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

RINCON MUSHROOM CORPORATION OF AMERICA , a California Corporation,) Case No. 09-CV-2330-WQH-OR
)
Plaintiff,	) REPLY TO RESPONSE IN OPPOSITION
	) TO SECOND MOTION TO RE-OPEN
	) CASE
)
v.	) Date: July 24, 2017
	) NO ORAL ARGUMENT UNLESS
BO MAZZETTI; JOHN CURRIER; VERNON WRIGHT; GILBERT PARADA; STEPHANIE SPENCER; CHARLIE KOLB; DICK WATENPAUGH; DOE CO.; and DOE I and DOE II,	) REQUESTED BY THE COURT
)
Defendants.	) Judge: Hon. William Q. Hayes
)
	) Location: Courtroom 14B
	) Suite 1480
	) 333 West Broadway
	) San Diego, CA 92101

Plaintiff RINCON MUSHROOM CORPORATION OF AMERICA ("RMCA") submits the following in reply to Defendants' Response in Opposition to Second Motion to Re-Open Case.

I.

THE EXHAUSTION ORDER DOES NOT APPLY TO CO-OWNER MARVIN DONIUS

As the Defendants concede, co-owner of the subject property, Marvin Donius ("Donius"), is not a party to the federal action that led to the exhaustion order.

When RMCA sought to exhaust its Tribal remedies, it filed a complaint for declaratory relief in Tribal Court together with Donius as party Plaintiffs against the RINCON BAND OF LUISENO

1 INDIANS ("the Tribe") and the other individually named
2 Defendants in this case (BO MAZETTI, JOHN CURRIER, VERNON
3 WRIGHT, GILBERT PARADA, STEPHANIE SPENCER, CHARLIE KOLB AND DICK
4 WATENPAUGH) who were members of the Tribal Council. MELISSA
5 ESTES was added as a party Defendant in her official capacity as
6 the Director of the Rincon Environmental Department ("RED").
7 The declaratory relief action sought a judicial determination on
8 whether the Tribe had regulatory jurisdiction over the
9 activities being conducted on the subject property under the
10 second exception of Montana v. United States (1981) 450 U.S.
11 544. In response, the Tribe filed a Cross-Claim against both
12 RMCA and Donius in Tribal Court alleging violations of the
13 Tribe's environmental ordinances concerning activities being
14 conducted on the subject property. The Tribe's environmental
15 ordinances it sought to enforce are patterned after the language
16 in Montana, supra.

17 The Tribal Court's decision here addresses the issue of
18 jurisdiction with respect to both RMCA and Donius's declaratory
19 relief action and the Tribe's Cross-Claim against both RMCA and
20 Donius. However, because Donius was not a party in the federal
21 action that led to the exhaustion order, Donius was not required
22 to file suit in Tribal Court to satisfy Tribal exhaustion.
23 Indeed, both Donius and RMCA filed their declaratory relief
24 action in Tribal Court without waiving their objections to
25 jurisdiction in Tribal Court.

26 Because Donius was not subject to the federal exhaustion
27 order, and neither he nor the Tribe was a party to the federal
28 action, his declaratory relief claim against the Tribe, and the
Tribe's Cross-Claim against him, triggered the application of
Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013)
736 F.3d 1298. In Evans, supra, the Tribe failed to show that
the non-Indian fee landowner's activities in constructing a

1 single-family home on his property posed any catastrophic risk
2 to the Tribe under Montana, supra. All of the Tribe's
3 complaints of water contamination and fire hazards were
4 speculative at best. Evans, supra, came down after the Court of
5 Appeals Memorandum of July 19, 2012 ("exhaustion order"). The
6 exhaustion order here stated only that RMCA (not Donius) was
7 required to exhaust its Tribal remedies before proceeding
8 further in federal court. As stated in RMCA's motion papers,
9 Evans, supra, held that a Tribal Court "plainly lacks
10 jurisdiction" under facts similar to this case, and that a non-
11 Indian fee landowner was not required to exhaust tribal remedies
12 where the Tribal Court plainly lacks jurisdiction.

13 Donius is not bound by the Court of Appeals exhaustion
14 order, and neither is this Court bound by that order in looking
15 to see if Evans, supra, may apply.

16 Accordingly, Donius has a right to have this Court
17 determine whether the Tribal Court "plainly lacks jurisdiction,"
18 based on the Tribe's utter failure to meet its burden of proof
19 under Montana, supra, during the trial in Tribal Court. He
20 should not be required to continue with the second phase of the
21 case and then launch into an appeal, all of which would prove to
22 be futile. He was never ordered to exhaust his Tribal remedies
23 to begin with. Thus, this Court can make a determination as to
24 Donius whether the Tribal Court "plainly lacks jurisdiction"
25 under Evans, supra, and whether Donius is at all required to
26 exhaust Tribal remedies before proceeding with his claims in
27 federal court.

28 The Court can easily conclude from the Tribal Court's
decision itself that the Tribe failed to meet its burden of
proof under Montana, supra, and that the Tribal Court "plainly
lacks jurisdiction." Because Donius was not a party to the
exhaustion order, this Court can conclude, based on the Tribal

1 Court's decision alone, that Donius is not required to exhaust
2 any tribal remedies before proceeding in federal court.

3 **II.**

4 **THE TRIBE'S CROSS-CLAIM TRIGGERED THE APPLICATION OF EVANS AS TO
5 BOTH DONIUS AND RMCA**

6 When the Court of Appeals directed that RMCA go to the
7 Tribal Court and exhaust its Tribal remedies before proceeding
8 with its federal claims in federal court, the Tribe was not a
9 party and had not yet filed suit in Tribal Court to enforce its
10 September 2015 NOV's. Once the Tribe filed its Cross-Claim
11 against RMCA and Donius, the application of the Evans case was
12 triggered.

13 As stated, Evans, supra, holds that a non-Indian fee simple
14 property owner "need not exhaust tribal remedies" in the first
15 instance, if it is shown that the Tribal Court "plainly lacks
16 jurisdiction" under Montana, supra. A Tribal court plainly
17 lacks jurisdiction under the second exception of Montana, supra,
18 where the Tribe asserting regulatory jurisdiction over the
19 activities being conducted on the non-Indian fee owner's
20 property fails to meet its burden of proof that such activities
21 pose a catastrophic risk to the Tribe economically, politically,
22 or in the Tribe's health and welfare.

23 RMCA and Donius sought to get the Tribal Court to rule on
24 this jurisdictional issue under Evans, supra, by way of a
25 summary judgment motion prior to trial. This was the subject of
26 the first motion to re-open. However, the Tribal Court refused
27 to apply Evans, supra, and instead ruled that triable issues of
28 fact precluded summary judgment. The Tribal Court was wrong.
At the summary judgment stage, the Tribe was required to present
evidence of potential catastrophic risk under Montana, supra,
which it failed to do. Under Evans, supra, the Tribal Court
should have found that it "plainly lacked jurisdiction."

1 Instead, it allowed the case to proceed on the issue of
 2 jurisdiction only. At trial, the Tribe again failed to meet its
 3 burden under Montana, supra.

4 III.

5 THE TRIBAL COURT DID NOT APPLY MONTANA

6 The language of the Tribal Court's decision clearly shows
 7 that the Tribe failed to meet its burden under Montana, supra.
 8 Knowing this, the Tribal Court simply rejects the clear reading
 9 of Montana, supra, and attempts to find jurisdiction under a
 10 "totality of the circumstances" test, including whether the
 11 subject property is a so-called "unlawful enclave," which is not
 12 the test under Montana, supra, or any cases following it.

13 The Tribe's assertion that the Tribal Court correctly
 14 applied Montana, supra, to find jurisdiction is belied by the
 15 plain language in the Tribal court's decision. For example, the
 16 Tribal Court decision states:

17 "In order to apply the tenets of *Montana* as discussed, we
 18 must first look to the totality of the situation as
 19 presented and ask, 'Do *Montana* and other cases as mentioned
 20 go too far in generalizing their response to the question
 21 of "tribal jurisdiction over non-native fee land" located
 22 on this reservation?'

23 "Can we use a cookie-cutter response with all tribes of all
 24 sizes in all similar situations? We believe the answer is,
 25 'No.' We believe there are several factors here that
 26 distinguish this case." (Emphasis added).

27 (Tribal Court Decision, pages 8-9). The Tribal Court applied
 28 this "totality of circumstances" test in order to justify
 considering the "unlawful enclave" argument made by the Tribe.
 The Tribal Court then "spring boarded" off of that point to
 conclude that the Tribe needs to control the subject property,
 notwithstanding the clear rule under Montana, supra, that it is
 the Tribe's burden, not the non-Indian fee land owner, to show
 that the activities pose a catastrophic threat before it can

1 regulate. To the Tribal Court, the Tribe's "need" to control is
2 sufficient to establish regulatory jurisdiction over the subject
3 property. It stated:

4 "Without the right to control land use in this matter, this
5 small Tribe lacks the ability to carry out comprehensive
6 land management program, a key proposition in the economic
7 development of the Tribe.

8 * * *

9 "The threat then to the Tribe comes from its inability to
10 regulate land use. Imagine if the City or County were to
11 have its ability to regulate land use removed. Chaos would
12 ensue..."

13 (Tribal Court Decision, page 9). This conclusion is legally
14 erroneous. Montana, supra, does not allow a Tribe to regulation
15 activities on non-Indian fee land simply because the Tribe
16 "needs" to regulate it. If that were the case, then Tribes
17 could regulate all non-Indian fee lands in and around their
18 reservations without applying the two exceptions under Montana,
19 supra. Moreover, contrary to the Tribal Court's analogy, Cities
20 and Counties are governed by Montana, supra.

21 Because the Tribal Court refused to apply the correct test
22 under Montana, RMCA and Donius are deemed to have exhausted
23 their tribal remedies. It would be futile for them to have to
24 go through the second phase of the trial under the
25 circumstances.

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IV.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in RMCA's motion to re-open, the Court should grant the motion and stay the proceeding in Tribal Court.

Dated: July 17, 2017

s/Manuel Corrales, Jr.

Manuel Corrales, Jr., Esq.

Attorney for Plaintiff RINCON

MUSHROOM CORPORATION OF AMERICA, a
California Corporation