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

APPELLANTS' OPENING BRIEF

Rupa G. Singh, SBN 214542
NIDDRIE ADDAMS FULLER
SINGH LLP
501 West Broadway, Suite 800
San Diego, CA 92101
858.699.7278
rsingh@appealfirm.com

Manuel Corrales, Jr.,
SBN 117647
17140 Bernardo Center Drive,
Suite 358
San Diego, CA 92128
858.521-0634
mannycorrales@yahoo.com

Attorneys for Plaintiffs, Counter-Defendants, and Appellants
RINCON MUSHROOM CORPORATION OF AMERICA
and MARVIN DONIUS

DISCLOSURE STATEMENT

As required under Federal Rule of Appellate Procedure 26.1(a), appellant Rincon Mushroom Corporation of America, Inc. states that it has no parent company and no publicly-held corporation owns ten percent or more of its stock.

Dated: August 2, 2023

Respectfully submitted,

NIDDRIE ADDAMS FULLER SINGH LLP

By: *s/ Rupa G. Singh*
Rupa G. Singh

MANUEL CORRALES, JR.

By: *s/ Manuel Corrales, Jr.*
Manuel Corrales, Jr.

Attorneys for Plaintiffs, Counter-Defendants and Appellants

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INTRODUCTION

This appeal arises from the erroneous recognition and enforcement of a tribal court judgment that purports to regulate appellants' use of their non-Indian fee simple land. The Court should reverse because the tribal court lacked personal jurisdiction over appellants, and its assertion of subject matter jurisdiction over their routine commercial activities eviscerates half a century of Supreme Court jurisprudence. Nor should the District Court have deemed untimely appellants' amended claims against the tribe and two defendants whose continuing inaction allowed the tribe to assert regulatory jurisdiction over appellants' private property.

Appellants are non-Indian fee landowners of a five-acre parcel of land (the Property) within the boundaries of a reservation in San Diego County, home to the Rincon Band of Luiseno Indians (the Tribe). In the decades since the Property passed out of tribal ownership, appellants have used or leased it for permissible activities such as mushroom farming, wood pallet manufacturing, junk disposal, or auto storage. However, the Property gained heightened value to the Tribe as a potential site to expand access to its nearby casino. As a result, when a 2007 wildfire caused explosions, oil leaks, and other damage on the Property, the Tribe began to complain that appellants' previously-unobjectionable activities were hazardous to its drinking water and fire safety. It also directed SDG&E not to

restore power to the Property disrupted by the wildfire, and later, tried to sue appellants in tribal court for renting billboard space to a competing casino owner.

Appellants filed the underlying suit to stop the Tribe's interference, which the District Court stayed after ordering appellants to exhaust tribal court remedies. Appellants complied, but objected to the tribal court's lack of personal and subject matter jurisdiction. Doubling down, the Tribe cross-claimed against appellants for allegedly violating its newly-enacted environmental ordinances.

Ignoring appellants' objection to its personal jurisdiction, the tribal court found grounds for tribal regulatory jurisdiction over the Property as an asserted "lawless enclave," allegedly neglected by appellants and unregulated by any agency. But Supreme Court precedent does not recognize this as one of two limited exceptions to the rule that tribal jurisdiction over activities on non-Indian fee simple land is presumptively invalid. Moreover, though the Tribe invoked the second exception, allowing tribal regulation of activities on non-Indian land *if* they risk catastrophic harm to tribal subsistence, it failed to establish either asserted risk to its water quality and fire safety. Nevertheless, the tribal court issued a judgment finding tribal regulatory jurisdiction over appellants' use of the Property, which the District Court recognized and enforced. The District Court also later rejected as untimely appellants' amended claims against the Tribe, County, and SDG&E. These rulings constitute reversible error for several reasons.

First, the tribal court lacked personal jurisdiction over appellants, who had no minimum contacts or other relationship with the Tribe, and only appeared in tribal court to exhaust their remedies, as ordered. Second, the Tribe failed to overcome the presumptive invalidity of tribal regulation over appellants' activities on the Property by showing that they risked catastrophic harm to its water supply or fire safety. Rather, the EPA declared the Tribe's water safe for drinking and evidence showed that pollution of its water well was a remote possibility. Also, even the Tribe's experts conceded that wildfire-related explosions, leaks, and damages did not jump to the casino but were confined within the Property's boundaries. Finally, appellants' amended claims against the Tribe, the County, and SDG&E were, in fact, timely, because they fully ripened during tribal court proceedings that brought to light these parties' continuing inaction or misfeasance.

If left to stand, the judgment will upend Supreme Court precedent that restrains tribal jurisdiction over non-Indian land and endorse all defendants' unprecedented interference with appellants' private property rights. Accordingly, this Court should reverse, and remand with instructions that the District Court allow appellants to pursue their claims against the Tribe, the County, and SDG&E.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the underlying action because asserted claims against and cross-claims by a federally-recognized tribe

arose under federal common and statutory law, including 42 U.S.C. §§1983 and 1985. *See* 28 U.S.C. §1331 (district courts have original jurisdiction over suits arising under the laws of the United States); 28 U.S.C. §1362 (district court has original jurisdiction over civil actions brought by tribes).

This Court has subject matter jurisdiction over this appeal because it arises from a final decision of a federal district court. *See* 28 U.S.C. §1291.

This appeal is timely because it was filed on February 2, 2023 (99-ER-29297), within 30 days of the entry of final judgment in the underlying action on January 5, 2023 (1-ER-2–3). *See* 28 U.S.C. §2107(a); Fed. R. App. P. 4(a)(1).

ISSUES PRESENTED

1. Did the District Court err as a matter of law in recognizing and enforcing the Amended Tribal Court Judgment without addressing the Tribal Courts' lack of personal jurisdiction over appellants, who objected to the improper assertion of jurisdiction over them because they are indisputably non-Indian fee landowners with no minimum contacts or consensual relationship with the Tribe?

2. Did the District Court err as a matter of law in recognizing and enforcing the Amended Tribal Court Judgment purporting to exert tribal subject matter jurisdiction to regulate appellants' lawful activities on non-Indian, fee simple land without showing that they pose a risk of catastrophic harm to tribal subsistence, as required under *Montana v. United States*, 450 U.S. 544 (1981)?

3. Did the District Court abuse its discretion in denying as untimely appellants' amended claims against the Tribe, County, and SDG&E even though appellants sought leave to amend as soon as their claims ripened upon entry of the Amended Tribal Court Judgment, which highlighted the County's regulatory inaction and SDG&E's improper cooperation with the Tribe's interference?

STATEMENT OF THE CASE

A. The Parties to this Case are Two Private Fee Simple Landowners, a Federally Recognized Tribe, San Diego County, and SDG&E

Appellants are the two plaintiffs in the underlying action—Rincon Mushroom Corporation of America, Inc. (RMCA), a non-Indian corporation previously engaged in the mushroom farming business, and Marvin Donius (Donius), who used to manage RMCA's business in San Diego (collectively appellants). (9-ER-2395; 40-11429-11430; 99-ER-29085.) RMCA is comprised entirely of non-Indian shareholders, officers, and directors. (5-ER-1212.)

Appellees are the three sets of defendants or cross-defendants: (1) the federally-recognized Tribe and individual Tribal Officials whose reservation is in San Diego County, California (the Tribal Defendants); (2) the County of San Diego (the County), which has collected property taxes from appellants for decades (2-ER-229; 3-ER-425–428; 9-ER-2203; 12-ER-3160); and (3) San Diego Gas & Electric (SDG&E), which provides power to customers within the County, previously including appellants (4-ER-708–709; 4-ER-716–735).

In dispute is the attempted tribal regulation of appellants' activities on their five-acre parcel of non-Indian fee simple land, located at 3377 Valley Center Road, Valley Center, California (the Property). (2-ER-228.) Appellants' small Property sits within the outer boundaries of an open area of the 4,026-acre Rincon Reservation, but is not a part of the reservation. (9-ER-2233, 2274; 10-ER-2472.) Across the Property, separated by a major San Diego County road, is the Tribe's casino, opened around 2001 and known as Harrah's Rincon Casino & Resort (the Rincon Casino). (9-ER-2274.)

B. Until a Wildfire Destroyed It in 2007, Appellants Used their Land for Mixed Commercial Activities Without Controversy or Objection

In 1960, decades before appellants came to own the Property, it was "allotted and conveyed out of tribal ownership" by a Bureau of Indian Affairs fee simple patent and since then, "has been, and now remains, non-Indian fee land." (9-ER-2274.) RMCA purchased the Property in fee simple in 1982. (*Ibid*.)

In 1999, RMCA sold the Property to Donius for a portion of its purchase price, receiving a promissory note for the balance secured by a deed of trust. (9-ER-2395.) Donius is the Property's sole owner and main resident (2-ER-228, 40-ER-11436), but the unpaid note and deed give RMCA the financial interest to be a necessary party to litigation involving the Property (2-ER-135; 37-ER-10538).

Beginning in 1989, and during much of the relevant time, appellants used the Property as a "non-tribal mixed-use commercial facility" for commercial

mushroom growing, produce management and transportation, and citrus fruit packaging businesses under the name "Mushroom Express." (9-ER-2274.) They also grew small plants or succulents for commercial purposes, and leased the Property to various non-tribal commercial and residential tenants for farming, habitation, and other purposes. (56-ER-16241–16242.)

In October 2007, the Property was destroyed by a wildfire that, mingled with other wildfires, also damaged the Rincon Reservation and miles of surrounding areas (the 2007 Wildfire). (24-ER-6654; 56-ER-16242). Though appellants neither caused nor contributed to the 2007 Wildfire (5-ER-971), the Tribe began to use the damage it caused to characterize appellants' activities on the Property as hazardous, as discussed.

C. After the 2007 Wildfire, the Tribe Claimed that Appellants' Activities on the Property Risked Its Water Supply and Fire Safety

The 2007 Wildfire caused mobile homes, semi-trucks, commercial vehicles, wooden pallets, and a diesel oil tank on the Property to burn, explode, spill oil, and leave debris and ash. (56-ER-16243, 16422.) Though appellants conducted cleanup efforts and contained the damage within the Property (2-ER-235–236), the Tribe began to complain that, due to the County's lack of regulation, appellants' activities on the Property—as opposed to the 2007 Wildfire—risked harming its water supply and fire safety and violated its environmental ordinances. (2-ER-235–236; 3-ER-433–434.)

In reality, appellants believed that the Tribe wanted to forcibly control or acquire the Property at a discount to enable greater access to the Rincon Casino it had built a few years earlier, in 2001–2002. (3-ER-434.) This is why the Tribe had disrupted the Property's sale to a residential real estate developer in 2005–2006 (2-(ER-229–230; 9-ER-2234) and interfered with the California Highway Patrol's rental of space on the Property to store police vehicles (40-ER-11414–11416).

Over the following months and years, the Tribe also obstructed appellants' cleanup efforts (2-ER-231); forced SDG&E to renege on its promise to restore power to the Property disrupted by the 2007 Wildfire (2-ER-231-234; 2-ER-250–254; 3-ER-699–701; 40-ER-11409, 11411, 11420); placed cement blocks on the County road to restrict access to the Property (3-ER-405, 417); got an allegedly enforceable tribal court "default judgment" against appellants for erecting billboards in violation of tribal ordinances (5-ER-1106–1129; 6-ER-1266–1297); and secured a purportedly valid tribal court "preliminary injunction" restricting appellants' use of and access to the Property (18-ER-5107–5115).

D. When Appellants Sued in District Court to Curb the Tribe's Interference, They Were Ordered to First Exhaust Tribal Remedies

To stop this interference, appellants filed the underlying action in 2009 against the Tribal Council's Chair and various individual members (the Tribal Defendants). (99-ER-29256–29297.) Appellants alleged that, to force the Property's sale, the Tribal Defendants passed new environmental ordinances,

issued alleged Notice of Violations of these ordinances (NOVs), and tried to forcibly regulate their activities. (*Ibid*.) Alleging claims for violation of civil rights, conspiracy, and interference with contractual and economic relationships, among others, appellants sought declaratory, injunctive, and monetary relief. (*Ibid*.)

In 2010, despite appellants' objection that the tribal court lacked personal and subject matter jurisdiction (2-ER-229), the District Court granted the Tribal Defendants' motion to dismiss the case for failure to exhaust tribal court remedies (2-ER-131–142). After a prior appeal to this Court, a divided panel in 2012 affirmed that order in 2012, reasoning that "colorable" and "plausible" grounds for tribal regulatory jurisdiction warranted exhaustion of tribal court remedies. (3-ER-349–352.) But this Court noted that a much lower threshold governed "colorable" and "plausible" jurisdiction for purposes of exhaustion than "actual" jurisdiction for tribal regulation of non-Indian land under *Montana v. United States,* 450 U.S. 544 (1981). (3-ER-351.)

On remand, the District Court stayed the action pending exhaustion instead dismissing it, as instructed. (3-ER-352; 99-ER-29320.) It later administratively closed the action without prejudice to any requests to reopen it. (99-ER-29321.)

E. From 2015 to 2019, the Parties Litigated the Issue of the Tribe's Regulatory Jurisdiction in the Tribal Trial and Appellate Courts

To exhaust their remedies, as ordered, appellants filed a complaint in the Rincon Trial Court for declaratory and injunctive relief that the Tribe could not

assert regulatory jurisdiction over their non-Indian fee simple land. (9-ER-2392–10-ER-2427.) As they had done in the District Court (2-ER-229, 231), appellants objected to the Rincon Trial Court's personal jurisdiction over them and subject matter jurisdiction over the dispute, making it clear that their attempt to comply with the order requiring exhaustion of remedies was not to be construed as a waiver of their objections or consent to tribal jurisdiction. (10-ER-2393–2394.)

In response, the Tribe first issued 12 new Notices of Violations (NOVs) (10-ER-2636–2643) and then counterclaimed, alleging that appellants' activities on the Property risked catastrophic consequences to its economic security, health, and welfare (10-ER-2618–2635). It also sought compliance with its recently-amended 2014 environmental ordinances governing the NOVs. (10-ER-2634, 11-ER-2798). The NOVs required appellants to remove items from the Property and restricted their entry and exit, among other things. (*Ibid*.) In their answer, appellants again objected to the Rincon Trial Court's jurisdiction. (11-ER-2826–2827.)

In 2016, the Rincon Trial Court bifurcated the trial to first decide whether the Tribe met its burden of exerting tribal regulatory jurisdiction over the Property under *Montana* and then determine what relief to award. (11-ER-2875.)

F. The Trial's First Phase in Tribal Court Lasted Until 2016

Central to the trial's first phase were the 12 NOVs, alleging that appellants were engaging in 12 activities posing two main risks due to the 2007 Wildfire—(1)

polluting the water table below the Property from which the Tribe gets its drinking water and (2) causing fire to jump from the Property to the Rincon Casino. (10-ER-2636–2643; 18-ER-4989–4999.) The allegedly high-risk activities included storing, constructing, and renting mobile homes to tenants; fabricating or refurbishing wooden pallets for sale; parking motor vehicles, semi-trucks, commercial trucks, and refrigeration-style trailers for farming, packaging, and transporting mushrooms, citrus, succulents, or other freight; and having a water well, septic system, and four water tanks for residents. (*Ibid.*) But lacking evidence of actual water pollution or the spread of fire from the Property to the Rincon Casino, the Tribe speculated that appellants' lawful activities constituted high-risk activities based on self-serving "site inspections" by the very tribal officials who also drafted its ordinances and issued the NOVs. (*Compare, e.g.*, 10-ER-2617–11-ER-2727 *with* 11-ER-2762–2793 and 39-ER-11281.)

For example, the Tribe opined on "information and belief" that parked vehicles and trucks, which leaked oil or diesel from time to time, would seep hundreds of feet below the soil and contaminate the water table. (24-ER-6898.) But one of its experts admitted there was no evidence of high-risk activities that might cause more than an occasional oil or diesel leak. (36-ER-1478.) Moreover, the Tribal Council Chair's cousin operated an auto repair and scrap metal business on the Rincon Reservation that produced oil leaks, tire fragments, and other waste

from crushers, forklifts, and other heavy equipment. (39-11304–11313, 11329–11330, 11334–11349.) And the EPA found storage tanks and drums on the Property free of petroleum staining or odor, and largely empty. (19-ER-5390.)

Further, risks posed by the Property's onsite well, related pumping and pressurization equipment, or in-ground sewage and septic system "on information and belief" as to (24-ER-6898) were not supported by evidence that they actually dumped waste or contaminated the soil (10-ER-2639). Likewise, the Tribe's belief that coolants such as freon *could* leak from refrigeration-style trailers, contaminating the water table or spreading fire to the Rincon Casino (5-ER-1189), was also not supported by evidence of such leakage (5-ER-1179). Rather, Donius testified inspections meeting Department of Transportation standards to protect against leakage of freon. (40-ER-11433–11435.) Meanwhile, tanks with attached faucets and hoses providing water on the Property were not alleged to pose risk other than not being disclosed to or approved by the Tribe. (6-ER-13022.)

1. Appellants Refuted Alleged Evidence of Water Pollution

Not only did the Tribe fail to establish a risk of catastrophic harm, but appellants submitted evidence to the contrary, including their efforts to contain and mitigate any harm from the 2007 Wildfire so it would not spread beyond the Property or onto the Rincon Reservation. (2-ER-230–231.) For example, appellants agreed to the EPA's oversight of cleanup efforts despite an inspection that found

no hazardous materials. (2-ER-235–236; 16-ER-4364; 39-ER-11403.) To protect groundwater quality and surface operation re-use, the EPA investigated and finished removing any risk contaminants from the Property, including ash-debris, petroleum and ash-metal impacted soil. (19-ER-5399; 22-ER-6153–6154.) The EPA's Report stated that the contaminated ash and soil were "successfully removed from the site on August 22, 2008." (2-ER-236; 19-ER-5394, 5399.) After testing the Property's commercial well, the EPA also founding it had drinking quality water not impacted by risk compounds. (18-ER-5393; 22-ER-6154.)

In December 2011, the Tribe's engineers found a low-level diesel and motor oil plume in the water table below the Property, but this was associated with the diesel tank explosion from the 2007 Wildfire, and not any subsequent activities on the Property. (22-ER-6155–6156; 36-ER-10450.) From March to October 2012, the Tribe's engineers took more samples and confirmed that the plume had reduced in size and did not extend beyond the table below the Property. (36-ER-10450.) They concluded that the plume's reduction in size was because bacteria from fertilizer used for farming activities on the Property had naturally degraded the concentrations of diesel and motor oil in the groundwater. (36-ER-10445–10447.)

Evidence at trial also showed that, whereas the water below the Property flows to the northwest (22-ER-6162; 18-ER-4985; 36-ER-10482), the Tribe's drinking water wells are approximately 2,400 feet from the Property's northwest

corner. (*Ibid.*) The Tribe produced no evidence that its drinking water was *actually* contaminated by appellants' activities on the Property. (36-ER-10250–10253, 10468–10469, 10478–10480; 40-ER-11429.) Nor was there any evidence of activities on the Property that could pose a catastrophic risk of contaminating the Tribe's drinking water table in the future, such as any attempt to dump fuel or hazardous waste into the ground. (36-ER-10478.) Rather, Donius testified that used oil and other waste materials from the Property are removed offsite and that trash was regularly picked up from dumpsters. (37-ER-10760–10761; 40-ER-11444.)

Tests by appellants' expert engineers in January 2016 on the Tribe's three drinking water wells northwest of the Property also showed that the water remained safe for drinking. (39-ER-11213, 11323–11324.) Another test by one of appellants' experts in March 2016 after checking into a room at the Rincon Casino confirmed the water was safe to drink. (22-ER-6162.) Further tests by appellants' engineers of the Property's well found that water to be safe. (*Ibid.*) Based on the rate at which the Tribe's engineers testified the groundwater travels—between 2 to 55 feet per year—it would take between 43 and 1,200 years for it to reach the closest Tribal drinking water well 2,400 feet away. (*Compare* 18-ER-4983–4985 *with* 22-ER-6162.) But these experts agreed that, by then, the dissolved diesel plume on the Property would be diluted or naturally attenuated within its stable footprint, never reaching the Tribe's drinking water wells. (*Ibid.*)

One of the Tribe's own engineers, Frank Dane, admitted he did not know if the diesel plume found on the Property in 2011 was still there (36-ER-10231); that the plume had both shrunk and would continue to shrink over the years (36-ER-10444–10445); that it would be speculative to say that parked vehicles on the Property were contaminating the soil or underground water table with oil leaks (36-ER-10237–10238); that the contaminants were successfully removed from the Property in 2008 after the 2007 Wildfire (36-ER-10249); that he could not opine whether the activities conducted on the Property actually impact the Tribe's drinking water. (36-ER-10250–10256.)

Another of the Tribe's engineers, Earl Stephens, confirmed that the diesel plume he measured in 2011 was contained within the Property, had almost entirely disintegrated, and would eventually disappear. (36-ER-10442-10444.) He further testified that the Tribe's routine testing of its drinking water wells had shown it to be safe to drink (36-ER-10466–10469) and he had no opinion whether the activities being conducted on the Property posed a risk of catastrophic harm to the Tribe's drinking water (*ibid*.). Moreover, he admitted that, during a recent visit to the Property, he did not finding any evidence of any above-storage diesel tanks of the type found in 2007, or any other evidence that fuel or hazardous material or fuel was being dumped or leaked into the ground. (36-ER-10477–10478.)

2. Appellants Also Refuted Evidence of Alleged Fire Hazards

As to any purported fire hazards, the Tribe's own "fire" expert, Douglas Allen, admitted that the two-lane County road and the Rincon Casino parking lot act as a "buffer," preventing any fires on the Property from reaching the Rincon Casino's structure. (36-ER-10332.) Allen also testified that, contrary to the NOV report authored by the Tribe's Environmental Director, Melissa Estes, stating that fireballs or fire brands from the Property had landed on the Rincon Casino during the 2007 Wildfire (18-ER-4998), the video submitted in corroboration showed no such evidence (36-ER-10338–10340). Allen further testified it would be speculative to assert that the Rincon Casino could burn down as a result of activities being conducted on the Property (36-ER-10334); that he was not aware of any fire brands or fire balls from the Property ever landing on the Rincon Casino's structure (36-ER-10338–10342); and that he was not aware of any facts to indicate that vehicles in the parking lot at the Rincon Casino were ever burned as a result of the 2007 Wildfire. (36-ER-10342–10343.) As Allen conceded, the Rincon Casino was an evacuation center *precisely because* it was the "safest place to be" out of all available options at the time. (36-ER-10343–10345.)

Environmental Director Estes, who issued the NOVs, speculated that activities involving refurbishing wooden pallets on the Property was a fire hazard because certain flammable chemicals "might" be applied to the pallets, which

chemicals must be stored somewhere on the premises. (29-ER-11281.) But Donius denied improperly storing pallet refurbishing chemicals, or any flammable chemicals, other than a single tenant who repairs wooden pallets for sale. (40-ER-11432–11433.)

Estes admitted there was no evidence other than her observation that the condition of or activities on the Property posed a risk of disease or an epidemic. (39-ER-11212, 11300.) Indeed, Estes testified she did not know if there was a breakout of a disease stemming from the trash or garbage she saw on the Property in passing. (*Ibid*.) She nevertheless speculated that, *if* there were rats on the Property, "the catastrophic consequences are that they migrate off property and infect people that are living on the reservation." (39-ER-11300.) But Estes denied ever seeing rats on the Property (*ibid.*), and Donius confirmed there was no vermin infestation on the Property (40-ER-11444).

Appellants also submitted evidence that danger from the burning or explosion of items on the Property such as vehicles or a diesel tank was contained on its boundaries during the 2007 Wildfire, contrary to speculation that it spread to the Rincon Casino or the Rincon Reservation. (13-ER-3516–3519.) And such danger was fully mitigated and eliminated by an EPA-supervised cleanup of the Property in 2008. (2-ER-236; 19-ER-5394, 5399.) Unfortunately, because the Tribe impeded cleanup efforts, the fire-damaged risk-impact debris, including ash-

debris, petroleum, and ash metal, was left on the Property for nearly a year, from October 2007 to August 2008. (22-ER-6153; 24-ER-6650.) But during this time, the Property was sealed with concrete and asphalt pavement, which restricted metals, petroleum products, and the risk-impact debris from leaching underground. (22-ER-6153.) During the 2007–2008 rainy season the ash and partially burnt debris did sit exposed on the Property's pavement and ground surface. (*Ibid*.) However, any run-off was isolated to the Property because the bowl-shaped depression in which the Property sits plus the closed basin grade topography and improvement barriers trap any surface runoff so it remains on the Property. (*Ibid*.)

G. The Rincon Trial Court Issued Its Initial Opinion in 2017 After the Trial's First Phase

In 2017, notwithstanding this evidence in the first phase of the trial, the Rincon Trial Court issued an Opinion concluding that the Tribe had regulatory jurisdiction over the activities being conducted on the Property (the 2017 Tribal Court Opinion). (5-ER-966–976.) Short on supporting facts, the 2017 Tribal Court Opinion stated that the Tribe should have the right to control the Property, including enforcing the NOVs and requiring a "usage plan" from appellants, because it should be able to protect its interests; because the County refused to regulate the Property; and because the Property would otherwise become a "lawless enclave." (5-ER-973–975.) As the Rincon Trial Court later explained, the 2017 Tribal Court Opinion's findings were based on the Tribe establishing

"colorable" or "plausible" jurisdiction (5-ER-982), which this Court had admonished was merely the standard favoring exhaustion of tribal court remedies, not the formidable showing to assert tribal regulatory jurisdiction (3-ER-351).

H. After the Trial's Second Phase, the Rincon Trial Court Issued the 2019 Tribal Court Judgment

In 2019, after the trial's second phase, the Rincon Trial Court entered judgment for the Tribe, denying appellants relief against the Tribe's interference and requiring them to submit a usage plan before conducting *any* activities on their Property (the Tribal Court Judgment). (25-ER-7052–7061). Again short on factual findings, this Tribal Court Judgment noted only two of twelve activities cited in the NOVs as the basis for tribal regulatory jurisdiction—manufacturing wooden pallets and using a septic system, neither of which it tied to catastrophic risk to the Tribe's water quality, fire safety, or other aspect of tribal subsistence. (*Ibid*.)

I. The Trial Court of Appeals Affirmed, Resulting in Entry of the 2020 Amended Tribal Court Judgment on Remand

Appellants appealed the 2017 Tribal Court Opinion and the 2019 Tribal Court Judgment on numerous grounds. (2-ER-289, 313–320.) In 2020, the Rincon Court of Appeals rejected all arguments, affirming the 2017 Tribal Court Opinion and substantially affirming the 2019 Tribal Court Judgment. (2-ER-320–324.) In finding that the Tribe did, in fact, have regulatory jurisdiction over appellants' activities on the Property, the Rincon Court of Appeals diminished the Rincon

Trial Court's findings that appellants were poor stewards of the Property and that the Property was a lawless enclave. (2-ER-313–314.) Instead, it recast the Rincon Trial Court's statements regarding a "remote" possibility of water contamination and alleged damages from future fires into catastrophic risks to the Tribe's drinking water and fire safety. (*Compare* 5-ER-971 *with* 2-ER-315–318.) It did reverse the 2019 Tribal Court Judgment's injunction as overbroad, remanding with instructions that the Rincon Trial Court "mold the protuberances of the injunction to the hollows of the potential harm" so that appellants need not cease all activities until they obtained a business plan acceptable to the Tribe. (2-ER-325.)

On remand, the Rincon Trial Court entered an Amended Tribal Court Judgment in June 2020, modifying the injunction by deleting the prohibition against all uses of the Property and the need for appellants to submit approval a business or usage plan as a condition of using their Property (the Amended Tribal Court Judgment). (2-ER-55–71.) Even as narrowed, though, the Amended Tribal Court Judgment authorized the Tribe to inspect the Property and regulate appellants' activities for compliance with tribal ordinances and other rules and regulations if the Tribe deemed it necessary to protect its interests. (2-ER-63–69.)

J. After Recognizing and Enforcing the Court Tribal Judgment, the District Court Entered Judgment for the Tribe, the County & SDG&E

In July 2020, the District Court granted appellants' motion to re-open the case and an accompanying motion for leave to amend their complaint. (2-ER-163–

172). In the first amended complaint, appellants added the Tribe as a defendant because the Tribe's assertion of a counterclaim against them in the Rincon Trial Court constituted a waiver of sovereign immunity, and alleged additional acts of interference with their right to use their Property. (98-ER-29085–29255.)

The Tribe then filed an answer and counterclaim on September 21, 2020, seeking recognition and enforcement of the Amended Tribal Court Judgment. (98-ER-28934–99–29084.) In response, RMCA filed a Third-Party Complaint against the Tribe, the County, and SDG&E, seeking declaratory and injunctive relief that the County reassert regulatory jurisdiction over the Property and damages against SDG&E for improperly refusing to reconnect power to the Property since the 2007 Wildfire. (98-ER-28850–28933.)

The District Court bifurcated proceedings to first address cross-motions for summary judgment on the jurisdictional issue underlying the recognition and enforcement of the Amended Tribal Court Judgment, while denying without prejudice appellees' motions to dismiss the third-party complaint. (99-ER-29326.) After a hearing, the District Court granted the Tribe's motion for summary judgment (4-ER-726–792), and, deferring to that the Rincon Trial Court's assertion of tribal regulatory jurisdiction over appellants' activities on the Property, recognized and enforced the Amended Tribal Court Judgment (1-ER-15–40).

In August 2022, the District Court granted the third-party defendants' renewed motion to dismiss the Third-Party Complaint as procedurally improper, and gave appellants leave to amend the first-amended complaint to add the claims in their prior Third-Party Complaint. (4-ER-716–725.) The District Court later denied appellants leave to file their second-amended complaint against the Tribe, the County, and SDG&E for alleged undue delay and statute of limitations. (1-ER-4–14). Once the District Court entered final judgment on January 5, 2023 (1-ER-2–3), appellants filed this timely appeal (99-ER-29297).

DISCUSSION AND ANALYSIS

I. The District Court Erred as a Matter of Law in Recognizing and Enforcing the Amended Tribal Court Judgment Because the Tribal Court Lacked Personal Jurisdiction Over Appellants

A. This Court Reviews De Novo the Legal Question Whether the Tribal Court Had Personal Jurisdiction Over Appellants

This Court reviews de novo the decision of the district court involving mixed questions of fact and law. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). The existence and extent of a tribal court's jurisdiction over nonmembers is exactly such a mixed issue, with legal questions underlying the tribal court's decision regarding the assertion of tribal jurisdiction reviewed de novo and related factual questions reviewed for clear error. *Ibid.* Personal jurisdiction is a legal issue reviewed de novo, especially where, as here, the district

court did not hear testimony or make findings of fact. *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 473 (9th Cir.1995).

B. The Rincon Tribal Court Lacked General or Specific Personal Jurisdiction Over Appellants, Who Neither Consented to Such Jurisdiction Nor Maintained Minimum Contacts with the Tribe

1. *The Rincon Trial Court Assumed It Had Personal Jurisdiction Over Appellants, Ignoring Their Contrary Objections*

For a district court to recognize and enforce any tribal court judgment, whether for injunctive, declaratory, monetary, or any other relief, the tribal court must have both personal and subject matter jurisdiction. *Wilson v. Marchington*, 127 F.3d 805, 807, 810 (1997) (tribal court's personal and subject matter jurisdiction are necessary predicates for federal court recognition and enforcement of tribal money judgment under principles of comity); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903–06 (9th Cir. 2002) (same with respect to recognizing and enforcing tribal court injunction); *Chesapeake Life Ins. Co. v. Parker*, No. 18-C-643, 2018 WL 4188469, at *4 (E.D. Wis., Aug. 31, 2018) (same with respect to recognizing and enforcing tribal court divorce judgment). Thus, the Rincon Trial Court was "obligated under federal law to determine whether [it had] personal jurisdiction over [nonmember] defendants haled into tribal court." NELL JESSUP NEWTON *et al*., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.02[2] at 604 (2012 ed.), citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

Instead of making this determination, however, the Rincon Trial Court apparently assumed that its personal jurisdiction was implicit in, necessary to, or coexistent with its power to determine its regulatory, subject matter jurisdiction over appellants' activities on the Property. But it is entirely conceivable that, like any other tribunal, "a tribal court could have subject matter jurisdiction over a case but lack personal jurisdiction over the defendant." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.02[2] at 604. For example where "a non-Indian defendant's 'conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'" to sufficiently establish subject matter jurisdiction, the tribal court still lacks personal jurisdiction over the defendant if the "conduct occurred outside the tribunal territory such that the defendant lacks 'minimum contacts' within the forum[.]" *Ibid*.

This principle is illustrated in *Smith v. Salish Kootena College*, where a non-tribal student who voluntarily sued a tribal college in tribal court was deemed to enter a consensual relationship with the tribe to trigger the tribal court's *subject matter* jurisdiction. 434 F.3d 1127, 1138 (9th Cir. 2006). Personal jurisdiction was not at issue in *Smith*, but this Court noted only that its subject matter jurisdiction analysis "resembles" the due process analysis underlying personal jurisdiction, carefully distinguishing the two inquiries. *Ibid*. But even if dicta in *Smith* could be read as holding that nonmembers who bring suit in tribal court consent to its

subject matter *and* personal jurisdiction, the facts here are to the contrary. Indeed, appellants were forced to appear in Rincon Trial Court to exhaust tribal court remedies; did not seek affirmative relief; and objected to the tribal court's personal and subject matter jurisdiction when the Tribe counterclaimed against them.

Thus, the Rincon Trial Court erred by brushing aside appellants' objection that it lacked personal jurisdiction over them and proceeding as if it did.

2. *The District Court Erroneously Discounted Appellants' Objection to the Tribal Court's Lack of Personal Jurisdiction*

The Rincon Trial Court's failure to address the basis for its personal jurisdiction over appellants in no way absolved the District Court of the need to do so when appellants renewed their objection in that tribunal. *See AT&T Corp.*, 295 F.3d at 904 (addressing parties' jurisdictional objections after noting that "tribal courts ordinarily have the first opportunity to determine the extent of their own jurisdiction"). But in a footnote in its summary judgment order, the District Court declined to address the Rincon Trial Court's personal jurisdiction, faulting appellants for not explaining the basis for their objection other than stating that the court "is to look to *Montana, supra*, and related federal common law following that decision." (1-ER-23, n.1.) According to the District Court, this was an insufficient explanation because "[t]he personal jurisdiction analysis is distinct from *Montana's* subject matter jurisdiction analysis." (*Ibid.*)

But the District Court misunderstood appellants' argument and their cited authority. "[F]ederal common law following [*Montana*]," is, in fact, the very authority recognizing that a tribal court's personal and subject matter jurisdiction are both necessary prerequisites for a tribal court judgment to be recognized and enforced. *See Marchington*, 127 F.3d at 810 (citing the Supreme Court's decision in *Montana* and the Restatement (Third) of Foreign Relations Law of the United States as requiring a tribal court to have both personal and subject matter jurisdiction). By citing *Montana* and decisions applying it, appellants sufficiently preserved their objection that the Rincon Trial Court lacked both personal and subject matter jurisdiction over them.

Moreover, as the District Court itself recognized, personal jurisdiction over non-residents such as appellants who lack minimum contacts with the forum "can be established through physical presence or in-state service." (1-ER-23, n.1, citing *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802, 819 n.9 (9th Cir. 2011).) But unlike the non-Indian parties in *Water Wheel*, who operated a resort on tribal land under a 20-year lease agreement, appellants were never physically present on the Rincon Reservation and were never served with process on the Rincon Reservation, the Rincon Casino, or elsewhere by the Tribe.

Regardless, even if they had been served with process, appellants' appearance in the Tribe's trial and appellate tribunals, as ordered by the District

Court, would not be sufficient to constitute minimum contacts for purposes of personal jurisdiction. *Cf., e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1209 (9th Cir. 2006) ("We do not regard the service of [process] in connection with a suit brought in a foreign court as contacts that by themselves justify the exercise of personal jurisdiction[.]"). Indeed, just as invoking a federal court's subject matter jurisdiction by removing an action does not waive an objection to the forum state's personal jurisdiction, appellants' appearance in the Rincon Trial Court per an order requiring them to adjudicate tribal regulatory jurisdiction did not waive their continuing objection to that tribunal's lack of personal jurisdiction. *E.g., Wabash W. Ry. v. Brow*, 164 U.S. 271, 278–79 (1896) (court appearance to remove action does not constitute waiver of personal jurisdiction); *Naxos Res. (U.S.A.) Ltd. v. Southam Inc.*, No. CV 96-2314 WJR (MCX), 1996 WL 662451, at *8 (C.D. Cal., Aug. 16, 1996) (invoking "*federal court's* power to adjudicate the *subject matter* of the action does not relate to the *forum state's* power to maintain jurisdiction over the defendant(s) under either state law or constitutional due process principles") (emphases in original).

Appellants, who had objected to the tribal court's lack of personal jurisdiction a decade ago in the Tribe's suit over billboards rented to an ad agency for a competing casino (2-ER-236–237; 40-ER-11450–114511), also did not waive their objection by exhausting tribal court remedies for another reason. Consistent

with a stay instead of dismissal of their action (3-ER-352), as anticipated by this Court (3-ER-351), and as allowed by Supreme Court precedent, appellants always intended to return to federal court after exhausting tribal court remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (providing for federal court review of tribal court's jurisdictional findings).

Thus, appellants properly raised their objection to the tribal court's lack of personal jurisdiction, supported by relevant law. The District Court compounded the Rincon Trial Court's error by also failing to address the issue on the merits.

3. *Appellants Had No Minimum Contacts or Consensual Relationship With the Tribe That Gave the Rincon Trial Court Personal Jurisdiction Over Them*

Had the District Court examined the issue, it would have had to sustain appellants' objection, and refuse to recognize or enforce the Amended Tribal Court Judgment on this ground alone. Under settled law, the Rincon Trial Court could exert personal jurisdiction over appellants only if they had "certain minimum contacts with the forum jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316. For "general" jurisdiction over any and all claims, appellants would need to conduct "continuous and systematic business activities" in the forum, whereas for "specific" jurisdiction over claims arising out of forum-related activities, appellants would need to "purposefully direct [their] activities or

consummate some transaction with the forum or resident thereof[.]" *Yahoo! Inc.*, 433 F.3d at 1205–06. The same criteria are set forth in relevant provisions of the Rincon Trial Court's rules—the Intertribal Court of Southern California Rules of Civil Procedure (ICSC Rules), which first look to federal law and then California law (2-ER-53). *See* ICSC Rule 2.3.03 (tribal courts have personal jurisdiction over nonmembers if they transact business within the reservation, supply goods or services to the Tribe, or commit an injurious act *on* the reservation).[1]

Here, it is undisputed that appellants did not reside on the Rincon Reservation or have any presence there. There was also no evidence that appellants transacted business with, supplied goods or services to, or had any other minimum contacts with the Tribe or the Rincon Reservation, let alone continuous and systematic business activities. RMCA did not even purchase the Property from the Tribe, but years after it had passed out of tribal ownership through a Bureau of Indian Affairs fee simple patent, meaning there was no prior contract or transaction tying the parties to each other. Nor was there any evidence of any injurious conduct by appellants *on* the Rincon Reservation; rather, the 2007 Wildfire that swept across the Rincon Reservation was indisputably not caused by appellants. Thus, the Rincon Trial Court lacked general personal jurisdiction over appellants.

[1] Available at https://rincon-nsn.gov/wp-content/uploads/2019/05/30300-Intertribal-Court-Rules.pdf.

The Rincon Trial Court also lacked specific jurisdiction over appellants because they never consented to its personal jurisdiction regarding the dispute at issue, but rather, objected to the lack of such jurisdiction in their original filings and whenever they participated in any proceedings before any tribal court. For example, appellants submitted their dispute to the Rincon Trial Court in compliance with the order requiring them to exhaust tribal court remedies, but, consistent with their objection to its personal jurisdiction over them, never sought affirmative relief from the Rincon Trial Court. And when the Tribe filed its counterclaim against appellants, they expressly objected in their Answer that the Rincon Trial Court lacked personal and subject matter jurisdiction. Notably, it was the counterclaim, not appellants' complaint, which later formed the basis for the Amended Tribal Court Judgment that the District Court recognized and enforced.

This was sufficient to preserve their objection as federal law no longer requires a "special appearance" to avoid waiving lack of personal jurisdiction. *See Republic Int'l Corp. v. Amco Engs., Inc.*, 516 F.2d 161, 165 (9th Cir. 1975) ("Special appearances to challenge jurisdiction are no longer required in federal courts."); *In re Carthage Trust*, No. 2:12-CV-10861-ODW, 2013 WL 589208, at *4, fn. 4 (C.D. Cal., Feb. 14, 2013) ("The Federal Rules of Civil Procedure abolished the need for special appearances, because a party does not waive lack of personal jurisdiction so long as the issue is raised under Rule 12(b)."); *accord*

WRIGHT & MILLER, 5B Fed. Prac. & Proc., §1351 (2023). Given appellants' repeated objections and their lack of any business, contractual, or other relationship with the Tribe, the Rincon Trial Court's exercise of personal jurisdiction over them was also unreasonable. *Yahoo!*, 433 F.3d at 1206 ("the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable").

The Rincon Trial Court therefore lacked personal jurisdiction over appellants to issue the Amended Tribal Court Judgment, which the District Court erred as a matter of law in recognizing and enforcing. *Int'l Shoe Co.*, 326 U.S. at 310 (courts cannot issue binding judgments against parties with whom the forum "has no contacts, ties, or relations").

II. The District Court Also Erred in Recognizing and Enforcing the Amended Tribal Court Judgment Because the Tribal Court Lacked Subject Matter Jurisdiction to Issue the Judgment

A. This Court Reviews De Novo Legal Issues Underlying the Question of Tribal Jurisdiction and for Clear Error Related Factual Findings

As noted, the existence and extent of a tribal court's jurisdiction over nonmembers is a mixed issue, with legal questions underlying the tribal court's decision regarding the assertion of tribal jurisdiction reviewed de novo and related factual questions reviewed for clear error. *See FMC*, 905 F.2d at 1313. Thus, this Court reviews de novo issues such as the standards applicable to the jurisdictional inquiry and for clear error the factual record developed by tribal courts during proceedings to exhaust remedies and determine their own jurisdiction. *Ibid.*; *Nat'l*

Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985) (whether tribe can compel a non-Indian property owner to submit to tribal court's civil jurisdiction is a "federal question"); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (tribal court's adjudicative authority over nonmembers is a federal question).

B. Tribal Jurisdiction Over Nonmembers on Non-Indian Fee Land is Presumptively Invalid Unless the Tribe Establishes That It Meets One of Two Exceptions Under *Montana v. United States*

Indian tribes do not, as a general matter, possess authority over non-Indians who come within their borders. *Montana*, 450 U.S. at 565; *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 939 (9th Cir. 2009) ("As a general rule, tribes do not have jurisdiction, either legislative or adjudicative, over nonmembers, and tribal courts are not courts of general jurisdiction."). This rule applies with greater force when, as here, the non-Indians remain outside tribal borders, on non-Indian land owned in fee simple, making tribal efforts to regulate such activities "presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 328, 329–330 ("once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it," meaning "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land").

This presumption can only be overcome if the tribe establishes one of two "limited" exceptions allowing it to regulate activities on non-Indian fee land within

the reservation—either (1) that the nonmembers entered "into consensual relationships with the tribe or its members" or (2) that they engaged in conduct that "threatens or has some direct affect on the political integrity, economic security, health, or welfare of the tribe." *Montana*, 450 U.S. at 565. These rules concerning regulating "the activities of nonmembers" or "the conduct of non-Indians on fee land" are known as the *Montana* exceptions. *Plains Commerce Bank*, 554 U.S. at 330. Because appellants indisputably did not enter into any consensual relationship with the Tribe or its members, only *Montana's* second exception was at issue here.

To qualify under the second exception, "[t]he conduct must do more than injure the tribe"—it must "'*imperil the subsistence*' of the tribal community" or be "so severe" that it can "fairly be called *catastrophic* for tribal self-government." *Plains Commerce Bank*, 554 U.S. at 341 (emphasis added); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §4.02[3][c] at 232, fn. 220 (tribe must show that the challenged conduct "*poses a catastrophic risk*" to its political integrity, economic security, or health and welfare, and that tribal regulation is "necessary to avert catastrophic consequences") (emphasis added). The burden rests on the tribe, not the nonmember. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647, 654 (2001).

Here, several legal and factual errors permeate the assertion of tribal regulatory jurisdiction over appellants' activities on the Property, which the District Court compounded by nevertheless recognizing and enforcing the

Amended Tribal Court Judgment. Four primary ones include (1) holding the Tribe to an incorrect, less stringent standard of "colorable" or "plausible" jurisdiction; (2) relying on non-existent considerations under *Montana* and its progeny; (3) making clearly erroneous determinations of alleged catastrophic risk to the Tribe's water quality and fire safety that are flatly contradicted by the record; and (4) issuing an impermissibly broad and vague injunction against appellants.

C. The Tribal Court Erred as a Matter of Law in Finding Tribal Regulatory Jurisdiction Under *Montana v. United States* By Relying On a Lower, Incorrect Standard Used to Determine Whether to Exhaust Tribal Court Remedies in the First Place

In its Amended Tribal Court Judgment, the Rincon Trial Court conceded it had applied an incorrect, lower standard otherwise used to determine whether the tribal regulatory jurisdiction is sufficiently "colorable or plausible" to warrant *exhausting* tribal court remedies. Specifically, the Rincon Trial Court stated:

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

(5-ER-982, emphases added; *accord* 25-ER-7056 [finding "the issue of jurisdiction factually "plausible".) But this Court in *Elliott* was reviewing only an order requiring exhaustion of tribal court remedies of a dispute involving a fire started by on non-Indian land based on exceptions in *Nevada v. Hicks*, 533 U.S. 353 (2001), not an order recognizing and enforcing a judgment exerting tribal regulatory jurisdiction under *Montana*. The non-Indian plaintiff who started the fire argued that exhaustion of tribal court remedies was unnecessary because it was "plain" that tribal jurisdiction was lacking under *Nevada*. This Court rejected the argument, holding that preliminary evidence showed that tribal jurisdiction was sufficiently "colorable or plausible" to warrant exhaustion. *Elliott*, 566 F.3d at 848.

This "colorable or plausible" standard is the same one this Court used to affirm the order requiring appellants to exhaust tribal court remedies in the prior appeal, which it clarified was *not* to be confused with the tribal court's need to determine *actual* tribal jurisdiction under *Montana* under a higher standard:

> Here . . . Rincon Mushroom has not exhausted its tribal remedies, so the standard (to determine whether tribal exhaustion is required) is lower. Tribal jurisdiction need only be "*colorable*" or "*plausible*." *Elliott*, 566 F.3d at 848 (emphasis added).
>
> We emphasize that we are not now deciding whether the tribe actually has jurisdiction under the second *Montana* exception.

(3-ER-351.) Consistent with this, courts recognize a tribe's "formidable burden" to establish *Montana's* second exception; thus, "with only 'one minor exception,

[the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.'" *Plains Commerce Bank*, 554 U.S. at 333 (sale of formerly Indian-owned fee land to third party is not "catastrophic" to tribal self-government).

While a tribal court's determination of its own jurisdiction is "helpful," federal courts are not obligated to follow it, but, as the final arbiters of federal law, may be "guided" by it. *FMC*, 905 F.2d at 1314. Because the Rincon Trial Court applied an incorrect standard, finding that "colorable and plausible" jurisdiction satisfied actual tribal jurisdiction, its determination is neither binding nor a helpful guidepost, but erroneous as a matter of law.

D. The Tribal Courts Also Erred By Relying on Non-Existent Considerations Under *Montana v. United States* That, In Any Event, Are Not Supported By the Record

In addition to using the wrong standard, the Rincon Trial Court also premised tribal regulatory jurisdiction on considerations not found in *Montana*. Chief among these were its belief that appellants had not maintained the Property all that well and that no one else could regulate the Property.

For example, the Rincon Trial Court observed that "over the last two decades or more, RMCA/Donius have not maintained their property"; that appellants' alleged lack of maintenance led to unspecified "serious consequences"; and that if the Property is not "somehow regulated," it can "affect the health,

welfare, and economic security of the Tribe." (5-ER-972.) It also noted that the "Tribe's economic, health, and general well-being" was "threatened" by the County's "lack of jurisdiction," making the Property a "lawless enclave" on which appellants "can do anything they wish . . . leaving the Tribe helpless." (*Ibid*.) According to the Rincon Trial Court, because "chaos would ensue" if, like a "City or County," the Tribe too could not regulate appellants' activities on the Property, *Montana's* second exception justified tribal regulatory jurisdiction. (*Ibid*.)

In addition to being subjective, these conclusions suffer from multiple, preliminary errors. First, the conclusion that the catastrophic consequence the Tribe faced was its inability to regulate appellants' activities on the Property is circular and speculative. Tribal regulatory jurisdiction cannot be premised on the fact that unspecified chaos might ensue if a tribe is denied such jurisdiction.

Second, the Rincon Trial Court was wrong to find that the County could not regulate the Property. County Land Use Ordinance, General Provision 1006(c), stating that ordinances "shall not apply to Indian Reservations within the County," is irrelevant because appellants' Property is recognized, non-Indian land that merely sits within the Rincon Reservation's boundaries. (3-ER-600.) Moreover, the County building codes and other ordinances expressly apply to land "within the unincorporated area of the County" such as the Property. (3-ER-450, 466.) Further, the County levied and collected property taxes for decades. (*E.g.*, 3-ER-425–428.)

Third, the Rincon Trial Court ignored evidence that other agencies could and did, in fact, regulate the Property. For example, the Tribe's Environmental Director conceded the EPA's regulatory jurisdiction over the Property, for example to issue stormwater permits under the Clean Water Act. (18-ER- 5019, 5032, 5036.) The Tribe even invoked the EPA's jurisdiction, requesting it to conduct a "site evaluation" and "compel" necessary cleanup actions (19-ER-5388.) Consistent with this, the EPA supervised cleanup on the Property after the 2007 Wildfire, and provided solicited guidance regarding its septic tank system, whose inspection it put under its groundwater office's jurisdiction. (19-ER-5388–5399; 8-ER-2115–2116.) The Tribe's fire expert further testified that the Property is "designated a state responsibility area of public resources" (36-ER-10362), and is required to have a fire prevention plan under the California Fire Code (10-ER-10328–10329.) Thus, contrary to the Rincon Trial Court's findings, neither appellants' alleged poor stewardship nor any lack of regulatory authority made the Property a purported "lawless enclave."

But even if evidence had supported these findings, mere concerns about appellants' failure to maintain their Property or the County's alleged abdication of its responsibility to impose fire, land use, or building regulations were insufficient as a matter of law to support tribal regulatory jurisdiction under *Montana's* second exception. Indeed, it is irrelevant whether the Property was "well maintained" to

the Tribe's satisfaction or appeared to have been neglected by agencies with regulatory authority over it to become a chaotic, lawless enclave when there was no evidentiary nexus between such purported lack of maintenance, on the one hand, and the risk of catastrophic consequences to tribal subsistence, on the other. *Montana Dep't of Transp. v. King*, 191 F.3d 1108, 1114 (9th Cir. 1999) ("The exception applies when to hold otherwise would threaten 'the right of reservation Indians to make their own laws and be ruled by them'"), quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). Notably, this Court rejected a similar argument, holding that tribes in Idaho could not regulate non-Indian fee land within a reservation in Idaho merely because the county purportedly lacked authority to do so, including because Idaho's government could, in fact, regulate it. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306–07 (9th Cir. 2013).

Reliance on the County's or any other agency's alleged failure to regulate appellants' use of the Property is erroneous for another reason. *Montana's* second exception allows tribal regulation based on a risk of catastrophic consequences to the Tribe from activities on the Property *conducted or controlled by appellants*, not from alleged inaction by the County or any other agency.

Nor was it sufficient to find tribal regulation over appellants' conduct as non-members on non-Indian fee land necessary merely because the Tribe has an

interest in protecting its members' safety. That simply begs the question regarding catastrophic risk underlying the exception, which "was not meant to be read so broadly." *Cnty. of Lewis* v. *Allen*, 163 F.3d 509, 515 (9th Cir. 1998). In its unanimous, en banc decision in *Allen*, this Court held that the Nez Perce Tribal Court lacked jurisdiction over a tribal member's suit against Idaho county law enforcement officers for false arrest, other torts, and violation of civil rights based merely on the undeniable tribal interest in its members' safety. *Ibid*. Otherwise, "[u]nder the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *Ibid.*; *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir.1999) (rejecting tribal jurisdiction over wrongful death lawsuits after car accident involving two tribal members at a railroad crossing because, if *Montana's* second exception required no more than the justification that their deaths "would deprive the Tribe of potential councilmembers, teachers and babysitters," then the "exception would severely shrink the rule"), cert. denied sub nom. *Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co.*, 529 U.S. 1110 (2000).

Faced with authority establishing that neither the Property's status as a "lawless enclave" nor its lack of regulation by other agencies was a permissible basis for tribal regulatory jurisdiction, the Rincon Court of Appeals tried to recast

these findings as merely "supporting" "evidence" for the Rincon Trial Court's analysis under *Montana*. (31-ER-9343–9344.) But this contradicted the Rincon Court of Appeals' acknowledgment in a section of its Opinion titled "The Tribal Court's Findings" that the assertion of tribal jurisdiction "coalesced around four consequences" of appellants' activities—that is, "(1) *their lack of stewardship of the fee land,* (2) *the creation of a "lawless enclave" based on the state and county disclaiming jurisdiction over all lands within the reservation*, (3) the potential for catastrophic fire, and (4) the pollution of groundwater." (33-ER-9335–9338, emphasis added.)

Thus, notwithstanding the Rincon Court of Appeal's attempt to diminish their importance, two main grounds the Rincon Trial Court relied on to find tribal regulatory jurisdiction are not cognizable under *Montana's* second exception. This renders the jurisdictional analysis fatally flawed.

E. The Findings of Alleged Risk to the Tribe's Water Quality and Fire Safety Were Clearly Erroneous and Contrary to the Record, Notwithstanding the Rincon Court of Appeals' Attempted Refinement

Findings of fact are clearly erroneous if they are "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Evans*, 736 F.3d at 1306. Here, the Rincon Trial Court's findings that appellants' activities threaten to pollute the Tribe's groundwater and

create a fire hazard to its nearby casino are clearly erroneous because they are contrary to the record, even as reinterpreted by the Rincon Court of Appeals.

For example, whereas the Rincon Court of Appeals asserted that appellants had conceded that "fire-damaged debris" including "ash-debris, petroleum, and ash metal" was left on the Property from October 2007 until August 2008," (ER) the record showed this was because the Tribe impeded appellants' cleanup efforts, but that nevertheless, the EPA removed all such contaminants. Evidence also showed that, during the relevant time, the Property was sealed with concrete and asphalt pavement that restricted debris from leaching underground while any surface run-off was isolated to the Property because of the bowl-shaped depression in which it sits plus its closed basin topography and improvement barriers. (23-ER-6153.) Similarly, whereas the Rincon Court of Appeals found that appellants had conceded that the Tribe's "expert engineers found a low-level diesel and motor oil plume extending from off the subject property" (33-ER-9346), the record showed that the plume had never reached the Tribe's groundwater, that it had since nearly dissipated, and that the EPA had declared the water safe for drinking. Similarly, whereas the Rincon Court of Appeals said appellants had conceded that they "engaged in unpermitted activities" such as "constructive mobile homes, fabricating or refurbishing wooden pallets, parking commercial trucks on the property, parking refrigeration trailers on the property, allowing people to live in

mobile homes on the property and parking motor vehicles on the property" (*ibid.*), the record showed that none of these activities—as opposed to future disaster outside of appellants' control—posed a catastrophic risk of polluting the Tribe's water or causing a fire, as discussed.

As discussed, the Rincon Trial Court's findings regarding water pollution and fire hazard were contrary to the record for additional reasons.

1. *There Was No Evidence of a Catastrophic Risk of Water Pollution*

Even the Rincon Trial Court only found it a "remote" possibility that appellants' activities on the Property, "if allowed to continue unchecked," could "possibly" damage the "pristine" water table underneath, making it a "factor" to be considered. (5-ER-971.) But there was no evidence that the Tribe's drinking water was contaminated. Rather, water from both the well on appellants' Property and the Tribe's wells a half of mile northwest was drinkable. (*See* OB Section F.1 at 17–19, *infra*.) The Tribe's experts also found its water safe to drink after testing it, and admitted they had no opinion whether appellants' activities posed a current or future risk of catastrophic harm to the Tribe's drinking water. (*Ibid.*)

While there was evidence of a diesel plume in the water table below the surface of appellants' Property from the explosion of a diesel tank, experts agreed that the plume had been shrinking and decaying, and would likely disappear. (*See* OB Section F.1 at 17, *infra*.). There was no evidence that fuel, oil, or hazardous

chemicals were being dumped into the ground or leaking from any vehicles parked on the Property. (*See* OB Section F.1 at 15, *infra*.).

The Rincon Trial Court nevertheless stated it had "no doubt" "that any fire on" or "passing through" the Property "can pose a catastrophic risk to [the Tribe's] water supply as well as misuse of the property as has been in the past." (5-ER-973.) But there was no evidence that the 2007 Wildfire contaminated the water table under the Rincon Reservation that serves as the Tribe's drinking water source. Though the Tribe was concerned that ash from burned tires and burned batteries on the Property following the 2007 Wildfire contained toxic chemicals that would leech into the soil after a rainfall and contaminate the water table below, the evidence shows that this did not happen. Rather, the contaminated soil—all 47 tons of it—was successfully removed under the EPA's oversight. (2-ER-236.) Moreover, water samples the EPA took from the area in 2008 tested "negative or below USEPA maximum contaminant levels for all investigated analytes." (19-ER-5391–5392.) To first assume that another fire would lead to more toxic ash on the Property and then hypothesize that appellants would not clean it up so it could contaminate the underground water table was speculation built upon speculation, especially as the Tribe's nearby Fire Department offered added protection. (6-ER-13440; 13-ER-3534 (map showing fire station).) Indeed, a mobile home on the Property that caught fire started by a trespassing vagrant in November 2014 was

promptly extinguished by the Tribal Fire Department one block away without contaminating the water table. (11-ER-2733.)

2. *There Was No Evidence of a Catastrophic Risk to the Tribe's Fire Safety*

The Rincon Trial Court's conclusory statement that "the condition of the property and poor maintenance of the property in and of itself poses a catastrophic risk" to the Tribe's fire safety was not supported by the evidence. (5-ER-971.) According to the Rincon Trial Court, "a video of explosions, fire embers, and other threatening conditions [from the Property] due to the fire were dangerously close to the Tribe's casino," and that "due to prior usage," the Property "presents a situation whereby any future fires in this highly prone 'fire area' can, in fact, have catastrophic consequences on the Tribe." (*Ibid*.) But the Tribe's own fire expert, Allen, confirmed that the referenced video showed no "explosions" or "fire brands," or anything coming from the Property and landing on the Rincon Casino. (*See* OB Section F.2 at 20, *infra*.; 36-ER-10338–10340.) He also testified that the County Road between the Rincon Casino and the Property acted as a "buffer," preventing any fire on the Property from spreading to the Rincon Casino, and that it would be speculative to suggest that the Rincon Tribe's Casino could burn down due to any activities on the Property. (36-ER-10332.) Allen further noted that, because it was the safest place to be, the Rincon Casino functioned as an evacuation center during the 2007 Wildfire. (26-ER-10343–10345.) Thus, the

Rincon Trial Court clearly erred in finding appellants' poor maintenance of the Property created an increased risk to the Rincon Casino, some 60 feet away with the "buffer" of County road and safe enough to serve as an evacuation site.

3. *There Were Several Other Indicia of Clear Errors in the Tribal Court's Analysis*

Other findings by the Rincon Trial Court, from which the Rincon Court of Appeal distanced itself by focusing only on the risk to the Tribe's drinking water and fire safety, further confirm that its reasoning was faulty and its analysis unsound. For example, whereas the Rincon Trial Court found that appellants' unspecified "activity" on the Property was "threatening the Tribe's political and economic security to justify tribal regulation over the land in question" (5-ER-973), even the Tribe did not assert any threat to its political security. Similarly, whereas the parties focused on the aftermath of the 2007 Wildfire, the Rincon Trial Court stated that, "for over 20 years, the owners of the property have done little or nothing to protect tribal interests" but have "in the past" threatened the "Tribe's safety from fire and its water supply," thereby exacerbating the potential of harm to its economy." (5-ER-974.) But appellants have no duty to "protect tribal interests," nor is failure to protect unspecified tribal interests a consideration under *Montana*.

The Rincon Trial Court also said that the Tribe's "small" size was an allegedly "distinguish[ing]" fact justifying its "right to control land use" or carry out a "comprehensive land management program" as "a key proposition" in its

"economic development." (*Ibid*.) But this too does not fit *Montana's* second exception, which would be extended beyond recognition if a tribe could justify regulating non-Indian land based on its small size.

The Rincon Trial Court next professed to "balance the interest of the Tribe's land use policies and procedures" against those of appellants, concluding that requiring them to submit a usage plan as a condition of using their property was reasonable, because it "is no more stringent than the average city or county requirements" and the Tribe was "willing to work with the fee owner" to "develop and enforce a comprehensive land use program." (5-ER-975.) But *Montana* does not allow tribal regulatory jurisdiction based on balancing the Tribe's interests or its willingness to work with the non-Indian fee landowner.

In sum, the Tribe's objections to appellants' activities are like a neighboring owner's ordinary complaints of annoyance from noisy or unsightly activities. The trailers, mobile homes, motor homes, trailers or other temporary residential units appellants refurbished for sale or rental—which Donius called "vintage" and the Tribe deemed "dilapidated" (39-ER-11198; 40-ER-11431)—were only claimed to pose a catastrophic risk *after* the 2007 Wildfire. (10-ER-2646–2653; 22-ER-6170.) But their alleged lack of "structural integrity" did not suddenly make them more combustible or likely to pollute the water table. (39-ER-11294.) To the extent some of them lacked adequate utilities or safe utility hookups; sewage or waste disposal,

or running water, this arguably made them substandard for appellants' customers, not hazardous to the Tribe's health or welfare.

In sum, the Tribe understandably would rather not have its casino sit across a site where mobile homes and wooden pallets are made, stored, or refurbished; trucks and trailers, including refrigerator trailers, in different states of repair are parked; a septic system and water tanks are visible; and people live in campers or trailers. However, because these activities do not pose a risk of catastrophic harm to the Tribe's water quality or fire safety, the mere fact that they create noise, dust, or other adverse effects does not warrant tribal regulatory jurisdiction. *Burlington N. R.R. Co.*, 196 F.3d at 1064–65 (*Montana's* second exception does not entitle relief "'against every use of fee land that has some adverse effect on the tribe.'").

4. *Relevant Case Law Further Undermines Asserting Tribal Regulatory Jurisdiction Under the Facts Here*

This Court has held that both contamination of a tribe's water quality and forest fires are threats that may be sufficient to sustain tribal jurisdiction, but under circumstances that do not exist here. For example, this Court affirmed an order requiring exhaustion of tribal court remedies where a nonmember started a forest fire on non-Indian land that spread to the reservation. *Elliott*, 566 F .3d at 850. Here, by contrast, appellants neither started the 2007 Wildfire, nor did any explosions or other fire-related spills or damage on the Property spread to the reservation. Similarly, this Court has upheld an EPA regulation giving tribes

authority to set more stringent water quality standards for non-Indian land based on commercial activities such as mine tailings, auto wrecking yards, dumps, landfills, wastewater treatment facilities, slaughterhouses, hydroelectric facilities, and wood processing plants that portended a "serious and substantial" threat to tribal water quality. *State of Montana v. U.S. E.P.A.*, 137 F .3d 1135, 1139 (9th Cir. 1998). But the risky activities in *State of Montana* are a far cry from appellants' farming, auto storage, and mobile home repair activities, and the tribal ordinances at issue do not narrowly target water quality or fire safety standards on the Property.

Two other cases applying *Montana* are particularly instructive. In the first case, tribal regulatory jurisdiction was not warranted over construction of a single-family home on non-Indian fee land because a Tribe's "generalized concerns" that construction or improper disposal of construction debris threatened to further pollute its already contaminated groundwater or constitute a fire hazard were "speculative." *Evans*, 736 F.3d at 1306. Similarly speculative is the Tribe's generalized concern here that the damage caused by and any insufficient cleanup from a future wildfire will pollute its groundwater or spread the fire to its casino.

In the second case, operating an elemental phosphorus plant on non-Indian fee land within a reservation for over 50 years did justify tribal regulatory jurisdiction under *Montana's* first *and* second exceptions because the non-Indian corporation had a consensual relationship with the tribe and its operation produced

22 million tons of hazardous waste deemed radioactive, carcinogenic, and poisonous. *FMC Corp.*, 942 F.3d at 939. The waste buried in railroad tanker cars, which had no lining or caps to prevent leakage; there was evidence of lethal amounts of toxic substances in the ground and the air that posed serious health risks to the tribal community; ducks spontaneously ignited when flying off the site's containment pods; and the EPA issued a consent decree requiring permits to store these hazardous substances. *Id*. at 921, 935, 936, 939. But here, there is no dumping, leaking, or storage of hazardous waste, and the EPA has declared the water safe.

The District Court's reliance on other cases to affirm tribal regulatory jurisdiction here is also erroneous. In such a case, *United States v. Cooley*, the Supreme Court found that, to protect the Tribe's health and welfare and until federal officers arrived, a tribal police officer had the right under *Montana's* second exception to *temporarily* detain and search the driver of a parked truck on a highway built on a public right-of-way through an Indian reservation. 141 S.Ct 1638 (2021). This is because the officer observed that the driver had watery, bloodshot eyes; had two semiautomatic rifles in plain view; and had a pipe and methamphetamine. Unlike *Cooley*, and the right-of-way case it cited, *Duro v. Reina*, 495 U.S. 676 (1990), appellants were not engaged in criminal activity on a

right of way through the Rincon Reservation, nor did the Tribe seek "temporary" regulation over appellants' activities.

Moreover, as other courts recognize, *Cooley* does not allow tribal regulatory jurisdiction over appellants' lawful commercial activities based on mere speculation that a future wildfire may contaminate the Tribe's water or be an additional fire hazard. *Mandan, Hidatsa, and Arikara Nation v. U.S. Dept. of Interior*, Civ. No. 1:19-cv-00037, 2022 WL 2612127, at *1 (D.N.D. June 9, 2022) (declining to extend *Montana*'s second exception under *Cooley* and rejecting tribal regulatory jurisdiction to impose tribe's 1000-foot setback rule on nonmember's fee land due to the mere "possibility" that contaminant "might" reach a tribal lake or cause damage, threatening the tribe's subsistence).

Ultimately, this case is much more like *Montana* itself, where Supreme Court held that a tribe could not regulate hunting and fishing on non-Indian land owned in fee simple by nonmembers absent risk of catastrophic harm, including because such activities were already regulated by state fishing and gaming laws. 450 U.S. at 545. Here too the Tribe cannot regulate all commercial activity on appellants' non-Indian land absent risk of catastrophic harm, including because appellants are already subject to local and federal regulations and oversight.

F. The Injunction is Impermissibly Overbroad, and Confirms That the Tribe Does Not Seek to Regulate Only Activities That Risk Catastrophic Harm, But Appellants' Use of the Property Altogether

Even if the Rincon Trial Court was right in its assertion of tribal regulatory jurisdiction, the accompanying injunction is overly broad, vague, and ambiguous. This is an independent ground for reversal of the Amended Tribal Court Judgment, and also confirms that the Tribe has been allowed to regulate activities regardless of whether they pose a risk of catastrophic harm to its water quality or fire safety.

Settled law requires injunctions to provide specific notice of their terms and be tailored to remedy the established violations. Without both elements, the enjoined parties are left to guess what conduct they need to avoid so as not to be subject to contempt. Fed. R. Civ. P. 65(d)(1) (to be valid, injunction, must: "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("[Rule 65] was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood."). But here, the injunction does not state its terms specifically or reasonably detail the enjoined acts.

For example, the injunction's first paragraph vaguely requires that, before "any development or use" of the Property, appellants comply either with "laws and

regulations designated by the [Rincon Environmental Director] as necessary to protect tribal interests" or "Uniform Building Code, and the San Diego County Code of Administrative Ordinances[.]" (2-ER-62.) The blanket reference to unspecified laws, regulations, codes and ordinances that appellants must comply with violates the rule that an injunction cannot "engraft codes and regulations in gross" or rely on a code or regulation for clarification of what is otherwise unclear in the decree itself. *Scott v. Schedler*, 826 F.3d 207, 213 (5th Cir. 2016).

Moreover, the broad language leaves appellants guessing what tribal laws or regulations might be deemed necessary to protect unspecified tribal interests, or which other building codes or ordinances might apply if tribal regulations on the issue do not exist, which is impermissible and violates "the elementary due process requirement of notice." *Scott*, 826 at 212; *accord Schmidt*, 414 U.S. at 476. This Court held invalid an injunction in a civil rights action that required a sheriff's department to follow its own policies and procedures regarding the proper use of force and the conduct of searches because, even though the department was expected to know its own policies or procedures, the injunction should have specified them. *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992). This analysis applies even more here because, unlike the sheriff's department in *Thomas*, appellants cannot be expected to know the substance of the Tribe's laws

and regulations or the contents of various agencies' unspecified building codes and administrative ordinances.

Further, to the extent the designated tribal ordinances are those referenced in in the NOVs, they are so general that the Tribe can deem virtually any conduct by appellants a violation. For example, one violation cited in the NOVs was that appellants purportedly engaged in "conduct that significantly impacted" or had the "potential to impose catastrophic consequences" on the "economic and health and welfare" of the Tribe. (10-ER-2637–2638). This broad language gives the Tribe unfettered discretion in finding appellants in violation of its laws and enjoining any and all activities.

The injunction also contains other improper, broad generalities. For example, it orders appellants to "immediately remove all combustible materials from the property, including fuel, wood and debris, wooden pallets, and shall discontinue all activities that include such combustible materials." (2-ER-67.) But this could prohibit anything from driving a car to cutting paper on the Property as both are arguably "combustible." And because everything wooden is arguable "combustible material," the injunction could require removal of wooden sheds or buildings, including nursery structures to grow plants for sale. The injunction also requires appellants to remove all fuels and to discontinue all activities that include fuels. (2-ER-65.) But this could be read to prohibit any vehicles from being driven

onto or parked on the Property, including for personal use, for appellants' trucking business, or for their farming operations.

Additionally, the fact that the injunction requires appellants' compliance with wholesale tribal and other rules and regulations before they undertake "any development or use" of the Property confirms that the assertion of tribal regulatory jurisdiction is unrelated to preventing catastrophic harm. *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50, 52–53 (2d Cir. 1996) (vacating as vague an injunction's catch-all paragraph requiring enjoined party to "take all other reasonably needful actions to facilitate" a general result). By prohibiting mundane activities such as farming, packaging, and trucking (which use fuel or other combustible materials), none of which were established to cause water contamination or spread a wildfire, the injunction is not "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order." *Doe v. Veneman*, 380 F.3d 807, 813 (5th Cir. 2004). Rather, it far exceeds regulation of activities that purportedly risk catastrophic harm to the Tribe's water source and fire safety. Similarly, the requirement that appellants remove the Property's septic system (2-ER-64) absent any evidence it was leaking sewage and despite EPA guidance on maintaining its structural integrity (8-ER-2115) improperly untethers the injunction from any underlying violation. *Calfano v. Yamasak*, 442 U.S. 682, 702 (1979) (scope of injunctive relief is dictated by extent of the violation established).

III. The District Court Abused Its Discretion By Denying Appellants Leave To File Their Second-Amended Complaint

A. Leave To Amend is Reviewed for an Abuse of Discretion, But Subject To the Strong Policy Permitting Amendment

This Court reviews for an abuse of discretion the denial of a motion for leave to amend. *Salameh v. Tarsadia Hotel,* 726 F.3d 1124, 1133 (9th Cir. 2013). But because leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), such review is conducted "in light of the strong public policy permitting amendment," *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

B. Because Tribal Proceedings Crystalized Conduct By the Tribe, the County, and SDGE That Formed the Basis of Appellant's Second-Amended Complaint, Their Amended Claims Were Timely

Appellants' original 2009 complaint led to a stay and then dismissal without prejudice of the action for over eight years, during which appellants were required to exhaust tribal court remedies. Returning to the District Court in July 2020, a month after the Amended Tribal Court Judgment, appellants filed a first-amended complaint, adding the Tribe as a defendant after it waived its immunity by filing a counterclaim in the tribal court. Appellants then also filed a third-party complaint against the Tribe, the County, and SDG&E based on, among other things, the Amended Tribal Court Judgment. This included, for example, the findings that the County's failure to regulate the Property made it a "lawless enclave" requiring

tribal regulatory jurisdiction and that the Tribe and SDG&E were wrong to prevent power from being restored to the Property after the 2007 Wildfire.

After recognizing and enforcing the Amended Tribal Court Judgment, the District Court dismissed the third-party complaint as procedurally improper because it found third-party defendants necessary parties to the complaint. But it gave appellants leave to amend the first-amended complaint to add the third-party claims. It was then that appellants sought leave to file a second-amended complaint that, having first invited, the District Court unexpectedly denied on the grounds of undue delay and prejudice to the Tribe, the County, and SDG&E.

But appellants did not and could not cause undue delay given the stay of the underlying action since August 1, 2012, lifted only when the case was reopened eight years later, in July 2020. Admittedly, appellants previously raised the Tribe's interference, the County's abdication, and SDG&E's refusal to restore power to the Property in a prior, dismissed state-court action against these parties. (1-ER-10.) But that action was dismissed against the Tribe due to its sovereign immunity, and as to the County and SDG&E because the Tribe was deemed an indispensable party. (2-ER-280–282.) This obstacle was only removed in the tribal court proceedings, during which the Tribe's counterclaim waived its immunity.

Moreover, 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. (4-ER-712.) It was then the District Court upheld the Rincon Trial Court's (1) finding that SDG&E and the Tribe were wrong to interfere with restoring power on the Property and (2) reliance on the County's refusal to regulate the Property as grounds for tribal regulatory jurisdiction so it would not become a "lawless enclave." As appellants also alleged, the Tribe used the Amended Tribal Court Judgment to *further* block access to the Property while the County used it to immunize its refusal to issue permits or regulate the Property. (3-ER-439–440.) Other inaction by the County underlying the proposed amendments, such as its failure to remove cement blocks preventing access to the Property, also occurred *during* the tribal court proceedings, throughout which this case was stayed.

To the extent the District Court faulted appellants for not moving to amend as soon as the case was-reopened, this was not prejudicial as 11 of the 12 proposed claims were re-pled from their pending third-party complaint against the Tribe, the County, and SDG&E (4-ER-712), dismissed only on procedural grounds (4-ER-720). Nor was the retirement or departure of a few County- and SDG&E-employees who were responsible for challenged projects on or communications with about the Property sufficient to establish prejudice (1-ER-12–13), especially when balanced against appellants' due process rights to redress.

Absent a true showing of undue delay by appellants or prejudice to the Tribe, the County, or SDG&E, the District Court abused its discretion by denying leave to filed the second amended complaint.

CONCLUSION

Appellants indisputably did not start, cause, or contribute to the 2007 Wildfire that damaged their Property and the Rincon Reservation. Nevertheless, the Tribe used the 2007 Wildfire as the unspoken pretext for issuing NOVs against appellants, claiming that their continuation of any activities posed a risk of contaminating the Tribe's water or burning the Rincon Casino during a future fire. But the tribal court lacked personal jurisdiction over appellants; evaluated its subject matter jurisdiction under an incorrect standard; and relied on subjective, erroneous, and improper considerations. The Tribe also failed to carry its heavy burden under *Montana's* second exception to establish that appellants' lawful activities, as opposed to a future wildfire or third-party regulatory inaction beyond appellants' control, risked catastrophic consequences to tribal subsistence.

Moreover, appellants' amended claims should not have been denied as untimely under the circumstances, especially as appellants filed them soon after the Court lifted the stay following tribal court proceedings that gave rise to grounds for amendment and absent evidence of undue prejudice.

This Court should reverse the judgment in the Tribe's, County's, and SDG&E's favor and instruct the District Court on remand to allow appellants to pursue their claims against these defendants.

Dated: August 2, 2023

Respectfully submitted,

NIDDRIE ADDAMS FULLER SINGH LLP

By: *s/ Rupa G. Singh*
Rupa G. Singh

MANUEL CORRALES, JR.

By: *s/ Manuel Corrales, Jr*
Manuel Corrales, Jr.

Attorneys for Plaintiffs, Counter-Defendants, and Appellants

STATEMENT OF RELATED CASE

Appellants are unaware of any related cases pending before this Court. However, this appeal is related to a prior appeal in the same underlying action, Ninth Circuit Case No. 10-56521.

Dated: August 2, 2023

Respectfully submitted,

NIDDRIE ADDAMS FULLER SINGH LLP

By: *s/ Rupa G. Singh*
Rupa G. Singh

MANUEL CORRALES, JR.

By: *s/ Manuel Corrales, Jr.*
Manuel Corrales, Jr.

Attorneys for Plaintiffs, Counter-Defendants and Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 501 West Broadway, Suite 800, San Diego, California 92130.

I certify that, on August 2, 2023, I electronically filed the following documents with the Ninth Circuit Clerk of Court by using the appellate CM/ECF system: (1) APPELLANTS' OPENING BRIEF and (2) APPELLANTS' EXCERPTS OF RECORD, VOLUMES 1–99, PAGES 1–29332.

I further certify that all participants in the case, including appellees' counsel of record, are registered appellate CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that that this declaration was executed on August 2, 2023, at San Diego, California.

s/ Rupa G. Singh
Rupa G. Singh