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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RINCON MUSHROOM CORPORATION OF AMERICA, a California Corporation; and MARVIN DONIUS, a California resident,

Plaintiffs,

v.

BO MAZZETTI; JOHN CURRIER; VERNON WRIGHT; GILBERT PARADA; STEPHANIE SPENCER; CHARLIE KOLB; DICK WATENPAUGH; TISHMALL TURNER; STEVE STALLINGS; LAURIE E. GONZALEZ; ALFONSO KOLB, SR.; MELISSA ESTES; and RINCON BAND OF LUISENO INDIANS, a federally recognized Indian Tribe,

Defendants.

RINCON BAND OF LUISENO INDIANS, a federally recognized Indian Tribe,

Counter-Claimant,

v.

RINCON MUSHROOM CORPORATION OF AMERICA, a California Corporation; and MARVIN DONIUS, a California resident,

Case No. 09-CV-2330-WQH-OR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS/COUNTER-DEFENDANTS MARVIN DONIUS AND RINCON MUSHROOM CORPORATION OF AMERICA, INC.

Date: TBD
Time: TBD
Judge: Hon. William Q. Hayes
Location: Courtroom 14B
Suite 1480
333 West Broadway
San Diego, CA 92101

(No Oral Argument unless requested by the Court)

Counter-Defendants.

RINCON MUSHROOM CORPORATION OF AMERICA, INC., a California Corporation; and MARVIN DONIUS, a California resident,

Third-Party Claimants,

v.

COUNTY OF SAN DIEGO, a public entity; and SAN DIEGO GAS & ELECTRIC COMPANY, a public utility; RINCON BAND OF LUISENO INDIANS, a federally recognized Indian Tribe,

Third-Party-Defendants.

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OTHER AUTHORITIES

Plaintiffs/Counter-Defendants RINCON MUSHROOM CORPORATION OF AMERICA, INC., ("RMCA") and MARVIN DONIUS ("Donius") (sometimes collectively "property owners") submit the following Memorandum of Points and Authorities in Support of Motion for Summary Judgment against Counter-Claimant RINCON BAND OF LUISENO INDIANS ("the Rincon Tribe" or "the Tribe") and Defendants BO MAZZETTI, JOHN CURRIER, VERNON WRIGHT, GILBERT PARADA, STEPHANIE SPENCER, CHARLIE KILB, DICK WATENPAUGH, TISHMALL TURNER, STEVE STALLINGS, LAURIE E. GONZALEZ, ALFONSO KOLB, SR., MELISSA ESTES, and RINCON BAND OF LUISENO INDIANS' (collectively "the Tribal Parties" or, except for Melissa Estes, "Tribal Council members").

I.

INTRODUCTION

The Rincon Tribe seeks recognition and enforcement of a judgment it obtained in Tribal Court allowing it to regulate the activities being conducted on RMCA and Donius' fee simple land, and awarding it $1.7 million in fees and costs. RMCA and Donius contend that under the principles of comity, the Tribal Court Judgment cannot be recognized or enforced, because the Tribal Court and the Tribe lacked subject matter jurisdiction and that RMCA and Donius were denied due process of law in the Tribal Court proceedings. In addition, the Judgment was obtained by fraud.

After RMCA filed suit in federal court seeking, inter alia, declaratory and injunctive relief against the Tribal Council members of the Rincon Tribe, the Tribal Council members moved to dismiss that action claiming that RMCA failed to exhaust its tribal remedies. In support of their motion, the Tribal Council members submitted four (4) declarations explaining how the activities on RMCA and Donius' property ("the subject property") could contaminate the Tribe's drinking water and put at risk its casino being burned down by fire, thereby jeopardizing its principal economic investment. On appeal, the 9th Circuit Court of Appeals held that such evidence was sufficient to make the Tribe's assertion of regulatory jurisdiction over the use of the subject property "colorable" or "plausible," for purposes of the low threshold standard in determining whether tribal exhaustion is necessary. It emphasized that it was not deciding whether the Tribe had actual jurisdiction under the second exception of Montana v. U.S. (1981)

450 U.S. 544, 566, which requires the Tribe to prove that activities being conducted on non-Indian fee land "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." The determination of actual jurisdiction was to be first made by the Tribal Court, and then, if RMCA is not satisfied with that determination, by the U.S. District Court.

RMCA and Donius both proceeded to exhaust their tribal remedies by filing suit in Tribal Court for declaratory and injunctive relief against the Tribal Council members. The Rincon Tribe filed a Counter Claim seeking to enforce its environmental ordinances ("NOVs") against RMCA and Donius. In the Tribal Court proceeding, RMCA and Donius claimed the Tribe was interfering with their use of their land, and the Tribe counterclaimed that RMCA and Donius violated its Tribal environmental ordinances and should be regulated. In both RMCA and Donius' Complaint and the Tribe's Counter Claim, the Tribal Trial Court was asked to determine first whether the Tribe had regulatory jurisdiction over the activities being conducted on the subject property. The Tribal Trial Court determined that the Tribe had regulatory jurisdiction.

The Tribal Trial Court based its finding of jurisdiction on its belief that evidence of jurisdiction need only be "colorable or plausible." However, this low standard of proof only applies to determining whether tribal exhaustion is required, not whether regulatory jurisdiction is actually permitted under Montana's second exception. To be sure, the Tribe's evidence of colorable or plausible jurisdiction at trial was simply the same evidence it presented to the U.S. District Court when it sought to dismiss RMCA's case based on a failure to exhaust tribal court remedies. In the Tribal Trial Court, however, it failed to meet its burden of proof required under Montana, supra. It failed to prove that the activities on the subject property "imperiled the subsistence of the [entire] Tribal community," as required under federal common law. It failed to prove that RMCA and Donius' use of their property was, and presently is, so severe as to fairly be called "catastrophic for tribal self-government," as that phrase is defined under federal common law. In fact, the Tribe's evidence at trial in the Tribal Court failed to show RMCA and Donius' use of their property posed any catastrophic risks whatsoever. The evidence was undisputed that the Tribe's drinking water has never been contaminated at all, that there never was, and presently is not, a fire hazard on the subject property, or

any hazard that would pose a risk of burning down the Tribe's casino across the street. The Tribe also failed to show that RMCA and Donius' use of their property has caused any disease, or any risk of disease, to the Tribe's members. As a result, the Tribe never really met its burden under the second exception pf Montana, supra, and never proved that it had the right under federal common law to regulate activities on RMCA and Donius' fee land, despite the Tribal Court's conclusion to the contrary.

Because the Tribe failed to show in the Tribal Trial Court that it has regulatory jurisdiction, the Tribal Trial Court had no jurisdiction, and the Amended Judgment the Tribal Trial Court rendered cannot be recognized or enforced under principles of comity. Moreover, the Tribal Trial Court's application of the wrong standard of proof relative to jurisdiction, i.e., using the low standard of "colorable or plausible" instead of the higher burden under Montana, supra, for actual jurisdiction, deprived RMCA and Donius of due process of law, rendering the Amended Judgment neither recognizable nor enforceable under the principles of comity.

RMCA and Donius were further deprived of due process when the Rincon Tribe charged them with violations under a 2012 Tribal environmental ordinance that provided them with a jurisdictional hearing in which the Tribe was required to first prove it had actual regulatory jurisdiction under Montana, supra, but then later prosecuted them under a later 2014 version that eliminated the jurisdictional hearing and required instead that RMCA and Donius submit an "activity plan" to the Tribe for pre-approval and then prove to the Tribe that their use of their property will not pose any catastrophic risks to the Tribe's economic or health and welfare. The Tribal Trial Court considered this as a factor in finding the Tribe has regulatory jurisdiction.

RMCA and Donius were further deprived of due process, because the Tribal Trial Court applied a "lawless enclave" standard in finding regulatory jurisdiction for the Tribe, despite no such standard existing under Montana, supra, or federal common law, concluding that if the County of San Diego refused to regulate the subject property, then the Tribe had the right to do so, otherwise "chaos would ensue."

Because RMCA and Donius were deprived of due process, the Tribal Court Judgment cannot be recognized or enforced under principles of comity.

In short, the Tribal Court Judgment cannot be recognized or enforced, because the Tribal Court lacked jurisdiction and deprived RMCA and Donius of due process of law. This Court should find that the Tribe has failed to meet its burden of showing that it has regulatory jurisdiction over the subject property under Montana's second exception.

II.

STATEMENT OF FACTS

Plaintiffs and Counter-Defendants MARVIN DONIUS ("Donius") and RINCON MUSHROOM CORPORATION OF AMERICA, INC., ("RMCA"), (collectively "property owners" or "Donius Parties") 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.[1] Donius and RMCA 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.[2]

In October 2007, the subject property was destroyed by a wildfire called the Poomacha Fire.[3] Donius and RMCA did not start or cause the fire.[4] The Poomacha Fire was part of a larger set of co-mingled wildfires called the Witch-Guajito-Poomacha Complex, which destroyed a wider area.[5] 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.[6] Although Donius and RMCA did not start or cause the fire, the Tribe contends that tangible items on the property that burned, including motor vehicles and a diesel storage tank that exploded, contaminated the soil and the water table below.[7] The fire-damaged debris was left on the subject property from October 2007 until August 2008.[8] The risk-impact debris left on the subject property included ash-debris, petroleum, and ash metal.[9] During the time the risk-impact debris was left on the subject property, the subject property was sealed with concrete and asphalt

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[1] RTCR003690
[2] (Trial Ex. "54, pg. 002, RTCR005448)
[3] (Trial Ex. "54," pg. 003, RTCR005449)
[4] (Tribal Trial Court Opinion, 5/18/2017, page 6, lines 7-8, RTCR005014)
[5] (Trial Ex. "164," pg. 002, RTCR004958)
[6] Id., RTCR004958
[7] (Trial Ex. "4," page 4, RTCR003780)
[8] (Trial Ex. "54," RTCR005449 and "164," pg. 003, RTCR004959)
[9] Id., RTCR004959

pavement, which restricted leaching of metals and petroleum products and ash debris into the underground.[10] The bowl-shaped depression in which the subject property sits, traps any surface runoff so that it remains on the subject property.[11] 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.[12]

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.[13] 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."[14] In August 2008, the EPA 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.[15] In August 2008, the EPA tested the subject property's commercial well and found that the water well was drinking water quality and was not impacted by risk compounds.[16] In December 2011, the Tribe's expert engineers found a low-level diesel and motor oil plume extending from off the subject property.[17] 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.[18] 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.[19] The general direction of the underground water flow on the subject property is to the northwest.[20] The Tribe's drinking water wells are approximately 2,400 feet from the

[10] (Trial Ex. "164," pg. 003, RTCR004959)
[11] Id., RTCR004959
[12] Id., RTCR004959
[13] (Trial Ex. "164," pg. 003-004, RTCR004959-60)
[14] (Trial Ex. "119," pg. 012, RTCR004216)
[15] (Trial Ex. "119," RTCR00425, "164," pg. 004 RTCR004960)
[16] (Trial Ex. "164," pg. 004, RTCR004960)
[17] (Trial Ex. "164," pg. 006, RTCR004962 and Ex. "7," pg. 026, RTCR003808)
[18] (Trial Ex. "7," pg. 026, RTCR003808)
[19] Id., RTCR003808
[20] (Trial Ex. "164," pg. 012, RTCR004968).

northwest corner of the subject property.[21] The Tribe produced no evidence at trial that activities being conducted on the subject property pose any catastrophic risk of contaminating its drinking water, or that its drinking water was ever contaminated by RMCA and Donius' use of their property.[22]

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.[23] The test results showed that the Tribe's drinking water is safe and is drinking water quality.[24] On May 17, 2016 the property owners' expert sampled the water well on the subject property and also found it to be safe.[25] 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.[26] 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.[27] 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.[28] The Tribe's own engineer testified at trial that he does not know if the plume found on the subject property in 2011 is still there.[29] The Tribe's own engineer testified at trial that it would be speculation to conclude that parked vehicles on the subject property were contaminating the soil or underground water table with oil leaks.[30] The Tribe's own engineer testified at trial that the diesel plume found on the subject property in 2011 had shrunk, and would have continued to shrink in the years thereafter.[31] The Tribe's own engineer testified at trial

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[21] Id., RTCR004968
[22] (RTCR009249, RTCR009255, RTCR009467-68, RTCR009478-80)
[23] Id.
[24] Id.
[25] (Trial Ex., "164, pg. 012, RTCR004968)
[26] (Trial Ex. "164," pg. 012, RTCR004968 and Ex. "7," pg. 023, RTCR003805)
[27] Id.
[28] (Trial Ex. "164," pg. 012, RTCR004968)
[29] (RTCR009230)
[30] (RTCR009236-37)
[31] (RTCR009244-45)

that the contaminants were successfully removed from the subject property in 2008 after the 2007 wildfire.[32] Mr. Dane Frank, one of the Tribe's engineers, testified at trial that he has no opinion on whether the activities being presently conducted on the subject property have any impact on the Tribe's drinking water.[33] Mr. Earl Stephens, another one of the Tribe's engineers, testified at trial that the diesel plume he measured in 2011, is almost entirely disintegrated, is presently contained within the subject property, and will eventually disappear.[34] Mr. Stephens also testified that the Tribe does routine testing of its drinking water wells, and all tests have shown its drinking water is safe to drink.[35] Mr. Stephens also testified at trial that he has no opinion about whether the activities being conducted on the subject property currently pose a catastrophic risk of harm to the Tribe's drinking water.[36] Nevertheless, Mr. Stephens testified at trial that he recently visited the subject property site and found no evidence of any above-storage diesel tanks as what existed on the property in 2007, or any evidence that hazardous material or fuel is being dumped or leaked into the ground.[37]

The Tribal Court Judgment against RMCA and Donius is predicated on the Tribe's September 24, 2015 "Notice of Violations" ("NOVs") that allege that RMCA and Donius are engaged in activities that, among other things, pose a fire hazard and risk of burning down its casino across the street, and pose a risk of polluting the water table below the subject property from which the Tribe derives its drinking water.[38] The Tribal Court Judgment is an enforcement of these NOVs. The Tribe's NOV's identify such activities as posing a fire hazard to include storing and 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 parking motor vehicles on the property, having a water well and septic system and installing four water tanks, and parking semi-trucks on the property.[39] The Tribe produced no evidence at trial that any of these activities, or any other

[32] (RTCR009248)
[33] (RTCR009249, RTCR009255)
[34] (RTCR009441-443)
[35] (RTCR009464-65)
[36] (RTCR009467-68)
[37] (RTCR009476-78)
[38] (Trial Ex. "8," RTCR003811 and "9," page 003, RTCR003819)
[39] (Trial Ex. "8," RTCR003811)

activities, being conducted on the subject property will cause the Tribe's casino to burn down, or contaminate its drinking water.[40] The two-lane County road and the Tribe's casino parking lot acts as a buffer to prevent any fires from reaching the casino structure.[41] The Tribe's "fire" expert, Douglas Allen, testified at trial that the County road between the subject property and the Tribe's casino prevents any fires from spreading from the subject property to the casino.[42] Although the Tribe's Environmental Director, Melissa Estes, wrote in her NOV report[43] that there were fireball or fire brands coming from the subject property and landing on the casino during the 2007 fire, Mr. Allen testified that he saw no evidence of that in the video of the fire on the subject property.[44] Mr. Allen testified at trial that it would be speculation for him to say that the Tribe's casino could burn down as a result of activities being conducted on the subject property.[45] Mr. Allen testified at trial that he is not aware of any fire brands or fire balls ever coming from the subject property and landing on the casino structure during the 2007 wildfire.[46] Nor was Mr. Allen aware of any facts that would indicate that vehicles parked in the parking lot at the casino were ever consumed by fire as a result of the 2007 wildfire.[47] In fact, as Mr. Allen conceded, the Tribe's casino acted as an evacuation center during the 2007 wildfire, because that was the safest place to be at the time.[48]

At trial, Melissa Estes, the Tribe's Environmental Director who issued the NOVs to RMCA and Donius, testified that activities involving refurbishing wooden pallets on the subject property was a fire hazard, because the activity "might" require the application of certain flammable chemicals to the pallets, and therefore those chemicals must be stored somewhere on the premises. However, the Tribe offered no evidence of improper storage of pallet refurbishing chemicals, or flammable chemicals at all, on the subject property. The Tribe offered no evidence that the condition of the subject

[40] (Tribal Court Opinion, 5/18/2017, page 6, RTCR005014)
[41] (RTCR009331)
[42] (RTCR009331)
[43] (Trial Ex. "9," RTCR003819)
[44] (RTCR009331)
[45] (RTCR009333)
[46] (RTCR009337-42)
[47] (RTCR009341-42)
[48] (RTCR009342)

property posed a catastrophic risk of disease or an epidemic to its Tribal members, as a result of activities being conducted on the subject property.[49] Melissa Estes, the Tribe's Environmental Director, testified at trial that she does not know if there was a breakout of a disease stemming from the trash or garbage she saw on the subject property in passing.[50] Ms. Estes also testified that, although she never saw any rats on the subject property, if there are rats on the property "the catastrophic consequences are that they migrate off property and infect people that are living on the reservation."[51] However, Estes denied ever seeing any rats on the subject property, and Mr. Donius denied he had a rat problem and regularly has his trash picked up and taken away.[52]

The Tribal Trial Court determined the issue of regulatory jurisdiction in favor of the Tribe, after the first phase of a bifurcated trial, and issued an "Opinion" ruling to that effect, dated May 18, 2017.[53] The Tribal Trial Court's Judgment, dated April 22, 2019, is as a product of the second phase of the trial, which reaffirmed the Tribal Trial Court's May 18, 2017 Opinion on regulatory jurisdiction. The Judgment was rendered in favor of the Tribe on its Counter Claim for the enforcement of its NOVs, which was injunctive in nature.[54] The Tribal Trial Court rendered a separate Order on the Tribe's "Cost Bill," awarding the Tribe $1.7 million in fees and costs, which was never incorporated into the Judgment.[55] The April 22, 2019, Judgment was amended on June 26, 2020, to amend only the injunction portion of the Judgment, after remand from the Tribal Court of Appeals.[56] The Tribe argued throughout the trial that it should have the right to regulate the subject property, because the County of San Diego claims no jurisdiction over the property. It contended that since no one regulates the property, the property has become an "lawless enclave," entitling it to regulate the property.[57] The Tribal Trial Court agreed and considered this as a determining factor in ruling that the Tribe, under these circumstances, should have the right to regulate the use of the subject property,

[49] (RTCR010208)
[50] (RTCR010208)
[51] (RTCR010296)
[52] (RTCR010439)
[53] (RTCR005008)
[54] (RTCR006080)
[55] (RTCR006416)
[56] (Amended Judgment, June 26, 2020, RTCR008501)
[57] (May 18, 2017, Opinion, RTCR005014)

otherwise "chaos would ensue."[58] Under Montana v. U.S. (1981) 450 U.S. 544, whether property is a "lawless enclave" is not a factor for consideration in determining whether a Tribe has a right to regulate activities being conducted on non-Indian fee land. Although not relevant here, RMCA and Donius have sued the County of San Diego seeking a judicial determination that it has regulatory jurisdiction over their property.[59] Despite claiming the subject property is a "lawless enclave," the Tribe's Environmental Director, Melissa Estes, stated that the U.S. Environmental Agency ("EPA"), through the Clean Water Act ("CWA") of 33 U.S.C. §1251, has regulatory jurisdiction over the subject property for purposes of issuing stormwater permits.[60]

In addition, at trial the Tribe's fire expert, Douglas Allen, testified that the subject property is "designated a state responsibility area of public resources," and that the California State Code sections apply to regulate the subject property.[61] The Tribe also felt the EPA had jurisdiction to compel RMCA and Donius to "proceed with any necessary clean up actions," in a letter the EPA wrote to Donius on September 4, 2008, stating that the Tribe had "requested USEPA assistance with the site evaluation and in efforts to compel the property owner to proceed with any necessary cleanup actions."[62] The EPA also notified Donius that the future inspections of his septic system would be placed under the jurisdiction of the EPA's groundwater office.[63]

In 2012, the Tribe had an environmental ordinance that provided that if a non-Indian fee landowner objects to the Tribe's attempts to assert regulatory jurisdiction over the use of his property, he was entitled to request a "jurisdictional hearing" in which the Tribe had the burden of proving regulatory jurisdiction under federal common law.[64] The Tribe's 2012 environmental ordinance did not require a non-Indian fee landowner to submit a business or "activity" plan to the Tribe for approval, or an independent analysis of the impact his activities would have on the Tribe, as a condition of use of his property.[65]

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[58] (May 18, 2017, Opinion, Page 9, line 19, RTCR005017)
[59] (See Court docket re: FAC)
[60] (Decision of the RED, June 1, 2015)
[61] (RTCR009327-28)
[62] (Trial Ex. "119," page 1, RTCR004205)
[63] (Trial Ex. "119," page 7 and 12 RTCR004211, RTCR004216)
[64] (Trial Ex. "99," page 4, §8.301(b)(3), RTCR005757)
[65] Id., RTCR005757

In 2014, while it was involved in litigation with RMCA and Donius, the Tribe amended its environmental ordinance and eliminated the "jurisdictional hearing" provision. In its place, the Tribe drafted a new procedural scheme for non-Indian fee landowners, which requires the non-Indian fee landowner to submit to the Tribe a proposed "activity" plan for approval in all cases, and an independent analysis of the impact his activities would have on the Tribe, as a condition of use of his property.[66] In the proposed "activity" plan set forth in the 2014 Tribal environmental ordinance, the non-Indian fee land owner has the burden of proving to the Tribe's satisfaction that his use of his property will not "threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe."[67] If the non-Indian fee landowner does not obtain prior approval from the Tribe for the use of his property, then the Tribe can pursue enforcement actions against the non-Indian fee landowner "until such time that prior approval is obtained for future action."[68] In the 2014 Tribal environmental ordinance, if the non-Indian fee landowner challenges any NOVs for failing to obtain prior approval for the use of his property, he may request a hearing. At the hearing, the Tribal Court determines if the non-Indian fee landowner failed to obtain prior approval for the use of his property. There is no jurisdictional hearing. Based on the burden placed on the non-Indian fee landowner in obtaining prior approval of his "activity" plan to show his use will not harm the Tribe, the non-Indian fee landowner will have the same burden at the enforcement hearing.[69] The Tribal Trial Court found that RMCA and Donius were required to "submit their proposed usage plan to the Tribe," which it found was necessary "to allow the fee land to be subject to the Tribe's land use control ordinance."[70] Rather than require the Tribe to carry its heavy burden of proof that the activities on the subject property posed a catastrophic risk of economic and health and welfare harm to the Tribe, as required under Montana, supra, the Tribal Trial Court instead looked to other factors, including its belief that the subject property was a "lawless enclave," and RMCA and Donius' failure to "submit their proposed usage plan

[66] (Trial Ex. "34," pages 12-14, RTCR005309-5311)
[67] (Trial Ex. "34," page 4, §8.301(b)(4), RTCR005301)
[68] (Trial Ex. "34," page 14, 8.313(b)(2)(iii), RTCR005311)
[69] (Trial Ex. "34," page 12-14, RTCR005309-5311)
[70] (Opinion 5/18/2017, page 10, RTCR005018)

to the Tribe" as a condition of use of their property.[71] The Tribal Trial Court applied the 2014 Tribal Environmental Ordinance in rendering judgment in favor of the Tribe on the jurisdictional issue, not the 2012 version.[72] The Tribal Court overruled or otherwise ignored RMCA and Donius' objections to the Tribe's 2014 revision of its environmental ordinance and elimination of the "jurisdictional hearing" provision.[73]

The Tribal Trial Court considered RMCA and Donius' failure to submit a propose "usage plan" to the Tribe, together with the Tribe's argument that the subject property was a "lawless enclave" in ruling that the Tribe had regulatory jurisdiction over the activities being conducted on the subject property.[74] The Tribal Court ignored the requirements under Montana, supra, by requiring RMCA and Donius to submit an "activity plan" for Tribal approval prior to using their property. Requiring a preapproved "activity" plan places the burden on RMCA and Donius to show that their activities do not impact the Tribe's economic and health and welfare interests, contrary to Montana, supra.

After the Tribe passed the 2014 amended environmental ordinance, it issued NOVs in September 2015 to RMCA and Donius based on this 2014 environmental ordinance, and sought to enforce them. The 2015 NOVs listed six (6) categories of activities that were in violation of the Tribe's environmental ordinances. These six (6) categories included: (1) storage of mobile homes, shipping pallets, refrigeration-style trailers, groundwater well and a septic system; (2) construction of mobile homes and trailers; (3) allowing people to live in campers or mobile homes on the property; (4) Refurbishing mobile homes on the property; (5) installation of four (4) water tanks; and (6) storing or parking semi-trucks on the property.[75] The 2015 NOVs stated that RMCA and Donius "must cease and desist any and all [of these activities] on the subject property until such time as **prior approval**, as set forth in Section 8.313(a) of the REEO (the 2014 Tribal environmental ordinance) is obtained."[76] Section 8.313(a) of the REEO provides that a non-Indian fee landowner must provide to the Tribe "an **independent**

[71] (Opinion, May 18, 2017, page 10, RTCR005018)
[72] Id., RTCR005018
[73] (Amended Judgment, June 6, 2020, page 6, RTCR008506)
[74] (Opinion, May 18, 2017, pages 8-10, RTCR005016-18)
[75] (Trial Ex. "8," pages 3-4, RTCR003813-14)
[76] (Trial Ex. "8," page 4, RTCR003814)

analysis of possible impacts upon the political integrity, the economic security, and health and welfare of the Tribe," in addition to a proposed activity plan, as a condition of use of his property.[77] The phrase "impacts upon the political integrity, the economic security, and health and welfare of the Tribe" is the phrase used in the second exception in Montana, supra, to allow a tribe to assert regulatory jurisdiction over a non-Indian fee landowner. Montana, supra. By requiring RMCA and Donius to provide the Tribe with an **independent analysis** of the possible impacts their activities on their land might have on the political integrity, the economic security, and the health and welfare of the Tribe," the Tribe shifted the burden of proof to RMCA and Donius, contrary to Montana, supra, and related federal common law. Under the Tribe's 2012 environmental ordinance, the Tribe would have had the burden to provide an independent analysis to prove that the activities cited in the 2015 NOVs potentially impacted the political integrity, the economic security, and the health and welfare of the Tribe.[78] The 2015 NOVs the Tribe issued to RMCA and Donius incorporated ongoing violations and previous NOVs from September 15, 2009, December 2, 2009, and October 4, 2013.[79]

Despite incorporating previous NOV violations from September 15, 2009, December 2, 2009, and October 4, 2013, the Tribe did not provide RMCA and Donius with a jurisdictional hearing as provided under the 2012 Tribal environmental ordinance. The Amended Judgment is based on the Tribal Court's enforcement of the September 2015 NOVs.[80] The Amended Judgment further provided that in the absence of applicable Tribal law, State and County laws would apply to regulate the use of the subject property.[81] By requiring Donius and RMCA to comply with State and County laws under the Amended Judgment, the Tribe has conceded the subject property is not a "lawless enclave." The Tribal Trial Court based its finding of jurisdiction on its belief that evidence of jurisdiction need only be "colorable or plausible."[82] However, the Tribe' evidence of colorable or plausible jurisdiction was the same evidence it presented to the

[77] (Trial Ex. "34," pages 12 and 13, RTCR005309-5310)
[78] (Trial Ex. "99," page 4, RTCR005757)
[79] (Trial Ex. "8," page 2, RTCR003812).
[80] (Amended Judgment, page 7, RTCR008507, Opinion, 5/18/2017, page 10, RTCR005018)
[81] (Amended Judgment, page 7, RTCR008507, Opinion, 5/18/2017, pages 8-16, RTCR005016)
[82] (Amended Judgment, June 26, 2020, page 5, RTCR008505)

U.S. District Court when it sought to dismiss RMCA's case based on a failure to exhaust tribal court remedies. (RMCA v. Mazzetti (9th Cir. 2012) No. 10-56521, page 2 ("the Tribe offered four declarations explaining how activities on Rincon Mushroom's property could contaminate the Tribe's sole water source and increase the risk of forest fires that could jeopardize its casino (its principal economic investment)). According to the Court of Appeals in RMCA v. Mazzetti, the standard to determine whether tribal exhaustion was required for RMCA is a lower standard than whether tribal jurisdiction is actually permitted under the second exception of Montana.[83] The Court of Appeals emphasized that it was not deciding whether the Rincon Tribe had actual jurisdiction based on the four declarations it submitted.[84] The Court of Appeals held that the Tribe's evidence was sufficient to make the Tribe's assertion of jurisdiction over the activities on the subject property "colorable or plausible," only for purposes of deciding whether RMCA needed to exhaust its tribal remedies.[85] When the Tribal Trial Court made the same finding that the Tribe's evidence was "colorable or plausible," it could not have decided actual jurisdiction.[86] The Tribal Trial Court's finding of jurisdiction based on the Tribe's evidence being "colorable or plausible" is not sufficient to sustain actual regulatory jurisdiction under the second exception of Montana, supra.[87]

III.

LEGAL STANDARD

A. THE LAW ON RECOGNITION OF A TRIBAL COURT JUDGMENT

The principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment. Wilson v. Marchington (1997) 127 F3d 805, 807. Federal courts must neither recognize nor enforce tribal judgments if (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law. Marchington, supra at 810. The existence of both personal and subject matter jurisdiction is mandatory and therefore a

[83] Id. at page 3, RTCR008503
[84] Id. at page 3, RTCR008503
[85] Id. at page 3, RTCR008503
[86] Id. at page 3, RTCR008503
[87] Id. at page 3, RTCR008503

necessary predicate for federal court recognition and enforcement of a tribal judgment. Id.

A federal court must also reject a tribal judgment if the defendant was not afforded due process of law. Marchington, supra at 811. "Due process" in the comity context means that "there has been an opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is **no showing of prejudice** in the tribal court or **in the system of governing laws**." Id. This is also a mandatory requirement and not left to the discretion of the district court. Id.

A reciprocal recognition of a tribal judgment has been rejected by the 9th Circuit. Marchington, supra at 812. While the district court may, in the exercise of discretion, choose not to honor a tribal judgment for fraud and other reasons, if it is shown that the Tribal Court had no personal or subject matter jurisdiction, or the defendant was not afforded due process of law, the district court is required (mandated) to reject the tribal court judgment. Id.

Accordingly, recognition of tribal court judgments requires the application of federal common law, not state law. Chilkat Indian Village v. Johnson (9th Cir. 1989) 870 F.2d 1469, 1473. With respect to whether the tribal court had personal and subject matter jurisdiction over a non-Indian defendant, the district court is to look to Montana, supra, and related federal common law following that decision. Marchington, supra at 814.

B. STANDARD OF REVIEW OF TRIBAL COURT JUDGMENTS

The standard of review of a tribal court judgment or decision, after tribal exhaustion, is **de novo** for **federal legal questions** and rulings, including legal rulings on **tribal jurisdiction**. FMC v. Shoshone-Bannock Tribes (9th Cir. 1990) 905 F.2d 1311, 1313-1314; Big Horn City Elec. Coop., Inc. v. Adams (9th Cir. 2000) 219 F.3d 944, 949. The district court, however, reviews for **clear error** the Tribal Courts' **factual findings** underlying their jurisdictional rulings. Id.

In National Farmers Union Ins. Cos. V. Crow Tribe of Indians (1985) 471 U.S. 845, the Supreme Court established that a federal court must initially "stay[ ] its hand

until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." The exhaustion of tribal remedies thus permits:

> … a full record to be developed in the Tribal Court before either the merits of any question concerning appropriate relief is addressed [in the federal district court] … [It will also] encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

471 U.S. at 856-857. Once tribal remedies have been exhausted, the Tribal Court's determination of tribal jurisdiction may be reviewed in the federal district court. Iowa Mutual Ins. Co. v. LaPlante (1987) 480 U.S. 9, 19.

On review, the federal district court must first examine the Tribal Court's determination of its own jurisdiction. This determination is a question of federal law that must be reviewed de novo. FMC v. Shoshone-Bannock Tribes (9th Cir. 1990) 905 F.2d 1311, 1313. However, in making its analysis, the district court should review the Tribal Court's findings of fact with respect to its jurisdictional rulings under a deferential, clearly erroneous standard. Id. Nevertheless, a Tribal Court's finding of fact will be deemed **clearly erroneous** "if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Evans v. Shoshone-Bannock Land Use Policy Comm'n (9th Cir. 2013) 736 F.3d 1298, 1306; see also Turtle Island Restoration Network v. U.S. Dep't of Commerce (9th Cir. 2012) 672 F.3d 1160, 1165.

While a tribal court's determination of its own jurisdiction is "helpful," and in some instances the federal court might benefit from that initial determination, federal court are not obligated to follow that determination, but need only be "guided" by it. FMC v. Shoshone-Bannock Tribes, supra at 1314. This is because federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question. FMC v. Shoshone-Bannock Tribes, supra at 1314 (citing Farmers Union, supra at 852-53). Accordingly, a tribal Court's determinations of its own jurisdiction is to be reviewed de novo. Id.

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C. THE LAW ON TRIBAL JURISDICTION OVER NON-INDIANS ON FEE LAND OUTSIDE TRIBAL BORDERS

Indian tribes do not, as a general matter, possess authority over non-Indians who come within their borders. Montana, supra at 565. This general rule is particularly strong when a non-Indian's activity occurs on land owned in fee simple, i.e., non-Indian fee land. Plains Commerce Bank v. Long Family Land & Cattle (2008) 554 U.S. 316, 328. Therefore, tribal efforts to regulate non-Indian owners of fee land are "presumptively invalid." Plains Commerce, supra at 330. In order to regulate activities on non-Indian fee land, tribes must show that at least one of two "limited" exceptions described in Montana, supra, applies. Atkinson Trading Co. v. Shirley (12001) 532 U.S. 645, 647. Under the first exception, tribes may regulate "nonmembers who enter into consensual relationships with the tribe or its members …" Strate v. A-1 Contractors (1997) 520 U.S. 438, 446. Under the second exception, tribes may regulate nonmember "activity that directly affects the tribe's political integrity, economic security, health, or welfare." Id. It is the second exception which is at issue here.

Under the second exception, the tribes face a "formidable burden," because "with only 'one minor exception, [the Supreme Court has] never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land.'" Plains Commerce, supra at 333.

"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." Plains Commerce, supra at 330. However, for a tribe to have authority over such nonmember conduct, "[t]he conduct must do more than injure the tribe…" Rather, "it must '**imperil the subsistence**' of the tribal community." Plains Commerce, supra at 341. As a result, "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. Instead, the tribe must show that the challenged conduct is "so **severe**" that it can "fairly be called **catastrophic** for tribal self-government." Plains Commerce, supra at 341. In other words, the tribe must show that the challenged conduct "**poses a catastrophic risk**" to one of the three categories affecting the tribe under the second

exception of Montana, supra, and that tribal regulation is "necessary to avert **catastrophic consequences**." Cohen's Handbook of Federal Indian Law, §4.02[3][c], 2012 ed., page 232, fn. 220.

In determining jurisdiction under the second exception of Montana, supra, a tribe must show that the challenged conduct is "**demonstrably serious**." Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation (1989) 492 U.S. 408, 431. Moreover, this second exception must be "**narrowly construed**" so as not to allow tribal regulation to "reach beyond what is necessary to protect tribal self-government or to control internal relations." Strate, supra at 1416. Nor is it sufficient for the tribe to argue that it must be allowed to regulate non-member conduct on non-Indian fee land merely because it has an interest in protecting the safety of its members. That simply "begs the question," and, if allowed, "the exception would swallow the rule, because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. The exception was not meant to be read so broadly." County of Lewis v. Allen (9th Cir. 1998) 163 F.3d 509, 515; Burlington, supra at 1065 (rejecting tribe's argument that death of two tribal members in a car accident at a railroad crossing warranted the application of the second exception under Montana, supra, simply because their deaths "would deprive the Tribe of potential councilmembers, teachers and babysitters," and noting that if Montana's second exception required no more than this, then the "exception would severely shrink the rule").

IV.

ARGUMENT

A. THE TRIBAL COURT JUDGMENT CANNOT BE ENFORCED AS A MATTER OF COMITY

1. The Tribal Court lacked personal and subject matter jurisdiction over RMCA and Donius' use of their non-Indian fee land.

a. The Tribal Court's factual findings are illogical, implausible and without support in the record.

The Tribal Trial Court rendered an "Opinion" in the first phase of the trial that was meant to decide whether the Tribe met its burden of showing regulatory jurisdiction under Montana, supra. A review of the ruling, however, shows that the Tribal Court's

factual findings are clearly erroneous. For the most part, the so-called "findings" are not findings at all, but mere conclusions that do not recite any specific facts to support the Tribal Court's conclusions or any logical inferences to be drawn from the record that activities being conducted on the subject property pose any risk of catastrophic consequences to the Tribe. In many instances, the Tribal Court simply states that the Tribe's interests are put at risk of catastrophic consequences by RMCA and Donius' misuse or lack of maintenance of their property, but never specifies what that conduct is.

For example, the Tribal Court stated that the "small size" of the Tribe *ipso facto* gives it a right to regulate the subject property, and because of its small size, a "comprehensive land management plan" or "land usage plan" for Tribal approval was necessary as a condition of RMCA and Donius' use of their property. (Pages 9 and 10 of Opinion, dated May 18, 2017). This conclusion is illogical. It is not the size of the Tribe that warrants regulation, but the activities on the non-Indian fee land that may pose a risk of catastrophic consequences to tribal self-government. Evans, supra at 1306.

In addition, the Tribal Court found that RMCA and Donius "have not maintained the property in question," but does not specify what that lack of maintenance is that poses catastrophic risks. (Page 6 of Opinion, lines 2-5, dated May 18, 2017). The Tribal Court also found the conditions on the subject property pose a fire hazard, and put at risk the Tribe's casino across the street of being destroyed by fire, but did not specify what those conditions are. (Page 6, lines 7-14, date May 18, 2017). The reference to a video shown at trial of "explosions, fire embers, and other threatening conditions due to the fire" that occurred in 2007 were shown to be non-existent, and thus are not supported in the record. Id.

The Tribal Court also found that there were certain activities that, if allowed to persist, would possibly, but "remotely," damage the Tribe's "pristine water table," but did not specify what those activities are. (Page 6, lines16-18, dated May 18, 2017). It considered this to be a factor in finding Tribal regulatory jurisdiction, despite the evidence at trial showing that the Tribe's drinking water has never been contaminated,

and that RMCA and Donius are not engaged in any activities that are contaminating the soil on their property or the water table below. Id.

The Tribal Court also found that the subject property was a "lawless enclave," because the County of San Diego purportedly claims it has no jurisdiction over this piece of land, and, together with the purported "continued misuse" of the subject property, the Tribal Court concluded the Tribe was left "helpless" and therefore had the right to regulate the subject property, otherwise "chaos would ensue." (Pages 6 and 9 of Opinion, dated May 18, 2017). However, the Tribal Court did not specify any facts to support its conclusion that RMCA and Donius engaged in "continued misuse" of the subject property.

b. The Tribe failed to show RMCA and Donius' use of their property has caused any drinking water contamination.

At trial, the Tribe offered the testimony from its expert witnesses to say that the activities on the subject property created a catastrophic risk to the Tribe's drinking water. On cross, these experts ultimately admitted that such a conclusion would be speculative at best. They testified as follows:

1) No evidence the diesel plume still exists.

Mr. Dane Frank, one of the Tribe's expert engineers from Applied Engineering & Geology, Inc., ("AEG"), testified on cross that he really did not know if the plum found on the subject property in 2011 is still there. He stated:

Q: And so, you said it was possible that the plume was still there in your opinion. Is it probable that the plume is still there?

A: I don't really know. It has been –

Q: You've answered the question.

So, in order for you to testify that the plume is still there, you would have to speculate based upon possibilities and not probabilities; correct?

A: Correct.

(RTCR009230).

Mr. Dane attempted to suggest at trial that Donius and RMCA need to remove all of the soil on their property to remove all possible contaminations. However, on cross, he

conceded that neither the EPA nor his own report ever recommended that be done. He stated:

Q: All right. Now, isn't is true that the EPA never recommended that all of the soil be removed from the property, as you have testified; correct?

A: I don't recall them recommending that. No.

Q: … Did you ever make that recommendation in any of your reports that all of the soil on the subject property be removed?

A: We did not.

(RTCR009232-33). He also never told the Tribe that it should ask Donius to remove the soil from his property. (RTCR009235).

Mr. Dane also conceded that it would be speculation to concluded that parked vehicles on the subject property is contaminating the soil. He stated:

Q: ...Did you inspect any of the vehicles to see if they were leaking?

A: I did not.

Q: So, when you said that it's possible that minor leaks from these vehicles could contribute to contamination of the soil or underground water table, you were again speculating; right?

A: Yes, as concluded.

(RTCR009236-37).

2) <u>The Tribe's drinking water is drinkable and not in any danger of being contaminated by anything being done on the subject property</u>.

Mr. Dane also conceded that he collected samples from the well on the subject property and could have used those samples to determine if the water was drinkable, but he chose not to. He stated:

Q: With the samples that you collected [from the well on the subject property], you could have determined whether or not it was drinkable; correct?

A: Correct.

Q: You chose not to; correct?

* * *

A: I did not make that choice.

(RTCR009241).

Mr. Dane also testified that the diesel plume on the subject property shrunk from when it was first observed in 2011 to when it was observed again in 2012, and that it is reasonable to concluded that it will continue to shrink over time. He stated:

Q: Okay. Now, you said that – you verified that in your report, Exhibit Number 146, you indicated that the plume had shrunk from what you observed in 2011 and what you observed in 2012; correct?

A: Correct.

* * *

Q: Okay … [I]f there was a pattern of [the plume] just going down from 2011 to 2012, would it be reasonable to conclude that it would shrink even more after 2012?

A: If a trend could be established, it would be reasonable to expect the trend to continue.

(RTCR009244-45).

Mr. Dane also testified on cross that he has no criticism of the way the contaminants were removed from the property in 2008 after the 2007 wildfire, and in fact agrees that the contaminates were successfully removed. He stated:

Q: Okay. Do you have any criticism of the way in which the contaminants were removed from the property as described in the [EPA letter of September 4, 2008, Exhibit 119]?

A: I do not.

Q: Okay. And then we have the last page of the document, page 12, "Conclusions." It says, "TPH – and metals – contaminated ash and soil were successfully removed from the site on August 22, 2008." Now, you disagreed with that?

A: No. That's what it says.

(RTCR009248).

In fact, Mr. Dane testified that he has no opinion whether the activities being conducted on the subject property have any impact on the Tribe's drinking water. He stated:

Q: … Do you have an opinion as to whether or not any of the activities that are being conducted presently on the site will have any impact on the Tribe's drinking water?

A: I don't know the current activities of the site well enough to say one way or another.

* * *

Q: … So, is it correct that you do not have an opinion about whether Mr. Donius is currently conducting activities on the property that could significantly impact the health and welfare of the Tribe; correct?

A: I don't have enough information about current activities on the property to form an opinion on whether current activities would negatively affect the health and welfare of the Tribe.

(RTCR009249, RTCR009255).

Mr. Earl Stephens, a geologist also with AEG, testified for the Tribe at trial and stated that the plume he measured in 2011 was in the water table below the surface of the subject property, and, if it has not already disintegrated, would migrate toward the Tribe's closest drinking water well 2,000 feet away between 44 years and 1,200 years. He stated:

Q: Let's assume [the Tribe's closest water well] is 2,400 feet [based on your report] … If – from your report, if the water migration is 2 feet per year, how many years would it take it to travel up the [Tribe's closest] water well?

A: It would take – at 2 feet per year, it would take approximately 1,200 years in the shallow aquifer to travel from the site to NS2 [the Tribe's closest water well].

Q: That's 1,200 years?

A: That is correct.

Q: If it traveled 55 feet per year, how long would it take to reach that well?

A: At 55 feet per year, it would take roughly 44 years to travel from the site to NS2 in the shallow aquifer.

(RTCR009430).

However, the contaminants are disintegrating, and would in fact never arrive at the Tribe's closest water well. He stated:

Q: So, in 2012, the plume had decreased, gotten smaller; correct?

A: Based on the data, yes.

Q: All right. And according to this document, the plume was almost entirely contained on the site; right?

A: Correct.

* * *

Q: All right. The last sentence says … "This band of TPHd contamination should continue to migrate in the direction of groundwater flow until the contaminant concentrations can no longer be detected." Do you see that, sir?

A: Yes.

Q: In other words, what you're saying is that the contaminated concentrations of diesel in the water flow in whatever amount that is would eventually disappear over time; correct?

A: Eventually.

(RTCR009441-443). Mr. Stephens further explained that the plume is disintegrating in part because of bacteria. He stated:

Q: Okay. So, I'm going to read this again. "Although the duration of the process appears to be expedited, the plume could have reduced in size over the past five years through a combination of dispersion, dilution and degradation." Did I read that correctly?

A: Yes.

Q: And isn't it true that this process – this expedited – potentially expedited process of dispersion and dilution and degradation has to do in part with bacteria?

A: Yes.

(RTCR009444).

Mr. Stephens also testified on cross that the Tribe does routine testing of its drinking water wells, and all tests have shown its drinking water is safe to drink. He also conceded that Donius and RMCA's expert, Anderson Donan, testing the same wells and confirmed that the water is safe to drink. He stated:

Q: … Did you become aware of the results of the Tribe's routine sampling or testing of the water before today's date?

* * *

A: Yes.

Q: And those results were that the Tribe's drinking water is safe to drink; correct?

A: It is my understanding that all – that the tests show that the concentrations are below the MCLs and it is safe to drink.

Q: … Did you also understand that the results of the tests that were done by Mr. Donan in 2016 confirmed that?

A: I understand it was a small hit of a trihalomethane, but other than that, it was fine, and the trihalomethane concentration was below the MCLs.

Q: Meaning that Mr. Anderson Donan's test results showed that the Tribe's drinking water was drinkable in 2016?

A: Correct.

(RTCR009464-65).

Mr. Stephens then testified that he has no opinion about whether the activities being conducted on the subject property currently pose a catastrophic risk of harm to the Tribe drinking water. He stated:

Q: So, as you sit here today, you cannot say that the activities that Mr. [Donius] is doing on his property currently would have catastrophic consequences on the Tribe's drinking water; correct?

A: I can't because I don't know what he is doing.

(RTCR009467-68).

Despite claiming no knowledge of what is being done on the subject property, Mr. Stephens admitted that he recently visited the subject property and found no evidence of any above-storage diesel tanks as what had existed on the property in 2007, or any evidence that hazardous material or fuel is being dumped into the ground. He stated:

Q: And based upon your recent view of the property, you didn't see any above tank diesel storage – I don't know what we call them – tanks, did you?

* * *

THE WITNESS: The answer is no. Excuse me.

BY MR. CORRALES:

Q: But you have no evidence, as you sit here today, that people on the property are dumping chemicals, hazardous chemicals, into the ground on the property; correct?

A: I have no knowledge of it.

Q: You have no evidence, as you sit here today, that Mr. Donius is dumping hazardous materials from dump trucks on the property; correct?

A: I have no knowledge of it.

Q: You have no evidence that Mr. Donius is currently dumping diesel fuel or any oil onto the property, do you?

A: Correct. I have no knowledge of it.

* * *

Q: Okay. And you have no evidence, for example, that any of the trucks that are being parked on the property are leaking oil or contaminants into the soil, do you, sir?

A: No evidence.

(RTCR009476-78).

Mr. Luke Montague, the Tribe's other expert not from AEG who testified in the second phase of the trial, offered nothing any more helpful than Dane Frank or Earl Stephens of AEG.

The undisputed evidence at trial showed that the Tribe's drinking water is safe to drink. (Trial Ex. "164," RTCR004957). In January 2016, RMCA and Donius' expert tested the Tribe's drinking water wells located 2,400 feet from the subject property where the underground water flows toward the wells, and the testing results show the water is safe to drink. Id. In May 2016, the RMCA and Donius' expert also tested the well on the subject property and found it to be safe drinking water. Moreover, based on the underground water flow rate, it would take 43 years to 1,200 years for any contaminants in the water below the subject property to reach the Tribe's drinking water wells. (Trial Ex. "164," pg. 012, RTCR004968). In March 2016, property owners' expert also tested the water in the hotel casino, and also found it safe to drink. The Tribe also concedes that its water is safe to drink and that no one has ever gotten sick from drinking its water.

The plume of low-level diesel, motor oil, and other contaminants left in the soil after the EPA cleaned up the after math of the 2007 wildfire in August 2008, is presently confined within the borders of the subject property and is shrinking and decaying. (Trial Ex. "7," pg. 026, RTCR003808). Based on the evidence adduced at trial in Tribal Court in January 2019, the plume has likely disappeared. (RTCR009441-443).

Based upon these undisputed facts, there are no catastrophic risks threatening the Tribe's health and welfare, i.e., the Tribe's drinking water attributable to activities on the subject property.

In Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298, a case with similar facts, the Court of Appeals held that the Tribe there 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. Therefore, the Rincon Tribe had the burden of proof to establish that the activities on the subject property presents a catastrophic risk of polluting its drinking water, and it clearly failed to meet that burden at trial.

3) Any contamination in the soil on the site left from the 2007 fire is confined to the site and is decaying.

As stated, the Rincon Tribe's own expert observed in 2012 a "contamination plume" he attributes to the 2007 fire in the soil of the subject property that is no longer extending off the property and is in fact shrinking in size and decaying. His report states:

> As reported [in December 2011], the TPHd [diesel] contamination plume associated with the Site was observed to extend offsite during November 2011. While the March 2012 sampling event did show substantial TPHd [diesel] contamination onsite, the March, September, and October 2012 sampling events did not show the TPHd contamination plume extending offsite.
>
> Although the duration of the process appears to be expedited, the plume could have reduced in size over the past five years through a combination of dispersion, dilution, and degradation...

(Trial Ex. "7," AEG Report dated March 6, 2013, Section 9.3, page 21, RTCR003803). Nowhere in his report, however, is there any mention that the contamination from this plume has reached the Tribe's drinking water wells. (Trial Ex. "19," Answer to Interrogatory No. 5: Contaminants from the plume have not reached the Tribe's water wells, RTCR003907). In fact, the EPA cleaned up the soil on the subject property in August of 2008 and removed any risk of groundwater contamination below the subject property. (Trial Ex. "164," Donan Report, Section 1.4, pg. 004, RTCR004960). To the extent there are low level traces of contaminants in the soil or water, those contaminants are from the 2007 fire that the property owners did not cause. Also, Mr. Donan, RMCA and Donius' expert consultant, recently took samples from the drinking well on the subject property and found it to be safe to drink.

The foregoing "evidence" that the Tribe proffered at trial concerning whether the activities being conducted on the subject property pose any catastrophic risk of harm to the Tribe's drinking water is speculative at best. It is not enough to meet its burden under Montana, supra, and Plains Commerce, supra. There is no imminent danger of a

catastrophic event. None of this evidence rises to the level of "imperiling the subsistence of the Tribal community," so as to warrant Tribal regulation on this ground. Plains Commerce, supra.

4) The Tribe's 2020 site inspection shows no water contamination of the water table below the subject property.

The Tribal Court Judgment provides that the Tribe shall have the right to enter the subject property:

> "…to conduct any necessary tests or inspections of the property, including water and surface conditions to determine the **impacts** which any conditions or activities on the property may have on the Rincon Tribe's economic safety, health and general welfare …" (Emphasis added).

(Amended Judgment, June 26, 2020, paragraph 2, RTCR008510). The Tribal Court Judgment further provides:

> "If any 'clean up' of the property is required, the RED shall **set a cleanup plan** in place, provide a copy of the cleanup plan to RMCA/Donius and to the Court, and provide fourteen (14) days' Notice to RMCA/Donius prior to initiating the cleanup plan…" (Emphasis added).

(Id. at paragraph 4, RTCR008509).

To date, the Tribe has not provided RMCA and Donius or the Tribal Court with any "cleanup plan," which strongly suggests that it found no contamination in the soil of the subject property that would have an "impact" on the Tribe's "economic safety, health and general welfare." Neither has the Tribe provided RMCA and Donius or the Tribal Court with a copy of its engineer's report showing what it found in its 2020 site inspection. The Tribe obviously wants to hide that report from this Court in connection with these cross motions for summary judgment, because the report will undoubtedly show that the soil on the subject property is not contaminated and thus does not pose a catastrophic risk to the Tribe to warrant regulatory jurisdiction under Montana, supra.

Instead, on June 2, 2021, RMCA and Donius filed with the Tribal Trial Court a report from their own engineers dated May 10, 2021. (RJN No. 1, Results of 2020 Tribal Site Inspection on Donius Property, page 3 of Report). The Tribe has refused to add this filing to the Tribal Court record, so RMCA and Donius seek judicial notice of it

instead. The report was prepared concerning the results of split soil samples (sister samples) the Tribe took from its site visit on the subject property in July 2020. Over RMCA and Donius' objections, the Tribe entered the subject property pursuant to the Tribal Court Judgment, and took soil samples for testing and laboratory analysis to determine if the soil and water table below were contaminated. This Court denied RMCA and Donius' ex parte motion prohibiting the site inspection, so the inspected proceeded as noticed by the Tribe. The site inspection proceeded for several days with large boring equipment and trucks. The Tribe's engineers provided split soil samples from twelve (12) soil borings the Tribe's engineers drilled, until July 23, 2020, when the Tribe instructed its engineers to stop providing RMCA and Donius with split samples, even though the testing was being conducted on their own property and the samples were of soil belonging to them as owners of the property. Id.

The Tribe refused RMCA and Donius' request for the results of the site inspection, i.e., whether the Tribe found any contamination in the soil. The Tribe had previously touted that testing of the soil on the subject property would show that RMCA and Donius' soil is contaminated, and that they need to remove the soil.

RMCA and Donius' expert report, however, shows that the soil is not contaminated, and no "cleanup" of the soil is required. RMCA and Donius reported these results to the Tribal Trial Court. In summary, the report concludes as follows:

(1) Very low concentrations of diesel range organics ("DRO") were detected in three (3) of twelve (12) soil borings conducted by the Tribe's engineers, which is "below typical regulatory action limits," if it is shown that the groundwater has not been impacted.

(2) Only very low DRO impact was detected I one (1) of the four (4) soil borings, which is well below typical regulatory action limits.

(3) The DRO appears to be weathered and/or degrading by natural attenuation as indicated by the atypical chromatographic response.

(4) It is not known if groundwater has been impacted by DRO; and

(5) "The concentrations of volatile organic compounds ("VOCs") detected in the soil gas from the two wells that RMCA and Donius' experts were allowed to sample

do not typically warrant further action as outlined in the State Water Resources Control Board's Underground Storage Tank Closure Policy."

Accordingly, there was no basis for the Tribal Trial Court to find regulatory jurisdiction over the activities being conducted on the subject property, because of baseless claims of soil contamination. This report confirms that the use of the subject property has not, and presently does not, pose a catastrophic risk of contaminating the Tribe's drinking water. RMCA and Donius did not "dump" any diesel or petroleum into the ground, and the Tribal Court record is devoid of any such evidence. When the 2007 wildfire swept across the reservation, the above-ground diesel tank Donius was using to fill up his trucks exploded and caused diesel fuel to spill onto the soil. But that is a far cry from him purposely dumping fuel or hazardous waste on to his property, or recklessly allowing the tank to leak fuel into the ground. The Tribal Court record shows that Donius promptly sought to clean up the soil as a result of the fire, despite the Tribe trying to interfere and prevent him from doing so. (Reporter's Transcript, Vol. VIII, March 8, 2017, RTCR009941-45). The EPA oversaw the cleanup and concluded all of the contaminates in the soil were removed, as far back as September 2008. (Trial Ex. "119," RTCR00425).

c. The Tribe failed to show RMCA and Donius' use of their property has created a risk of burning down the Tribal casino.

The other claim the Tribe advances to support regulatory jurisdiction under the second exception of Montana, supra, is that the condition of the subject property is a fire hazard, and if a fire were to occur again on the property, it would spread over across the County Road and burn down the Tribe's casino. This claim ignores the fact that the two-lane County Road, in addition to the casino paved parking lot, acts as a buffer to prevent any fires from reaching the casino building structure.

The Tribe offered no competent evidence at trial to the effect that the subject property is a fire hazard or that, if a fire were to occur on the property, it could burn down the Tribe's casino. For example, the Tribe's "fire" expert, Douglas Allen, testified that the County Road between the subject property and the casino prevents any fires from spreading from the subject property and burn the casino. He was also shown the video taken of the 2007 fire by the Tribe when it was ongoing, and denied seeing any

"fireballs" or "fire brands" coming from the fire on the subject property and landing on the casino as the Tribe's Environmental Director, Melissa Estes, falsely wrote in her report (Trial Ex. "9," RTCR003819).

Conceding the County Road is a buffer between the subject property and the casino, Mr. Allen stated:

Q: Between Mr. Donius' property and the casino, did you understand there is a road between them?

A: Yes, a highway.

Q: A highway. How wide is that?

A: Probably 60 feet wide.

Q: Okay. Would you consider that to be some sort of a buffer in the event of a fire between the casino and the property across the street?

A: Yes.

Q: Okay. And oftentimes, highways, freeways and roadways act as a buffer for firefighter purposes – for suppression purposes; correct?

A: That's correct.

(RTCR00933, lines 11-25).

Mr. Allen then stated that it would be speculation for him to say that the Tribe's casino could burn down as a result of activities being conducted on the subject property. He stated:

Q: … Is it correct, then, that you have no opinion on whether or not current activities that are being conducted on the property would cause the casino to burn down; correct?

* * *

A: ... I can't predict whether the entire casino would burn down.

Q: That would be speculation on your part; correct?

A: It would.

(RTCR009333, lines 14-18).

On cross, Mr. Allen was shown a video (Trial Ex. "110," RTCR004149) of the fire in progress on the subject property which refuted the report prepared by Ms. Estes (Trial Ex. "9," RTCR003819), the Tribe's RED Director, stating that fireballs flew from

the property and landed on the casino building. After viewing the entire video, Mr. Allen conceded that there were no fireballs at all, as falsely represented by Ms. Estes. He stated:

Q: Okay. Now, as we go through this video, I want you to point out to me where you see fireballs coming from this fire toward the casino.

* * *

Q: A fireball, fire brand, a fire – piece of fire coming up out of the fire coming toward the casino.

THE COURT: The witness is indicating he knows what a fire brand is.

* * *

BY MR. CORRALES: Go ahead and run the video.

(video playing)

BY MR. CORRALES:

Q: Okay. So, I take it from your lack of pointing out anything on the screen that you didn't see any fire brand coming out from the fire toward the casino; is that correct?

A: That's correct.

THE COURT: Could you explain for the Court what a fire brand is.

THE WITNESS: They're sparks from burning vegetation. It might be leaves, twigs, shingle roofs, any combustible object flying through the air ahead of the fire. That's a fire brand.

* * *

Q: Okay. I'm going to read you something that's in [Ms. Estes'] report and I want to ask you if you're aware of this ever occurring. It says, "Additionally, and in fact, these consequences occurred. Over the past decade, two wildfires have swept through the Rincon Reservation. In both circumstances, the subject property was upwind and adjacent to Harrah's Resort Southern California. In both circumstances, structures and fuel on the subject property exploded, sending fireballs onto Harrah's Resort Southern California."

* * *

BY MR. CORRALES:

Q: Do you understand what the term “fireball” means?

A: If it means fire brand, yes.

* * *

Q: ... Are you aware of any fire brands, using your term, ever coming from Mr. Donius’ property and going up into the air and landing on the casino? Are you aware of any such facts?

A: No.

Q: Okay. Now are you aware of any facts that would indicate that vehicles that were parked in the parking lot at the casino were ever consumed by fire as a result of this 2007 fire?

A: I got no information about that.

(RTCR009337-42).

In fact, Mr. Allen pointed out that the casino acted as an evacuation center, because that was the safest place to be at the time. (RTCR009342, lines 14-16).

1) Wooden Pallets.

The Tribe took pictures and inspected the grounds of the subject property at various times and observed that the property owners are engaging in the activity of refurbishing and/or constructing wooden pallets, and that wooden pallets are piled up on a certain portion of the property. (Trial Ex. “8,” page 3: 2015 NOVs, RTCR003813). At trial, Melissa Estes, the Director of RED, and the person who issued the NOVs to Donius and RMCA, surmised that this activity would require certain flammable chemicals to be applied to these palettes, and therefore, there must be flammable chemicals stored on the property. The Tribe claimed, without evidence, that the refurbishing of these wooden pallets was somehow a fire that could spread to the casino across the street. (Trial Exhibit “8,” page 3, RTCR003813).

To be sure, there was no evidence at trial that flammable chemicals are being stored on the property at all. Based upon the holding in Evans, supra, this claim cannot support the need to regulate activities on the property so as to avert a catastrophe. Even if a fire were to start on the property for any reason, it is a stretch to contend that it would spread and burn down the Tribe’s casino across the street.

2) Electrical Cords.

The Tribe also claimed that RMCA and Donius are stringing out throughout the property certain electrical cords, which it contends creates a fire hazard. (Trial Ex. "17," RTCR003886). However, there was no evidence that it did in fact create a fire hazard, and the Tribe's claims in this regard were speculative.

d. The Tribe failed to show that RMCA and Donius' use of their property has caused any disease or epidemic amongst Tribal members.

The Tribe's RED Director, Melissa Estes, testified at trial about the NOVs she issued to the property owners concerning activities being conducted on the subject property. She stated that there were "unsanitary conditions" on the subject property in the form of people living in mobile homes and trash being on the property ground in various places. She stated that she believed such conditions could attract rats and diseases and impact the health and safety of the Tribe. (RTCR010294-97).

However, the Tribe offered no evidence that the condition of the subject property has caused, or has the potential of causing, the spread of disease to members of the Tribe. For the Tribe's witnesses, specifically Melissa Estes, to suggest otherwise was pure speculation.

For example, Ms. Estes testified that although she cited Donius for trash and garbage on his property, she did not know if there was a breakout of a disease stemming from the trash she saw. She stated:

Q: ... One of the reasons why you cited Mr. Donius and RMCA for what you observed to be garbage, solid waste or trash on his property is because of the concern for the health and welfare of the Tribe; correct?

A: Yes.

Q: And you indicated that the trash, garbage and solid waste could cause a disease; correct?

A: Potentially, yes.

Q: Are you aware of any evidence that any Tribal member got sick as a result of any trash, garbage or solid waste that may have been deposited on the subject property?

A: I don't know.

Q: To your knowledge, was there a breakout of a disease or an epidemic of some sort that came from the subject property that you could attribute to any trash, garbage or solid waste that was deposited on the property?

A: I don't know.

(RTCR010208).

Mr. Donius refuted the Tribe's claims that he irresponsibly throws trash on his property which attracts rats. He testified as follows:

Q: Do you have a rat problem on your property?

A: Not that I am aware of.

Q: To your knowledge, have any of your employees or those people that work on the property ever contracted a disease that you believe might be connected with, you know, a vermin problem, rat problem?

A: No.

Q: Okay. Do you have any reason to believe that the way in which you handle your garbage or your trash could in any way have catastrophic consequences on the Tribe?

A: No.

Q: Do you have your trash picked up?

A: Yes.

Q: Who picks it up?

A: We have a contractor that picks up the dumpster and takes it to Escondido.

(RTCR010439).

Ms. Estes testified that if there are rats on the subject property, "the catastrophic consequences are that they migrate off property and infect people that are living on the reservation." (RTCR010296). However, other than using the buzz words "catastrophic consequences," and pontificating in fantasies, Estes could not articulate any evidence of seeing any rats or vermin on the subject property, let alone any knowledge of an epidemic in the Tribal community attributable to a rat problem on the subject property. (RTCR010295: "I did not observe any [vermin or rats] that particular day"). In short, the

Tribe offered no competent evidence to support a claim that Donius and RMCA are engaging in activities that could cause a spread of disease to the Tribe.

e. The Tribe failed to show that RMCA and Donius' construction of a small wall on the subject property posed any catastrophic risk.

In the summer of 2016, Donius began building a small wall on his property for a fruit stand business. In August 2016, the Tribe issued another NOV and a "Cease and Desist" notice concerning this activity, claiming that the construction violated the previous 2010 preliminary injunction. (Trial Exhibit "21," RTCR003921-37). There was no evidence presented at trial that the construction of this small wall posed any catastrophic risk to the Tribe in any fashion. Whether or not the construction of the wall violated the 2010 injunction turns on whether the Tribe had jurisdiction to regulate the activities on the property in the first instance. The evidence at trial showed that the Tribe never had such authority, however.

f. The Tribe failed to show that RMCA and Donius renting space to campers and RVs poses any catastrophic risk.

In its NOVs, the Tribe claimed that RMCA and Donius' actions in renting out RVs, campers and mobile homes for people to live in on their property was "unsafe or unsanitary," and therefore posed a risk of catastrophic consequences to the Tribe. (Trial Ex. "8, RTCR003814). However, at trial, the Tribe failed to show how any of these activities in any way was so demonstrably serious as to imperil the subsistence of the Tribe, so as to pose a risk of catastrophic consequences to the Tribe. Instead, the evidence the Tribe produced at trial amounted to nit-picky complaints that never gave rise to the level of harm associated with the risk of contaminating the Tribe's drinking water of threatening to destroy the casino across the street by fire.

g. The Tribe failed to show that RMCA and Donius' use in allowing motor vehicles to be parked on their property poses a risk of catastrophic consequences.

The Tribe's NOVs also cite RMCA and Donius for having trucks and cars parked on their property. (Trial Ex. "8," RTCR003813-14). Again, the basis for the citation was that such activities have the "potential to impose catastrophic consequences upon the economic security and health and welfare of the Tribe." Id. at page 3. However, at trial,

the Tribe failed to "connect the dots," and put on no evidence of such risks. Indeed, the evidence was to the contrary. (RTCR009236-37: [Tribe's expert, Dane Frank, testified that is would be speculation to say that parked cars on the property would contaminate the soil or underground water table with oil leaks]).

2. RMCA and Donius were not afforded due process of law in the Tribal Court proceedings.

a. The Tribal Court created an "unlawful enclave" standard to justify regulatory jurisdiction.

The Tribe argued throughout the trial that it should have the right to regulate the subject property, because the County of San Diego purportedly claims no jurisdiction over the property, notwithstanding Montana, supra. The Tribe contends that since the County will purportedly not regulate the property, the property is nothing more than a "lawless enclave." The Tribal Trial Court adopted this argument and ruled that this is a factor it should consider that warrants Tribal regulatory jurisdiction. (5/18/2017 Opinion, RTCR005017.) This contention and "rubber-stamp" ruling by the Tribal Trial Court finds no support in the law, and flies in the face of well-settled Supreme Court precedent of the narrow scope of the second exception of Montana, supra.

Whether the County or any other public agency has regulatory jurisdiction over the subject property is irrelevant. Nowhere in Montana, supra, does it provide that a Tribe can ignore the narrow scope of Montana's second exception, if the fee land it seeks to regulate is not regulated by a public agency. Indeed, the Court in Evans, supra, rejected a similar argument in its case, when the Tribes there argued that it could regulate the non-Indian fee land in question, because the County purportedly did not. It stated:

> The Tribes further contend that they may regulate Evans' land use because Power County purportedly lacks the authority to do so, and because "no case categorically bars the assertion of Tribal jurisdiction in this case." But these arguments ignore the crucial fact that Evans' property in non-Indian fee land.
>
> * * *
>
> ...Indeed, the Supreme Court held long ago that the government of Idaho could regulate non-Indian activity within the borders of the Fort Hall Reservation. (citation). (Emphasis added).

Evans, supra at 1306-1307.

Since the Tribal Trial Court's finding of regulatory jurisdiction to support the Judgment it rendered against RMCA and Donius is premised on this "lawless enclave" rule, instead of the rule provided under the second exception of Montana, supra, RMCA and Donius were denied due process of law. The rule espoused by the Tribal Court is one of "necessity," and runs contrary to federal common law protecting the rights of non-Indians who happen to have non-Indian fee land next to or within an Indian reservation.

The recent case of U.S. v. Cooley (2021) 593 U.S. _____, recently decided by the Supreme Court on June 1, 2021, does not support the Tribe's argument on this score, and is easily distinguishable. There, a Tribal Police officer approached a parked truck on a U.S. highway, a public right-of-way through an Indian reservation. The Tribal Police officer observed the driver to be a non-Indian who had watery, bloodshot eyes, with two semiautomatic rifles in plain view. The Tribal Police officer ordered the individual out of the truck, conducted a pat down search and saw a glass pipe and a plastic bag with methamphetamine in the truck. The Tribal Police officer detained the individual until federal officers arrived and arrested the individual. The Supreme Court reversed the order suppressing the drug evidence, holding that the second exception Montana, supra, "fits almost like a glove" under these circumstances to give the Tribal Police officer the right to temporarily detain the non-Indian and search him in order to protect the Tribe from "conduct that threatens or has some direct effect on … the health or welfare of the tribe." (citing Montana, supra). In contrast, the subject property is not on a public right-of-way, but is a private fee simple parcel with no public access. In addition, in Cooley, supra, there was direct evidence of criminal activity afoot, including the likelihood that the non-Indian posed an eminent danger to the members of the Tribe in driving through the reservation under the influence of drugs, and being a threat of causing injury and death with the potential use of his firearms in what may be a planned drug transaction. No such criminal facts are present in this case. Moreover, this is not a Tribal right to detain on "public right-of way" case similar to Duro v. Reina (1990) 495 U.S. 676, to which the Court in Cooley, supra, likened, where a Tribal Police officer has the power to detain and transport non-Indian offenders to the proper authorities. Thus,

the Tribe's "unlawful enclave" argument, while sounding in "necessity," does not "fit like a glove" within any of the two Montana's exceptions. The Tribal Court's use of it to render a Judgment against RMCA and Donius was a denial of their due process rights.

Th Tribal Court's application of an "unlawful enclave" rule is nevertheless flawed. It's citation to General Provision 1006(c) of the San Diego County Land Use Ordinance stating that "this ordinance shall not apply to Indian Reservations within the County," begs the question. The subject property in question here is not an Indian Reservation. The Tribe has never cited any authority, and none exists, that provides the County of San Diego has no jurisdiction over non-Indian fee land within or adjacent to an Indian reservation.

The Tribe's "lawless enclave" argument is also contradicted by its own RED Director, Melissa Estes, who stated in her official report concerning the subject property that the U.S. Environmental Protection Agency ("EPA") through the Clean Water Act ("CWA") of 33 U.S.C §1251, has regulatory jurisdiction over the subject property for purposes of issuing stormwater permits. In her Decision dated June 1, 2015, rejecting Donius and RMCA's application for approval to operate a vehicle storage business on the property, Ms. Estes insisted that Donius and RMCA must first obtain a stormwater permit from the EPA. She stated:

> "The CWA specifies that a MSGP [EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity] must be obtained for stormwater discharges in Indian Country, which is defined under U.S.C §1151 as 'All land within any Indian Reservation notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. This includes all federal, tribal, and Indian and non-Indian privately-owned land within the reservation.' Thus, even though the applicant has submitted an application for a facility to be operated on a parcel of land owned in fee simple, the parcel is located within the external boundaries of the Rincon Reservation and is therefore **subject to the authority of the U.S. EPA** for enforcement and compliance with the CWA.
>
> * * *
>
> "...Therefore, [Donius and RMCA] must submit a SWPPP and obtain a MSGP from the EPA whether the facility is engaged in automobile storage under NAICS code 43190, or automobile salvage under SIC code 5015." (Emphasis added).

(RTCR003840). Ms. Estes reiterated her position that the EPA has jurisdiction over Mr. Donius' fee land, in subsequent letters to Mr. Donius' counsel dated July 14, 2015, (RTCR003854 [indicating that based on her conversation with Mr. Hagler of the EPA, the EPA agreed with her position that it had jurisdiction over the Donius property]) and July 27, 2015 (RTCR003856).

In addition, the Tribe's own fire expert, Douglas Allen, testified at trial that Mr. Donius' property is "designated a state responsibility area of public resources." (RTCR009361). To this end, Mr. Allen testified that California State Code sections apply to regulate Mr. Donius' property, which prompted the Court to ask Mr. Allen to confirm his testimony, knowing that it trumped the Tribe's "lawless enclave" argument. Mr. Allen stated as follows:

Q: Do you believe that the California Fire Code and the California Building Code apply to this piece of property?

A: Yes.

Q: And for –

THE COURT: I'm sorry. You said that you believe that it does?

THE WITNESS: Yes.

THE COURT: What's the basis of your belief?

THE WITNESS: Just my experience of what the building code might require, such as electricity.

THE COURT: With regards to the fact that it's fee simple land within external boundaries of the Tribe, you still have that belief?

THE WITNESS: Yes. It is private land, as I understand it.

THE COURT: Okay. That's what I said, fee simple. All right. Thank you. (RTCR009327-28).

Mr. Allen was adamant that the California Fire Code required Mr. Donius to have a fire prevention plan, separate and apart from any Rincon Tribal fire code, and that the California fire code applies to the subject property. He was questioned about his report and stated:

Q: Number 3, the same question. It says, "The Development Plan must address the fire prevention requirements of the California Public Resource Code,

Section 4291, the California Industrial Operation Fire Prevention Field Guide, Edition 1999, and California Property Inspection Guide, Edition 2000." So, you believe that those California code sections and guides apply to this piece of property?

A: That's correct.

(RTCR009328).

Thus, if, according to the Tribe's own fire expert, the California fire codes apply to the subject property, then the State of California has the right to regulate matters of fire prevention, inspection and fire development plans as it pertains to the subject property. Since Mr. Allen was never withdrawn as the Tribe's expert, but was allowed to testify at trial, his expert testimony is an authorized admission of a party-opponent under FRE 801(d)(2)(C). In re Hanford Nuclear Reservation Litig. (9th Cir. 2008) 534 F.3d 986, 1016 (evidence produced during cross-examination of plaintiff's expert in prior trial was admissible against plaintiff in current litigation as authorized admission of party opponent). As a result, the Tribe cannot assert that the subject property is a "lawless enclave."

The Tribe's "lawless enclave" argument is also inconsistent with the EPA's supervised cleanup of the aftermath of the 2007 wildfire that destroyed Donius' property, caused his diesel tank to burn and spill fuel onto the ground, and left burnt ash and other hazardous oils and debris in the soil. In its letter dated September 4, 2008, the EPA wrote that the Tribe had "requested USEPA assistance with the site evaluation and in efforts to compel the property owner [Mr. Donius] to proceed with any necessary cleanup actions." (Trial Ex. 119, RTCR004205). This statement is an admission by the Tribe that it considered the EPA as having jurisdiction over the subject property, enough to "compel" Donius to "proceed with any necessary cleanup actions." FRE 801(d)(2)(A); Green v. Administrators of Tulane Educational Fund (5th Cir. 2002) 284 F.3d 642, 660 (in sexual harassment/retaliation action against supervisor, supervisor's hearsay statement ["he had to get rid of" employee] admissible as party-opponent admission).

Moreover, the EPA's September 4, 2008 letter reveals much more. The letter makes reference to the emergency response team declining to address whether Donius' septic system needs to be inspected more thoroughly, but stated that that task would be placed under the jurisdiction of the EPA's groundwater office. It stated:

> "FOSC Benson [the EPA On-Scene Coordinator] has determined that the septic system issues are best placed under the jurisdiction of the USEPA's Groundwater Office, and will not be further addressed by the USEPA's Emergency Response Section.
>
> * * *
>
> "… FOSC Benson has determined that future site septic tank investigations, if any, should be conducted under the jurisdiction of the USEPA Groundwater Office." (Emphasis added).

(Trial Ex. "119," RTCR004211, RTCR004216).

In addition, recently, the Tribe elicited the help of the County of San Diego to place cement blocks on the subject property to prevent vehicles from entering and leaving the property. This was a repeat of what occurred in 2010, when the County assisted the Tribe to do the same thing.

Trial Ex. "35" is the Declaration of Rob Shaffer, the editor of the Tribe's newspaper called the "Rincon Voice." Attached to Shaffer's Declaration (Ex. "2") is a newspaper article describing the September 27, 2010 blockade of Donius' property with cement blocks. The article reports how the County assisted the Tribe in blocking the subject property, and shows a picture of Scott Crowell, the Tribe's lawyer, and Bo Mazzetti and other Tribal Council members meeting with the San Diego County tribal liaison, Teresa Brownyard. The article states:

> "County Sheriff joins Rincon Security in blockade of entrance to Mushroom Farm [Donius' property]." (Emphasis added).

(Trial Ex. "35, RTCR005318). The article further states:

> "COUNCIL, COUNTY MEET ON MUSHROOM FARM BLOCKADE
>
> [picture shown of meeting]
>
> "Rincon AG Scott Crowell and Council members brief Teresa Brownyard on plan to blockade Mushroom Farm.
>
> "Tribal Council members met with San Diego County attorney and tribal liaison Teresa Brownyard on September 28th regarding the Tribal Court's decision allowing the Rincon Band to blockade the entrance to the Mushroom Farm

> property. The council members were joined by Rincon Attorney General Scott Crowell.
>
> "Scott Crowell briefed Counselor Brownyard on the history of the Mushroom Farm litigation and the County and state court rulings in favor of Rincon.
>
> "Council members Bo Mazzetti and Steve Stallings explained how Rincon would proceed with the blockade and how tribal security would handle vehicles and personnel attempting to enter the property.
>
> "**Counselor Brownyard stated that County agencies such as the sheriff's department would be notified, and that the County would provide support if required**." (Emphasis added).

(Trial Ex. "35," RTCR005318). The statements in this article are an admission by a party opponent on whether the Tribe believes the County of San Diego has jurisdiction over the subject property, and whether the property is a "lawless enclave." FRE 801(d)(2)(A); Green, supra. If the Tribe felt the County had no say or authority over the subject property, then there would be no need to meet with Ms. Brownyard, and the County would not be in a position to even say that "it would provide support if required." This article refutes the Tribe's claim that the subject property is a "lawless enclave." If it was, the Tribe would not be in any position to have the County assist it in placing cement blocks on Donius' property.

b. The Tribe required that RMCA and Donius submit a "usage plan" for the Tribe's approval before they could be allowed to use their property.

Throughout the history of this dispute between the Tribe and RMCA and Donius, the Tribe has repeatedly, either directly or indirectly, required that Donius and RMCA first prove to the Tribe that their use of the subject property poses no catastrophic risk of harm to the Tribe, either economically (destruction of the Tribe's casino by fire) or to the Tribe's health and welfare (drinking water contamination or spread of disease), before being allowed to use it. The Tribe's written correspondence to Donius and others introduced at trial confirmed that the Tribe demanded that Donius and RMCA submit a proposed business or "usage" plan for Tribal approval as a condition of use of the subject property, which required that Donius and RMCA prove to the Tribe's satisfaction that activities on the subject property pose no risk of catastrophic consequences to the

Tribe's health, safety or economy. Making such a requirement violates RMCA and Donius' due process rights, largely because Montana, supra, makes no such requirement for non-Indians, but rather places the burden on the Tribe instead.

For example, the Tribe wrote Donius on January 16, 2006, that any development projects on the property may only be undertaken with prior, written Tribal approval, because the Tribe has jurisdiction over non-Indian "fee land activities which threaten the health, safety and welfare of the residents of the Reservation." (Trial Ex. "45," RTCR005403). On April 1, 2008, after the 2007 wildfire caused destroyed Donius' property and SDG&E equipment providing power to the property, the Tribe wrote to SDG&E requesting that SDG&E not re-connect power, because Donius is purportedly operating his business on the property without the Tribe's authorization. The letter stated:

> "The Band has communicated numerous times with Mr. Donius that he needs to **submit a business plan**, clean-up plan, and plans and specifications to the Band for review and approval **before** he will be able to resume his business. To date, the Band has not received any plans to review." (Emphasis added).

(Trial Ex. "39," RTCR005349). (See also Trial Ex. "40," Tribe's letter to SDG&E date May 23, 2008, RTCR005350: Donius failed to get prior Tribal approval for construction or development work on his property; Trial Ex. "41," Tribal letter to SDG&E, RTCR005352: Donius is required to get prior Tribal approval for any construction or development activity on his property).

When the Tribe issued its Notice of Violations ("NOVs") to Donius and RMCA on September 24, 2015, it explained that the NOVs were the result of Donius and RMCA's failure to obtain prior Tribal approval before conducting any activities on the subject property. The Tribe's "Determinations" supporting its NOVs stated in pertinent part:

> "[Donius and RMCA] … have never availed themselves of the process available under Tribal law … to inform the RED [Rincon Environmental Department] of their intended activities on the Subject Property, and to provide analysis regarding significant impacts of the activity or the risk of catastrophic consequences …, which if pursued, could avoid enforcement action by the RED." (Emphasis added).

(Trial Ex. "9," "Determinations," dated September 24, 2015, p. 3, RTCR003819).

The Tribe's environmental enforcement ordinance relied upon to issue the NOVs to Donius and RMCA unlawfully require that Donius and RMCA, and non-Indian fee landowners, obtain prior, Tribal written approval in the form of a "business plan" or "usage plan," before engaging in any activities or use on the subject property. The Tribe's argument that no such requirement exists, because of the use of the word "may" in the Rincon Environmental Enforcement Ordinance ("REEO"), specifically §8.313(a)(1)["a person may seek prior approval/determination …"], is seriously misleading and frankly false. The critical language is found in §8.313(b)(1)(B), which allows the Tribe to take enforcement action against a Non-Indian fee landowner who "does not have prior approval [in the form of a proposed plan] and engages in conduct that falls within the exceptions set forth in §8.301(b)(4)." (Trial Ex. "34," RTCR005310). Section 8.301(b)(4) provides that the Tribe can regulate activities on non-Indian fee land which pose risks of catastrophic consequences to the Tribe's political, economic or health and welfare. Clearly, the Tribe pursued a NOV enforcement action in the form of its Cross-Claim, because Donius and RMCA did not submit and obtain from the Tribe a business plan that proves to the Tribe's satisfaction that the activities on the subject property will not pose a risk of catastrophic consequences to the Tribe's political, economic or health and welfare. The Tribal Court's Judgment granted that enforcement action which requires RMCA and Donius to submit such a "usage plan" prior to their use of their property, and therefore denied them due process of law.

Based on this evidence, the Tribal Court unlawfully placed the burden on Donius and RMCA to first prove to the Tribe that their use of their own property will not pose any catastrophic risks to the Tribe, rather than the Tribe having that initial burden, and then erroneously engaged in a "balancing of interests" analysis that finds no support under Montana, supra. It stated:

> "Here we must balance the interest of the Tribe's land use policies and procedures and the Defendants' [RMCA and Donius]. They, in fact, are quite liberal. *See, e.g.*, Rincon Tribal code Section 8.300. Thus, the fee owner has to **submit their proposed usage plan to the Tribe**, at which time then parties then work together to conclude the reasonableness of the plan as it impacts their joint interests. The Rincon code which the Tribe is asking (**requiring**) the **owners to follow** is no more stringent than the average city or county requirements. While Congress has not acted in the area of jurisdiction in such matters, not being able

> to develop and **enforce a comprehensive land use program** on this small reservation falls short of anything reasonable. The Tribe is willing to work with the fee owner, as testified. The Court finds that a **comprehensive land management plan is necessary** …" (Emphasis added).

(Opinion, May 18, 2017, page10). Accordingly, because the Tribal Court Judgment is based on RMCA and Donius' failure to submit and obtain from the Tribe a "usage plan", which the Tribal Court erroneously concluded was necessary to avoid catastrophic risks under Montana, supra, RMCA and Donius were denied due process of law. RMCA and Donius were prejudiced by the Tribe's system of laws that did not comport with federal common law, and under Marchington, supra, the Judgment cannot be recognized or enforced. Marchington, supra at 810.

c. The Tribe altered its own environmental ordinance to get around Montana's requirements and deny RMCA and Donius a jurisdictional hearing.

RMCA and Donius were further deprived of due process when the Rincon Tribe charged them with violations under a 2012 Tribal environmental ordinance that provided them with a jurisdictional hearing in which the Tribe was required to first prove it had actual regulatory jurisdiction under Montana, supra, but then later prosecuted them under a later 2014 version that eliminated the jurisdictional hearing and required instead that RMCA and Donius submit an "activity plan" to the Tribe for pre-approval and then prove to the Tribe that their use of their property will not pose any catastrophic risks to the Tribe's economic or health and welfare. The Tribal Trial Court considered this as a factor in finding the Tribe has regulatory jurisdiction. (Opinion, dated 5/18/2017, RTCR005017-18).

The Tribe attempted to cover this fact up by falsely stating that it had amended its REEO in 2014 so as to make it consistent with Montana, supra, "and its progeny." (RTCR005138, Rincon Tribe's Preliminary Trial Brief, 9/05/2018, page 3). The Tribe made this same false statement to Donius and RMCA when it issued its 2015 NOVs. It falsely stated:

> "On April 29, 2014, the Rincon Band of Luiseno Indians (the "Rincon Band") adopted revisions to the REEO in response to certain legal opinions issued by the Ninth Circuit Court of Appeals, including but not limited to legal opinions arising out

> of litigation brought by the alleged owners of the Subject Property against the Rincon Band. Specifically, the revisions to the REEO clarify the circumstances giving rise to, and limitations upon, the Rincon Band's jurisdiction over non-Indian activities on non-Indian-owned fee lands within the Reservation." (Emphasis added).

(Trial Ex. "8," NOVs, date September 24, 2015, RTCR003812).

In truth and fact, the Tribe amended its REEO in 2012, and it did so to make its environmental ordinance consistent with Montana, supra, and Plains, supra, which places the burden on the Tribe to first prove that the non-Indian fee landowner's activities pose a catastrophic risk of harm to the Tribe. The 2012 REEO specifically quotes Montana, supra, and then states that "prior to applying a Rincon land use or environmental ordinance to non-Indian activities occurring on fee lands …, **the [Tribe]** must **first** determine that the non-Indian activities seeking to be regulated fall within one of the [two exceptions under Montana]." (Trial Ex. "99," page 3, RTCR005756). It then provides that if a non-Indian fee landowner objects to the Tribe's attempts to assert regulatory jurisdiction over the use of his property, he may request a "jurisdictional hearing" in which **the Tribe** has the **burden** of proving regulatory jurisdiction under federal law. It states:

> "If the recipient objects to tribal jurisdiction and requests a jurisdictional hearing, the burden shall be on the Tribe to establish tribal jurisdiction pursuant to federal common law." (Emphasis added).

(Trial Ex. "99," page 4, §8.301(b)(3), RTCR005757). **This provision was entirely eliminated in the 2014 amended REEO**. Thus, it was false for the Tribe and its lawyers to represent to the Court and to Donius and RMCA that the Tribe had amended its REEO in 2014 to make it consistent with Montana, supra, "and its progeny." They knew that was not true at all. In reality, the Tribe amended its REEO in 2014 to make it contrary to and inconsistent with Montana, supra, and its progeny, by shifting the burden away from the Tribe and on the non-Indian landowner to show that activities being conducted on non-Indian fee land pose a catastrophic risk to the Tribe. In truth, the Tribe amended its REEO in 2012 to make it consistent with Montana, supra, and Plains, supra, but decided to eliminate those revisions in 2014, presumably because those lawful revisions made it difficult to regulate Donius and RMCA's use of the subject property, and the Tribe was

heavily involved in litigation with them at the time. It charged them with violations that purportedly occurred in 2009 and 2013 that would have been subject to the 2012 REEO, but then prosecuted them under the 2014 version, knowing that the 2014 version eliminated their right to a jurisdictional hearing and required that they obtain a "usage plan" approved by the Tribe, which was not in the 2012 REEO. (Trial Ex. "99," page 4, 8.01(b)(3), RTCR005757).

d. The Tribal Court Amended Judgment is unlawfully based on a finding of "colorable or plausible" jurisdiction.

In rendering judgment, the Tribal Trial Court revealed it had applied the wrong standard of proof relative to jurisdiction in the first phase, i.e., it used the low standard of proof of "colorable or plausible" instead of the higher burden of proof under Montana, supra, for actual jurisdiction, thus depriving RMCA and Donius of due process of law, and rendering the Amended Judgment neither recognizable nor enforceable under the principles of comity. (Amended Judgment, June 26, 2020, RTCR008505). It stated:

> "Regarding the matter of jurisdiction, the Tribal Court concluded it did, at the initial part of this trial, in all regards, have jurisdiction. In considering this, the court found jurisdiction need only be 'colorable or plausible.' *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009). The Court finds it has no doubt regarding its jurisdiction. Additionally, a complete evaluation and discussion of this case also included extended discussion of *Montana v. United States*, 450 U.S. 544 (1981), its application and unique acts in the case which has affected the Court's decision in the application of *Montana*.
>
> "The courts have repeatedly held attempts at determining the scope of jurisdiction in Tribal court is not an easy task (citation). Again, we find the phrase "plausible" in describing the issue of jurisdiction. And in this case, the Court actually finds the issue of jurisdiction factually 'plausible.'" (Emphasis added).

(Amended Judgment, June 26, 2020, RTCR008505).

The Tribal Trial Court based its finding of jurisdiction on its belief that evidence of jurisdiction need only be "colorable or plausible." (Amended Judgment, June 26, 2020, page 5). However, the Tribe's evidence of colorable or plausible jurisdiction was the same evidence it presented to the U.S. District Court when it sought to dismiss RMCA's case based on a failure to exhaust tribal court remedies. (RMCA v. Mazzetti (9th Cir. 2012) No. 10-56521, page 2 ("the Tribe offered four declarations explaining how

activities on Rincon Mushroom's property could contaminate the Tribe's sole water source and increase the risk of forest fires that could jeopardize its casino (its principal economic investment)"). According to the Court of Appeals in RMCA v. Mazzetti, the standard to determine whether tribal exhaustion was required for RMCA is a lower standard than whether tribal jurisdiction is actually permitted under the second exception of Montana. Id. at page 3. The Court of Appeals emphasized that it was not deciding whether the Rincon Tribe had actual jurisdiction based on the four declarations it submitted. Id. at page 3. Rather, the Court of Appeals held that the Tribe's evidence was sufficient to make the Tribe's assertion of jurisdiction over the activities on the subject property "colorable or plausible" for purposes of requiring tribal exhaustion. Actual jurisdiction was to be determined first by the Tribal Court, but not based on the lower "colorable or plausible" standard of proof. In this regard, the Tribal Court committed clear error." Evans, supra at 1306.

B. THE TRIBAL COURT JUDGMENT WAS OBTAINED BY FRAUD

Although a lack of jurisdiction and due process are mandatory grounds for not recognizing or enforcing a tribal judgment, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including where circumstances show that the judgment was obtained by **fraud**. Marchington, supra at 810. The Tribal Court record shows the Tribal Court Judgment was in fact obtained by fraud.

The historical record shows that in its ongoing dispute with RMCA and Donius over its efforts to regulate the subject property, the Tribe was faced with a problem. On July 19, 2012, the 9th Circuit Court of Appeals rendered its decision affirming that RMCA must exhaust its tribal remedies before proceeding against the Tribal Council members in federal court. It cited Plains Commerce, supra, and explained that when RMCA (and presumably Donius) goes to Tribal Court to exhaust its Tribal remedies, the Tribal Court must decide whether Tribal jurisdiction is "actually permitted." As explained, Plains Commerce, supra, specifically held:

> Given Montana's "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," (citations), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "**presumptively invalid**," (citation). 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. (citation). These exceptions are "limited" ones, (citation), and cannot be construed in a manner that would "swallow the rule," (citation), or "severely" shrink it, (citation). (Emphasis added).

554 U.S. at 330. The Tribe, therefore, knowing that Donius and RMCA would be in Tribal Court to exhaust their Tribal remedies, obviously reviewed its 2008 version of its REEO, which contained no language that "tracked" the Montana language or the language in Plains Commerce, supra. It, therefore, revised its REEO and came up with the August 14, 2012 version, as described above. That version accurately stated the law on under what conditions the Rincon Tribe could regulate the activities being conducted on the Donius' property.

But as events later unfolded, the Rincon Tribe realized it had a two-fold problem. First, if the 2012 revision of the REEO accurately stated the law with respect to non-Indian fee landowners, then that means the previous REEOs, i.e., the 2007 and 2008 version, and the 1989 and 1990 land use ordinances, were unlawful. If they were unlawful or invalid, then the pre-2012 NOVs and Tribal orders enforcing them were all invalid. That would mean that the Preliminary Injunction, dated September 27, 2010, the Tribe obtained against Donius and RMCA was likewise invalid, since it was based on the same unlawful 2007 REEO and the other 1989 and 1990 "emergency" land use ordinances, which all required prior Tribal approval before and activities on non-Indian fee land could be conducted, and provided no preliminary jurisdictional hearing where the burden is on the Tribe to prove any of the two exceptions under Montana, supra, to allow the Tribe to regulate the complained of activities. (See Trial Ex. "8," RTCR003812, setting forth the history of the NOVs, but falsely stating that the 2014 REEO was passed to conform with Montana, supra).

Second, the Tribe also realized that in order to accomplish its scheme to drive Donius and RMCA off their land, the Tribe needed to issue new NOVs and have them stick. It knew that it could not prove it was at risk of catastrophic harm by the activities being conducted on the subject property (the evidence showed the use of the property did not contaminate the water table below or put at risk the Tribe's casino being burned). Therefore, the Tribe decided to **fraudulently alter** its own environmental

ordinance, so as to allow it to regulate activities being conducted on the subject property. To do this, it eliminated all of the language in the 2012 version of its REEO that tracked Montana, supra, and Plains Commerce, supra. It passed the 2014 version of its REEO in order to get around the law under Montana, supra, and Plains Commerce, supra, that placed the burden on the Tribe, not Donius or RMCA, to prove it is at risk of catastrophic harm by Donius' business activities on his property. With its fraudulently altered 2014 REEO, the Tribe then issued bogus NOVs and thereafter sought to enforce them through the Tribal Court.

Since the Tribal Court Judgment is based on the enforcement of the Tribe's 2014 REEO, the federal court can exercise its discretion and refuse to recognize and enforce the Judgment based on fraud. Marchington, supra at 810.

C. THE INJUNCTION PORTION OF THE TRIBAL COURT JUDGMENT IS OVERLY BROAD, VAGUE AND AMBIGUOUS IN VIOLATION OF DUE PROCESS

The injunction portion of the Tribal Court Judgment is overly broad and vague and ambiguous, in violation of FRCP 65(d), and therefore denies RMCA and Donius "the elementary due process requirement of notice." Scott v. Schedler (5th Cir. 2016) 826 F.3d 207, 212.

FRCP 65(d) requires that an injunction provide specific notice of its terms and be tailored to remedy the established violations. Otherwise, the person subject to the injunction is left to guess what conduct he or she is to avoid so as to avoid being subject to contempt. Schmidt v. Lessard (1974) 414 U.S. 473, 476. Here, the Tribal Court Judgment is lacking in specificity and overly broad, vague and ambiguous, so as to leave RMCA and Donius guessing what to do or not do to avoid being in contempt.

For example, the first paragraph of the injunction portion of the Tribal Court Judgment states in pertinent part:

> "In order to proceed with any development or use of the property, RMCA/Donius shall comply, at a minimum, **with those laws and regulations of the Rincon Tribe which are designated by the RED [Rincon Environmental Director] as necessary to protect tribal interests**, and in the absence of such tribal laws and/or regulations relevant to any development or use of the property, RMCA/Donius shall comply with the Uniform Building Code, and the San Diego County Code of Administrative Ordinances, …" (Emphasis added).

(Amended Judgment, June 26, 2020, paragraph 1, RTCR008508). This leaves RMCA and Donius to guess what those Tribal laws might be. The record shows that Melissa Estes was the RED who issued the subject NOVs to RMCA and Donius in 2015, and specifically designated the 2014 REEO as the Tribal laws which were purportedly violated. However, the REEO with respect to non-Indian fee landowners is so general, that the Tribe can virtually decide what conduct it feels violates the ordinance. For example, the violations Estes cited in the 2015 NOV were that RMCA and Donius were purportedly engaging in "conduct that significantly impacted" or had the "potential to impose catastrophic consequences" on the "economic and health and welfare" of the Tribe. (Trial Ex. "8," RTCR008502-03). This language gives the Tribe wide latitude and unfettered discretion on what it feels are violations of its laws, as was evident in the underlying Tribal Court trial. Thus, for the Judgment to provide that other state laws would apply in the absence of such tribal laws and/or ordinances, is entirely meaningless, since the Tribe can make up any violation it wants by characterizing any conduct it wants as being a "potential to impose catastrophic consequences." In the end, resort to any other state or non-Indian laws would never arise, since the Tribe would decide what conduct it feels violates its REEOs.

In addition, the Tribal Court Judgment makes reference to all fuels, hazardous wastes, septage, and "wood and debris," including wooden pallets, and attempts to prohibit any activities related to such matters. (Paragraphs 5, 6 and 7). Moreover, the Tribal Court Judgment makes reference to a host of laws and regulations, without citing specific references to any law or regulation that addresses specific conduct. For example, the first paragraph as cited above states that RMCA and Donius are required to "comply with the Uniform Building Code" and the "San Diego County Code of Administrative Ordinances" without specifying which ones. As a result, the Tribe's proposed modifications are both **vague** and **overly broad**, because they fail to state injunctive terms specifically and fail to describe in reasonable detail the conduct to be restrained or required, in violation of FRCP 65(d).

Under the law, an injunction must be (1) sufficiently specific to give notice of its terms and (2) be tailored to remedy the established violations. Schmidt v. Lessard

(1974) 414 U.S. 473, 476. FRCP 65(d)(1) requires that an injunction and every restraining order, to be valid, must: "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." The Tribal Court Judgment does not comply with subparts (B) and (C).

"Analytically, the broadness of an injunction refers to the range of proscribed activity, while vagueness refers [to] the particularity with which the proscribed activity is described." U.S. Steel Corp. v. United Mine Workers of Am. (5th Cir. 1975) 519 F.2d 1236, 1246, fn. 19. "'Vagueness' is a question of **notice**, i.e., **procedural due process**, and 'broadness' is a matter of substantive law." Id. Thus, an injunction is overly vague if it fails to satisfy the specificity requirements set out in Rule 65(d)(1), and it is overly broad if it is not "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order" as determined by the substantive law at issue. Doe v. Veneman (5th Cir. 2004) 380 F.3d 807, 813.

Accordingly, in order to comply with FRCP 65(d), the language in the Amended Judgment relative to RMCA/Donius' proscribed conduct on their property must "state its terms specifically" and "describe in reasonable detail" the conduct restrained or required." Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C. (5th Cir. 2013) 710 F.3d 579, 586. The drafting standard has been described as "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." U.S. Steel Corp, supra at fn. 20. "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt, supra at 476.

The wording in the Tribal Court Judgment is, in many places, too vague to be understood, because the laws and regulations cited do not specify which particular provisions RMCA/Donius are to abide by or follow. See Scott v. Schedler (5th Cir. 2016) 826 F.3d 207, 211-213; Thomas v. County of Los Angeles (9th Cir. 1992) 978 F.2d 504, 509.

In Thomas, supra, a group of black and Hispanic residents sued the Los Angeles County Sheriff's Department for excessive force and illegal searches in violation of their

civil rights. The Court of Appeals reversed the District Court's injunction that ordered the Sheriff's Department to "follow the Department's own stated policies and guidelines regarding the use of force and procedures for conducting searches." 978 F.2d at 506. The 9th Circuit held that the injunction failed to satisfy Rule 65(d) because it did not define the "Department policies and guidelines for conducting searches and for the use of force" that the Department was ordered to follow, concluding that reference to the Department's policies in this general way was overly vague, even though one might expect the Sheriff's Department to know what its own policies and procedures to be on such matters. Id. at 509.

For the same reasons, the language contained in the Tribal Court Judgment would simply create an injunction that would refer RMCA/Donius to various laws and regulations without defining what those specific provisions are or how they can be identified. RMCA/Donius cannot be expected to know what specific laws and regulations they are to follow or abide by, unless they are specified in the order. Making blanket references to the entire set of various Codes and regulations forces RMCA/Donius to conduct independent research to try and figure out which provisions of those Codes and regulations might apply. Moreover, as stated, the REEO itself as it pertains to non-Indian fee landowners is purposely vague so as to give the Tribe wide latitude in deciding for itself what conduct is unlawful, forcing RMCA and Donius to wait for the Tribe to tell them if their conduct is unlawful, rather than telling them in advance in writing what to look for.

An injunction should not contain broad generalities. Peregrine Myanmar Ltd. v. Segal (2nd Cir. 1996) 89 F.3d 41, 50, 52-53 (vacating as vague a catch-all paragraph of an injunction requiring the appellant to "take all other reasonably needful actions to facilitate" a general result). Moreover, an injunction must describe in reasonable detail the acts restrained or required "not by referring to . . . [any] other document." FRCP 65(d)(1)(C). For example, the Tribal Court Judgment states that RMCA/Donius "shall immediately remove all combustible materials from the property, including fuel, wood and debris, wooden pallets, and shall discontinue all activities that include such combustible materials." (Amended Judgment, June 26, 2020, paragraph 10, page 13). This could mean anything from driving a car on the property to cutting out paper dolls.

The Tribal Court Judgment then goes on to prohibit future "use or storage" of these items unless they are in compliance whatever the Tribe designates as what is to be complied with, and, if the RED does not designate anything, then they are to comply with unspecified provisions of various Codes and regulations, leaving RMCA/Donius to guess which ones to follow. Id. Because the Tribal Court Judgment fails to define the specific provisions of Tribal and non-Tribal Codes and regulations it expects RMCA/Donius to abide by and follow, it lacks the specificity required by FRCP 65(d).

The Tribal Court injunction cannot "engraft codes and regulations in gross" or rely on a code or regulation for clarification of what is otherwise unclear in the decree itself. Scott, supra at 213. If it uses statutory authority in its decree, the injunction must use it only to supplement specific instructions in the decree with statutory authority from which the right to issue such instructions derive, and it must clearly define those codes and regulations that it orders RMCA/Donius to follow.

At the same time, the injunction portion of the Tribal Court Judgment is **overly broad**, because it encompasses more conduct than was requested and exceeds the legal basis of the lawsuit. Veneman, supra at 819. For example, the injunction requires RMCA/Donius to remove all fuels and to discontinue all activities that include fuels. (Amended Judgment, June 26, 2020, paragraph 10, RTCR008513). This language is overly broad, because it can be reasonably read to prohibit any vehicles from coming onto the property. Donius' secretary cannot drive onto the property and park her car there when she comes to work. Donius cannot drive his car onto the property for any reason. He cannot use a bulldozer or other equipment on his property, as he customarily does. As read, trucks cannot come onto the property in connection with Donius' ongoing trucking business.

Likewise, the Tribal Court Judgment requiring the removal of all combustible material is overly broad, because it can reasonably be read to require Donius to remove anything that is made of wood. (Amended Judgment, June 26, 2020, paragraph 10, RTCR008513). This would include Donius' office trailers, sheds and other buildings, and any structures made of wood. It would include Donius' nursery structures he has on his property to grow plants which he sells commercially. Moreover, this language is overly broad, because it exceeds the extent of the purported violations established at

trial. Calfano v. Yamasaki (1979) 442 U.S. 682, 702 (scope of injunctive relief is dictated by extent of the violation established). There was no evidence at trial that all wood structures on Donius' property were a fire hazard and had the potential of causing a catastrophic event, i.e., burn down the Tribe's casino across the street. This is evident by the fact the Tribal Trial Court never mentioned this in its "Opinion" following the trial.

The same can be said about the Tribe's proposed modifications that require the removal of RMCA/Donius' septic system from the property, in addition to "fuels," and "shall discontinue all activities that include fuels, hazardous wastes or septage." (Amended Judgment, June 26, 2020, paragraph 5, RTCR008510). There was no evidence at trial that RMCA/Donius' septic system had the potential of causing catastrophic consequences to the Tribe's drinking water or the spread of disease. In addition, as stated above, this overly broad language can be read to prohibit RMCA and Donius from driving cars onto the property, since cars have fuel tanks. The subject property operates on a septic system. Based on this language, RMCA and Donius would be in violation of the injunction for having toilets.

D. THE TRIBAL COURT'S JUDGMENT FOR $1.7 MILLION IN ATTORNEY'S FEES IS INVALID

Given the fact that the Tribal Court did not have jurisdiction, did not afford RMCA and Donius with due process of law, and the Judgment was obtained by fraud, the award of attorney's fees in the amount of $1.7 million in favor of the Tribe should likewise not be recognized or enforced.

E. THE TRIBAL COURT OF APPEALS DECISION IS IRRELEVANT

The Tribe may argue that the Tribal Court of Appeals Decision affirming the Tribal Trial Court's ruling on jurisdiction should be followed, because the panel was composed of non-Indians who were a law professor, a retired federal judge and a partner in a law firm. Their decision, however, is irrelevant and not binding on this Court. They are paid by the Tribe and have a financial interest in staying on the panel. Moreover, this Court is the final arbiter of federal law, not the Tribal Court of Appeals, and the question of tribal court jurisdiction is a federal question. FMC v. Shoshone, supra at 1314. Therefore, the issue of whether the tribe has regulatory jurisdiction is to be reviewed by this Court de novo. Id.; Farmers Union, supra at 852-53.

V.

CONCLUSION

For the foregoing reasons, the Tribe's and the Tribal Parties' motion for summary judgment to recognize and enforce its judgment should be denied. RMCA and Donius' motion for summary judgment should be granted. The Court should find that the Tribe and the Tribal Trial Court did not have jurisdiction over RMCA and Donius and over the activities being conducted on their property. The Court should find that the Tribe does not presently have regulatory jurisdiction over the subject property. Because the Tribal Court had no jurisdiction over the subject property, did not afford RMCA and Donius due process of law, and permitted the Judgment to be fraudulently obtained, the Tribal Court Judgment should neither be recognized nor enforced for the reasons stated herein.

Dated: June 21, 2021

s/ Manuel Corrales, Jr.
Manuel Corrales, Jr., Esq.
Attorney for Plaintiffs/Counter-Defendants/Third-Party Claimants RINCON MUSHROOM CORPORATION OF AMERICA, INC., and MARVIN DONIUS

CERTIFICATE OF SERVICE

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

1. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS/COUNTER-DEFENDANTS MARVIN DONIUS AND RINCON MUSHROOM CORPORATION OF AMERICA, INC.**

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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: June 21, 2021

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