

Denise Turner Walsh, SBN 254434
Attorney General, Rincon Band of Luiseno Indians
One Government Center Lane
Valley Center, California 92082-6015
Telephone: (760) 297-2680
Fax: (760) 749-5144

Scott Crowell *Pro Hac Vice*
Crowell Law Office – Tribal Advocacy Group LLP
1487 W. State Route 89A, Ste. 8
Sedona, Arizona 86336
Telephone: (425) 802-5369
Fax: (509) 235-5017

*Attorneys for Defendants/Counter-Claimant Rincon
Band and Tribal Officials*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

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

Civil No. 09-CV-2330 WQH POR

**RINCON BAND'S
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT PER FRCP 56**

Hearing Date: TBD

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Judge: Hon. William Q. Hayes
Location: Courtroom 14B

Rincon Band's Memorandum
In Support of Motion
For Summary Judgment

1 OF LUISENO INDIANS, a federally
2 recognized Indian Tribe,

3 Defendants.

Suite 1480
333 West Broadway
San Diego, CA 92101

4 RINCON BAND OF LUISENO
5 INDIANS, a federally recognized Indian
6 Tribe,

7 Counter-Claimant,

8
9 v.

10 RINCON MUSHROOM
11 CORPORATION OF AMERICA, a
12 California Corporation; and MARVIN
13 DONIUS, a California resident,

14 Counter-Defendants

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

19 Third-Party Claimants,

20 v.

21 COUNTY OF SAN DIEGO, a public
22 entity; SAN DIEGO GAS & ELECTRIC,
23 a public utility, RINCON BAND OF
24 LUISENO INDIANS, a federally
25 recognized Indian Tribe,

26 Third-Party Defendants.

27
28 Rincon Band's Memorandum
In Support of Motion
For Summary Judgment

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Pursuant to Fed.R.Civ.P 56, Defendant/Counter-Claimant Rincon Band of Luiseno Indians (“Rincon Band” or “Tribe”), together with Defendants Bo Mazzetti; John Currier; Vernon Wright¹; Gilbert Parada; Stephanie Spencer; Charlie Kolb; Dick Watenpaugh²; Tishmall Turner; Steve Stallings; Laurie E. Gonzalez; Alfonso Kolb, Sr.; and Melissa Estes (collectively referred to as “Tribal Officials”), hereby move for an entry of summary judgment in favor of the Tribe and Tribal Officials on Plaintiffs/ Counter-Defendants Rincon Mushroom Corporation of America and Marvin Donius’ (collectively referred to as “RMCA/Donius”) claims, and Defendant/Rincon Band’s counter-claim, regarding the recognition and enforcement of the Amended Judgment of the Rincon Tribal Court regarding activities under RMCA/Donius’ control on certain lands owned and controlled by Plaintiff Marvin Donius. This Motion for summary judgment (“Motion”) is made consistent with the terms of this Court’s Orders of March 18, 2021 (Dkt. 155) and April 23, 2021 (Dkt. 157) regarding bifurcated proceedings in this matter. This Motion is also supported by the separately filed Statement of Undisputed Facts pursuant to Local and Chamber Rules.

¹ RMCA/Donius named Defendant Vernon Wright in the First Amended Complaint even though he is deceased. Accordingly, the Tribe files this pleading only on Vernon Wright’s behalf as sued in his official capacity.

² RMCA/Donius include Defendant Dick Watenpaugh in the First Amended Complaint even though neither RMCA/Donius nor the Tribe have been able to locate him for several years. Accordingly, the Tribe files this pleading only on Dick Watenpaugh’s behalf as sued in his official capacity.

I. INTRODUCTION

This case is about the ability of the Rincon Band, a federally-recognized Indian tribe, to take governmental actions necessary to protect against activities being conducted on a five-acre parcel of fee land (here, the “Subject Property”) located within the external boundaries of the Rincon Reservation (the “Reservation”), and owned by Plaintiff/ Counter-Defendant Marvin Donius, a non-Indian (and falsely claimed to be owned and controlled by Plaintiff/ Counter-Defendant RMCA), in a manner that could inflict catastrophic consequences to protectable tribal interests, including economic interests. After a torturous ten-year path of litigation, winding through several lawsuits filed in tribal, state and federal courts, this case was finally heard on its merits in the Intertribal Court of Southern California (the “Tribal Trial Court”). After extensive discovery, and thirteen days of trial wherein RMCA/Donius were able to present any and all evidence, and any and all arguments, regarding their claims and defenses, RMCA/Donius lost on the merits in the Tribal Trial Court.

The initial litigation was bifurcated into two parts per stipulation of the Tribe and RMCA/Donius. The Hon. Anthony J. Brandenburg of the Tribal Trial Court issued his ruling on phase one of the bifurcated trial on May 18, 2017 (RTCR 5009-

5018)³, finding that the Tribe had met its burden in establishing jurisdiction pursuant to the “second exception” set forth in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny. The Tribal Trial Court issued its ruling on phase two of the bifurcated trial on April 22, 2019 (RTCR 6080-6090), ruling in favor of the Tribe on its claims against RMCA/Donius, and ruling against RMCA/Donius on their claims against the Tribe and the named Tribal Officials.

The Rincon Tribal Court of Appeals (the “Rincon Appeals Court”) issued a unanimous Opinion on April 2, 2020 (RTCR.APP 16245-16287) authored by the Hon. James Ware and joined by Hon. Arthur Gajarsa and Hon. Matthew Fletcher, affirming in part and reversing and remanding in part, the Tribal Trial Court Judgment. The Rincon Appeals Court affirmed the Tribal Trial Court’s ruling that the Tribe had met its burden in establishing jurisdiction over the use of the Subject Property pursuant to the “second exception” set forth in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny, and affirmed that injunctive relief was appropriate, but vacated and remanded that portion of the Judgment granting the Tribe injunctive relief as too broad, with instructions and guidance to revise the

³ The voluminous Record of the Tribal Court Proceedings, per Order of this Court and agreement of the parties, has been submitted to this Court. Dkts.158-163. The Tribal Trial Court record and the Rincon Appeals Court record are each Bates stamped. Bates stamped pages of the Tribal Trial Court record are noted herein as “RTCR” and Bates stamped pages to the Rincon Appeals Court record are “RTCR.APP.”

1 scope of the injunction provisions on remand. On June 26, 2020, the Tribal Trial
2 Court issued an Amended Judgment (RTCR 8501-8517) to conform to the
3 instructions of the Rincon Appeals Court. That Amended Judgment, as a matter of
4 tribal law, is now in effect.

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6 This Memorandum borrows heavily from the Opinion of the Rincon Appeals
7 Court. Such is appropriate as the three highly-qualified jurists were faced with the
8 very same issues which RMCA/Donius raise in this litigation. This Court is strongly
9 encouraged to both begin and end its review of the cross-motions for summary
10 judgment in this case with a reading of Judge Ware's thorough 43- page opinion,
11 writing for a unanimous panel of the Rincon Appeals Court.

12
13 The overarching jurisdictional question is whether RMCA/Donius steward (or
14 fail to steward) the Subject Property in such a manner that activities on the Subject
15 Property threaten or have some direct effect on the political integrity, the economic
16 security, or the health and welfare of the Tribe. This jurisdictional question, known
17 as *Montana's* Second Exception, is based on *Montana v. United States*, 450 U.S.
18 544 (1981) and its progeny. Since the Rincon Appeals Court issued its opinion, the
19 Supreme Court has very recently (June 1, 2021) issued a unanimous opinion
20 reaffirming *Montana's* Second Exception and applying it to uphold specific actions
21 taken by the Crow Tribe (tribal police detaining and searching a non-member on
22 non-trust lands within the Crow Reservation). *United States v. Cooley*, 141 S. Ct.

1 1638 (2021). At trial, the Rincon Band met its burden to establish the factual
2 threshold required of *Montana*'s Second Exception, which in turn, establishes that
3 the Tribe has jurisdiction over activities on the Subject Property to the extent
4 necessary to protect against catastrophic consequences to protectable tribal interests.
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6 The Rincon Band, in Section II below, establishes this Court's jurisdiction,
7 and sets forth the standards which this Court should apply for what is essentially an
8 appeal of the April 2, 2020 Opinion of the Rincon Appeals Court and the June 22,
9 2020 Amended Judgment of the Tribal Trial Court. In Section III(A) below, the
10 Tribe sets forth that this Court's *de novo* review of the Tribal Trial and Appellate
11 Courts' opinions and orders will conclude that they correctly state and apply
12 *Montana*'s Second Exception. In Section III(B) below, the Tribe establishes that this
13 Court's review for clear error in the Tribal Trial Court's factual determinations will
14 find that substantial evidence was presented such that there is no basis for disturbing
15 those findings. Given that the Tribal Trial Court's opinions correctly state the law
16 and appropriately find facts that establish jurisdiction under *Montana*'s Second
17 exception, Section III(C) establishes that this Court should grant comity to those
18 opinions, enforce the Amended Judgment, and deny RMCA/Donius' efforts to void
19 the Amended Judgment.
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II. STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The Tribe recognizes that RMCA/Donius may invoke this Court’s jurisdiction to void the adverse judgment of the Tribal Trial Court. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-857 (1985) (“The question of whether an Indian tribe retains power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court . . . is a federal question under 28 U.S.C. § 1331”); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009). The Tribe further recognizes that this Court has jurisdiction to hear the Tribe’s counter-claim seeking this Court’s recognition and enforcement of the Tribal Trial Court’s Amended Judgment. *Coeur d’Alene Tribe v. Hawks*, 933 F.3d 1052, 1053-4 and 1060 (9th Cir. 2019) (actions seeking to enforce a tribal judgment against nonmembers raise a substantial question of federal law).

As a general rule, federal courts must recognize and enforce tribal court judgments under the doctrine of comity. *Hawks*, 933 F.3d at 1056; *AT&T Corp. v. Coeur D’Alene Tribe*, 295 F.3d 299, 903 (9th Cir. 2002); *Wilson v. Marchington*, 127 F.3d 805, 809-10 (9th Cir. 1997). Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect. *Id.* The rule affording comity to tribal court decisions is grounded in federal policies supporting tribal sovereignty, including (1) giving tribal courts an

1 initial opportunity to evaluate the legal and factual bases underlying the challenge to
2 their jurisdiction promotes tribal self-determination and self-government; (2) tribal
3 exhaustion promotes administrative efficiency insofar as a full record is developed
4 in the tribal court before federal judicial review; and (3) exhaustion will encourage
5 tribal courts to explain to the parties the precise basis for accepting jurisdiction, and
6 will also provide other courts with the benefit of their expertise in such matters in
7 the event of further judicial review. *Farmers Union*, 471 U.S. at 856-857; *Window*
8 *Rock Unified School Dist. v. Reeves*, 894 F.3d 897-898 (9th Cir. 2017); *Big Horn*
9 *County Electric Cooperative, Inc. v. Big Man*, 2018 WL 4603276 at *1 (D. Mont.
10 2018); *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699 - 700 (8th Cir. 2019); *Norton*
11 *v. Ute Indian Tribe*, 862 F.3d 1236, 1243 (10th Cir. 2017).

12 The Supreme Court instructs federal courts that affording proper deference to
13 the tribal court system precludes re-litigation of issues raised by the underlying claim
14 and resolved in the tribal courts. *Iowa Mutual*, 480 US at 19; *Attorney's Process*
15 *and Investigative Services, Inc. v. Sac & Fox Tribe of Mississippi*, 609 F.3d 927, 942
16 (8th Cir. 2010). Federal courts may not re-adjudicate questions – whether of federal,
17 state or tribal law – already resolved in the tribal courts. *Iowa Mutual*, 480 U.S. at
18 19; *Attorney's Process*, 609 F.3d at 942. This Court should review, *de novo*, only
19 those legal questions regarding tribal jurisdiction. *AT&T Corp. v. Coeur d'Alene*
20 *Tribe*, 295 F.3d 899, 904 (9th Cir. 2002); *Attorney's Process*, 609 F.3d at 942. The
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1 factual findings relevant to tribal jurisdiction, however, are reviewed under a
2 deferential, clearly erroneous, standard. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 757
3 (8th Cir. 1994); *Ute Indian Tribe*, 862 F.3d at 1245, n.3 (“A key rationale underlying
4 the tribal exhaustion requirement is to provide federal courts with ‘the benefit of a
5 full factual record on the relevant issues and the benefit of tribal court expertise”);
6 *State Farm Insurance Co. v. Turtle Mountain Fleet Farm LLC*, 2014 WL 1883633
7 at *7 (D. N.D. 2014) (“In deciding the jurisdictional issue, the court is instructed to
8 rely upon the tribal court record for the facts (unless there has been a clear error) and
9 to defer to the decisions of the tribal court”).
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13 A major purpose of promoting comity is to enable tribal courts to clarify the
14 factual and legal issues relevant to evaluating any jurisdictional question. *Farmers*
15 *Union*, 471 US at 856-85; *DISH Network Services LLC v. Laducer*, 725 F.3d 877,
16 883 (8th Cir. 2013). Another major purpose of promoting comity is to allow for
17 errors to be rectified at the tribal level. *Farmers Union*, 471 US at 857; *South v.*
18 *Navajo Nation*, 2000 WL 36739428 at *7 (D. N.M. 2000) (“The orderly
19 administration of justice will be best served if this Court stays its hand until after the
20 Tribal Court has had a full opportunity to determine its own jurisdiction and to
21 rectify any errors it may have had.”).
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26 The crux of this appeal is whether the Tribal Trial Court correctly applied the
27 law of *Montana*’s Second Exception and/or committed clear error in determining
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1 that the facts and circumstances supported findings that (i) RMCA/Donius' failed
2 stewardship of the Subject Property poses risks of catastrophic consequences to
3 protectable tribal interests, and (ii) RMCA/Donius' assertions that the actions of the
4 Tribe, including the named Tribal Officials, were intended to force RMCA/Donius
5 to sell the Subject Property at less than its marketable value, are incorrect and untrue.
6 As already determined by the Rincon Appeals Court, the Tribal Trial Court correctly
7 concluded that *Montana's* Second Exception applies.
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10 III. ARGUMENT

11 A. *De novo* review: The Tribal Trial Court correctly applied *Montana* 12 and its progeny to find that the Tribe met its burden of establishing 13 jurisdiction over activities conducted on the Subject Property. 14

15 The overarching jurisdictional question is whether RMCA/Donius steward (or
16 fail to steward) the Subject Property in such a manner that activities on the Subject
17 Property threaten or have some direct effect on the political integrity, the economic
18 security, or the health and welfare of the Tribe. Such activities include conduct that
19 either (i) in fact, significantly impacts the political integrity, the economic security,
20 or the health and welfare of the Tribe, or (ii) has the potential to impose catastrophic
21 consequences upon the political integrity, the economic security, or the health and
22 welfare of the Tribe. *See Montana* 450 U.S. at 566; *Cooley*, 141 S. Ct. at 1644-45;
23 *Knighton v. Cedarville Rancheria*, 922 F.3d 892, 895, 904-905 (9th Cir. 2019)
24 (former employee's embezzlement of tribal funds "threatened the Tribe's very
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1 subsistence”); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir.
2 2019)(elemental phosphorus in the ground, and phosphine gas in the air caused by
3 FMC on fee land adjacent to the Fort Hall Reservation imperils the subsistence of
4 welfare of the Tribes); *Grand Canyon Skywalk Developments LLC v. ‘Sa’Nyu Wa*
5 *Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (jurisdiction plausible because of the
6 enormous potential economic impact if the subject contract is terminated); *Rincon*
7 *Mushroom Corp. of America v. Rincon Band*, 490 Fed. Appx. 11, 2012 WL 2928605
8 (9th Cir. 2012); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th
9 Cir.2009); *Attorneys Process and Investigative Services Inc. v. Sac and Fox Tribe*,
10 609 F.3d 927, 939 (8th Cir. 2010); *see also* Robert Anderson, 34 Stanford
11 Environmental Law Journal, 101, 135 and n.172, *Water Rights in Indian Country*,
12 (June 24, 2015) (the EPA has concluded in 49 out of 49 applications by Indian tribes
13 for treatment in the same manner as states, that pollution of tribal waters certainly
14 could imperil tribal subsistence).

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16 The Supreme Court in *Montana* said that while Indian tribes possess
17 “attributes of sovereignty over both their members and their territory,” they “have
18 lost many of the attributes of sovereignty” through “their original incorporation into
19 the United States as well as through specific treaties and statutes.” 450 U.S. at 563
20 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). Thus, “exercise of
21 tribal power beyond what is necessary to protect tribal self-government or to control
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internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Id.* at 564. Accordingly, there is a presumption that “the inherent sovereign powers of an Indian tribe do not extend to activities of non-members of the tribe,” *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 326 and 332 (2008) (*Montana*’s exceptions did not apply because restrictions on the sale of land, which do not threaten tribal interests, are not restrictions on activities to be conducted on the land, which may threaten protectable tribal interests), and the exception must not be read in a manner that swallows the rule. *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064-65 (9th Cir. 1999). The Tribe acknowledges the limits of its authority over non-Indian activities and embraces those limits, and established to the Tribal Trial Court that the circumstances regarding activities on the Subject Property fall within *Montana*’s Second Exception affirming tribal jurisdiction in this circumstance.

To contextualize the facts of this case in the universe of the *Montana* general rule and exceptions, it is useful to describe the evolution of the Supreme Court’s analysis on tribal jurisdiction over nonmembers. The Rincon Appeals Court opinion correctly notes that the “catastrophic consequences” language codified into Rincon tribal law originated not in Supreme Court case law, but with the 2005 edition of the *Cohen’s Handbook on Federal Indian Law*, § 4.02[3][c], at 232 n. 220 (2005). The Cohen Handbook editors had quoted a Supreme Court decision that held a tribe may

not impose a tax on nonmember activities on nonmember land unless the nonmember activity “actually ‘imperils’ the political integrity of Indian tribes. . . .” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657-58 n.12 (2001) (quoting *Montana*, 450 U.S. at 566). The Cohen Handbook editors extrapolated from the “imperils” remark that tribal jurisdiction is not justified unless the jurisdiction “is necessary to avert catastrophic consequences.” Cohen Handbook, *supra*, § 4.02[3][c], at 232 n. 220. Three years later, the Supreme Court took that stray remark as support for the proposition that there is an “elevated threshold for application of the second *Montana* exception . . . that tribal power must be necessary to avert catastrophic consequences.” *Plains Commerce*, 554 U.S. 326 at 341 (quoting Cohen Handbook). Notably, the Supreme Court’s recent affirmation of *Montana*’s Second Exception reiterates the original wording (“threaten”), rather than “imperil” as used in *Atkinson* or “catastrophic consequences” as used in *Plains Commerce*. Accordingly, the possibility of catastrophic consequences as set forth in the Rincon Band’s governing ordinances, and as required by the Tribal Trial Court, may indeed be an even harder standard for establishing jurisdiction over activities on non-trust lands than the standard under applicable federal law. In other words, by meeting its burden under the “possibility of catastrophic consequences” standard required of Rincon tribal law, the Tribe certainly met the lower “threaten or have some direct effect” standard required by federal law.

1 This evolution in the Supreme Court's characterization of *Montana*'s Second
2 Exception arises from a limited universe of cases with fact patterns that fall short of
3 meeting the exception. The original case, *Montana*, involved a nonmember fishing
4 in a river. *Montana*, 450 U.S. at 547. The next major case, *Strate v. A-1 Contractors*,
5 520 U.S. 438 (1997), involved a nonmember-on-nonmember tort claim arising from
6 a car accident on a public right-of-way running through a reservation. *Id.* at 442. The
7 next case was *Atkinson Trading*, involving a tax on a hotel. 532 U.S. at 647. The
8 subsequent case, *Plains Commerce*, involved race discrimination against tribal
9 citizen ranchers by a bank. 554 U.S. at 320. These cases each involve isolated
10 incidents with harms that likely would not have impacted tribal lands. None of these
11 cases involved a fact pattern similar to the one at bar, which involves nonmember
12 activity that is likely to impact critical tribal lands and water resources.

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18 The Supreme Court cases of *Cooley* and *Brendale*, wherein the Court found
19 tribal jurisdiction under *Montana*'s Second Exception, however, do address
20 nonmember conduct that could create impacts that spread from nonmember lands to
21 tribal lands, and the Supreme Court's analysis in each is instructive for
22 contextualizing how RMCA/Donius' land use choices impact the Rincon
23 Reservation.
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26 In *Cooley*, a Crow tribal police officer made a routine traffic stop of a non-
27 Indian on a state right-of-way within the Crow Reservation and observed that the
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1 non-Indian had blood-shot eyes, weapons and drug paraphernalia in the vehicle. 141
2 S. Ct. at 1641. Upon further searching, he observed illicit drugs. *Id.* The tribal police
3 officer confiscated the illicit drugs and detained the non-Indian until the proper non-
4 tribal authorities arrived for arrest and prosecution. *Id.* In a unanimous opinion, the
5 Supreme Court reversed the lower appellate and District Court decisions to suppress
6 the evidence, reasoning:
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9 The second exception we have just quoted fits the present case, almost
10 like a glove. The phrase speaks of the protection of the “health or welfare
11 of the tribe.” To deny a tribal police officer authority to search and detain
12 for a reasonable time any person he or she believes may commit or has
13 committed a crime would make it difficult for tribes to protect
14 themselves against ongoing threats. Such threats may be posed by, for
15 instance, non-Indian drunk drivers, transporters of contraband, or other
criminal offenders operating on roads within the boundaries of a tribal
reservation.

16 *Id.* at 1643. The unanimous Court continued:

17 We have previously warned that the *Montana* exceptions are “limited”
18 and “cannot be construed in a manner that would swallow the rule.”
19 *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks
20 omitted). But we have also repeatedly acknowledged the existence of
21 the exceptions and preserved the possibility that “certain forms of
22 nonmember behavior” may “sufficiently affect the tribe as to justify
23 tribal oversight. *Id.* at 335. Given the close fit between the second
24 exception and the circumstances here, we do not believe the warnings
25 can control the outcome.

26 *Id.* at 1645.

27 *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492
28 U.S. 408 (1989) (plurality opinion) involved consolidated cases regarding the power

1 of a tribe to impose its zoning ordinance on nonmember-owned land. *Id.* at 438
2 (Stevens, J., lead opinion). The most relevant of the consolidated cases involved a
3 nonmember named Brendale who owned land in fee within an area of the Yakama
4 Indian Reservation called the “closed area.” *Id.* The closed area of the reservation
5 was massive, around 807,000 acres, of which only 25,000 acres were held in fee. *Id.*
6 Even on the fee lands, no one lived permanently in the closed area, which was
7 pristine wilderness. *Id.* at 438-40. Brendale owned 20 acres in the “heart” of the
8 closed area. *Id.* at 440. He sought permission from the county to subdivide and
9 develop his lands. *Id.* The Yakama Indian Nation objected before the zoning
10 commission, asserting that the tribe possessed jurisdiction over the nonmember
11 parcel. *Id.* The tribe’s zoning regulations prohibited development of the kind
12 proposed by Brendale. *Id.* at 441. The regulations took “care that the closed area
13 remain[ed] an undeveloped refuge of cultural and religious significance, a place
14 where tribal members ‘may camp, hunt, fish, and gather roots and berries in the
15 tradition of their culture.’” *Id.* (quoting Amended Zoning Regulations of the Yakima
16 Indian Nation, Resolution No. 1-98-72, § 23 (1972)). Justice Stevens characterized
17 Brendale’s proposal to develop land within the area that prohibited that type of
18 development as bringing “a pig into a parlor”:
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26 The question is then whether the Tribe has authority to prevent the few
27 individuals who own portions of the closed area in fee from
28 undermining its general plan to preserve the character of this unique
resource by developing their isolated parcels without regard to an

1 otherwise common scheme. More simply, the question is whether the
2 owners of the small amount of fee land may bring a pig into the parlor.

3 *Id.* at 441. Justice Stevens’ opinion expressly adopted findings of the district court
4 with respect to *Montana*’s Second Exception:

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6 Second, in the *Montana* case we were careful to point out that the
7 conduct of the non-Indians on their fee lands [hunting and fishing]
8 posed no threat to the welfare of the Tribe. [citation to *Montana*, 450
9 U.S. at 566]. In sharp contrast, in this case the District Court expressly
10 found that Brendale’s “planned development of recreational housing
11 places critical assets of the Closed Area in jeopardy. . . . [O]f paramount
12 concern to this court is the threat to the Closed Area’s cultural and
13 spiritual values. To allow development in this unique and undeveloped
14 area would drastically diminish those intangible values. That in turn
15 would undoubtedly negatively affect the general health and welfare of
16 the Yakima Nation and its members. This court must conclude therefore
17 that the Yakima Nation may regulate the use that Brendale makes of his
18 fee land within the Reservation’s Closed Area.”

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20 492 U.S. at 443. Justice Stevens, writing for himself and Justice O’Connor,
21 concluded that the tribe’s interests in zoning the nonmember land justified the
22 exercise of that power:

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24 In my view, the fact that a very small proportion of the closed area is
25 owned in fee does not deprive the Tribe of the right to ensure that this
26 area maintains its unadulterated character. This is particularly so in a
27 case such as this in which the zoning rule at issue is neutrally applied,
28 is necessary to protect the welfare of the Tribe, and does not interfere
with any significant state or county interest.

Id. at 444. Justice Blackmun, writing for himself and Justices Brennan and Marshall,
concluded in Justice Stevens’ judgment, *id.* at 448-49, concluding that finding that
the tribe did not possess jurisdiction over the Brendale property “would guarantee

1 that adjoining reservation lands would be subject to inconsistent and potentially
2 incompatible zoning policies, and for all practical purposes would strip tribes of the
3 power to protect the integrity of trust lands over which they enjoy unquestioned and
4 exclusive authority.” *Id.* at 449; *see also id.* at 458 (“And how can anyone doubt that
5 a tribe’s inability to zone substantial tracts of fee land within its own reservation-
6 tracts that are inextricably intermingled with reservation trust lands-would destroy
7 the tribe’s ability to engage in the systematic and coordinated utilization of land that
8 is the very essence of zoning authority?”).

12 In the plurality opinions in *Brendale*, one finds a majority of the Justices
13 applying *Montana*’s Second Exception to prevent a non-Indian land owner from
14 developing property in any manner whatsoever. The application of tribal authority
15 at issue here is far less intrusive. The Rincon Band does not seek to prevent
16 RMCA/Donius from developing the Subject Property. Rather, the Rincon Band
17 seeks to protect its tribal interests by requiring that any development be done in a
18 manner that protects those tribal interests, including protection of the Tribe’s pristine
19 ground water supply and protection of the Tribe’s economic interests, including its
20 gaming resort. In contrast, RMCA/Donius believe that they can develop anything on
21 the Subject Property, short of a nuclear waste dump (RTCR 9816, Trial Testimony
22 of Marvin Donius, March 8, 2017 at 1391), without regard to the development’s
23 impact on the Tribe’s protectable interests.
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1 The Tribal Trial Court and the Rincon Appeals Court did not err in their
2 respective statements of the law regarding *Montana's* Second Exception

3 **B. Clear Error Review: The Tribal Trial Court embraced and**
4 **correctly applied *Montana's* Second Exception to the facts**
5 **presented in this case, and properly concluded that the Tribe met**
6 **its burden.**

7 The legal question of the existence and scope of *Montana's* Second Exception
8 clearly being resolved in the Tribe's favor, the correctness of the Tribal Trial Court's
9 judgment then turns on whether the Tribal Trial Court committed clear error in
10 concluding:
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12 *Montana*, within its text quotes *United States v. Wheeler*, 435 U.S. 313,
13 stating essentially that tribes have lost many attributes of their power in
14 relations between a tribe non-member other than to protect tribal self-
15 government. Having this said, *Montana* goes on to make clear that the
16 activity on the land must in fact threaten the tribe's political and
17 economic security to justify tribal regulation over the land in question.
18 We believe, considering all facts and circumstances in this case, this
19 later statement to be true here.

20 RTCR 5009-5018, May 18, 2017 Opinion at 8.

21 In the Rincon Appeals Court's review for clear error, and finding of no clear
22 error, it noted:

23 The Tribal Trial Court found conclusively (1) that the Appellants failed
24 to maintain their property; (2) that the Appellants' land constitutes a
25 fire hazard in an area that is unusually threatened by fire; (3) that the
26 Appellants' actions and inactions have contributed to a significant
27 threat to the pristine character of the tribe's water supply; and (4) that
28 the Appellants' assertion of immunity from tribal jurisdiction, together

1 with local government's demurrer, creates a lawless enclave within the
2 reservation.

3 RTCR.APP 16245-16287, April 2, 2020 Opinion at 31.

4 The Tribe presented at trial extensive evidence regarding the risk of
5 catastrophic consequences from exacerbated fire damage, pollution of the Tribe's
6 pristine water supply, and protection of public health and welfare. *See, e.g.*, RTCR
7 4623-4656. Trial Exhibit 146, a Report prepared by Applied Engineering and
8 Technology, dated March 6, 2013, entitled "Report of 2012 Activities;" RTCR 4392-
9 4424, Trial Exhibit 134, Declaration of Douglas Allen and exhibits thereto, dated
10 May 14, 2010, filed in the matter of *RMCA v. Mazzetti*, Case No. 09-CV-2330-
11 WQH-JLB (S.D. Cal.); RTCR 4514-4530, Trial Exhibit 139, a Draft Report
12 prepared by Applied Engineering and Technology, dated August 4, 2011, entitled
13 "Phase I Environmental Site Assessment;" RTCR 4531-4559, Trial Exhibit 140, a
14 Report prepared by Douglas Allen, dated August 9, 2011, entitled "Preliminary
15 Analysis of Fire Prevention Requirements, State Law, Regulations, Fire Prevention
16 Guides, Fire Hazard Severity Zones, Etc.;" RTCR 4560-4569, Trial Exhibit 141, a
17 Report prepared by Applied Engineering and Technology, dated October 28, 2011,
18 entitled "Evaluation of Potential Impacts to Groundwater Quality and Resources;"
19 RTCR 4570-4597, Trial Exhibit 142, a Report prepared by Applied Engineering
20 and Technology, dated December 19, 2011, entitled "Report of Soil and
21 Groundwater Sampling, Monitoring Well Installation and Aquifer Testing;" RTCR
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1 4614-4622, Trial Exhibit 145, a Report prepared by Babcock Laboratories Inc.,
2 dated March 19, 2014, entitled “Quarterly Service Water Monitoring;” RTCR 4944-
3 4949, Trial Exhibit 162, a Report prepared by Applied Engineering and Technology,
4 dated May 3, 2016, entitled “Report of January 2016 Site Monitoring Activities;”
5 RTCR 8895-9084, Expert Trial Testimony of Dane Frank, February 2, 2017,
6 Transcript at 383 - 468; RTCR 9085-9263, Expert Trial Testimony of Dane Frank,
7 February 3, 2017, Transcript at 677-737; RTCR 9264-9485, Expert Trial Testimony
8 of Douglas Allen, February 9, 2017, Transcript at 766-861; RTCR 9264-9485,
9 Expert Trial Testimony of Earl Stephens, February 9, 2017, Transcript at 861-962;
10 RTCR 11087-11189, Expert Trial Testimony of Luke Montague, December 20,
11 2018, SER, Transcript at 2675-2735. After consideration of the evidence, the Tribal
12 Trial Court found that the Tribe had met its burden under the criteria set forth in
13 *Montana* and its progeny.
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19 In its review for clear error, the Rincon Appeals Court noted that
20 RMCA/Donius concede sufficient facts which support a finding of jurisdiction under
21 *Montana’s* Second Exception:
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23 Here, RMCA/Donius’ own admissions about the facts in their brief
24 demonstrates the potential catastrophic impacts of their conduct.
25 RMCA/Donius concede that after a massive wildfire on the reservation
26 and beyond in 2007, “fire-damaged debris was left on the property from
27 October 2007 until August 2008. . . . The risk-impact debris left on the
28 subject property included ash-debris, petroleum, and ash metal.”
(Appellants’ Brief, RTCR.APP 0327 at 12). RMCA/Donius also
concede that in 2011 “the Tribe’s expert engineers found a low-level

1 diesel and motor oil plume extending from off the subject property.” Id.
2 In addition, RMCA/Donius concede that in 2015, the Tribe discovered
3 that RMCA/Donius had engaged in unpermitted activities, including
4 “constructing mobile homes, fabricating or refurbishing wooden
5 pallets, parking commercial trucks on the property, parking
6 refrigeration-style trailers on the property, allowing people to live in
7 mobile homes on the property and parking motor vehicles on the
8 property.” Id. at 14. Finally, RMCA/Donius have conceded that each of
9 these activities is a potential threat, but rest their defense on the claim
10 that none of these activities have actually harmed the Tribe. However,
11 under *Montana*, **actual harm is not the trigger for tribal jurisdiction,**
12 **potential harm is.** Thus, we do not find RMCA/Donius’ defense
13 credible, or consistent with the law.

14 RTCR.APP 16245-16287, April 2, 2020 Opinion at 35 (emphasis added).

15 Similarly, the Tribal Trial Court correctly rejected RMCA/Donius’ allegations
16 that the Tribe was motivated to render the Subject Property unmarketable, except to
17 the Tribe. RMCA/Donius contend that they “showed that the Tribe’s claim of being
18 legitimately concerned over (RMCA/Donius’) use of the Subject Property was a
19 ‘pretext,’ and that the real reason for the Tribe’s attempts to regulate that use was to
20 make the subject property unmarketable except for the Tribe” (RTCR.APP 0327,
21 Brief of Appellants to the Rincon Appeals Court at 5 and 36). The Tribal Trial Court
22 concluded “none of these allegations to be true. They are unfounded and per
23 evidence presented at trial, untrue.” (RTCR 6080-6090, April 22, 2019 Judgment,
24 at 5).

25 At trial, when asked what evidence they had to support their allegation,
26 RMCA/Donius pointed only to the Tribe following through with the court-approved
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1 enforcement action as “evidence” that the Tribe was motivated not by legitimate
2 concerns of impacts to tribal interests, but by an ulterior motive of forcing a “cheap
3 sale” of the Subject Property to the Tribe. RTCR 10540-10820, Trial Testimony of
4 Marvin Donius, December 18, 2018, Transcript at 2080-88, 2184–89. Such
5 backwards reasoning must be examined in its proper context: RMCA/Donius assert
6 that the Tribe, by going to the Tribal Trial Court in an effort to secure a court order
7 allowing the Tribe to proceed with enforcement action, with full notice and
8 opportunity to RMCA/Donius to be heard, and with full due process being afforded
9 to RMCA/Donius, including the opportunity of RMCA/Donius to avail themselves
10 of both the Tribal Trial Court and the Rincon Appeals Court and to assert a defense
11 that the enforcement action was not warranted, somehow is “evidence” supporting
12 RMCA/Donius’ contrived conspiracy theory of the Tribe’s efforts to extort a below-
13 market sale of the Subject Property to the Tribe. What the Tribe’s actions do actually
14 evidence is the opposite of what RMCA/Donius assert: the Tribe, in taking
15 RMCA/Donius to Tribal Trial Court in 2009 and through the present, is transparent
16 regarding its intended enforcement actions, and its intent to implement the proposed
17 enforcement actions only if the independent tribunal of the Tribal Trial Court
18 approves. Such conduct hardly reflects a conspiracy on the part of the Tribe to force
19 a below-market sale of the Subject Property to the Tribe.

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28 RMCA/Donius assert that a sale of the Subject Property to a third party fell

1 through in 2006 because the prospective buyer was told by the Tribe that the Tribe
2 had jurisdiction over the Subject Property (RTCR.App. 0327, Brief of Appellants at
3 15), but RMCA/Donius can neither establish that the sale fell through as a result of
4 that communication or that the alleged communication is true. Even by
5 RMCA/Donius' admission, the Tribe does have jurisdiction to the degree necessary
6 to protect tribal interests, including economic interests, from the risk of catastrophic
7 consequences. *See* RTCR 10540-10820, Trial Testimony of Marvin Donius,
8 December 18, 2018, Transcript at 2086 – 2089. Any future buyer of the Subject
9 Property should be aware of such jurisdiction.
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13 **C. This Court should grant comity to the Tribal Trial Court opinions**
14 **and enforce the Amended Judgment, and should deny**
15 **RMCA/Donius' efforts to void the Amended Judgment.**

16 The Rincon Band's counter-claim (Dkt. 134 at 109-113) seeks an Order of
17 this Court recognizing and enforcing the June 26, 2020 Amended Judgment of the
18 Tribal Trial Court. As set forth in greater detail in Section II above and recently
19 clarified by the Ninth Circuit in *Hawks*, 933 F.3d at 1060, given that the Tribal Trial
20 Court and the Rincon Appeals Court correctly stated and applied *Montana's* Second
21 Exception, and given that the Tribal Trial Court did not commit clear error in its
22 factual findings, this Court should grant summary judgment in favor of the Rincon
23 Band and afford comity to the Tribal Trial Court's and Rincon Appeals Court's
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1 opinions and orders, and accordingly, should recognize and enforce the June 26,
2 2020 Amended Judgment.

3 Similarly, this Court should grant summary judgment in favor of the Tribe
4 and Tribal Officials on all counts of RMCA/Donius' Amended Complaint. As
5 demonstrated above, the Tribal Trial Court correctly applied the law and did not
6 commit clear error in its factual findings. This Court has correctly pointed out in its
7 denial of multiple motions by RMCA to reopen this case or to stay (or effectively
8 enjoin) the injunctive provisions of the Tribal Trial Court's orders:
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12 There are four exceptions to the exhaustion rule: "(1) when an assertion
13 of tribal court jurisdiction is 'motivated by a desire to harass or is
14 conducted in bad faith'; (2) when the tribal court action is 'patently
15 violative of express jurisdictional prohibitions'; (3) when 'exhaustion
16 would be futile because of the lack of an adequate opportunity to
17 challenge the tribal court's jurisdiction'; and (4) when it is 'plain' that
18 tribal court jurisdiction is lacking, so that the exhaustion requirement
19 'would serve no purpose other than delay.'" *Elliott*, 566 F.3d at 847
20 (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). The Court has
21 reviewed the record, which establishes legal and factual disputes
22 between the Rincon Band Defendants and Plaintiff RMCA but does not
23 demonstrate that the assertion of tribal jurisdiction was motivated by a
24 desire to harass or was conducted in bad faith. The Court concludes that
25 the evidence in the record is insufficient to "prove the enforcement of
26 the statutory scheme was the product of bad faith conduct or was
27 perpetuated with a motive to harass." *A & A Concrete, Inc. v. White
28 Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986). For the
reasons stated in the Court's July 26, 2017 Order, the Court finds that
no exception to the exhaustion requirement applies in this case based
on express jurisdictional prohibition, lack of opportunity to challenge
jurisdiction, or a plain lack of jurisdiction.

1 Dkt. 109 at 9-110. Although RMCA/Donius continue to make the allegation that the
2 Tribe's assertion of tribal court jurisdiction is "motivated by a desire to harass or is
3 conducted in bad faith," they failed to provide any evidence other than the
4 allegations discussed above into the Tribal Trial Court's Record. Accordingly, none
5 of the grounds for voiding the Tribal Trial Court's June 26, 2020 Amended Judgment
6 have been established by RMCA/Donius.
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9 IV. Conclusion

10 Although it was a formidable task to summate a decade of litigation,
11 thousands of pages of exhibits, dozens of days of deposition and trial testimony, and
12 hundreds of pages of court-issued opinions and orders within this Court's 25-page
13 limitation, this Motion establishes that the Tribal Trial Court afforded enormous due
14 process to RMCA/Donius, despite their defiance of the Tribe's jurisdiction, and after
15 an extensive trial, properly found that the Rincon Band met its burden in establishing
16 jurisdiction over RMCA/Donius' activities on the Subject Property pursuant to
17 *Montana's* Second Exception. No error of law, and no clear error of fact, occurred.
18 Accordingly, summary judgment should be entered in the Tribe's favor on all counts
19 of RMCA/Donius' Complaint and on the Tribe's Counter-claim.
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25 Date: June 21, 2021

26 /s/ Scott Crowell

27 SCOTT CROWELL (*pro hac vice*)
28

Crowell Law Office – Tribal Advocacy
Group LLP
1487 W. State Route 89A, Ste. 8
Sedona, Arizona 86336
Telephone: (425) 802-5369
Fax: (509) 235-5017

Denise Turner Walsh, SBN 254434
Attorney General
Rincon Band of Luiseno Indians
One Government Center Lane
Valley Center, CA 92082
Telephone: (760) 297-2680
Fax: (760) 749-5144

*Attorneys for Rincon Band and Tribal
Officials*

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that the Memorandum in Support of Motion for Summary Judgment per FRCP 56 was filed through the ECF System and therefore copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF):

mannycorrales@yahoo.com

dwalsh@rincontri.org

scottcrowell@hotmail.com

rasmith@sdge.com

john.cooley@sdcounty.ca.gov

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Dated: June 21, 2021

s/ Scott Crowell

SCOTT CROWELL

Email: scottcrowell@hotmail.com