ... to acquire ... ‘on the cheap’ [Plaintiff’s] five-acre parcel.” *Id.* ¶ 14. The
21 plan “has included various efforts by these defendants to diminish and depreciate the value of
22 [the] subject property.” *Id.* ¶ 15. In December 2005 and January 2006, “defendants embarked
23 upon successful efforts to ‘chill’ and ultimately kill a proposed purchase of subject property
24 by FF Realty, LLC—a purchase which would have been consummated but for defendants’
25 action.” *Id.* ¶ 46. Following an October 2007 wildfire which damaged the subject property
26 along with other properties on the reservation, “defendants, in an effort to persuade [San Diego
27 Gas & Electric] not to re-energize the property ..., falsely represented that there was no
28 ‘easement for electrical service’ on the property, such easement being required to allow re-

energization.” *Id.* ¶ 49(b). On December 29, 2007, “defendants attempted to prevent a ‘clean-up’ of those portions of the five-acre parcel destroyed by the [October 2007] fire ... by ordering employees and representatives of ... a contractor for the County of San Diego to cease work and leave the property.” *Id.* ¶ 49(c). By letter dated January 14, 2008, Defendants “falsely represented” to the California Highway Patrol, the AAA Auto Club of Southern California, and a firm known as “Automotive Specialists,” that “land use [of the subject property] is under the jurisdiction of the Rincon Band, and that such purported jurisdiction was exclusive,” and that Donius was “operating as an unauthorized business and may violate federal and tribal law.” *Id.* ¶ 49(d)-(f). Defendants made similar “misrepresentations” other times during 2008 in letters to other entities, including the United States Environmental Protection Agency and San Diego Gas & Electric. *Id.* ¶ 49(g); *see generally id.* ¶ 49. Defendant’s actions have prevented Donius from using the property and Donius has therefore stopped paying Plaintiff money it is owed from the sale of the land. *Id.* at ¶ 34.

The Complaint alleges ten counts seeking monetary relief: (1) intentional interference with contract; (2) intentional interference with advantageous economic relationship; (3) conspiracy to intentionally interfere with contract; (4) conspiracy to intentionally interfere with advantageous economic relationship; (5) conspiracy to deprive plaintiff of equal protection and equal privileges and immunities under 42 U.S.C. § 1985(3); (6) civil RICO; (7) civil RICO conspiracy; (8) negligent interference with contract; (9) negligent interference with advantageous economic relationship; and (10) violation of 42 U.S.C. § 1983.

B. Procedural History

On December 11, 2009, Defendants filed the Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(7). (Doc. # 17). On March 25, 2010, the Court heard oral argument on the motion. (Doc. # 31). On December 11, 2009, January 28, 2010, April 7, 2010, September 1, 2010 and September 3, 2010, Defendants filed evidence in support of the Motion to Dismiss. (Doc. # 17, 28, 33-34, 45-50, 52). On January 11, 2010, March 31, 2010 and September 14, 2010, Plaintiff filed evidence in opposition to the Motion to Dismiss. (Doc. # 21, 25, 32, 53).

II. Standing

On April 9, 2010, the Court issued an Order which stated:

On March 25, 2010, at oral argument on Defendants' Motion to Dismiss, both parties asserted that Donius assigned his right to sue to RCMA. However, as Plaintiff conceded, nothing in the record before this Court establishes that Donius assigned this right to RCMA. On the record before this Court it is not clear that Plaintiff has standing to pursue its claims on behalf of Donius. If the plaintiff before a federal court lacks standing to pursue its claims, the court lacks jurisdiction to proceed. A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction. RCMA is therefore ORDERED TO SHOW cause why this case should not be dismissed for lack of standing.

(Doc. # 35 at 1-2 (citations omitted)).

On April 16, 2010, Plaintiff filed the declaration of Nicholas Litchin, Plaintiff's president. (Doc. # 37-38). Litchin states that Plaintiff sold the land at issue to Donius in August of 1999 in exchange for "a promissory note in a substantial amount coupled with a 'carry-back' deed of trust." (Doc. # 37 at 2). The deed is attached to the declaration as Exhibit A. Litchin states that Donius timely made his payments on the promissory note until October 2006. *Id.* at 2-3. Litchin states that the Tribe began asserting regulatory jurisdiction over the property in 2005, which prevented Donius from selling the land for \$1.9 million to a developer. *Id.* at 3. Litchin states that Donius has been unable to operate his business since 2006 due to Defendants' actions and has made no payments to Plaintiff since October 23, 2006. *Id.* Litchin states that Donius owes Plaintiff \$527,719.00 on the promissory note. *Id.* at 4. Litchin states that Plaintiff has agreed to forego foreclosure and waive a balloon payment which would otherwise have been due on December 10, 2006 in exchange for Donius's cooperation in the litigation and assignment of the proceeds of the litigation to Plaintiff. *Id.* at 4-5.

Plaintiff also submitted the declaration of Donius. (Doc. # 25). Donius states that the property at issue was damaged by a wildfire in October of 2007. *Id.* at 3. After the fire, Donius states that Defendants prevented the San Diego County Department of Public Works from cleaning up the damage to the property by standing in front of their equipment and asserting to the crew that Defendants had the authority to bar them from the site. *Id.* Donius states that Defendants have prevented San Diego Gas & Electric from restoring power to the property by asserting that the Tribe has regulatory jurisdiction over the property and falsely

1 stating that Donius’ “use of electricity is unsafe.” *Id.* at 7. Donius states that he cannot sell
2 the property because “no purchaser will buy this property without a firm written assurance of
3 the availability of electrical power to the property.” *Id.* at 10.

4 Plaintiff contends that it has standing to challenge Defendants’ regulatory actions
5 “because plaintiff has sufficiently suffered economic injury ... that ... directly flows from and
6 is a proximate result of the impairment and deprivation of plaintiff’s legal right to use and
7 financially benefit from subject real property by reason of tribal defendants’ improper and
8 wrongful acts.” (Doc. # 38 at 3). On March 31, 2010, Defendants sent Plaintiff a Notice of
9 Violations which lists ten violations of tribal zoning ordinances. (Doc. # 33 at 77-81).
10 Plaintiff contends that this “recent action by the tribal defendants to prosecute alleged
11 violations of tribal law on the property directly against plaintiff” has further injured Plaintiff,
12 although Plaintiff concedes that standing is determined based on the facts as they existed at the
13 time of filing. (Doc. # 38 at 5). Plaintiff contends that its injury was caused by Defendants
14 because Donius and Plaintiff are the targets of regulatory action. *Id.* Plaintiff contends that
15 the injury is redressable by this Court because a declaratory judgment would remove the
16 barrier to Donius’s activities. *Id.* at 9-10. Plaintiff contends that Donius’s assignment of part
17 of the proceeds of successful litigation or part of the sale proceeds from the land once the
18 Tribe’s regulatory jurisdiction over the land is adjudicated is sufficient, on its own, to give
19 Plaintiff standing to pursue this litigation. *Id.* at 10-11.

20 Defendants contend that Plaintiff and Donius, who has filed a separate lawsuit before
21 this Court, “are trying to pass the ball between them in order to manipulate a result where this
22 Court has jurisdiction to hear the case while avoiding the requirement that tribal remedies be
23 exhausted.” (Doc. # 43 at 4-5). Defendants contend that Plaintiff “has failed to show any
24 cognizable injury to a legally protected interest.” *Id.* at 6. Defendants contend that the “post-
25 complaint issuance by the Rincon Environmental Department of Notice of Violations upon
26 [Plaintiff] is of no consequence to the standing question herein.” *Id.* at 8. Defendants contend
27 that Plaintiff cannot establish redressability because Plaintiff cannot establish that preventing
28 the Tribe from asserting regulatory jurisdiction over the land would enable Donius to sell or

1 use the land. *Id.* at 12.

2 Article III standing is a jurisdictional prerequisite which must be met before a federal
3 court may adjudicate a case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

4 [T]he irreducible constitutional minimum of standing contains three elements.
5 First, the plaintiff must have suffered an injury in fact—an invasion of a legally
6 protected interest which is (a) concrete and particularized, and (b) actual or
7 imminent, not conjectural or hypothetical. Second, there must be a causal
8 connection between the injury and the conduct complained of—the injury has
to be fairly ... traceable to the challenged action of the defendant, and not ... the
result of the independent action of some third party not before the court. Third,
it must be likely, as opposed to merely speculative, that the injury will be
redressed by a favorable decision.

9 *Id.* (citations and internal quotation marks omitted). In essence, a plaintiff must establish a
10 sufficient stake in the outcome of the litigation to justify the “invocation of federal-court
11 jurisdiction.” *Baker v. Carr*, 369 U.S. 186, 204 (1962).

12 Plaintiff has established that it has suffered an “injury in fact,” in that it has lost income
13 from payments on the promissory note it holds as a result of Donius’s inability to use or sell
14 the property. Plaintiff’s loss of income is both “concrete and particularized” and “actual” in
15 that Plaintiff has not received payments on the promissory note for over four years. In addition
16 to the interest Plaintiff has in the land via the promissory note, due to Donius’s default,
17 Plaintiff has a right of possession of the property which it has agreed not to exercise in
18 exchange for Donius’s cooperation in the litigation and a share of the proceeds. Plaintiff has
19 established that there is a causal connection between the injury and Defendants’ conduct.
20 Plaintiff has produced evidence that its loss of income is directly traceable to Defendants’
21 actions in asserting regulatory jurisdiction over the property and preventing San Diego Gas &
22 Electric from restoring power to the property. Plaintiff has established redressability. A
23 declaratory judgment from this Court in Plaintiff’s favor would likely redress the situation by
24 making clear that the Tribe lacks regulatory jurisdiction over the property. Such a declaratory
25 judgment would allow Donius to use or sell the land, allowing him to pay off the promissory
26 note Plaintiff holds. Damages would redress Plaintiff’s loss of income.

27 The Court concludes that Plaintiff has satisfied the requirements to establish Article III
28 standing in this matter.

1 **III. Motion to Dismiss**

2 Defendants' Motion to Dismiss is brought pursuant to Federal Rules of Civil Procedure
 3 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and
 4 12(b)(7) (failure to join a party under Rule 19). (Doc. # 17). A Rule 12(b)(1) motion asserting
 5 lack of subject matter jurisdiction may be either a facial attack on the sufficiency of the
 6 pleadings or a factual attack on the basis for a court's jurisdiction. *See White v. Lee*, 227 F.3d
 7 1214, 1242 (9th Cir. 2000). "In resolving a factual attack on jurisdiction, the district court
 8 may review evidence beyond the complaint without converting the motion to dismiss into a
 9 motion for summary judgment." *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The
 10 court need not presume the truthfulness of the plaintiff's allegations." *Id.* (citing *White*, 227
 11 F.3d at 1242). However, "[j]urisdictional finding of genuinely disputed facts is inappropriate
 12 when the jurisdictional issue and substantive issues are so intertwined that the question of
 13 jurisdiction is dependent on the resolution of factual issues going to the merits of an action."
 14 *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983).

15 Motions pursuant to Federal Rule of Civil Procedure 12(b)(2) challenge personal
 16 jurisdiction. "When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff
 17 bears the burden of demonstrating that the court has jurisdiction over the defendant." *Pebble*
 18 *Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). A plaintiff must "make only a
 19 prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Id.*
 20 "[U]ncontroverted allegations in plaintiff's complaint must be taken as true, and conflicts
 21 between the facts contained in the parties' affidavits must be resolved in plaintiff's favor."
 22 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010).

23 **A. Sovereign Immunity**

24 Defendants contend they are tribal officials "imbued with tribal sovereign immunity"
 25 which bars this suit. (Doc. # 17-1 at 13). Defendants contend that all acts were taken in their
 26 official representative capacity and within their authority as tribal officials. Defendants
 27 contend that Plaintiff's suit is "clearly directed at influencing the behavior of Tribal officials
 28 and the Tribe" which is barred by sovereign immunity. *Id.* at 14. Defendants contend that the

County of San Diego has recognized that the Tribe has regulatory authority over the land at issue, so a ruling from this Court that Defendants acted *ultra vires* would create a regulatory void. *Id.* at 18.

Plaintiff contends that Defendants are not entitled to assert tribal sovereign immunity because the Tribe lacks regulatory jurisdiction over the land at issue, so all attempts to regulate the land exceed the scope of tribal authority and are *ultra vires*. (Doc. # 21 at 13-14). Plaintiff contends that allegations that Defendants acted “under an authority not validly conferred” in violation of federal law defeats sovereign immunity at the pleadings stage. *Id.* at 15-16.

“Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal [] jurisdiction.” *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009). “Under the doctrine of *Ex Parte Young*, immunity does not extend to [tribal] officials acting pursuant to an allegedly unconstitutional statute.” *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Ex Parte Young*, 209 U.S. 123, 155-56 (1908)). “In determining whether *Ex Parte Young* is applicable to overcome the tribal officials’ claim of immunity, the relevant inquiry is only whether [plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief.” *Id.* (citation omitted).

Plaintiff has adequately alleged that Defendants were acting pursuant to an invalid tribal ordinance which exceeds the scope of the Tribe’s regulatory jurisdiction. The first two counts of the Complaint seek prospective relief. Accordingly, Defendants’ motion to dismiss the first two counts of the Complaint based on sovereign immunity is denied.¹ *See id.*; *see also Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) (“[T]ribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly

¹ Defendants contend that Plaintiff’s claims in counts one and two are analogous to the claims asserted by the plaintiff in *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997) (holding that an exception to *Ex Parte Young* exists when the “suit is the functional equivalent of a quiet title action which implicates special [state] sovereignty interests”). Defendants have cited to no cases—and the Court is aware of none—which have applied the exception to *state* sovereign immunity announced in *Coeur d’Alene* to *tribal* sovereign immunity. *Cf. Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042, 1054 n.8 (9th Cir. 2001) (“The extent to which *Coeur d’Alene* is limited to its particular and special circumstances cannot be overstated.”) (quotation omitted).

1 acting in violation of federal law.”), *overruled on other grounds by Big Horn County Elec.*
 2 *Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). Because the Court holds that Plaintiff
 3 must exhaust his tribal court remedies, *see infra*, the Court does not reach the issue of whether
 4 counts three through twelve of the Complaint (which seek monetary relief) should be
 5 dismissed based upon sovereign immunity. *Cf. Sharber v. Spirit Mountain Gaming*, 343 F.3d
 6 974, 976 (9th Cir. 2003) (“[T]he tribal exhaustion requirement also applies to issues of tribal
 7 sovereign immunity....”).

8 **B. Exhaustion of Tribal Remedies**

9 **1. Contentions of the Parties**

10 Defendants contend that Plaintiff was required to exhaust available tribal remedies
 11 before filing a federal court claim. (Doc. # 17 at 22-23). Defendants contend that the Tribe
 12 has jurisdiction to regulate Plaintiff’s property under the “second *Montana* exception,” because
 13 “[t]he presence of fire hazards on the Subject Property is a serious threat to the Tribe’s
 14 economic security in its Casino” and “conduct on [Plaintiff’s property] threatens to
 15 contaminate the Tribe’s groundwater supply that serves the Reservation’s members and
 16 commercial activities, such as the Casino.” (Doc. # 28 at 4).

17 Plaintiff contends that exhaustion is not required because it is clear that the Tribal Court
 18 lacks jurisdiction. (Doc. # 21 at 20-21). Plaintiff contends that the Tribe lacks regulatory
 19 jurisdiction over the property at issue because the property is non-Indian land held in fee
 20 simple and tribes generally do not have jurisdiction over such lands. Plaintiff contends that
 21 the exceptions to this general rule do not apply because Plaintiff has not consented to
 22 jurisdiction and because the activity on the land does not threaten Tribal sovereignty.

23 **2. *Montana*’s Second Exception**

24 Tribal governments have been divested of sovereignty over “relations between an
 25 Indian tribe and nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 564
 26 (1981) (quotation omitted). Tribal governments have no jurisdiction over non-members
 27 “beyond what is necessary to protect tribal self-government or to control internal relations.”
 28 *Id.* Tribes have some authority to regulate nonmembers on tribal lands, but as a general rule,

tribes may not regulate nonmembers on non-Indian land within the boundaries of the reservation. *Id.* at 564-65. There are two exceptions to that general rule; only the second exception is at issue in this case: “a tribe may exercise ‘civil authority over the conduct of non-Indians on fee lands within the 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.’” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008) (quoting *Montana*, 450 U.S. at 565). This exception is “limited,” and “cannot be construed in a manner that would swallow the rule or severely shrink it.” *Id.* (quotations omitted). The conduct at issue “must do more than injure the tribe, it must imperil the subsistence of the tribal community.” *Id.* at 2726 (quotation omitted). “The burden rests on the tribe to establish one of the exceptions to *Montana*’s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land.” *Id.* at 2720.

3. Exhaustion

There is a general rule that if a non-Indian defendant is haled into a tribal court and asserts that the tribal court lacks jurisdiction, the defendant must exhaust tribal remedies before seeking to enjoin the tribal proceeding in federal court. *See Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). 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 nonmember actions taken on non-Indian land within a reservation without exhausting tribal court remedies. *See Burlington N. v. Crow Tribal Council*, 940 F.3d 1239, 1246 (9th Cir. 1991); *see also Sharber*, 343 F.3d at 976 (“The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.”). “Exhaustion is prudential; it is required as a matter of comity, not as a jurisdictional prerequisite.” *Boozier v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004).

Plaintiff contends that “the *Strate* exception makes the tribal court exhaustion doctrine inapplicable under the facts of this case.” (Doc. # 21 at 20). The “*Strate* exception” provides that exhaustion is not required “[w]hen ... it is plain that no federal grant provides for tribal governance of nonmembers’ conduct on land covered by *Montana*’s main rule,” so the

1 exhaustion requirement ‘would serve no purpose other than delay.’” *Nevada v. Hicks*, 533
 2 U.S. 353, 369 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60, n.14 (1997)).²
 3 When determining “whether it is plain that the tribal court lacks jurisdiction,” a court considers
 4 whether “jurisdiction is colorable or plausible.” *Elliott v. White Mountain Apache Tribal*
 5 *Court*, 566 F.3d 842, 848 (9th Cir. 2009) (“If jurisdiction is colorable or plausible, then the
 6 exception does not apply and exhaustion of tribal court remedies is required.”) (quotations
 7 omitted).

8 The Court of Appeals for the Ninth Circuit has held that “threats to water rights may
 9 invoke inherent tribal authority over non-Indians” pursuant to *Montana*’s second exception.
 10 *Montana v. U.S. Env’tl. Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998) (“*Montana II*”). “A
 11 tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on
 12 fee lands within its reservation when that conduct threatens or has some direct effect on the
 13 health and welfare of the tribe. This includes conduct that involves the tribe’s water rights.”
 14 *Id.* (quotation omitted). Similarly, tribes have a “strong interest” in “prevention of forest fires,
 15 and preservation of its natural resources” which could plausibly support tribal court
 16 jurisdiction pursuant to *Montana*’s second exception. *Elliott*, 566 F.3d at 850; *cf. id.* (“[E]ven
 17 if we applied the two *Montana* exceptions without regard to the Supreme Court’s instruction
 18 that ownership of the land may be dispositive in some cases, we reach the same conclusion:
 19 In the circumstances of this case, we cannot say that the tribal court plainly lacks jurisdiction.”)
 20 (holding that it is not plain that a tribal court lacked jurisdiction over a nonmember for

21
 22 ² There is a second exception to the exhaustion requirement, which applies “when an
 23 assertion of tribal court jurisdiction is ‘motivated by a desire to harass or is conducted in bad
 24 faith.’” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009)
 25 (quoting *Nevada*, 533 U.S. at 369). In opposition to the Motion to Dismiss, Plaintiff has not
 26 contended that this exception is applicable, although Plaintiff’s Complaint alleges that
 27 Defendants “have attempted to implement and effectuate, a plan ... to acquire ... ‘on the cheap’
 28 [Plaintiff’s] five-acre parcel” (Doc. # 1 ¶ 14). Even if Plaintiff had properly raised the
 argument in opposition to the Motion to Dismiss, the evidence in the record is not sufficient
 to “prove[] that enforcement of the statutory scheme was the product of bad faith conduct or
 was perpetuated with a motive to harass.” *A & A Concrete, Inc. v. White Mountain Apache*
Tribe, 781 F.2d 1411, 1417 (9th Cir. 1986) (“This exception to the exhaustion requirement ...
 may not be utilized unless it is alleged and proved that enforcement of the statutory scheme
 was the product of bad faith conduct or was perpetuated with a motive to harass. No such
 proof appears in the record.”); *see also Elliott*, 566 F.3d at 847 (exception inapplicable because
 “there is no evidence of bad faith or harassment in the record”).

1 violating tribal regulations which prohibit setting a fire without a permit on tribal land).

2 Defendants have submitted evidence indicating that conduct on Plaintiff's property
 3 "pose direct threats to the Tribe's groundwater resources." (Minjares Decl. ¶ 29, Doc. # 52).
 4 Defendants also have submitted evidence that "[c]onditions on the Subject Property during the
 5 [2007] Poomacha Fire contributed to the spread of wildfire from that property to Tribal lands
 6 across the street on which the Casino is located." (Mazzetti Decl. ¶ 15, Doc. # 17-2).
 7 Although Plaintiff disputes this evidence, Defendants have shown that conduct on Plaintiff's
 8 property plausibly could threaten the Tribe's groundwater resources and could contribute to
 9 the spread of wildfires on the reservation. This showing is sufficient to require exhaustion,
 10 given the relief requested by the first two counts of the Complaint.

11 In the first count of the Complaint, Plaintiff requests that the Court "declare and adjudge
 12 that neither the Rincon Tribe nor the above-named Tribal defendants presently have, nor in the
 13 future could as a matter of law have, any regulatory or adjudicative authority of any nature
 14 whatever over or as to plaintiff and/or over or as to subject property." (Doc. # 1 ¶ 23(d)). The
 15 second count of the Complaint seeks the issuance of "a mandatory injunction requiring and
 16 ordering that the above-named Tribal defendants desist and refrain from any further actual or
 17 attempted enforcement, prospectively and in the future, of any and all purported Rincon Tribe
 18 regulatory or adjudicative authority over or as to plaintiff and/or over or as to subject
 19 property." *Id.* ¶ 29. The declaratory and injunctive relief requested make no exception for
 20 "conduct [that] threatens or has some direct effect on the political integrity, the economic
 21 security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565.

22 Given the breadth of the declaratory and injunctive relief requested by Plaintiff, there
 23 is a "colorable or plausible" claim to tribal regulatory and tribal court jurisdiction pursuant to
 24 *Montana's* second exception. *Elliott*, 566 F.3d at 848; *cf. Montana II*, 137 F.3d at 1141.
 25 Although *Montana's* second exception should not "be construed in a manner that would
 26 swallow the rule or severely shrink it," *Plains Commerce Bank*, 128 S. Ct. at 2720, neither
 27 should it be construed in a manner that would eliminate the exception entirely. Because tribal
 28 court jurisdiction is plausible, "principles of comity require [federal courts] to give the tribal

1 courts a full opportunity to determine their own jurisdiction in the first instance.” *Elliott*, 566
2 F.3d at 850-51. The Court concludes that Plaintiff must exhaust tribal remedies prior to
3 asserting its claims in this Court.

4 The Court has the discretion to dismiss or stay this action while Plaintiff exhausts its
5 tribal court remedies. *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948
6 (9th Cir. 2008) (“As a matter of discretion, a district court may either dismiss a case or stay the
7 action while a tribal court handles the matter.”) (citing *Nat’l Farmers*, 471 U.S. at 857).
8 Plaintiff has not asserted that the statute of limitations would bar Plaintiff from asserting its
9 claims in a later-filed action post-exhaustion. *Cf. Sharber*, 343 F.3d at 976 (“[D]ismissal might
10 mean that [plaintiff] would later be barred permanently from asserting his claims in the federal
11 forum by the running of the applicable statute of limitations. Under the circumstances, the
12 district court should have stayed, not dismissed, the federal action pending the exhaustion of
13 tribal remedies.”). Defendants’ attempts to assert regulatory jurisdiction over Plaintiff and the
14 property at issue are ongoing, and Plaintiff requests prospective relief in counts one and two
15 of the Complaint.

16 Donius has filed an essentially identical Complaint against the same Defendants in
17 another action pending before this Court, *Donius v. Mazzetti*, S.D. Cal. Case No. 10cv591-
18 WQH-POR. As discussed above, issues have been raised concerning Plaintiff’s standing in
19 this case. If the Court dismisses each action, Plaintiff and Donius (who are represented by the
20 same counsel) will have the opportunity to refile any claims which remain after exhaustion in
21 a single action, which potentially would eliminate any doubt regarding standing and would
22 better conserve judicial resources. The Court finds that this weighs in favor of dismissal.

23 The Court takes judicial notice of the civil complaint filed against Plaintiff and Donius
24 in the Intertribal Court of Southern California by the Rincon Tribe on July 30, 2010. (Doc. #
25 45, Ex. A). The complaint pending in Tribal Court raises issues related to the claims in
26 Plaintiff’s Complaint in this action. The fact that there is a pending proceeding in Tribal Court
27 weighs in favor of dismissal of this action. *See Atwood*, 513 F.3d at 948 (“Because the parties
28 do not dispute that the ... issue is still pending before the Tribal Court, the district court

properly exercised its discretion and dismissed this case due to Plaintiff's failure to exhaust tribal court remedies.”).

The Court concludes that this action should be dismissed due to Plaintiff's failure to exhaust tribal remedies.

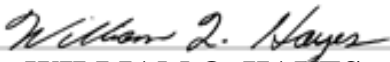
IV. Conclusion

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss for failure to exhaust tribal remedies is GRANTED. (Doc. # 17). Except as discussed above, the Court does not reach the other issues raised by the Motion to Dismiss.

The Ex Parte Application for Request for Judicial Notice (Doc. # 45) and Ex Parte Application Requesting Judicial Notice of Supplemental Authorities (Doc. # 50) are GRANTED.

The Clerk of the Court shall close this case.

DATED: September 21, 2010


WILLIAM Q. HAYES
United States District Judge

CERTIFICATE OF SERVICE

I, Manuel Corrales, Jr., hereby certify that the following:

1. REPLY TO OPPOSITION TO EX PARTE APPLICATION FOR EMERGENCY STAY

was filed through the ECF System and therefore copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF):

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As of today there are no non-registered participants identified on the Notice of Electronic Filing (NEF) Manual Mailing Notice List requiring paper copies to be mailed.

Dated: May 31, 2019

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