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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RINCON MUSHROOM  
CORPORATION OF AMERICA, a  
California Corporation,

Plaintiff,

v.

BO MAZZETTI; JOHN CURRIER;  
VERNON WRIGHT; GILBERT  
PARADA; STEPHANIE SPENCER;  
CHARLIE KOLB; DICK  
WATENPAUGH; DOE CO.; and  
DOE I and DOE II,

Defendants.

CASE NO. 09cv2330-WQH-JLB  
ORDER

HAYES, Judge:

The matters before the Court are the Motion to Re-Open Federal Case After Exhaustion of Tribal Remedies (ECF No. 83) and the Second Motion to Re-Open Federal Case-Post Trial In Tribal Court and the Request for Preliminary Injunction (ECF No. 92) filed by Plaintiff Rincon Mushroom Corporation of America (hereinafter "RMCA").

**I. Procedural Background**

On October 20, 2009, RMCA initiated this action by filing the Complaint. (ECF No. 1). The action concerns tribal regulation of non-Indian fee simple land located within the boundaries of the reservation of the Rincon Band of Luiseno Mission Indians. Defendants Bo Mazzetti, John Currier, Vernon Wright, Gilbert Parada,

1 Stephanie Spencer, Charlies Kolb, and Dick Watenpaugh (“the Rincon Band  
2 Defendants”) are tribal officials sued in their individual and official capacities. *Id.* ¶¶  
3 4-5.

4 The Complaint alleges the following ten causes of action: (1) intentional  
5 interference with contract; (2) intentional interference with advantageous economic  
6 relationship; (3) conspiracy to intentionally interfere with contract; (4) conspiracy to  
7 intentionally interfere with advantageous economic relationship; (5) conspiracy to  
8 deprive plaintiff of equal protection and equal privileges and immunities under 42  
9 U.S.C. § 1985(3); (6) civil RICO; (7) civil RICO conspiracy; (8) negligent interference  
10 with contract; (9) negligent interference with advantageous economic relationship; and  
11 (10) violation of 42 U.S.C. § 1983. (ECF No. 1).

12 On September 21, 2010, the Court entered an Order granting a Motion to Dismiss  
13 filed by the Rincon Band Defendants. (ECF No. 54). The Court concluded that RMCA  
14 “satisfied the requirements to establish Article III standing in this matter” but dismissed  
15 the Complaint for failure to exhaust tribal court remedies. The Court stated,

16 Given the breadth of the declaratory and injunctive relief requested by the  
17 Plaintiff, there is a “colorable or plausible” claim to tribal regulatory and  
18 tribal court jurisdiction pursuant to *Montana*’s second exception. *Elliott*,  
19 566 F.3d at 848; *cf. Montana II*, 137 F.3d at 1141. Although *Montana*’s  
20 second exception should not “be construed in a manner that would  
21 swallow the rule or severely shrink it,” *Plains Commerce Bank*, 128 S. Ct.  
22 at 2720, neither should it be construed in a manner that would eliminate  
23 the exception entirely. Because tribal court jurisdiction is plausible,  
24 ‘principles of comity require [federal courts] to give the tribal courts a full  
25 opportunity to determine their own jurisdiction in the first instance.’  
26 *Elliott*, 566 F.3d at 850-51. The Court concludes that Plaintiff must  
27 exhaust tribal remedies prior to asserting its claims in this Court.

28 (ECF No. 54 at 13-14).

29 The Ninth Circuit Court of Appeals affirmed the Court’s determination that  
30 RMCA must exhaust its tribal remedies on the issue of tribal jurisdiction before  
31 bringing suit in federal court. (ECF No. 66). The Court of Appeals stated,

32 We emphasize that we are not now deciding whether the tribe actually has  
33 jurisdiction under the second *Montana* exception. We hold only that  
34 where, as here, the tribe’s assertion of jurisdiction is “colorable” or  
35 “plausible,” the tribal courts get the first chance to decide whether tribal  
36 jurisdiction is actually permitted. If the tribal courts sustain tribal

1 jurisdiction and Rincon Mushroom is unhappy with that determination, it  
2 may then repair to federal court.

3 *Id.* at 4. However, the Court of Appeals held that this Court abused its discretion in  
4 dismissing the case rather than staying it. *Id.* at 5. The Court of Appeals reversed the  
5 court’s dismissal and remanded with instructions to stay the case pending RMCA’s  
6 exhaustion of tribal remedies. *Id.*

7 On August 1, 2012, this Court issued an Order spreading the mandate, ordering  
8 the Clerk of Court to reopen the case, and staying the case pending the exhaustion of  
9 tribal remedies. (ECF No. 65).

10 In the years following the Order staying the case, the Court ordered and the  
11 parties filed three status reports as to the exhaustion of tribal remedies. (ECF Nos. 72,  
12 78, 81). On June 25, 2015, the Court issued an Order administratively closing the case  
13 “without prejudice to any party to move to reopen, and without prejudice to the  
14 resolution of any statute of limitations issue associated with the filing of this  
15 complaint.” (ECF No. 82 at 3).

16 On December 16, 2016, RMCA filed the Motion to Reopen Federal Case after  
17 Exhaustion of Tribal Remedies. (ECF No. 83). On January 9, 2017, the Rincon Band  
18 Defendants filed a response in opposition. (ECF Nos. 84, 85-90). On January 18, 2017,  
19 RMCA filed a reply. (ECF No. 91).

20 On June 20, 2017, RMCA filed a second Motion to Re-Open Federal Case-Post  
21 Trial In Tribal Court and a Request for a Preliminary Injunction. (ECF No. 92). The  
22 Rincon Band Defendants filed a response in opposition. (ECF No. 93). RMCA filed  
23 a reply. (ECF No. 94).

## 24 **II. Allegations of the Complaint**

25 In 1982, RMCA, a non-Indian corporation, purchased from a non-Indian five  
26 acres of land within the exterior boundary of the Rincon Tribal Reservation. (ECF No.  
27 1 at ¶ 9). In 1960, the property was “allotted and conveyed out of Tribal ownership,”  
28 and since that time, “the property continuously has been, and now remains, non-Indian  
fee land.” *Id.* (quotation omitted). RMCA owned the land in fee simple until 1999,

1 when it sold the land to Marvin Donius, also a non-Indian. *Id.* ¶ 11. RMCA “receiv[ed]  
2 as partial consideration . . . a promissory note in a substantial amount, together with a  
3 ‘carry-back’ deed of trust.” *Id.* Donius and RMCA used the land as a “non-tribal  
4 mixed use commercial facility.” *Id.* at ¶ 13. “The property is located in an ‘open’ part  
5 of the Rincon Reservation . . . from the Rincon Tribe’s public casino.” *Id.* ¶ 10.

6 On March 15, 1960, the Rincon Tribe enacted Articles of Association, which  
7 state that the “Rincon Tribal Business Committee ... shall have jurisdiction over the  
8 lands within the boundaries of the Rincon Reservation.” *Id.* ¶ 19. On or about April  
9 2007, “the Rincon Tribe enacted a ‘Tribal Environmental Policy Ordinance’ that . . .  
10 purportedly placed under the governmental jurisdiction of the Tribe the subject parcel,  
11 on the asserted basis that the Tribe’s regulatory authority extended to and included all  
12 land within the exterior boundaries of the Rincon Reservation.” *Id.* ¶ 20 (quotations  
13 omitted). “[T]he Rincon Tribe enacted an Environmental Enforcement Code that as  
14 revised on or about July 10, 2007 purported to extend tribal environmental regulatory  
15 authority over and as to [the] subject property, on the basis of the Tribe’s claim of such  
16 authority over all lands within the exterior boundaries of the Rincon Indian  
17 Reservation.” *Id.* ¶ 21 (quotations omitted). “On ... September 30, 2008, these  
18 defendants caused the Rincon Tribe to enact a Tribal Court Jurisdiction Ordinance that  
19 purported to claim regulatory as well as *in personam* and subject matter adjudicative  
20 jurisdiction over non-tribal member plaintiff, non-tribal member Donius, and as to  
21 subject non-tribal fee property, ... and also purports to extend the Tribe’s Territorial  
22 Jurisdiction over any fee lands within the external boundaries of the Rincon  
23 Reservation....” *Id.* ¶ 22 (quotations omitted).

24 The first count of the Complaint seeks a judicial declaration that “any prospective  
25 or future actual or attempted enforcement by these defendants of” the above-referenced  
26 Articles of Association, Tribal Environmental Policy Ordinance, Environmental  
27 Enforcement Code, and Tribal Court Jurisdiction Ordinance is “facially  
28 unconstitutional, unconstitutional as applied, and/or illegal, and/or entirely

1 unenforceable, pursuant to applicable provisions of federal and California law, both  
2 with respect to plaintiff as well as concerning subject property.” *Id.* ¶ 23(a).

3 The second count of the Complaint seeks the issuance of “a mandatory injunction  
4 requiring and ordering that the above-named Tribal defendants desist and refrain from  
5 any further actual or attempted enforcement, prospectively and in the future, of any and  
6 all purported Rincon Tribe regulatory or adjudicative authority over or as to plaintiff  
7 and/or over or as to subject property.” *Id.* ¶ 29.

### 8 **III. Recent Tribal Court Proceedings**

9 In 2010, a tribal court in the Intertribal Court of Southern California (“the tribal  
10 court”) issued an order granting the Rincon Band of Luiseno Indians’ (the “Rincon  
11 Band”) application for a preliminary injunction against Marvin Donius, Mushroom  
12 Express, Inc., and RMCA. (ECF No. 85-1). The preliminary injunction order states  
13 that Donius, Mushroom Express, Inc., and RMCA are, among other restrictions,  
14 “enjoined from bringing any additional property onto the subject property.” *Id.* at 3.

15 On September 27, 2016, the Rincon Band filed a motion for order to show cause  
16 regarding civil contempt in the tribal court alleging that Donius and RMCA had began  
17 constructing a structure on the property in violation of the preliminary injunction. (ECF  
18 No. 85-3). On November 2, 2016, the tribal court held a hearing regarding a motion for  
19 partial summary judgment on the issue of jurisdiction and this motion for an order to  
20 show cause why Donius/RMCA should not be held in contempt for violating a  
21 preliminary injunction. (ECF No. 83-2). At the tribal court proceeding, the tribal court  
22 judge stated, “When I gave that order, with all due respect . . . It was for everything.  
23 Everything was to cease and desist, period. I don’t know how you or anyone else  
24 interpreted it. It was stop everything. That was my order.” (ECF No. 83-2 at 22). Mr.  
25 Corrales, counsel for Marvin Donius and RMCA, raised the issue of jurisdiction.

26 MR. CORRALES: Yes, I brought it up because they are going to interpret  
27 your statement that Your Honor made the original preliminary injunction  
28 had to do with not only no further building, but any activities on the  
property. And so what the Court is doing here is the Court is making a  
determination of regulatory jurisdiction as to what is going on in the  
property now.

1 THE JUDGE: There is no dispute. I've already made the comment.  
MR. CORRALES: Okay.  
2 THE JUDGE: This Court has jurisdiction. That's what we're arguing,  
rehashing.  
3 MR. CORRALES: Yes. That is--  
THE JUDGE: I already made that. It went to the Ninth Circuit. The Ninth  
4 Circuit says, you, Counsel, your side, has not exhausted its tribal remedies.  
So we're back in terms of additional aspects that you want to add to this.  
5 MR. CORRALES: Yes, Your Honor.  
THE JUDGE: But as we sit and talk here today this Court has jurisdiction.  
6 That was the finding that remains.  
MR. CORRALES: Yes, Your Honor. I understand that. So if that's the  
7 case, then why are we going forward with the trial in this case? Why are  
we going forward with the summary judgment? If the Court today, right  
8 now as to this issue --  
THE JUDGE: Because you have brought up all this new information, et  
9 cetera, that may change the Court's mind.  
10 MR. CORRALES: Yes, Your Honor. Just so it is clear, the Court has said  
that the preliminary injunction --  
11 THE JUDGE: Stands.  
MR. CORRALES: -- stands and that the preliminary injunction at issue in  
12 September 2010 was based upon this Court's determination that there is  
regulatory jurisdiction on the property by the tribe.  
13 THE JUDGE: I'm going to determine that at the next hearing and/or at  
trial.  
14 MR. CORRALES: Yes, Your Honor. We're going to revisit that in  
summary.  
15 THE JUDGE: Yes. Revisit it and then again at the trial, if necessary.  
MR. CORRALES: Yes, Your Honor.  
16 THE JUDGE: As we all know jurisdiction is always subject to being  
questioned, no matter at what level, Court, tribe, et cetera, trial, et cetera.  
17 So we've settled this issue for now.

18 *Id.* at 23-25.

19 At a subsequent proceeding on January 7, 2017, the tribal court heard oral  
20 argument on the motion for summary judgment on the issue of jurisdiction filed by  
21 Donius and RMCA. (ECF No. 89). The tribal court judge stated,

22 This is a partial -- motion for partial summary judgment with regards to the  
23 issue of: Does the tribe have jurisdiction in this matter over this piece of  
property based upon the ownership being fee simple by a nontribal  
24 member?

25 ...  
The question before the Court today is: Does the Court have  
jurisdiction? Does the Court have jurisdiction to ask these questions? Does  
26 the Court have jurisdiction, in essence, to bring these issue to trial?

27 I have to agree with the tribe in that there are many disputed issues  
of material fact within the arguments that are being made on both sides, I  
might add.

28 So while I'm ruling for the tribe at this juncture, I'm saying there  
are disputes, there are material issues of fact that could affect the outcome  
of who has jurisdiction.

1 So as to the motion for partial summary judgment as to jurisdiction,  
2 it's denied as to Mr. Donius and the mushroom farm. This case will go to  
trial on that issue.

3 Now, that's the Court's decision. I have a lot more, but I don't think  
4 it's necessary. I don't feel – let me just add. I don't feel it's reasonable in  
any way, shape or form based on the history of the use of the tribe to put  
5 the tribe at risk. And “potential” is a word that's used in Montana. And  
there is a potential.

6 We have no idea what Mr. Donius intends to do with this property.  
We know what the tribe's got in mind. They've got their livelihood.

7 The Evans case talks about one house. I don't see how that affects  
this particular case. I don't even think that the Evans case – and I have a  
further reading, but at this juncture, I find that the Evans case is really not  
8 applicable here, but it may. I'll reread it, but I doubt it at this point.

9 I stress that the defendant has a duty, if not a responsibility, to see  
that his use now and in the future does not foster an unreasonable risk to  
this major tribal enterprise.

10 Now, I may be misinterpreting Montana. I may be intellectually  
expanding Montana, but I think it's an issue that has to go to trial, period.

11 Now, as to the ultimate decision, the answer is, yes, this Court does  
feel, based upon the arguments today, that the tribe has jurisdiction, I want  
that to be clear.

12 Trial is scheduled for next Monday.

13 (ECF No. 89 at 89-92).

14 After the first motion to reopen the case was filed, the tribal court conducted the  
15 first portion of the bifurcated trial to address the issue of tribal jurisdiction. On May 18,  
16 2017, the tribal court issued an order stating, “Judgment in this matter with regard to  
17 the Tribe's jurisdiction over the fee land in question is confirmed thereby giving the  
18 Tribal Court jurisdiction in this case. As the trial has been bifurcated, all other matters  
19 shall be set for future proceedings.” (ECF No. 92-2 at 13).

#### 20 **IV. Discussion**

##### 21 **A. Exhaustion of Tribal Remedies**

22 RMCA contends that this Court should reopen the case because RMCA has  
23 exhausted its tribal court remedies. (ECF No. 83-1). RMCA contends that the  
24 statements by the tribal court judge on November 2, 2016 establish that the tribal court  
25 has concluded that the Rincon Band has jurisdiction to regulate all activities conducted  
26 on RMCA's property. RMCA contends that based on this “express statement” from the  
27 tribal court, RMCA has exhausted its tribal remedies and need not wait for any further  
28 ruling. RMCA contends that tribal court proceedings on December 15, 2015 and June

1 21, 2009 also establish the exhaustion of tribal remedies. (ECF No. 91). In its second  
2 motion, RMCA contends that it has exhausted tribal remedies based on (1) the tribal  
3 court’s “recognition” of the effectiveness of the 2010 injunction, and (2) the ruling on  
4 the bifurcated issue of jurisdiction. (ECF No. 92). RMCA contends that these rulings  
5 are interlocutory and therefore non-appealable. (ECF No. 92-1 at 7).

6 The Rincon Band Defendants contend that RMCA has not exhausted tribal  
7 remedies. The Rincon Band Defendants contend that the tribal court’s conclusion that  
8 the preliminary injunction remains effective is not a final determination on the issue of  
9 jurisdiction. (ECF No. 84). The Rincon Band Defendants contend that RMCA has not  
10 exhausted its tribal remedies until tribal appellate review on the issue of jurisdiction is  
11 conducted. (ECF No. 93). The Rincon Band Defendants contend that once RMCA  
12 advances the tribal court matter to final judgment, it may appeal the final judgment to  
13 the tribal court of appeals. *Id.* at 5.

14 Tribal governments have been divested of sovereignty over “relations between  
15 an Indian tribe and nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544,  
16 564 (1981) (quotation omitted). Tribal governments have no jurisdiction over non-  
17 members “beyond what is necessary to protect tribal self-government or to control  
18 internal relations[.]” *Id.* Tribes have some authority to regulate nonmembers on tribal  
19 lands, but as a general rule, tribes may not regulate nonmembers on non-Indian land  
20 within the boundaries of the reservation. *Id.* at 564-65. The Supreme Court has  
21 recognized two exceptions to this general rule, but only the second exception is at issue  
22 in this case. The second *Montana* exception provides, “[A] tribe may exercise ‘civil  
23 authority over the conduct of non-Indians on fee lands within the reservation when that  
24 conduct threatens or has some direct effect on the political integrity, the economic  
25 security, or the health or welfare of the tribe.’” *Plains Commerce Bank v. Long Family*  
26 *Land & Cattle Co.*, 554 U.S. 316, 329-30 (2008) (quoting *Montana*, 450 U.S. at 565).  
27 This exception is “limited,” and “cannot be construed in a manner that would swallow  
28 the rule or severely shrink it.” *Id.* at 330 (quotations omitted). The conduct at issue

1 “must do more than injure the tribe, it must imperil the subsistence of the tribal  
2 community.” *Id.* at 341 (quotation omitted). “The burden rests on the tribe to establish  
3 one of the exceptions to *Montana’s* general rule that would allow an extension of tribal  
4 authority to regulate nonmembers on non-Indian fee land.” *Id.* at 330.

5 Generally, if a non-Indian defendant is haled into a tribal court and asserts that  
6 the tribal court lacks jurisdiction, the defendant must exhaust tribal remedies before  
7 seeking to enjoin the tribal proceeding in federal court. *See Nat’l Farmers Union Ins.*  
8 *Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985). Even when there is no  
9 pending proceeding in tribal court, a nonmember plaintiff may not sue in federal court  
10 asserting that the tribe lacks regulatory authority over nonmember actions taken on non-  
11 Indian land within a reservation without exhausting tribal court remedies. *See*  
12 *Burlington N. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991).  
13 “Exhaustion is prudential; it is required as a matter of comity, not as a jurisdictional  
14 prerequisite.” *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004).

15 The Ninth Circuit Court of Appeals and the Supreme Court have both held that  
16 the exhaustion of tribal remedies includes tribal appellate review on the issue of  
17 jurisdiction. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987) (“At a minimum,  
18 exhaustion of tribal remedies means that tribal appellate courts must have the  
19 opportunity to review the determinations of the lower tribal courts.”); *Allstate Indem.*  
20 *Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999) (“Exhaustion of tribal remedies  
21 includes tribal appellate review on the question of jurisdiction; thus, federal courts  
22 should not intervene until tribal appellate review is complete.”).

23 This Court previously ruled and the Ninth Circuit Court of Appeals affirmed that  
24 RMCA must exhaust its tribal remedies before seeking relief in federal district court.  
25 The Court determined that the tribal court must be afforded the first opportunity to  
26 make a determination as to the extent of tribal jurisdiction. While the tribal court has  
27 made an initial determination on jurisdiction following the first portion of the bifurcated  
28 trial, exhaustion of tribal remedies includes tribal appellate review on the issue of

1 jurisdiction. *See Iowa Mut. Ins. Co.*, 480 U.S. at 16-17. The ICSC Code of Civil  
2 Procedure and Rules of Court, and the ICSC Inter-Governmental Agreement provide  
3 that parties in tribal court may appeal a final order or judgment of the ICSC Tribal  
4 Court. *See ICSC Code of Civil Procedure and Rules of the Court* at § 7.701; ICSC  
5 Inter-Governmental Agreement §§ 202, 205 (“Any party aggrieved by a final order or  
6 judgment of the ICSC Trial Court may file a petition requesting the ICSC Court of  
7 Appeals review the order or judgment . . .”).<sup>1</sup> (ECF Nos. 88-1 at 8, 88 at 41). Based  
8 on the record before this Court, RMCA has not sought and the tribal appellate court has  
9 not conducted any review of the issue of tribal jurisdiction. While RMCA contends that  
10 these rulings are interlocutory and therefore not appealable, RMCA fails to establish  
11 that the tribal court’s decision on jurisdiction would not be subject to tribal appellate  
12 review at a later point during tribal court proceedings. *See Elliott v. White Mountain*  
13 *Apache Tribal Court*, 586 F.3d 842, 847 (9th Cir. 2009) (determining that where a tribal  
14 appellate review process did not permit interlocutory appeals from jurisdictional  
15 rulings, the plaintiff was still required to exhaust tribal court remedies by waiting to  
16 seek appellate review until a final decision on the merits). Based on the record before  
17 the Court, the Court concludes that RMCA has not exhausted its tribal court remedies.

### 18 **B. Exceptions to the Exhaustion Requirement**

19 There are four exceptions to the exhaustion rule: “(1) when an assertion of tribal  
20 court jurisdiction is ‘motivated by a desire to harass or is conducted in bad faith’; (2)  
21 when the tribal court action is ‘patently violative of express jurisdictional prohibitions’;  
22 (3) when ‘exhaustion would be futile because of the lack of an adequate opportunity to  
23 challenge the tribal court’s jurisdiction’; and (4) when it is ‘plain’ that tribal court  
24 jurisdiction is lacking, so that the exhaustion requirement ‘would serve no purpose other  
25 than delay.’” *Elliott*, 566 F.3d at 847 (quoting *Nevada v. Hicks*, 533 U.S. 353, 369  
26

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27 <sup>1</sup> The Rincon Band Defendants provide a copy of the ICSC Code of Civil  
28 Procedure and Rules of Court and the ICSC Inter-Governmental Agreement. (ECF  
Nos. 88-1 at 8; 88 at 41). RMCA does not challenge the validity of these documents.

1 (2001)). RMCA moves the Court to reopen the district court case on the grounds that  
2 the following exceptions to the exhaustion requirement apply: (1) jurisdiction is plainly  
3 lacking such that the exhaustion requirement would serve no purpose other than delay;  
4 (2) the tribe's assertion of regulatory jurisdiction over the subject property is motivated  
5 by a desire to harass or is conducted in bad faith; and, (3) lack of an opportunity to  
6 challenge tribal court jurisdiction.

### 7 **1. Plainly Lacking Jurisdiction**

8 RMCA contends that the tribal court plainly lacks jurisdiction under the facts of  
9 this case pursuant to *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d  
10 1298 (9th Cir. 2013), which was decided after the Court of Appeals issued its decision  
11 in this case.<sup>2</sup> (ECF No. 83-1 at 6,16). The Rincon Band Defendants contend that *Evans*  
12 does not negate or diminish the application of *Montana's* second exception. (ECF No.  
13 84 at 16).

14 The "*Strate* exception" provides that exhaustion is not required "[w]hen ... it is  
15 plain that no federal grant provides for tribal governance of nonmembers' conduct on  
16 land covered by *Montana's* main rule,' so the exhaustion requirement 'would serve no  
17 purpose other than delay.'" *Nevada*, 533 U.S. at 369 (quoting *Strate v. A-1*  
18 *Contractors*, 520 U.S. 438, 459-60, n.14 (1997)). When determining "whether it is  
19 plain that the tribal court lacks jurisdiction," a court considers whether "jurisdiction is  
20 colorable or plausible." *Elliott*, 566 F.3d at 848 ("If jurisdiction is colorable or  
21 plausible, then the exception does not apply and exhaustion of tribal court remedies is  
22 required.") (quotations omitted). "The plausibility of tribal court jurisdiction depends  
23 on the scope of the Tribes' regulatory authority, as a tribe's adjudicative jurisdiction  
24 does not exceed its legislative jurisdiction." *Evans*, 736 F.3d at 1302 (citing *Plains*  
25 *Commerce*, 554 U.S. at 328).

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26  
27 <sup>2</sup> RMCA contends that Marvin Donius is "not bound by the Court of Appeals  
28 exhaustion order" and that he has a right to have this Court determine whether the  
Tribal Court "plainly lacks jurisdiction." (ECF No. 94 at 1-4). However, Mr. Donius is  
not currently a party to the matter before this Court.

1           The Court of Appeals for the Ninth Circuit has held that “threats to water rights  
2 may invoke inherent tribal authority over non-Indians” pursuant to *Montana’s* second  
3 exception. *Montana v. U.S. Env’tl. Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998).  
4 “A tribe retains the inherent power to exercise civil authority over the conduct of  
5 non-Indians on fee lands within its reservation when that conduct threatens or has some  
6 direct effect on the health and welfare of the tribe. This includes conduct that involves  
7 the tribe’s water rights.” *Id.* (quotation omitted). Similarly, tribes have a “strong  
8 interest” in “prevention of forest fires, and preservation of its natural resources” which  
9 could plausibly support tribal court jurisdiction pursuant to *Montana’s* second  
10 exception. *Elliott*, 566 F.3d at 850.

11           In its previous Order, this Court concluded that exhaustion was required because  
12 “Defendants have shown that conduct on Plaintiff’s property plausibly could threaten  
13 the Tribe’s groundwater resources and could contribute to the spread of wildfires on the  
14 reservation.” (ECF No. 54 at 13). The Court stated, “Given the breadth of the  
15 declaratory and injunctive relief requested by Plaintiff, there is a ‘colorable or plausible’  
16 claim to tribal regulatory and tribal court jurisdiction pursuant to *Montana’s* second  
17 exception.” *Id.* The Court of Appeals affirmed this decision and stated,

18           A tribe has jurisdiction to regulate “the conduct of non-Indians on fee  
19 lands within the reservation when that conduct threatens or has some  
20 direct effect on the political integrity, the economic security, or the healthy  
21 or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566  
22 (1981). We have held that both forest fires and contamination of a tribe’s  
23 water quality are threats sufficient to sustain tribal jurisdiction. *Elliott*,  
24 566 F.3d at 850 (forest fires); *Montana v. EPA*, 137 F.3d 1135, 1139-40  
(9th Cir. 1998)(water quality). Here, the tribe offered four declarations  
explaining how activities on Rincon Mushroom’s property could  
contaminate the tribe’s sole water sources and increase the risk of forest  
fires that could jeopardize its casino (its principal economic investment).  
Those threats are sufficient to make the tribe’s assertion of jurisdiction  
over activities on Rincon Mushroom’s property “colorable” or “plausible.”

25 (ECF No. 66 at 3-4).

26           In *Evans*, the Court of Appeals considered “whether the Shoshone-Bannock  
27 Tribes plausibly ha[d] the authority to regulate the land use of [the plaintiff], a  
28 nonmember of the Tribes, who owns land in fee simple within the Fort Hall

1 Reservation.” *Evans*, 736 F.3d at 1300. The Court of Appeals determined that the  
2 tribes plainly lacked authority to regulate the plaintiff’s conduct. *Id.* Similar to the  
3 Rincon Band Defendants in this case, the tribes in *Evans* argued that jurisdiction was  
4 plausible in part because the plaintiff’s conduct “threaten[ed] or has some direct effect  
5 on the political integrity, the economic security, or the health or welfare of the tribe.”  
6 *Id.* at 1305 (citing *Montana*, 450 U.S. at 566). The Court of Appeals determined that  
7 the tribes plainly lacked jurisdiction because the tribes failed to satisfy their burden to  
8 show that *Montana*’s second exception was applicable. The Court of Appeals stated,

9       The Tribes fail to show that [the plaintiff’s] construction of a single-family  
10       house poses catastrophic risks. The Fort Hall Reservation has long  
11       experienced groundwater contamination, and the Tribes proffer no  
12       evidence showing that [the plaintiff’s] construction would meaningfully  
13       exacerbate the problem. Further, the Tribes’ generalized concerns about  
14       waste disposal and fire hazards are speculative, as they do not focus on  
15       [plaintiff’s] specific project.

16 *Id.* at 1306.

17       While the Court of Appeals in *Evans* determined that there was insufficient  
18       evidence to support a finding that the tribes plausibly had jurisdiction, the Court of  
19       Appeals in this case held that declarations provided by the Rincon Band Defendants  
20       were sufficient to make the assertion of tribal court jurisdiction plausible. The Court  
21       concludes that *Evans* does not require a conclusion that jurisdiction is plainly lacking  
22       under the facts of this case and does not warrant reconsideration of the prior rulings on  
23       this issue by both this Court and the Court of Appeals.

## 24                   **2. Bad Faith or Desire to Harass**

25       RMCA contends that the Rincon Band’s assertion of regulatory jurisdiction over  
26       the subject property is motivated by a desire to harass or is conducted in bad faith.  
27       RMCA contends that the Rincon Band’s issuance of numerous [Notice of Violations  
28       (“NOVs”)] and litigation over the NOVs demonstrate an effort to harass RMCA into  
29       giving up the property. (ECF No. 83-1 at 17). RMCA contends that there is no  
30       evidentiary support for the Rincon Band’s assertions that RMCA’s activities on the  
31       property pose a risk of water contamination and threat of fire. The Rincon Band

1 Defendants contend that there is no credible evidence that the Rincon Band is using the  
2 tribal court for the purpose of harassment. (ECF No. 84 at 22-23).

3 An exception to the exhaustion requirement exists where “an assertion of tribal  
4 court jurisdiction is ‘motivated by a desire to harass or is conducted in bad faith.’”  
5 *Elliott*, 566 F.3d at 847 (9th Cir. 2009) (quoting *Nevada*, 533 U.S. at 369). This  
6 exception to the exhaustion requirement, however, may not be utilized unless it is  
7 alleged and “proved that enforcement of the statutory scheme was the product of bad  
8 faith conduct or was perpetuated with a motive to harass.” *A & A Concrete, Inc. v.*  
9 *White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986).

10 The Court previously determined that this exception was not applicable in this  
11 case because evidence in the record was insufficient to establish bad faith conduct or  
12 a motive to harass. (ECF No. 54 at 12 n.2). In support of this motion, RMCA provides  
13 the September 2015 NOVs and determination of risk of catastrophic risks (ECF No. 83-  
14 2, Exhibits 10,11); an expert report by Anderson Donan on water contamination issues  
15 (ECF No. 83-2, Exhibit 12); responses to interrogatories by the Rincon Band (ECF No.  
16 83-2, Exhibit 14); the Rincon Band’s written responses to an application for approval  
17 of a proposed business plan (ECF No. 83-2, Exhibits 5-7); and, a transcript from the  
18 deposition of Defendant Bo Mazzetti (ECF No. 83-2, Exhibit 13). These documents  
19 establish the existence of various legal and factual disputes between the Rincon Band  
20 Defendants and RMCA but do not demonstrate that the assertion of tribal jurisdiction  
21 was motivated by a desire to harass or was conducted in bad faith. The Court concludes  
22 that the evidence in the record is insufficient to “prove[] the enforcement of the  
23 statutory scheme was the product of bad faith conduct or was perpetuated with a motive  
24 to harass.” *A & A Concrete, Inc.*, 781 F.2d at 1417.

25 **3. Exhaustion Futile Due to A Lack of Opportunity to Challenge**  
26 **Tribal Court Jurisdiction**

27 RMCA contends that the tribal court judge has predetermined its ruling on  
28 regulatory jurisdiction by affirming that the preliminary injunction remains enforceable

1 during tribal court proceedings on November 2, 2016. (ECF No. 83-1 at 12). RMCA  
2 contends that the Rincon Band caused RMCA to believe that the preliminary injunction  
3 was not in effect because it did not enforce the injunction until August 2016. *Id.* at 12-  
4 13. RMCA contends that the Court of Appeals Memorandum on July 19, 2012,  
5 “invalidat[ed] or supersed[ed] the Tribal Court’s September 2010 preliminary  
6 injunction.” (ECF No. 83-1 at 14). RMCA contends that by “reaffirming” the  
7 preliminary injunction during the November 2016 proceedings, the tribal court judge  
8 “effectively cut-off Donius/RMCA’s right to challenge the Rincon Band’s assertion of  
9 regulatory jurisdiction.” *Id.* at 15. RMCA additionally contends that the tribal court  
10 has shown favoritism toward the Rincon Band. *Id.* at 20. RMCA contends that it  
11 would be futile to continue with the second phase of trial because the “Tribal Court  
12 made it clear that it had already decided jurisdiction in favor of the Tribe as far back as  
13 September 2010.” (ECF No. 92-1 at 23).

14 The Rincon Band Defendants contend that RMCA has been afforded the  
15 opportunity to challenge tribal court jurisdiction. (ECF No. 84 at 19). The Rincon  
16 Band Defendants contend that the tribal court’s decision to issue an interlocutory  
17 preliminary injunction does not establish that it will reach the same conclusion on  
18 jurisdiction after a full consideration of the facts and arguments. *Id.* The Rincon Band  
19 Defendants contend that RMCA was not denied an opportunity to appeal the  
20 preliminary injunction. *Id.* at 20. The Rincon Band Defendants contend that RMCA  
21 will have an additional opportunity to seek review from a tribal appellate court upon  
22 entry of final judgment. *Id.* The Rincon Band Defendants contend that there is no  
23 evidence that the tribal court has shown favoritism towards the Rincon Band. *Id.* at 23.

24 The Court concludes that RMCA fails to establish that the November 2016  
25 proceedings before the tribal court deprived RMCA of an opportunity to challenge the  
26 Rincon Band’s regulatory jurisdiction. RMCA asserts that its time to challenge the  
27 preliminary injunction ended in 2010, well before the Court of Appeals decision in  
28 2012 and the November 2, 2016 proceedings. The November 2016 tribal court

1 proceedings did not deny RMCA the opportunity to appeal the preliminary injunction.  
2 Further, the record reflects that RMCA has been afforded multiple opportunities to  
3 challenge tribal jurisdiction through motions for partial summary judgment and a trial  
4 on the issue of jurisdiction. Finally, RMCA will also have the opportunity to seek tribal  
5 court appellate review of the tribal court's ruling on jurisdiction in the trial court. The  
6 Court concludes that RMCA has failed to establish that it lacks an adequate opportunity  
7 to challenge tribal court jurisdiction.

8 Further, RMCA's argument that the tribal court exhibited favoritism towards the  
9 Rincon Band Defendants does not provide grounds for claiming an exception to the  
10 exhaustion requirement in this case. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19 ("The  
11 alleged incompetence of tribal courts is not among the exceptions to the exhaustion  
12 requirement established in *National Farmers Union* . . . and would be contrary to the  
13 congressional policy promoting the development of tribal courts.").

#### 14 **V. Preliminary Injunction**

15 In its second motion, RMCA requests the court enjoin the proceedings in the  
16 tribal court by ordering that the second phase of the trial not proceed and "instead  
17 permit the Plaintiff to proceed with his case as originally pled in federal court." (ECF  
18 No. 92-1 at 27). This Court and the Court of Appeals has determined that RMCA must  
19 exhaust its tribal remedies prior to seeking relief in this Court, which includes tribal  
20 appellate review on the issue of jurisdiction. Accordingly, the request for a preliminary  
21 injunction is denied.

#### 22 **VI. Conclusion**

23 IT IS HEREBY ORDERED that the Motion to Re-Open the Federal Case After  
24 Exhaustion of Tribal Remedies is DENIED. (ECF No. 83).

25 IT IF HEREBY ORDERED that the Second Motion to Re-Open Federal Case -  
26 Post Trial in Tribal Court and Request for Preliminary Injunction is DENIED. (ECF No.  
27 92)

28 IT IS FURTHER ORDERED that the parties shall file a status report regarding

1 the exhaustion of tribal remedies no later than sixty days from the date this Order is  
2 issued and every 60 days thereafter.

3 DATED: July 26, 2017

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5 **WILLIAM Q. HAYES**  
6 United States District Judge  
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