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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,

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

COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO COUNTERCLAIMANT'S RINCON BAND OF LUISENO INDIANS AND TRIBAL OFFICIAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND IN REPLY TO OPPOSITION TO RMCA/DONIUS' CROSS MOTION FOR SUMMARY JUDGMENT

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-Claimant,

v.

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

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 Combined Memorandum of Points and Authorities in Opposition to the Cross-Motion for Summary Judgment filed by 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"), and in reply to opposition to RMCA/Donius' Cross Motion for Summary Judgment.

I.

INTRODUCTION

RMCA/Donius incorporate by reference the Introduction (Section I) in their Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed June 6, 2021. In addition, RMCA/Donius states:

The sole issue to be decided on these cross motions for summary judgment is whether the Tribal Court Judgment rendered against

RMCA/Donius should be recognized and enforced. Under the law in the 9th Circuit, a Tribal Court Judgment rendered against a non-Indian can only be recognized and enforced in federal court where the Tribal Court had jurisdiction over the non-Indian Tribal Court judgment creditor and afforded him due process in the Tribal Court proceeding. Both of these requirements are mandatory, and both of these requirements are lacking with respect to RMCA/Donius. Thus, summary judgment must be granted against the Tribe and in favor of RMCA/Donius on this issue. The Tribe's cross motion for summary judgment challenging all causes of action in the First Amended Complaint ("FAC") should be ignored as beyond the scope of this Court's order bifurcating this issue for resolution first.

II.

STATEMENT OF FACTS

RMCA/Donius incorporate by reference the Statement of Facts (Section II) in their Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed June 6, 2021.

RMCA/Donius own a five-acre fee simple parcel across the street from the Tribe's casino in Valley Center, California. RMCA/Donius are non-Indian fee landowners, and their property is within the Rincon reservation,

except for the east side of their property which adjoins the San Diego County Road.

In October 2007, a wildfire swept through the valley and the Rincon reservation and destroyed buildings, cars, and various items on the subject property. A large above-ground tank containing diesel fuel exploded, spilling diesel fuel on the ground. The large diesel tank was installed by previous owners of the property, and Donius had it inspected by the EPA prior to the fire. (The diesel tank is no longer there). (RTCR-009476-78). Immediately after the fire, Donius undertook efforts to clean up the debris, which included burnt tires, ash, burnt batteries, spilled diesel fuel, and other hazardous fire-debris materials. He contacted FEMA in Rancho Bernardo, California, and they came out to assess the damage. (RTCR-009940-9941). A clean up was scheduled, and the crew of 30 men and six loaders and trucks showed up to start cleaning up. However, Tribal Chairman Bo Mazzetti and Tribal Councilmember Stephanie Spencer showed up and blocked those efforts. Chairman Mazzetti actually stood in front of the bulldozer and told the crew to "get the hell out of there." (RTCR-009941-9942).

Thereafter, the EPA called Donius to say the Tribe was complaining that he was not cleaning up the debris. After explaining that the Tribe

stopped his efforts to do so, the EPA began working with Donius to clean up the debris. (RTCR-9942-9944). Donius hired another crew and an environmental consultant, Marc Boogay, to begin the cleanup. (RTCR-9942-9944). It took about 90 days to assess the site, prepare a site map, and take water and soil samples, before commencing the cleanup. (RTCR-09944-9945). The site was cleaned up under EPA supervision in August 2008. (Trial Ex. "164," pg. 003-004, RTCR-004959-60). Thereafter, the water table below was tested and was found to be safe, and the soil was no longer contaminated. The well on the property was also tested and found to have drinkable water. The Tribe's drinking wells to the northwest of the subject property were tested and found to be safe.

After the fire, Donius continued to grow mushrooms and succulent plants. He keeps one oil waste drum in a secured location on the property, and calls a recycle company once a year to pump it out and take the waste oil away. (RTCR-009712-9713). He does not do vehicle maintenance on the majority of the trucks on the property, but has it done outside from the property. (RTCR-009712). He stores no hazardous waste on the property, and has never dumped or placed any drums containing hazardous waste into the ground.

He has no pesticides stored or used on his property, since all of his mushrooms are organic, and he uses "fly spray" from the garden center on his succulent plants in his nursery. (RTCR-009716-9717).

He rented space to someone who did pallet fabrication, but that person is no longer doing that, and the only use put to the property is succulent growing (nursery) and parking of vehicles at the office structure. (RTCR-009721). He recently attempted to build a small wall for someone to set up a produce stand and sell produce, but that was stopped. (RTCR-009722-9724).

As to any future activities on the property that involve environmental issues, Donius plans on involving the EPA to determine their impact on the environment. (RTCR-009727).

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 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 v. U.S. (1985) 450 U.S. 544, 564-566, 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 courts 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 determination of its own jurisdiction is to be reviewed de novo. Id.

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"). Indeed, nowhere has the second exception of the Montana rule been interpreted to allow tribal regulatory jurisdiction because the complained of activities on non-member fee land could have the **potential** to cause catastrophic harm to tribal self-government. In fact, the Supreme Court in Strate v. A-1 Contractors (1997) 520 U.S. 438, specifically rejected the application of a "potential" standard for the second exception of Montana rule, as "severely shrinking the rule." 520 U.S. at 457-458; see also Marchington, supra, at 814-815; Yellowstone County v. Pease (9th Cir. 1996) 96 F.3d 1169, 1176-77 (rejecting as speculative tribal jurisdiction under second exception of Montana, because of "potential" foreclosures "could be devastating to the Tribe's land holdings and political integrity").

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IV.

ARGUMENT

A. THE TRIBAL COURT JUDGMENT CANNOT BE RECOGNIZED OR ENFORCED, BECAUSE THE TRIBAL COURT DID NOT AFFORD RMCA/DONIUS DUE PROCESS OF LAW

As stated, under the rule set forth in Marchington, supra, the subject Tribal Court Judgment cannot be recognized and enforced in this Court, because the Tribal Court did not have jurisdiction over RMCA/Donius, and it did not afford RMCA/Donius proper due process of law in the Tribal Court proceedings, or with respect to its Tribal ordincances.

1. The Tribe fraudulently altered its own environmental ordinance to get around the Montana requirements for jurisdiction, and thus denied RMCA/Donius due process of law.

Since 2007, when a wildfire destroyed RMCA/Donius' property, the Tribe has been in litigation with RMCA/Donius and trying by various means to regulate the use of their property. That litigation has continued unabated over the years up to the present day. The record shows that RMCA/Donius were resilient against these attempts, which they viewed as harassing, and that the Tribe was focused on chasing them off of their property. It is undisputed that the Tribe views the subject property as prime real estate, since it sits directly across the Tribe's casino and can be used for casino parking and other uses related to the casino.

In 2012, the Tribe revised its environmental ordinance, called the Rincon Environmental Enforcement Ordinance ("REEO") Code §8.300. (Trial Ex. "99"). This 2012 REEO tracked the language of Montana, supra, with respect to attempted regulation of non-Indian fee landowners within the boundaries of the reservation. (Trial Ex. "99"). Specifically, the 2012 REEO accurately quoted the two exceptions under Montana, supra, and stated the following with respect to the second exception bearing on Tribal self-government, which is at issue here:

> "A tribe may also retain inherent power to exercise civil authority over conduct that threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." (Emphasis added).

(Trial Ex. "99," page 3). Noticeably absent is the word "**potential**" in this paragraph, which the Tribe later added in its 2014 version. By later adding the word "potential" in its REEO, the Tribe could more easily assert regulatory jurisdiction, because arguably any activities, could potentially threaten or potentially have some direct effect on Tribal self-government. All the Tribe would need to do was to be creative.

As pointed out in RMCA/Donius' moving papers, this 2012 REEO also provided that the Tribe was to provide the objecting non-Indian fee landowner with a jurisdictional hearing, where the burden would be on the

Tribe to prove it had regulatory jurisdiction "pursuant to federal common law." The phrase "federal common law," meant Montana, supra, and the federal cases that construed, refined, clarified and followed it. Neither Montana, supra, nor any subsequent Supreme Court cases dealing with Montana, supra, ever permitted a Tribe to assert regulatory jurisdiction by claiming that activities being conducted on non-Indian fee land within or next to its borders could "**potentially**" threaten or could "**potentially**" have some direct effect on, or **potentially** trench unduly on, Tribal self-government. See County of Lewis, supra at 515.

Since the 2012 REEO, as drafted, provided no basis for the Tribe to assert regulatory jurisdiction over the subject property, the Tribe revised its REEO in 2014 to make it easier to do so. It accomplished this by adding the phrase, "**has the potential to impose catastrophic consequences**," which had the effect of watering down the strict requirements under the second exception of Montana, supra. The revised language states:

> (4) The activities include conduct that threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe. For an activity to qualify under this subsection (b)(4), it must be conduct that either:
>
> (A) in fact, significantly impacts the political integrity, the economic security, or the health and welfare of the Tribe, or

> (B) has the **potential to impose catastrophic consequences** upon the political integrity, the economic security, or the health and welfare of the Tribe.

(Trial Ex. "34," page 4; also quoted on page 51 of the Tribe Memo PAs). As can be seen, paragraph (4), without the subsections, accurately states the second exception under Montana, supra, which is quoted in the 2012 version. However, the subsections, qualify that language and expand the scope to include anything that could potentially have such an affect. With this non-Montana language inserted into its REEO in 2014, the Tribe could more easily assert regulatory jurisdiction over the subject property, because just about anything RMCA/Donius does on their property would, according to this revision, have the **potential** of causing catastrophic consequences. The Supreme Court, however, condemned and rejected any interpretation of Montana's second exception to be read this way. To do so, would simply "swallow the rule." County of Lewis, supra at 515. As explained in County of Lewis v. Allen, supra:

> Nor is it sufficient to argue, as the tribe does, that the exception applies because the tribe has an interest in the safety of its members. That simply begs rather than answers the question. Under the tribe's analysis, 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**. (Emphasis added).

163 F.3d at 515.

It was clear that the Tribe passed the 2014 REEO revisions for the sole purpose of making it easier for it to assert regulatory jurisdiction over RMCA/Donius' property, and thus denied them due process of law. RMCA/Donius were entitled to be judged and regulated in accordance with established federal common law that narrowly construes Montana's second exception, 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. The Tribe's 2014 revised REEO flies in the face of that narrow construction and permits the Tribe to escape the heavy burden of proving RMCA/Donius's conduct "**imperils the subsistence**" of the Tribe's community, not that it has the "potential" of doing so. Plains Commerce, supra at 341. It unlawfully allows the Tribe to skirt the requirement of it proving RMCA/Donius' conduct is "**so severe**" that it in fact "**poses** a catastrophic risk" to Tribal self-government, not that it potentially poses such a risk. Plains Commerce, supra at 341. To the extent the Tribe altered that right and obtained a judgment against RMCA/Donius in violation of these strict requirements, the Court cannot,

and must not, recognize or enforce that Judgment against them. Marchington, supra. To do otherwise would deny them of fundamental due process.

Despite federal authority rejecting this "potential" standard, the Tribe in the Tribal Trial Court argued that the word "threat" and "potential" were in fact synonymous, and falsely stated that federal cases have in fact "used the same word, 'potential,' to describe the 'threat' of catastrophic consequences under Montana's second exception. (RTCR-6057: Tribe's Post-Trial Brief). Mr. Crowell stated in open Tribal Court:

> MR. CROWELL:
>
> … But in phase two, [Mr. Corrales] made a big deal about the word "potential" isn't in Montana. The word "threaten" is in Montana. We point out that the definition of threaten is the possibility of harm."
>
> * * *
>
> … [Mr. Corrales] makes the statement that none of the cases in Montana's progeny use the word "potential." Again, we cite at page 8 of our post trial brief no less than five cases that use the word "potential" to describe whether the circumstances for Montana's jurisdiction under second --- under Montana's second exception exists ….

(RTCR-11254-11255, 11374). A quick review of those cases cited in Mr. Crowell's Post Trial Brief show that they don't say that at all. For example, in Grand Canyon Skywalk Development LLC v. 'Sa' Nyu Wa Inc. (9th Cir. 715 F.3d 1196, 1206, the Court explicitly stated the dispute at issue was

"not a Montana case," because it dealt with tribal trust land, not fee simple land of a non-Indian. 715 F.3d at 1205. It's use of the word "potential," was therefore dictum, and was in reference to the "potential economic impact" of the subject revenue-sharing contract in conjunction with a consensual relationship under the 1st exception of Montana, supra, and was not used to describe catastrophic consequences of activity on non-Indian fee land. The case of Burlington Northern Santa fe R. Co. v. Assiniboine and Sioux Tribes (9th Cir. 2003) 323 F.3d 767, 774, also cited by the Tribe for this proposition, doesn't say anything at all about the word "potential" relative to Montana, supra. The case of Montana v. E.P.A. (9th Cir. 1998) 137 F.3d 1135, 1141, also cited by the Tribe, actually rephrased the ruling in Brendale v. Confederate Tribes (1989) 492 U.S. 408, 431, to say that to support the exercise of regulatory authority over activity on non-Indian fee land, "the potential impact of regulated activities must be serious." 137 F.3d at 1140-1141. However, when the citation to Brendale, supra, is read, the Brendale Court never used the word "potential" at all. The Court in Brendale, supra, made it clear that in special circumstances of checkerboard ownership of fee lands within a reservation, like what is at issue in this case, the tribe's interest:

> … does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.

492 U.S. at 430-431. Nowhere does the Court in Brendale, supra, use the word "potential" together with the word "impact" or "catastrophic consequences," or "imperil," to warrant regulatory jurisdiction under Montana, supra. In fact, it doesn't use the word "potential" at all. The other case the Tribe pointed to, Babbitt Ford v. Navajo Indian Tribe (9th Cir. 1983) 710 F.2d 587, 593, is equally inapplicable. That case involved the Navajo Tribe's asserted right to enforce a tribal regulation prohibiting non-Indians from repossessing cars on the reservation. It explained that such activity would have the potential to leave a tribal member stranded, not that it would have the potential to impose catastrophic consequences on the tribe. It ruled that such conduct "threatens or has some direct effect on the … health and welfare of the tribe," not that it "potentially" threatens to do so. 710 F.2d at 593. At issue was preserving the peace on the reservation. The Court stated:

> The Navajo consent regulation at issue in this matter is a necessary exercise of tribal self-government and territorial management: the regulation is designed to keep reservation peace and protect the health and safety of tribal members. The Navajo reservation covers a vast expansion of land. Repossession of an automobile has the potential to leave a tribal member stranded miles from his or her

> nearest neighbor. A repossession without the consent of the tribe member also may escalate into violence, particularly if others join the affray.
>
> Such conduct, in our view, clearly "threatens or has some direct effect on the … health and welfare of the tribe." (citing Montana, supra). (Emphasis added).

710 F.2d at 593. Similarly, in Glacial Electrical Cooperative v. Gervais (D.Mont. 2015) 2015 WL 13650531, at *4, also cited by the Tribe, the Court's only use of the word "potential" was in stating that the tribe had a "colorable claim of jurisdiction" based on the consensual relationship of the parties and "the potential impact of the relationship on the health and welfare of the Blackfeet tribal members," because the Electric Cooperative conducted winter electrical power shut offs. It was the potential impact of the relationship, not the potential threat of catastrophic consequences on tribal self-government, that was described.

These cases must be read in light of cases like County of Lewis, supra, and Burlington Northern R. Co. v. Red Wolff, supra, that clearly reject an interpretation of Montana's 2nd exception as allowing tribal regulation based on the claim that the challenged conduct could have the potential to cause catastrophic consequences to tribal self-government. 196 F.3d at 1065. In this regard, the Tribe's 2014 REEO, as applied to RMCA/Donius, denied them due process of law.

2. The Tribal Court of Appeals improperly relied upon the Tribe's unlawful 2014 REEO to affirm the Tribal Trial Court Judgment.

a. The inclusion of the word "potential" in the 2014 REEO is an unlawful modifier.

The Tribe states that it relied heavily on the Tribal Court of Appeals' Opinion to draft its motion, admitting that it quoted the Opinion verbatim throughout its papers and, for the most part, did a cut and paste job from that document. (Tribe's PAs, page 5, ["borrows heavily from the Opinion of the Rincon Appeals Court]). In essence, its summary judgment motion is the Tribal Court of Appeals' Opinion. To this end, its motion stands or falls on correctness of that Opinion. However, the Tribal Court of Appeals Opinion is plainly wrong in its analysis on tribal jurisdiction for several reasons, the most glaring of which is its conclusions that a tribe may purportedly assert regulatory jurisdiction over a non-Indian fee landowner under Montana, supra, by simply claiming that activities on such fee land can have the "**potential**" to cause catastrophic harm the tribal self-government. As pointed out above, this is not true.

Throughout its opinion, the Tribal Court of Appeals, in affirming the Tribal Court Judgment on jurisdiction, concluded that the Tribe had purportedly "shown" it has regulatory jurisdiction over the activities being conducted on the subject property, because those activities had the

"**potential**" to cause catastrophic consequences to Tribal self-government. While the 2014 REEO permitted such a result, because it contained this language, federal common law does not. Yet the Tribal Court of Appeals Opinion upheld jurisdiction under both. Neither supports jurisdiction. The 2014 REEO cannot support jurisdiction, because it is contrary to federal common law of Montana, supra, and federal common law standing alone does not support jurisdiction, because, as pointed out, it does not permit tribal regulatory jurisdiction on the assertion that the challenged conduct might or potentially could cause a catastrophic consequence. County of Lewis v. Allen (9th Cir. 1998) 163 F.3d 509, 515; Burlington, supra at 1065. For example, the Tribal Court of Appeals Opinion erroneously states:

* "The Tribe's burden is to show that Donius' actions or inactions have the **potential** to impose catastrophic consequences …" (Page 15, footnote 14)

* "… the trial court's repeated conclusions that [RMCA/Donius'] actions and inactions **could lead** to catastrophic consequences." (Page 28).

* "The trigger point for tribal jurisdiction under [REEO] §8.301(b)(4)(B) in this case is the **potential** for the defendants' activities to

create catastrophic consequences that can spread to tribal lands." (Page 30).

* "We conclude that the Appellants' land use choices on its own property have the **potential** to create catastrophic impacts on the Rincon Band's lands. We hold that the RMCA/Donius' conduct has long created the **potential** for catastrophic consequences on the tribe." (Page 31).

* "… the trial court states that it found the Tribe's efforts 'to safeguard any **potential** damage …" Page 32).

* "… the facts in their brief demonstrates the **potential** catastrophic impacts of their conduct." (Page 35).

* "… each of these activities is a **potential** threat …" (Page 35).

* "However, under Montana, actual harm is not the trigger for tribal jurisdiction, **potential** harm is." (Page 35).

The Tribal Court of Appeals clearly tried to justify regulatory jurisdiction for the Tribe under this low standard, because that is the language contained in the 2014 REEO for which RMCA/Donius were prosecuted and which forms the basis of the Tribal Trial Court Judgment. Because the use of that word "potential" to modify the second exception under Montana, supra, is legally incorrect, the Tribal Court's Opinion affirming the Tribal Trial Court Judgment must be rejected, making the

Tribe's reliance on that Opinion to support its summary judgment motion clearly misplaced.

b. The REEO improperly shifted the burden away from the Tribe and placed it on RMCA/Donius to show lack of regulatory jurisdiction.

The Tribal Court of Appeals erroneously concludes, and the Tribe argues in its motion, that the 2014 REEO does not require a "business plan," but simply "allows one at the discretion of the fee owner." (Page 33 of Opinion). This is blatantly false.

RMCA/Donius incorporates by reference Section A.2.b. of the Argument section in their original motion paper (pages 44-47) which points out how the Tribe over the years had requested that RMCA/Donius submit to the Tribe a business plan for the Tribe's approval before RMCA/Donius would be allowed to conduct activities on their property. Consistent with this mindset, the Tribe's 2014 REEO requires the same. While the REEO states that a fee landowner "may" seek prior Tribal approval in the form of a "business plan" or "usage plan," if one is not submitted, the Tribe is allowed to take enforcement action. (REEO §8.313(b)(1)(B), Trial Ex. "34," RTCR-005310). As result, a business plan is "required," unless a fee landowner wants to be prosecuted for not having one. Being required to submit a business or usage plan for approval places the burden on the fee

landowner to prove to the Tribe's satisfaction that the proposed activities on his land will not have any "potential" catastrophic consequences to Tribal self-government. And because the Tribe's 2014 REEO contains the word "potential" in its measuring standard, the Tribe can make it almost impossible for a fee landowner to obtain approval for the use of his property, like in the present case with Donius, since the Tribe can be creative on what it feels might potentially cause harm to its political, economic, and health and welfare.

Under the Montana rule, the burden is on the tribe, not the fee landowner to show that the activities being conducted on the fee land are so severe that they pose catastrophic consequences by imperiling the subsistence of the tribal community. Plains Commerce, supra. The Tribe's 2014 REEO turns this well settled rule on its head and nullifies it. Because the Tribal Trial Court Judgment is based, in part, on RMCA/Donius' failure to submit and obtain a usage plan in accordance with the 2014 REEO, they were denied due process, and the Judgment cannot be recognized or enforced. Marchington, supra.

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c. The Tribe altered its 2012 REEO to get around Montana's strict requirements.

RMCA/Donius incorporate by reference Section A.2.c. of the Argument section in their original motion paper (pages 47-49) regarding how the Tribe changed its own REEO to get around the requirements of Montana, supra, to demonstrate its right to regulate the subject property. As pointed out, the Tribe essentially charged them with conduct in violation of the 2012 REEO, but prosecuted them under the 2014 REEO. The 2012 REEO contained no "potential" modifier and provided fee landowners with a jurisdictional hearing where the Tribe, not the fee landowner, had the burden of proving that it had regulatory jurisdiction under Montana, supra.

The Tribe falsely states that it amended its REEO in 2014 to make it comport with Montana, supra, when in fact, it amended its REEO in 2012 to do so. It amended its REEO in 2014 to make it out of line with Montana, supra, so it could more easily regulate RMCA/Donius' property, since it was at that time in the midst of heavy litigation with them over control of their property.

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

The Tribal Court of Appeals Opinion says nothing about the Tribal Trial Court using the wrong standard of proof in rendering its ruling on

Tribal regulatory jurisdiction. It simply glosses over this glaring error and rubber-stamps the ruling on jurisdiction. The Tribe's motion papers only make a passing reference to this issue, with the Tribe scrambling to try and explain this glaring error by pointing out that the Tribal Trial Court later stated that it "had no doubt regarding its jurisdiction," a comment that is simply meaningless. (Tribe's PAs, pages 4-25). Otherwise, the Tribe completely ignores this issue. This is perhaps the most egregious of errors the Tribal Trial Court committed, resulting in the Tribal Court Judgment being legally void.

RMCA/Donius incorporate by reference Section A.2.d. of their Argument Section in their original summary judgment motion, which points out how the Tribal Trial Court actually admits that it based its findings of jurisdiction on the low standard of proof of "**colorable or plausible**," instead of the higher standard of proof for actual jurisdiction under Montana, supra. As explained, the lower standard of "**colorable or plausible**" applies only in determining initially in the federal court whether tribal exhaustion is required. If so, then the Tribal Court gets to determine in the first instance whether the Tribe has proved actual jurisdiction. Indeed, the 9th Circuit Court of Appeals in its 2012 Memorandum pointed out this difference. (RMCA v. Mazzetti (9th Cir. 2012) No. 10-56521, page

2). It specifically stated that it was not deciding whether the Tribe had actual jurisdiction. It held the Tribe's evidence presented at the federal court hearing was merely "plausible or colorable," and therefore was sufficient for requiring tribal exhaustion, but not sufficient for establishing actual jurisdiction. The issue of actual jurisdiction was to be decided first by the Tribal Court, and then, if RMCA/Donius were dissatisfied with that ruling, by the U.S. District Court after exhaustion. Yet, the Tribal Trial Court chose to ignore that plain difference, or just did not understand the difference. Either way, the Tribal Court Judgment, being a product of the wrong standard of proof, denied RMCA/Donius due process of law, and therefore cannot be recognized or enforced under federal law. Marchington, supra.

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

RMCA/Donius incorporate by reference Section A.2.1. of their argument in their original motion for summary judgment, which discusses the Tribal Trial Court use of an "unlawful enclave" factor in its analysis of regulatory jurisdiction. As explained, nowhere in Montana, supra, or other relevant case law is a court to consider whether a purported lack of regulation or oversight of non-Indian land by non-tribal governing bodies

warrants, by necessity, tribal regulation. Indeed, as the Court in FMC Corporation, supra, aptly pointed out:

> As we have explained previously, there is "**no suggestion**" in the *Montana* case law that "**inherent [tribal] authority exists only when no other government can act**." *Montana v. U.S. EPA*, 137 F.3d at 1141.

942 F.3d at 935; see also Evans, supra at 1306 (rejecting the Tribe's contention that it had the right to regulate the subject non-Indian fee land because the County purportedly lacks the power to do so). Thus, the fact that the County of San Diego refuses to assert regulatory jurisdiction does not give the Tribe the right to "step in" and protect its Tribal interests, so that the subject fee land does not become an "unlawful enclave." In any event, the record demonstrates that the EPA asserted jurisdiction over the subject property to ensure the property was cleaned up after the fire.

Moreover, RMCA/Donius' suit against the County of San Diego, which has been stayed pending a ruling on this bifurcated issue of jurisdiction, makes it abundantly clear that RMCA/Donius do not consider their property to be beyond regulation by the County. They sued the County for declaratory and injunctive relief, asking this Court for an order directing that the County assert regulatory jurisdiction over their property. There is no reason why the County has taken the unusual position that it

has no regulatory jurisdiction over the subject property. RMCA/Donius pay County property taxes on the subject property, and because of that fact they are entitled to the County's services, including obtaining regulatory oversight on their property and obtaining building permits, should they wish to develop it.

Their property has lost value because of the County's position, and the Tribe has taken advantage of that uncertainty to assert regulatory jurisdiction under a false "unlawful enclave" theory, which the Tribal Trial Court accepted and used to rule on Tribal jurisdiction.

Because the Tribal Trial Court Judgment is based, in part, on an "unlawful enclave" factor, which finds no support in the law, the Judgment is void and cannot be recognized or enforced against RMCA/Donius.

B. THE TRIBAL COURT JUDGMENT CANNOT BE RECOGNIZED OR ENFORCED, BECAUSE THE TRIBAL COURT DID NOT HAVE JURISDICTION

RMCA/Donius incorporate by reference Section A.1. of their Argument in their original motion for summary judgment. It sets forth all of the reasons the Tribal Trial Court did not have jurisdiction over RMCA/Donius. As pointed out, the record does not show that anything RMCA/Donius are presently doing, or previously did, on their property was or is so severe that it imperiled, or is presently imperiling, the Tribe's

subsistence, posed, or is presently posing, a catastrophic risk, or was or is so demonstratively serious that Tribal regulation is necessary to avert catastrophic consequences. Plains Commerce, supra at 341; Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation (1989) 492 U.S. 408, 431; Cohen's Handbook of Federal Indian Law, §4.02[3][c], 2012 ed., page 232, fn. 220. The evidence was just not there. Instead, the record merely shows that the Tribe was just "complain[ing] or [seeking] to obtain relief against every use of fee land that has some adverse effect on the tribe,'" a standard that does not rise to the level of having any right to regulate the subject property under federal common law. Burlington N. R.R. Co. v. Red Wolf (9th Cir. 1999) 196 F.3d 1059, 1064-65. To get around this problem, the Tribe, as pointed out above, watered down the language of its own environmental ordinance to make it easier to regulate the subject property, thereby denying RMCA/Donius with due process of law. The record shows that the Tribe's claim of water contamination and the threat of its casino being burned down by activities being conducted on the subject property were all based on pure speculation. However, the Tribe's speculative concerns do not entitle the Tribe to regulate the subject fee property. Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298, 1306 (holding no jurisdiction on non-Indian fee land,

because the Tribe's "generalized concerns about waste disposal and fire hazard [were] speculative").

1. RMCA/Donius never admitted or conceded that they created "potential" catastrophic impact on the water table below their property.

The Tribal Court of Appeals Opinion falsely asserts that RMCA/Donius "admitted" in their appellate brief on appeal that they created a "potential catastrophic impact" on the Tribe's water source by purportedly "leaving" "fire-damaged debris" on their property "from October 2007 until August 2008." (Page 35 of Opinion). The Tribe likewise falsely states that "RMCA/Donius do not dispute that they likely contaminated the groundwater with toxic diesel fuel." (Tribe's PAs, page 32, lines 3-5).

First of all, as explained, the phrase "potential catastrophic impact" is not legally recognized as the proper measure or standard for permitting a tribe to assert regulatory jurisdiction over non-Indian fee land. Second, it is clear that the Tribal Court of Appeals recognized that RMCA/Donius did not actually take any affirmative action to contaminate the Tribe's drinking water, like, for example, dump fuel or hazardous waste into the soil or water table below, or store any such material in the ground, or engage in any high-risk handling of hazardous material that could result in a hazardous waste spill, like what occurred in FMC Corporation v. Shone-

Bannock Tribes (9th Cir. 2019) 942 F.3d 916, 921 (22 million tons of hazardous waste stored in waste storage ponds, phosphorous, arsenic, and other hazardous materials contaminate addition one million tons of loose soil, millions of tons of slag containing radioactive materials contaminate the site, 30 railroad tanker cars containing toxic phosphorous sludge are buried in the soil, and air at the site is radioactive, carcinogenic, and poisonous). The property is not presently contaminated, and the soil and air are not poisonous or hazardous, like in FMC Corporation, supra. Because of this lack of affirmative evidence, the Court of Appeals Opinion (and the Tribe in adopting that Opinion for its motion papers) instead shifted its focus on the fire-damaged debris purportedly being left on the property in the months following the 2007 wildfire as evidence of so-called "bad stewardship." The record refutes this assertion, however.

2. The Tribe's contention that RMCA/Donius was a bad steward of their property or failed to maintain it is not supported in the record.

The record shows that the Tribe's drinking water was never affected by any activities being conducted on the subject property, because it is undisputed that RMCA/Donius did not cause the fire that swept through the reservation and destroyed their property. There is no evidence that they carelessly left the burnt ash, burnt tire residue, burnt batteries, and spilled

diesel fuel from the exploding tank on their property, or even dumped or stored hazardous waste in their soil or into the water table below their property, either from the 2007 wildfire residue, or any other time. **In fact, the record shows that Donius tried to clean up the property immediately after the fire, but the Tribe came onto his property and interfered with his efforts**. Donius testified that the first thing he did after the fire was to go to FEMA in Rancho Bernardo to get the clean-up process started. He stated:

Q: … Mr. Crowell, in his examination of you, was suggesting that you waited or delayed for all of these months in getting this thing cleaned up since the fire. Was that the case? Were you delaying?

A: No.

Q: What were you doing – between the time of the fire and the ultimate cleanup of that property, what were you doing to clean up the mess?

A: Well, initially after the fire, I went to the FEMA location in Rancho Bernardo, I believe, and told them of my problem. And they said, yes, they could help and, and, and, and.

And they came out and did an assessment of the damage. There was some paperwork involved and then they scheduled the cleanup.

And they were cleaning up numerous sites, hundreds of sites, if not thousands, around the County.

(RTCR-009940-9941).

Donius then explained that when he hired a clean-up crew with trucks and equipment to do the cleanup, the Tribe showed up and stopped the crew. He testified:

Q: Okay. You mentioned that there was a time where the Chairman of the Tribe, Bo Mazzetti, showed up and prevented the efforts to clean up the property. Describe what happened and when that occurred.

A: … [T]he clean-up crews that were contracted to clean up properties came. And it was a Saturday morning, I remember that. And they showed up with quite a bit of equipment, maybe six trucks and loaders and so forth, and maybe a crew of as many as 20 or 30 men. They were going to clean up the site that day.

And they worked for maybe a half an hour or an hour and they got some trucks loaded and so forth. And then Bo Mazzetti and the lady whose name is Stephanie. A don't know her last name. They just simply came in and said, "You've got to get out of here," and stood in front of the front-end loader and would not let it move.

And the supervisor on the job called me on my cell phone and said, “Hey, I’ve got a problem here. These people are saying they’re the Rincon Tribal Council. They’re not going to allow this property to be cleaned up.”

Q: So, what happened?

A: Well, then what happened is I said, “Well, could you put one of them on the phone?”

And I could hear the conversation. He said, “Marvin wants to talk to you.”

They said, “Tell Marvin we’re not talking to him. You get the hell out of here.”

Q: So, what happened? Did they leave?

A: Yeah. They left.

Q: Okay. What did you find out, if anything, as to why the Tribe was trying to prevent you from cleaning up the property at that time? …

A: Nothing.

(RTCR-009941-9942). The Tribe never wrote Donius any letter, telephoned him or gave him any explanation for their interfering with his efforts to clean up the property. (RTCR-009942). It was clear, however, that the Tribe was trying to set Donius up, so it could falsely accuse him of

leaving the hazardous debris on his property and then assert regulatory jurisdiction.

Despite the Tribe's efforts to interfere, Donius worked with the U.S. Environmental Protection Agency ("EPA") to clean up the property, after the EPA called him and told him the Tribe was complaining that he wasn't cleaning up his property, which was false. Donius testified:

Q: All right. How did you get around that? Once the Tribe chased off these people that you were trying to get to help you clean up the property, how did you get around that? What happened after that?

A: I don't recall the next steps exactly, but I remember Craig Benson from the Signal Hill, California, office of the EPA called me and said, "Hey, the Tribe's complaining that you are not cleaning up."

Q: Did you tell them what happened with Bo Mazzetti?

A: Yes.

Q: What did he say?

A: He goes, "That's a little confusing."

I said, "Well, you're hearing my side of the story, but anyway," I said, "on to more important things. You say you want to get this property cleaned up. I want to get it cleaned up."

He goes, "Yeah. I'd like to have a meeting with you at the site."

Q: Did that meeting occur?

A: Yes.

Q: Who attended?

A: It was just Craig Benson and I.

Q: What was discussed?

A: Well, he said, "What's your plan?"

I said, "Well, here's where I'm at."

And he goes, "Well, you know the EPA will be involved. We'll help you and you have to follow our protocol. And you have to hire --- or have a written plan. You can do it yourself."

I said, "Hell, I don't know what I'm doing on that."

He goes, "Well, then, you can get an outside consultant to write the plan. We have a list of people that are available."

I told him I had a relationship with Marc Boogay of, I believe, Boogay Environmental in Vista. And he said, "Fine. Contact him. Tell him this is the plan we're looking for." And he said, "We have a list of recommended qualified cleanup people that will handle the cleanup."

Q: And then after that, did you put into motion the cleanup process?

A: Yes. Yes. I called Marc Boogay. He goes, "Absolutely. I've done this before. I know exactly, ta, ta, ta. …

(RTCR-9942-9944).

About 90 days went by since Donius first met with the EPA representative and the work actually begin. According to Donius, the site had to be assessed first, a site plan had to be drawn up, and sampling of the water well had to be taken for testing, all of which took time before the clean up could commence. Mr. Donius explained:

Q: How much time, if any, passed from the time that you had this meeting with the EPA until the cleanup efforts went under way?

A: Again, I'd have to look back, but I am guessing it is probably 90 days.

Q: So, why 90 days? What was the reason for that?

A: There was – not complicated, but there was a procedure to assess the site and see what was there. And that involved the EPA representative. It involved Marc Boogay. And at that point we had selected environmental services out of the L.A. area as our people that would clean it up. And testing of the well water, testing of what was there, any contamination, and there was. There was those batteries that were burned. There were tires that was tire ash and so forth. That was all there.

They did a site map, identified what was where, did samplings. They did samplings of the well water and that were – you know, it was all done under, you know, rubber gloves and all these procedures of – the outlet was flamed and make sure it was absolutely clean … (TRCR-009944-9945).

The Tribal Trial Court found that RMCA/Donius poorly maintained their property, and as a result their poorly maintained property "poses a catastrophic risk to the Tribe." (Tribal Trial Court Opinion, page 6, line 2-14). However, these findings and accusations were conclusory without any factual support, and therefore amounted to speculation. Nowhere in the Tribal Trial Court's Opinion does it point to any specific fact of poor maintenance and tie it to a catastrophic risk. It is not enough to say the properly is poor maintained. There must be some facts to back up that statement. And none were provided.

The Tribe's cross examination of Donius on his purported poor stewardship of the subject property fell flat on its face. The only thing elicited was that Donius had from time to time a mess here and there on his property that needed to be cleaned up. (RTCR-009783). Other times, the Tribe elicited from Donius that he had a pallet business that used air compressors, that were hooked up to generators, that used electrical cords

"strewn across bare ground." (RTCR-009784, 9789). Other times, Donius stated on cross that he had cars and truck parked on the bare soil without metal pans underneath to prevent oil leaks from seeping into the dirt. (RTCR-009785). However, the Tribe never called an expert to testify that there were any oils leaks detected on the property from parked vehicles, or that the soil was contaminated from parked cars that leaked oil. The Tribe also elicited testimony from Donius that there was a PVC water pipe (used for gardening and transporting water to a mobile home [RTCR-009740]) that was exposed in some spots and buried in others, and tried to suggest that this was another example of poor maintenance on the property. (RTCR-009788). In short, the Tribe failed to connect the dots to a threat of catastrophic consequences.

The Tribe's failed cross examination of Donius on the issue of his alleged poor stewardship, not cited in its motion papers, of the subject property also included:

* Donius stating that he did not install the above-ground storage tank, and that the EPA inspected it before the fire. (RTCR-009708-9709)

* He keeps one oil waste drum in a secured location on the property, and calls a recycle company once a year to pump it out and take the waste oil away. (RTCR-009712-9713).

* He does not do vehicle maintenance on the majority of the truck on the property, but has it done outside from the property. (RTCR-009712).

* He has no pesticides stored or used on his property, since all of his mushrooms are organic, and he uses “fly spray” from the garden center on his succulent plants in his nursery. (RTCR-009716-9717).

* He rented space to someone who did pallet fabrication, but that person is no longer doing that, and the only use put to the property is succulent growing (nursery) and parking of vehicles at the office structure. (RTCR-009721).

* He recently attempted to build a small wall for someone to set up a produce stand and sell produce, but that was stopped. (RTCR-009722-9724).

* As to any future activities on the property that involve environmental issues, Donius plans on involving the EPA to determine their impact on the environment. (RTCR-009727).

At no time during the trial did the Tribe ever elicit any testimony from Donius that would suggest that he allowed his property to become a toxic waste dump, a fire hazard, or a source of a disease, or that it would have any catastrophic consequences to the Tribe's drinking water, its casino across the street, or the health of its members as a whole. Collectively, the evidence elicited was nothing more than trivial complaints of sundry sorts that would have no adverse impact on the Tribe's self-government. Relying on the Tribe's 2014 REEO to say that such conduct would have the "potential" of causing catastrophic consequences to the Tribe is a stretch, and not the standard established under federal common law. Such an argument is similar to what this Court rejected in Burlington, supra, when the Tribe sought civil jurisdiction in Tribal Court against a railroad company over a tort claim that occurred on a right-of-way crossing on a reservation, and claimed that the "deaths of Tribal members cause damage to the community by depriving the Tribe of potential councilmembers, teachers, and babysitters." 196 F.3d at 1065. The Court correctly held that the railroad company's conduct was not demonstratively serious enough to warranted jurisdiction under Montana's second exception. Id. The same can be said about RMCA/Donius' conduct, as elicited from Donius at trial.

It does not pass the "demonstratively serious" test to warrant regulatory jurisdiction. Burlington, supra.

3. The Tribe's claim that the video introduced at trial showed fire embers coming from the subject property and landing on the casino is false.

To bolster its holding that the subject property was a fire hazard and "exacerbated" the fire to threaten the Tribe's casino, the Tribal Court of Appeals' Opinion falsely states that the record "dramatically" demonstrated through a video recording shown at trial that "burning embers originating from an explosion on [RMCA/Donius'] property cross[ed] the street and land[ed] on the roof of the Tribal hotel." (Tribal Court of Appeals Opinion, page 26). This is false. RMCA/Donius incorporate by reference pages 31 through 34 of their original motion for summary judgment. In these pages, RMCA/Donius quotes from the record the Tribe's own expert being shown the subject video, and he testified he saw no embers anywhere coming from the subject property and landing on the casino building or hotel.

4. The Tribe's claim that the water table below the subject property is contaminated is contradicted by its recent Tribal Court ordered sampling and testing of the soil and water table.

The recent sampling the Tribe took of the soil on the subject property and the water table below show that there is presently no contamination of

the soil or the water table, and that the water table and water well on the property produce drinkable water.

5. Donius' "attitude" does not justify Tribal regulation of his property.

Tribe's motion papers, the Tribal Trial Court's ruling, and the Tribal Court of Appeals' Opinion, all criticize Donius for "copping an attitude" about what he felt he could do on his property. They point to his statement he made at trial that he felt he could do anything he wants on his property short of building a nuclear waste plant as evidence that he had a bad attitude toward the management of his property, and therefore the Tribe was justified in intervening and protecting its interests. (Tribal Trial Court Opinion, TRCR-005008, page 9, lines 15-16; Tribal Court of Appeals Opinion, page 31; Tribe's PAs, page 20, lines 10-14, page 26, lines 19-23, page 33, lines 1-3, page 46, line 10). The Tribe also argues that a proper interpretation of Montana, supra, permits it to assert jurisdiction here because of Donius' attitude, including being "vague and unresponsive to Tribal inquiries about the use of the subject property." (Tribe's PAs, page 46, lines 6-8). However, a non-Indian fee landowner's "attitude" is not a factor to consider in the Montana analysis to determine if the Tribe can assert regulatory jurisdiction. If that were the case, then a tribe could

simply be allowed to assert jurisdiction because the non-Indian fee landowner looked at the Tribal Councilmembers cross-eyed or didn't show them any respect.

The Tribe's bad attitude factor should be rejected or ignored as irrelevant.

C. THE COURT HAS THE DISCRETION TO ALSO REFUSE RECOGNITION AND ENFORCEMENT OF THE TRIBAL COURT JUDGMENT BASED ON FRAUD

RMVCA/Donius incorporate by reference Section B of their Argument in their motion for summary judgment.

D. THE INJUNCTION PORTION OF THE JUDGMENT VIOLATES RMCA/DONIUS' DUE PROCESS

RMVCA/Donius incorporate by reference Section C of their Argument in their motion for summary judgment.

The Tribe refuses to address RMCA/Donius' points raised concerning the injunction portion of the Tribal Trial Court Judgment being overly broad and vague and ambiguous so as to be in violation of FRCP 65(d). The Tribe's refusal to address these points is a concession that the points and arguments raised are valid.

Requiring RMCA/Donius to "comply with those laws and regulations of the Rincon Tribe which are designated by the RED" is so broad that

RMCA/Donius would have to guess what those laws might be in order to comply with the Judgment and not be held in contempt, a clear violation of their due process rights. Schmidt v. Lessard (1974) 414 U.S. 473, 476. It also gives the Tribe unfettered discretion on what laws it wants to cite RMCA/Donius for the use of their property. If RMCA/Donius guess wrong, they could end up having their property blocked off with cement blockades as the Tribe did in the past.

E. THE TRIAL COURT JUDGMENT/ORDER AWARDING THE TRIBE $1.7 MILLION IN FEES AND COST SHOULD NOT BE RECOGNIZED OR ENFORCED

The Tribal Trial Court's award of $1.7 million to the Tribe falls or stands on the validity of the Judgment. Since the Judgment is a product of a denial of RMCA/Donius' due process and was issued by a court that had no jurisdiction over RMCA/Donius, based on the Tribal Trial Court record, the Tribe cannot enforce it in federal court and seek to collect it from RMCA/Donius.

In addition, the award is based on the provisions of the 2014 REEO, which, as shown is legally defective and does not provide appropriate due process rights to non-Indian fee landowners whose fee land the Tribe seeks to regulate. That is to say, the 2014 REEO provides that the Tribe is entitled to an award of fees and cost as the prevailing party in an action to

enforce the provisions of the REEO against a non-Indian fee landowner. If the provisions of the 2014 REEO are not in harmony with federal common law, including Montana, supra, then any award of attorney's fees and costs to the Tribe in an enforcement action under that ordinance is void and unenforceable. Marchington, supra.

V.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in RMCA/Donius' original motion for summary judgment, which RMCA/Donius incorporate by reference herein, and for the reasons set forth in RMCA/Donius' Separate Statement filed concurrently herewith, the Tribe's and the Tribal Parties' motion for summary judgment should be denied. RMCA/Donius' motion for summary judgment should be granted in their favor instead. The Tribal Trial Court Judgment cannot be recognized or enforced, because RMCA/Donius were denied due process of law in the Tribal Court proceedings, and the Tribe and Tribal Court did not prove

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under the second exception of Montana, supra, that it has jurisdiction over RMCA/Donius, or the activities being conducted on their property.

Dated: September 20, 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. **COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO COUNTERCLAIMANT'S RINCON BAND OF LUISENO INDIANS AND TRIBAL OFFICIAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND IN REPLY TO OPPOSITION TO RMCA/DONIUS' CROSS MOTION FOR SUMMARY JUDGMENT**

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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: September 20, 2021

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