FOR PUBLICATION

IN THE COURT OF APPEALS
FOR THE RINCON BAND OF LUISEÑO INDIANS

Case No. AP-0205-19

MARVIN DONIUS and RINCON MUSHROOM CORPORATION OF AMERICA, INC.
Plaintiffs/Appellants,

vs.

RINCON BAND OF LUISEÑO INDIANS, MELISSA ESTES,
BO MAZZETTI, STEPHANIE SPENCER, STEVE STALLINGS,
LAURIE E. GONZALEZ and ALFONSO KOLB, SR.,
Defendants/Appellees.

RINCON BAND OF LUISEÑO INDIANS
Counter-Plaintiffs/Appellees

vs.

MARVIN DONIUS and RINCON MUSHROOM CORPORATION OF AMERICA, INC.
Counter-Defendants/Appellants

OPINION

Appeals from the Rincon Trial Court
Intertribal Court of Southern California 1C5C
In CVR-2019-0002

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Pala, California

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Before: James Ware, Matthew Fletcher and Arthur Gajarsa, Appellate Judges

Opinion of the Court filed by Judge Ware

I. INTRODUCTION

This case arises out of a dispute between Appellants, Rincon Mushroom Corporation, Inc., and Marvin Donius (collectively, "RMCA/Donius") and Appellees, the Rincon Band of Luiseño Indians, (the "Tribe") and members of the Tribe's Business Committee. The Tribe is a federally recognized Indian tribe under the Mission Indian Relief Act of 1891 pursuant to which it is the beneficial owner of a reservation in northern San Diego county in California. Marvin Donius is a non-Indian who owns approximately five acres of land in fee simple within the geographic boundaries of the Tribe's reservation. Rincon Mushroom Corporation operated a business on the land and now holds a promissory note from Donius that is secured by an interest in the land. United States law allows an Indian tribe to regulate conduct on fee land if that conduct harms or threatens to harm the health and welfare of the tribe.

Based on events and conditions on the subject property that the Tribe concluded affected the health and welfare of the Tribe, the Tribe sought to enforce its Environmental Enforcement Ordinance against RMCA/Donius in

tribal court. In response, RMCA/Donius filed an action in the United States District Court for the Southern District of California seeking a declaration that, as a fee owner, the Tribe had no jurisdiction over his land-based activities and sought to permanently enjoin the Tribe from interfering with him. Under the comity doctrine, the federal court stayed the action and ordered RMCA/Donius to first exhaust its remedies before the tribal court. In proceedings before it, the tribal trial court ruled that the Tribe had proved that RMCA/Donius were engaged in conduct on their land that threatened the health and welfare of the Tribe. The tribal court granted injunctive relief in favor of the Tribe against RMCA/Donius.

With the judgment below being final, RMCA/Donius appeal the tribal trial court's decision. The question on appeal before this Court is whether under applicable law, the Tribe possesses authority to enforce its environmental ordinance against RMCA/Donius. Based on the briefings submitted to date and oral argument before this Court, we now affirm in-part and reverse-in part the decision of the trial court. This Court determines that while the trial court's findings are correct, the relief granted, however, is overbroad and must become focused on the issues to be resolved; we therefore vacate the judgment granting injunctive relief and remand the issue of relief to the trial court for further consideration consistent with this Opinion.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Rincon Reservation is approximately 4,026 acres in northern San Diego county. A casino and resort are the principal sources of revenue for the Tribe. The Tribe seeks to regulate development on real property within the Reservation through codes and ordinances, the earliest relevant code and ordinance having been enacted in 2007.

The RMCA/Donius property is approximately 5 acres within the geographic boundaries of the Rincon Reservation and is located directly across a highway from the Tribe's casino and resort. For years, RMCA/Donius and predecessor companies had conducted activities that include the following: "operating (i) a mushroom farm and other agricultural enterprises; (ii) a wooden pallet manufacturing facility; (iii) a fuel depot; (iv) a trucking company; (v) an auto storage facility; (vi) a junk yard; and (vii) other undisclosed 'small activities.'" (Appellees' Response Brief at 7.)

Tribal groundwater wells underneath both properties are the source of drinking water for both properties. The groundwater from these wells is limited in quantity and is susceptible to contamination from surface runoff due to the porous soils and shallow depth of the groundwater supply. Surface runoff is the primary source of recharge to the alluvial aquifer that supplies the Tribe's groundwater.

In 2005, Tribal officials became concerned about wastewater disposal on the RMCA/Donius property. They requested an inspection of the property by the U.S. Environmental Protection Agency. (Trial Exh. 102.) The inspection revealed potentially contaminating activities: improper storage of waste oil, undocumented materials in a truck repair area and injection wells used for sewage. Additional testing and monitoring were recommended to determine the seriousness of the potential for contamination.[1] The inspection disclosed a plume of contamination originating from the RMCA/Donius property. In 2007,

[1] The EPA report stated:

> The drinking water supply for the Tribe should be protected by requiring backflow prevention . . . from the hose supplying water to the site.
>
> If the drinking water well on the site is no longer functioning, its cause of failure should be documented and the well properly destroyed, so that the well bore does not transmit surface contaminants to underground sources of drinking water. If this is the case, a more permanent source of drinking waste for the site should be obtained, either a new well or a legal hookup to the Tribal public water system.
>
> Ground Water/Wastewater concerns: EPA will notify business owner of their obligation to Inventory their (4) injection wells, and will include compliance assistance information with that correspondence. EPA will provide best management practice guidelines for the storage of motor vehicle fluids to the facility owner. This will include general RCRA compliance assistance.
>
> EPA will recommend that in the course of determining septic system location, capacity and design, that the Tribe be provided with advance notice of the pumping state so that they can be present to evaluate the condition of the injection well(s). EPA recommends that the Tribe contact RCAC as well, to utilize RCAC's technical expertise in evaluating the condition of the wastewater system.
>
> The site should be reinspected for compliance with applicable housing and hazardous materials regulations. (Trial Exh. 102 at 3.)

a "preliminary aquifer vulnerability analysis" was conducted by Bikis Water Consultants ("BWC"). BWC identified "high risk zones" and "moderate risk zones" within the Reservation that might be susceptible to contamination.[2]

Later in 2007, a wildfire that swept across Southern California engulfed the RMCA/Donius property and destroyed the buildings on the property. The fire also damaged or destroyed cars and trailers that were stored on the property as well as oil drums and compressed gas tanks. A 3,000 gallon above-ground diesel storage tank on the property exploded during the fire. Although the Tribe's casino was not burned, the wildfire spread downwind to an area that threatened to involve the casino. Tribal officials believed that conditions on the RMCA/Donius property contributed significantly to the spread of the wildfire. RMCA/Donius did not restore or repair the fire damage to their property immediately. During the trial, RMCA/Donius' expert witness testified that there is a reasonable probability that during the 2007-2008 rainy season, metal contents from ash debris leached into the groundwater. (Tr. at 622.)

In 2008, RMCA/Donius resumed commercial activities on the property. Rincon tribal officials notified RMCA/Donius that because their property was within the Rincon Reservation and because they had repeatedly been notified

[2] (Trial Exh. 105.)

of potentially hazardous and unsafe conditions on the property, Tribal land use jurisdiction was being asserted over their property; the tribal officials cited a June 11, 1989, version of the Tribe's land-use Ordinance. (Trial Exh. 112.) RMCA/Donius were given a time period to provide information about lessees and sub-lessees; water supply to the property; the septic system; wastewater disposal; above and below ground storage tanks, storage drums, and storm water runoff; injection wells; clean-up from the fire; and current and proposed activities on the property. (Id.) Tribal officials provided RMCA/Donius with photographs of a variety of contaminants and at least two conduits for contamination into the unconfined aquifer beneath the site. (Trial Exh. 114.)

An EPA "Pollution Report" dated on March 20, 2008, documented the state of the property at that time:

> EPA maintains an interest in coordinating oversight of a voluntary cleanup of this site with the Rincon Tribal authorities. The property owner and Rincon Mushroom Corporation have individually expressed their desire to cooperate with the EPA and address all site concerns. Failure to complete burn ash/debris removal and conduct an environmental assessment of identified areas of concern may result in an EPA removal program action. The overarching issue appears to be a lack of appropriate regulatory jurisdiction on this land. The site appears to be unregulated from the standpoint of basic fire codes, land use, building codes and other matters associated with municipal government. The issue is also relevant to oversight of property remediation and re-development. (Trial Exh. at 4.)

In or around February 2009 two large wooden billboard signs were erected on the RMCA/Donius Property. The Tribe's Sign Ordinance as of February 1, 2009, provided, *inter alia*:

> [A]ll signs erected on the Rincon Reservation must receive Council approval before they are constructed/erected. All requests for Council approval must be submitted in writing to the Executive Assistant of the Tribal Council and must meet the criteria set forth in the Ordinance."[3]

RMCA/Donius refused to submit an application for the billboards. On April 17, 2009, the Tribe filed a complaint for violation of the Sign Ordinance in the tribal court against Donius and Mushroom Express, Inc., his then company, (the "Billboard Sign case").[4] The defendants filed a "Special Appearance" in which they objected to the subject matter and personal jurisdiction by the tribal court. The Tribe submitted a brief in support of jurisdiction, citing Montana v. United States, 450 U.S. 544, 565 (1981). (See Trial Exh. 12.) The trial judge found that the tribal court had both subject matter and personal jurisdiction over the defendants and ordered them to file an answer. When the defendants failed to do so, the tribal court entered a default judgment imposing a $5,000 fine on the defendants and ordered them to correct the sign ordinance violation

[3] (See Rincon Brief in Support of Jurisdiction at 4.)
[4] Rincon Band of Luiseno Indians v. Marvin Donius and Mushroom Express Inc., No. 02972009.

within ten days. If defendants failed to follow timely the mandate of the court's order, the judgment authorized the Tribe to remove the billboards.[5]

The defendants did not appeal the default judgment in the Billboard Sign case.[6] In 2009, however, RMCA filed multiple civil complaints in the Superior Court of the State of California and in the United States District Court for the Southern District of California against the members of the Rincon Tribal Council in their individual and official capacities[7] and SDG&E[8] (the "October 2009 civil actions"). RMCA collaterally attacked the default judgment by the tribal trial court and sought declaratory and injunctive relief preventing the Tribal Council from enforcing the Tribal ordinances against RMCA and the subject property. RMCA also alleged tort claims for interference with contracts and business relations and civil RICO causes of action. RMCA alleged that the Tribe had implemented a plan to force RMCA to sell the property to the Tribe by interfering with its efforts to have San Diego Gas & Electric re-energize the property, ordering a clean-up contractor to leave the property and by making false claims to various entities that the property was under the exclusive

[5] In July 2009 Tribal representatives entered the RMCA/Donius property and removed the billboards. (Docket Item No. 28 at 4.)
[6] Because the Ordinance under which the default judgment was entered did not comply with the second Montana exception, we set aside the default judgment *nunc pro tunc*.
[7] The defendants were Bo Mazzetti, John Gilbert Parada, Stephanie Spencer, Charlie Kolb, and Dick Watenpaugh.
[8] RMCA v. Mazzetti, Case No. 09-CV-2330.

jurisdiction of the Tribe. SDG&E filed a cross-claim against the Tribe. All of the state court actions were dismissed.

The Rincon Tribe moved to dismiss the two October 2009 federal civil actions on the ground, *inter alia*, that RMCA had not exhausted remedies before the Rincon tribal court. The district judge granted the motions to dismiss, ruling that under the doctrine of comity, the non-Indian plaintiffs had to exhaust tribal court remedies before seeking to have a federal court enjoin the tribal proceedings. RMCA appealed the dismissals to the Ninth Circuit.[9] The Ninth Circuit affirmed the district court's exhaustion order but instructed the lower court to stay the case pending exhaustion. The district court complied and the matters moved back to the tribal court for exhaustion.[10]

Coincidentally with the return of the cases to the tribal court, in 2014, the Tribe amended its Environmental Enforcement Ordinance by establishing

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[9] (See 3:09-cv-2330, Docket Item No. 56.)

[10] The district court stayed the actions and directed the parties to proceed before the tribal court and to submit status reports on RMCA's exhaustion of remedies before the tribal court. On June 15, 2015, the parties submitted a joint status report informing the district court that on December 5, 2014, RMCA had submitted a proposed plan to the Rincon Environmental Department that sets forth the activity to be conducted on the property. On June 1, 2015, the Rincon Environmental Department had denied the request to approve the proposed plan, but had indicated that the submission of certain information and clarification could cause it to approve the proposed plan. Consequently the parties jointly requested the district court to further stay the proceedings pending review of additional information. Based on the joint status report, the district court administratively closed its case without prejudice to any party to move to reopen and without prejudice to resolution of any statute of limitations issue associated with the filing of the complaint. (See 3:09-cv-2330, Docket Item No. 82.)

"catastrophic consequences" as the standard for tribal jurisdiction to match language now being used by the Supreme Court's interpretations of the Montana case. See Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 341 (2008).

On August 25, 2015, RMCA/Donius filed a complaint in the tribal trial court that repeated the substance of their allegations in the October 2009 civil action[11] and the Tribe filed violation notices and a counterclaim reasserting jurisdiction under the amended Ordinance. The trial judge consolidated the two cases[12] and ordered a separate trial on the issue of tribal jurisdiction, followed by a second trial to decide remedies, if necessary. In an order dated May 18, 2017 ("Tribal 2017 Order"), the trial court held that based on the actions and inactions of RMCA/Donius, the Tribe had established that it possesses jurisdiction over the activities of RMCA/Donius. Phase two was not tried until 2019. On April 22, 2019, the trial court issued judgment in favor of the Tribe and also granted several forms of relief to the Tribe, including injunctive relief. RMCA/Donius timely appeal from the 2017 Order and 2019 Judgment.

[11] (Docket Item No. 69–71.)
[12] On November 10, 2015, in the Tribal Court, the Rincon Tribe granted a motion to consolidate federal civil action Nos. 09-CV-2330 and 10-CV-0591 for purposes of further proceedings.

III. APPELLATE JURISDICTION

This Court's jurisdiction to hear this matter is derived from the Articles of Association of the Rincon Band and from referral of the case by the federal district court for exhaustion under the doctrine of comity.[13]

IV. STANDARDS OF REVIEW

As an appellate court, we defer to the findings of fact of the trial court. We will not reverse or vacate those findings of fact unless the trial court committed clear error. As to questions of law, however, we apply the *de novo* standard of review. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc., 715 F.3d 1196 (9th Cir. 2013).

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[13] The Rincon Band of Luiseño Indians is organized pursuant to Articles of Association approved by the Commissioner of Indian Affairs on March 15, 1960. Section 1 of the Articles establishes that the Rincon Tribal Business Committee (called the "Council") governs the Rincon Band and that the Council "shall have jurisdiction over the lands within the boundaries of the Rincon Reservation (the "Reservation")." Pursuant to Rincon Tribal Ordinance 3.800." The Council created this Court of Appeals and promulgated Rules and Procedures Appellate:

> Any party aggrieved by any final order, or judgment of the Rincon Trial Court may appeal such order, or judgment to the Rincon Court of Appeals by filing a notice of appeal with the Rincon Trial Court within fifteen (15) days after such order or judgment has been entered. Rincon App. Ct. Rules & Proc. §3.812.

Under the doctrine of comity, the district court required RMCA/Donius to exhaust tribal court remedies. At a minimum, exhaustion of tribal court remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987).

V. DISCUSSION

A. Tribal Jurisdiction

Indian tribes are recognized as *quasi* dependent nations and as "distinct, independent political communities," qualified to exercise many of the powers and prerogatives of self-government. Worchester v. Georgia, 31 U.S. 515, 559 (1832). The United States Supreme Court has characterized the sovereignty retained by Indian tribes as having a "unique and limited character" that centers on the reservation and on tribal members within the reservation. United States v. Wheeler, 432 U.S. 313, 322-323 (1978). Subject to congressional oversight, tribes retain authority to govern reservation land and the conduct of their members on the reservation. United States v. Mazurie, 419 U.S. 544, 557 (1975). Governance of reservations became more complex when some reservation lands were converted into fee simple parcels and conveyed to nonmembers under the Indian General Allotment Act of 1887, 25 U.S.C. § 331, *et seq*.

1. The Montana Second Exception

In Montana v. United States, 450 U.S. 544, 565 (1981), the Supreme Court reaffirmed that once reservation land was converted to fee simple and conveyed to nonmembers by a tribe, the tribe loses its plenary jurisdiction over that part of the land. However, the Montana Court articulated two exceptions

to that principle. Under the first exception, when a non-Indian enters into a consensual commercial relationship with a tribe or one of its members, the tribe is permitted to exercise civil jurisdiction over the non-Indian through taxation, licensing, or other means. Under the second exception, a tribe is permitted to exercise civil authority over the conduct of non-Indian owners of fee lands within the reservation, when the landowner's conduct on the fee land threatens to have or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566.[14]

At the outset of our analysis, we draw attention to a difference between the standard as articulated in Montana and that of the Tribe's Ordinance, as it is presently worded. As originally articulated, the second Montana exception allowed for tribal jurisdiction over nonmembers when nonmember conduct "threatens or has some direct effect on the political integrity, the economic

[14] The parties' briefs are replete with discussion of the second Montana exception and the Supreme Court and other federal cases that have applied the exception. However, in their briefs, the parties do not always accurately recite the second Montana exception. For example, in his opening brief, Donius argues, "The landowners assert that the Tribe has no regulatory jurisdiction to enforce its environmental ordinances, because the Tribe cannot show the activities *will* cause a catastrophic risk of harm to the Tribe under established federal law, and that the Tribe's efforts to unlawfully regulate them is part of the Tribe's scheme to force them to sell their property to the Tribe." (Corrected Brief of Appellants at 1, emphasis added). This argument is inapposite of the second exception under Montana. On the contrary, the Tribe does not have the burden to prove that Donius' activities *will* cause a catastrophe. The Tribe's burden is to show that Donius' actions or inactions have the *potential* to impose catastrophic consequences upon the political integrity, economic security or health and welfare of the Tribe.

security, or the health or welfare of the tribe." Montana, 450 U.S. at 566. Some courts have now stated that the second exception applies when there is a threat of "catastrophic consequences" to a tribe.[15] In 2014, as this case was being sent back to the Rincon tribal court for exhaustion, the Tribe amended the ordinance to state that it applied to conduct that had the potential to impose catastrophic consequences on the Tribe.

To contextualize the facts of this case in the universe of the Montana general rule and exceptions, it is useful to describe the peculiar evolution of the Supreme Court's analysis on tribal jurisdiction over nonmembers. The "catastrophic consequences" language codified into tribal law originated with the 2005 edition of the Cohen Handbook on Federal Indian Law, § 4.02[3][c], at 232 n. 220 (2005). The Cohen Handbook editors had quoted a Supreme Court decision that held a tribe may not impose a tax on nonmember activities on nonmember land unless the nonmember activity "actually 'imperils' the political integrity of Indian tribes. . . ." Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657-58 n.12 (2001) (quoting Montana, 450 U.S. at 566). The Handbook editors extrapolated from the "imperils" remark that tribal jurisdiction is not

[15] See Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c][i], at n.75 (Nell Jessup Newton ed., 2012)).

justified unless the jurisdiction "is necessary to avert catastrophic consequences." Cohen Handbook, supra, § 4.02[3][c], at 232 n. 220. Three years later, the Supreme Court took that stray remark as support for the proposition that there is an "elevated threshold for application of the second Montana exception . . . that tribal power must be necessary to avert catastrophic consequences." Long Family Land, 554 U.S. 326 at 341 (quoting Cohen Handbook).

This evolution in the Supreme Court's characterization of the Montana second exception from the "threatens or has some direct effect" trigger to the "catastrophic consequences" trigger arises from an incredibly limited universe of cases. The original case, Montana, involved a nonmember fishing in a river. Montana, 450 U.S. at 547. The next major case, Strate v. A-1 Contractors, 520 U.S. 438 (1997), involved a nonmember-on-nonmember tort claim arising from a car accident. Id. at 442. The next case was the Atkinson Trading case involving a tax on a hotel. 532 U.S. at 647. The subsequent case, Plains Commerce, involved race discrimination against tribal citizen ranchers by a nonmember bank. 554 U.S. at 320. These cases involve isolated incidents with harms that likely would not have impacted tribal lands. None of these cases involved a fact pattern similar to the one at bar, which involves nonmember activity that is likely to impact critical tribal lands.

However, one Supreme Court decision with a fact pattern similar to the one at bar is Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), although even its utility is limited because the Court did not reach a majority opinion. That matter involved consolidated cases regarding the power of a tribe to impose its zoning ordinance on nonmember-owned land. Id. at 438 (Stevens, J., lead opinion). The most relevant of the consolidated cases (docket number 87-1622) involved a nonmember named Brendale who owned land in fee within an area of the Yakima [now Yakama] Indian Reservation called the "closed area." Id. The closed area of the reservation was massive, around 807,000 acres, of which only 25,000 acres were held in fee. Id. Even on the fee lands, no one lived permanently in the closed area, which was pristine wilderness. Id. at 438-40. Brendale owned 20 acres in the "heart" of the closed area. Id. at 440. He sought permission from the county to subdivide and develop his lands. Id. The Yakama Indian Nation objected before the zoning commission, asserting that the tribe possessed jurisdiction over the nonmember parcel. Id. The tribe's zoning regulations prohibited development like the kind proposed by Brendale. Id. at 441. The regulations took "care that the closed area remain[ed] an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of

their culture.'" Id. (quoting Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1-98-72, § 23 (1972)). Justice Stevens characterized Brendale's proposal to develop land within an area that prohibited that type of development as bringing "a pig into a parlor":

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

While Justice Stevens' opinion focused on the power of Indian tribes to exclude persons from their lands (a question not at issue here), the Stevens opinion expressly adopted findings of the district court with respect to the second Montana exception:

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

> Brendale makes of his fee land within the Reservation's Closed Area." 617 F. Supp. [735,] 744 [(E.D. Wash. 1985)].

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

> In my view, the fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest. Id. at 444.

Justice Blackmun, writing for himself and Justices Brennan and Marshall, concurred in Justice Stevens' judgment. Id. at 448-49 (Blackmun, J., concurring in 87-1622). Justice Blackmun concluded that finding that the tribe did not possess jurisdiction over the Brendale property "would guarantee that adjoining reservation lands would be subject to inconsistent and potentially incompatible zoning policies, and for all practical purposes would strip tribes of the power to protect the integrity of trust lands over which they enjoy unquestioned and exclusive authority." Id. at 449 (emphasis omitted); see also id. at 458 ("And how can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation-tracts that are inextricably intermingled with reservation trust lands-would destroy the tribe's ability to

engage in the systematic and coordinated utilization of land that is the very essence of zoning authority?").

Brendale, while of limited utility to the federal courts perhaps, is instructive to us for contextualizing how the Appellants' land use choices impact the Rincon Reservation. Brendale is the only United States Supreme Court decision that addresses nonmember conduct that could create impacts that spread from nonmember lands to tribal lands. The Yakama zoning ordinance fits comfortably within the constellation of cases holding an Indian tribe had power to enforce its land use laws on nonmember lands. See e.g., Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation, Wyo., 670 F.2d 900 (10th Cir. 1982); Hoover v. Colville Confederated Tribes, 2002 WL 34540595 (Colville Ct. App., Mar. 18, 2002).

Even so, the Supreme Court's precedents on the second Montana exception provide little guidance to this Court. The parties appear to have realized the same, namely, that the Supreme Court precedents are of limited value to the analysis. They instead focus on two Ninth Circuit decisions, Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298 (9th Cir. 2013), and FMC Corp. v. Shoshone-Bannock Tribes, 2017 WL 4322393 (D. Idaho, Sept. 28, 2017), aff'd, 942 F.3d 916 (9th Cir. 2019). RMCA/Donius emphasize Evans as the most persuasive case. Evans arose on the Fort Hall Reservation, home to

the Shoshone-Bannock Tribes. Id. at 1300. The tribes there tried to require that a nonmember on fee lands seek a building permit from the tribes before constructing a single residence home. Id. at 1301. The Ninth Circuit, applying the second Montana exception test, concluded that, since the reservation "has long experienced groundwater contamination," simply building a house would not "meaningfully exacerbate the problem." Id. at 1306.[16] Further, the Ninth Circuit concluded that "the [t]ribes' generalized concerns about waste disposal and fire hazards are speculative, as they do not focus on Evans' specific project." Id.

The Tribe in this case focuses more on the FMC case.[17] The FMC case involved the same reservation as the Evans decision, the Fort Hall Reservation. FMC, 942 F.3d at 919. That case involved the source for the polluted reservation groundwater referenced in Evans, the FMC Corporation; FMC stored "millions of tons of hazardous waste on the Reservation. . . ." Id. at 935. The Ninth Circuit held that the tribe possessed civil jurisdiction over FMC on the basis of the elemental phosphorus in the ground and the phosphine gas in

[16] The Court does not comment on whether it agrees with the Ninth Circuit's characterization here.

[17] The tribe relied on the district court's opinion in that matter. The Ninth Circuit has since affirmed that decision. We focus our attention on the Ninth Circuit's opinion.

the air, both of which the court found were "deadly" and pose "a real risk of catastrophic consequences." Id. at 934-39 (quotation omitted).

2. The Tribe's Ordinance

On July 10, 2007, the Tribe enacted a comprehensive environmental ordinance. The Ordinance as it was worded in the 2007 revision, provided that a Notice of Violation could be filed against a "Band Member" or a person who was "not a Band Member (non-member Indian or non-Indian)." (Rincon Environmental Enforcement Code section 304, Docket Item No. 33 (Phase Two Trial Ex. 33).) On February 13, 2013, the Tribe adopted a Fire Hazard Abatement Ordinance. It empowered the Tribal Fire Chief to apply the Ordinance to "non-Indian activities occurring on non-Indian owned fee lands" if the conduct met the second Montana exception. (Section 15.3003, Phase Two Trial Exh. 36.)

The Ordinance was amended in 2008, 2012, and again, on April 29, 2014, which is the current version. In relevant part, the 2014 Ordinance provides:

> This Ordinance shall apply to activities occurring on non-Indian owned fee lands located within the exterior boundaries of the Rincon Reservation if . . . (4) [t]he activities include conduct that threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe. For an activity to qualify . . . , it must

> be conduct that either (A) in fact, significantly impacts the political integrity, the economic security, or the health and welfare of the Tribe, or (B) has the potential to impose catastrophic consequences upon the political integrity, the economic security, or the health and welfare of the Tribe. RINCON TRIBAL CODE § 8.301(b).

At oral argument, counsel for the Tribe acknowledged that the Ordinance is grounded on Montana and is intended to guide the Tribe in complying with the Supreme Court's precedents.

The 2014 Ordinance requires this Court to determine, as a matter of law, whether the Appellants' actions and inactions pose a catastrophic threat to the tribe. See section 8.301(b)(4)(B).

3. The Tribal Court's Findings

The Rincon Tribal Code ties the subject matter jurisdiction of the tribal judiciary to all actions so long as there is "any basis consistent with the inherent sovereignty of the Band, its Articles of Association and laws, and federal law." RINCON TRIBAL CODE § 3.103. Based on the plain language of the Ordinance, the trial court held that the Tribe had proved that it had jurisdiction over RMCA/Donius. The trial court's holding coalesced around four consequences deriving from the actions and inactions of RMCA/Donius that had "the potential to impose catastrophic consequences upon the political integrity, the economic security, or the health and welfare of the Tribe." (Id.)

The trial court labeled the first finding as "Stewardship of the Fee Land;" it involved the failure of the RMCA/Donius to maintain their property:

> Plaintiffs contend and offer evidence that, over the last two decades or more, Defendants have not maintained the property in question. The property, according to the Plaintiffs, is not and has not been well maintained and this has led to serious consequences, and if not somehow regulated can, in fact, affect the health, welfare, and economic security of the Tribe. (Tribal 2017 Order at 6.)

The second finding involved the potential for catastrophic fire. The trial court used the label "Fire Hazard" to describe this problem:

> Over the last few years, devastating fires have swept through the area. It is not argued that Defendants caused these fires. However, the condition of the property and poor maintenance of the property in and of itself poses a catastrophic risk to Plaintiffs. Plaintiffs' rationale is that the property is located approximately 60 feet from the Harrah's Rincon Casino which is Plaintiffs' primary source of income. At trial a video of explosions, fire embers, and other threatening conditions due to the fire were dangerously close to the Tribe's casino, these coming from the Defendants' property. In short, due to prior usage, the property presents a situation whereby any future fires in this highly prone "fire area" can, in fact, have catastrophic consequences on the Tribe. Id. at 6.

The court added, "There is no doubt in the Court's mind that any fire on Defendants' property or passing through Defendants' property can pose a catastrophic risk to Plaintiffs' water supply as well as misuse of the property as has been in the past." (Tribal 2007 Order at 8.) The court further found,

"Defendants' use of the property in the past has threatened the Tribe's safety from fire and its water supply, exacerbating the potential of harm to its economy." (Id.) Indeed, the records show that during trial, the threat of fire damage arising from Appellants' property causing damage to the Tribe's gaming and resort properties was dramatically demonstrated by video of burning embers originating from an explosion on Appellants' property crossing the street and landing on the roof of the tribal hotel. (Appellees' Response Brief at 24; Appellees' Supplemental Excerpts of Record at 791-94.)

The third finding involved pollution of the groundwater. The court labeled this concern "Water Table":

> Plaintiffs contend the activities on Defendants' property, if allowed to continue unchecked, bear a distinct possibility of damaging its "pristine" water table. Evidence at trial showed this, while possibly remote, is a factor to be considered as argued by the Plaintiffs. (Tribal 2007 Order at 6.)

The court found that the Tribe's water was "'pristine' and the only source of water it has, [which it] shares with Defendants' property." (Id. at 8.) The court further found that a fire "passing through Defendants' property can pose a catastrophic risk to Plaintiffs' water supply as well as misuse of the property as has been in the past." Id. The tribe's witnesses offered uncontroverted testimony that there "is one aquifer underneath the entire reservation that

provides all the groundwater and drinking water for all . . . of the wells on the reservation." (Appellees' Supplemental Excerpts of Record at 55.)

The court's final finding was that the defendants' refusal to disclose their intended uses of the property, coupled with the fact that the state and county have disclaimed jurisdiction over all lands within the reservation, creates a "lawless enclave." The court identified this piece as "Other Factors":

> Plaintiffs additionally contend that Defendants' use of the property in general must be regulated for the protection of the Tribe's economic, health, and general well-being, which is threatened by lack of jurisdiction as the County and State have no civil regulatory jurisdiction over the property. Considering this, the Plaintiffs allege Defendants' property becomes a "lawless enclave" whereby Defendants can do anything they wish on the property, leaving the Tribe helpless. Plaintiffs' intention at trial was to show what they believed is continued misuse of Defendants' property poses potential catastrophic consequences to the Tribe. Id. at 6.[18]

4. Analysis

RMCA/Donius argue for reversal of the trial court's jurisdiction finding. We now specifically address each of those grounds in turn, although not in the order presented.

[18] The trial court also found that RMCA/Donius' response to the Tribe's allegations were "vague and unresponsive to Tribal concern." (Tribal 2007 Order at 6.)

First, RMCA/Donius argue that the trial court refused to place the burden on the Tribe to prove that the second Montana exception applied. (Appellants' Corrected Brief at 25.) RMCA/Donius' argument that the trial court placed the burden of proof on them as fee landowners finds no support in the opinion or judgment. In its May 17, 2017 Order, the trial court noted, "This [c]ourt is well aware [that] the Tribe has a heavy burden of showing that the activity on the fee land poses a catastrophic threat to tribal government as opposed to simply an effect on surrounding land and is mindful of all related factors." (Tribal 2007 Order at 7-8.) Allocation of the burden of proof should not be confused with the trial court's repeated conclusions that the Appellants' actions and inactions could lead to catastrophic consequences. (Id. at 6.)[19]

Second, RMCA/Donius argue that the injunction that requires them to submit a business plan effectively shifts the burden of proof away from the Tribe.

> The Tribe cannot require RMCA and Donius to first prove to the Tribe that the activities being conducted on the subject property will not pose a catastrophic risk to the political integrity, the

[19] Specifically, the tribal court found the following: "However, the condition of the property and poor maintenance of the property in and of itself poses a catastrophic risk to Plaintiffs." (Id.) "In short, due to prior usage, the property presents a situation whereby any future fires in this highly prone 'fire area' can, in fact, have catastrophic consequences on the Tribe." (Id. at 8.) "There is no doubt in the [c]ourt's mind that any fire on Defendants' property or passing through Defendants' property can pose a catastrophic risk to Plaintiffs' water supply . . . ." (Id.)

> economic security, or the health and welfare of the Tribe, by requiring them to submit a business plan for the Tribe's approval, before being allowed to engage in any activities on the subject property. That gives the Tribe complete discretion and control over the property, contrary to Montana, supra, and cases construing it. It unlawfully places the burden on the non-Indian owner of fee land to prove to the Tribe that its activities will not amount to catastrophic consequences. (Appellants' Corrected Brief at 25-26.)

This Court finds that RMCA/Donius improperly conflate the burden of proof that was placed on the Tribe, and the injunctive remedy that was imposed on them after the trial court found that the Tribe had met its burden of proof. Once the tribe has proven that the second Montana exception applies to the conduct of a fee landowner, it was permissible for the tribal court to issue an order that places the burden on the fee landowners to perform actions or to stop their actions or to seek tribal permission to take similar actions.

Third, RMCA/Donius argue that, assuming the burden of proof was placed on the Tribe, it failed to prove that the threat posed by their conduct is sufficient to trigger jurisdiction under Montana and its progeny. We summarily reject RMCA/Donius' argument for three reasons. First, it seems to be based on the *ex post facto* doctrine. However, the doctrine does not apply here because although the Ordinance was amended after a dispute had arisen, it imposed a more severe burden on the Tribe, not on RMCA/Donius. Second, the violation

notices,[20] pleadings claiming a violation of the Ordinance were filed after the Ordinance had been amended. Finally, the judgment was based on the Ordinance as amended in 2014. Further, the Rincon Tribal Code ties the subject matter jurisdiction of the tribal judiciary to all actions so long as there is "any basis consistent with the inherent sovereignty of the Band, its Articles of Association and laws, and federal law." RINCON TRIBAL CODE § 3.103. Based on the plain language of the Ordinance, the trial court held that the Tribe had proved that it had jurisdiction over RMCA/Donius.

The trigger point for tribal jurisdiction under § 8.301(b)(4)(B) in this case is the potential for the defendants' activities to create catastrophic consequences that can spread to tribal lands. To review, the trial court found conclusively (1) that the Appellants failed to maintain their property; (2) that the Appellants' land constitutes a fire hazard in an area that is unusually threatened by fire; (3) that the Appellants' actions and inactions have contributed to a significant threat to the pristine character of the tribe's water supply; and (4) that the Appellants' assertion of immunity from tribal

[20] The Tribe issued new Notices of Violations (NOV) to RMCA/Donius after the 2014 amendment. The new notices referred back to earlier notices: "The violations described in this Notice have been previously described in RED Notices dated October 13, 2009 and January 15, 2010, which were served on the property owner of record Mr. Marvin Donius , who has not responded, and dated March 31, 2010, which was served on both RMCA and Mr. Donius, neither of which has responded." (Trial Exh. 161.)

jurisdiction, together with local government's demurrer, creates a lawless enclave within the reservation.

We conclude that the Appellants' land use choices on its own property have the potential to create catastrophic impacts on the Rincon Band's lands. We hold that the RMCA/Donius' conduct has long created the potential for catastrophic consequences on the tribe. There are two critical facts that undergird our holding. First, the Tribe is dependent on a single water source, the groundwater underneath both the Tribe's lands and the RMCA/Donius' lands. Second, the Tribe is dependent on a major source of revenue from its gaming operations, which are located across the street from the defendants' property. If either of those resources are threatened with catastrophic harm, then tribal law authorizes the Tribe to assert jurisdiction over the defendants.

Moreover, in support of their attack on tribal jurisdiction, Marvin Donius testified that he believed "he could use the land in any fashion he chose, short of a nuclear waste dump." (Tribal 2007 Order at 9.) Thus, on appeal, RMCA/Donius ask us to disregard the trial court's concern that the RMCA/Donius property was a "lawless enclave." First, they argue that in its judgment the trial court concluded that being a "lawless enclave" gave the Tribe the "right to regulate the property, despite the requirements under Montana." The Court finds that this argument misconstrues the judgment. In the

judgment, the trial court states that it found the Tribe's efforts "to safeguard any potential damage to the Tribe's economic security, health, welfare, and safety" to be legitimate "in light of the fact that local government shows no interest in zoning, regulating, or exercising any form of regulation dealing with any control over non-Indian owned fee land located on Indian reservations in San Diego County." (Tribal 2007 Order at 5.) Thus, contrary to RMCA/Donius' argument the trial court did not treat the "lawless enclave" character of the property as a basis for tribal jurisdiction despite Montana. Rather, the trial court incorporated RMCA/Donius' conduct on a "lawless enclave" as supporting its Montana analysis.

We also reject RMCA/Donius' argument that, under Montana, the fact that fee land on a reservation is not regulated by local and state governmental bodies is not a permissible basis for the Tribe to assert jurisdiction over their fee land. We acknowledge that there is no discussion in Montana and its progeny about lack of local governmental regulation as a basis for tribal jurisdiction. However, that was not the analysis by the trial court. The lack of local and state health and safety regulation of matters normally falling in the ambit of such regulation is recited by the trial court as evidence that may be considered when deciding whether the circumstances here warrant imposition of tribal jurisdiction.

In addition, RMCA/Donius attempt to deprive the Tribe of reliance on the symmetry between the "catastrophic consequences" language of its Ordinance and the present articulations of the Montana standard, by arguing that that the Ordinance was "fraudulently altered." (Appellants' Corrected Brief at 33.) As recited in the background, the dispute between RMCA/Donius and the Tribe has lasted for over fifteen years. During that time, the Tribe has promulgated ordinances and amended various versions of ordinances. RMCA/Donius argue that the ordinance under which the Tribe's jurisdiction should be tested is the one in effect before the current version that the Tribe had adopted on August 14, 2012. The 2012 version did not use "catastrophic consequences" as the standard. RMCA/Donius argue that the 2012 version arguably shifted the burden of proof away from the Tribe because it requires a fee landowner to submit a business plan in which the fee owner proves to the Tribe's satisfaction that a proposed use will not threaten tribal health and welfare. The 2014 version of the Ordinance does not require a business plan, but allows one at the discretion of the fee owner. We therefore find that the trial court did not err when it held that, as a matter of law, Appellants' actions and inactions had the potential to impose catastrophic consequences on the tribe. This holding meets the standard established by section 8.301(b)(4)(B) of the Ordinance.

Finally, the Court finds that the current case is in equipoise between Evans and FMC. The RMCA/Donius' land use activities are far more consequential than the mere construction of a single-family home at issue in Evans. But RMCA/Donius' activities have not been shown to be as potentially "deadly" as those of the polluter in FMC. However, it is also helpful to review the universe of Montana second exception cases for context. The most relevant cases are those in which nonmembers asserted the privilege of being excepted from tribal jurisdiction while on fee lands surrounded by tribal lands. RMCA/Donius' assertion of the privilege of being excepted from tribal jurisdiction despite potentially leaching contaminants into the tribe's groundwater and creating conditions for extensive fire damage places RMCA/Donius in that category. In each of these cases,[21] the ultimate outcome

[21] Examples of nonmember conduct similar to RMCA/Donius' include, for example, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) ("huge zinc-copper sulfide mine"); Burlington N. Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation, 323 F.3d 767 (9th Cir. 2003) (railroad operating on reservation right of way that carried hazardous waste and subject to derailments leading to fatalities and toxic spills); State of Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998) ("feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills[;] wastewater treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydroelectric facilities and wood processing plants"); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) ("waste treatment facility which dumps into the river"); BP America Inc. v. Yerington Paiute Tribe, 2018 WL 6028697 (D. Nev., Nov. 15, 2018) (abandoned copper mine with contaminants that could seep into the ground and surface water on the reservation; settlement with tribe reached leading to federal clean up of mine); St. Isadore Farm LLC v. Coeur d'Alene Tribe of Indians, 2013 WL 4782140 (D. Idaho, Sept. 5, 2013) (alpaca farm with untreated septage that could seep into the groundwater on the reservation).

of the dispute between the tribe and nonmembers resulted in court decisions or settlements favoring the tribal interests.

Here, RMCA/Donius' own admissions about the facts in their brief demonstrates the potential catastrophic impacts of their conduct. RMCA/Donius concede that after a massive wildfire on the reservation and beyond in 2007, "fire-damaged debris was left on the property from October 2007 until August 2008. . . . The risk-impact debris left on the subject property included ash-debris, petroleum, and ash metal." (Appellants' Brief at 12.) RMCA/Donius also concede that in 2011 "the Tribe's expert engineers found a low-level diesel and motor oil plume extending from off the subject property." Id. In addition, RMCA/Donius concede that in 2015, the Tribe discovered that RMCA/Donius had engaged in unpermitted activities, including "constructing mobile homes, fabricating or refurbishing wooden pallets, parking commercial trucks on the property, parking refrigeration-style trailers on the property, allowing people to live in mobile homes on the property and parking motor vehicles on the property." Id. at 14. Finally, RMCA/Donius have conceded that each of these activities is a potential threat, but rest their defense on the claim that none of these activities have actually harmed the Tribe. However, under Montana, actual harm is not the trigger for tribal jurisdiction, potential harm is. Thus, we do not find RMCA/Donius' defense credible, or consistent with the

law. In short, RMCA/Donius demand this Court to grant them immunity from tribal jurisdiction. Given the long and detailed history of potential catastrophe narrowly avoided over the years, Appellants' arguments must be rejected.

B. Remedies

After phase one, the trial court concluded that there was a basis under the second Montana exception for the Tribe to enforce its environmental protection Ordinance over RMCA/Donius. During the second phase, the trial court reviewed and affirmed jurisdiction and took evidence on what relief should be awarded based on the present conditions on RMCA/Donius' land. The trial court imposed the following injunctive remedies:

1. In order to proceed with any development or further use of the property RMCA/Donius shall provide the Tribe with a business plan acceptable per the standard of the REEO.

2. Both parties shall make a good faith effort to work together to develop this business plan. Per any business plan RMCA/Donius shall provide Rincon access to the property allowing professional experts to conduct any necessary, water, and surface conditions of the property and any impact the business plan may have on the Tribes economic safety, health, and general welfare.

3. If factually any assessment by these experts concludes any contamination is present and further inspection and analysis are required, RMCA/Donius shall bear all related reasonable expenses.

4. If any "clean up" of the property is required the RED shall set a plan in place subject to the Court's approval and again if required RMCA/Donius shall bear all costs.

5. As a point of clarity RMCA/Donius shall not conduct any activity on the property without an approved business plan being in place and approved. This includes all commercial, residential, or any type of personal or business activity. However, RMCA/Donius may remove existing items from the property.

6. Should RMCA/Donius violate any provisions of the order or is not in compliance with an approved business plan they shall be subject to the $2,000 (two thousand dollar) a day fine payable to the Rincon Tribe. Said fines shall remain in place until said violation is cured.

7. With a 24 hour notice to RMCA/Donius, Rincon or its representative experts or RED representatives shall be allowed access to the property.

In addition, the trial court reserved ruling on an award of "cost" to the Tribe.

RMCA/Donius challenge the injunctive relief based on conflict in the testimony between the Tribe's lay and expert witnesses and those called by RMCA/Donius. We review a trial court's ruling on applications for injunctive relief for abuse of discretion. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-313 (1982). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009) ("[W]e will affirm a district court's factual finding unless

that finding is illogical, implausible, or without support in inferences that may be drawn from the record.") If some evidence appears in the record that reasonably supports the trial court's decision there is no abuse of discretion. Id. Thus, a trial court does not abuse its discretion when an order is supported by some evidence even if there is conflicting evidence. Harman v. Apfel, 211 F. 3d 1172, 1175 (9th Cir. 2000).

An award of injunctive relief must be based on a finding that the party awarded injunctive relief satisfied a four-factor test: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) (quoting Ebay Inc. v. Mercexchange, LLC, 547 U.S. 388 (2006)).

An irreparable injury occurs when the injury is of such a nature that the injured party cannot be adequately compensated by damages or the damages cannot be measured by any certain pecuniary standard. Herb Reed Enter, LLC v. Florida Ent. Mgmt., Inc., 736 F.3d 1239, 1249 (9th Cir. 2013). A party has no adequate remedy at law when damages are incapable of calculation or the party to be enjoined is incapable of responding in damages. Cottonwood Envtl. Law

Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1090 (9th Cir. 2015); Johnson v. Couturier, 572 F.3d 1067, 1081 (9th Cir. 2009) (Irreparable harm prong satisfied where the plaintiffs showed that it was likely that the defendants would not have the resources to satisfy a judgment in the plaintiffs' favor).

The showing that a tribe must make to establish jurisdiction under the second Montana exception also satisfies the showing that it must make to be entitled to injunctive relief. Conduct that places a tribe under the potential for harm to its political integrity, economic security and health or welfare under Montana, constitutes irreparable injury under the principles of equity. Potential harm to political integrity, economic security, health and welfare are each a type of potential harm for which there is no adequate or certain pecuniary standard for compensatory damages. When weighted against one another, in the face of a potential for catastrophic consequences to the tribe caused by a fee owner's conduct, equity gives greater weight to requiring the fee owner to comply with a tribe's health and safety regulations than it does to a fee owner's freedom from tribal regulation. With respect to public interest, environmental preservation is in the public interest. See Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1308 (9th Cir. 2003); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002).

Based on evidence of lack of maintenance of the land by RMCA/Donius, rendering it susceptible to wildfires and to groundwater contamination, and a lack of regulation by local and state government, the trial court did not abuse its discretion in concluding that RMCA/Donius' conduct has the potential to impose catastrophic consequences upon the political integrity, economic security and health and welfare of the Tribe, making it appropriate to grant injunctive relief. It is the essence of equity jurisdiction that a court is only empowered to grant relief no broader than necessary to cure the effects of the harm caused by the violation. The Forschner Grp., Inc. v. Arrow Trading Co., 124 F.3d 402, 406 (2d Cir. 1997). We find that the scope of the injunction exceeds the amount of restraint necessary to protect the Tribe from the potential harm presented by RMCA/Donius' conduct. Therefore, we reverse, in part, and remand the case to the trial court to mold the protuberances of the injunction to the hollows of the potential harm.

We cite three examples as guidance. First, the injunction prohibits RMCA/Donius from "any development or further use of the property" until they provide the Tribe with a business plan acceptable per the standard of the REEO. There was no evidence that all of RMCA/Donius' development or use threatened catastrophic consequences. An injunction is overbroad when it seeks to restrain a party from engaging in legal conduct. Lineback v. Spurlino

Materials, LLC, 546 F. 3d 491, 504 (7th Cir. 2008). Thus, an injunction against all development or use of the land is overbroad.

Second, RMCA/Donius are enjoined to cease all activity on the property until they have provided the Tribe with a business plan acceptable to the Tribe. This business plan requirement is perhaps drawn from an earlier version of the Ordinance. Since the threat is grown out of actions or inactions that pose a fire hazard, groundwater contamination, and health and safety conduct that would otherwise be regulated by state and local governmental agencies, the injunction should speak to those concerns. In addition, we instruct the trial court to consider whether there is any basis under the Ordinance for the Tribe to give instructions to SDG&E with respect to the RMCA/Donius property.[22]

Finally, with respect to the twenty-four hours' notice requirement, RMCA/Donius are enjoined to provide the Tribe with access to their property to permit the Tribe to conduct professional inspections of water and surface conditions. The injunction does not address the frequency of unilaterally

[22] On April 1, 2008, the Tribe notified San Diego Gas & Electric not proceed with reconnecting power to the RMCA/Donius property. (See Phase Two Trial Ex. 39.) The present status of utilities, particularly of electrical power to the property is unclear to this Court. The Court understands that RMCA v. Mazzetti, Case No. 09-CV-2330-WQH-JLB (S.D. Cal.) is stayed pending exhaustion in this case. In the interest of judicial economy, in its reconsideration of the injunction, the trial court is directed to determine if electrical power is not connected at the direction of the Tribe, and if so, whether the second Montana exception empowers the Tribe to direct SDG&E to not reconnect power to the property under circumstances that meet with the approval and standards of SDG&E.

initiated tribal inspections. The Ordinance does not provide the Tribe with the unilateral right to enter and inspection. Conceivably, inspections could be sought from the tribal court as a form of emergency relief. That would provide a landowner with a forum to challenge a requested inspection.

VI. CONCLUSION

The Court finds that the Tribe's 2014 Ordinance meets the second Montana exception. Thus, the Court regards an injunction that follows the Ordinance more favorably than one that orders RMCA/Donius to do things that deviate from the procedures set forth in the Ordinance.

In reversing the injunction, we order the trial court to vacate any order finding RMCA/Donius in contempt based on noncompliance with the injunction and to vacate any fine imposed on RMCA/Donius pursuant to the injunction.

We vacate the 2009 default judgment that was entered under the version of the Ordinance that did not comport with the Montana standard. We vacate our order requiring Appellants to post a bond to stay enforcement of the judgment *nunc pro tunc* and purge Appellants of all citations of contempt by the trial court for conduct that took place while this appeal was pending.

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Pending further proceedings before the trial court, the Tribe is ordered to remove its blockade of the RMCA/Donius property.

Each party shall bear its own appellate costs.

THE JUDGMENT OF THE TRIBAL COURT IS AFFIRMED IN PART, VACATED IN PART AND REMANDED.