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' COMBINED REPLY BRIEF

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INTRODUCTION

In response to appellants' showing that legal and evidentiary errors pervade the underlying judgment, the Tribe urges this Court to defer to the "esteemed" and "highly-qualified" jurists who issued the Amended Tribal Court Judgment and "begin and end its review . . . with a reading of Judge Ware's thorough 43-page opinion, writing for a unanimous panel of the Tribal Appeals Court." (AB at 3.) Indeed, wholesale sections of the Tribe's Answering Brief appear to have been cut and pasted from the Rincon Court of Appeals' Opinion. (*Compare* AB 15–17, 19–22 *with* 28-ER-28815–822.) But whether this Court accepts the Tribe's invitation to take the judgment at face value or engages in its habitual, thoughtful review, it should be left with the definite and firm conviction that the tribal assertion of regulatory jurisdiction over the Property at issue contravenes *Montana v. United States*, 450 U.S. 544 (1981) and its progeny. This is because the tribal courts lacked personal jurisdiction over appellants; the Rincon Trial Court demonstrably used the wrong standard to justify tribal subject matter jurisdiction over the non-tribal Property at issue under *Montana*; the Rincon Court of Appeals improperly critiqued *Montana*'s evolution in an attempt to salvage the Rincon Trial Court Opinion; and the District Court failed to address these errors based on a misguided belief that comity required undue deference to the tribal courts.

Moreover, contrary to appellees' assertion, neither neglect nor strategic machinations led appellants to unduly delay moving for leave to amend their claims against the Tribe, SDG&E, and the County. Rather, the dismissal of appellants' 2008 state court action against the Tribe on sovereign immunity grounds, and against SDG&E and the County based on the Tribe's status as an indispensable party, left appellants with no avenue to seek relief against these co-tortfeasors. That is, until the Tribe waived its sovereign immunity in 2020 by filing a counterclaim in the underlying federal action.[1] Without any delay, appellants immediately filed a third-party complaint against the Tribe, SDG&E, and the County, which the District Court later found *procedurally* improper on the ground that the claims should be alleged against the parties principally, not as third parties. Yet when appellants filed the invited motion for leave to amend to reallege their claims from the third-party complaint against these parties, the District Court improperly found undue delay and prejudice, ignoring that appellants acted diligently but were constrained by circumstances beyond their control.

Accordingly, appellants respectfully request that this Court reverse the underlying judgment (1) recognizing and enforcing the Amended Tribal Court Judgment and (2) denying them leave to amend their claims against appellees.

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[1] The Tribe now claims to have preserved its sovereign immunity (AB at 4), but cites no authority to support its astonishing position that it can do so despite filing counterclaims against appellants seeking affirmative relief in the underlying action.

DISCUSSION AND ANALYSIS

I. The Rincon Trial Court Lacked Personal Jurisdiction Over Appellants, Who Neither Consented to Such Jurisdiction Nor Had Minimum Contacts With the Tribe, and Did Not Waive the Issue Just Because Every Tribunal Before Whom They Raised It Failed to Address It

A. Appellants Sufficiently Preserved the Tribal Courts' Lack of Personal Jurisdiction, a Purely Legal Issue This Court Can and Should Reach

Contrary to the Tribe's assertions, appellants' objection that the Rincon Trial Court lacked personal jurisdiction over them is neither waived nor contrived. (AB at 51.) Whereas waiver is an equitable defense, requiring the "'voluntary or intentional relinquishment of a known right,'" its application here would be demonstrably inequitable. *Rhorer v. Raytheon Eng'rs & Constructors, Inc*., 181 F.3d 634, 645 (1999) (quotation omitted), *overruled on other grounds by Cigna Corp. v. Amara*, 563 U.S. 421, 436 (2011). This is because, although it appears with the benefit of hindsight that appellants could have further developed their argument regarding lack of personal jurisdiction in the District Court, their conduct throughout belies any volition or intent to waive this objection.

For example, appellants filed the underlying action in 2009 in the District Court, submitting to that federal court's personal jurisdiction over them. (99-ER-29256–297.) When the Tribal Defendants moved to dismiss the underlying action for failure to exhaust tribal court remedies, appellants expressly objected that the tribal courts lacked "personal and subject matter jurisdiction" over them and the

Property. (2-ER-229, ¶3.) When ordered by the District Court, as affirmed by this Court, to nevertheless exhaust their tribal court remedies (2-ER-131–142; 3-ER-349–52), appellants raised lack of personal jurisdiction in their first filing in the Rincon Trial Court. (10-ER-2393–94.) At that time, appellants expressly asserted that their suit was not a "a waiver or consent to Tribal jurisdiction, but is being done to exhaust Plaintiffs' Tribal remedies." (10-ER-2394.) When the Tribe filed a counterclaim, appellants again objected to the Rincon Trial Court's jurisdiction in their answer. (11-ER-2826–27.) After the issuance of the Amended Tribal Court Judgment, when the Tribe sought its enforcement and recognition, appellants raised both lack of personal and subject matter jurisdiction before the District Court a final time in their cross-motion for summary judgment and opposition to the Tribe's motion for summary (ECF 166 at 18; ECF 171 at 5–6),[2] which declined to rule on the first issue in a footnote (1-ER-23, n.1).

On this record, whereas appellants can be blamed for not developing the argument further or fully, it would be inequitable to accuse them of failing to "adequately" challenge the Rincon Trial Court lack of personal jurisdiction over them or intentionally relinquishing such objection. Moreover, because this is a purely legal issue that this Court can address based on undisputed facts in the

[2] Given the voluminous ER and SER, appellants cite the District Court docket instead of filing an FER, but would do so if the Court prefers. The page numbers cited are the original ones in the documents, not the CM/ECF blue-stamped pages.

record, this Court should exercise its discretion to reach it. *See United States v. Northrop Corp*., 59 F.3d 953, 958, n.2 (9th Cir. 1995). All the more so because, as further discussed, it is an important issue, possibly of first impression, not a contrived one as the Tribe claims.

B. The Rincon Tribal Courts' Lack of Personal Jurisdiction is Not Just Conceivable, But Evident Under the Circumstances Here

The Tribe's assertion that the District Court necessarily concluded that appellants failed to establish lack of personal jurisdiction is circular. According to the Tribe, because appellants' activities within the Rincon Reservation's external boundaries met the threshold for *subject matter jurisdiction* under *Montana's* second exception, they "provide 'certain minimum contacts' with the Tribe" to establish *personal jurisdiction*. (AB at 52.) But this impermissibly conflates subject matter and personal jurisdiction, rendering superfluous well-established law that "the existence of *both* personal and subject matter jurisdiction is a necessary predicate for federal court recognition and enforcement of a tribal judgment." *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (emphasis added). Because *Montana's* framework is most frequently applied to address the assertion of tribal jurisdiction over land within reservation boundaries owned by non-Indians in fee simple, it cannot be the case that a tribe *always* has personal jurisdiction over non-Indians who own such land. Nor does it make sense to hold, as the Tribe urges, that appellants' commercial activities on their own Property de

facto give the Tribe personal jurisdiction over appellants when appellants do not direct those activities at the Tribe and do not purposefully avail themselves of the privilege of doing business with the Tribe or the protection of its tribal laws. (AB at 53.) It would be backwards, circular, and nonsensical to adopt the Tribe's argument that, because the Rincon Trial Court ultimately found that appellants' activities on their non-Indian imperil tribal subsistence, it "follows" that the Rincon Trial Court had personal jurisdiction over appellants before it could arrive at such a conclusion. (*Ibid*.)

Notably, the Tribe's cited authority does not support its assertion that the "Supreme Court has never found tribal court's assertion of personal jurisdiction to be improper." (*Compare* AB at 52 with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) [evaluating Oklahoma's personal jurisdiction over a corporation in a products liability case].) Though appellants concede they can find no case finding lack of personal jurisdiction under the circumstances here, it does not mean such an outcome is inconceivable, as the Tribe argues, but that it has not been addressed, making it an issue of first impression. Whether a tribal court lacks personal jurisdiction over non-Indian parties engaged in commercial activities on non-Indian fee land under the circumstances here is something this Court should actually decide, instead of deferring to the treatise stating that such a result is

"conceivable although unlikely." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.02[2] at 604 (2012 ed.).

II. The Amended Tribal Court Judgment Employed Both Incorrect Legal Standards and Nonexistent Factors Under *Montana's* Second Exception to Justify Tribal Jurisdiction Over the Non-Tribal Property at Issue[3]

A. The "Failure To Steward" Standard Urged by the Tribe and Adopted by the Rincon Trial Court Does Not Exist Under *Montana*

Donius' inartful testimony that he was entitled to any viable use of the Property except as a "nuclear waste dump" (38-ER-10913–914), which the Tribe never tires of repeating (AB at 21, 22, 28, 34, 40), led the Tribe to erroneously but successfully urge the tribal courts to assert jurisdiction based on appellants' stewardship of the Property. (5-ER-974.) Even now, starting with its recitation of the "overarching jurisdictional question" and continuing throughout its answering brief, the Tribe defends the Amended Tribal Judgment by claiming that appellants' alleged "fail[ure] to steward" their Property "threatened or had some direct effect on the political integrity, the economic security, or the health and welfare of the

[3] The Tribe's criticism of the record as excessive is not well-taken. (AB at 2–3, n. 2.) While appellants admit the record is voluminous and regret certain repetition, they tried to be complete and were constrained by the protracted and complex nature of this dispute. *Cnty. of Lewis v. Allen*, 163 F.3d 509, 513 (9th Cir. 1998) ("Jurisdictional disputes have been called '[t]he most complex problems in the field of Indian Law.'"), citing William C. Canby, Jr., Am. Indian Law 111 (1998)); *see also Philip Morris USA, Inc. v. King Mountain Tobacco Co. Inc*., 569 F.3d 932, 937 (9th Cir. 2009) ("Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis.")

Tribe." (AB at 1, 13, 29, 31, 38.) But the assertion of tribal jurisdiction over non-tribal land based on a purported "failure to steward" standard is untethered to *Montana* and its progeny.

Indeed, neither *Montana* nor the remaining cases the Tribe cites require landowners to "steward" their non-tribal land in a particular manner, but instead inquire only whether their activities on the land create "threats" to or direct effects on tribal subsistence. *E.g.*, *Montana*, 450 U.S. at 566 (conduct must "threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."); *United States v. Cooley*, 141 S.Ct. 1638, 1644–45 (2022) (same); *Knighton v. Cedarville Rancheria*, 922 F.3d 892, 895, 904–05 (9th Cir. 2019) (embezzlement of tribal funds "threatened the Tribe's very subsistence"); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935–36 (9th Cir. 2019) (elemental phosphorus contamination imperiled the Tribe's subsistence or welfare, posing "a serious threat to human health, the environment, and the welfare of the Tribe"); *Attorneys Process and Investigative Servs. Inc. v. Sac and Fox Tribe*, 609 F.3d 927, 939 (8th Cir. 2010) (non-tribal entity's attempt to seize control of casino and government offices during intratribal dispute directly affected Tribe's political integrity and economic security)

Notably, the remaining cases the Tribe cites not only fail to recite any "failure to steward" standard, but are further inapposite because they only address

when tribal jurisdiction would be "plausible" or "colorable" to require exhausting tribal court remedies, not the standard for asserting tribal jurisdiction under *Montana*. (AB at 14, citing *Grand Canyon Skywalk Devs. LLC v. 'Sa' Nyu Wa Inc*., 715 F.3d 1196, 1206 (9th Cir. 2013) (exhaustion of tribal court remedies not excused given enormous economic impact on tribe from termination of revenue-sharing contract); *Rincon Mushroom Corp. of Am. v. Rincon Band of Luiseño Indians*, 490 Fed. Appx. 11, 13 (9th Cir. 2012) (affirming exhaustion order as tribal jurisdiction was "colorable" or "plausible"); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009) (affirming exhaustion requirement for non-member who caused fire on tribal land).) As discussed in Section II.D, *infra*, the standard for requiring non-Indians to exhaust tribal court remedies is indisputably *lower* than the standard to satisfy the actual assertion of tribal jurisdiction over non-Indians or their land, a manifest error by the Rincon Trial Court that the Tribe now compounds by trying to defend.

Other authorities confirm that the non-existent "failure to steward" standard urged by the Tribe and adopted by the Rincon Trial Court is irreconcilable with the presumption that tribes lack regulatory jurisdiction over nontribal members or their land, and the high burden to prove otherwise under *Montana's* second exception. *See Montana*, 450 U.S. at 565 (noting as a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers

of the tribe."); *Plains Commerce*, 554 U.S. at 330 (tribal efforts to "regulate nonmembers, especially on non-Indian fee land, are presumptively invalid."); *Strate v. A–1 Contractors*, 520 U.S. 438, 445–46 (1997) ("tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances" as "tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions"). That the Rincon Trial Court nevertheless employed the lower "failure to steward" standard is also indisputable, including based on its own admission:

> Plaintiffs [Tribal Parties] contend and offer evidence that, over the last two decades or more, Defendants [RMCA/Donius] have *not maintained the property* in question. The property, according to the Plaintiffs, *is not and has not been well maintained* and this has led to serious consequences, and if not somehow regulated can, in fact, affect the health, welfare, and economic security of the Tribe.
>
> * * *
>
> [T]he *condition of the property* and *poor maintenance of the property in and of itself poses a catastrophic risk to Plaintiffs*.
>
> * * *
>
> For over 20 years, the owners of the property have *done little or nothing to protect tribal interests.*

(5-ER-971, 974, emphasis added.) Having found appellants' alleged "poor maintenance of the property *in and of itself* poses a catastrophic risk" (*ibid*.), the Rincon Trial Court erroneously excused the Tribe from having to establish whether appellants' activities on the Property actually posed catastrophic risks to tribal subsistence. Because failure to manage or steward the Property in a manner that

satisfies the Tribe is not sufficient to trigger *Montana's* second exception, this constituted the first of several demonstrable, prejudicial, and reversible errors.

B. The Tribe's Claim that *Montana's* Second Exception Was Erroneously Elevated by a Commentator's Stray Remark Fails as the Supreme Court Has Since Confirmed and Applied the Elevated Standard

Rather than actually "embrac[ing]" the limits of tribal authority over non-Indian activities under *Montana's* second exception, as it professes, the Tribe attacks the standard embodied in it, just as the Rincon Court of Appeals did. (AB at 15.) According to the Tribe and the Rincon Court of Appeals, whereas the Supreme Court decided that a tribe could tax a non-member's activity only if it actually "imperils" the tribe's political integrity, the editors of a legal handbook "extrapolated" from this that tribal jurisdiction was only justified if necessary to avert "catastrophic consequences." (98-ER-28816–817; AB at 16, citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657–58 fn.12 (2001) [quoting *Montana*, 450 U.S. at 566].) The editors' alleged "stray remark" supposedly led the Supreme Court to later adopt an "elevated threshold for the application of the second *Montana* exception . . . that tribal power must be necessary to avert catastrophic consequences" in a later decision. (AB at 16, quoting *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 330 (2008).) But the Supreme Court's adoption of the elevated standard in *Plains Commerce* establishes that, far from being a "stray remark," the editors' extrapolation of the standard for tribal

jurisdiction articulated in *Atkinson Trading* and *Montana* was spot on. All the more so as the elevated standard has been affirmed and applied in this Circuit ever since, leading to only a handful of cases recognizing tribal jurisdiction over non-tribal fee land under *Montana's* second exception. *E.g., State of Montana v. U.S. E.P.A.*, 137 F .3d 1135, 1139 (9th Cir. 1998) (recognizing tribal authority to impose more stringent standards on commercial activities on non-Indian land posing a "serious and substantial" threat to tribal water quality); *FMC Corp.*, 942 F.3d at 935 (recognizing tribal jurisdiction over activities on non-Indian land under both *Montana* exceptions that produced radioactive waste, thereby satisfying the test that the nonmember's activities "must 'imperil the subsistence or welfare' of the tribal community.") (citations omitted).

Nor is the Tribe right that the Supreme Court's recent use of the original word "threaten" instead of "imperil" suggests that there was never an elevated standard under *Montana's* second exception, only a showing that the activities "threaten or have some direct effect." (AB at 16–17.) In reality, this Court has criticized allowing tribal regulation of non-tribal activities based on a lower threshold such as a threat to or an effect on tribal safety because it would make *Montana's* second exception "swallow the rule." *Cnty. of Lewis*, 163 F.3d at 515. However, the Tribe's environmental ordinances nevertheless permit it to regulate activity on non-tribal fee land "to the extent necessary to protect the Tribe from

actual direct significant impacts, *or* potential catastrophic consequences" (E.g., 11-ER-2802, §8.300, emphasis added.) The use of the "or" in the ordinance therefore allows the Tribe to regulate "to the extent necessary to protect the Tribe from actual direct significant impacts," which allowed the Rincon Trial Court here to apply the erroneous "failure to steward" standard, and ignore any potential catastrophic consequences.

But as this Court has explained, asserting tribal jurisdiction to protect a tribe from "significant impacts" can mean anything, and would improperly expand Montana's second exception beyond recognition. *Cnty. of Lewis*, 163 F.3d at 515 (declining to assert jurisdiction over sheriff's deputy for making an alleged false arrest on the reservation "just because the tribe has an interest in the safety of its members" because "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe."); *Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 950–51 (9th Cir. 2000) (declining to allow tribe to impose utility tax on electric cooperative with easements across non-Indian fee land mean to finance important services necessary to tribal well-being because it would "effectively swallow *Montana's* main rule"). By enforcing the Tribe's ordinances against appellants under the expansive standard articulated in them, the tribal courts ignored the elevated standard requiring proof that the non-member's conduct or activity at issue would "imperil[]

the subsistence of the tribal community" *Plains Commerce*, 554 U.S. at 330, or "trench unduly on tribal self-government," *Strate*, 520 U.S. at 445–46.

C. Neither of Two Recent Cases the Tribe Cites Relaxed the Standard for Tribal Jurisdiction Over Nontribal Land or Justify the Assertion of Such Jurisdiction Over the Property Under the Circumstances Here

The Tribe relies on two relatively recent cases finding tribal jurisdiction under *Montana's* second exception, but neither establish that the impact of appellants' "land use choices" satisfied *Montana's* second exception. (AB at 17.)

First, *United States v. Cooley* involved unique circumstances whereby a tribal police officer stopped, detained, and searched a non-Indian traveling on a public right-of-way through the Crow Reservation who was observed to have telltale "watery, blood-shot eyes," two "semiautomatic rifles" lying on the front seat, and other drug paraphernalia in plain view. 141 S.Ct. 1638, 1642 (2021). In reversing the suppression of this evidence in a subsequent federal criminal prosecution, the Supreme Court explained that denying "a tribal police officer authority to search and detain *for a reasonable time* any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats." *Id*. at 1643 (emphasis added); *see also id.* at 1641 (summarizing tribal officer's authority to "temporarily" detain and search non-Indian traveling through reservation). Moreover, the Supreme Court explained that, unlike other cases, the tribal exercise of jurisdiction in *Cooley* did not require

"the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *Id*. at 1644–45 (citations omitted). *Cooley* has no application here because tribal jurisdiction over the Property would not be temporary, but permanent, and would expressly allow the application of the Tribe's environmental ordinances to non-member appellants who had no say in creating those ordinances. Nor do the threats from "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation" in *Cooley* resemble the threats at issue here. *Id*. at 1647–48.

Other cases confirm that *Cooley* is inapplicable here or instructive only in that it confines the rare exercise of jurisdiction under *Montana's* second exception to its unique circumstances. For example, in *Strate*, the Supreme Court had previously found that the tribal court lacked jurisdiction to adjudicate a personal-injury action against nonmembers involved in a car accident on a public right-of-way through a reservation. 520 U.S. at 445–46. Unlike *Cooley*, the exercise of jurisdiction in *Strate* would have involved more than a temporary detention and search, and require imposing tribal law on non-members. Likewise, in *Mandan, Hidatsa, and Arikara Nation v. United States Department of the Interior*, the District Court rejected *Cooley* as inapposite to the determination that a tribe could not assert regulatory jurisdiction over oil drilling operations on nearby non-fee land

based on the possibility that an equipment or other failure could result in a discharge of contaminants, some amount of which might reach a lake which was the source of the Tribe's drinking water, fishing, and other recreation. No. 1:19-CV-00037, 2022 WL 2612127, at *2 (D.N.D. Jun. 9, 2022).[4]

Second, the plurality opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) also fails to support the Tribe's position as urged. In the cases consolidated in *Brendale*, the Yakima Nation sought to impose its zoning laws to prohibit certain types of development on non-Indian fee land within the reservation that was divided into two areas—(1) "open" areas, that is rangeland, agricultural land, and land used for residential and commercial development, and (2) "closed" areas, that is forest land closed to the public. *Id*. at 414. A plurality of the Court held that the Tribe lacked authority under *Montana*'s second exception to zone fee lands in the "open" areas, but had authority to do so in the "closed" areas, *id*. at 432–33. Notwithstanding the Tribe's reliance on portions of Justice Stevens' opinion, the issue from his perspective was whether the Yakima Nation had authority to "prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the character of this unique resource by developing their isolated parcels without regard to an

[4] The District Court adopted the Magistrate Judge's Report and Recommendation, which has further analysis. *See* 2021 WL 8322489, at *20 (D.N.D., Feb. 22, 2021).

otherwise common scheme." *Id*. at 441. In answering yes, Justice Stevens did nothing to undermine Justice White's opinion, joined by three other justices, reaffirming that a tribe is not entitled "*to complain or obtain relief against every use of fee land that has some adverse effect on the tribe*" because the "*impact must be demonstrably serious* and *must imperil* the political integrity, the economic security, or the health and welfare of the tribe." *Id*. at 430–31 (emphasis added); *see also State of Montana*, 137 F.3d at 1140–41 (noting "both Justice White's and Justice Stevens' admonitions in *Brendale* that, to support the exercise of inherent authority, the potential impact of regulated activities must be *serious and substantial*") (emphasis added).

Here, however, there was no evidence that appellants' development of the Property posed a serious or substantial threat to a common scheme to preserve any unique character of any closed or pristine area of the Rincon Reservation. If anything, the character of the Property and the surrounding Rincon Reservation is indistinguishable, with identical businesses on the Reservation creating the same alleged risk of water contamination and fire hazard as appellants' alleged activities on the Property—such as Rik's Garage, an auto repair and scrap metal business that produced oil leaks, tire fragments, and other waste from crushers, forklifts, and other heavy equipment. (39-11304–313, 11329–330, 11334–349.) Contrary to the Tribe's argument, then, *Brendale* also does not lower its burden under *Montana's*

second exception. *E.g., State of Montana*, 137 F.3d at 1141 ("The *Strate* decision reaffirms the vitality of *Montana*; *Brendale* did not repudiate it."); *see also Boisclair v. Superior Court*, 51 Cal.3d 1140, 1158 (1990) (characterizing *Brendale* as affirming *Montana's* core holding that "Indians may not impose land use regulations on non-Indian land within reservation boundaries").

D. The Tribal Courts Confused the Tribe's High Burden to Assert Jurisdiction Over Non-Tribal Land With the Lower Standard Allowing the Tribe to Require Exhaustion of Administrative Remedies

Fatal to the Tribe's assertion the Rincon Trial Court did not use the wrong "colorable and plausible" standard, which applies only to exhaustion of tribal court remedies (AB at 26), is the Rincon Trial Court's own admission that it applied the wrong standard, a fundamental error the District Court never addressed.

In the Amended Tribal Court Judgment, the Rincon Trial Court explained that it had previously concluded that the Tribe could assert regulatory jurisdiction over the Property by satisfying the "colorable or plausible" standard:

> 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."* [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*."

(33-ER-9500, emphasis added). As is law of the case per this Court's disposition of the prior appeal, the "colorable or plausible" standard applies only to decide

whether to require exhaustion of tribal court remedies, which is "lower" than the standard required to actually establish tribal regulatory jurisdiction under Montana's second exception. (3-ER-351.) Because the Rincon Trial Court admittedly applied an erroneous standard of proof as the trier of fact, its finding of regulatory jurisdiction further constitutes reversible error as a matter of law.

E. The Tribal Court's Reliance on Other Improper Factors Confirms Its Failure to Correctly Apply *Montana's* Second Exception

The Tribe's defense of the Rincon Trial Court's reliance on other improper factors fails, confirming that the Amended Tribal Court Judgment was erroneous and should not have been recognized and enforced by the District Court.

First, the Tribe is wrong that the Rincon Trial Court correctly identified "the reality of a 'lawless enclave' as a factor in concluding that the Tribe met its burden under *Montana*" (AB at 39–40) and properly found that the County's refusal to assert jurisdiction over the Property meant that "chaos would ensue" (22-ER-6215). In reality, the "limited" scope of regulatory jurisdiction under *Montana* articulates no such factor to be considered as part of the Tribe's heavy burden of proof. *E.g.*, *Mandan*, 2022 WL 2612127, at *20 ("the *Montana* exceptions are 'limited,'" quoting *Plains Commerce*). The County's refusal to assert jurisdiction over the Property despite levying and collecting taxes from appellants for decades cannot justify the assertion of tribal jurisdiction absent a showing that appellants' activities on the Property pose threats to tribal subsistence under *Montana* and its

progeny. Indeed, contrary to the District Court's finding, nowhere does *Plains Commerce* state that a court "may consider the absence of federal, state, and local regulation as a factor relevant to whether [tribal] jurisdiction is 'necessary to avert catastrophic consequences.'"[5] (*Compare* 1-ER-32 *with Plains Commerce*, 554 U.S. at 341.) Such reasoning assumes catastrophic consequences absent some sort of regulation, excuses an abdication of authority by the proper regulating authority (here the County), and puts tribes on par with federal, state, and local authorities which necessarily enjoy a different relationship with private landowners.

Second, the Tribe ignores that, instead of analyzing regulatory jurisdiction under factors actually articulated in *Montana*, the Rincon Trial Court focused unduly, if not exclusively, on whether it was fair to require appellants to comply with the Tribe's environmental ordinances in the absence of County regulations. For example, the Rincon Trial Court stated: "Surely, requiring the Defendants to come into line with the Tribe's environmental code does little more than reasonably attempt to protect the health, welfare, and economic interest of the Tribe." (5-ER-974.) The Rincon Trial Court also opined that the "Rincon code which the Tribe is asking (requiring) the owners to follow is no more stringent than

[5] Even if the absence of other regulation were appropriate to consider, the District Court ignored EPA oversight over appellants' Property, while dismissing appellants' third-party claims and denying leave to amend their declaratory and injunctive relief claims against the County to require it to assume regulatory jurisdiction over the Property, including permitting future development efforts.

the average city or county requirements" and that it had to "*balance* the interest of the Tribe's land use policies and procedures [with] the Defendants." (5-ER-975.) But no such policy considerations or balancing are articulated in *Montana* or its progeny; tribal jurisdiction is appropriate because its absence threatens tribal subsistence, not because it is reasonable, unobtrusive, or balanced. Moreover, asking whether the Tribe's environmental ordinances were fair to impose impermissibly flipped the burden under *Montana*. Instead of requiring the Tribe to establish that its ordinances were justified by the threats or direct effects on its subsistence, the Rincon Trial Court required appellants to demonstrate that enforcing the ordinances would be an unfair or unreasonable imposition.

Third, the Tribe cannot justify after-the-fact that the "small" size of the Rincon Reservation was a proper factor for the Rincon Trial Court to consider because there is no "cookie-cutter" approach to the *Montana* analysis. (AB at 44.) Applying *Montana's* second exception to the record necessarily means it is not a "cookie-cutter" analysis—as is true of any legal test applied to the facts at hand—but the application must remain guided by recognized factors, not new ones that a tribunal deems appropriate. Neither *Montana* nor any cases construing it examine the size of a tribe, its membership, or its reservation as consideration in determining whether regulatory jurisdiction should be asserted.

Finally, the Tribe's attempted defense of the Amended Tribal Court judgment based on other "conditions" on the Property also fails for multiple reasons. For example, the Tribe asserts that unsanitary conditions exist on the Property because they were observed by the Tribe's former environmental director, Melissa Estes, a "credentialed biologist" and because "[i]t does not take a rocket scientist to conclude that unsanitary conditions can threaten public health and the spread of disease." (AB at 43.) But the Rincon Trial Court never cited any unsanitary conditions on the property or Estes' opinions concerning their purported risk of spreading disease to justify the assertion of tribal regulatory jurisdiction. Nor could it because Estes was never designated as an expert in any science whom a tribunal could deem qualified to identify unsanitary conditions on the Property as the cause of a potential epidemic threatening the Tribe's health. *See* Fed. R. Evid. 702, Adv. Comm. Notes (2000) (requiring trial court to find expert testimony "properly grounded, well-reasoned, and not speculative before it can be admitted").

F. The Evidence Did Not Satisfy the High Threshold Showing That Appellants' Activities Risked the Tribe's Water Quality or Fire Safety

Appellants did not merely identify evidence contrary to the Tribal Court's Opinion to argue that its findings were clearly erroneous, as the Tribe asserts. (AB at 12.) Rather, appellants established that the evidence did not meet the high threshold showing that the activities on the Property posed a threat or direct effect on tribal subsistence under *Montana's* second exception. That is not to say that the

Tribe had to establish *actual* water contamination or increased fire hazard from activities on the Property as opposed to the *potential* for such risks. Rather, as with all evidence, such risks could not be speculative or remote to satisfy the Tribe's burden, as was the case here.

Instructive in this regard is *Mandan*, where the court began by acknowledging that "the Supreme Court has made clear that the *threshold* for invocation of *Montana's* second exception is *high*," such that "the potential for harm or damage must rise to the level of *imperiling the subsistence of the tribal community.*" 2021 WL 8322489, at *20.[6] The *Mandan* Court then rejected tribal regulatory jurisdiction over oil drilling operations on nearby non-fee land because the tribe's evidence "at best" supported only the "*possibility* that, if there is an equipment or other failure resulting in a discharge of contaminants, *some amount* of contaminant *might* reach" a lake critical to the tribe's water, fishing, and recreation. *Ibid*. It also went on to explain:

> What the evidence does not demonstrate, however, is a substantial risk that, if some contaminant should find its way to the Lake, it would cause significant damage—much less that reaching catastrophic proportions or otherwise putting in peril the subsistence of the [Tribe] (e.g., actually resulting in an inability to use the Lake for drinking water, fishing, or recreational purposes).

[6] Cited here is the "Report and Recommendation" adopted by the district court.

Ibid. Here too, the Tribe was required to meet its high burden to establish that appellants' activities created more than a remote or speculative risk to its drinking water or fire safety, which it failed to do, as appellants established in the Opening Brief and briefly further discuss.

1. Substantial Evidence Did Not Show Anything More Than a "Possibly Remote" Risk of Water Contamination

Just as in *Mandan*, with respect to its drinking water, the Tribe established, at best, the remote possibility that, *if* a diesel plume under the Property's surface caused by the 2007 Wildfires *did not* continue to dissipate and completely dissolve as indicated by tests, it *might* migrate towards the Tribe's closest water well within 43 to 1,200 years. (OB at 21–24.) The Rincon Trial Court even noted in its findings that this risk was "remote":

> Plaintiffs contend the activities on Defendants' property, if allowed to continue unchecked, bear a distinct possibility of damaging its "pristine" water table. Evidence at trial showed this, *while possibly remote*, it is a factor to be considered as argued by the Plaintiffs.

(5-ER-971, emphasis added.) Meanwhile, the Tribe successfully urged the Rincon Trial Court and the Rincon Court of Appeals to ignore evidence that appellants had engaged in cleanup efforts overseen by the EPA, which gave the Property a clean bill of health in removing all contaminants and assumed jurisdiction over the septic system, all of which further attenuated the already remote risk to the Tribe's drinking water. (2-ER-236; 18-ER-4985, 5393; 19-ER-5391–94, 5399; 22-ER-

6153–56, 6162; 36-ER-10450, 10482.) And just as it does now in citing assertedly voluminous evidence supporting its position (AB 23–24. 27–29), the Tribe ignored its own testing reports plus admission by its experts (Frank Dane and Earl Stephens), as well as other witnesses, that the well on the Property was not contaminated, that the diesel oil plume caused by the 2007 Wildfires had been shrinking, that the plume would likely disappear over time, and that it would be speculative to opine whether activities on the Property posed a catastrophic risk of harm to the Tribe's drinking water. (18-ER-4983–4985; 22-ER-6162; 36-ER-10450, 10442–447, 10466–469, 10477–478; 37-ER-10760–10761; 39-ER-11213, 11323–11324; 40-ER-11444; *see also generally* OB at 23-24, 51–54.)

2. Substantial Evidence Also Did Not Support More Than a Speculative Risk to the Tribe's Fire Safety

Likewise, and again as in *Mandan*, with respect to fire safety, the Tribe established only the mere possibility that, *if* there were another wildfire like the one in 2007 and *if* it were exacerbated by flammable structures and equipment stored on the Property, it *might* lead the fire to jump the adjacent two-lane County road and burn down the casino that was otherwise deemed so safe as to have been an evacuation center during the 2007 wildfires. (*See* OB at 25–26.) Again, this speculative scenario overlooked cleanup efforts on the Property to remove or more safely store flammable equipment or materials, including sealing the Property's pavement with concrete and asphalt to restrict any debris from leaching

underground (2-ER-236; 22-ER-6153;13-ER-3516–3519; 19-ER-5394, 5399; 40-ER-11432–433), plus the additional safety provided by a well-staffed tribal fire department on the Rincon Reservation (6-ER-13440; 13-ER-3534.) Moreover, whereas it now cites voluminous purported site inspection reports, a video from the 2007 Wildfires, plus testimony from experts like Douglas Allen supporting its position, the Tribe overlooks that the same video and reports were inconclusive while the same expert admitted on cross-examination that he could not definitely opine that any of appellants' activities on the Property could create a risk that the casino would burn down. (*Compare* AB at 36–38 *with* 18-ER-4998, 36-ER-10332, 10334,10338–345; *see also generally* OB 53–54.)

The disconnect between the Tribe's evidence and the particularized showing required under *Montana's* second exception is explained by the substance of the notices of violation (NOVs) that formed the basis of the Tribe's counterclaim for enforcement in the Rincon Trial Court and the resulting Amended Tribal Court Judgment. These NOVs were premised on the occurrence of a series of unlikely catastrophes befalling the equipment stored on the Property for routine commercial activities, such as (1) mobile home structures for sale and refurbishing; (2) parked cars and semi-trucks; (3) refrigeration trailers; (4) groundwater pumps and pressurization equipment; (5) a septic system; (6) rented mobile homes or campers; (7) stacked wooden pallets for refurbishing; and (8) three water tanks. (10-ER-

2636–43; 18-ER-4989–99; *see generally* OB at 19–20.) But there was no evidence that that these materials, equipment, or related agricultural or commercial activities threatened the Tribe's drinking water or fire safety barring circumstances that defied all evidence and expert admissions—such as a diesel plume *unexpectedly* failing to dissipate and traveling 2,400 feet over dozens of years to the Tribe's drinking well; a wildfire *unpredictably* jumping from the Property, but not the surrounding Rincon Reservation, to burn down the Tribe's well-fortified casino; or a rodent-borne disease *surprisingly* on the Property despite regular trash collection and absent objective evidence of a rat infestation.

3. No Evidence Established Any "Exacerbated" Risk Over Time

The Tribe also defends the Rincon Trial Court's finding of regulatory jurisdiction based on an alleged "present" ongoing risk that the water table below the Property is still contaminated, which will manifest itself in future testing. (AB at 30–32). As the Tribe is well aware, however, evidence to the contrary was provided to the Rincon Trial Court and the District Court in the form of a 2020 site inspection report by the Tribe showing "very low" level contamination of the soil and water table on the Property, such that it was "below typical regulatory action limits" and did not "warrant further action." (4-ER-906–915.) Though the District Court's refused to take judicial notice of this report on the ground that it was not presented to the Rincon Trial Court during trial (*compare* 4-ER-901–903 *with* 1-

ER-26, n.3), the Tribe should not be allowed to leverage this ruling to assert an argument contrary to evidence it knows exists outside the record.

G. The Amended Tribal Court Judgment's Injunction is Overbroad and Vague, Challenges Appellants Preserved Before all Tribunals

The Tribe's defense of the District Court's conclusion that appellants failed to appeal the injunction issued as part of the Amended Tribal Court Judgment to the Rincon Court of Appeals, and thus failed to exhaust their tribal court remedies, is contrary to the record. (AB at 50.) First, appellants challenged the entirety of the 2019 Tribal Court Judgment in their appeal to the Rincon Court of Appeals, leading that tribunal to reverse the injunction as "overbroad," and remand with instructions that the Rincon Trial Court "mold the protuberances of the injunction to the hollows of the potential harm." (2-ER-325.) As examples of overbreadth, the Rincon Court of Appeals noted that not all appellants' activities were found to threaten catastrophic consequences; not all activities needed to cease until the Tribe approved a business plan; and the Tribe could not unilaterally enter the Property to initiate inspections. (2-ER-326–26.) Unfortunately, the Amended Tribal Court Judgment failed to address all these issues. Second, the parties stipulated, and the District Court confirmed, that appellants had successfully exhausted their tribal court remedies when, following issuance the Amended Tribal Court Judgment, appellants moved to reopen the underlying action in District Court. (ECF 131 at 7 ["The parties do not dispute that Plaintiff RMCA has exhausted its tribal court

remedies."].)[7] Thus, appellants' overbreadth and vagueness challenges to the injunction under Rule 65 were preserved and are properly before this Court.

On the merits, the Tribe's contention that the broad scope of the injunction only requires appellants to comply with "various specified laws and regulations of the county, state or the United States" where "tribal law is silent," is wrong. (AB at 51.) As appellants explain in their Opening Brief, there is no specification of the laws and regulations with which appellants much comply, simply a blanket requirement for appellants to comply with any and all ""laws and regulations designated by the [Rincon Environmental Director] as necessary to protect tribal interests" or the "Uniform Building Code, and the San Diego County Code of Administrative Ordinances[.]" (2-ER-62.) The Tribe's attempt to reserve discretion over which of its environmental ordinances must be complied with is the exact problem. And the Tribe's related contention that wholesale County Codes are the "the very same exact laws that would apply" if the Property were located outside the Rincon Reservation's "external boundaries" also misses the point. (AB at 51.) Given the Tribe's assertion that the County has no jurisdiction over the Property, rendering it a purported "lawless enclave," appellants have no way of knowing which provisions of the County Codes they must comply with to avoid violating the injunction, the exact problem Rule 65 is meant to avoid. *Schmidt v. Lessard*,

[7] *See* footnote 2, *supra*.

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.").

III. Appellants Did Not Unduly Delay Seeking Leave to Amend Their Claims But Rather, Were Constrained by Circumstances Beyond Their Control, Including the Tribe's Status as an Immune But Indispensable Party to Such Claims and the 10-Year Stay in the Underlying Action

The Tribe, the County, and SDG&E all defend the District Court's decision to deny appellants leave to amend their claims against them by accusing appellants of either neglecting to or strategically delaying seeking leave to amend. In reality, however, appellants exercised diligence but were forced to wait due to a series of events beyond their control. Because appellees were admittedly on notice of the substance of the proposed claims against them all along, the denial of leave to amend is more prejudicial to them than the unavoidable delay is to appellees.

First, as appellants explained, and appellees admit, appellants' 2008 state court action arising out of these facts against the Tribe and SDG&E, with the County added as a cross-defendant, was dismissed over appellants' objections on the grounds that the Tribe enjoyed sovereign immunity from suit but was an indispensable party. (*Compare* 1-ER-10, 4-ER-661–64 *with* 4-ER 686–92.)

Second, the following year, when appellants filed the underlying federal action in 2009, they could only sue Tribal officials in their individual capacities because of the Tribe's sovereign immunity. (99-ER-29256–294.) Had appellants

alleged claims against the County and SDG&E at the time, the Tribe's absence as an immune but indispensable party would have required dismissal of such claims under the preclusion doctrines. *See Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003) (describing the "same general principle" underlying the doctrines of claim and issue preclusion—that is, "[a]fter a claim or issue is properly litigated, that should be the end of the matter for the parties to that action."). In other words, appellants did not inexplicably fail to or otherwise strategize delaying their claims against the Tribe, the County, and SDG&E, as appellees assert; rather, they were legally barred from pursuing such claims. Moreover, in 2012, the underlying action was administratively closed for nearly a decade to force appellants to exhaust their tribal court remedies over their objection and at the individual Tribal Defendants' behest. (OB at 17–20, 28–29.)

Third, when the underlying action was reopened in 2020 to adjudicate the enforceability of the Amended Tribal Court Judgment (2-ER-163–172), appellants filed a first-amended complaint in July 2020 adding the Tribe asserting it had waived sovereign immunity by filing a counterclaim against appellants in the Rincon Trial Court (98-ER-29085–255.) When the Tribe doubled down by filing an answer and counterclaim in the underlying action in September 2020, confirming its waiver of sovereign immunity, appellants *immediately* filed a third-party complaint against the Tribe, the County, and SDG&E *the same month*,

asserting the claims against these parties that they had not been allowed to pursue in their state court action in 2008. (98-ER-28934–99-29084; 98-ER-28850–933.) Appellees' claim thus boils down to the assertion that appellants failed to file their third-party complaint in July 2020, when the underlying action was first re-opened and they filed their first-amended complaint adding the Tribe, instead of September 2020, a three-month period that hardly constitutes prejudicial or undue delay.

Finally, the two-year period between appellants' filing of the third-party complaint in September 2020 and their proposed second-amended complaint with their motion for leave to amend in August 2022 is also not attributable to appellants' undue delay. Rather, the District Court bifurcated proceedings to first adjudicate cross-motions regarding the enforceability of the Amended Tribal Court Judgment, and then address appellees' motions to dismiss the third-party complaint. (1-ER-6–7.) When the District Court eventually did address appellees' motions to dismiss the third-party complaint, it granted them on *procedural* grounds, finding that the Tribe, the County, and SDG&E were improper third-party defendants and inviting appellants' motion for leave to amend. (1-ER-7.) Appellants then immediately and timely moved for leave to file a second-amended complaint, alleging the claims against the Tribe, the County, and SDG&E that they admit to being aware of since 2008 but could not assert for over a decade, supplemented with allegations of additional, continuing violations. (*Ibid*.)

On this record, the District Court did abuse its discretion by denying leave to amend for undue delay without appreciating let alone analyzing the circumstances beyond appellants' control that forced them to defer seeking leave to amend. Contrary to the District Court's conclusion, however, appellants did not arbitrarily "wait[] more than thirteen years to request the addition of the proposed amendments to the Complaint despite their awareness throughout the litigation of the material facts and theories raised by the amendment." (1-ER-11.) Rather, for nearly that entire 13-year period, appellants were foreclosed from asserting the amended claims despite exercising reasonable diligence, as discussed above. Moreover, the District Court improperly gave primacy to the unavoidable delay in seeking leave to amend but failed to balance the proclaimed prejudice to appellees against the greater prejudice to appellants from having their claims permanently foreclosed despite the exercise of diligence. *See Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982) (prejudice to opposing party, not moving party's diligence, is the crucial factor in determining whether or not to grant leave to amend), *vacated on other grounds*, *Sumner v. United States,* 459 U.S. 810 (1982); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–187 (9th Cir.1987) (prejudice is the "touchstone of the inquiry under rule 15(a)" and the party opposing amendment bears the burden of showing prejudice); *Howey v. United*

States, 481 F.2d 1187, 1190 (9th Cir.1973) (stating that "the crucial factor is the resulting prejudice to the opposing party").

Further, the District Court essentially conflated the inquiry with respect to delay and prejudice, finding that appellants' "extended delay" alone created prejudice because the remaining claims in the case had been adjudicated and certain employees with knowledge of the relevant facts had retired. (E.g., 1-ER-12–13.) But the District Court failed to consider the fact that the delay was caused by circumstances beyond appellants' control, including the District Court's own rulings to bifurcate proceedings when the underlying litigation was re-opened, or the possibility that substantial evidence regarding the remaining claims was already adduced during tribal proceedings.[8] On balance, then, and particularly if this Court reverses the order recognizing and enforcing the Amended Tribal Court judgment, it should also reverse the denial of leave to amend.

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[8] The County also asserts that denial of leave to amend should also be affirmed on grounds not considered or addressed by the District Court—that is, because it would have been futile as appellants' claims fail on various asserted grounds. Although space constraints prohibit appellants from addressing the County's lengthy arguments here, they incorporate by reference their arguments in opposition to the County before the District Court. (*See* ECF No. 210; 3-ER-404–560.)

CONCLUSION

For the reasons discussed in appellants' Opening Brief and here, appellants respectfully request that this Court reverse the underlying judgment.

Dated: December 4, 2023

Respectfully submitted,

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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 December 4, 2023, I electronically filed APPELLANTS' COMBINED REPLY BRIEF with the Ninth Circuit Clerk of Court by using the appellate CM/ECF system. 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 December 4, 2023, at San Diego, California.

s/ Rupa G. Singh
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