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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RINCON MUSHROOM CORPORATION OF AMERICA, a California Corporation,	)	Civil No. 09-CV-2330 WQH POR
	)	
Plaintiff,	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF</b>
v.	)	<b>SPECIALLY APPEARING</b>
	)	<b>DEFENDANTS', BO MAZZETTI,</b>
	)	<b>JOHN CURRIER, VERNON</b>
BO MAZZETTI; JOHN CURRIER; VERNON	)	<b>WRIGHT, GILBERT PARADA,</b>
WRIGHT; GILBERT PARADA; STEPHANIE	)	<b>STEPHANIE SPENCER, CHARLIE</b>
SPENCER; CHARLIE KOLB; DICK	)	<b>KOLB and DICK WATENPAUGH,</b>
WATENPAUGH; DOE CO.; and DOE I and	)	<b>MOTION TO DISMISS COMPLAINT</b>
DOE II,	)	<b>FOR LACK OF JURISDICTION,</b>
	)	<b>INDISPENSABLE PARTY AND</b>
Defendants.	)	<b>FAILURE TO EXHAUST TRIBAL</b>
	)	<b>REMEDIES</b>

)  
) Judge: William Q. Hayes  
) Date: January 11, 2010  
) NO ORAL ARGUMENT UNLESS  
) REQUESTED BY THE COURT  
) Time: 11:a.m.  
) Courtroom: 4, Fourth Floor

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## I. INTRODUCTION

The Defendants, Bo Mazzetti, John Currier, Vernon Wright, Gilbert Parada, Stephanie Spencer, Charlie Kolb and Dick Watenpaugh (collectively “Tribal Defendants”) specially appear and move to dismiss the Complaint of the Plaintiff, Rincon Mushroom Corporation of America (“RMCA”), pursuant to Civ. R. 12 (b) (1), (2) and (7). The Tribal Defendants are comprised of former and current government officials of the Rincon Band of San Luiseno Indians (“Tribe”). Rincon Mushroom Corporation of America’s, (“RMCA”) claims against the Tribal Defendants rest on allegations that these officials conspired to regulate a non-Indian fee parcel of land within the Tribe’s reservation with the common goal of devaluing the Subject Property so that the Tribe could purchase it cheaply for use in connection with its adjacent gaming facility on the Tribe’s Reservation. RMCA bases its claims on alleged communications by the Tribal Defendants with respect to the Property. However, both the face and substance of those communications reveal that the Tribal Defendants signed them in their capacity as Tribal officials and acted within the scope of their authority in doing so. Even if the Tribal Defendants allegedly wrongful actions were based on a mistake of fact or law regarding the scope of the Tribe’s jurisdiction, they would nonetheless enjoy the Tribe’s immunity from suit for such alleged acts undertaken in their official capacity. The Tribal Defendants thus enjoy the Tribe’s common law sovereign immunity from suit and RMCA’s Complaint against them must be dismissed pursuant to Civ. R. 12(b)(1) for lack of personal jurisdiction, and 12(b)(2) for lack of subject matter jurisdiction.

Even if this Court were to find that the Tribal Defendants do not enjoy sovereign immunity from RMCA’s suit, it should nevertheless dismiss the action pursuant to Civ. R. 12(b)(7), because the Tribe is indispensable under Civ. R. 19. Finally, the Court should dismiss RMCA’s Complaint because it filed this action without exhausting available Tribal remedies.

Although not mentioned in RMCA's federal Complaint, ("Complaint") the claims in this action are duplicative of those it filed previously against the Tribal Defendants in an action before the Superior Court of California, County of San Diego, North County Branch, Case No. 37-2008-00101838-CU-BT-NC. The Tribal Defendants successfully moved to dismiss that Complaint on the same grounds that they now assert to support dismissing RMCA's federal Complaint. Although the Superior Court granted the Tribal Defendants' motion to dismiss, it stayed the dismissal to permit RMCA to "file a federal action and seek removal." RMCA subsequently filed this federal action and the state court stayed RMCA's state action pending federal determination.<sup>1</sup>

## II. STATEMENT OF RELEVANT FACTS

The Rincon Band of Luiseno Indians ("Tribe") is a sovereign nation recognized by the United States of America. *See* Complaint at ¶ 8; Declaration of Karen R. Graham at ¶¶ 3-4 ("Graham Decl."), Exh. 1 (Federal Register Notice). Pursuant to the Tribe's federally approved Articles of Association ("Articles"), the Rincon Tribal Business Committee ("Council") is empowered to exercise jurisdiction over lands within the exterior boundaries of the Tribe's reservation, including the power to enact ordinances to effectuate the Tribe's inherent sovereign powers and to serve as tribal representatives to the reservation community and other governments. *See* Declaration of Bo Mazzetti at ¶ 2 ("Mazzetti Decl."), Exh. 1 thereto (Tribe's Articles, at §§ 1, 6).

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<sup>1</sup> This motion is not a general appearance by the Tribal Defendants and does not waive their immunity from suit as tribal government officials. Civ. R. 12 (b) provides that "no defense or objection is waived by joining with it one or more other defenses or objections in a responsive pleading or in a motion." The Tribal Defendants expressly reserve their right to assert additional defenses in responsive pleadings and to file further motions regarding subject matter jurisdiction and failure to state a claim upon which relief can be granted as provided under Civ. R. 12(b), (c), (g) and (h)(2)-(3).

Defendants, Bo Mazzetti, John Currier, Vernon Wright, Gilbert Parada, Stephanie Spencer, and Charlie Kolb, were duly elected Council members during all, or a portion of the time, in which the events alleged in RMCA's Complaint occurred. *See Id.* at ¶ 3. Bo Mazzetti is the current Council Chairman. *See Id.* at ¶ 1. During the times relevant to this action, Dick Watenpugh was employed by the Tribe as the Director of Tribal Administration (Director). *See Id.* at ¶ 4. The Director serves at the direction of the Council and under its authority. *Id.*

RMCA is a non-Indian owned California corporation and the former fee owner of real property within the exterior boundaries of the Tribe's reservation, located at 33777 Valley Center Road, Valley Center, California ("Subject Property"). *See Complaint* at ¶¶ 3, 7, 9. The Subject Property is located across the street and immediately adjacent to the Tribe's casino. *See Complaint* at ¶ 10; Mazzetti Decl. at ¶ 10. The Subject Property is also located above and adjacent to the Reservation's primary ground and surface water resources. *See Mazzetti Decl.* at ¶ 10. RMCA's only alleged interest in the Subject Property is a promissory note and a "carry-back" deed of trust resulting from RMCA's sale of the Subject Property to its current owner, Marvin Donius ("Donius"). *See Complaint* at ¶ 9, 11.<sup>2</sup>

The Subject Property has been and is operated by Donius. Although the uses of the property appear to be solely determined by Donius, it can be characterized as a mixed-use commercial facility. *See Complaint* at ¶ 10, 13. Donius has sought to redevelop the property since the 2007 Poomacha Fire engulfed that property. *Complaint* at ¶¶ 16-17; Mazzetti Decl. at ¶ 15.

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<sup>2</sup> RMCA standing in this action is apparently premised on its allegation that the Tribal Defendants' acts have caused a "consequent failure by Donius to perform his payment obligations" under the note and carry-back deed of trust, *see Complaint* at ¶¶ 34 and 80. Despite Donius' failure to perform, he remains the holder of fee-title to the Subject Property. *Id.* at ¶ 12.



1 The Tribe, through the Tribal Defendants, notified Donius that he needed to submit  
 2 business and cleanup plans for the Tribe's review and approval before he could engage in  
 3 redevelopment activities on the Subject Property. *See* Mazzetti Decl. at ¶ 19. Neither Donius  
 4 nor RMCA has submitted such plans to the Tribe. The Tribe consequently didn't approve or  
 5 grant approval to Donius or RMCA to activate electric service on the property. *See Id.* San  
 6 Diego Gas & Electric Co. ("SDG&E") requires customers who seek electric service to their  
 7 property to obtain inspection and approval from the government with jurisdiction over the  
 8 property, as provided under SDG&E Tariff Rules 11 and 16. *See* Graham Decl. at ¶5-6, Exhs. 2  
 9 (SDG&E Tariff Rules 11 and 16) and 3 (SDG&E's Cross-Complaint in state court).  
 10

11 In April 2009, the Tribe filed a civil action in the Rincon Tribal Court ("ICSC")<sup>3</sup> against  
 12 Donius alleging that his development of commercial signs on the Subject Property without  
 13 Council approval violates the Tribe's commercial sign ordinance. The Tribe requested the ICSC  
 14 to find Donius liable and to impose civil penalties on him as provided under the ordinance. *See*  
 15 Mazzetti Decl. at ¶ 21. Donius objected to ICSC's personal and subject matter jurisdiction. *See*  
 16 *Id.* at ¶ 22, Exh. 11 (Donius' objection). The Court ordered briefing on the jurisdictional issues.  
 17 At a hearing on May 27, 2009, which Donius attended and participated in during oral argument,  
 18 the ICSC ruled that it had personal and subject matter jurisdiction and ordered Donius to file an  
 19 answer by June 8, 2009. *See Id.* at ¶ 23, Exh. 12, (June 2, 2009 Order). Donius failed to file an  
 20 answer. The Tribe moved for entry of default. The Court entered a default judgment against  
 21 him. *See Id.* at ¶ 24, Exh. 13 (June 27, 2009 Default Judgment). Citing *Montana v. United*  
 22 *States*, 450 U.S. 544, 565-66 (1981) the ICSC specifically found that the Tribe established its  
 23  
 24  
 25  
 26

27 <sup>3</sup> The Rincon Tribal Court is administered by the Intertribal Court of Southern California. *See*  
 28 [www.icsc.us](http://www.icsc.us).

jurisdiction over the activities on the Subject Property. *See Id.*, Exh. 13 at 4. No appeal was taken of this judgment. *See Id.* at ¶ 25.<sup>4</sup>

In December 2008, RMCA filed claims against SDG&E in the Superior Court of California (“Court”). *See Mazzetti Decl.* at ¶ 28. RMCA’s claims against SDG&E related to reactivating electrical service to the Subject Property. *See Id.* In the same proceeding in April 2009, SDG&E filed a cross-complaint against the Tribe and the County of San Diego seeking relief as to which government had proper authority over the Subject Property. *See Id.* The Tribe successfully moved to quash the service of the summons on SDG&E’s cross complaint and to dismiss the action based on its status as an indispensable party. *See Id.* at ¶ 29, Exh. 17 (September 3, 2009 order). The County of San Diego joined in the Tribe’s motion and stated that the Tribe, not the County, was the proper government with authority over the Subject Property. *See Mazzetti Decl.* at 30, Exh. 18 (County Notice of Joining Tribe’s Motion to Dismiss). The Superior Court’s order specifically found that the Tribe was indispensable to the action due to, *inter alia*, its interests in preserving its sovereign immunity, its authority to govern the reservation, and in ensuring fire protection and safety on the reservation. *See Id.*, Exh. 17 (Sept. 3, 2009 Order at 2). The Court also found that the “Plaintiff [RMCA] may submit to the jurisdiction of the tribal court for resolution of this matter.” *See Id.*

While the Tribe’s motion to dismiss was pending, in May 2009, RMCA amended its complaint and filed claims, essentially the same claims asserted here, against the Tribal Defendants. *See Id.* at ¶ 31, Exh. 19 (RMCA’s 1<sup>st</sup> Amended Complaint). The Tribal Defendants moved to quash and dismiss the claims based on sovereign immunity as tribal officials acting

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<sup>4</sup> Appeals from ICSC judgments may be submitted to the ICSC Court of Appeals if a petition for review is submitted within fifteen (15) days of the judgment. *See Mazzetti Decl.*, Exh. 16 (ICSC Rule § 1.7.01); Exhibit 14 (Inter-Tribal Court Governing Agreement §§ 205, 206).

1 within the scope of their authority and the Tribe's status as an indispensable party.<sup>5</sup> *See Id.* at  
 2 28. The Court granted the Tribal Defendants' motions specifically finding that (1) "there was  
 3 sufficient evidence that the Tribal Defendants were each acting in their 'representative capacities  
 4 and within the scope of their authority' as Tribal Officials at all pertinent times alleged in  
 5 [RMCA's complaint]" and (2) the Tribe was an indispensable party given its interests in this  
 6 case. *See Id.*, Exh. 16 (Minute Order Sept. 25, 2009). The California court also found that the  
 7 "second *Montana* exception authorizes an Indian tribe to exercise civil jurisdiction when non-  
 8 Indians' conduct menaces the political integrity, the economic security, or the health or welfare  
 9 of the Tribe ..." and that the Tribe has a significant interest in protecting the Reservation against  
 10 the "catastrophic" danger of wildfires. *Id.*

11  
 12  
 13 The Court's based its determination that the Tribe was indispensable on its findings that:  
 14 "(1) a judgment rendered in the Tribe's absence would be extremely prejudicial to the Tribal  
 15 Defendants and potentially prejudicial to the Tribe; (2) the Court [saw] no way in which the  
 16 judgment could be shaped to help the Tribal Defendants avoid inconsistent obligations or  
 17 multiple liabilities; (3) a judgment rendered in absence of the Tribe would not be adequate" and  
 18 (4) "Plaintiff may submit to the jurisdiction of the tribal court for resolution of this matter." *Id.*

19  
 20 The Court's stayed its September 25th Order for 30 days, however, to allow RMCA time  
 21 to "file an action in federal court *and* seek removal." *See Id.*, Exh. 16 at ¶ 2 (emphasis added).  
 22 Instead of removal, RMCA filed this original action and the State Court litigation was stayed  
 23 after RMCA filed its Notice of Filing a Federal Action. *See* Graham Decl., Exh. 5 (Notice of  
 24 Filing Federal Action). Because RMCA did not seek removal as envisioned under the Minute  
 25 Order, and RMCA admits that it cannot remove under federal law, the Tribal Defendants have  
 26

27  
 28 <sup>5</sup> While the Tribal Defendants' motion to dismiss was pending, RMCA again moved to amend its  
 complaint and asserted the same exact claims that it presents to this Court.

twice requested that RMCA clarify and correct this issue with the state court so that the state court litigation can be dismissed without prejudice. *See Id.* at ¶8, Exhibits F and G thereto (Letters to and from RMCA counsel regarding the stay of the state court litigation).

### III. LEGAL ARGUMENT

The purpose of RMCA's action against the Tribal Defendants is to prevent the Tribal government from regulating activity on the Subject Property, which is a fee parcel located within the Tribe's reservation and situated adjacent to the Tribe's principle economic development engine, the Harrah's-Rincon Casino and Resort. RMCA's prior attempt to directly achieve this end by its action against the Tribal Defendants in the California Superior Court did not succeed, leading to the present effort to obtain this result in federal court.

The Tribe's reservation lies in an area that is prone to wildfire events. *See Mazzetti Decl.* at ¶¶ 12-16. The County of San Diego does not claim any zoning jurisdiction on the Subject Property and recognizes that the Tribe has that jurisdiction. *Graham Decl.* at ¶ 7, 11, Exh. 10 at 24 (Transcript Excerpt); *Mazzetti Decl.* Exh. 2 (August 13, 2004 Letter from County). During the 2007 Poomacha Fire, conditions on the Subject Property contributed to the spread of wildfire to the Tribe's Casino across the street. *See Mazzetti Decl.* at ¶ 15. RMCA's Complaint seeks damages and attempts to remove tribal authority over Donius' *and* for all indefinite future owners regardless of their intended use of the Subject Property. *See Complaint passim* (RMCA seeks relief "both with respect to plaintiff as well as concerning the subject property" and "over or as to plaintiff and/or over or as to the subject property"). Undaunted by the California Superior Court's rulings against RMCA's claims against the Tribal Defendants, RMCA now seeks to revive those claims against the Tribal Defendants in this federal court. The Tribal Defendants therefore move for a second time to dismiss RMCA's claims against them on

1 sovereign immunity grounds, and for a third time to dismiss those claims because the Tribe is  
2 indispensable.

3 A. *The Court should Grant Motion to Dismiss because the Tribal Defendants are*  
4 *Imbued with Tribal Sovereign Immunity.*

5 Indian Tribes have long been recognized as possessing the common-law immunity from  
6 suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358  
7 (1919) ; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity  
8 therefore bars suits against a Tribe absent a clear waiver by the Tribe. *Oklahoma Tax Comm'n v.*  
9 *Citizen Band Potawatomie Indian Tribe*, 498 U.S. 505, 509 (1991). As discussed below, the  
10 Tribal Defendants enjoy the Tribe's immunity from suit with respect to the claims alleged  
11 against them in RMCA's Complaint and those claims must be dismissed as the Court lacks  
12 personal jurisdiction as to the Tribal Defendants and subject matter jurisdiction as to RMCA's  
13 claims.  
14  
15

16 1. Standards of Review for Motions to Dismiss for Lack of Personal and  
17 Subject Matter Jurisdiction based on Tribal Sovereign Immunity.

18 The issue of tribal sovereign immunity is jurisdictional in nature and the plaintiff bears  
19 the burden of establishing the court's subject matter jurisdiction. *See Unkeowannulack v. Table*  
20 *Mountain Casino*, No. CV F 07-1341 AWI DLB, 2007 WL 4210775, \*3 (E.D. Cal. Nov. 28,  
21 2007, citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A motion under  
22 Civ. R. 12 (b)(1) can be made on the face of the Complaint or by presenting affidavits or other  
23 evidence before the Court and in such case the Court need not presume the truthfulness of the  
24 plaintiff's allegations. *See Id.*, citing, *Safe Air for Everyone v Meyer*, 373 F.3d 1035, 1039 (9<sup>th</sup>  
25 Cir. 2004). Further, in a Civ. R. 12 (b)(1) motion the court may review evidence and resolve  
26 factual disputes without converting the motion to dismiss into a motion for summary judgment.  
27  
28

1 *See Friends of Panamint Valley v. Kempthorne*, 499 F. Supp.2d 1165, 1172 (E.D. Cal. 2007).

2 “When a defendant makes a factual challenge ‘by presenting affidavits or other evidence ..., the  
3 party opposing the motion must furnish affidavits or other evidence necessary to satisfy its  
4 burden of establishing subject matter jurisdiction.” *Unkeowannulack*, No. CV F 07-1341 AWI  
5 DLB, 2007 WL 4210775 at \*3, *quoting*, *Safe Air for Everyone v. Meyer*, 373 F.3d at 1039 and  
6 *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9<sup>th</sup> Cir. 2003).

7  
8 2. All Activities by the Tribal Defendants were Conducted as Tribal Officials  
9 within the Scope of their Authority and therefore are Protected by Tribal  
10 Sovereign Immunity.

11 The Tribe enjoys common law immunity from suit and that immunity extends to suits,  
12 such as the present one, against tribal officials for acts taken in their representative capacity and  
13 within their authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88,  
14 (1949); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9<sup>th</sup> Cir.  
15 1991); *Saul v. Larsen*, 847 F.2d 573, 575 (9<sup>th</sup> Cir. 1988); *Hardin v. White Mountain Apache*  
16 *Tribe*, 779 F.2d 476,478 (9<sup>th</sup> Cir. 1985); *see also Unkeowannulack v. Table Mountain Casino*,  
17 No. CV F 07-1341 AWI DLB, 2007 WL 4210775 at \*3 (extending tribal official immunity to  
18 president of tribal casino where the individual actions alleged in the complaint fell within the  
19 scope of the president’s authority)  
20

21  
22 RMCA’s claims against the Tribal Defendants rest upon common allegations that their  
23 actions to regulate the Subject Property were outside the scope of their authority and are thus  
24 *ultra vires* as to the Tribe. Complaint at ¶ 44, 48. RMCA references various oral and written  
25 communications by the Tribal Defendants involving the Subject Property as the basis for those  
26 allegations. Neither the face nor substance of these communications supports RMCA’s  
27 allegations. These communications clearly show that the Tribal Defendants’ actions were taken  
28

1 in their capacity as Tribal officials and were within the scope of their authority. *See Mazzetti*  
 2 Decl. ¶¶ 5-9.

3 The correspondence referenced in RMCA's Complaint at ¶¶ 49h, 49j, 73e, and 73g  
 4 appear on the Tribe's official letterhead, the Tribal Defendants who are Council members signed  
 5 them in their capacity as the Tribe's governing body, and the subject matter of those letters  
 6 relates to the Tribe's legitimate sovereign interests in protecting against the recognized threat of  
 7 devastating wildfires on the Reservation to the Tribe's political integrity, economic security, or  
 8 its health or welfare through regulating commercial and industrial development on all lands  
 9 within the Reservation. *See Id.*, Exhs. 3, 5-7. The Tribal Defendants' signatures on these letters  
 10 constitute the official act of the Tribe, not their own individual acts. The letters referenced in  
 11 RMCA's Complaint at ¶¶ 49d-f, 49i, 73b-d and 73f were prepared on the Tribe's official  
 12 letterhead and signed by the Tribe's Director who was acting – consistent with the official duties  
 13 – at the direction of Council. *See Id.*, Exhs. 2, 4.

16 The same holds true for all alleged verbal communications between the Tribal  
 17 Defendants and SDG&E, FF Realty, the County of San Diego and U.S. EPA - as all such  
 18 communications relate to the Tribe's legitimate sovereign interests in regulating commercial and  
 19 residential development within the Reservation and protecting human health and the  
 20 environment therein consistent with Tribal laws. *See Id.* at ¶¶ 16-18.<sup>6</sup> By RMCA's own  
 21 allegations, the purpose of the Tribal Defendants' alleged conspiracy was to benefit the Tribe,  
 22 *see* Complaint at ¶¶ 15, 33, and 72, compelling the conclusion that the alleged actions of the  
 23 Tribal Defendants toward that goal were performed in their capacity as Tribal government  
 24

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26  
 27 <sup>6</sup> The environmental issues related to the Subject Property are described by the U.S. Indian  
 28 Health Services in a letter to the Tribe dated January 18, 2008. *See Mazzetti Decl.* at ¶ 18 and  
 Exh. 9, (January 18, 2008 letter from Indian Health Service).

officials who acted within the scope of their authority, not as individuals acting for their individual benefit.<sup>7</sup>

RMCA's demand for relief in this action against the Tribal Defendants is a telltale indicator that RMCA seeks direct relief against the Tribe. For example, RMCA seeks a declaration that the Tribe's Articles and various tribal ordinances, the Tribal Environmental Policy Ordinance, the Environmental Enforcement Code and the Tribal Court Jurisdictional Ordinances, are unconstitutional as to RMCA or the Subject Property and that any prospective or future enforcement of the Tribe's regulatory or adjudicative authority clearly exceeds any authority that could be conferred or bestowed by the Tribe upon the Tribal Defendants. *See* Complaint at ¶¶ 19-29. Specifically, RMCA requests this Court declare that "*neither the Rincon Tribe nor the above named Tribal Defendants presently have, nor in the future could as a matter of law have, any regulatory or adjudicative authority of any nature whatever over or as to the plaintiff and/or over or as to the subject property.*" *See* Complaint at ¶ 24d (emphasis added). RMCA's broad request for declaratory and injunctive relief is clearly directed at influencing the behavior of Tribal officials and the Tribe.<sup>8</sup> A claim against a governmental official, even if he is named in his individual capacity, is barred by sovereign immunity if the purpose or effect of the lawsuit is to influence the behavior of or obtain relief against the sovereign. *U.S. ex. Rel* *Shakopee v. Pan American Management*, 650 F. Supp. 278, 281 n. 5 (D. Minn. 1986), *citing*,

<sup>7</sup> It is irrelevant that individually named tribal member defendants might indirectly benefit from the alleged conduct due to their status as members. *Great Western Casinos, Inc.*, 74 Cal. App.4<sup>th</sup> 1407, 1422-23, 88 Cal. Rptr. 2d 828, 839 (1999)(immunity upheld for members of tribal council and individual tribal members who acted collectively to benefit tribe, even though they indirectly reaped benefits of the tribe's official government actions).

<sup>8</sup> To the extent to which RMCA argues the Tribal Defendants' efforts to enact these Ordinances individually subjects them to damages, such acts of the Tribal Defendants are inescapably official legislative acts by the Council pursuant to its power to enact ordinances under Section 6 of the Tribe's federally approved Articles and therefore are within the scope of their authority and entitled to immunity.



1 *Rochester Methodist Hospital v. Travelers Ins. Co.*, 728 F.2d 1006, 1012 (8<sup>th</sup> Cir. 1984); *see also*  
 2 *Saul v. Larsen*, 847 F.2d 573, 575 (9<sup>th</sup> Cir. 1988) (sovereign immunity extends to governmental  
 3 officials when the act challenged falls within the scope of the official's authority and  
 4 performance of such acts would suffer under the threat of litigation).

5 RMCA also contends that the Tribal Defendants knew or should have known that their  
 6 alleged conspiracy to acquire the Subject Property economically and without paying fair  
 7 compensation was prohibited by the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §  
 8 1302. *See* Complaint at ¶ 45. However, RMCA's reliance on ICRA serves only to undermine  
 9 its allegations that the Tribal Defendants' actions were "beyond and outside the scope of any  
 10 validly conferred authority given to [them] as Rincon Band Tribal Council members or  
 11 otherwise, and were *ultra vires* as to the [Tribe]." Complaint at ¶ 44, *see also* Complaint at ¶ 48.  
 12 ICRA's protections are limited in scope to Tribes and Tribal officials exercising governmental  
 13 authority and ICRA provides very limited means of relief. ICRA's protections apply to non-  
 14 Indians as well as Indians only when they are subject to a tribe's jurisdiction. *See*, 25 U.S.C.  
 15 §1302; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978). By invoking ICRA's  
 16 protections to establish the duty of care owed to RMCA by the Tribal Defendants, RMCA tacitly  
 17 acknowledges that the Tribe has jurisdiction to regulate land use activity on the Subject Property.  
 18

19 RMCA alleges that the Tribal Defendants' false and erroneous statements as to the  
 20 Tribe's jurisdiction to regulate the Subject Property began no later than late December 2005-  
 21 early 2006. *See* Complaint at ¶46. This presumes that the Tribal Defendants knowingly lacked  
 22 jurisdiction at that time, chose to regulate the property nonetheless and thereby acted outside the  
 23 scope of their authority. As early as August 2004, however, the County of San Diego concurred  
 24 with the Tribe's view that the Tribe, not the County, has zoning jurisdiction over the Subject  
 25  
 26  
 27  
 28

Property. *See* Mazzetti Decl. at ¶ 6.a, and Exh. 2 (letter of August 13, 2004, from County of San Diego, to Tribe). Indeed, the County of San Diego stated that since the Subject Parcel “is located within the exterior boundaries of the Rincon Reservation, ...the County has no land use jurisdiction over the parcel” and “[z]oning and land use on this parcel, and other fee parcels, are within the jurisdiction of the Rincon Band.” *Id.* The County’s position in this regard remains unchanged. *See* Graham Decl. at ¶¶ 7, 11, Exh. 4 (Answer of Cross-Defendant County of San Diego at ¶ 6); Exh. 10 at 24:15-27 (Excerpt from hearing transcript ).

As the Superior Court found in *RMCA v. Mazzetti*, the Tribe has a legitimate interests in protecting the Reservation community, its lands and its resources from the deadly and destructive threat of area wildfires and these interests and the impact of wildfires supports the Tribe’s regulation of non-Indians under the second *Montana* exception. *See* Mazzetti Decl., Exh. 21 (September 25, Order at 1), *see also*, Mazzetti Decl., Exh. 17 (Sept. 3, 2009 Order at 2). Granting RMCA’s request for declaratory relief would effectively create a regulatory void in which activity on the Subject Property would be free from both Tribal and County land use and zoning regulations to protect human health and the environment. RMCA and its successors would be free to continue activities on the Subject Property that pose direct threats to the Tribe’s political integrity, economic security, and health or welfare, such as increasing the potential of devastating Reservation wildfires and polluting the Tribe’s groundwater supply.

The Tribal Defendants alleged actions to regulate the Subject Property were clearly taken in their respective capacities as Tribal officials and within the scope of their authority at all times relevant to this action. The Tribal Defendants consequently enjoy the Tribe’s sovereign immunity from RMCA’s suit against them, and their motion to dismiss RMCA’s Complaint

under Civ. R. 12(b)(1) and (2) should therefore be granted because the Court lacks jurisdiction over and the subject matter of the action.

B. *The Court should Grant the Motion to Dismiss because the Tribe is an Indispensable Party.*

The Court engages in a twofold inquiry to determine whether the Tribe is indispensable under Civ. R. 19. *See* Civ. R. 19; *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9<sup>th</sup> Cir. 2002). First, the Court determines if the Tribe is a necessary party under the factors listed in Civ. R. 19(a). Second, if the Tribe is a necessary party who cannot be joined, the Court “must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Civil R. 19(b).<sup>9</sup>

1. The Tribe is a necessary party under Civ. R. 19(a).

In determining whether the Tribe is a necessary party under Civ. R. 19(a), the Court considers if “in the [Tribe’s] absence, the court cannot accord complete relief among existing parties.” Civ. R. 19 (a)(1)(A). In the alternative, the Court considers if the Tribe “claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may: (i) as a practical matter impair or impede the [Tribe’s] ability to protect that interest or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.” Civ. R. 19(a)(1)(B). The determination of whether a non-party is necessary “is heavily influenced by the facts and circumstances of each case.” *See Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1991); *see also, American Greyhound Racing*, 305 F.3d at

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<sup>9</sup> California Code of Civil Procedure Rule 389 regarding necessary and indispensable parties is essentially identical to the language and requirements of Civ. R. 19, *see County of San Joaquin v. State Water Resources Control Bd.*, 54 Cal.App.4<sup>th</sup> 1144, 1151-52, 63 Cal.Rptr.2d 277, 282 (1997), and therefore the determinations by the Superior Court of California in the parallel proceeding are applicable.

1018. If the Tribe meets either the test under Civ. R. 19(a)(1)(A) or (B), it is a necessary party to the instant litigation.

- a. The Tribe is a necessary party under Civ. R. 19(a)(1)(A) because in its absence complete relief cannot be accorded among those already parties.

The Tribe is a necessary party under Civ. R. 19 (a)(1)(A) because “in [its] absence the court cannot accord complete relief among existing parties.” RMCA seeks damages and declaratory and injunctive relief regarding the enforcement of the Tribe’s ordinances on the Subject Property, including a declaratory judgment that neither the Tribe nor the Tribal Defendants have authority over RMCA or the Subject Property. *See* Complaint at ¶ 23a-d. Even if RMCA prevailed on its claims, the Court cannot accord complete relief among the remaining parties absent the Tribe, because the Court’s judgment wouldn’t bind the Tribe. Thus, the Tribe would continue to assert its sovereign regulatory authority over activities and conduct on the Subject Property that poses a direct threat to the Tribe’s political integrity, economic security, or health or welfare. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1155-56 (9<sup>th</sup> Cir. 2002). If RMCA prevails in this action, the Tribal Defendants “would be between the proverbial rock and a hard place,” *Dawavendewa*, 276 F.3d at 1156, facing sanctions from this Court if they did not comply with an order enjoining regulation of activities on the Subject Property while facing sanctions from the Tribe if they fail to enforce Tribal ordinances governing activities on the Subject Property.

- b. Alternatively, the Tribe is a necessary party under Civ. R. 19(a)(1)(B)(i) or (ii).

Alternatively, the Tribe is a necessary party under Civ. R. 19 (a)(1)(B)(i) because “[the Tribe] claims an interest relating to the subject of this action and is so situated that disposing of the action in [the Tribe’s] absence may ... as a practical matter impair or impede [the Tribe’s]

ability to protect that interest.” Civ. R. 19 (a)(1)(B)(i). The Tribe need only show a legally protected interest in the subject of this action to satisfy the interest requirement of Civ. R. 19; it is not required to show a property interest. *See, American Greyhound Racing, Inc.*, 305 F.3d at 1023. The Tribe’s interests relating to the subject of this action are (1) its sovereign right to not have its regulatory authority over the Subject Property judicially determined in its absence and without its consent, *Enterprise Mgmt. Consultants v. Hodel*, 883 F.2d 890, 894 (10<sup>th</sup> Cir. (1989)); (2) its inherent sovereign power to regulate activities within the Reservation, *Dawavendewa*, 276 F.3d at 1157; and (3) preserving the comity that other governments accord the Tribe in recognizing its jurisdiction to regulate land use on the Subject Property.<sup>10</sup> This Court would abrogate the Tribe’s strong interest in preserving its sovereign immunity from suit if it decided whether the Tribe is a government authority with jurisdiction over the Subject Property or RMCA. The Court would also directly undermine the Tribe’s interests in regulating activities on other fee lands within the Reservation pursuant to the County’s recognition that the Tribe’s jurisdiction extends to the Subject Property as well as to the Reservation generally. *See American Greyhound Racing, Inc.*, 305 F.3d at 1024 (finding that tribes were necessary party where, although not bound by the disposition of the action under res judicata or collateral estoppels, the tribe’s interests may be affected by a judgment that their gaming operations are illegal and where their ability to negotiate is impaired by the ruling.); *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1498 (Court found that non-party tribe’s current status as the exclusive governing authority of the reservation was a valid interest for Civ. R. 19(a)). In view of these considerations, the Tribe is clearly a necessary party under Civ. R. 19(a)(1)(B)(i).

<sup>10</sup> SDG&E has recognized the Tribe’s authority in its application of Tariff Rules 11 and 16 to that property. The County of San Diego admits that the Tribe has jurisdiction over that property and that the County does not. *See Graham Dec.* at ¶ 7, Exh. 4, (Answer of San Diego County at ¶ 6.)

1 The Tribe is also a necessary party under Civ. R. 19 (a)(1)(B)(ii) because disposition of  
2 this action absent the Tribe would leave the extant parties subject to a substantial risk of  
3 incurring double, multiple, or otherwise inconsistent obligations by reason of the Tribe's claimed  
4 interests. The Tribal Defendants will likely be severely prejudiced to the degree to which this  
5 Court directs them to discontinue their efforts to regulate the activities on the Subject Property  
6 and the Tribe is not a party bound by that direction. *See Confederated Tribes of the Chehalis*  
7 *Indian Reservation*, 928 F.2d at 1498 (Court found that an action that tried to reject the non-party  
8 tribe's exclusive authority within the reservation subjected the non-party tribe and the existing  
9 parties to the substantial risk of multiple or inconsistent legal obligations.)  
10

11 A decision adverse to the Tribal Defendants regarding the Tribe's jurisdiction to regulate  
12 the Subject Property would also conflict with the decisions of two other courts that involve the  
13 Subject Property. The first is an action in brought by the Tribe in the ICSC against the current  
14 property owner, Donius, for violating the Tribe's ordinance requiring its approval before erecting  
15 or constructing a commercial billboard on lands within the Reservation. *See supra* at 5-6. The  
16 second is the California Superior Court's dismissal of the Complaint that SDG&E filed against  
17 the Tribe in connection with RMCA's suit against it for refusing to restore electric service to the  
18 Subject Property because the property owner, Donius, could not show Tribal approval to restore  
19 power to the Subject Property. The Court ruled that the Tribe was immune from suit and that,  
20 under the circumstances, the Tribe was indispensable to the action.  
21

22 The Tribe is a necessary party under either Civ. R. 19(a)(1)(A) or (B). Where a person  
23 is determined to be a necessary party under Civ. R. 19 (a)(1), the Court shall order that person  
24 joined as a party. However, the Court cannot order the Tribe to join in this action or enforce  
25 such a declaration because it enjoys sovereign immunity from suit that bars the Court from  
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exercising jurisdiction over it.<sup>11</sup> Where a necessary party cannot be joined in the action, the Court must determine whether the party is indispensable to the action under Civ. R. 19.

2. The Tribe is an indispensable party under Civ. R. 19(b).

Because the Tribe is a necessary party who cannot be joined, “the Court must determine whether in equity and good conscience the case should proceed among the existing parties or should be dismissed.” Civ. R. 19 (b). The factors the Court is to consider in determining whether the Tribe is an indispensable party include, “(1) the extent to which a judgment rendered in the [Tribe’s] absence might prejudice [the Tribe] or the existing parties, (2) the extent to which any prejudice could be lessened or avoided, ... (3) whether a judgment rendered in the [Tribe’s] absence would be adequate, and (4) whether the plaintiff would will have an adequate remedy if the action is dismissed for nonjoinder.” Civ. R. 19 (b)(1)-(4). Consideration of each factor in view of the circumstances in this action leads to the conclusion that the case should be dismissed.

First, a decision by the Court to proceed absent the Tribe might be prejudicial to the Tribe or to those already parties. Civ. R. 19 (b)(1). The prejudice factor under Civ. R. 19(b)(1) is essentially the same assessment under Civ. R. 19(a). *See American Greyhound Racing*, 305 F.3d at 1024-25; *Confederated Tribes of the Chehalis*, 928 F.2d at 1499. A judgment directing Tribal Defendants to desist regulation of the Subject Property would interfere with the Tribal government’s authority and the federal policy of encouraging self-determination and would effectively abrogate the Tribe’s sovereign immunity from suit and would directly conflict with the Tribe’s decisions and policies as to that property. *See Enterprise Mgmt. Consultants*, 883

<sup>11</sup> An Indian tribe is subject to suit only where Congress has so authorized or where the Tribe has waived its immunity by consenting to suit. Absent such authorization or consent, the courts do not have jurisdiction over suits against a tribe. *Santa Clara Pueblo Tribe v. Martinez*, 436 U.S. at 58. There has been no waiver by the Tribe in this action.

1 F.2d at 894. Further, the practical impact of that decision would prejudice the Tribe's future  
2 authority over of lands within the Reservation, and would have a severe chilling effect on future  
3 actions taken by the Council members on any tribal ordinance for fear of personal liability for  
4 actions taken under tribal law as an officer of the Tribe; not to mention in dealings with SDG&E  
5 and the County of San Diego as to the scope of Tribal authority over the Subject Property and  
6 other properties within the Reservation. *See Confederated Tribes of the Chehalis*, 928 F.2d at  
7 1499 (Court found that an action that tried to reject a non-party tribe's current status as the  
8 exclusive authority within the Reservation clearly prejudiced the non-party tribe.) Plaintiff  
9 RMCA also would likely be prejudiced by a judgment reaching the question of the Tribal  
10 Defendants' authority over the Subject Property because it would leave open the possibility of  
11 Tribe's regulatory jurisdiction. Finally, the Tribal Defendants would likely be prejudiced by a  
12 judgment ordering them to desist from enforcement regarding the Subject Property because of  
13 their obligations as the Tribe's governing Council.  
14  
15

16 Second, the Court cannot lessen or avoid the above-described potential prejudice to the  
17 Tribe or other parties through protective provisions in the judgment, by the shaping of relief or  
18 other measures under Civ. R. 19 (b)(2)(A)-(C). Affording the Tribe an opportunity to intervene  
19 is insufficient to shape relief to lessen any possible prejudice. *Confederated Tribes of the*  
20 *Chehalis*, 928 F.2d at 1499-1500. Nor can the Court shape relief to lessen any possible  
21 prejudice that the Tribe would suffer if this Court adjudicates the nature and scope of the Tribe's  
22 jurisdiction over the Subject Property in its absence because proceeding to judgment on that  
23 issue would - in and of itself -effectively abrogate its sovereign immunity from suit on that  
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1 issue.<sup>12</sup> The Court's lack of jurisdiction over the Tribe also prevents it from including measures  
 2 in its judgment that would protect the other parties in this action from the potential prejudice of  
 3 subsequent Tribal actions against them for violations of Tribal land use ordinances, collection of  
 4 associated civil penalties, and injunctions if they sought to rely upon this Court's Declaration.

5 Third, the Court's lack of jurisdiction to bind the Tribe to its judgment in this action also  
 6 highlights that the judgment will not be adequate because it will leave the Plaintiff without a  
 7 suitable remedy, and/or it will expose the Tribal Defendants to multiple, inconsistent and  
 8 substantial obligations, as discussed *supra* at pp. 18.

10 Fourth, RMCA has an adequate remedy if the Court dismisses this action for non-joinder  
 11 of the Tribe. RMCA can avail itself of Tribal administrative and judicial remedies to resolve  
 12 whether the Tribe is a government with jurisdiction over the Subject Property, as the state court  
 13 admonished in its two prior orders that held the Tribe was indispensable to RMCA's action  
 14 against SDG&E and its action against the Tribal Defendants. Those remedies include: (1)  
 15 submitting the information that the Tribe has requested from Donius so that the Tribe can  
 16 determine whether the Subject Property remains in violation of Tribal ordinances, and if so,  
 17 what measures must be taken to comply with those ordinances; and/or (2) filing an action before  
 18 the Tribe's administrative or judicial forums challenging the Tribe's jurisdiction to regulate the  
 19 activities on the Subject Property. Even RMCA may lack an adequate remedy in Tribal court or  
 20 another forum, "this does not automatically prevent dismissal of [this action]." *Confederated*  
 21 *Tribes of the Chehalis*, 928 F.2d at 1500. "Courts have recognized that a plaintiff's interest in  
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27 <sup>12</sup> This is especially true where the plaintiff has not exhausted available tribal remedies allowing  
 28 the tribal court to make the initial determination of tribal jurisdiction over subject and the  
 activities involved in this case. *See infra* Section III.C.

1 litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign  
 2 immunity." *Id.*; see *American Greyhound Racing*, 305 F.3d at 1025.

3 In view of the foregoing considerations under the four factors listed in Civ. R. 19 (b) the  
 4 Court should dismiss the entire action without prejudice because the Tribe is indispensable.

5 *C. The Court should Dismiss the Action for Failure to Exhaust Tribal Remedies.*

6  
 7 The Supreme Court repeatedly has recognized tribal courts "as appropriate forums for the  
 8 exclusive adjudication of disputes affecting important personal and property interests of both  
 9 Indians and non-Indians." *Santa Clara Pueblo Tribe v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670  
 10 (1978). In furtherance of this principal, the Court has long held that a plaintiff must first exhaust  
 11 available tribal remedies before filing any claim in federal court asserting that a tribe lacks  
 12 jurisdiction. *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct.  
 13 2447, 85 L.Ed.2d 818 (1985); *Iowa Mutual Insurance Co. v. LaPlante* 480 U.S. 9, 107 S.Ct. 971,  
 14 94 L.Ed.2d 10 (1987). The jurisdictional issues to be resolved in the tort claims pled in *National*  
 15 *Farmers* and *Iowa Mutual* turned on resolution of factual disputes and complex principles of  
 16 federal law concerning tribal jurisdiction over the conduct of non-Indians on reservation lands.  
 17 The Court held in both cases that tribal courts were the appropriate forum in which to resolve  
 18 these jurisdictional matters in the first instance and accordingly instructed the district courts to  
 19 either dismiss, or to stay the federal proceedings pending a tribal court adjudication on  
 20 jurisdictional issues. *National Farmers*, 471 U.S. at 856, 857; *Iowa Mutual*, 480 U.S. at 976-  
 21 977. The Court declared that the requirement of exhaustion of tribal remedies best serves the  
 22 orderly administration of justice by allowing tribal courts to develop a full record concerning  
 23 jurisdictional determinations, and to enable other courts to benefit from tribal court expertise in  
 24 such matters in the event of future judicial review. *National Farmers* 471 U.S. at 856.  
 25  
 26  
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Because RMCA's claims rest on interpretations of the Tribe's Constitution and various Tribal laws and regulations, Complaint at ¶¶ 19-29, the policy reasons behind the doctrine of exhaustion of tribal remedies are particularly strong. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9<sup>th</sup> Cir. 2008). At issue in *Marceau* was whether the Blackfeet Tribal Council, in enacting the Blackfeet Housing Authority enabling ordinance, waived the Tribe's sovereign immunity such that those who rented or purchased homes from the housing authority could bring contract and other claims against the Blackfeet Housing Authority. *Marceau*, 540 F.3d 921. The Ninth Circuit determined that it is for the Tribe's courts to issue that judicial interpretation in the first instance. *Marceau*, 540 F.3d at 921. The specific legal issues in this case are even more compelling than those before the court in *Marceau*, because they turn upon interpretations of the Tribe's federally approved Constitution. RMCA's claims accordingly should be decided first by the Tribe's Court, thus allowing this Court to benefit from its presumed expertise in interpreting the Tribe's laws – particularly its organic documents. *Marceau*, 540 Fed at 921; *National Farmers*, 471 U.S. at 856.

Even when no tribal court proceeding has been commenced, abstention/exhaustion still applies. *See Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9<sup>th</sup> Cir. 1987)(Indian plaintiff must exhaust available tribal remedies before bringing federal diversity case against non-Indian). *See also Stock West v. Taylor*, 964 F.2d 912 (9<sup>th</sup> Cir. 1992)(tribal court had colorable claim to jurisdiction over action between Oregon corporation and non-Indian reservation attorney, and thus principles of comity required the district court to abstain from hearing the action).

Here, RMCA has not even attempted to avail itself of any tribal remedies, much less exhaust them, despite conceding that: (1) the Subject Property is located within the exterior boundaries of the Rincon Indian Reservation, Complaint ¶¶ 9, 10, 12; (2) Donius, through whom

1 RMCA somehow asserts standing to bring the instant claims,<sup>13</sup> has engaged in substantial  
 2 commercial activity upon those lands and claims that the Tribal Defendants are impermissibly  
 3 interfering with such on-Reservation activities, Complaint ¶ 13, (3) the Defendants at all relevant  
 4 times were “members or representatives of the Rincon Band of Luiseno Indians,” Complaint ¶ 4,  
 5 and (4) RMCA’s multiple claims against the Tribal Defendants center on interpretation of the  
 6 Tribe’s Constitution, Complaint ¶ 18-24.

8 Moreover, Mr. Donius was recently a Defendant in a Tribal Court proceeding in which he  
 9 challenged the Tribe’s personal and subject matter jurisdiction to enforce Tribal environmental  
 10 ordinances against him.<sup>14</sup> RMCA did not appear or otherwise assert its status as a “successor in  
 11 interest” to Mr. Donius in that proceeding. Instead, RMCA has filed parallel actions against the  
 12 Tribal Defendants in state and federal courts that side-step Tribal administrative and judicial  
 13 processes and seek relief that directly runs against the Tribe. As Donius’ successor in interest,  
 14 RMCA such should not be allowed to do indirectly what Donius is directly prohibited from  
 15 doing under applicable Supreme Court and Ninth Circuit decisions: filing a claim in federal court  
 16 alleging lack of tribal jurisdiction without first exhausting tribal remedies.

19 Finally, had Donius submitted a redevelopment plan to the Council, perhaps there would  
 20 be a basis upon which RMCA could distinguish legitimate governmental actions to protect  
 21 substantial interests of the Tribe - such as the well-recognized wildfire threat on the  
 22 Reservation<sup>15</sup> - from the improper motives RMCA ascribes to the Tribal Defendants in its  
 23 federal Complaint. If Donius disagrees with Council’s decision regarding approval of a  
 24

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25  
 26 <sup>13</sup> Complaint at ¶¶ 11, 15.

27 <sup>14</sup> Mazzetti Decl. at ¶ 19-27.

28 <sup>15</sup> Mazzetti Decl. at ¶¶ 12-17, Exh. 12, Exh. 13, Exh. 16.

1 redevelopment plan, he is entitled to file an appeal to the ICSC - a forum that this Court has  
2 already concluded affords significant due process protections to non-Indian litigants. *Roach v.*  
3 *HCAL Corporation, et al*, Case No. 06-CV-953W (WMC) (S.D. Cal), Mazzetti Decl. Exh. 10.  
4 Simply put, RMCA and Donius must exhaust Tribal remedies before they file for federal court  
5 review of whether the Tribe lacks jurisdiction to regulate activity on the Subject Property.  
6  
7 RMCA and Mr. Donius have failed to even seek them.

#### 8 IV. CONCLUSION

9 For all of the foregoing reasons the Tribe respectfully requests that the Court enter an  
10 Order of Dismissal of RMCA's Complaint against them in this action. The Tribal Defendants  
11 respectfully request oral argument on the motion to dismiss.  
12

13 Dated: December 10, 2009

LAW OFFICES OF KAREN R. GRAHAM

15 By: s/Karen R. Graham  
16 Karen R. Graham

17 Attorney for Special Appearing  
18 Defendants Bo Mazzetti, John Currier,  
19 Vernon Wright, Gilbert Parada,  
20 Stephanie Spencer, Charlie Kolb, Dick  
21 Watenpugh  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Notice of Motion and Motion to Dismiss Complaint [F.R.C.P. 12(b)(1)(2) and (7), indispensable party and failure to exhaust tribal remedies], the memorandum and points of authorities in support thereof, were filed electronically with the Clerk of the Court through ECF and that accordingly ECF will send an e-notice of the electronic filing to counsel of record as follows:

Mr. McGill is not currently registered as an ECF user.

I arranged for the foregoing documents to be hand delivered by currier service to the below named attorneys, at the indicated address, who are not registered CM/ECF users.

George McGill, Esq.  
1328 Sun Valley Road  
Solana Beach, CA 92075-1647  
Attorneys for Plaintiff,  
Rincon Mushroom Corporation of America

I declare under penalty of perjury under the laws of the United States that the foregoing statement is true and correct.

Dated: December 10, 2009

s/ Karen R. Graham