

1
2
3
4
5
6 **THE INTERTRIBAL COURT OF SOUTHERN CALIFORNIA**
7 **RINCON BAND OF LUISENO INDIANS**

8 RINCON BAND OF LUISENO INDIANS,
9 Plaintiff,

10 v.

11
12 MARVIN DONIUS, an individual, and
13 MUSHROOM EXPRESS, INC., a California
14 Corporation,
15 Defendants.

Case No. RINCON-02972009

11 **ORDER**

16 THIS MATTER came before the Court on the Tribe's Motion for Order Compelling Site
17 Access ("Motion"). Specifically, the Tribe seeks an order authorizing the Tribe to be present on
18 the property located at 33777 Valley Center Road, Rincon Reservation, San Diego County
19 ("Former Mushroom Farm" or "FMF"), California from March 26 through April 2, 2012 for the
20 purposes of obtaining soil and groundwater samples pursuant to the Tribal Council approved
21 workplan prepared by Applied Engineering and Geology, Inc ("AEG"). Upon consideration of
22 the Motion, supporting memorandum and exhibits, the declarations of Defendants, and the
23 Court's file in this case, the Court issues the following memorandum opinion and Order:
24

25 By order issued June 2, 2009, the Court concluded that the Tribe has civil regulatory
jurisdiction over the FMF. The Court's order was not appealed to the Tribal Court of Appeals.
However, at the Defendants' request, this Court has agreed to entertain anew, as a motion to

1 reconsider, the Defendants' objections to the Tribe's jurisdiction. At the Parties' request, the
2 Court allowed additional discovery to be taken on issues related to the Tribe's jurisdiction, or
3 lack thereof.

4 A principal argument advanced by the Tribe is that, under the facts and circumstances of
5 this case, the Tribal civil regulatory jurisdiction lies under the second "*Montana*" exception
6 because past and current activities at the FMF pose a direct and substantial threat to the Tribe's
7 federally-reserved Reservation groundwater resources. The Tribe argues, and the Court agrees,
8 that evidence of actual groundwater contamination present upon the FMF is relevant to the
9 establishment of the Tribe's civil regulatory jurisdiction under *Montana's* second exception. The
10 Court also agrees that the soil and groundwater contamination present around the perimeter of
11 the FMF, as revealed in the December 29, 2011 Report ("Report"), warrant the proposed on-site
12 testing. Finally, the Court notes that the authors of the Report and the workplan for on-site
13 testing are registered professional civil engineers ("AEG") and that the workplan has been
14 approved by the Tribal Council ("AEG Workplan").

15 As evidenced by the Declaration of Marvin Donius, the Defendants advise that they will
16 not consent to the proposed on-site sampling called for in the AEG Workplan, scheduled to take
17 place at the FMF between March 26 and April 2, 2012. In essence, Defendants oppose the AEG
18 Workplan because they maintain permits must be obtained from the San Diego Department of
19 Environmental Health prior to the drilling of any on-site test boreholes or test wells. Defendants
20 argue that by permitting such activities without a County-issued permit, they expose themselves
21 to potential criminal liability under California law.

22 Given this Court's prior ruling on jurisdiction, the Court determines that Tribe may
23 properly enter and remain upon the FMF for the purposes of conducting an investigation of the
24

1 source of the TPHd and TPHmo contamination detected around the perimeter of the site,
2 pursuant to the tribally-approved AEG Workplan. The Court finds that sufficient evidence exists
3 to warrant the proposed onsite testing, not only for the purpose of accessing evidence material to
4 the Defendants' jurisdictional objections, but also to address community safety concerns
5 associated with soil and groundwater contamination.
6

7 The Court's entry of an order compelling site access should put the Defendants at some
8 ease, as it will make clear that the on-site testing at the FMF is an act of the Tribe, through its
9 agents (over which the County clearly does not have jurisdiction), as opposed to a voluntary act
10 of Defendants. The Court will also require that the Tribe hold Defendants harmless from any
11 liability that may arise because of the Tribe's performance of the on-site testing at the FMF
12 pursuant to this Court's order.
13

14 Based upon the Foregoing, its is hereby ORDERED:

- 15 1. The Tribe and its agents are hereby authorized to access the property located at 33777
16 Valley Center Road, Rincon Reservation, San Diego County ("Former Mushroom Farm" or
17 "FMF"), California from March 26 through April 2, 2012 for the purposes of obtaining soil and
18 groundwater samples pursuant to the approved AEG Workplan. The Tribe and its, officers and
19 agents (to specifically include AEG staff) are authorized to be present on-site during those days
20 from the hours of 6 a.m. through 7 p.m. for the sole purpose of effectuating the AEG Workplan.
21
- 22 2. The Tribe and its agents shall allow Defendants or their designated representatives to be
23 present and to observe all testing performed pursuant to this Order, and Defendants shall further
24 be provided with all associated test results and reports.
- 25 3. The Tribe shall indemnify and hold the Defendants' harmless for any liability that may
arise because of the Tribe's performance of the on-site testing at the FMF pursuant to this Order.

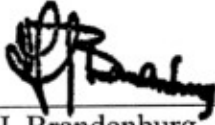
1 4. All prior orders of the Court remain in effect.

2

3 So Ordered this 26 Day of March, 2012

4

5



6

Anthony J. Brandenburg
Chief Judge
Intertribal Court of Southern California

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25