No. 23-55111

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RINCON MUSHROOM CORPORATION OF AMERICA, INC. and MARVIN DONIUS,

Plaintiffs, Counter-Defendants, and Appellants,

v.

BO MAZZETTI *et al.*,

Defendants, Counter-Claimants, and Appellees.

On Appeal from the United States District Court, Southern District of California
The Honorable William Q. Hayes, Case No. 09-cv-2330-WQH-OR

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DISCLOSURE STATEMENT

As required under Federal Rule of Appellate Procedure 26.1(a), Appellees Rincon Band of Luiseno Indians *et al*., state that it has no parent company and no publicly-held corporation owns ten percent or more of its stock.

Dated: October 2, 2023

Respectfully submitted,

Crowell Law Office-Tribal Advocacy Group

s/ *Scott D. Crowell*
SCOTT D. CROWELL

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I. INTRODUCTION

This appeal is about the ability of the Rincon Band of Luiseno Indians ("Tribe"), a federally-recognized Indian tribe, to take governmental actions necessary to protect against activities being conducted on a five-acre parcel of fee land (the "Subject Property") located within the external boundaries of the Rincon Reservation (the "Reservation"), owned by Appellant Marvin Donius ("Donius"), a non-Indian, and falsely claimed to be owned and controlled by Appellant Rincon Mushroom Corporation of America, Inc., ("RMCA")(collectively, "RMCA/Donius"), in a manner that could inflict catastrophic consequences to protectable tribal interests, including economic interests. By establishing in the Intertribal Court of Southern California (the "Tribal Trial Court") that RMCA/Donius engage in activities on the Subject Property that threaten protectable tribal interests, the Tribe has 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 overarching jurisdictional question is whether RMCA/Donius steward (or fail to steward) the Subject Property in such a manner that activities on the Subject Property threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe. The United States Supreme Court

recently issued a unanimous opinion reaffirming *Montana's* Second Exception and applying it to uphold specific actions taken by the Crow Tribe (tribal police detaining and searching a non-tribal member on non-trust lands within the Crow Reservation). *United States v. Cooley,* 141 S.Ct. 1638 (2021)[1]. At trial, the Tribe met its burden to establish the factual threshold required of *Montana's* Second Exception, which in turn, establishes that the Tribe has jurisdiction over activities on the Subject Property to the extent necessary to protect against catastrophic consequences to protectable tribal interests.

This Answering Brief borrows heavily from the Opinion of the Rincon Tribal Court of Appeals (the "Tribal Appeals Court") (98-ER-28801-28843)[2]. Such is

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[1] Throughout the years of litigation, RMCA/Donius have repeatedly contended that with one minor exception (*Brendale*), the United States Supreme Court has never upheld *Montana*'s Second Exception. Despite quoting *Cooley*, (OB at 59-60), RMCA/Donius continue this assertion (OB at 45), which, even if valid prior to the decision in *Cooley*, is certainly valid no more.

[2] The Tribe notes that RMCA/Donius submitted an "Excerpts of Record" comprised of 29,407 pages contained in 99 volumes. Certainly, RMCA/Donius' submission violates the spirit of this Court's rules. Certainly, RMCA/Donius submission is not limited to those documents in the record needed to support statements made in their Opening Brief. In the ordinary appeal, the Tribe might object to such a tactic as unduly burdensome and this Court may desire to take action against the tactic *sua sponte,* to which the Tribe would have no objection. As the Tribe has conducted itself throughout the litigation, however, it has deliberately avoided any effort that could be perceived as limiting the ability of RMCA/Donius from submitting every argument, without regard to lack of merit, and submitting every stitch of evidence, without regard to its relevance. The Tribe has exercises such leniency to ensure that the Tribe's judiciary afforded RMCA/Donius more than adequate due process in its deliberation of the Tribe's claims against RMCA/Donius. The enormity of the

appropriate as the three highly-qualified jurists were faced with the very same issues that RMCA/Donius raise in this appeal. This Court is strongly encouraged to both begin and end its review of the briefing of this case with a reading of Judge Ware's thorough 43-page opinion, writing for a unanimous panel of the Tribal Appeals Court (98-ER-28801-28843). The opinions of three esteemed jurists of the Tribal Appeals Court, combined with the decision of the Hon. William Q. Hayes in the District Court, mark four esteemed jurists who have reviewed and affirmed the finding of the Tribal Trial Court that the Tribe has established jurisdiction over activities conducted on the Subject Property pursuant to *Montana*'s Second Exception. This Court should adopt the same reasoning set forth by the four esteemed jurists and affirm the Opinion and Final Judgment of the District Court.

II. JURISIDICTIONAL STATEMENT

The Tribe recognizes that RMCA/Donius properly invoked the federal courts' 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

Excerpts of Record underscore both that the Tribe's judiciary provided adequate due process, and that RMCA/Donius' appeal to this Court is the third level of appellate review of the Tribal Trial Court's determination that the Tribe has established jurisdiction under Montana's Second Exception.

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). Similarly, federal courts have jurisdiction to hear the Tribe's counter-claim seeking federal court 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).

The Tribe does not dispute RMCA/Donius' contention in Appellants' Opening Brief ("OB") at 13, that the District Court has jurisdiction under 28 U.S.C. §1331 (district courts have original jurisdiction over suits arising under the laws of the United States) and 28 U.S.C. §1362 (district court has original jurisdiction over civil actions brought by tribes). The Tribe agrees with RMCA/Donius (OB at 13) that this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and that the appeal was timely. However, in the unlikely event that the District Court decision is reversed and remanded, the Tribe and all named tribal officials preserve the position that tribal sovereign immunity precludes the District Court from having jurisdiction over the twelve causes of action that RMCA/Donius have filed against them.

III. STATEMENT OF THE ISSUES

A. Whether the District Court erred in finding that the Tribal Court properly held that the Tribe met its burden to establish that the Tribe has jurisdiction over activities that occur on the Subject Property under *Montana*'s Second Exception;

B. Whether the District Court erred in granting comity to recognize and enforce the Amended Judgment of the Tribal Trial Court;

C. Whether the District Court erred in finding that RMCA/Donius failed to exhaust tribal remedies regarding the scope of the injunctive provisions of the Amended Judgement of the Tribal Trial Court; and

D. Whether the District Court erred in denying RMCA/Donius' motion to file a Second Amended Complaint.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The facts and history of this dispute, now in its fourteenth year, are extensive and complex. At bottom, the case involves jurisdiction over activities conducted on the Subject Property. For years, RMCA/Donius have conducted activities on the Subject Property without adhering to the laws of any jurisdiction, whether tribal, county, state or federal. Specific facts are addressed at the appropriate discussion

below. The District Court provides a concise and accurate statement of the factual and procedural background at issue, *see* 2022 WL 1043451 at *1-4, which the Tribe adopts and incorporates herein.

B. PROCEDURAL BACKGROUND

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 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.

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 (22-ER-6207-6216), 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 (22-ER-7052-7062), 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 Tribal Appeals Court issued a unanimous Opinion on April 2, 2020 (98-ER-28801-28843), authored by the Hon. James Ware (retired Federal District Court judge) and joined by the Hon. Arthur Gajarsa (retired Federal Appeals Court judge) and Hon. Matthew Fletcher (tenured professor of law), affirming in part and reversing and remanding in part, the Tribal Trial Court Judgment. The Tribal Appeals Court affirmed (98-ER-28801-28843) 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* and its progeny, and affirmed that injunctive relief was appropriate, but vacated and remanded that portion of the Tribal Trial Court Judgment granting the Tribe injunctive relief as too broad, with instructions and guidance to revise the scope of the injunction provisions on remand. On June 26, 2020, the Tribal Trial Court issued an Amended Judgment (33-ER-9496-9512) to conform to the instructions of the Tribal Appeals Court. Notably, RMCA/Donius did not appeal the scope of the injunctive provisions of Amended Judgment to the Tribal Appeals Court. That Amended Judgment, as a matter of both federal and tribal law, is now in effect.

After the issuance of the Amended Judgment, RMCA/Donius successfully petitioned the District Court to reopen the case below, which opened the case on July 15, 2020 (1-SER-2-9). After the filing of a First Amended Complaint (1-SER-551-721), the Tribe's filing of its counterclaims against RMCA/Donius (3-SER-351-

464), and RMCA/Donius's filing of Third-Party claims against San Diego County, the SDG&E utility and the Tribe (4-SER-352-435), RMCA/Donius and the Tribe filed cross-motions for summary judgment (4-SER-283-3513-SER-277-282). On March 15, 2022, the District Court affirmed the Tribal Trial Court's findings that the Tribe had established jurisdiction over activities conducted on the Subject Property, denied RMCA/Donius' motion for summary judgment, and granted summary judgment on the Tribe's counterclaim seeking comity of the Amended Judgment by recognizing and enforcing the Amended Judgment. 2022 WL 1043451. Subsequently, on August 26, 2022, RMCA/Donius sought leave to amend to file a Second Amended Complaint alleging a conspiracy between the Tribe, San Diego County and SDG&E to deprive RMCA/Donius of the enjoyment of the Subject Property (2-SER-21-206). The District Court denied leave to amend on November 30, 2022, 2022 WL 17345485, and on January 5, 2023, entered Final Judgment (1-ER-2). RMCA/Donius timely filed their appeal of those decisions and the Final Judgment to this Court.

V. SUMMARY OF ARGUMENT

The Tribe in Section VI below establishes the District Court's jurisdiction, and sets forth the standards which this Court should apply for what is essentially an appeal of the April 2, 2020 Opinion of the Tribal Appeals Court (98-ER-28801-28843) and the June 22, 2020 Amended Judgment of the Tribal Trial Court (34-ER-9476-9479) (the "Amended Judgment").

In Section VII (A) below, the Tribe sets forth that this Court's review of the District Court's decision below, and the Tribal Trial Court's and the Tribal Appeals Court's opinions and orders, properly results in the conclusion that such decisions, opinions and orders correctly state and apply *Montana's* Second Exception. In Section VII (B), the Tribe establishes that the District Court's review for clear error in the Tribal Trial Court's factual determinations properly found that substantial evidence was presented such that there was no basis for disturbing those findings. Given that the Tribal Trial Court's opinions correctly state the law and appropriately find facts that establish jurisdiction under *Montana's* Second Exception, Section VII (C) establishes that the District Court properly granted comity to the Tribal Trial Court and Tribal Appeals Court decisions, enforcing the Amended Judgment and denying RMCA/Donius' efforts to void the Amended Judgment. Section VII (D) addresses RMCA/Donius' arguments regarding the scope of the injunctive relief set forth in the Amended Judgment, which arguments are out of order and unavailing.

Section VII(E) establishes that RMCA/Donius' contention that the District Court should have found that the Tribal Trial Court lacked personal jurisdiction over them is unavailing. Finally, Section VII(F) establishes that the District Court did not abuse its discretion in denying RMCA/Donius leave to file a Second Amended Complaint. For all the reasons set forth below, the District Court's opinions and Final Judgment should be affirmed.

VI. LEGAL STANDARDS

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 initial opportunity to evaluate the legal and factual bases underlying the challenge to their jurisdiction promotes tribal self-determination and self-government; (2) tribal exhaustion promotes administrative efficiency insofar as a full record is developed in the tribal court before federal judicial review; and (3) exhaustion encourages tribal courts to explain to the parties the precise basis for accepting jurisdiction, and also provides other courts with the benefit of their expertise in such matters in the event

of further judicial review. *Farmers Union*, 471 U.S. at 856-857; *Window Rock Unified School Dist. v. Reeves*, 894 F.3d 897-898 (9th Cir. 2017); *Big Horn County Electric Cooperative, Inc. v. Big Man*, 2018 WL 4603276 at *1 (D. Mont. 2018); *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699 - 700 (8th Cir. 2019); *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1243 (10th Cir. 2017).

The Supreme Court instructs federal courts that affording proper deference to the tribal court system precludes re-litigation of issues raised by the underlying claims and resolved in the tribal courts. *Iowa Mutual,* 480 US at 19; *Attorney's Process and Investigative Services, Inc. v. Sac & Fox Tribe of Mississippi*, 609 F.3d 927, 942 (8th Cir. 2010). Federal courts may not re-adjudicate questions – whether of federal, state or tribal law – already resolved in the tribal courts. *Iowa Mutual*, 480 U.S. at 19; *Attorney's Process*, 609 F.3d at 942. This Court should review, *de novo*, only those legal questions regarding tribal jurisdiction. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002); *Attorney's Process*, 609 F.3d at 942. The factual findings relevant to tribal jurisdiction, however, should be reviewed under a deferential, clearly erroneous, standard. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 757 (8th Cir. 1994); *Ute Indian Tribe*, 862 F.3d at 1245, n.3 ("A key rationale underlying the tribal exhaustion requirement is to provide federal courts with the benefit of a full factual record on the relevant issues and the benefit of tribal court expertise"); *State Farm Insurance Co. v. Turtle Mountain Fleet Farm LLC*, 2014

WL 1883633 at *7 (D. N.D. 2014) ("In deciding the jurisdictional issue, the court is instructed to rely upon the tribal court record for the facts - unless there has been a clear error- and to defer to the decisions of the tribal court"). A finding of fact is clearly erroneous if it is illogical, implausible, or without support in inferences that may be drawn from facts in the record. *Evans v. Shoshone -Bannock Land Use Policy Commission*, 736 F.3d 1298, 1306 (9th Cir. 2013).

RMCA/Donius appear to agree with the above analysis (OB at 31 and 40). Yet, RMCA/Donius also appear to advocate that identifying any evidence controverting the Tribal Trial Court's findings renders those findings clearly erroneous. As seen in the OB at 21-26, 52-55, RMCA/Donius often restate, in its best light, their own evidence presented to the Tribal Trial Court, without providing any argument or reason as to why the presentation of such evidence demonstrates that the Tribal Trial Court's findings are clearly erroneous.

A major purpose of promoting comity is to enable tribal courts to clarify the factual and legal issues relevant to evaluating any jurisdictional question. *Farmers Union*, 471 US at 856-85; *DISH Network Services LLC v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). Another major purpose of promoting comity is to allow for errors to be rectified at the tribal level. *Farmers Union,* 471 US at 857; *South v. Navajo Nation*, 2000 WL 36739428 at *7 (D. N.M. 2000) ("The orderly administration of justice will be best served if this Court stays 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 had.”).

The crux of this appeal is whether the Tribal Trial Court correctly applied the law of *Montana*’s Second Exception and/or committed clear error in determining that the facts and circumstances supported findings that (i) RMCA/Donius’ failed stewardship of the Subject Property poses risks of catastrophic consequences to protectable tribal interests, and (ii) RMCA/Donius’ assertions that the actions of the Tribe, including the named Tribal Officials, were intended to force RMCA/Donius to sell the Subject Property at less than its marketable value, are incorrect and untrue. As already determined by the Tribal Appeals Court and the District Court below, the Tribal Trial Court correctly concluded that *Montana*’s Second Exception applies.

VII. ARGUMENT

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

The overarching jurisdictional question is whether RMCA/Donius steward (or fail to steward) the Subject Property in such a manner that activities on the Subject Property threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe. Such activities include conduct that either (i) in fact, significantly impacts the political integrity, the economic security, or the health and welfare of the Tribe, or (ii) has the potential to impose catastrophic

consequences upon the political integrity, the economic security, or the health and welfare of the Tribe. *See Montana* 450 U.S. at 566; *Cooley*, 141 S.Ct at 1644-45; *Knighton v. Cedarville Rancheria*, 922 F.3d 892, 895, 904-905 (9th Cir. 2019) (former employee's embezzlement of tribal funds "threatened the Tribe's very subsistence"); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019)(elemental phosphorus in the ground and phosphine gas in the air caused by FMC on fee land adjacent to the Fort Hall Reservation imperils the subsistence and welfare of the Tribes); *Grand Canyon Skywalk Developments LLC v. 'Sa'Nyu Wa Inc*., 715 F.3d 1196, 1206 (9th Cir. 2013) (jurisdiction plausible because of the enormous potential economic impact if the subject contract is terminated); *Rincon Mushroom Corp. of America v. Rincon Band*, 490 Fed. Appx. 11, 2012 WL 2928605 (9th Cir. 2012); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir.2009); *Attorneys Process and Investigative Services Inc*. *v. Sac and Fox Tribe*, 609 F.3d 927, 939 (8th Cir. 2010).

The Supreme Court in *Montana* said that while Indian tribes possess "attributes of sovereignty over both their members and their territory," they "have lost many of the attributes of sovereignty" through "their original incorporation into the United States as well as through specific treaties and statutes." 450 U.S. at 563 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). Thus, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control

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., Ins*., 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. The Tribe, however, presented facts and argument to the Tribal Trial Court that the circumstances regarding activities on the Subject Property fall within *Montana's* Second Exception, establishing 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 Tribal Appeals Court opinion (98-ER-28801-28843) 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 *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 which held that 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*, § 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 Tribe'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.

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

The Supreme Court cases of *Cooley* and *Brendale,* wherein the Court found tribal jurisdiction under *Montana's* Second Exception, however, do address nonmember conduct that could create impacts that spread from nonmember lands to tribal lands, and the Supreme Court's analysis in each is instructive for contextualizing how RMCA/Donius' land use choices impact the Rincon Reservation.

In *Cooley,* a Crow tribal police officer made a routine traffic stop of a non-Indian on a state right-of-way within the Crow Reservation and observed that the non-Indian had blood-shot eyes, weapons and drug paraphernalia in the vehicle. 141 S.Ct. at 1641. Upon further searching, the tribal police officer observed illicit drugs. *Id.* The tribal police officer then confiscated the illicit drugs and detained the non-Indian until the proper non-tribal authorities arrived for arrest and prosecution. *Id.* In a unanimous opinion, the Supreme Court reversed the lower appellate and District Court decisions to suppress the evidence, reasoning:

> The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the "health or welfare of the tribe." To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.

Id. at 1643. The unanimous Court continued:

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

Id. at 1645.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinion) involved consolidated cases regarding the power of a tribe to impose its zoning ordinance on nonmember-owned land. *Id.* at 438 (Stevens, J., lead opinion). The most relevant of the consolidated cases involved a nonmember named Brendale who owned land in fee within an area of the Yakama Indian Reservation called the "closed area." *Id.* The closed area of the reservation was massive, around 807,000 acres, of which only 25,000 acres were owned in fee. *Id.* Even on the fee lands, no one lived permanently in the closed area, which was pristine wilderness. *Id.* at 438-40. Brendale owned 20 acres in the "heart" of the closed area. *Id.* at 440. He sought permission from the county to subdivide and develop his lands. *Id.* The Yakama Indian Nation objected before the zoning commission, asserting that the tribe possessed jurisdiction over the nonmember parcel. *Id.* The tribe's zoning regulations prohibited development of the kind proposed by Brendale. *Id.* at 441. The regulations took "care that the closed area remain[ed] an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of their culture.'" *Id.* (quoting Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1-98-72, § 23 (1972)). Justice Stevens characterized Brendale's proposal to develop land within the area that prohibited that type of development as bringing "a pig into a parlor":

> The question is then whether the Tribe has authority to prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the character of this unique resource by developing their isolated parcels without regard to an otherwise common scheme. More simply, the question is whether the owners of the small amount of fee land may bring a pig into the parlor.

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

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

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

> In my view, the fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, 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, concurred in Justice Stevens' judgment, *id.* at 448-49, concluding that finding that the tribe did not possess jurisdiction over the Brendale property "would guarantee that adjoining reservation lands would be subject to inconsistent and potentially incompatible zoning policies, and for all practical purposes would strip tribes of the power to protect the integrity of trust lands over which they enjoy unquestioned and exclusive authority." *Id.* at 449.

In the plurality opinions in *Brendale*, one finds a majority of the Justices applying *Montana's* Second Exception to prevent a non-Indian land owner from developing property in any manner whatsoever. Notably, RMCA/Donius fail to discuss or even cite to *Brendale* in their Opening Brief. They do attempt to distinguish *Cooley* (OB at 59-60), but the application of tribal authority at issue here is far less intrusive than the tribal authority at issue in either *Brendale* or *Cooley*. The Tribe does not seek to prevent RMCA/Donius from developing the Subject Property. Rather, the Tribe seeks to protect its tribal interests by requiring that any development be done in a manner that protects those tribal interests, including protection of the Tribe's pristine ground water supply and protection of the Tribe's economic interests, including its gaming resort. In contrast, RMCA/Donius believe that they can develop anything on the Subject Property, short of a nuclear waste dump, without regard to the development's impact on the Tribe's protectable

interests (39-ER-10914, Trial Testimony of Marvin Donius, March 8, 2017). The District Court below also noted the significance of Donius' statement: Donius testified that "short of storage of nuclear waste, [his] plans [for the Property] could run the gamut" and that the sole basis on which he makes decisions is his "common sense," as he has "no knowledge or experience in assessing the impacts of [his] activit[ies]." 2022 WL 1043451 at *8.

The Tribal Trial Court, the Tribal Appeals Court and the District Court did not err in their respective statements of the law regarding *Montana's* Second Exception.

B. The Tribal Trial Court embraced and correctly applied *Montana's* Second Exception to the facts presented in this case, and properly concluded that the Tribe had met its burden.

1. Substantial evidence was presented to support the factual findings regarding RMCA/Donius' years-long pattern of activities.

The legal question of the existence and scope of *Montana's* Second Exception clearly being resolved in the Tribe's favor, the correctness of the Tribal Trial Court's judgment then turns on whether the Tribal Trial Court committed clear error in concluding:

> *Montana,* within its text quotes *United States v. Wheeler*, 435 U.S. 313, stating essentially that tribes have lost many attributes of their power in relations between a tribe non-member other than to protect tribal self-government. Having this said, *Montana* goes on to make clear that the activity on the land must in fact threaten the tribe's political and economic security to justify tribal regulation over the land in question.

> We believe, considering all facts and circumstances in this case, this later statement to be true here.

May 18, 2017 Opinion, 22-ER-6214. In the Tribal Appeals Court's review for clear error, and finding no clear error, it noted:

> The Tribal Trial Court found conclusively (1) that the Appellants failed to maintain their property; (2) that the Appellants' land constitutes a fire hazard in an area that is unusually threatened by fire; (3) that the Appellants' actions and inactions have contributed to a significant threat to the pristine character of the tribe's water supply; and (4) that the Appellants' assertion of immunity from tribal jurisdiction, together with local government's demurrer, creates a lawless enclave within the reservation.

April 2, 2020 Opinion, 98-ER-28831.

The Tribe presented at trial extensive evidence regarding the risk of catastrophic consequences from exacerbated fire damage, pollution of the Tribe's pristine water supply, and protection of public health and welfare. *See*, *e.g*., 21-ER-5812-5845, a Report prepared by Applied Engineering and Technology, dated March 6, 2013, entitled "Report of 2012 Activities;" 20-ER-5580-5612, Declaration of Douglas Allen and exhibits thereto, dated May 14, 2010, filed in the matter of *RMCA v. Mazzetti*, Case No. 09-CV-2330-WQH-JLB (S.D. Cal.); 20-ER-5702-5712, 21-ER-5714-5719, a Draft Report prepared by Applied Engineering and Technology, dated August 4, 2011, entitled "Phase I Environmental Site Assessment;", 21-ER-5720-5748 a Report prepared by Douglas Allen, dated August 9, 2011, entitled "Preliminary Analysis of Fire Prevention Requirements, State Law,

Regulations, Fire Prevention Guides, Fire Hazard Severity Zones, Etc.;" 21-ER-5749-5758, a Report prepared by Applied Engineering and Technology, dated October 28, 2011, entitled "Evaluation of Potential Impacts to Groundwater Quality and Resources;" 21-ER-5759-5786, a Report prepared by Applied Engineering and Technology, dated December 19, 2011, entitled "Report of Soil and Groundwater Sampling, Monitoring Well Installation and Aquifer Testing;" 21-ER-5803-5811, a Report prepared by Babcock Laboratories Inc., dated March 19, 2014, entitled "Quarterly Service Water Monitoring;" 22-ER-6138-6143, a Report prepared by Applied Engineering and Technology, dated May 3, 2016, entitled "Report of January 2016 Site Monitoring Activities;" 34-ER-9894-9908,35-ER-9909-10084, Expert Trial Testimony of Dane Frank, February 2, 2017; 35-ER-10084-10207,36-ER-9208-10264, Expert Trial Testimony of Dane Frank, 36-ER-10265-10486, Expert Trial Testimony of Douglas Allen, February 9, 2017; 36-ER-10265-10486, Expert Trial Testimony of Earl Stephens, February 9, 2017; 42-ER-12094-12196, Expert Trial Testimony of Luke Montague, December 20, 2018. After consideration of the evidence, the Tribal Trial Court found that the Tribe had met its burden under the criteria set forth in *Montana* and its progeny.

In its review for clear error, the Tribal Appeals Court noted that RMCA/Donius concede sufficient facts to support a finding of jurisdiction under *Montana's* Second Exception:

> Here, RMCA/Donius' own admissions about the facts in their brief demonstrates the potential catastrophic impacts of their conduct. RMCA/Donius concede that after a massive wildfire on the reservation and beyond in 2007, "fire-damaged debris was left on the property from October 2007 until August 2008. . . . The risk-impact debris left on the subject property included ash-debris, petroleum, and ash metal." (44-ER-12781). RMCA/Donius also concede that in 2011 "the Tribe's expert engineers found a low-level diesel and motor oil plume extending from off the subject property." Id. In addition, RMCA/Donius concede that in 2015, the Tribe discovered that RMCA/Donius had engaged in unpermitted activities, including "constructing mobile homes, fabricating or refurbishing wooden pallets, parking commercial trucks on the property, parking refrigeration-style trailers on the property, allowing people to live in mobile homes on the property and parking motor vehicles on the property." Id. at 14. Finally, RMCA/Donius have conceded that each of these activities is a potential threat, but rest their defense on the claim that none of these activities have actually harmed the Tribe. However, under *Montana*, **actual harm is not the trigger for tribal jurisdiction**, **potential harm is.** Thus, we do not find RMCA/Donius' defense credible, or consistent with the law.

98-ER-28840. (emphasis added). The District Court reviewed the evidence presented to the Tribal Trial Court and properly "concludes that the Tribe has jurisdiction to enforce the 2014 REEO with respect to the activities on the Property that are the subject of the Rincon Trial Court's Amended Judgment under the second *Montana* exception." 2022 WL 1043451 at * 9.

2. RMCA/Donius’ arguments with respect to the evidence in the record regarding the risks to the Tribe’s protectable interests are unavailing.

RMCA/Donius contend that the Tribal Trial Court merely found that the Tribe’s allegations were “colorable or plausible.” (OB at 41-45). That contention reflects misstatements of the Tribal Trial Court’s express factual findings, based on the weight of extensive expert testimony and reports, as well as the testimony of the parties over thirteen days of trial. The passage upon which RMCA/Donius rely does not conclude that the Tribe’s jurisdiction is merely colorable or plausible, but that the Tribal Trial Court “has no doubt regarding its jurisdiction” after “a complete evaluation and discussion” of *Montana* and its progeny. (33-ER-9500). Similarly, in its May 18, 2017 Opinion (22-ER-6207-6216), the Tribal Trial Court reasoned that “*Montana* goes on to make clear that the activity on the land must **in fact** threaten the tribe’s political and economic security to justify tribal regulation over the land in question. We believe, considering all facts and circumstances in this case, this later statement to be true here.” (22-ER-6214) (emphasis added). Similarly, the District Court rejected RMCA/Donius’ contention, concluding that “the Rincon Appellate Court explicitly discussed the standard and burden of proof, and the relevance of the lawless enclave finding in considering Plaintiffs’ appeal. This Court has also conducted a full review of the issue of tribal jurisdiction in this Order. The

Court concludes that the tribal courts provided Plaintiffs' 'a full and fair trial before an impartial tribunal.'" 2022 WL 1043451 at *11.

Moreover, as stated above, the Tribal Appeals Court noted that RMCA/Donius' "own admissions about the facts in their brief demonstrates the potential catastrophic impacts of their conduct." (98-ER-28835).

Below, the Tribe addresses the specific factual findings with which RMCA/Donius take issue, breaking down the activities conducted on the Subject Property into those which risk polluting the Tribe's pristine groundwater supply, those which exacerbate fire hazards, and those which constitute other threatening activities.

a. Risks of contaminating the Tribe's pristine groundwater supply.

RMCA/Donius do not attempt to dispute the evidence that activities on the Subject Property threaten to pollute the pristine groundwater supply located under the Rincon Reservation, including the Subject Property. Rather, RMCA/Donius attempt to answer different questions – whether RMCA/Donius' activities in fact have polluted the Tribe's "drinking water," and whether the diesel plume, which they admit did occur, is still occurring. (OB at 21-24, 52-54). RMCA/Donius appear to argue that there is clear error in the Tribal Trial Court's conclusion that activities on the Subject Property threaten catastrophic risks because RMCA/Donius submitted evidence of no current contamination of the Tribe's drinking water. The

question is not whether there is current contamination of the Tribe's drinking water – the question is whether RMCA/Donius' activities on the Subject Property risk such contamination. Given the pattern of prior activities and the actual presence of a toxic diesel plume on the Subject Property, and excluding only a nuclear storage facility as possible activity on the Subject Property, substantial evidence exists in the record that the answer to the proper question is clearly "yes".

RMCA/Donius point this Court to evidence that the Subject Property was sealed with concrete and asphalt pavement; that the EPA had found that contaminants after the wildfire were successfully removed; that the drinking water outlets were tested and no contamination was found; that the closest current drinking groundwater intake point is 2,400 feet from the Subject Property; and that a shallow bowl shape of groundwater sits above the primary aquifer running below the Subject Property. (OB at 21-24, 52-54). RMCA/Donius' assertion that "there was no evidence of a catastrophic risk of water pollution" (OB at 52) does not refute the Tribal Trial Court's decision, which was based on the evidence presented by both sides. At best, RMCA/Donius establish that they provided some controverting evidence and argument, but that is simply not enough – the Tribal Trial Court considered all of the evidence, submitted by both sides - RMCA/Donius do not establish clear error in the Tribal Trial Court's factual findings.

RMCA/Donius do not dispute that activities on the Subject Property which occurred during their stewardship caused a toxic diesel plume in the Tribe's groundwater (OB at 22, 52). RMCA/Donius do not dispute that they allowed an above-ground storage tank full of hazardous material to be located upon the Subject Property, without the proper containment required under federal, state and tribal law, which storage tank exploded during a wildfire, causing contamination to the soil and the groundwater. Trial Exhibit 7 at §§ 2, 18-ER-4943-4945 and 9.1,18-ER-4984; Trial Testimony of Melissa Estes, February 1, 2017, 34-ER-9736; Trial Expert Testimony of Dane Frank, February 2, 2017, 34-ER-9907, 35-ER-9909-9978. RMCA/Donius fail to recognize the Tribe's evidence that much of the Subject Property is bare land, not sealed by asphalt and concrete, and that much of the asphalt and concrete is cracked and broken, such that leaching is a real risk. Trial Exhibits 160,22-ER-6093-6118; Trial Testimony of Melissa Estes, January 31, 2017 , 34-ER-9624; Trial Expert Testimony of Dane Frank, February 2, 2017 , 35-ER-9950-9962. The trial testimony of Anderson Donan, December 18, 2018 ,41-ER-11755, is particularly telling, as Mr. Donan, when commenting on the conditions of Rik Mazzetti's property (also located within the boundaries of the Rincon Reservation), identifies that the leaching of leakage from wrecked or stored vehicles onto bare ground risks catastrophic consequences. The same science and conclusion applies to the leaching of leakage from wrecked or stored vehicles onto bare ground or cracked

and broken asphalt and concrete on the Subject Property. RMCA/Donius fail to recognize the Tribe's evidence that only surface material was removed from the Subject Property after the wildfire, and then only in selected areas. Trial Expert Testimony of Dane Frank, February 3, 2017, 36-ER-10210-10211, Trial expert Testimony of Earl Stephens, February 9, 2017, 36-ER-10423-10424. RMCA/Donius fail to recognize that the diesel fuel spill migrated off of the Subject Property in a northwesterly direction, or that later testing of the diesel plume was inhibited by a temporarily-lowered water table resulting from a statewide drought, or that future testing when the water table rises may indeed show a current and migrating presence of the diesel plume. Trial Expert Testimony of Dane Frank, February 2, 2017, 36-ER-10213-10229; Trial Expert Testimony of Earl Stephens, February 9, 2017, 36-ER-10393-10438.

The Rincon Reservation completely surrounds the Subject Property. As a responsible government protecting the Rincon Reservation and all of its residents and businesses, both tribal and non-tribal, in order to remedy any contamination of the underlying groundwater, the Tribe would have to engage in remedial efforts at the location of the Tribe's lands nearest to the point of contamination. Trial Expert Testimony of Earl Stephens, February 9, 2017, 36-ER-10418-10420. The Tribe is currently engaged in the economic development of its lands located adjacent to the point of contamination, and the groundwater lying below those lands is the Tribe's

groundwater. The Tribe will be deprived of using that groundwater resource (whether in connection with development or otherwise), and will be responsible for any cleanup of that resource, if it is contaminated. *Id.* The children and grandchildren of the current Tribe's membership will be subject to that contamination, even if it does not manifest on the Tribe's property for many years. The bottom line is that the contamination will still have been caused by RMCA/Donius' irresponsible stewardship of the Subject Property.

RMCA/Donius want to morph the factual question regarding *Montana's* Second Exception into whether their conduct in fact contaminated the Tribe's drinking water system (OB at 21-24, 52-54). That is the wrong question. RMCA/Donius mock the toxic diesel plume as being too far from the Tribe's wells, and not currently causing any harm to the sole source of drinking water for the entire Rincon Reservation (*Id*.). This litigation is directed to whether RMCA/Donius steward the Subject Property in a manner that risks catastrophic consequences to the Tribe. That a recent and finite example of contamination exists in the context of a contaminated groundwater supply is great evidence for this litigation, but the discovery was terrible news to the Tribe – their sole and pristine source of water for all uses was being contaminated because of an irresponsible property owner. RMCA/Donius are not able to avoid the matter by chanting "no harm/no foul." This recent and finite example of contamination is evidence of the current and on-going

risk. Even though groundwater contamination has happened at least once before, there is no evidence that RMCA/Donius have taken any measures to reduce the risk of it happening again. Trial Testimony of Marvin Donius, March 7, 2017, 37-ER-10785-10793. RMCA/Donius attested that they have done absolutely nothing to make sure activities on the Subject Property will not contaminate the groundwater. *Id.* There is nothing in the record that suggests RMCA/Donius have ever taken any measures whatsoever to that end.

RMCA/Donius cite (OB at 48-50, 58) to *Evans v. Shoshone Bannock*, supra, in support of their contention that the facts here do not support tribal jurisdiction under *Montana's* Second Exception. *Evans* is inapposite; it specifically involved the application of the Shoshone-Bannock Tribes' general zoning law, and did not include any type of factual development showing more than generalized statements of threat to the Shoshone-Bannock Tribes' water supply. *Id*. 736 F.2d at p. 1306. In sharp contrast, the Tribe's tribal law expressly acknowledges the limits of its jurisdiction, and requires the Rincon Environmental Department ("RED") to find, under the particularized facts of the enforcement action at issue, that jurisdiction exists under *Montana's* Second Exception. Also in sharp contrast, in this litigation there is particularized evidence supporting the assertion of jurisdiction – RMCA/Donius do not dispute that they likely contaminated the groundwater with toxic diesel fuel, and they do not dispute that the soils were contaminated when

above-ground fuel storage tanks exploded during a wildfire. In a more analogous case, where the claims of groundwater contamination were particularized, the Shoshone-Bannock Tribe exercised its jurisdiction under *Montana's* Second Exception. *See FMC Corp. v. Shoshone- Bannock Tribes,* 942 F.3d 916 (9th Cir. 2019)[3].

The factual determinations at issue in *Evans* are distinguishable from those at issue here in at least three material respects. First, Evans obtained a Power County (the county in which the property was located) permit and had the intent and expectation that county jurisdiction would govern his activities. 736 F.3d at 1301. Here, San Diego County (the county with exterior boundaries surrounding the Rincon Reservation) asserts that it does not have any civil jurisdiction over the Subject Property (*see* section VII(B)(2)(c), below). RMCA/Donius assert entitlement to a lawless enclave where the only governing restriction is the Marvin Donius "gut instinct" test – if Marvin Donius thinks that an activity is okay, then it's okay. Trial Testimony of Marvin Donius, March 8, 2017, 38-ER-10914. Mr. Donius

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[3] RMCA/Donius wrongly attempt to distinguish *FMC Corp*. on the grounds that that the Shoshone-Bannock Tribes had a consensual relationship with FMC Corp. (OB at 58-59). The FMC Court found that the Shoshone-Bannock Tribal Court properly found jurisdiction under *Montana*'s first exception because of the consensual relationship, and separately found jurisdiction under *Montana*'s Second Exception, not because of the consensual relationship, but because of the evidence presented that the activity posed a serious threat to the Shoshone-Bannock Tribes' protectable interest. 942 F.3d at 934-935.

also concedes, however, that he has no expertise in any of the multiple areas of land-use management, and he will only categorically rule out using the Subject Property as a nuclear waste dump, refusing to rule out any other activity. *Id.,* 38-ER-10913-10914, and 38-ER-11014. Second, in *Evans*, the Shoshone- Bannock Tribes knew exactly what Evans intended to do, based upon plans and county permits. Here, RMCA/Donius have failed to disclose any plans whatsoever as to the activities on or development of the Subject Property. Third, in *Evans*, there was a history of seriously contaminated water 736 F.3d at 1306. The Ninth Circuit was hard-pressed to find catastrophic consequences as a result of adding more pollution to an already-polluted water supply. *Id*. Here, as a matter of fact and by RMCA/Donius' own admission, the drinking water on the Rincon Reservation is clean and pristine, because the fragile aquifer from which the drinking water flows is clean, at least for now. Trial Testimony of Melissa Estes, February 1, 2017, 34-ER-9852. Here, the activities in question pose a serious risk of polluting a clean water system, which is the sole source of water for the entire Rincon Reservation. Accordingly, the risk is of an extremely high magnitude.

Significantly, the *Evans* court did not negate or diminish *Montana's* Second Exception. *Montana* and its progeny, including the Ninth Circuit opinion in *Elliot*, are still the law. Rather, *Evans* reaffirmed *Montana's* Second Exception, but found that the Shoshone-Bannock Tribes failed to proffer particularized evidence that

Montana's Second Exception applied. In considering RMCA/Donius' statements that the facts in this case and in *Evans* are similar, this Court should ask/ponder whether the result in *Evans* would have been the same if Evans had not secured the permits issued by Power County; if Evans had not been transparent about his plans for developing the entirety of his fee lands within the Fort Hall Reservation; and if the threat of groundwater pollution had been to a pristine, clean and fragile aquifer that was the sole source of water to the Fort Hall Reservation.

Similarly, RMCA/Donius cite *Mandan, Hidatsa, and Arikara Nation v. U.S. Dept. of Interior*, 2022 WL 2612127, (D.N.D. June 9, 2022) for the proposition that mere speculation of contamination of a body of water does not meet the threshold for applying *Montana*'s Second Exception (OB at 60). Unlike the facts at issue here, at issue in *Mandan*(an action under the APA challenging the issuance of a drilling permit by the Department of the Interior) was the tribe's failure to submit evidence into the administrative record regarding its opposition to the Department's review under NEPA. The Department had expressly asked the tribe for "any documentation of science" to justify the need for the setback, and having received none, concluded that the tribe lacked jurisdiction. The case did not involve an appeal of a tribal court decision (as here) which found that the specific facts and particular circumstances presented at trial met the required threshold for jurisdiction under *Montana*'s Second Exception. The tribe in *Mandan* attempted to use the NEPA process to apply a 1,000-

foot setback rule, applicable under tribal law to tribal properties, to the fee land on which the drilling is proposed. *Id.* Here, in sharp contrast, the evidence presented to a full trial on the merits identifies an articulated and evidenced risk to the Tribe's pristine groundwater, the sole source of water for the Rincon Reservation. Moreover, RMCA/Donius fail to inform this Court that the *Mandan* case is currently pending an appeal to the Eighth Circuit. Case No. 22-2459 (oral argument is scheduled to be heard on October 19, 2023).

RMCA/Donius' assertions that there is no evidence regarding risk to the Tribe's pristine groundwater fails to establish clear error regarding the Tribal Trial Court's factual conclusion.

b. Risks from fire hazards.

RMCA/Donius boldly assert: "There was no evidence of a catastrophic risk to the Tribe's fire safety" (OB at 54). In contrast to the analysis regarding water quality, where the Tribal Trial Court weighed the evidence provided by both parties on the issue of fire hazards, RMCA/Donius provide only conclusory assertions and provide no evidence regarding risks from fire hazards.

Unequivocal evidence has been presented by the Tribe, but RMCA/Donius simply ignore it as if it is not there. The report of premier fire expert Douglas Allen, entitled "Fire Prevention Requirements, State Law, Regulations, Fire Prevention Guides, Fire Hazard Severity Zones, etc.", prepared August 9, 2011, Trial Exhibit

140, 21-ER5720-5748, concludes that any activities on the Subject Property should be subject to a specific development plan that identifies all activities, and ensures compliance with fire prevention requirements at least as restrictive as those set out in the California Fire Code, the California Building Code, the California Public Resources Code § 4291, the California Operations Fire Prevention Field Guide, ed. 1999, and the California Property Inspection Guide, Ed. 2000. Moreover, expert witness Allen inspected the Subject Property by viewing it from its full exterior boundaries and from a nearby mountain, and found "conditions on the Subject Property that in my opinion pose serious potential fire and safety hazards". Trial Exhibit 134, 20-ER-5580-5612. Expert witness Allen provides numerous examples of fire hazards currently present on the Subject Property, concluding "It is my opinion that the above-described fire hazard conditions on the Subject Property and the likelihood of a fire originating on that property or sweeping through would pose a serious threat to the Casino and resort and the safety of those occupying it." *Id.*; *See also* Trial Expert Testimony of Douglas Allen, February 9, 2017, 36-ER-10287-10382.

RMCA/Donius do not dispute that, on two occasions, wildfires driven by Santa Ana winds from the east swept through the Subject Property, which is immediately upwind from the Tribe's casino/resort. *Id.* RMCA/Donius do not dispute that tanks and structures on the Subject Property exploded, creating fireballs

and burning embers. *Id.* This litigation is directed to whether RMCA/Donius steward the Subject Property in a manner that does not risk catastrophic consequences to the Tribe. The two finite examples, in the context of the prior wildfires, provide evidence that activities on the Subject Property are being conducted with complete disregard for the risk of catastrophic consequences. Since the initial explosion during the first fire of the above-ground diesel storage tank located upon the Subject Property, new above-ground storage tanks have been located upon the Subject Property. Live, long electric cords with exposed connections are extended for hundreds of feet across the Subject Property, and are left unattended over grass and debris. *Id.* Abandoned trailers and recreational vehicles sit idle on the Subject Property and are decaying, and several very tall stacks of wood pallets with or without chemicals are stored on the Subject Property. *Id.* All of these create or enhance the fire risk to the Tribe.

Again, RMCA/Donius attempt (OB at 25-27, 54-55) to redefine the inquiry as to whether RMCA/Donius' activities, in fact, caused the wildfires that ravaged the Rincon Reservation, and suggest that Douglas Allen's testimony that the two-lane County Road helps buffer the fire hazard to the Tribe's casino-resort eliminates any risks to the Tribe's casino-resort arising from RMCA/Donius' activities. Those allegations, even if correct (they are not), do not negate the Tribal Trial Court's findings that RMCA/Donius' activities risk enhancing or exacerbating the damage to the Tribe when wildfires spread through the Rincon Reservation.

RMCA/Donius fail to establish clear error regarding the Tribal Trial Court's factual conclusion that, considering all facts and circumstances, RMCA/Donius' activities in fact threaten the Tribe's political and economic security so as to justify tribal jurisdiction over the Subject Property.

c. RMCA/Donius conducting activities in a lawless enclave is a proper factor considered by the Tribal Trial Court.

RMCA/Donius contend that the District Court erred in finding that the Tribal Trial Court properly considered the paucity of federal, state or county assertions of regulatory jurisdiction over activities conducted on the Subject Property as a factor in determining whether *Montana*'s Second Exception applied (OB at 46-50). RMCA/Donius' discussion of possible concurrent jurisdiction with San Diego County or the United States does not dispute the fact that RMCA/Donius have never sought any county or EPA permits; have never otherwise sought to ensure that activities conducted on the Subject Property were being conducted in compliance with county or EPA regulations; and have never sought to ensure that activities were being conducted on the Subject Property in accordance with any standard other than the Marvin Donius "gut instinct" check, a/k/a the "lawless enclave" standard (Trial Testimony of Marvin Donius, March 8, 2017, 38-ER-10914).

The Tribal Trial Court was correct to identify the reality of a "lawless enclave" as a factor in concluding that the Tribe had met its burden under *Montana.* The Tribal Trial Court noted that RMCA/Donius were "vague and unresponsive" to tribal

inquiries about the use of the Subject Property (May 18, 2017 Opinion, 22-ER-6213), and that the only activity RMCA/Donius would rule out conducting on the Subject Property was "a nuclear waste dump." (May 18, 2017 Opinion, 22-ER-6214). When there is a void of non-tribal law, such as in the present case where San Diego County has declined jurisdictional authority, to ensure that activities conducted on the Subject Property do not pose a risk of catastrophic consequences, the risks of such dangerous conduct "short of a nuclear waste dump" causing catastrophic consequences is heightened. Absent any entity with jurisdiction to which RMCA/Donius must disclose development plans and business activities, and address potential impacts, the Tribal Trial Court properly noted "chaos would ensue" (May 18, 2017 Opinion, 22-ER-6215).

It follows that the threshold question of whether activities actually pose a risk of catastrophic consequences is lessened where other jurisdictions are able to protect a tribe's interests in the absence of tribal jurisdiction. As discussed above, the presence of county-issued building permits was a factor in the *Evans* court finding that the Shoshone-Bannock Tribes had failed to meet their burden of establishing jurisdiction under *Montana's* Second Exception. Accordingly, the existence of a "lawless enclave" is a proper factor to be considered in determining whether the Tribe met its burden under *Montana* and its progeny.

RMCA/Donius refute whether San Diego County exercises civil/regulatory jurisdiction over the Subject Property by engaging in their own self-serving interpretation of Section 1006(c) of the San Diego County Zoning Ordinance. Even assuming *arguendo* that the County could assert jurisdiction over the Subject Property, the Tribe established that the County, in fact, does not assert such jurisdiction. Four exhibits submitted to the Tribal Trial Court place the County's lack of exercising civil/regulatory jurisdiction beyond dispute. First, on August 13, 2004, San Diego County's Tribal Liaison informed the Tribe, in writing, that the "County has no land use jurisdiction over the parcel." Trial Exhibit 101, 19-ER-5311. Second, on January 21, 2007, San Diego County's Fire Service Coordinator confirmed to the Tribe's Fire Department that the "County does not have jurisdiction on this parcel." The correspondence was forwarded to RMCA/Donius' legal counsel on November 15, 2007. Trial Exhibit 111, 19-ER-5333. Third, on December 15, 2008, RMCA unsuccessfully sued SDG&E for failure to provide power to the Subject Property, and SDG&E filed cross claims against the Tribe and San Diego County. In its formal Answer filed with the State Superior Court, San Diego County "Admits that the County has no jurisdiction over the Subject Property, and that the County does not intend to take any action on the Subject Property, including enforcing county ordinances." Trial Exhibit 124, 20-ER-5450-5451. Fourth, on March 27, 2012, in response to a demand by RMCA/Donius' lawyer at the time,

George McGill (now deceased), legal counsel for San Diego County informed Mr. McGill that the County lacked civil/regulatory jurisdiction on any property within the external boundaries of the Rincon Reservation, except for the narrow exception of its right-of-way for Valley Center Road. Trial Exhibit 144, 21-ER-5801-5802.

RMCA/Donius' assertions that evidence of the existence of a lawless enclave is irrelevant fail to establish clear error regarding the Tribal Trial Court's factual conclusion that, considering all facts and circumstances, RMCA/Donius' activities in fact threaten the Tribe's political and economic security, thereby justifying tribal jurisdiction over the Subject Property.

There was much activity and evidence presented at trial over what is actually known – that RMCA/Donius have established a pattern of disregard to risks of groundwater pollution, fire hazards and unsanitary conditions, which all imperil tribal interests. What may be more troubling, however, is what is not known. Hiding in their lawless enclave, RMCA/Donius candidly concede that they believe they could conduct any activity, large or small, dangerous or not, without the need for any assessment of or protection against grave and catastrophic impacts, and proceed with impunity. The Tribe is not seeking to prevent RMCA/Donius from engaging in any lawful activity or development of the Subject Property; rather, it only seeks that activities be conducted in a manner that does not imperil protectable tribal interests. *Montana's* Second Exception affords the Tribe the jurisdiction to do so.

d. Other activities on the Subject Property reinforce the Tribal Trial Court's findings.

In addition to the threat of RMCA/Donius' activities to the Tribe's pristine groundwater, and to exacerbating the fire hazard to the Tribe's economic interests, the Tribal Trial Court also looked to evidence and testimony regarding unsanitary conditions and the scattering of cars, mobile homes and recreational vehicles, most in damaged condition, on the Subject Property.

First, RMCA/Donius argue (OB at 26 - 27) that no evidence exists that the activities on the Subject Property threaten public health and the spread of disease, because any such evidence is based on RED Director Melissa Estes' own observations and mere "speculation" that public health is at risk. Ms. Estes was not speculating – she was making conclusions based on her actual observation of unsanitary conditions. Testimony of Melissa Estes, March 9, 2017, 39-ER-11189. Ms. Estes is an experienced director of governmental environmental departments and a credentialed biologist. Testimony of Melissa Estes, January 31, 2017, 39-ER-11276-11280. It does not take a rocket scientist to conclude that unsanitary conditions can threaten public health and the spread of disease.

Second, RMCA/Donius argue (OB at 51-52, 56) that there is no evidence that the parking or storage of campers, recreational vehicles and other vehicles pose any risk of catastrophic consequences. Yet, they ignore the fact that the vehicles were observed to be broken and dilapidated (which they attempt to redefine as "vintage"),

that much of the Subject Property is dirt, and that the portions of the Subject Property which are paved with asphalt or cement are broken, cracked and dilapidated, increasing the likelihood that contaminants will leach into to soil. (Trial Exhibits 160 (22-ER-6093-6118; Trial Testimony of Melissa Estes, January 31, 2017, 34-ER-9624, 9629; Trial Expert Testimony of Dane Frank, February 2, 2017, 35-ER-9950-9952). Moreover, RMCA/Donius fail to address that their own alleged expert, viewing the same types of activities occurring within the Rincon Reservation's boundaries at Rik's Garage, concluded that such activities posed the risk of catastrophic damage to the Tribe's groundwater. (Trial Testimony of Anderson Donan, December 18, 2018, 41-ER-11765).

Third, RMCA/Donius assert (OB at 55) that the "Tribe's small size" is not a factor to be considered in the determination that jurisdiction exists under *Montana*'s Second Exception. The May 18, 2017 Opinion of the Tribal Trial Court acknowledges that situations regarding the application of *Montana's* Second Exception differ, such as the size of the tribe or reservation, and do not allow for a cookie-cutter approach, and that the Tribe's inability to control land use to the extent necessary to protect its interests, due to RMCA/Donius' activities, impacts the "small Tribe" and its "small reservation." May 18, 2017 Opinion, 22-ER-6215. Moreover, size is merely one of "several factors that distinguish this case." *Id.*

RMCA/Donius' assertions that there is no evidence regarding public health risks fail to establish clear error regarding the Tribal Trial Court's factual conclusion that, considering all facts and circumstances, RMCA/Donius' activities in fact threaten the Tribe's political and economic security so as to justify tribal regulation over the Subject Property.

3. RMCA/Donius' arguments that the Tribe was motivated to render the Subject Property unmarketable are unavailing.

Similarly, the Tribal Trial Court correctly rejected RMCA/Donius' allegations (OB at 10, 17) that the Tribe was motivated to render the Subject Property unmarketable, except to the Tribe. RMCA/Donius contend that the Tribe's claim of being legitimately concerned over (RMCA/Donius') use of the Subject Property was a "pretext," and that the real reason for the Tribe's attempts to regulate its use was to make the Subject Property unmarketable except to the Tribe. (44-ER-12763, Brief of Appellants to the Rincon Appeals Court at pp. 5 and 36). The Tribal Trial Court concluded "none of these allegations to be true. They are unfounded and per evidence presented at trial, untrue." (April 22, Judgment, 25-ER-7057).

At trial, when asked what evidence they had to support their allegation, RMCA/Donius pointed only to the Tribe following through with the court-approved enforcement action as "evidence" that the Tribe was motivated not by legitimate concerns of impacts to tribal interests, but by an ulterior motive of forcing a "cheap sale" of the Subject Property to the Tribe. 40-ER-11545-11707, 41-ER-11709-

11826, Trial Testimony of Marvin Donius, December 18, 2018, 40-ER-11605-11613. Such backwards reasoning must be examined in its proper context: RMCA/Donius assert that the Tribe, by going to the Tribal Trial Court in an effort to secure a court order allowing the Tribe to proceed with enforcement action, with full notice and opportunity to RMCA/Donius to be heard, and with full due process being afforded to RMCA/Donius, including the opportunity for RMCA/Donius to avail themselves of both the Tribal Trial Court and the Tribal Appeals Court to assert a defense that the enforcement action was not warranted, somehow is "evidence" supporting RMCA/Donius' contrived conspiracy theory of the Tribe's efforts to extort a below-market sale of the Subject Property to the Tribe. What the Tribe's actions actually evidence is the opposite of what RMCA/Donius assert: the Tribe, in taking RMCA/Donius to Tribal Trial Court, is transparent regarding its intended enforcement actions, and its intent to implement the proposed enforcement actions only if the independent tribunal of the Tribal Trial Court approves. Such conduct hardly reflects a conspiracy on the part of the Tribe to force a below-market sale of the Subject Property to the Tribe.

Similarly, RMCA/Donius assert that a sale of the Subject Property to a third party and lease of a portion of the Subject Property fell through because of the Tribe's asserting jurisdiction over activities on the Subject Property (OB at 17), but RMCA/Donius can neither establish that the transactions fell through as a result of

any tribal communication or that the alleged tribal communication is not true. Even by RMCA/Donius' admission, the Tribe does have jurisdiction over activities on the Subject Property to the degree necessary to protect tribal interests, including economic interests, from the risk of catastrophic consequences. *See* 40-ER-11609-11614, Trial Testimony of Marvin Donius, December 18, 2018, Transcript. Any future buyer of the Subject Property should be aware of such jurisdiction.

C. The District Court properly granted comity to recognize the Tribal Trial Court opinions and to enforce the Amended Judgment.

1. RMCA/Donius have abandoned their argument that the Tribal Trial Court deprived them of proper due process.

Notably, RMCA/Donius do not allege error in the District Court's granting comity: "The Amended Judgment of the Rincon Trial Court must be recognized and enforced as a matter of comity unless Plaintiff's were denied due process or other special circumstances are present." 2022 WL at 1043451 at *10. Finding that RMCA/Donius were not denied due process and no special circumstances present, the District Court ruled "Defendants are entitled to prevail on their counterclaim regarding the recognition and enforcement of the June 26, 2020 Amended Judgment of the Rincon Trial Court." *Id.* at *13.

RMCA/Donius argued repeatedly below, until this appeal, that comity should not be granted where there has been a deprivation of due process, citing *Marchington,* 127 F.3d at pp.14-15, with the term "due process" meaning "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 by the defendant and there is no showing of prejudice in the tribal court or in the system of governing laws." 3-SER-221-222. That RMCA/Donius have abandoned the argument on appeal reinforces the correctness of the District Court's affirmance of the Tribal Trial Court's findings that the Tribe established jurisdiction under *Montana*'s Second Exception.

2. Tribal Ordinances, including the Rincon Environmental Enforcement Ordinance, afford RMCA/Donius due process of law.

The Rincon Environmental Enforcement Ordinance ("REEO"), the tribal statute on which RED's enforcement actions were taken, requires that: "[P]rior to taking enforcement action . . . the RED must make a specific written determination that the conduct qualifies under the scope of the RED's enforcement authority as set forth in Section 8.301 (expressly incorporating *Montana*'s Second Exception) including the facts relied upon and the rationale for such determination." Only after such a written determination is made, and only after the impacted party fails to comply with the NOV, may the Tribe then file an action in Tribal Trial Court to seek enforcement of the NOV. Indeed, the Tribe sought just such an Order in the very litigation which RMCA/Donius now appeal to this Court, to take the proposed

enforcement action, but only after full notice to RMCA/Donius and their attorney, and only after affording the full due process of the Tribal Trial Court.

Throughout this litigation and at every stage before this appeal, RMCA/Donius contended that the REEO requires that they seek and receive approval of a business plan before they can engage in any activities on the Subject Property (it does not), and contended that the REEO is intentionally structured to deprive RMCA/Donius of due process of law, 3-SER-254-259, (it does not). *See*, *e.g*., 4-SER-327-332. Notably, after being rebuked repeatedly on his false and baseless allegations, *see, e.g*., April 24, 2019 Judgment, 25-ER-7057, RMCA/Donius do not make that argument in their current appeal. Accordingly, the argument has been waived.

3. RMCA/Donius have abandoned their claims of biased jurists.

RMCA/Donius contended in proceedings below that the Opinion issued by the Tribal Appeals Court (98-ER-28801-28843) is irrelevant because the three esteemed jurists "are paid by the Tribe and have a financial interest in staying on the panel" (4-SER-340). RMCA/Donius have abandoned such insulting, indeed libelous, assertions. All three appellate court judges, as well as the judge of the Tribal Trial Court, are experienced jurists in federal or state courts, subject to the rules of ethics of those forums, and are active members of state bar associations in good standing. RMCA/Donius' suggestion that being paid by the Tribe renders their

opinions irrelevant has no place in this litigation. RMCA/Donius do not make that argument in their current appeal. Accordingly, the argument has been waived.

D. RMCA/Donius' challenges to the scope of the injunctive relief in the Amended Judgment are out of order and without merit.

RMCA/Donius contend that the scope of the injunctive relief set forth in the Amended Judgment is overly broad (OB at 61-64). That issue is not properly before this Court because RMCA/Donius failed to appeal the Amended Judgment to the Tribal Appeals Court. As the District Court found "[t]he injunction contained in the Amended Judgment has not been appealed within the tribal court system." 2022 WL 1043451at *2. Further, the District Court concluded "Plaintffs' failure to exhaust their tribal remedies with respect to the injunction precludes review of the injunction by this Court." *Id.* at *12. RMCA/Donius provide no argument or analysis that the District Court erred in refusing to review their contention that the scope of the injunction in the Amended Judgment is overly broad.

The Tribal Appeals Court found the injunctive provisions of the initial Judgment to be overly broad and remanded the case to the Tribal Trial Court with instructions "to mold the protuberances of the injunction to the hollows of the potential harm" Tribal Appeals Court decision, 98-ER-28840. Hence, it is clear that the Tribal Appeals Court may have/could have indeed provided RMCA/Donius the very relief they now seek.

Even if the RMCA/Donius had properly appealed the scope of the injunctive provisions of the Amended Judgment, however, their arguments are unavailing. The allegations that the injunctive provisions are overly broad focus on the provisions requiring RMCA/Donius to comply with various specified laws and regulations of the county, state or United States regarding activities conducted on the Subject Property where tribal law is silent. That spurious argument only underscores the Tribe's analysis on the issue of the lawless enclave. The Amended Judgment merely requires RMCA/Donius to be aware of and comply with the very same exact laws that would apply if the Subject Property were a mere mile north of its current location, but outside of the external boundaries of the Rincon Reservation.

E. RMCA/Donius' contrived argument that the District Court lacked personal jurisdiction is unavailing.

RMCA/Donius attempt to disguise their failure in the District Court and the Tribal Courts to adequately challenge the courts' personal jurisdiction over them as reversible error (OB at 31-40). They focus their argument on Judge Hayes' footnote:

> Plaintiffs contend that the Rincon Trial Court lacked both "personal and subject matter jurisdiction...." (ECF No. 166 at 26). However, Plaintiffs do not explain the basis for their contention that the Rincon Trial Court lacked personal jurisdiction over them other than to state that "the district court is to look to *Montana*, supra, and related federal common law following that decision." (*Id.* at 23). The personal jurisdiction analysis is distinct from *Montana*'s subject matter jurisdiction analysis. *See, Water Wheel*, 642 F.3d at 819 n.9. (recognizing that personal jurisdiction is "distinguishable" from subject matter jurisdiction and can be established through physical presence or in-state service).

Plaintiffs have failed to demonstrate that the Rincon Trial Court lacked personal jurisdiction.

1-ER-23; 2022 WL 1043451at *4, n.1 (S.D. Cal. 2022) (emphasis added).

RMCA/Donius misconstrue the gravamen of the District Court's footnote. The quoted footnote of the District Court acknowledges RMCA/Donius raised the issue (or at least included the words), but RMCA/Donius provided no analysis or evidence, and the footnote concludes that "Plaintiffs have failed to demonstrate that the Rincon Trial Court lacked personal jurisdiction." 1-ER-23.

RMCA/Donius' predicament is problematic. Judge Hayes affirmed the Tribal Trial Court's finding that RMCA/Donius' activities meet the threshold of *Montana*'s Second Exception because their activities are conducted within the external boundaries of the Rincon Reservation and sufficiently threaten protectable tribal interests. Those same activities provide "certain minimum contacts" with the Tribe, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). It follows that Judge Hayes concluded that RMCA/Donius have failed to establish a lack of personal jurisdiction.

The Supreme Court has never found a tribal court's assertion of *personal* jurisdiction to be improper. *World-Wide Volkswagen Corp. v. Woodson*, 344 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, *357* U.S. *235, 253* (1958)). Specific personal jurisdiction exists where "the defendant has purposefully directed his

activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985). Because of the finding that RMCA/Donius' activity is conduct that imperils the protectable interests of the Tribe, the Tribal Trial Court could properly assert personal jurisdiction over a non-Indian transgressor. It follows that persons or entities have "purposefully availed" themselves to the jurisdiction of a tribe by conducting or authorizing activity upon real property within the tribe's external boundaries that threatens protectable tribal interests. *See* Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 American Indian Law Review. (2011) at 542 n.80.

Notably, RMCA/Donius cite to *Cohen's Handbook of Federal Indian Law*, §7.02[2] at 604, for the proposition that it is possible that a tribal court may have subject matter jurisdiction in a case where it lacks personal jurisdiction, but RMCA/Donius delete the qualifying introduction to the sentence: "***it is conceivable, although unlikely.***" Cohen continues to state that as a practical matter, an individual whose conduct "threatens or directly affects tribal interests within the meaning of *Montana's* Second Exception, is very likely to have minimum contacts with the forum sufficient to justify the tribal court's personal jurisdiction." Cohen, *supra* note 51, at 605. Moreover, RMCA/Donius' attempt to use *Water Wheel Camp*

Recreational Area v. Larance, 642 F.3d 802 (9th Cir. 2019), as support is misplaced. Although *Water Wheel* established tribal court jurisdiction under *Montana*'s First Exception (consensual relationship), tribal court jurisdiction was also established under *Montana*'s Second Exception, *Id.* at 807. The *Water Wheel* court found that minimum contacts were present to establish personal jurisdiction for the tribal court's award of damages for conduct that occurred *after* the consensual relationship had ended, *Id*. at 806 and 820 ("Johnson clearly had sufficient minimum contacts with the CRIT and its tribal land to satisfy considerations of fairness and justice"). Similarly, RMCA/Donius' attempt to distinguish *Smith v. Salish Kootenai College*, 424 F.3d 1127, 1136 (9th Cir. 2006), is misplaced ("because we conclude that Smith's agreement to invoke the jurisdiction of the tribal court fits more comfortably within the first exception, we need not decide whether the second also applies").

RMCA/Donius attempt, for the first time in this litigation, to contend that they lack the minimum contacts necessary to establish personal jurisdiction by noting that they have no consensual or contractual relationship with the Tribe, and that the Subject Property is fee land acquired from another non-Indian (OB at 37-39). Those points do not negate the fact that RMCA/Donius are conducting activities that threaten protectable tribal interests. This case is not about a hypothetical situation wherein the Tribe is asserting jurisdiction over an unaware and distant off-reservation tortfeasor. RMCA/Donius knowingly acquired the Subject Property,

which is located well within the external boundaries of the Rincon Reservation (21-ER- 5920). In doing so, RMCA/Donius knew or should have known that the Tribe has jurisdiction over activities on non-Indian fee lands that threaten protectable tribal interests. Accordingly, it is incredulous to argue that being subject to the jurisdiction of the Tribal Trial Court offends traditional notions of fair play and substantial justice.

Furthermore, much of RMCA/Donius' briefing on this issue is defensive (OB at 34-37), insisting that the argument was not waived, without directly conceding that waiver is an issue. This Circuit follows the general rule that appellate courts will not consider arguments that are not raised before the District Court. *W.B. Music Corp. v. Royce International Broadcasting Co*., 47 F.4th 944, 951 (9th Cir. 2022); *see also Cray Inc. v Raytheon Co.* 179 F.Supp. 3d 977 (W.D. Wash. 2016) (refused to consider argument regarding personal jurisdiction when raised for the first time in a reply brief and movant failed to provide sufficient information to address issue). Moreover, an argument that is perfunctory and undeveloped in the District Court is considered waived. *National Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir. 1997) (cited with approval in *Cooper v. U.S.*, 1998 WL 4086 at *1 (9th Cir. 1998)). At best, RMCA/Donius can contend that they raised the words "personal jurisdiction" in proceedings below, but they cannot contend that the argument was developed or in any way distinguished from their argument that this case falls outside of

Montana's Second Exception. Accordingly, this Court should not consider RMCA/Donius' argument regarding personal jurisdiction on appeal.

RMCA/Donius fail to establish that the District Court erred in its determination that "Plaintiffs have failed to demonstrate that the Rincon Trial Court lacked personal jurisdiction."

F. RMCA/Donius' argument that the District Court erred in denying leave to amend their Complaint for the third time, is unavailing.

After contending for thirteen years that the Tribe lacks jurisdiction over RMCA/Donius' activities on the Subject Property, and after filing a First Amended Complaint in July 2020 (5-SER-551-721) and Third-Party Claims in September, 2020 (4-SER-352-435), and losing on those claims, RMCA/Donius sought to file a Second Amended Complaint alleging a grand conspiracy between the Tribe, San Diego County and SDG&E to deprive RMCA/Donius of their ability to lawfully engage in activities on the Subject Property (2-SER-21-206). The crux of the alleged conspiracy is that the lawless enclave was deliberately created by the County not asserting its own jurisdiction over the Subject Property (2-ER-050,052).

The District Court properly denied RMCA/Donius' motion, noting that they were aware of the facts on which they now allege this grand conspiracy since 2007, before the filing of RMCA/Donius' initial complaint in 2009, and failed to include this grand conspiracy in their First Amended Complaint filed in July 2020, waiting until after all existing claims had been fully adjudicated to seek leave to amend. 2022

WL 17345485 at *4. The District Court found that because of the undue delay in seeking leave to bring the new claims and the prejudice to the parties, essentially taking them back to square one in resolving a 13-year old dispute, it would not exercise its discretion to allow leave to amend. *Id*. at *4-5.

RMCA/Donius correctly note that the District Court's denial of leave to amend is only to be reversed for an abuse of discretion (OB at 65, citing *Salameh v. Tarsadia Hotel,* 726 F.3d 1124, 1133 (9th Cir. 2013)). The District Court properly found that undue delay and prejudice to the parties are both factors on which the court may exercise its discretion to deny leave to amend. 2022 WL 17345485 at *4-5, citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) and *Eminence Capital, LLC v. Aspeon, Inc*., 316 F.3d 1048, 1051 (9th Cir. 2003) (undue prejudice), and *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) (undue delay). Yet, RMCA/Donius fail to provide any plausible analysis refuting the District Court's findings of undue delay and undue prejudice. The District Court noted that both are sufficient grounds for denying leave to amend. RMCA/Donius contend that the stay of the District Court's analysis prevented RMCA/Donius from filing their amendments prior to July, 2020, but the stay would not have prevented RMCA/Donius from filing their claims in their initial Complaints to the District Court or from seeking leave to amend their Answer or otherwise raise the allegations in the Tribal Trial Court proceedings. Moreover if leave were granted, the case

would need to be stayed yet again pending RMCA/Donius' exhaustion of tribal remedies, allowing the Tribal Trial Court and the Tribal Appeals Court to first adjudicate the merits of the new claims. Perhaps most troubling is RMCA/Donius' statement that "only after the District Court recognized the Amended Tribal Court judgment did appellants have new allegations against all three defendants for actualized harm from these parties' concerted inaction or misfeasance" (OB at 66-67). The inexplicable statement is a non-sequitur. The allegations that comprise the Second Amended Complaint predate and have nothing to do with the District Court's grant of comity to the Amended Judgment. Moreover, the District Court properly reasoned that RMCA/Donius could have included the new allegations in the First Amended Complaint, filed in July 2022, but did not. *Id* at. *4.

RMCA/Donius fail to establish that the District Court abused its discretion in denying leave to file a Second Amended Complaint.

VIII. CONCLUSION

Although it was a formidable task to summate more than a decade of litigation, thousands of pages of exhibits, dozens of days of deposition and trial testimony, and hundreds of pages of court-issued opinions and orders into a single brief, this Opposition Brief establishes that the Tribal Trial Court afforded enormous due process to RMCA/Donius, despite their defiance of the Tribe's jurisdiction, and after an extensive trial, the Tribal Court properly found that the Tribe met its burden of

establishing jurisdiction over RMCA/Donius' activities on the Subject Property pursuant to *Montana's* Second Exception. No error of law, and no clear error of fact, occurred. Accordingly, the District Court's opinions and Final Judgment should be affirmed.

DATED this 2nd day of October, 2023.

s/ *Scott D. Crowell*
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STATEMENT OF RELATED CASES

There are no related appeals pending in this Court.

Dated: October 2, 2023 s/ *Scott Crowell*
SCOTT CROWELL

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 2, 2023

s/ *Scott D. Crowell*
SCOTT D. CROWELL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-55111

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