

Rincon Band of Luiseño Indians

PO Box 68 Valley Center, CA 92082 ♦ (760) 749-1051 ♦ Fax: (760) 749-8901



AMICUS BRIEF COORDINATION PROCEDURES

TIME SENSITIVE!!

TO: TRIBAL LEADERS

FROM: BO MAZZETTI, RINCON TRIBAL CHAIRMAN

A handwritten signature in black ink, appearing to read 'Bo Mazzetti', is written over the printed name.

DATE: MAY 7, 2012

I recently notified Tribal Leaders of the Rincon Band's petition for rehearing en banc before the Ninth Circuit in the *Rincon Mushroom Corporation of America v. Mazzetti* case. Rincon seeks rehearing en banc to reverse a 3-judge decision that jurisdiction is "plainly lacking" over non-Indian activities on fee lands within the reservation to protect core natural resources and that non-Indians are not required to exhaust tribal court remedies.

If allowed to stand, the Panel's decision promises to substantially and adversely impact all 9th Circuit tribes with a tribal court, fee lands within their reservation or non-Indians residing or visiting their reservations.

We have received inquiries from tribes throughout California and the Pacific Northwest, expressing an interest in either signing onto, or participating in preparation of, a tribal amici brief in support of Rincon's petition for rehearing. The Pala Band of Mission Indians and the Santa Ynez Band of Chumash Indians authorized their attorneys to assist in drafting an amici brief. In addition to assistance from NARF/NCAI Supreme Court Project attorneys, we expect tribal attorneys throughout the Ninth Circuit's Indian country to collaborate on the tribal amici brief[s].

Unfortunately, we are working within a tight time frame. Rincon's petition must be filed by May 11, 2012, and tribal amici brief[s] must be filed by May 21, 2012.

Rincon encourages your Tribe's leadership to consider authorizing your Tribe's attorney to sign the amici brief[s] on your Tribe's behalf. Please indicate below whether your tribe's attorney has, or will have, signature authority to assist in the preparation of the tribal amici brief. Once completed, immediately fax this form to Chairman Mazzetti of the Rincon Band of Luiseño Indians (760) 749-5144 so that our attorneys can coordinate with your tribal attorney to document your support. **Please return this form by May 16, 2012.** Thank you.

TRIBE: _____

ATTORNEY NAME: _____

ATTORNEY PHONE NUMBER: _____

ATTORNEY EMAIL: _____

If you need more details regarding this case, please see the attached letter requesting amicus support on April 25, 2012. Also, our attorneys will be submitting a draft petition to counsel for tribal amici by May 8, 2012.

Bo Mazzetti
Chairman

Stephanie Spencer
Vice-Chairwoman

Charlie Kolb
Council Member

Steve Stallings
Council Member

Laurie E. Gonzalez
Council Member

Rincon Band of Luiseño Indians

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April 25, 2012

Re: Why your Tribe should sign on to the Tribal Amici Brief in *RMCA v. Mazzetti*

Dear Tribal Leader:

We are writing on very short notice to seek your support in the form of filing or joining an amicus brief in support of the Rincon Band's Petition for Rehearing *en banc* of the recently issued decision in *Rincon Mushroom Farm of America (RMCA) v. Mazzetti*. If allowed to stand, the Panel's decision in *RMCA v. Mazzetti*, turns Indian country into a safe harbor for non-Indian polluters and establishes a new market for unscrupulous investors to purchase fee lands within Indian country and engage in nuisance land uses, free of any tribal government regulation, in order to extort exorbitant purchase prices from tribes.

Because the decision imperils the right of all 9th Circuit tribes to protect against catastrophic threats to their homelands, the Band will be filing a petition for rehearing/rehearing *en banc*, which is due on May 4, 2012. Rehearing *en banc* is rare, and requires a "critical mass" of 9th Circuit Judges to vote to hear the case *en banc*. A strong amicus brief submitted by 9th Circuit tribes will demonstrate the importance of this issue to Indian Country. Tribal amicus briefs in support of the petition for rehearing/rehearing *en banc* must be filed by May 14, 2012.

EXECUTIVE SUMMARY

On April 20, 2012, a Panel of the 9th Circuit Court of Appeals determined that the Rincon Band of Luiseno Indians "plainly lacked" jurisdiction over the activities of non-Indians on fee land within the Rincon Indian Reservation, despite evidence presented by the Band demonstrating that those activities posed significant, demonstrable threats to wildfire safety and Reservation ground water. The Panel reversed the district court's determination that the Band demonstrated "colorable" jurisdiction. The district court order would have required RMCA to exhaust its tribal court remedies prior to challenging the Band's jurisdiction in federal court. The Panel's conclusion that the Band's jurisdiction is plainly lacking deprives the Band of any evidentiary hearing to present evidence in support of its assertion of jurisdiction. At the same time, the Panel ignored the record that the district court relied upon to conclude that the Band demonstrated "colorable jurisdiction" over RMCA's activities.

Bo Mazzetti
Chairman

Stephanie Spencer
Vice-Chairwoman

Charlie Kolb
Council Member

Steve Stallings
Council Member

Laurie E. Gonzalez
Council Member

The Panel's decision cannot be squared with existing 9th Circuit precedent, which recognizes that a tribe may assert jurisdiction over non-Indian activities occurring on fee lands within its reservation when such activities pose a substantial and demonstrable threat to critical reservation resources. See *Elliot v. White Mountain Apache*, 566 F.3d at 848-50 ("*Elliot*"); *Montana v. U.S. Env'tl. Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998) ("*Montana v. EPA*"). The district court adhered to these cases, and properly distinguished "generalized" threats to a Tribe's core sovereignty interests, which are inadequate to show colorable jurisdiction over the activities of non-Indians on fee land within a reservation pursuant to *Montana's* second exception, from particularized threats posed by fire and water contamination hazards on non-Indian fee land that does show colorable jurisdiction.

In reversing the district court, the Panel concluded that *Montana's* second exception does not permit a tribe to assert jurisdiction to protect against catastrophic threats to core tribal reservation resources.¹ Instead, *Montana's* second exception applies only when non-Indian activities imperil "the right of reservation Indians to make their own laws and be ruled by them." According to the Panel, a tribe *may* be able to assert jurisdiction under *Montana's* second exception only *after* non-Indian activities cause a catastrophic event that damages a tribe's very subsistence (e.g. *after* the reservation has been engulfed by a fire or *after* reservation waters have been polluted). This narrow interpretation of tribal jurisdiction significantly reduces the ability of tribal governments to exercise legal and political control over their own affairs and resources.

While the Panel's decision is "unpublished", recent changes in federal court rules allow the opinion to be cited freely in future lawsuits as persuasive authority. The decision will be seized upon by non-Indian interests who seek to: 1) use fee lands within Indian reservations as a safe harbor to pollute and, 2) purchase fee lands within Indian reservations and engage in nuisance land uses to compel tribes to pay exorbitant prices to purchase the land from them. RMCA, a small group of private

¹ In *Montana v. U.S.*, the pathmarking case concerning tribal civil authority over nonmembers, the Supreme Court held that civil regulation of nonmembers on fee lands is governed by "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S.Ct. 1245. But the Court described two exceptions to that general rule:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their Reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

“investors,” has engaged in a concerted campaign to accomplish both objectives. The Panel’s decision will embolden RMCA and similarly motivated investors to expand their operations throughout Indian country.

A review of the composition of the Panel, the questions from the bench and recent 9th Circuit decisions on point reveal a split among the 9th Circuit judges concerning the scope of inherent tribal jurisdiction under *Montana*. Thus, while petitions for rehearing en banc are rarely granted, counsel for the Band believes the Panel’s decision to be a good candidate for such a rehearing. The filing of a strong amicus brief(s) by 9th Circuit tribes will only help the necessary “critical mass” of judges to understand the importance of this issue to Indian country, and to vote to grant rehearing en banc to clarify that *Elliot* and *Montana v. EPA* are the law of the 9th Circuit.

The Band is in discussions with California tribes who have expressed an interest in authorizing their counsel to draft a substantive tribal amici brief. Please consider joining such a brief, or alternately submitting your own amicus brief on the merits.

Please contact Chairman Bo Mazzetti directly at (760) 801-4550 or (760) 749-1092 to further discuss this important matter. Also, Scott Crowell, lead counsel in the litigation, is available at (425) 802-5369 to answer any questions your legal counsel may have regarding the Panel’s decision and the possibility of your Tribe’s participation as amicus.

Respectfully,

A handwritten signature in black ink that reads "Bo Mazzetti". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

**Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians**