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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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.	Case No. 09-CV-2330-WQH-OR **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SECOND MOTION TO RE-OPEN FEDERAL CASE-POST TRIAL IN TRIBAL COURT** Date: July 24, 2017 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

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Plaintiff RINCON MUSHROOM CORPORATION OF AMERICA ("RMCA") submits the following Memorandum of Points and Authorities in Support of its Motion to Re-Open the Federal Case—Post Trial in Tribal Court.

I.

INTRODUCTION

On May 18, 2017, the Tribal Court for the Rincon Band of Luiseno Indians ("the Tribe") rendered a decision on a bifurcated trial on the issue of jurisdiction. (Copy attached as Exhibit "19"). The trial commenced on January 31, 2017, and, because of scheduling problems, ended with closing arguments on April 5, 2017. The Tribe put on evidence first, in light of its burden to show it has jurisdiction to regulate the activities on Plaintiff's property. The following is a list of the days this matter was tried in the Tribal Court on the bifurcated issue of jurisdiction:

	DATE	SUBJECT MATTER
1.	January 31, 2017	Opening Statements and witness examinations
2.	February 1, 2017	Witness examinations
3.	February 2, 2017	Witness examinations
4.	February 3, 2017	Witness examinations
5.	February 9, 2017	Witness examinations
6.	February 27, 2017	Witness examinations
7.	March 7, 2017	Witness examinations
8.	March 8, 2017	Witness examinations
9.	March 9, 2017	Witness examinations
10.	April 5, 2017	Closing Arguments

After hearing all of the evidence, the Tribal Court rendered its decision on May 18, 2017, concluding that the Tribe has jurisdiction to regulate the activities being conducted on

Plaintiff's five-acre, fee simple property across the street from the Rincon casino and surrounded by the Rincon Tribal reservation.

In reaching its decision, the Tribal Court reaffirmed its June 29, 2009 (or September 2010) order that the Tribe has regulatory jurisdiction over the subject property, and noted that that order was never appealed.

Although the issue to be decided was whether the Tribe could meet its burden to establish the second exception under Montana v. U.S. (1981) 450 U.S. 544, that bars Tribes from regulating non-Indian activities on land owned in fee-simple by non-Indians, the Tribal Court refused to apply Montana, supra, and instead looked at the issue advanced by the Tribe that it had jurisdiction because Plaintiff was using his land as an "unlawful enclave," i.e., with purportedly no one to regulate activities being conducted on the property. Nothing in Montana, supra, permits this analysis, however. The Tribe offered no evidence showing that any of the activities being conducted on the subject property poses any catastrophic risks to the political integrity, the economic security, or the health or welfare of the Tribe, as required under Montana, supra. In a circular and confusing fashion, the Tribal Court concluded that the Tribe should have jurisdiction, despite Montana, supra, because the Tribe has no right to control and regulate Plaintiff's activities. This is not the law.

This is the second motion to re-open the federal case. The first motion was filed and set for hearing on January 23, 2017. Plaintiff argued that to proceed with the trial in Tribal Court would be "futile," since the Tribal Court had reiterated it had already ruled as far back as 2009 that the Tribe had regulatory jurisdiction over the activities being conducted on the subject property, and that that order is still in effect. Plaintiff

further argued in its prior motion that the new case of Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298, now controls the issue of jurisdiction in this case. It holds that a Tribal Court plainly lacks jurisdiction and therefore exhaustion of Tribal remedies is not required, under facts identical to those in this case. However, this court never ruled on the motion. In the meantime, the parties proceeded to trial in the Tribal Court as set forth above.

The Tribal Court's ruling on the bifurcated issue of jurisdiction is interlocutory and therefore non-appealable. Likewise, its "recognition" of the continued validity of its injunction order of 2010 concluding it had jurisdiction over the activities on the subject property is non-appealable. As a result, Plaintiff would have to proceed to complete the second phase of the trial, which, under the circumstances would be futile and a waste of the parties' resources.

II.

BACKGROUND

Plaintiff RMCA and MARVIN DONIUS ("Donius") (collectively "property owners") are non-Indians who own a fee simple piece of land within the boundaries of the Rincon Band Indian reservation in Valley Center, California, across the street from the Rincon Casino. They sued members of the Tribal Council in federal court, alleging that the Tribe was wrongfully interfering with their right to conduct business on their property by asserting regulatory jurisdiction over their property, serving them with illegal "Notice of Violations," directing SDG&E to cut off their electrical power, and threatening third parties who wish to do business with them, etc. The federal court ruled that the property owners must first exhaust their tribal remedies by having the Tribal Court first hear the matter. Afterwards, the

property owners may return to federal court if they are unhappy with the Tribal Court's ruling.

The main preliminary issue for determination in the Tribal Court was whether the Tribe can show that the activity being conducted on the property owners' property threatens or has some direct impact on the political integrity, the economic security, or the health and welfare of the Tribe. It was the Tribe's burden to show this. If it cannot make this showing, then, under the law, it cannot assert regulatory jurisdiction over the activities on the subject property.

After the federal court ruled that the property owners must exhaust their Tribal remedies, the property owners filed a Complaint for Declaratory Relief in the Tribal Court seeking a judicial determination that the Tribe has no regulatory jurisdiction over their property. The Tribe filed a Counter-Claim to the Complaint alleging that the property owners are in violation of its environmental enforcement ordinance, because the activities that are being conducted on the subject property impact the "economic security" and the "health and welfare of the Tribe." This is the second exception allowing for tribal regulation of activities on non-Indian land within the boundaries of an Indian reservation under Montana, supra at 564-566. In short, the Tribe contended in Tribal Court that the activities being conducted on the subject property threaten or has some impact on the Tribe's drinking water ("health and welfare") and poses a fire hazard that can threaten the destruction of its casino across the street ("economic security"). However, in order for it to assert regulatory jurisdiction over the subject property to require the property owners to comply with its Tribal environmental ordinance, it must first show that the complained of activities on the subject property threaten to contaminate its drinking water or threaten

to burn down its casino. The Tribe failed to make this showing in Tribal Court. Knowing that it could not meet this burden, the Tribe instead shifted its argument to contend that jurisdiction can nevertheless be asserted, because the property owners were "bad stewards" and were conducting activities on their property in an "unlawful enclave," i.e., without any regulation from anyone at all. The Tribe then argued that if the County of San Diego and other public agencies claim they have no jurisdiction over the subject property, then the Tribe should be given that authority, even though it may not meet any of the exceptions under Montana, supra. The Tribe presented no legal authority for this proposition, and relied completely on the Tribal Court's deep-seated bias toward the Tribe, as demonstrated by the history of the litigation between the parties, to go along with this fallacious and nonsensical theory.

Not surprisingly, the Tribal Court adopted completely the Tribe's nonsensical "unlawful enclave" argument, and ruled the Tribe had jurisdiction under this theory, despite Montana's requirements, and by virtue of its previous 2009 injunction order directing that all activities stop on the subject property. The entire trial was an exercise in futility, since the Tribal Court was predisposed to rule in favor of the Tribe, even if the Tribe had no evidence to meet its burden under Montana, supra.

III.

MATERIAL FACTS

Plaintiff RMCA and Donius (collectively "property owners") own a five (5) acre parcel of land in fee simple within the exterior boundaries of the Rincon Tribal Reservation ("subject property"). RMCA has owned the subject property since 1982. Donius has co-owned the subject property since 1999. The

subject property is non-Indian fee land. The subject property is located across the street from the Tribe's "Rincon Casino" on Valley Center Road. The subject property and the Casino are separated by two-lane County Road, a gas station/convenience store, and a large paved parking lot.

NO CONTAMINATION OF DRINKING WATER

The evidence at trial showed that the Tribe's drinking water was safe, and that no activity being conducted on the subject property caused any contamination of the Tribe's drinking water or threatened to contaminate it. The Tribe's main focus was on the 2007 wildfire that swept through the reservation and destroyed the subject property. The Tribe argued that that event demonstrated that if another fire occurred it could burn down its casino, even though there was no evidence adduced at trial to support this contention. It was undisputed that the fire was not caused by the property owners, and that the fire that swept through the reservation and burnt down the subject property did not reach the casino across the street.

In October 2007, the subject property was destroyed by a wildfire called the Poomacha Fire. The Poomacha Fire was part of a larger set of co-mingled wild fires called the Witch-Guajito-Poomacha Complex, which destroyed a wider area. This wider fire damaged area surrounded the subject property and blanketed several miles up gradient along the San Luis River basin that flanks the subject property. The surrounding area, as well as the subject property was subject to the rainy season of October 2007 through March 2008. The up gradient fire damaged areas included surface waste run-off into the San Luis River from the Rincon Tribe landfill-dump.

The fire-damaged debris was left on the subject property from October 2007 until August 2008. The risk-impact debris left on the subject property included ash-debris, petroleum, and ash metal. During the time the risk-impact debris was left on the subject property, the subject property was sealed with concrete and asphalt pavement, which restricted leaching of metals and petroleum products and ash debris into the underground.

The bowl-shaped depression in which the subject property sits, traps any surface runoff so that it remains on the subject property. During the 2007-2008 rainy season the ash and partially burnt debris sat exposed on the pavement and ground surface of the subject property, but any run-off was isolated to the subject property because of its bowl-shaped, closed basin grade topography and improvement barriers.

In August 2008, the U.S. Environmental Protection Agency ("EPA") finished cleaning up the subject property by removing all risk impact contaminants on the subject property. In August 2008, the EPA cleaned up the risk impacts by the ash debris and petroleum soil on the subject property and left the non-risk impacts. The EPA Report of September 2008 states with respect to the cleanup of the subject property as follows: "The TPH and metal-contaminated ash soil and soil were successfully removed from the site on August 22, 2008." In August 2008, the EPA adequately investigated and removed the risk threat in the ash-debris and petroleum and ash-metal impacted soil from the subject property to protect groundwater quality and surface operation re-use. In August 2008, the EPA adequately tested the subject property's commercial well and found that the water well was drinking water quality and was not impacted by risk compounds.

In December 2011, the Tribe's expert engineers found a low-level diesel and motor oil plume extending from off the subject property. In March through October 2012, the Tribe's engineers took more samples and found that the plume had reduced in size and was no longer extending off the subject property. The Tribe's engineers concluded that the plume's reduction in size was due to bacteria degrading the concentrations of diesel and motor oil in the plume in the groundwater. The general direction of the underground water flow on the subject property is to the northwest. The Tribe's drinking water wells are approximately 2,400 feet from the northwest corner of the subject property.

On January 14, 2016, the property owners' expert engineers sampled and tested the Tribe's three (3) drinking water wells located northwest of their property. The test results show that the Tribe's drinking water is safe and is drinking water quality. On May 17, 2016 the property owners' expert sampled the water well on the subject property and also found it to be safe. The closest Rincon Tribe drinking water well to the subject property is 2,400 feet away. According to the Tribe's own expert engineers, the groundwater under the subject property travels at a rate of between two (2) feet per year to 55 feet per year. Based upon the rate given by the Tribe's engineers, it would take 43 years to 1,200 years for the groundwater beneath the subject property to reach the closest Tribal drinking water well 2,400 feet away. The dissolved diesel plume on the subject property will be diluted or naturally attenuated within its stable footprint and will never reach the Rincon Tribe's drinking water wells 2,400 feet northwest of the subject property.

On March 17, 2016, the property owners' expert engineer checked into a hotel room at the Rincon Casino and tested the

water in his room. The water in the expert's room was drinking water quality.

Accordingly, the evidence at trial showed that there is no risk of contamination to the Tribe's drinking water as a result of any activity being conducted on the subject property. There are no activities being conducted on the subject property, which would have the potential to impose catastrophic consequences upon the health and welfare of the Tribe. There has been no reported spread of any disease from the subject property. No Tribal member has gotten sick as a result of any activity being conducted on the subject property.

NO FIRE HAZARD

On September 24, 2015, the Tribe, through its Environmental Department ("RED") issued a "Notice of Violations" ("NOV") to property owners for activities being conducted on the subject property. The NOV alleges that the property owners are engaging in the following activities on the subject property: constructing mobile homes, fabricating or refurbishing wooden pallets, parking commercial trucks on the property, parking refrigeration-style trailers on the property, allowing people to live in mobile homes on the property and parking motor vehicles on the property. The Tribe contends that these activities are fire hazards. The Tribe contends that this fire hazard threatens to burn down its Casino located across the street from the subject property. However, at trial it was shown that none of these activities would cause the Tribe's casino to burn down, and the Tribe failed to show any condition presently existing on the subject property that could be construed as a fire hazard. There was no evidence presented that in the event of another wildfire in the area the activities being conducted on the subject property will increase the likelihood of a fire spreading to the casino.

PROPOSED VEHICLE STORAGE BUSINESS

On April 29, 2015 the property owners submitted to the RED a proposed plan to operate a vehicle storage business. Property owners submitted their vehicle storage business plan to the RED without waiving their right to contest jurisdiction. Property owners submitted their vehicle storage business plan to the RED as part of their requirement to exhaust their tribal remedies before going back to federal court. Property owners' proposed vehicle storage plan will not threaten or directly affect the Tribe's drinking water. Property owners' proposed vehicle storage plan will not pose catastrophic risks to the Tribe in any way. The RED ultimately denied the property owners' approval of their vehicle storage plan. The Tribe failed to show at trial that the proposed plan would result in any risk of catastrophic consequences to the Tribe. The evidence at trial showed that the Tribe never really intended to approve the proposed plan, but that it created multiple roadblocks and unnecessary conditions, in order to justify denying the application.

IV.

ARGUMENT

A. THE TRIBAL COURT'S DECISION BASED ON AN "UNLAWFUL ENCLAVE" THEORY AND ITS PREVIOUS 2009 "JURISDICTION" ORDER IS PLAINLY ERRONEOUS AND RENDERS ANY FURTHER EXHAUSTION OF TRIBAL REMEDIES "FUTILE"

1. "Unlawful enclave" theory.

Knowing that it had no evidence to show that the activities being conducted on the subject property pose any catastrophic risks as outlined under Montana, supra, the Tribe argued before the Tribal Court that it can still establish regulatory jurisdiction in this case on the theory that the property owners should not be allowed to manage their property in an "unlawful

enclave." The Tribe contended that if neither the County of San Diego, the State of California, nor the federal government has any regulatory jurisdiction over the activities being conducted on the subject property (a point that was never proved), the property owners are thus "answerable to no one" and are simply managing their property in an "unlawful enclave." The Tribe then asserts that "by default," it should be the one who must regulate the activities on the property so as to protect its interests. This contention has no merit.

First of all, the federal Environmental Protection Agency ("EPA") has jurisdiction over the activities on the subject property to the extent such activities put at risk water and soil through hazardous materials and waste. It exercised that authority in 2008 when it supervised the clean up on the subject property as a result of the 2007 wildfire. The Tribal Court simply brushed this fact aside in its decision by claiming it "researched this claim" and found it to be "untrue." It then stated: "The EPA's reach does not extend to jurisdiction over fee land use." (Page 7 of T.C. Decision). If this were true, then the EPA could not regulate anything, and its 2008 clean-up activities on the subject property was an exercise in futility.

Second, Montana v. U.S. (1981) 480 U.S. 544, 564-566, does not provide for an "unlawful enclave" exception allowing the Tribe to regulate activities on non-Indian fee land. There are only two exceptions, and an "unlawful enclave" rule is not one of them.

Third, the Tribe's own ordinance, Section 8.300, patterned after Montana, supra, contains no provisions allowing for an "unlawful enclave" exception.

Because the subject property is "non-Indian fee land," the Tribe's efforts to regulate activity thereon are "**presumptively invalid**." Plains Commerce Bank v. Long Family Land and Cattle

Co. (2008) 554 U.S. 316, 330. Therefore, the burden rests on the Tribe, not the property owners, to establish the second exception to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. Plains Commerce Bank v. Long Family Land and Cattle Co. (2008) 554 U.S. 316, 330. For a tribe to have authority over such nonmember conduct, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." Plains Commerce, supra at 341. Thus, "Montana's second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" Burlington N. R.R. Co. v. Red Wolf (9th Cir. 1999) 196 F.3d 1059, 1064-65. Rather, the challenged conduct must be so severe as to "fairly be called catastrophic for tribal self-government." Plains Commerce, supra at 341. At trial, the Tribe failed to show any catastrophic risks or consequence that would occur as a result of any activities being conducted on the subject property.

The property owners pointed out to the Tribal Court the case of Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298, a case with similar facts. There, the Court of Appeals held that the Tribe that case failed to show that the construction of a single-family house on a non-Indian fee land within the reservation poses catastrophic risks under the second exception of Montana, supra, and thus the Tribe had no jurisdiction to regulate the activities on the land. Similar to what the Rincon Tribe alleges here, the Tribe in Evans, supra, claimed it had jurisdiction because the Evans construction project threatened to contaminate its groundwater, the Evans were improperly disposing of construction debris, and the project was a fire hazard. The Court of Appeal rejected these concerns as "speculative" and concluded that the Tribe

failed to show that the regulation of this "modest project is necessary to avert a catastrophe." It stated:

> The Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem. Further, the Tribes' generalized concerns about waste disposal and fire hazards are speculative, as they do not focus on Evans' specific project...Accordingly, the tribal court plainly lacks jurisdiction, and Evans need not exhaust tribal remedies.

736 F.3d at 1306.

For the same reasons, the Rincon Tribe's claim that the property owners' activities on their land threatens to contaminate its drinking water is pure speculation and therefore does not rise to the level of posing a catastrophic risk so as to give it authority over conduct on the subject property. Under the law, the Tribe's attempts to regulate activities on the subject property are "presumptively invalid." Plains Commerce, supra at 330. At trial, the Tribe failed to meet its burden of proof of showing that the activities being conducted on the subject property either in fact polluted the Tribes drinking water or had the potential of polluting it.

Overall, the evidence at trial showed that the tribe failed miserably to meet its burden under Montana's second exception. Thus, in a last ditch, desperate attempt to show it has the right to regulate activities on the subject property, the Tribe resorted to this nonsensical claim that it should nevertheless be allowed to regulate those activities, because otherwise the subject property simply becomes an "unlawful enclave." Even the Tribe's own ordinances refute this claim. For example, Rincon Tribal Ordinance § 8.301 provides that the Tribe can regulate activities on non-Indian fee land only if the activities arise

out of a consensual relationship with the Tribe (Montana's first exception) or those activities significantly impact or has the potential to impose catastrophic consequences upon the political integrity, the economic security, or the health and welfare of the Tribe. (Montana's second exception)(See attached relevant pages, Exhibit "20"). See also Rincon Tribal Ordinance § 8.601 (quoting Montana; see attached pages, Exhibit "21").

Accordingly, there is no legal basis for the Tribe to claim it has regulatory jurisdiction over the activities being conducted on the subject property under an "unlawful enclave" theory. No such theory exists in the law, and the Tribal Court's ruling concluding the Tribe has jurisdiction under this theory is legally unsound and without any merit whatsoever.

2. The June 29, 2009 Tribal Court Order finding jurisdiction.

The Tribal Court decision of May 18, 2017, noted that "in an order dated June 29, 2009, this [Tribal] Court held that the Rincon Band of Luiseno Indians has civil regulatory jurisdiction over the subject property," and that that order "was not appealed." (Page 3 of T.C. Decision). In other words, the Tribal Court was essentially stating that whether or not the Tribe had met its burden of proof under Montana, supra, at trial was irrelevant, because it had already decided the Tribe had regulatory jurisdiction over the subject property as far back as 2009, which the property owners never appealed.

The June 29, 2009 order the Tribal Court references is actually a June 21, 2009 order for entry of default judgment in which the Tribal Court stated:

> "To prevail on its claims, the Tribe has to have jurisdiction to regulate the activities involved in this action. In its brief in support of jurisdiction, the Tribe established its jurisdiction over the activities at issue on the Donius Property based on its tribal law and

> established federal law recognizing that the Tribe has inherent power to regulate conduct of non-members on fee land within the Reservation where the conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981). The facts submitted in the Tribe's brief in support of jurisdiction establish that the Defendants' activities on the Donius Property have a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe...**The Tribe therefore had the authority to regulate the Defendants' activities on the Donius Property**." (Emphasis added).

(Ex. "18," Order Granting Motion for Entry of Default Judgment, 6/21/2009).

However, it is actually the Tribal Court's September 2010 preliminary injunction order that the Tribal Court relied upon to conclude it had already decided the Tribe has jurisdiction. The Tribal Court made this point clear two months before the trial commenced in Tribal Court.

For example, on November 2, 2016, after the Tribe discovered the property owners were building a small wall on their property, the Tribal Court entertained the Tribe's motion for "contempt" and stated unequivocally that the previous preliminary injunction it issued in September 2010 was still in force and that it was based on the Tribal Court's conclusion that the Tribe had jurisdiction to regulate all activities being conducted on Plaintiff's property, and that it prohibited all activities being conducted on the Plaintiffs' property from that date forward, including the present conduct of Plaintiff's business. That injunction order required that all items and persons be removed from the property, and that all business activities cease and remain so in the future. Plaintiff and Donius objected and argued that the injunction could no longer be valid and enforceable, especially since the Tribe has never

tried to enforce it and has allowed Donius and RMCA to conduct business as usual since 2010.

At the November 2, 2016, OSC hearing, the Tribal Court reaffirmed and clarified that its September 2010 preliminary injunction was still in effect, and that it was and is based on the Tribal Court's determination that the Tribe has regulatory jurisdiction under Montana, supra. The September 2010 preliminary injunction came about because Plaintiff and Donius had erected a sign on the subject property, and Plaintiff and Donius argued before the Tribal Court at the November 2, 2016 OSC hearing that it could not apply to anything beyond that, and that the Tribe must show that the construction of the wall has catastrophic consequences under Montana, supra, so as to give the Tribe regulatory jurisdiction over the wall. The Tribal Court disagreed and stated that its 2010 preliminary injunction applied to all future activities, including the wall presently under construction. It stated:

THE JUDGE: When I gave that order, with all due respect...[i]t was for everything. Everything was to cease and desist period. I don't know how you or the Ninth Circuit or anyone else interpreted it. It was to stop everything. That was my order.

(RT, 11/2/2016, page 65, lines 10-13).

Plaintiff and Donius' counsel then raised concerns about the Tribal Court's statement having the effect of giving the Tribe the right and opportunity to immediately have the Tribal Police enter the subject property and remove all the trailers, trucks, and other items from the property, and in essence stop Plaintiff and Donius' business operations now—something the Tribe has not done since the September 2010 preliminary injunction was first issued. In response, the Tribal Court stated that it had jurisdiction back in 2010 to issue the

preliminary injunction, it has jurisdiction today to reaffirm the current effectiveness of that order, and Plaintiff and Donius are in violation of that order with respect to all present activities on the subject property. It stated:

MR. CORRALES: Well, the buildings are—no, not constructing, but they have like these trailers, mobile homes that they're—that they've created offices out of. They're parking cars there. They're parking their tractor-trailers there. [Donius] is conducting his business.

And for this Court to make that statement today causes me great concern because they're going to get—they're going to use this and give it to the Tribal Police and say, "We have an order. You can enter the property and arrest people and remove everybody. All activities have to cease," when we're just talking about a small wall here. And now we're revisiting the preliminary injunction and this court is clarifying it.

* * *

THE JUDGE: This Court has jurisdiction. That's what we're arguing, rehashing.

MR. CORRALES: Yes. That is—

THE JUDGE: I already made that. It went to the Ninth Circuit. The Nine Circuit says, you, counsel, your side, has not exhausted its tribal remedies. So we're back in terms of additional aspects that you want to add to this.

MR. CORRALES: Yes, Your Honor.

THE JUDGE: But as we sit and talk here today, this Court has jurisdiction. That was the finding that remains.

(RT, 11/20/2016, pages 68-70).

Although the Tribe stated that it would not enforce the preliminary injunction, so long as the construction of the wall stops, the fact remains: **The Tribal Court has determined the Tribe presently has regulatory jurisdiction over the subject**

property, and clarified that the Tribe presently has the right to enter the property to stop any activity it chooses.

It further stated:

MR. CORRALES: Yes, Your Honor. Just so it is clear, the Court has said that the preliminary injunction—

THE JUDGE: Stands.

MR. CORRALES: --stands and that the preliminary injunction at issue in September of 2010 was based upon this Court's determination that there is regulatory jurisdiction on the property by the Tribe.

* * *

MR. CROWELL: I just want to clarify that my understanding of the Court's order would still allow the Tribe to go in and stop any permanent construction if it begins.

THE JUDGE: Definitely.

MR. CROWELL: Very good.

THE JUDGE: Any objection to that, Mr. Corrales?

MR. CORRALES: Yes, Your Honor. We object to that, but that's what the Court's order [is].

THE JUDGE: No. You may object, but you will do it over the Court's ruling.

MR. CORRALES: Yes, Sir.

(RT, 11/2/2016, pages 73-75).

It further stated that the basis of its injunction order was that the Tribe had regulatory jurisdiction under the Supreme Court case of Montana v. U.S., supra. The Tribal Court therefore made it clear that the Tribe presently has the right, based on the Tribal Court's September 2010 injunction order, to enter Plaintiff's property and remove persons and property from the property, including blocking ingress and egress from the property without any further court order. Whether or not the

Tribe chooses not to exercise that right is irrelevant. The point is that the Tribal Court had already decided jurisdiction as far back as 2010, thus making it unnecessary for the Tribe to ever meet its burden of proof under Montana, supra, at the recent trial.

It is noteworthy that the Tribal Court did not order that its September 2010 injunction order "continue." Had it done so, that order would be appealable under federal law. 28 U.S.C. §1292(a)(1); United States v. Oakland Cannabis Buyers' Coop. (2001) 532 U.S. 483, 488. By contrast, an order that simply "recognizes" the continued validity of an injunction is neither a "continuation" nor a "modification" of the injunction. Thus, it is not appealable. Public Service Co. of Colorado v. Batt (9th Cir. 1995) 67 F.3d 234, 236-237. Accordingly, the Tribal Court's November 2, 2016 ruling reaffirming its September 2010 injunction order is not appealable.

Therefore, based upon this express statement from the Tribal Court at the November 2, 2016 hearing, it would be futile for the property owners to continue with the second phase of the trial in Tribal Court. At the conclusion of the second phase of the trial, the property owners would be barred from appealing the May 18, 2017 decision, because the Tribal Court made it clear that it had already decided jurisdiction in favor of the Tribe as far back as September 2010.

B. THE TRIBAL COURT IMPROPERLY REJECTED EVANS WHICH SUPPORTS THE PROPOSTION THAT THE TRIBE "PLAINLY" LACKS JURISDICTION

In its decision, the Tribal Court attempted to distinguish the recent case of Evans, supra, by pointing out that the reservation at issue in Evans, supra, was 1.2 million acres, whereas the reservation in this case is less than 6,000 acres, a distinction without any difference. (Page 7-8 of T.C. Decision).

It then makes the following conclusion without any factual or evidentiary support in the record:

> "There is no doubt in the Court's mind that any fire on [the subject property] or passing through [the subject property] can pose a catastrophic risk to [the Tribe's] water supply as well as misuse of the property as has been in the past."

(Page 8, T.C. Decision). Based on what? At trial, the Tribe offered no evidence to support this conclusion. The 2007 fire that destroyed the subject property was cleaned up in 2008. Other lots next to the subject property and along the same block were also destroyed. Yet the fire never crossed over the County highway separating the Tribe's casino and the subject property. Indeed, the evidence at trial showed that the County highway acts as a fire "buffer" and protection from any fire that may occur on the subject property, which explains why the fire never reached the casino. The evidence at trial confirmed that no fire trucks were stationed between the subject property and the casino during the fire. The County highway protected the casino.

Whatever diesel fuel that spilled into the ground from the 2007 fire was cleaned up, and the diesel plume that was discovered in 2011 on the property had shrunk and likely disappeared the following couple of years thereafter. Any residual diesel fuel that may have leached into the water table below the subject property will not reach the Tribe's water supply for close to 2,000 years, if at all. Before then, it will likely dissolve through natural processes. This evidence came from the Tribe's own expert engineers on cross-examination.

The Tribe offered no evidence at trial that its drinking water supply has been contaminated by this 2007 wildfire event, from anything that the property owners did or from anything anyone else did in the surrounding area. In fact, the evidence

at trial was that the Tribe's drinking water is drinkable and not contaminated, and has never been contaminated since the 2007 wildfire. At trial, the Tribe focused exclusively on the events stemming from the 2007 wildfire, but offered no evidence of anything the property owners are doing now that would pose any catastrophic risks to its water supply or its casino across the street. In short, the Tribe's assertion that activities being conducted on the subject property pose catastrophic risks to the Tribe's political, economic and health and welfare was based on pure speculation.

The Supreme Court has outlined four exceptions to the exhaustion of tribal remedies requirement. They are: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." Elliott v. White Mountain Apache Tribal Court (9th Cir. 2009) 566 F.3d 842, 847 (quoting Nevada v. Hicks (2001) 533 U.S. 353, 369). Either one of these exceptions, if shown, would relieve a party of the necessity of exhausting tribal remedies. Id.

The fourth exception mentioned in Elliott, supra, is where it is "plain" that the tribal court lacks jurisdiction, such that "exhausting" tribal remedies "would serve no purpose other than delay." 566 F.3d at 847. Recently, the case of Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298, held under facts similar to this case that the tribal court "plainly lacks jurisdiction" and exhaustion of tribal remedies would therefore not be required, where the Tribe failed

to show that the construction of a single family home on non-Indian fee land within a reservation poses catastrophic risks. Id. at 1306.

In Evans, supra, decided after the Court of Appeals Memorandum of July 19 2012 in this case, Plaintiff property owner was in a similar situation as is Donius/RMCA here. He was a non-Indian who owned land in fee simple within a reservation. There, the Tribe sought to prevent Plaintiff from building a single-family home on his property, claiming, like the Rincon Tribe claims here, that the construction would contaminate the Tribe's water or cause a fire. The Court held that the Tribe failed to meet its burden under Montana, supra, that the activity complained of posed a catastrophic risk of harming the Tribe economically or in the Tribe's health and welfare, because those assertions were speculative at best. It stated:

> For a tribe to have authority over such nonmember conduct, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." (Citing Plains Commerce Bank v. Long Family Land & Cattle (2008) 554 U.S 316, 341). Thus, "Montana's second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" (Citations omitted). Rather, the challenged conduct must be so severe as to "fairly be called catastrophic for tribal self-government." (Citing Plains Commerce, supra).
>
> The Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem. Further, the Tribes' generalized concerns about waste disposal and fire hazards are **speculative**, as they do not focus on Evans' specific project. To the extent the district court concluded otherwise, its findings are clearly erroneous. (Citation omitted). Accordingly, the tribal court plainly lacks jurisdiction, and Evans need not exhaust tribal remedies. (Emphasis added).

736 F.3d at 1306.

C. THE DISTRICT COURT SHOULD ENJOIN THE TRIBAL COURT FROM PROCEEDING TO THE SECOND PHASE OF THE TRIAL

Plaintiff requests the court enjoin the proceedings in the Tribal Court, i.e., order that the second phase of the trial not proceed, but instead permit the Plaintiff to proceed with his case as originally pled in federal court.

In granting a preliminary injunction the federal court is guided by consideration of four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the balance of equities tips in his favor; and (4) the public interest in granting the stay. Winter v. Natural Resources Def. Council, Inc. (2008) 555 U.S. 7, 20-21. These preliminary injunction factors are to be balanced, and are not prerequisites that must be met. Washington v. Reno (6th Cir. 1994) 35 F.3d 1093, 1099.

Here, the Plaintiff will be irreparably harmed by the Tribal Court's Decision to proceed with the second phase of the trial, based on the fact that the Tribal Court plainly lacks jurisdiction, and that it would be an act of futility to force the Plaintiff to go through the expense and time of the balance of the trial. The Tribal Court has already decided the issue of jurisdiction, and it would serve no purpose other than delay to proceed to the second phase of the trial, simply to allow the Plaintiff to appeal the Tribal Court's decision on jurisdiction.

V.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's prior motion to re-open, Plaintiff's motion to re-open this case in federal court should be granted. It would be futile to require Plaintiff to proceed with the second phase of

the trial in Tribal court. The Tribal Judge has made it clear that he had already decided and ruled the Tribe has jurisdiction as far back as September 2010 based on his injunction order that all activities on the subject property cease and all personnel and property be removed from the property. That order remains in effect, and can be enforced at the whim of the Tribe.

In addition, the Tribal Court based its recent decision that the Tribe has jurisdiction over the activities being conducted on the subject property on an "unlawful enclave" theory, instead of the appropriate second exception under Montana, supra. In fact, the Tribal Court rejected the application of Montana, supra, stating that Montana, supra, goes "too far in generalizing...the question of tribal jurisdiction over non-native fee land located on this reservation." (Page 8-9, T.C. Decision).

The court should issue a temporary injunction ordering that the second phase in the trial in Tribal Court not proceed, and, instead, allow the Plaintiff to proceed with its case in federal court.

Dated: June 20, 2017

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