No. _____

In the Supreme Court of the United States

FMC CORPORATION,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long held that tribal efforts "to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citation omitted). This rule is subject to two exceptions, "known as the *Montana* exceptions." *Id.* But the Court has repeatedly stressed that these exceptions are "limited" and cannot be construed so as to "swallow the rule" against tribal jurisdiction over nonmembers. *Id.* (citation omitted). The Court has also emphasized that, even when a *Montana* exception is met, a tribe's regulation of nonmembers still "must stem from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337.

The Ninth Circuit, which is home to some 400 Indian tribes, has repeatedly resisted these limits, leading one judge to observe that the court has "flip[ped] *Montana*'s general rule on its head." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 907, 916 (9th Cir. 2017) (Christen, J., dissenting). Here, in direct conflict with the decisions of this Court as well as those of the Seventh and Eighth Circuits, the Ninth Circuit overhauled *Montana*'s carefully tailored framework and turned it into an unprecedented source of tribal jurisdiction over nonmembers who have no say in tribal government.

The questions presented are:

1. Whether the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana* exception is met, or whether, as the Seventh and Eighth Circuits have held, a court must also determine that the exercise of such

jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations.

2. Whether the Ninth Circuit has construed the *Montana* exceptions to swallow the general rule that tribes lack jurisdiction over nonmembers.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner FMC Corporation hereby states that it is a publicly traded company, it is not owned by a parent company, and no publicly held corporation owns 10% or more of its stock.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioner states that there are no proceedings directly related to this case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner FMC Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-55a) is reported at 942 F.3d 916. The district court's opinion (App. 56a-89a) is available at 2017 WL 4322393.

JURISDICTION

The court of appeals entered its opinion on November 15, 2019, App. 1a, and denied rehearing en banc on January 13, 2020, *id.* at 90a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Because the asserted tribal jurisdiction at issue in this case is outside the Constitution and not based on any federal statute, there are no relevant constitutional or statutory provisions.

INTRODUCTION

This case seeks review of the Ninth Circuit's expansive conception of tribal authority over nonmembers on non-Indian fee land. In the decision below, the Ninth Circuit held that respondent Shoshone-Bannock Tribes (Tribes) had jurisdiction to impose what amounts to a perpetual, $1.5 million annual penalty on petitioner FMC Corporation (FMC) based on the presence of hazardous waste on FMC's own fee land, even where that waste is subject to a

containment plan designed and approved by the U.S. Environmental Protection Agency (EPA). That decision directly conflicts with the decisions of this Court and those of other circuits. And it underscores that the Ninth Circuit has become a stark outlier in liberalizing the test for determining whether, and when, tribal jurisdiction may be exercised over nonmembers. This Court's intervention is needed.

Because nonmembers "have no say in the laws and regulations that govern tribal territory," and tribal sovereignty itself "is 'a sovereignty outside the basic structure of the Constitution,'" this Court has long held that Indian tribes generally lack authority over nonmembers, especially when it comes to non-Indian fee land. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 337 (2008) (citation omitted); *Montana v. United States,* 450 U.S. 544, 565 (1981) ("[T]he general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). This rule is subject to two exceptions, which stem from this Court's decision in *Montana v. United States,* known as the "*Montana* exceptions."

Under the first *Montana* exception, a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565. And, under the second, a tribe may regulate "conduct [that] threatens . . . the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Critically, however, there is a more fundamental limit: even if a *Montana* exception is met, a tribe's regulation of nonmembers "must stem from the tribe's inherent sovereign authority" and,

thus, is permitted only "*to the extent necessary* to protect tribal self-government [and] to control internal relations." *Plains Commerce*, 554 U.S. at 332; *see Montana*, 450 U.S. at 564 (emphasis added).

This Court has repeatedly stressed that *Montana*'s exceptions are "limited" and should not be expanded. *Plains Commerce,* 554 U.S. at 330 (citation omitted). Nonetheless, some courts have pressed *Montana*'s limits, and confusion exists over the scope of tribal power over nonmembers. Twice in recent years this Court has granted certiorari to address questions regarding the scope of *Montana*—although in one case (*Plains Commerce*), it resolved the question presented on narrow grounds and, in the other (*Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159, 2159 (2016)), it split 4-4, and so issued no opinion at all. Accordingly, confusion has persisted.

The Ninth Circuit, in particular, has repeatedly stretched *Montana'*s limits, leading one judge to observe that the court, in effect, has "flip[ped] *Montana'* s general rule on its head." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 907, 916 (9th Cir. 2017) (Christen, J., dissenting). In this case, the Ninth Circuit reached a new extreme. The court's decision overhauls not one but both *Montana* exceptions, while disregarding the touchstone requirement that the regulation at issue must be necessary to set conditions on entry, preserve tribal self-government, or control internal relations to begin with. The court's decision not only flouts this Court's precedent, but directly conflicts with the decisions of other circuits. *See, e.g., Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014), *cert. denied*, 575 U.S. 983 (2015).

The practical consequences of the decision below will be dramatic. Under the Ninth Circuit's decision in this case, an agreement or relationship entered into by a nonmember with a tribe—even under threat of massive regulatory penalties—triggers regulatory and adjudicatory jurisdiction over all aspects of the arrangement, as later characterized by the tribe's own courts. Likewise, the tribe's assertion of a speculative threat is a basis for exercising tribal jurisdiction over nonmembers on their own fee lands, even where the federal government itself (EPA, here) has rejected the alleged threat. And, on top of that, there is no requirement that a tribe tie the regulation at issue to its inherent authority to protect tribal self-government or control internal relations.

In a circuit home to more than 400 of the nation's 567 federally-recognized Indian tribes, this fundamental refashioning of tribal sovereignty is a recipe for uncertainty and strife among nonmembers and tribes, as well as jurisdictional conflict among federal, state, local, and tribal governments.

The petition should be granted.

STATEMENT OF THE CASE

A. FMC's Fee Land And EPA's Containment Plan For Waste On The Site

FMC owns 1,450 acres of fee land a few miles west of Pocatello, Idaho, located mostly inside the eastern boundary of the Fort Hall Indian Reservation. App. 56a. Fee title to the on-reservation land passed from the Tribes under the General Allotment Act, and later to FMC. The adjacent reservation land consists largely of other fee parcels owned by non-Indians, including the Pocatello Municipal Airport, owned by

the City of Pocatello, and a railroad owned by Union Pacific Railroad, which runs through the reservation alongside FMC's property. CA Excerpts of Record (ER) 877-78, 969, 971, 1211. Interstate Highway 86 and U.S. Highway 30 cut through the reservation adjacent to FMC's property as well. *See* CA9 FMC Opening Br. 5-6 (maps of area).

From 1949 to 2001, FMC and its predecessors owned and operated an elemental phosphorus processing plant on FMC's land. ER946. Elemental phosphorus is a basic ingredient used in a variety of everyday products, such as soda, cereal, flour, and toothpaste. However, the processing of elemental phosphorus generates a number of byproducts, including solidified elemental phosphorus, phossy water containing residual phosphorus particles, and phosphine gas, which can be harmful—if unmanaged. App. 18a-19a; ER844, 847, 937, 955, 976.

But the elemental phosphorus and byproducts on FMC's land were not unmanaged. To the contrary, they are heavily regulated under numerous federal environmental laws, including the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *id.* § 9601 *et seq.*; and extensive regulations under those statutes. App. 17a-19a. And they are subject to extensive monitoring to this day.

In 1990, EPA designated FMC's land, along with a neighboring fertilizer plant, a "Superfund Site" under CERCLA, and spent years studying it to determine the remedial measures necessary to protect human health and the environment. App. 71a-73a; ER944, 967. EPA proposed an elaborate remediation plan for the site, under both RCRA and CERCLA. The RCRA

remedy is embodied in a consent decree, which, among other things, called for the construction of state-of-the-art waste containment ponds, and stringent monitoring controls. App. 6a, 8a-9a; ER850, 856, 1152-58. The CERCLA remedy was set forth in a 1998 Record of Decision, later updated in 2012, and required additional remedial measures and monitoring. App. 17a-18a; ER939-45.

From the outset, the Tribes objected to containing the waste on FMC's property, arguing that doing so would pose an unacceptable threat to the health and safety of the Tribes. But, after consultation with the Tribes and careful consideration, EPA disagreed and found that containing and monitoring the waste in place is "protective of human health and the environment." *Id.* at 941-44; *see id.* at 915-17, 959, 965. Indeed, in EPA's judgment, it is the *removal* of the waste that would present the real threat. *See id.* at 958-59. And, in rejecting the Tribes' challenge to the consent decree, the Ninth Circuit itself found that "the Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment." *United States v. Shoshone-Bannock Tribes,* 229 F.3d 1161, 2000 WL 915398, at *2 (9th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001).[1]

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[1] In urging the Ninth Circuit to uphold the RCRA consent decree, the United States likewise stated that there is "no evidence" of harm based on any "past violations" of federal law and that EPA's plan to contain the waste on FMC's land "fully protected human health and the environment." U.S. Br. *24-25, *31 & n.20 (Feb. 7, 2000), 2000 WL 33996529; *see* U.S. Opp. Br. *17-18, *Shoshone-Bannock Tribes v. United States,* 532 U.S. 1019 (2000) (No. 00-1262), 2000 WL 34001040.

The phosphorus-related waste has now been on FMC's land for more than 70 years, and there is no evidence of any "measurable harm" to the Tribes or anyone else in the vicinity. ER18-20.

B. The Tribes' Increasing Regulatory Demands And Closure Of FMC's Plant

Unable to derail EPA's containment plan, the Tribes sought to impose their own regulatory demands on FMC based on the assertion of tribal law. In 1997, the Tribes demanded that FMC apply to their Land Use Policy Commission (LUPC) for a permit to construct EPA-mandated containment ponds, and threatened to enjoin construction in tribal court if FMC did not comply. ER1200-01 ¶ 4; *id.* at 1246-47 ¶¶ 3-4. Two weeks later, the Tribes upped their demands by adding a *disposal* fee of $182 million annually—an amount so large it would have required FMC to close its operations. *Id.* at 1093.

Eventually, after a series of letters and meetings over the course of a year or so in which the Tribes repeated their demands, FMC relented and entered into a settlement agreement with the Tribes, in order to avoid even more crippling regulatory penalties. As stated in a May 19, 1998 letter, "in lieu of the hazardous and nonhazardous waste permit fees" established by the Tribes' then current Guidelines, FMC agreed to pay the Tribes a "one time startup" fee of $1 million, and an annual "hazardous and nonhazardous fixed permit" fee of $1.5 million. ER1045-46; App. 63a. FMC paid the startup fee and $1.5 million annual fee from 1998 to 2001. App. 63a.

In 2001, FMC was forced to close its plant due to a sudden and unexpected increase in energy prices. FMC stopped disposing of waste on the site and began

dismantling the facility altogether. ER844. Meantime, FMC worked with EPA to supplement the existing containment plan, including construction of protective caps engineered with millions of tons of clean soil, and implementing extensive additional monitoring controls. *Id.* at 845-46, 940-43, 960-61. EPA later affirmed that the updated plan, as embodied in an Interim Record of Decision Amendment (IRODA), is "protective of human health and the environment." *Id.* at 939-44, 956.

Today, after implementation of these measures, FMC's site is a series of grassy and shrub-covered rolling hills, underneath which the capped ponds are secured, with monitoring devices on top. *Id.* at 964-66, 975; FMC Opening CA9 Br. 16 (photo).

C. This Dispute And Tribal Court Process Resulting In The Judgment At Issue

After the plant's closure, the Tribes took the position that FMC is required to obtain a special use permit and pay the $1.5 million annual fee for as long as the waste remains on the site, which, under EPA's plan, likely will be for centuries. ER1054-55. The Tribes also demanded that FMC obtain additional building and other permits. *See id.* at 1060-81. FMC, however, maintained that it only agreed to pay the fees while FMC was actually disposing waste at the site (which it did), but not after the plant closed.

In 2005, the Tribes filed a motion in the RCRA consent decree action in federal court seeking a declaration that FMC was required to comply with their various demands. The district court ruled for the Tribes, and ordered FMC to exhaust its jurisdictional objections in tribal court first. App. 9a. On appeal, the Ninth Circuit reversed, holding that

the Tribes—who were not parties to the consent decree—had no right to enforce the decree. *United States v. FMC Corp.,* 531 F.3d 813 (9th Cir. 2008).

Meanwhile, however, FMC embarked on what ended up being an eight-year, tribal-court exhaustion process. That process culminated in a 2014 Tribal Court of Appeals (TCA) judgment that FMC owed the Tribes some $19.5 million in unpaid permit fees for 2002-2014. App. 3a, 23a. The tribal courts found that the Tribes' jurisdiction extended to all matters regarding "the permitting process, and the ancillary issues related to it," including both "regulatory and adjudicatory" jurisdiction. ER172.

The Shoshone-Bannock tribal courts operate subject to the sole governing, political arm of the Tribes—the Business Council—and tribal court judges thus "serve at the pleasure of the Fort Hall Business Council." *Id.* at 366, 980. The tribal court proceedings in this case were marked by striking irregularities. For example, while FMC's case was pending before them, two of the three TCA Judges who initially heard and decided the case made public remarks at a law school conference evidencing a clear bias in favor of tribal jurisdiction.

One of the judges, Fred Gabourie, criticized this Court's decisions on tribal jurisdiction, describing *Montana* as "murderous to Indian tribes" and emphasizing the need to "get around" it. *Id.* at 772:10-15, 774:24-775:3. He also observed that it was important for tribal appellate courts "to step in . . . to protect the tribe," *id.* at 791:15-18, for example, by "tak[ing] the case and mold[ing] it." *Id.* at 768:20-769:10. The other judge, Mary L. Pearson, likewise emphasized the importance of "avoid[ing]" "bad [Supreme Court] decisions" on tribal jurisdiction. *Id.*

at 789:4-8. And she confessed to the audience that "we're sitting on [a case] now that we know is going to go up, so we're saying our prayers as well as reading the cases." *Id.* at 778:17-20.

Once these stunning remarks became public, Judges Gabourie and Pearson were removed and replaced with two new judges. But the new panel refused to reconsider the previous ruling of the TCA on the first *Montana* exception, explaining that the court had "previously ruled" that it had jurisdiction under that exception. *Id.* at 115. Moreover, the TCA took the unusual step of receiving evidence on the second *Montana* exception itself—while the case was on appeal—thus depriving FMC of any opportunity for appellate review of that decision, since the TCA is the Tribes' highest court. CA9 FMC Opening Br. 56. Yet, while the TCA went out of its way to allow evidence by the Tribes, it barred FMC from presenting evidence that came to light during the case. *Id.* at 56-57. Remarkably, the TCA also assessed nearly $1 million in attorney's fees against FMC simply for disputing the Tribes' jurisdiction to impose their regulatory demands. ER46, 132.

D. Federal Court Decisions Below

Once the TCA issued its final judgment, FMC filed a complaint in federal district court seeking a declaration that the TCA's judgment was not enforceable because the Tribes lacked jurisdiction over FMC and the tribal court proceedings violated due process. App. 25a; ER637-721.

In September 2017, the district court issued a decision holding that the tribal court's judgment should be enforced. App. 56a. The court first held that the Tribes had jurisdiction over FMC under the

first *Montana* exception, reasoning that FMC's decision to accede to the Tribes' permitting demands so it could construct the containment ponds was "a simple business deal" representing the "same type of consensual relationship" approved under *Montana*. *Id.* at 78a, 23a-24a. But the court concluded that the judgment could not be enforced under the second *Montana* exception, because "the Tribes have never explained why an annual fee of $1.5 million is necessary to provide . . . supplemental protection" over and above EPA's remediation plan. *Id.* at 85a.

The Ninth Circuit affirmed the district court's decision enforcing the TCA's judgment—but went even further than the district court by holding that the Tribes had jurisdiction to impose the annual $1.5 million fee under the second *Montana* exception as well. *Id.* at 55a-56a. As to the first *Montana* exception, the court found that FMC had consented to tribal jurisdiction because it "negotiated and entered into [a] permit agreement with the Tribes" requiring "an annual $1.5 million permit fee" to keep waste on FMC's land. *Id.* at 30a. In the court's view, "FMC should have reasonably anticipated that" this agreement would "'trigger' tribal regulatory authority." *Id.* at 32a (citation omitted).

As to the second *Montana* exception, the court acknowledged that the waste was subject to an EPA-approved containment plan, but reasoned that, "no matter how well [EPA's] system is designed, the system may fail." *Id.* at 44a-45a (quoting district court). Then the court excused the Tribes' failure to account for *how* the fees would be spent to remedy this threat, stating: "There is nothing . . . requiring the Tribes to show that the $1.5 million annual use permit fee [would] be spent on supplemental

measures, beyond those now being taken by EPA, to protect against hazards posed by [the] waste." *Id.* at 47a. Indeed, the court suggested that a tribe might actually charge *more* if it liked. *Id.* at 47a-48a.

Finally, the court held that the Tribes had adjudicatory as well as regulatory jurisdiction over FMC. *Id.* at 48a-49a. The court recognized that "the Supreme Court has never decided whether a Tribe's adjudicatory jurisdiction is necessarily as extensive as its regulatory jurisdiction." *Id.* at 48a. But the court held that, where a tribe may "regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Id.* (citation omitted). Likewise, the court brushed off FMC's due process challenge to the tribal court proceedings, finding that there was nothing "indicat[ing] bias against FMC" and that "'[e]mpirical studies'" show that "'tribal courts are even-handed in dispensing justice to nonmembers.'" *Id.* at 52a, 54a (citation omitted).

The Ninth Circuit denied FMC's petition for rehearing en banc. *Id.* at 90a-91a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Ninth Circuit decision below broadly expands tribal jurisdiction over nonmembers—in conflict with the decisions of this Court and other circuits.

A. The Ninth Circuit Refuses To Recognize A Fundamental Limitation On Tribal Sovereignty Over Nonmembers

1. America was founded on the right of people to govern themselves—a right that depends on having a say in that government. Tribal sovereignty over nonmembers, however, stands in stark contrast. "[N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). This Court, accordingly, has long held that "efforts by a tribe to regulate nonmembers" are "'presumptively invalid.'" *Id.* at 330 (citation omitted). Moreover, the Court has held that this presumption "is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* at 328. Indeed, a key purpose of the Allotment Acts was to *dissolve* tribal jurisdiction over fee lands conveyed under the Acts, like the land here. *See Montana v. United States*, 450 U.S. 544, 559 n.9 (1981).[2]

While much of the attention in cases involving the exercise of tribal jurisdiction over nonmembers centers on the *Montana* exceptions, this Court's precedents make clear that there is a minimum requirement a tribe must meet regardless of the exceptions: the tribe must show that its regulation of nonmembers "stem[s] from the tribe's inherent sovereign authority to set conditions on entry,

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[2] This rule, of course, does not mean that nonmember interactions or agreements with tribes are *unregulated*. Rather, it means that they are regulated like everything else—subject to state and federal law, enforceable in state and federal court.

preserve tribal self-government, or control internal relations." *Plains Commerce,* 554 U.S. at 337; *see Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) ("[A] [tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." (first alteration added) (quoting *Montana*, 450 U.S. at 564)).

As this Court has explained, "[t]he logic of *Montana* is that certain activities on non-Indian fee land . . . may intrude on the internal relations of the tribe or threaten tribal self-rule," and thus may be regulated "[*t*]*o the extent* they do." *Plains Commerce,* 554 U.S. at 334-35 (emphasis added). But "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (quoting *Montana*, 450 U.S. at 564) (emphasis added). Thus, *irrespective* of the *Montana* exceptions, a tribe has no authority to regulate nonmembers outside of these specified areas of sovereign concern. As the Court put it in *Plains Commerce*, "[*e*]*ven then"—i.e.,* even when an exception is met—"the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337 (emphasis added).

2. The Ninth Circuit, however, has repeatedly ignored this touchstone limit. For example, seizing on the Court's passing observation in *Plains Commerce* that the defendant there had no reason to "anticipate[]" the assertion of tribal jurisdiction over its sale of land, the Ninth Circuit has applied a far

broader test that looks to whether a nonmember should have "reasonably anticipated" the exercise of tribal jurisdiction. *See, e.g.*, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (citing *Plains Commerce*, 554 U.S. at 338); *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 817 (9th Cir. 2011) (same); *see* App. 32a (reasoning that "FMC should have reasonably anticipated that its interactions [with the Tribes] might 'trigger' tribal regulatory authority" (citing *Water Wheel,* 642 F.3d at 818)).

That test is circular—what can be "reasonably anticipated" depends on the governing law regarding tribal jurisdiction, which is the very subject in dispute. Yet, time and again the Ninth Circuit has invoked that amorphous test as a warrant to find tribal jurisdiction over nonmembers. As Judge Christen observed, the Ninth Circuit's tribal jurisdiction jurisprudence has "flip[ped] *Montana*'s general rule on its head." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 907, 916 (9th Cir. 2017) (Christen, J., dissenting) (describing trend in Ninth Circuit decisions). In effect, the Ninth Circuit has created a *caveat emptor* regime in which a nonmember's interactions with a tribe can subject it to tribal jurisdiction based simply on a court's *later* view that the nonmember should have known what it was getting into—even where, as here, the underlying events or interactions occurred *years* earlier.

Here, despite the fact that FMC strenuously pressed the argument in its briefs and at oral argument, the Ninth Circuit eschewed any determination whether the tribal regulation at issue stems from the Tribes' inherent sovereign authority—*i.e.*, its authority to set conditions on entry, control

internal relations, or preserve tribal self-government.[3] Instead, as it has done in prior cases, the Ninth Circuit simply disregarded that threshold limitation on tribal sovereignty, and began and ended its analysis of tribal jurisdiction with the *Montana* exceptions. *See* App. 46a-47a.

As explained below, the court's *Montana* analysis is grossly at odds with this Court's precedents. But the Ninth Circuit's more basic failure to enforce the inherent limits on tribal sovereignty alone was outcome determinative. It is clear that the tribal jurisdiction at issue was not necessary to protect any of the aspects of inherent tribal sovereignty recognized by this Court. Because FMC owns the land on which the waste sits, the permit fees cannot possibly be justified by the Tribes' inherent authority to set conditions on entry. Likewise, the fees obviously have nothing to do with controlling internal relations, like membership.

Nor are the fees necessary to preserve tribal self-government. The Tribes existed, and maintained their political integrity, for centuries before they attempted to impose fees on the presence of material on *another* landowner's fee land. Moreover, as discussed, EPA is directly—and extensively—regulating the containment of the waste on FMC's property, belying any claim that extraction of the permit fees at issue is necessary for the Tribes' continuing political existence. *See Montana,* 450 U.S. at 564 n.13 (explaining that tribal regulation of

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[3] This argument was a central feature of FMC's appeal. *See* CA9 FMC Opening Br. 29, 49-51; CA9 FMC Response & Reply Br. 8; CA9 Oral Argument 13:20-13:41, 17:00-17:55 (May 17, 2019); CA9 FMC Pet. for Reh'g 9-11.

hunting and fishing by nonmembers was not "necessary to Crow tribal self-government" given that the State has traditionally regulated hunting and fishing on fee lands within the reservation).

3. The Ninth Circuit's reliance on the *Montana* exceptions alone to justify tribal jurisdiction over nonmembers places it in square conflict with the Seventh and Eighth Circuits. In *Kodiak Oil & Gas (USA) Inc. v. Burr*, for example, the Eighth Circuit concluded that a tribe lacked jurisdiction over claims for "royalties from wastefully-flared gas" from wells on trust land within a reservation. 932 F.3d 1125, 1129-30 (8th Cir. 2019). The Eighth Circuit held that, although "[t]he oil and gas companies' leases are consensual relationships with tribal members" that might otherwise qualify under *Montana*'s first exception, "[a] *consensual relationship alone is not enough*." *Id.* at 1138 (emphasis added). "Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Id.* (quoting *Plains Commerce*, 554 at 336). The court explained that the federal regulation of oil and gas leases on allotted lands defeated the notion that tribal regulation in this area was "necessary for tribal self-government." *Id.*

Kodiak is on all fours with this case. Here, as in *Kodiak,* the Tribes argue that tribal jurisdiction exists under *Montana's* first exception for "consensual relationships." Yet, in this case, the Ninth Circuit held that the existence of such a relationship alone *was* sufficient to establish tribal jurisdiction under *Montana*, App. 33a-34a, whereas in *Kodiak* the

Eighth Circuit held that such a consensual relationship (even when present) "alone is *not* enough." 932 F.3d at 1138 (emphasis added). And here, as in *Kodiak,* the fact that the federal government is already heavily regulating the alleged threat eliminates any argument that tribal regulation is necessary to preserve tribal self-government. *Id.* If anything, *Kodiak* is a *stronger* case for tribal jurisdiction, because the land there was held in trust by the federal government for the benefit of the tribe. Here, the land is purely private fee land. *Kodiak* thus squarely conflicts with the decision below.

The decision below also conflicts with *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). Once again, the tribal defendants sought to establish tribal jurisdiction under *Montana*'s first exception (there, based on a loan contract specifying a tribal forum for resolving disputes). *Id.* at 777. Yet, the Seventh Circuit held that, under this Court's precedents, "a nonmember's consent to tribal authority is *not sufficient* to establish the jurisdiction of a tribal court." *Id.* at 783 (emphasis added). Rather, the relevant "regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* (emphasis omitted) (quoting *Plains Commerce*, 554 U.S. at 337). Because the tribal defendants had "made no showing that the present dispute implicates *any* aspect of 'the tribe's inherent sovereign authority,'" the court held, *Montana*'s first exception did not apply. *Id.*

In sum, in the Seventh and Eighth Circuits, the rule is that fitting a case within a *Montana* exception is *not* enough to trigger tribal jurisdiction. Instead, a tribe must show that the regulation stems from its

inherent sovereign authority. In the Ninth Circuit, however, satisfying a *Montana* exception *is* enough to trigger tribal jurisdiction—regardless of whether the regulation at issue stems from the tribe's inherent sovereign authority to preserve tribal self-government or control internal relations.

4. The Ninth Circuit's consistent refusal to enforce this inherent limitation on tribal sovereignty warrants review. As Judge Smith explained in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, disregarding this fundamental requirement "profoundly upsets the careful balance that the Supreme Court has struck between Indian tribal governance, on the one hand, and American sovereignty and the constitutional rights of U.S. citizens, on the other hand." 746 F.3d 167, 178 (5th Cir. 2014) (Smith, J., dissenting), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016); *see id.* at 178-80. This Court's intervention is needed to resolve this circuit conflict and eliminate any confusion on whether the *Montana* exceptions displace the inherent limits on tribal sovereignty.[4]

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[4] This issue split the Fifth Circuit in *Dolgencorp*. *See* 746 F.3d at 178 (Smith, J., dissenting) (criticizing panel majority for upholding tribal jurisdiction "without a finding that jurisdiction is 'necessary to protect tribal self-government or to control internal relations'"); *see Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 588, 590 (5th Cir. 2014) (Smith, J., joined by Jones, Clement, Owen, and Southwick, JJ., dissenting from the denial of rehearing) (arguing that this independent requirement is "plain" from this Court's decisions).

B. The Ninth Circuit Vastly Expanded The Scope Of *Montana*'s First Exception

The Ninth Circuit's expansive interpretation of the *Montana* exceptions also warrants review. In finding that the Tribes had jurisdiction under the first *Montana* exception, the Ninth Circuit held that "FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into [a] permit agreement with the Tribes" as to the fees at issue. App. 30a.

1. The Ninth Circuit's decision conflicts with this Court's precedents confining the scope of the first *Montana* exception. As this Court has explained, "*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind" for that exception. *Strate*, 520 U.S. at 457 (citation omitted); *see Plains Commerce,* 554 U.S. at 332; *Hicks*, 533 U.S. at 372; *see also Montana,* 450 U.S. at 565-66 (citing cases). And what the cases cited by the Court in *Montana* have in common is that they all involved voluntary commercial relationships by nonmembers who chose to go onto tribal land or do business with a tribe or its members.

As the Court explained in *Hicks*, one of cases involved "nonmember purchasers of cigarettes from tribal outlets" on tribal lands; one involved a "general store on the Navajo reservation"; one involved "ranchers grazing livestock and horses on Indian lands 'under contracts with individual [tribal] members'"; and one involved a tax on "nonmembers for the 'privilege . . . of trading within the borders'" of tribal lands. 533 U.S. at 372 (descriptions taken from parentheticals; citations omitted); *see Plains Commerce*, 554 U.S. at 332-33 (summarizing cases).

The "consensual relationship" alleged here is fundamentally different. Here, the agreement at issue did not stem from FMC's decision to do business with the Tribes, or its use of tribal land. The Tribes went to FMC and sought to regulate FMC's own land. FMC only agreed to pay the $1.5 million annual fee in response to the Tribes' assertion of the regulatory power at issue—in a good faith effort to *prevent* the assertion of broader regulatory jurisdiction that could have interfered with FMC's compliance with EPA's remediation plan. It would be perverse to construe such an agreement as "consent" to the very tribal jurisdiction it was intended to forestall.

Moreover, unlike the voluntary commercial relationships in the cases cited in *Montana,* the "consensual relationship" here cannot be terminated. In other *Montana* cases, nonmembers could avoid—and terminate—jurisdiction simply by choosing to no longer do business with a tribe, or stay off tribal lands. Here, FMC cannot do anything to terminate the regulation short of removing the waste—which it is not allowed to do under EPA's plan. In other words, the Ninth Circuit's version of the first *Montana* exception is like the "Hotel California"—you can check out but you can never really leave. *See* Eagles, *Hotel California* (Asylum Records 1976).[5]

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[5] The Ninth Circuit also pointed to the RCRA consent decree, which it believed "required [FMC] to obtain tribal permits." App. 31a. But that is clearly wrong. First, as the United States has already explained, nothing in the consent decree recognized, much less created, any tribal jurisdiction to impose any permits. *See* U.S. Amicus Br. § C, *United States v. FMC Corp.*, No. 06-35429 (9th Cir. May 14, 2007), 2007 WL 1899170. Indeed, the consent decree expressly states that it does *not* create rights in anyone not a party to the decree. *Id.* And,

2. The decision below thus confirms the Ninth Circuit's sweeping conception of the first *Montana* exception: in the Ninth Circuit, an agreement with a tribe, even one involving non-Indian fee land, establishes regulatory jurisdiction over the resulting relationship—and adjudicatory jurisdiction to decide the *scope* of such jurisdiction—as long as a nonmember should have "reasonably anticipated that its interactions *might* 'trigger' tribal regulatory authority." App. 30a, 32a (emphasis added) (citation omitted). This case illustrates how broad that rule is. FMC vigorously objected to the notion that it had somehow agreed to pay a $1.5 million annual fee to the Tribes for as long as waste remains on FMC's land. But the Ninth Circuit—invoking its "reasonabl[e] anticipation" test—declared that simply by "enter[ing] into [a] permit agreement with the Tribes," FMC had agreed to give the Tribes the regulatory power to *impose* that unprecedented penalty, *and* the adjudicatory jurisdiction to interpret the scope of that agreement. App. 30a-32a.[6]

The Ninth Circuit's broad conception of the first *Montana* exception is thus the epitome of an "in for a penny, in for a [p]ound" regime. *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 656 (2001) (citation omitted).

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second, and in any event, anything FMC was "required" to do by federal law or otherwise, can hardly establish the kind of *voluntary* relationship embodied by the cases cited in *Montana*.

[6] If this case had been brought as a breach-of-contract action in state court, the Tribes would have had to establish exactly what "contract" FMC had entered into, and its precise terms. Moreover, under Idaho law, any contract that does not specify its duration "is terminable at will by either party." *Zidell Explorations, Inc. v. Conval Int'l, Ltd.,* 719 F.2d 1465, 1473 (9th Cir. 1983); *see* 5 *Corbin on Contracts* § 24.29 (Online ed., 2019).

The crux of the Ninth Circuit's holding on the first *Montana* exception is that an agreement to pay regulatory fees at one point in time creates perpetual tribal jurisdiction to (1) adjudicate any disagreement about the scope of that agreement, and (2) impose fees and additional requirements, in essence, indefinitely. That is precisely the sort of never-ending, impossible-to-revoke "consent" that this Court has emphatically disclaimed in case after case, when propounding the "limit[ed]" nature of the first *Montana* exception. *Plains Commerce,* 554 U.S. at 332.

The Ninth Circuit's reinvention of the first *Montana* exception warrants certiorari.

C. The Ninth Circuit Vastly Expanded The Scope Of *Montana*'s Second Exception

After expanding the first *Montana* exception beyond recognition, the Ninth Circuit could have stopped (after all, it had found jurisdiction to impose the fees at issue). But instead, the Ninth Circuit went out of its way to expand *Montana*'s second exception, too. That ruling likewise warrants review.

This Court has explained that there is a particularly "'elevated threshold'" for *Montana*'s second exception: "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce*, 554 U.S. 341 (citations omitted). The exception thus is a break-the-glass, failsafe that confers jurisdiction when it is "necessary to avert catastrophic consequences." *Id.* (citation omitted); *see Atkinson Trading Co.,* 532 U.S. at 657 n.12. And like the first exception, "*Montana*'s second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations.'" *Id.* at 658-59 (citation

omitted). The decision below eradicates these limits, in direct conflict with this Court's precedent.

1. Once again, the Ninth Circuit failed to explain how the regulation at issue (the $1.5M annual fee) was necessary to protect tribal self-government. *Plains Commerce*, 554 U.S. at 341; *see Strate,* 520 U.S. at 459. And any such finding would directly conflict with *Montana* itself. 450 U.S. at 565 n.13. There, this Court held that tribal regulation of hunting and fishing on non-Indian fee lands was not necessary to protect tribal "self-government," given that the State of Montana had traditionally regulated the nonmember activity at issue. The same goes here, where EPA has extensively regulated the waste on FMC's property—and continues to regulate it.

2. The Ninth Circuit also rested its invocation of the second *Montana* exception on a highly *speculative* threat. While the court tried to paint the threat posed by elemental phosphorus and its byproducts in the most extreme terms,[7] ultimately the court acknowledged that FMC and "EPA ha[ve] taken substantial steps to contain the toxic waste and prevent harm." App. 44a (quoting district court). Indeed, EPA brought all the muscle of the federal environmental laws to the situation, and designed and imposed a remediation plan for the site that it repeatedly determined would protect human health and the environment. In compliance with federal requirements, FMC has spent more than $100 million

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[7] While irrelevant to the legal issues presented here, the Ninth Circuit's opinion, like the tribal court decisions, misstates the threat actually posed by the waste under EPA's containment plan. *See* CA9 FMC Response & Reply Br. 28-44.

in state-of-the-art soil caps, monitoring systems, and other facilities. *See supra* at 5-6.

Yet, pointing to this Court's statement in *Plains Commerce* that a tribe may "seek to protect its members from noxious uses that threaten tribal welfare or security," 554 U.S. at 336, the Ninth Circuit held that there is jurisdiction under the second *Montana* exception based on the theoretical *possibility* that EPA's plan will fail. As the court put it, "no matter how well [a] containment system is designed, the system may fail." App. 44a (quoting district court). But, if that were the way to analyze risks, nuclear power plants could not be built, planes could not fly, and most surgeries would be banned. By holding that *any* risk, no matter how speculative, triggers tribal jurisdiction, the Ninth Circuit's decision delegates to the Tribes the authority to decide what activities are too risky to undertake on *non*-Indian land on a reservation.

That sort of plenary tribal jurisdiction over dangerous activities on non-tribal land cannot be reconciled with this Court's precedent. *See Strate*, 520 U.S. at 457–58 ("Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.").

Indeed, the determination of the federal agency charged with protecting human health and the environment that containing the waste on FMC's land—subject to EPA's extensive controls—is safe alone should defeat any argument that tribal jurisdiction is "necessary to avert catastrophic consequences." *Plains Commerce*, 554 U.S. 341

(citation omitted). The Tribes' assertion of jurisdiction is a direct affront to EPA's finding. And here, the Tribes must overcome history as well. As the district court itself observed, and independent studies have confirmed, even though the phosphorus waste has existed on FMC's property in large quantities for more than 70 years, there has been "*no* measurable harm" to humans or water quality. App. 73a-74a (emphasis added); *see id.* at 72a. In the face of such experience, the argument that tribal jurisdiction is "necessary" is the height of speculation.

3. Finally, and perhaps most startlingly, the Ninth Circuit held that the Tribes were not even required to explain *how* the regulation at issue was to be used to address the alleged threat. App. 48a. It is undisputed that the imposition of a $1.5 million annual fee does nothing to make any "catastrophic consequence[]" less likely. App. 44a-45a (citation omitted). The Ninth Circuit nevertheless held that this was immaterial, stating that "[t]here is nothing . . . requiring the Tribes to show that the $1.5M annual use permit fee be spent on supplemental measures, beyond those now being taken by EPA, to protect against hazards posed by FMC's hazardous waste." *Id.* at 47a; *see also id.* at 47a-48a (suggesting, remarkably, that a tribe might "charge substantially more," including up to "$3.3 billion.") That cannot be correct. The second *Montana* exception applies only when a regulation is "necessary to *avert*" the alleged harm—a regulation that concededly does nothing to reduce the alleged harm to begin with cannot possibly qualify.

The Ninth Circuit analogized the $1.5M annual fee at issue here to "storage" fees charged by waste disposal facilities. *Id.* at 47a. But such storage fees are paid to private companies that take and dispose

of the waste. Here, the Tribes have not taken the waste, and are doing nothing to the waste; they simply seek to extract fees from FMC for FMC's *own containment* of waste on FMC's *own land*. In essence, therefore, the fees at issue operate as a penalty, with no demonstrated nexus to the threat that the Tribes supposedly are seeking to alleviate. This Court has never remotely suggested that *Montana*'s second exception can be invoked in such a manner.

Here again, the decision below parts with other circuits, which have heeded this Court's admonitions on the narrow scope of *Montana*'s second exception. *See, e.g.*, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 209 (7th Cir. 2015) (holding that adverse "financial consequences" to a tribe cannot qualify under *Montana*'s second exception because they do not "threaten[] the right of tribal members 'to make their own laws and be ruled by them'"); *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 660 (8th Cir. 2015) (noting that "a lax application or overly broad reading of the second *Montana* exception would render meaningless *Montana*'s general rule," and thus rejecting tribal jurisdiction over various claims, including excessive force, arising from a nonmember operating a school on tribal land). The Ninth Circuit, by contrast, has eviscerated *Montana*'s limits.

The Ninth Circuit's wholly unnecessary, and wildly expansive, ruling on the second *Montana* exception warrants this Court's review.

D. All Told, The Ninth Circuit's Revamped *Montana* Framework "Swallows The Rule" That Tribes Presumptively Lack Jurisdiction Over Nonmembers

The decision below represents nothing less than a ground-up overhaul of the *Montana* framework. This Court has repeatedly emphasized that the *Montana* exceptions should *not* be interpreted in a way that "swallow[s]" or "severely shrinks" the general rule that tribal regulation of nonmembers is invalid. *Plains Commerce*, 554 U.S. at 330 (citations omitted); *Atkinson Trading Co.*, 532 U.S. at 655. Yet, the decision below does just that—in *several* independent ways—transforming tribal jurisdiction over nonmembers into the rule, not a rare exception.

Based on the decision below, a tribe may now (under *Montana*'s first exception) assert unfettered regulatory and adjudicatory jurisdiction over nonmembers who enter into any sort of contractual arrangement with the tribe. A tribe no longer has to show the agreement's nexus to self-government or control of internal relations, and it is immaterial whether the agreement itself disclaims or seeks to limit tribal jurisdiction. And separately, even where no contract has been signed, a tribe may assert jurisdiction (under *Montana*'s second exception) to regulate hazardous activity occurring on fee lands—even where the relevant activity is already extensively regulated by federal or state law, and the tribal regulation consists of a penalty which does nothing to remove or reduce the asserted threat.

This Court has never remotely suggested that tribal jurisdiction over nonmembers is so expansive. And because the Ninth Circuit—answering in the

Tribes' favor yet *another* question reserved by this Court's precedent—held that a tribe's adjudicatory jurisdiction extends as far as its regulatory jurisdiction, the decision below will channel nonmembers into tribal court almost as a matter of course. Indeed, because tribal exhaustion is required for any *colorable* claim of tribal jurisdiction (*see Strate,* 520 U.S. at 448), virtually every case involving a tribe will now have to be adjudicated in tribal court for starters—since there will almost always be at least a colorable argument for tribal jurisdiction under the reasoning of the decision below.

As this case underscores, that too will have far-reaching consequences. FMC spent over a *decade* litigating this case before the Tribes themselves, in proceedings marked by striking irregularities and blatant bias. *See supra* at 9-10. In reality, most parties simply cannot afford to litigate their way through the maze of the tribal courts for years simply to see the inside of a federal courtroom. It is for that reason that this Court's tribal exhaustion requirement has always been premised on the highly limited scope of tribal jurisdiction. But in the Ninth Circuit, that limited scope is no more: Tribal jurisdiction is now firmly the norm, not the exception.

II. THIS CASE PRESENTS A RECURRING ISSUE OF UNQUESTIONABLE IMPORTANCE AND WARRANTS THIS COURT'S INTERVENTION HERE

A. This Court Has Repeatedly Recognized The Need To Enforce The Limits On Tribal Jurisdiction Over Nonmembers

This Court has long recognized the importance of properly defining the scope of tribal jurisdiction over

nonmembers, and has repeatedly intervened when lower courts have misapplied the *Montana* framework—even absent any circuit conflict. Indeed, this Court twice in recent years has granted certiorari to address the reach of *Montana*'s exceptions in the absence of such a conflict. *See Dollar General Corp.*, 136 S. Ct. at 2159; *Plains Commerce*, 554 U.S. at 320; *see also Hicks*, 533 U.S. at 357. This case presents a clear circuit conflict—in addition to the same need to clarify the limits of *Montana*'s exceptions.

"The ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence." *Hicks*, 533 U.S. at 383 (Souter, J., concurring). The Ninth Circuit's decision creates enormous uncertainty for any person or entity doing business with a tribe, or operating on or adjacent to tribal land. Tribal and nonmember communities are often economically and socially interdependent, to the mutual benefit of both. In a circuit that is home to over 400 Indian tribes, there are countless relationships that could be impacted.

The Ninth Circuit's holding on the first *Montana* exception implicates virtually all contractual relationships between tribes and nonmembers, which may now form the basis for purported "consent" to tribal jurisdiction—even when (as here) the relevant agreement was entered into years, if not decades, ago. In each of these countless relationships, nonmembers risk being subjected to onerous regulatory demands, or being haled into tribal courts that operate without fundamental constitutional guarantees. Moreover, the Ninth Circuit's decision invites tribes to impose new demands on nonmembers in an effort to spur settlement agreements that can then be used to

manufacture jurisdiction—a sure recipe for conflict. This alone warrants this Court's intervention.

The Ninth Circuit's holding as to *Montana*'s second exception will also imperil settled expectations. Because the mere possibility of harm to tribal welfare is now grounds to invoke jurisdiction—even based on materials contained entirely on non-tribal land—any entity who owns or uses land within a reservation now risks being subject to tribal jurisdiction. For example, under the Ninth Circuit's decision, tribes could seek to impose new and far-reaching fees on nonmembers for ubiquitous activities like the transportation of hazardous materials on public roadways or tracks within the boundaries of a reservation. *See* App. 34a-36a. And businesses operating on fee lands within a reservation could be subjected to new "permit fees" based on alleged threats stemming from such operations.

Because (as discussed above) only *colorable* tribal jurisdiction is needed to trigger the exhaustion requirement, the decision below also will have far-reaching implications even in cases where jurisdiction would ultimately be deemed to not lie with the tribe. In the best case scenario, nonmembers could spend years or decades tied up in tribal litigation, before having their rights vindicated in federal court. Much more likely, they will be forced to settle well before seeing the inside of a federal court. Either way, there are few areas of the law where uncertainty can have such dramatic consequences; and the decision below, at a minimum, fosters enormous uncertainty.

The decision below could harm Indian tribes, too. If the Ninth Circuit's ruling is left to stand, commercial entities will be wary if not unwilling to enter into contractual arrangements with tribes, for

fear of automatically subjecting themselves to broad-based tribal jurisdiction. Businesses might likewise be wary of operating on or close to tribal land. But such relationships with nonmembers are often the lifeblood of the tribal economy, and withdrawal by nonmembers from tribal communities—where unemployment is already high and access to commercial services is low—could be devastating to tribal welfare. *See Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2010).

The decision below also invites conflict among tribes and federal, state, and local governments. Here, for example, the Tribes' assertion of authority is directly at odds with EPA's own determinations as to the threat posed by the waste on FMC's land. EPA approved a containment plan that keeps waste on FMC's land subject to EPA's controls based on the premise that doing so *is* protective of human health and the environment, *see supra* at 6; yet the Tribes' assertion of regulatory jurisdiction here is based on the opposite premise. The only way FMC can avoid a penalty under tribal law is to remove the waste from the land, but doing so would violate federal law. Those directly conflicting regulatory requirements place regulated parties in an impossible situation and undercut the effectiveness of federal and state law.

The state of Indian law in the Ninth Circuit is a matter of singular importance, given that two-thirds of the nation's Indian tribes are based in the circuit, as well as scores of reservations. California alone has more than 100 Indian reservations—the most of any State. And the division in authority between the Ninth and other circuits—including the Eighth

Circuit, which is also home to many Indian tribes—is itself of major practical significance. The rights of both tribes and nonmembers should not vary based on the happenstance of geography. Yet, the decision below creates the very real possibility that the scope of an individual tribe's sovereign power will turn on which jurisdiction it happens to be operating in, as will the fundamental rights of identically situated nonmembers. Only this Court's review can reestablish nationwide uniformity and consistency in the scope of tribal jurisdiction over nonmembers.

B. This Case Presents An Ideal Vehicle To Clarify And Reinforce The Limits Of Tribal Jurisdiction Over Nonmembers

This case presents an exceptionally clean vehicle for the Court's review. The Ninth Circuit's opinion squarely addresses the *Montana* framework in unusually strong, frank, and unequivocal language. The decision below is a final judgment that conclusively determines the parties' rights, and therefore the last opportunity for this or any court to address the questions presented here. And those questions are without doubt outcome determinative.

Moreover, unlike many tribal jurisdiction cases, which reach federal court before tribal exhaustion—and thus present only the question of whether tribal jurisdiction is "colorable"—FMC has fully exhausted its remedies in tribal court, and there is no other procedural impediment to this Court's review. The opportunity for this Court to review a case in such a posture is rare, in light of the often inexorable pressure to settle cases rather than endure years of tribal litigation before reaching the first step of federal review. This case also presents an

opportunity to address *both Montana* exceptions, and thus the *Montana* framework as a whole.

Moreover, this case involves both a tribe's assertion of regulatory and adjudicatory authority. Indeed, the Ninth Circuit separately ruled that the Tribes had both forms of jurisdiction, and were thus permitted to impose the $1.5 million annual fee both as a result of their regulatory power to require permits *and* their adjudicatory power to interpret the agreement as mandating fees indefinitely. App. 48a. The practical consequences of the Tribes' assertion of jurisdiction in this case are also unusually penal. The Tribes assert a right to extract an annual $1.5 million fee from FMC—in perpetuity. That is an uncommonly harsh if not unprecedented penalty.

In short, it is difficult to imagine a better or more compelling case for clarifying the limits of tribal jurisdiction over nonmembers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2020

APPENDIX

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UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

FMC CORPORATION, Plaintiff-Appellant/ Cross-Appellee,

v.

SHOSHONE-BANNOCK TRIBES, Defendant-Appellee/ Cross-Appellant.

Nos. 17-35840

17-35865

Argued and Submitted May 17, 2019 Seattle, Washington

Filed November 15, 2019

942 F.3d 916

Before: MICHAEL DALY HAWKINS and WILLIAM A. FLETCHER, Circuit Judges, and DAVID C. BURY,* District Judge.

OPINION

W. FLETCHER, Circuit Judge:

For over 50 years, FMC Corporation ("FMC") operated an elemental phosphorus plant on fee land within the Shoshone-Bannock Fort Hall Reservation ("Reservation") in Idaho. FMC's operations produced approximately 22 million tons of hazardous waste that is currently stored on the Reservation. The waste is radioactive, carcinogenic, and poisonous.

In 1990, the U.S. Environmental Protection Agency ("EPA") declared FMC's plant and storage

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* The Honorable David C. Bury, United States District Judge for the District of Arizona, sitting by designation.

area, together with an adjoining off-reservation plant owned by J.R. Simplot, a Superfund Site under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In 1997, the EPA further charged FMC with violating the Resource Conservation and Recovery Act ("RCRA"). A Consent Decree settling the RCRA suit required FMC to obtain permits from the Shoshone-Bannock Tribes ("the Tribes"). FMC and the Tribes negotiated an agreement under which FMC agreed to pay $1.5 million per year for a tribal use permit allowing storage of hazardous waste. FMC paid the annual use permit fee from 1998 to 2001 but refused to pay the fee in 2002 after ceasing active plant operations. FMC has continued to store the hazardous waste on the Reservation despite its failure to pay the use permit fee.

The Tribes sued FMC in Tribal Court, seeking *inter alia* payment of the annual $1.5 million use permit fee for waste storage. Under *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), there are two potentially relevant bases for tribal jurisdiction in this case—two of the three so-called "*Montana* exceptions." First, "[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." *Id.* at 565, 101 S.Ct. 1245. Second, "[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." *Id.* at 566, 101 S.Ct.

1245. After years of litigation, the Tribal Court of Appeals held in 2014 that the Tribes have regulatory and adjudicatory jurisdiction over FMC under both *Montana* exceptions. The court held that FMC owed $19.5 million in unpaid use permit fees for hazardous waste storage from 2002 to 2014, and $1.5 million in annual fees going forward.

After the decision of the Tribal Court of Appeals, FMC sued the Tribes in federal district court. FMC argued that the Tribes did not have jurisdiction under either of the *Montana* exceptions; that the Tribal Court of Appeals denied FMC due process because two judges on the Tribal Court of Appeals were biased against FMC; and that the judgment by the Tribal Court of Appeals was unenforceable. The Tribes counterclaimed, seeking an order recognizing and enforcing the judgment of the Tribal Court of Appeals. The district court held that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions, that the Tribal Court of Appeals had not denied FMC due process, and that the Tribal Court of Appeals' judgment was entitled to comity, and was therefore enforceable, under the first but not the second *Montana* exception.

FMC appeals the district court's judgment in favor of the Tribes. The Tribes cross-appeal the district court's decision that the Tribal Court of Appeals' judgment is not enforceable under the second *Montana* exception.

We affirm the judgment of the district court. We hold that the judgment of the Tribal Court of Appeals is enforceable under both *Montana* exceptions.

I. Factual and Procedural Background

The Shoshone-Bannock Tribes are a federally recognized Indian tribe comprising the eastern and western bands of the Northern Shoshone and the Bannock, or Northern Paiute, bands. The Tribes are organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101 et seq., and are governed by the Fort Hall Business Council, a legislative body consisting of seven elected members. Shoshone-Bannock Tribes, *Tribal Government*, http://www2.sbtribes.com/government (last visited Sept. 19, 2019). The ancestral lands of the Tribes included land in present-day Idaho, Oregon, Nevada, Utah, Wyoming, Montana, and parts of Canada. *See* Shoshone-Bannock Tribes, http://www2.sbtribes.com/about (last visited Sept. 19, 2019). Pursuant to the Fort Bridger Treaty of 1868, 15 Stat. 673, and related executive orders, the Tribes today have sovereign authority over the Fort Hall Reservation. The Fort Hall Reservation originally encompassed approximately 1.8 million acres, or 2,800 square miles. *See id.* The Reservation now encompasses approximately 544,000 acres, or 840 square miles, in what is now southeastern Idaho. Ninety-seven percent of the Reservation is tribal land or land held in trust by the United States for the benefit of the Tribes and their members. Approximately three percent of the Reservation is fee land owned by non-members.

A. FMC's Phosphorus Plant, Consent Decree, and Permit Fees

From 1949 to 2001, FMC Corporation and its predecessors owned and operated an elemental phosphorus production plant occupying 1,450 acres.

Virtually all of the property is fee land on the Fort Hall Reservation. FMC's plant was the largest elemental phosphorus plant in the world. FMC Idaho, *Plant History*, http://fmcidaho.com/plant-history (last visited Sept. 19, 2019). For most of its operation, FMC obtained or mined raw materials for its plant from tribal and allottee lands on the Reservation. *See*, *e.g.*, *id.*

Hazardous waste from the plant's 52 years of operation contaminates FMC's land on the Reservation. Approximately 22 million tons of hazardous waste are stored in waste storage ponds on the site. Some storage ponds are capped. Some are not. Some ponds are lined. Some are not. Phosphorus, arsenic, and other hazardous materials contaminate an additional 1 million tons of loose soil and groundwater throughout the site. Millions of tons of slag containing radioactive materials contaminate the site. Somewhere between twenty one and thirty railroad tanker cars containing toxic phosphorous sludge are buried on the property. There is no lining underneath the tanker cars and no cap above them. As will be described in greater detail below, the hazardous waste in the storage ponds, tanker cars, soil, groundwater, and air at the site is radioactive, carcinogenic, and poisonous.

In 1990, EPA declared the FMC plant, as well as an adjoining off-reservation plant owned by a different company, J.R. Simplot, as a National Priority List Superfund Site—the "Eastern Michaud Flats" site—under CERCLA. *See* 55 Fed. Reg. 35502, 35507. The National Priorities List is a list of the nation's "worst hazardous waste sites." EPA, *Superfund Cleanup Process*,

https://www.epa.gov/superfund/superfund-cleanup-process (last visited Sept. 19, 2019).

In 1997, EPA charged FMC with violating RCRA. RCRA regulates the disposal of solid and hazardous waste. To avoid litigation, FMC began negotiations with the EPA over the terms of a possible Consent Decree that would settle the RCRA suit. Though not a formal party, the Tribes participated in the negotiations. Among other measures, the proposed RCRA Consent Decree required construction of a treatment facility and additional waste storage ponds on FMC's fee land on the Reservation. As a condition to obtaining the Consent Decree, the EPA required FMC to obtain relevant permits from the Tribes. *See* Consent Decree, Case No. 4:98-cv-00406-BLW (D. Idaho, July 13, 1998).

Pursuant to the Tribes' Land Use Policy Ordinance ("LUPO" or "Ordinance") and associated Guidelines, the relevant tribal permits included a building permit for construction of the treatment facility and waste storage ponds, and a use permit for storage of the hazardous waste. FMC and the Tribes met in July 1997 to discuss the permits. During negotiations, FMC consented to tribal jurisdiction. *See, e.g.*, Letter from the Land Use Policy Commission to FMC (Aug. 6, 1997) (stating that following the July meeting, "We understood that FMC would recognize tribal jurisdiction within the exterior boundaries of the Fort Hall Indian Reservation."); Letter from J. Paul McGrath, Senior Vice President and General Counsel and Secretary of FMC, to the Fort Hall Business Council, Shoshone-Bannock Tribes (Oct. 30, 1997) (stating "[i]n connection with the land use permit, we did agree that we would consent to tribal

jurisdiction in that area"). FMC applied for the building and use permits in August 1997.

While negotiations were proceeding, the Tribes considered and then adopted amended LUPO Guidelines for storage of hazardous waste on the Reservation. The Tribes finalized the amended Guidelines in April 1998. The amended Guidelines required an annual use permit for storage of hazardous waste on the Reservation, with an annual fee of $5.00 per ton. Money from use permit fees was to be "deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund," and to be used "to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." Amendments to Chapter V: Fort Hall Land Use Operative Policy Guidelines, § V-9-2(B) (1998).

The Land Use Policy Commission ("LUPC" or "Commission"), the Tribes' administrative and enforcement body for the Ordinance, notified FMC of the amended Guidelines. FMC estimated that the $5 per ton storage fee would cost over $110 million per year. FMC sought to negotiate a compromise with the Tribes. *FMC Corp. v. Tribes*, No. 4:14-CV-489-BLW, 2017 WL 4322393, at *2 (D. Idaho Sept. 28, 2017).

In May and June 1998, the Tribes and FMC negotiated an agreement under which FMC agreed to a one-time fee of $1 million and an annual use permit fee of $1.5 million to cover FMC's storage of its hazardous waste on the Reservation. *See* Letter from LUPC to FMC (May 19, 1998). The parties agreed that FMC was required to obtain a use permit and to pay the $1.5 million fee even if FMC capped and closed the eleven hazardous waste ponds that were subject to the RCRA Consent Decree (the "RCRA

ponds"). *See id.* (stating that FMC agreed to pay the annual use permit fee "beginning on June 1, 1999, and for every year thereafter"); Letter from J. Paul McGrath, Senior Vice President and General Counsel and Secretary of FMC, to LUPC (June 2, 1998) ("[I]t is our understanding that the permit covers the plant and that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17–19 was terminated in the next several years."); Affidavit of Robert J. Fields, Division Manager of FMC (Oct. 20, 2000) (stating that he participated in the negotiations with the Tribes and that the June 2, 1998 letter from FMC was intended to confirm FMC's shared understanding that the use permit covered the entire facility and that FMC's agreement to pay $1.5 million per year would not end when Ponds 17, 18 and 19 were closed pursuant to the Consent Decree). FMC paid its first fee on June 1, 1998.

A few months later, FMC and the EPA agreed to a Consent Decree to settle the RCRA suit. *FMC Corp. v. Tribes*, 2017 WL 4322393 at *3. Paragraph 8 of the Consent Decree memorialized the Decree's requirement that FMC obtain permits from the Tribes: "Where any portion of the Work requires a . . . tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." *See* Consent Decree, No. 4:98-CV-00406-BLW, ¶ 8 (D. Idaho July 13, 1998).

Pursuant to the Consent Decree, FMC agreed to pay a fine to the U.S. government of $11.9 million, to install a range of upgrades in its handling of waste, and to cap nine of the eleven RCRA ponds covered by the Consent Decree. *FMC Corp. v. Tribes*, 2017 WL 4322393 at *3. Between 1999 and 2005, FMC capped

and/or closed the RCRA ponds. *Id.* at *4. In 2005, FMC certified that the last of the RCRA ponds had been capped and/or closed.

B. Prior Federal Court Proceedings

From 1998 to 2001, FMC paid the Tribes the annual use permit fee of $1.5 million pursuant to its 1998 agreement with the Tribes. In December 2001, FMC stopped all active phosphorus processing operations at the site. When the $1.5 million use permit fee came due in 2002, FMC refused to pay it.

After negotiations failed, the Tribes filed a motion in the RCRA Consent Decree action in federal district court, seeking a declaration that FMC was required by the Consent Decree to obtain tribal permits for waste storage on the Reservation. *Id.* The district court held that "(1) the Tribes had jurisdiction over FMC under the first *Montana* exception . . . , (2) FMC was required to apply for Tribal permits based on FMC's agreement to submit to tribal jurisdiction in ¶ 8 of the RCRA Consent Decree, (3) the Tribes were intended third-party beneficiaries of the Consent Decree and therefore had a right to enforce its terms, and (4) FMC was required to exhaust tribal remedies over any challenges to the Tribal permit decisions." *FMC Corp. v. Tribes*, 2017 WL 4322393 at *4; *see United States v. FMC*, No. CV-98-0406-E-BLW, 2006 WL 544505 (D. Idaho 2006).

On appeal from the district court, we addressed only the third of the district court's holdings. We held that the Tribes were incidental rather than intended beneficiaries of the Consent Decree and therefore had no right to judicial enforcement of the Decree. *United States v. FMC*, 531 F.3d 813, 815 (9th Cir. 2008). We remanded to the district court with instructions to

dismiss the Tribes' suit. *Id.* at 824. However, we noted that during the pendency of the appeal to our court "FMC began the process of applying for tribal permits, which is the main relief that the Tribes have sought in this action." *Id.* at 823. We explicitly noted and relied on a representation by FMC. We wrote:

> At oral argument, the Tribes expressed their concern that, if we were to hold that the Tribes lack standing to enforce the Consent Decree, FMC would withdraw its permit applications and undo the progress made to date on the proper resolution of this dispute. In response to questioning from the panel, FMC's lawyer represented to the court that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion. We accept that statement from counsel as binding on FMC.

Id. at 823–24.

C. Tribal Proceedings

In 2006, after entry of the district court's order but while FMC's aforementioned appeal to our court was still pending, FMC applied to the Tribes' Land Use Policy Commission for a building permit for demolition activities and a use permit for continued storage of the waste. Following notice and a public hearing, the Commission granted FMC's applications for the two permits. *See* Findings of Fact and Decision on FMC Application for Building Permit for Activities at the FMC Pocatello Plant (Land Use Policy Commission, Apr. 25, 2006); Findings of Fact and Decision on FMC Application for Special Use Permit for Activities at the FMC Pocatello Plant (Land Use Policy Commission, Apr. 25, 2006). The Commission

concluded that it had regulatory jurisdiction under both *Montana* exceptions to require FMC to obtain the permits. The Commission assessed a one-time building permit fee at $3,000 for demolition activities during that year. The Commission also assessed FMC's use permit fee for storage of hazardous waste at the previously agreed $1.5 million annual rate. The Commission provided, as an alternative, that FMC could choose to pay the higher $5 per ton fee based on the weight of the waste stored on FMC's property on the Reservation, pursuant to the Tribes' amended Guidelines. *Id.*

FMC appealed the Commission's decision to the governing body of the Tribes, the Fort Hall Business Council ("Council"). On July 21, 2006, the Council affirmed the Commission's decision. Fort Hall Business Council Decision Regarding FMC's Appeals of the April 25, 2006 Land Use Permit Decisions (July 21, 2006). On February 8, 2007, the Commission issued a "letter resolution" setting the use permit fee at the agreed-upon $1.5 million. FMC again appealed the Commission's decision to the Council. On June 14, 2007, the Council affirmed the Commission's decision.

FMC appealed the Council's and the Commission's decisions to the Tribal Court. (The Shoshone-Bannock tribal court system consists of a trial court and an appellate court—the "Tribal Court" and the "Tribal Court of Appeals.") The Tribal Court held *inter alia* that, pursuant to the Tribes' laws, the Tribes were required to submit their Land Use Policy Guidelines and the Hazardous Waste Management Act of 2001, upon which the tribal use permit requirement was premised, to the Secretary of the Interior for approval. *FMC Corp. v. Shoshone-*

Bannock Tribes' Fort Hall Business Council and Land Use Policy Commission, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Court, Civil Division, May 21, 2008). The Tribal Court found that the Guidelines and the Act had not been approved by the Secretary of the Interior, and therefore, were unenforceable as a matter of tribal law.

In June 2008, the Tribes and FMC cross-appealed to the Tribal Court of Appeals. The members of that court were Judges Fred Gabourie, Mary Pearson, and Cathy Silak. None of them is a member of the Shoshone-Bannock Tribes. Judge Gabourie is a former California state court judge, former Chief Judge for the Kootenai Tribe of Idaho, and a former prosecutor and city attorney. Judge Pearson is a former Chief Judge for the Spokane Tribe and the Coeur d'Alene Tribe. Judge Silak is a former Justice of the Idaho Supreme Court.

1. Conference Remarks by Judges Gabourie and Pearson

While the case was pending before the Tribal Court of Appeals, Judges Gabourie and Pearson spoke at a conference entitled "Tribal Courts: Jurisdiction and Best Practices" convened by the University of Idaho College of Law on March 23, 2012. In the audience were law students, tribal court practitioners, other lawyers, and members of the public. The conference was videotaped. FMC's counsel attended the judges' presentation.

Judge Gabourie described the manner in which tribal appellate court decisions come before federal courts, and he noted that very few federal court judges have experience with tribes. He stated that "every

court has—should be impartial" and "a good opinion comes [from] both sides, both parties. Because both parties rely on a good opinion, strong opinion." He stated that a tribal appellate court decision should discuss the tribe's tradition and culture so that judges in the federal system have some context when they read the decision. He stated that an appellate judge has a responsibility to remand the case for testimony from expert witnesses if there is a weakness in the record. He discussed limitations on tribes' sovereign powers under current law, and how, in light of Supreme Court decisions like *Montana*, "which has just been murderous to Indian tribes," it is important for tribes to support good appellate courts that can issue strong opinions in the event issues are heard in a federal court. He discussed *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), and *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), noting that the tribal appellate court decisions had not been good, and that, as a result, the U.S. Supreme Court did not have vital information about the tribes' cultures and traditions.

Judge Pearson discussed the importance of tribal attorneys creating a record at the tribal trial court level. She stated tribal attorneys should involve the tribe in the "big cases." She noted that they had a big case at that moment that they knew was "going to go up," so they were saying prayers, reading cases, and "trying to do . . . the history." She described *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001), as a case where the tribal lawyers had effectively laid out the history for the tribal trial and appellate courts. She discussed the importance of this responsibility—how "[you] just need to make sure

that you do the job right"—since non-Indian federal judges were reviewing the decisions.

In response to questions, Judge Gabourie discussed the value of anthropologists and scientists testifying in tribal court cases. He stated that the use of experts in *Bugenig* was a model for tribes seeking to protect their sovereignty, traditions, and cultures. Expanding on his earlier discussion of experts, Judge Gabourie stated:

> You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and then the mining company or whatever, manufacturing company, disappears. They leave, you know. They've . . . either dug everything they could, and then the ground is disturbed, sometimes polluted beyond repair. And you sit as . . . an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself, you know, we know that . . . there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it. And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses. You need chemists and whatever to get out of testifying. It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."
>
> You know, you made—and you're really being fair to both sides. . . . That's why you need the expert witnesses to cover those loose ends, you know, so when it finally goes to the—whatever

> circuit it may go to, they can see that there's been some experts testifying on behalf. Maybe experts that testify on behalf of the mining company, but experts nonetheless. Well, you can be damn sure that the mining company's going to spend the money to protect their interest, you know.
>
> So the appellate courts have got to step in and in their own way, make a good, balanced decision, a hundred-percenter for both sides, but be sure to protect the tribe. And that's my own opinion, that last sentence.

Judge Pearson clarified, "We're not guaranteeing anybody anything." Judge Pearson advised the audience:

> Well, I encourage you to get the *Bugenig* handouts, because it's really important. If you're a law student and you're going to practice law, as well as if you're a judge and you're going to be hearing cases, you know where—companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they go out of business. And they leave you just sitting. And you need to know what you can do as you're sitting as a judge with those cases coming toward you.

2. Decisions of the Tribal Court of Appeals

Just over a month later, on May 8, 2012, the Tribal Court of Appeals issued an opinion holding *inter alia* that (1) the Tribes have regulatory and adjudicatory jurisdiction over FMC under the first *Montana* exception to require FMC to obtain a building permit

for demolition and construction, and a use permit for hazardous waste storage, and to require FMC to pay the agreed-upon annual use permit fee of $1.5 million; (2) the use permit fee was authorized by and enforceable under tribal law, because, *inter alia*, the Land Use Policy Ordinance and the Hazardous Waste Management Act were both approved by the Secretary of the Interior consistent with tribal law; and (3) the Tribal Court erred in failing to consider whether the Tribes have jurisdiction under the second *Montana* exception. The court issued an amended order on June 26, 2012. *FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council*, Amended, Nunc Pro Tunc Findings of Fact, Conclusions of Law, Opinion and Order, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Court of Appeals, June 26, 2012) ("Tribal Court of Appeals, June 2012 Opinion").

On January 10, 2013, pursuant to a state-court order under the Idaho Public Records Act, FMC obtained a videotape of Judges Gabourie and Pearson's remarks at the law school conference. In April 2013, Judges Peter McDermott and Vern Herzog Jr. replaced Judges Gabourie and Pearson on the Tribal Court of Appeals. Judge McDermott is a retired Idaho state district court judge. Judge Herzog is a practicing attorney. Neither is a member of the Shoshone-Bannock Tribes. Judge Silak remained on the court.

On May 6, 2013, FMC filed briefs asking the reconstituted Tribal Court of Appeals to reconsider its prior rulings on the ground that the statements by Judges Gabourie and Pearson showed bias against FMC. In an order dated May 28, 2013, the Tribal Court of Appeals revised its earlier ruling on an issue

unrelated to the questions now before us. It upheld its earlier rulings on all other issues. The court ordered an evidentiary hearing to resolve the question previously left open—whether the Tribes had regulatory and adjudicatory jurisdiction over FMC under the second *Montana* exception.

From April 1 to April 15, 2014, the Tribal Court of Appeals held an evidentiary hearing on the second *Montana* exception. Judge Silak was not available for the hearing. Judge John Traylor replaced Judge Silak. Judge Traylor is a practicing attorney. He is not a member of the Shoshone-Bannock Tribes. Judges McDermott and Herzog remained on the court. Following the hearing, the Tribal Court of Appeals made factual findings and held that the Tribes had regulatory and adjudicatory jurisdiction under the second *Montana* exception. *See Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council v. FMC Corp.*, Opinion, Order, Findings of Facts and Conclusions of Law (Shoshone-Bannock Tribal Court of Appeals, May 16, 2014) ("Tribal Court of Appeals, May 2014 Opinion"); *see also Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council v. FMC Corp.*, Statement of Decision (Shoshone-Bannock Tribal Court of Appeals, Apr. 15, 2014) ("Tribal Court of Appeals, Statement of Decision").

In 2012, prior to the decision of the Tribal Court of Appeals, the EPA had issued an Interim Amendment to the Record of Decision ("IRODA") under CERCLA addressing the FMC Operable Unit ("OU") of the Eastern Michaud Flats Superfund Site. *See* EPA, *Interim Amendment to the Record of Decision for the EMF Superfund Site, FMC Operable Unit, Pocatello, Idaho* (Sept. 2012) ("*IRODA*"). The IRODA replaced

an earlier 1998 Record of Decision ("ROD"). EPA concluded that it needed to issue the IRODA because the human health and environmental threats at the FMC site were greater than anticipated, there were "immediate" threats to human health and the environment, and EPA "no longer considered" the 1998 ROD "protective of human health and the environment." *IRODA* at v, 14, 52; *see also id.* at ii, 16, 20.

The IRODA noted the particular dangers of the elemental phosphorus present at the FMC site: Elemental phosphorus is an "ignitable and reactive waste" that has "physical properties unlike most contaminants of concern . . . encountered in environmental response actions." *Id.* at iii. Due to these characteristics, elemental phosphorus "requires special handling techniques not only for routine handling but also for emergency response." *Id.* The IRODA noted that the remedial work completed under the RCRA Consent Decree was independent of the remedial work that remained to be done under CERCLA. *Id.* at v.

The IRODA outlined an extensive, multi-part "interim amended remedy" to be implemented on the FMC site. The IRODA included the following remedial measures: (1) place evapotranspiration caps over eight "remediation areas" on the Reservation containing "non-slag fill (such as elemental phosphorous, phossy solids, precipitator solids, . . .)," *id.*; (2) place "approximately 12 inches of soil cover over areas containing slag fill, ore stockpiles, and the former Bannock Paving areas to prevent [ ] exposure to gamma radiation and fugitive dust," *id.* at iii–iv; (3) "[c]lean underground reinforced concrete pipes that contain elemental phosphorous and

radionuclides," *id.* at iv; (4) "[i]nstall an interim groundwater extraction/treatment system to contain contaminated groundwater, thereby preventing contaminated groundwater from migrating beyond the FMC OU and into the Simplot OU and/or adjoining springs or the Portneuf River," *id.*; (5) "[i]mplement a long-term groundwater monitoring program to evaluate the performance of the soil and groundwater remedial actions," *id.*; and (6) "[i]mplement a gas monitoring program at the FMC OU capped ponds (also referred to as the *CERCLA Ponds* to distinguish them from the RCRA-regulated ponds) and subsurface areas where elemental phosphorous is present to identify potential phosphine and other potential gas generation at concentrations that could pose a risk to human health," *id.* (emphasis in original).

In its brief to us, FMC wrote, "The IRODA—which remains in effect today—requires an additional set of remedial actions that EPA has concluded are appropriate and *fully* 'protective of human health and the environment.' " (emphasis added.) FMC's brief misrepresents what the EPA wrote. The EPA did not write that the interim remedial measures described in the IRODA would be "fully" protective. Here is what the EPA wrote in the IRODA, specifying that the remedial measures are "interim" (which FMC's brief failed to mention), and not using the word "fully" (which FMC's brief supplied):

> The measures in this selected *interim* amended remedy will be *protective of human health and the environment*, comply with federal and state/tribal requirements that are applicable or relevant and appropriate within the scope of the selected interim amended remedy, and

> result in cost-effective action and utilize permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable.

IRODA at v (emphasis added to indicate words quoted in FMC's brief).

The IRODA went on to specify:

> Because the selected interim amended remedy will result in hazardous substances, pollutants, or contaminants remaining on the FMC OU above levels that allow for unrestricted use and unlimited exposure, a statutory review will be conducted within 5 years after initiation of the remedial action, and every 5 years thereafter to ensure that the interim amended remedy is or will [sic] protect human health and the environment.

Id. at vi.

The Tribal Court of Appeals' factual findings were based in substantial part on the IRODA, and on earlier orders by the EPA, whose factual findings were not contested by FMC. *See e.g.*, Tribal Court of Appeals, May 2014 Opinion, at 6 n.2. The Tribal Court of Appeals found that "FMC created and continues to store millions of tons of toxic waste on its fee land within Reservation boundaries." *Id.* at 5. This hazardous waste includes (1) as much as 16,000 tons of elemental phosphorus that leaked into the soil during production and now contaminates approximately 780,000 cubic yards of soil weighing approximately 1 million tons; (2) elemental phosphorus that is "suspended in contaminated water" and contained in 23 waste storage ponds on the site; (3) "phosphine gas," which is produced when

elemental phosphorus is exposed to water; (4) approximately 21 tanker rail cars that were used to ship hazardous elemental phosphorous sludge and are now buried in unlined soil on the site; and (5) groundwater contaminated with arsenic and phosphorus that flows into important ground and surface water resources on the Reservation. *Id.* at 5–7 (citing *IRODA* at 7–9). "The site was also filled and graded using millions of tons of slag that contains radioactive materials which emit gamma radiation in excess of EPA's human health safety standards." *Id.* at 6 (citing *IRODA* at 7–9).

The Tribal Court of Appeals found that FMC's creation and storage of this hazardous waste on the Reservation creates "an ongoing and extensive threat to human health" and threatens the "welfare and cultural practices of the Tribes and their members." *Id.* at 5. "The elemental phosphorus in the soil and in containment ponds [on] FMC's land is reactive, meaning that it will burst into flames when exposed to oxygen." *Id.* at 6 (citing *IRODA* at 77). "The phosphorus itself is toxic when ingested, inhaled or absorbed." *Id.* (citing *IRODA* at 78). Phosphine gas, which "is harmful and even deadly to humans at certain levels," has been released from the site at dangerous levels. *Id.* at 7 (citing *IRODA* at 77). The tanker rail cars buried at the site contained "from 200 to 2,000 tons of elemental phosphorus sludge, 10–25% of which remained in each of the tankers at the time they were buried" because FMC concluded cleaning them was "dangerous" to employees. *Id.* at 7–8. These tankers remain in the ground today, and "it is possible that they either have or will corrode to the point of leakage." *Id.* "Arsenic and phosphorus from the site are continuously flowing in the groundwater

from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms." *Id.* at 8. This groundwater contamination "negatively affects the ecosystem and subsistence fishing, hunting and gathering by tribal members at the River, as well as the Tribes' ability to use this important resource as it has been historically used for cultural practices, including the Sundance." *Id.*

The Tribal Court of Appeals stated that "FMC does not challenge" that the hazardous materials present at the FMC site "do pose a threat" to the Tribes. *Id.* at 9. "Rather, [FMC] contends that if certain methods suggested by the EPA are undertaken and properly implemented by FMC in the future, the risk will be contained." *Id.* But the court found that EPA itself continues to view FMC's site as dangerous to public health and welfare. For example, in 2013, a year after the issuance of the IRODA, the EPA wrote that hazardous waste at the FMC site "may constitute an imminent and substantial endangerment to public health or welfare or the environment." *Id.* (quoting EPA, *Unilateral Admin. Order for Remedial Design and Remedial Action*, No. CERCLA-10-2013-0116, at 9–10 (June 10, 2013)). Further, the court wrote, "Although the EPA has been involved at this site since 1990, remedial actions chosen by the EPA have not been implemented" and many "proposed remedial actions are still in design phase only." *Id.* "EPA's IRODA is itself only an interim measure." *Id.* "[A] final Record of Decision will not be available for five to ten years." *Id.* (citing *IRODA* at 19). "EPA's plans remain just that: Plans." *Id.* In addition, "EPA's plans are containment plans," which would keep the hazardous wastes on the Reservation "for the indefinite future." *Id.*

The Tribal Court of Appeals held that the Tribes had regulatory and adjudicatory jurisdiction over FMC under the second *Montana* exception. It concluded that FMC's storage of millions of tons of toxic waste on the Reservation poses a serious threat, and has a direct effect on, "the political integrity, the economic security or the health or welfare of the [Tribes]." *See* Tribal Court of Appeals, May 2014 Opinion at 14–15; Tribal Court of Appeals, Statement of Decision at 29–32. The Court concluded that this threat "is real; it is not a mere potential," and is a threat of catastrophic consequences to the Tribes. Tribal Court of Appeals, May 2014 Opinion, at 11.

On May 16, 2014, the Tribal Court of Appeals issued a final judgment, holding FMC liable for an annual use permit fee of $1.5 million. *See Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council v. FMC Corp.*, Judgment and Order for Attorney Fees and Costs, May 16, 2014. The court assessed FMC $19,500,000 for unpaid permit fees for 2002–2014; $928,220.50 in attorneys' fees; and $91,097.91 in costs, for a total judgment of $20,519,318.41. *Id.*

D. Federal District Court Proceedings

In November 2014, FMC filed a complaint in the United States District Court for the District of Idaho, requesting that the district court deny enforcement of the judgment of the Tribal Court of Appeals. The Tribes counterclaimed, seeking an order enforcing the judgment.

The district court granted the Tribes' motion to enforce the judgment. The court concluded that the Tribes had jurisdiction over FMC under both *Montana* exceptions. The district court rejected

FMC's due process challenge based on the alleged bias of Judges Gabourie and Pearson on the first panel of the Tribal Court of Appeals. The court noted that the reconstituted panel reconsidered the rulings of the first panel and, in relevant part, independently reached the same conclusions.

The district court enforced the judgment in its entirety under the first *Montana* exception. However, the court denied comity under the second *Montana* exception on the ground that there was insufficient nexus between the $1.5 million annual permit fee and the costs of tribal programs required to mitigate the threat from the storage of FMC's hazardous waste on the Reservation. The court concluded that the second *Montana* exception was therefore not a ground on which the judgment could be enforced.

The present appeal followed. FMC argues that the Tribes lacked jurisdiction over FMC under both *Montana* exceptions, and that FMC was denied due process. The Tribes cross-appeal, arguing that the district court erred in finding that the judgment was not enforceable under the second *Montana* exception.

II. Appellate Jurisdiction and Standard of Review

We have appellate jurisdiction under 28 U.S.C. § 1291.

"We have . . . recognized that because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.' " *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (quoting *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)). "As we consider questions of tribal jurisdiction, we are mindful of 'the

federal policy of deference to tribal courts' and that '[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts.' " *Id.* at 808 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987)); *see also United States v. Wheeler*, 435 U.S. 313, 332, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests").

We review de novo tribal courts' legal rulings on tribal jurisdiction, and we review for clear error tribal courts' factual findings underlying their jurisdictional rulings. *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002).

We review de novo the district court's summary judgment decision on the due process claim. *Big Horn Cty.*, 219 F.3d at 949.

III. Discussion

The core question in this appeal is whether we should recognize and enforce the Shoshone-Bannock Tribal Court of Appeals' final judgment holding FMC liable for an annual use permit fee of $1.5 million.

"As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d at 903 (citing *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). In some circumstances, however, we will not recognize and enforce a judgment. *Id.* First, we will not recognize and enforce a judgment if the tribal court did not have both personal and subject matter jurisdiction. *Id.* Second, we will not enforce a judgment if the tribal court denied due process

to the losing party. *Id.* Further, "[u]nder limited circumstances, . . . [we] may refuse to recognize or enforce a tribal judgment on equitable grounds as an exercise of discretion." *Id.*

FMC argues we should not enforce the judgment of the Shoshone-Bannock Tribal Court of Appeals for two reasons. First, FMC argues the Tribes lacked subject matter jurisdiction over FMC. Second, FMC argues it was denied due process of law because two judges of the Tribal Court of Appeals were biased against it.

Unless we hold that the Shoshone-Bannock Tribal Court of Appeals lacked subject matter jurisdiction or denied FMC due process, we "must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *Id.* at 903–04 (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 19, 107 S.Ct. 971 ("Unless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigation of issues . . . resolved in the Tribal Courts.")). We "may not readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." *Id.* at 904.

We address each of FMC's arguments in turn. We hold that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions to impose and enforce the permit fees. We further hold that there was no due process violation. Finally, we hold that the final judgment of the Shoshone-Bannock Tribal Court of Appeals is entitled to recognition and enforcement under principles of comity under both *Montana* exceptions.

A. Subject Matter Jurisdiction

We first determine whether the Shoshone-Bannock Tribal Court of Appeals had subject matter jurisdiction over the Tribes' claims against FMC. To make that determination, we must answer two related questions. First, did the Tribes have regulatory jurisdiction to impose the permit fees? Second, did the Tribes have adjudicatory jurisdiction to enforce those fees in tribal court? *See, e.g.*, *Water Wheel*, 642 F.3d at 809 ("To exercise its inherent civil authority over a defendant, a tribal court must have [ ] subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction . . . ."); *see also Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019) (quoting the same). For the reasons that follow, we hold that the Tribes had both regulatory and adjudicatory jurisdiction.

1. Regulatory Jurisdiction

The case before us concerns nonmember conduct on non-Indian-owned fee land within the boundaries of the Reservation. We therefore apply the Supreme Court's framework set forth in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), to determine whether the Tribes had regulatory jurisdiction to impose permit fees on FMC. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017), *as amended* (Aug. 3, 2017) (explaining that "[o]ur caselaw has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant: (1) the right to exclude, which generally applies to nonmember conduct on *tribal land*; and (2) the exceptions

articulated in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), which generally apply to nonmember conduct on *non-tribal land*." (emphasis added)).

In *Montana*, the Supreme Court held that there are three bases for tribal regulatory jurisdiction over nonmember activities on non-Indian fee land within the boundaries of a reservation—the so-called *Montana* exceptions. 450 U.S. at 565–66, 101 S.Ct. 1245 ("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."); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209–10 (9th Cir. 2001) (en banc) (discussing the same); *see also Iowa Mut. Ins. Co.*, 480 U.S. at 18, 107 S.Ct. 971 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 934–35 (8th Cir. 2010) (briefly discussing some of the historical scope of tribal sovereignty and changes over time). *Cf. Worcester v. Georgia*, 31 U.S. 6 Pet. 515, 557, 8 L.Ed. 483 (1832) (Tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.").

First, a tribe retains the inherent sovereign authority to "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." 450 U.S. at 565, 101 S.Ct. 1245. Second, a tribe "retain[s] 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." *Id.* at 566, 101 S.Ct. 1245. Third, a Tribe may regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty. *See Strate*, 520 U.S. at 445, 117 S.Ct. 1404; *Montana v. U.S. EPA*, 137 F.3d 1135, 1140 (9th Cir. 1998). There is a presumption against tribal jurisdiction over nonmember activity on non-Indian fee land. *Bugenig*, 266 F.3d at 1209–10; *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). The Tribes bear the burden of rebutting that presumption. *Plains Commerce Bank*, 554 U.S. at 330, 128 S.Ct. 2709.

Only the first two jurisdictional bases are relevant here. We examine them in turn.

a. First *Montana* Exception

The first *Montana* exception provides that tribes have jurisdiction to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members," including consensual relationships "through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565–66, 101 S.Ct. 1245; *see also Strate*, 520 U.S. at 446, 117 S.Ct. 1404. The Supreme Court has recognized that permit requirements and permit fees constitute a form of regulation. *See Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (recognizing tribal jurisdiction to require non-

members to obtain permits and pay a permit fee in order to graze livestock on reservation).

For purposes of determining whether a consensual relationship exists, "consent may be established 'expressly or by [the nonmember's] actions.' " *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 338, 128 S.Ct. 2709). The test is not subjective. Rather, it is "whether under th[e] circumstances the non-Indian defendant should have reasonably anticipated that [its] interactions might 'trigger' tribal authority." *Id.* at 817–18 (quoting *Plains Commerce Bank*, 554 U.S. at 337, 128 S.Ct. 2709) (stating also "[t]he Supreme Court has indicated that tribal jurisdiction depends on what non-Indians 'reasonably' should 'anticipate' from their dealings with a tribe or tribal members on a reservation.").

FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into an permit agreement with the Tribes, requiring annual use permits and an annual $1.5 million permit fee to store 22 million tons of hazardous waste on the Reservation. As the district court noted, FMC then "affirmed its consensual relationship with the Tribes by signing the Consent Decree, which required FMC to obtain Tribal permits." *FMC Corp. v. Tribes*, 2017 WL 4322393 at *9. "FMC then cited its consensual relationship with the Tribes" to the district court and our court "as part of its argument that the Decree should be approved." *Id.* The conduct that the Tribes seek to regulate through the permit fees at issue—the storage of hazardous waste on the Reservation—arises directly out of this consensual relationship. *See Knighton*, 922 F.3d at 904 ("*Montana*'s consensual

relationship exception requires that 'the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.' " (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001))).

FMC argues this consensual relationship was "coerced" because EPA required FMC to obtain relevant permits from the Tribes in order to obtain a Consent Decree to settle EPA's RCRA-based claims against FMC. FMC may indeed have been "coerced" in the sense that the EPA required it to obtain tribal permits as a condition for obtaining a Consent Decree. However, the "coercion," if it can be called that, came from FMC's strong interest in obtaining a Consent Decree that would allow it to settle the RCRA suit on favorable terms.

FMC was highly motivated to obtain the Consent Decree proffered by the EPA. In the words of the district court, "[T]he Consent Decree allowed FMC to dump the toxic mess it had created in the EPA's lap by paying a small fine of $11.9 million along with a few million dollars in construction commitments. That was a sweetheart deal and FMC was desperate to grab it." *FMC Corp. v. Tribes*, 2017 WL 4322393 at *13. Faced with a choice between years of litigation, on the one hand, and a "sweetheart deal" that required FMC to pay a small fine and obtain tribal permits whose terms were already known, on the other, FMC chose to consent to tribal jurisdiction. The district court wrote, "This was a simple business deal . . . ." *Id.* at *10. It was "not the product of illegal duress or coercion." *Id.*

We fail to see why a strong interest in obtaining a particular result is "coercion" that invalidates an agreement designed to achieve that desired result.

Further, to the extent that there was some kind of "coercion," it was "coercion" by the EPA. It was the EPA that insisted on tribal permits as a condition to agreeing to enter into the Consent Decree. As the district court observed, the Tribes simply "took advantage of their bargaining leverage, a long-standing practice in the sharp-elbowed corporate world in which FMC does business every day." *Id.*

Moreover, FMC should have reasonably anticipated that its interactions might "trigger" tribal regulatory authority. *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 338, 128 S.Ct. 2709). FMC "is no stranger" to the Tribes' governance and laws or to the Tribes' regulatory and adjudicatory jurisdiction. *Knighton*, 922 F.3d at 904. FMC has operated on the Reservation for over 50 years and has had an extensive relationship with the Tribes for 70 years. That relationship includes a long history of "commercial dealing[s], contracts, leases, and other arrangements" with the Tribes, including mining leases, contracts for the supply of phosphate shale, agreements recognizing the Tribes' taxing power, royalty payments, and employment and permit agreements. *Montana*, 450 U.S. at 565–66, 101 S.Ct. 1245; *see also FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1312 (9th Cir. 1990) (discussing FMC's extensive mining operations on the Reservation to supply the phosphate shale needed to produce phosphorus at FMC's facility).

Based on FMC's history on the Fort Hall Reservation, we have previously held that FMC had entered into a consensual relationship with the Tribes. In 1990, in *FMC v. Shoshone-Bannock Tribes*, we held that the Tribes had regulatory jurisdiction over FMC's activities on its fee land within the

Reservation such that the Tribes could require FMC to comply with the Tribes' Tribal Employment Rights Ordinance. 905 F.2d 1311. Enacted by the Tribes in 1980, the Ordinance required employers on the Reservation, including non-Indian employers operating on fee land, to give mandatory preferences in hiring, contracting, and subcontracting to Indians. *Id.* at 1312. FMC initially objected to application of the Ordinance to its phosphorus production plant, the same plant at issue here. *Id.* But there, as here, "[a]fter negotiations with the Tribes, FMC entered into an employment agreement based on the TERO in 1981 that resulted in a large increase in the number of Indian employees at FMC." *Id.* at 1312–13.

In 1986, "the Tribes became dissatisfied with FMC's compliance with the employment agreement," and after attempts to negotiate failed, the Tribes filed suit in Tribal Court. *Id.* at 1313. There, as here, FMC argued the Tribes lacked regulatory and adjudicatory jurisdiction over FMC. *Id.* The Tribal Court held the Tribes had jurisdiction over FMC and concluded that FMC had violated the Ordinance. *Id.* The Tribal Court of Appeals affirmed. *Id.* When the parties could not agree on a compliance plan, the Tribal Court of Appeals entered its own compliance plan and levied an annual fee of approximately $100,000 against FMC. *Id.*

We held that the Tribes had jurisdiction over FMC under *Montana*'s first exception. We wrote:

> FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide[ ]ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing

> power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly, on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved.

Id. at 1314.

We therefore conclude that the Tribes had regulatory jurisdiction under *Montana*'s first jurisdictional basis to impose the permit fees based on FMC's consensual relationship with the Tribes.

b. Second *Montana* Exception

Under *Montana*'s second exception, the Tribes must demonstrate that FMC's conduct on its fee lands within the Reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S.Ct. 1245. Under the second exception, a tribe "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." *Plains Commerce Bank*, 554 U.S. at 336, 128 S.Ct. 2709. Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare. *See, e.g.*, *id.* at 333, 128 S.Ct. 2709; *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 441, 109 S.Ct. 2994, 106

L.Ed.2d 343 (1989); *Montana v. U.S. EPA*, 137 F.3d at 1139, 1141 ("We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. A tribe retains the 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 health and welfare of the tribe. This includes conduct that involves the tribe's water rights. . . . [D]ue to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.") (internal quotation marks and citations omitted).

To establish jurisdiction under *Montana*'s second exception, the nonmember's activities "must do more than injure the [Tribes]." *Plains Commerce Bank*, 554 U.S. at 341, 128 S.Ct. 2709. The activities must "imperil the subsistence or welfare" of the tribal community. *Montana*, 450 U.S. at 566, 101 S.Ct. 1245; *accord Plains Commerce Bank*, 554 U.S. at 341, 128 S.Ct. 2709; *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013).

Tribal jurisdiction under the second *Montana* exception may exist concurrently with federal regulatory jurisdiction. *See* Tribal Court of Appeals, May 2014 Opinion, at 5 (discussing the same). As we have explained previously, there is "no suggestion" in the *Montana* case law that "inherent [tribal] authority exists only when no other government can act." *Montana v. U.S. EPA*, 137 F.3d at 1141.

We conclude that FMC's storage of millions of tons of hazardous waste on the Reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare" of the Tribes to the extent that it "imperil[s] the subsistence or welfare" of the Tribes. *Montana*, 450 U.S. at 566, 101 S.Ct. 1245. We base our conclusion on the factual findings of the Tribal Court of Appeals, the factual findings and conclusions of the EPA, expert testimony presented in the Tribal Court of Appeals, and the record as a whole. The record contains extensive evidence of toxic, carcinogenic, and radioactive substances at the FMC site. We highlight here only two sources of contamination and the threats they pose to the Tribes: elemental phosphorus in the ground, and phosphine gas in the air.

i. Elemental Phosphorus in the Ground

Millions of tons of "ignitable-reactive elemental phosphorus," "high concentrations of arsenic," and gamma radiation contaminate the soil at the FMC site. EPA, *2013 Unilateral Admin. Order for Remedial Design and Remedial Action*, CERCLA No. 10-2013-0116, at 7 (June 10, 2013) ("2013 *UAO*"). "The elemental phosphorus contamination within the FMC OU alone is at a scale unprecedented anywhere in the United States . . . ." *IRODA* at 83. As much as 16,000 tons of elemental phosphorus saturate the ground, extend in a plume at least 85 feet below ground, and contaminate approximately 780,000 cubic yards of soil weighing 1 million tons. *IRODA* at 21, 78, 83. This calculated amount of phosphorus does not include elemental phosphorus-contaminated wastes that currently sit in ponds on the FMC site, the elemental phosphorus waste that has migrated or been blown off-site, and the unknown amount of

waste that is contained in buried rail tanker cars that may corrode and leak. *IRODA* at 9, 14, 83. The elemental phosphorus contamination at the FMC site poses a serious threat to human health, the environment, and the welfare of the Tribes. In the EPA's words, elemental phosphorus at the FMC site exists "in concentrations exceeding 1,000 parts per million (ppm)" in the soil and "will present a significant risk to human health and the environment should exposure occur." *IRODA* at ii; *see also id.* at 34 ("[R]isks from exposure to ignitable elemental phosphorus are severe and highly certain should direct exposure occur.").

The EPA concluded that the elemental phosphorus at the FMC site constitutes a "principal threat waste." *IRODA* at ii, 77–78. "Principal threat wastes are those source materials considered to be highly toxic or highly mobile that generally cannot be reliably contained or would present a significant risk to human health or the environment should exposure occur." *Id.* at ii–iii. Elemental phosphorus "is highly toxic by ingestion, inhalation, and skin absorption"; "may be fatal at high concentrations; is corrosive to skin and other living tissue"; "is likely to cause skin burns upon contact"; and is pyrophoric, meaning it will spontaneously burst into flames when exposed to the air, producing phosphine and other toxic gases. *Id.* at 77–78. Exacerbating the threat, elemental phosphorus "has physical properties that are unlike most [contaminants of concern] encountered in environmental response actions," requiring "special handling techniques not only for routine handling but also for emergency response." *Id.* at iii, 77–78; *see also id.* at 28 (concluding that elemental phosphorus at the FMC site "could ignite, causing burns and inhalation

hazards from intensely irritating phosphoric acid aerosols with potential to drift beyond the immediate area."). "The threat of elemental phosphorus was vividly described by Claudeo Bronco, [a witness before the Tribal Court of Appeals,] who testified that he [saw] ducks spontaneously ignite as they took off from FMC's phosphorus containment ponds." Tribal Court of Appeals, May 2014 Opinion, at 6–7.

The EPA's CERCLA plan calls for FMC to place evapotranspiration caps over areas contaminated with elemental phosphorus. *IRODA* at 68. However, despite the EPA's involvement at the site since 1990 when the EPA first declared the plant a Superfund Site, many areas of the site, including the area where the tanker railroad cars are buried, still had not been capped at the time of the 2014 hearing before the Tribal Court of Appeals. Further, as the EPA wrote, capping "does not reduce [the] toxicity, mobility, or volume of contaminants." *Id.* at 60. Even if capped, phosphorus-contaminated soil will remain on the Reservation indefinitely and continue to present a threat to Tribal health and welfare.

ii. Phosphine Gas in the Air

Phosphine gas produced from elemental phosphorus stored in ponds on FMC's site poses a constant threat to the Tribes. Phosphine gas is "very flammable," "highly reactive," and "extremely toxic" to humans. Letter from Kai Elgethun, Idaho Dep't of Health and Welfare to Greg Weigel, EPA Idaho Operations Office, at 2–3 (June 1, 2010) ("Letter from Idaho Dep't of Health and Welfare"); EPA, *Unilateral Admin. Order for Removal Action*, *FMC Idaho LLC*, CERCLA No. 10-2010-0170, at 9 (June 14, 2010) ("2010 *UAO*"); *see also* Expert Witness Testimony

from Dr. Jerrold Leikin and Dr. Peter Orris, members of EPA's Supplemental Environmental Project 14 for the FMC Site (discussing the dangers of phosphine gas and the FMC site in particular). Phosphine gas is "immediately dangerous to life and health" at concentrations of 50 parts per million ("ppm"). 2010 *UAO* at 9. It burns spontaneously upon contact with air and explodes at concentrations at or near 20,000 ppm. *Id.*; *see also* Expert Witness Testimony of Dr. Jerrold Leikin (describing phosphine as a "knockdown gas," meaning a few breaths can render a person unable to walk or talk, and can result in extreme harm or eventual death). The short-term upper limit for human exposure is 1 ppm for 15 minutes of exposure. 2010 *UAO* at 9.

There are eleven RCRA waste ponds on FMC's property that are supervised under the Consent Decree. Nine of those ponds were capped between 1999 and 2005. *See* 2010 *UAO* at 8; *FMC Corp. v. Tribes* at *4. The other two were left uncapped. *Id.* at 9–10. Dangerous levels of phosphine gas build up beneath the evapotranspiration caps on the capped ponds and are released from the uncapped ponds. *Id.* Although the EPA has ordered FMC to implement measures to contain the gas, releases continue to occur.

In 2006 and 2010, for example, the EPA entered Unilateral Administrative Orders ("UAO") responding to phosphine gas releases from capped and uncapped RCRA ponds. *See* EPA, *Unilateral Admin. Order for Removal Actions*, *FMC Idaho LLC*, CERCLA No. 10-2007-0051 (Dec. 14, 2006) ("2006 *UAO*"); 2010 *UAO* at 10–11 (noting that in 2005, 2006, 2007, and 2009, levels of phosphine gas in the air around the RCRA ponds were high enough that

workers in the area either had to delay work or leave the area for their safety).

The EPA reported in its 2006 UAO that phosphine gas releases had been detected at RCRA Pond 16S. In June 2006, "intermittent emissions of smoke" from two temperature monitoring points ("TMP") had been observed at the pond. 2006 *UAO* at 10. Subsequently, "[v]isible air emissions from Pond 16S [were] observed on a number of occasions [after] June 2006, including by Shoshone-Bannock Tribal staff on September 6, 2006 and September 18, 2006." *Id.* FMC had reported to the EPA that phosphine gas was collecting in TMP well casings at Pond 16S, and was "likely accumulating to the phosphine auto-ignition concentration (20,000 parts per million) inside the temperature well casings or vents." *Id.* The EPA concluded that "[t]he conditions at the Site constitute[d] an imminent and substantial endangerment to public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a)." *Id.* at 13–14 (stating also that the conditions "constitute a threat to public health or welfare or the environment"). The EPA issued a "time critical Action Memorandum on December 13, 2006 for Pond 16S to remove and treat phosphine and other gases at levels of concern . . . ." *Id.* at 12–13.

Dr. Peter Orris testified before the Tribal Court of Appeals that he "absolutely" agreed with the EPA's findings and conclusions in the 2006 UAO. He testified that the phosphine gas was "both acutely and chronically dangerous to people in the area or downstream, if you will, or downwind." "Phosphine gas [is a] close cousin to the phosgene gas used in World War I . . . that gassed all the soldiers, so that a

high dose short-term exposure can kill people. . . . This is pretty catastrophic stuff."

The EPA reported in its 2010 UAO that "[p]hosphine gas ha[d] been detected in and around TMPs and in ambient air at a number of the RCRA Ponds." 2010 *UAO* at 9. In late 2009, FMC detected phosphine levels above 1 ppm near Pond 15S, triggering alarms downwind and requiring evacuations on November 2, 23, and 27, and on December 22. *Id.* at 11. In December 2009 to April 2010, FMC detected concentrations of phosphine gas as high as 23,000 ppm inside a lift station associated with Pond 15S. *Id.* Daily monitoring from February to April 2010 measured phosphine gas in "ambient air," at breathing zone height, ranging from 0 to at least 20 ppm. *Id.* at 12. The actual concentrations may have been much higher. The EPA reported, "[O]n numerous occasions the monitors [ ] 'pegged out' at 20 ppm," the upper detection limit for FMC's monitors, "indicating some unknown concentration higher than 20 ppm." *Id.* Another phosphine survey on April 30, 2010, "provided phosphine readings that averaged 300 ppm" in another area of the pond. *Id.*

FMC first reported the issues with Pond 15S to the EPA in a letter dated April 14, 2010. *Id.* at 11. In response to an EPA request for information, FMC sent the EPA monitoring data from all the RCRA ponds on April 26, 2010. *Id.* at 12. The data indicated that phosphine concentrations in the ambient air around two more ponds—one capped and one uncapped—were at or near the upper detection limit for FMC's monitors. *Id.* (Ponds 8E and 17); *see id.* at 8 for a list of capped and uncapped RCRA ponds.

On June 1, 2010, shortly before the EPA's release of its 2010 UAO, Dr. Kai Elgethun of the Idaho

Department of Health and Welfare wrote: "We conclude that the phosphine gas being released from Pond 15S is an urgent public health hazard to the health of people breathing the air in the proximity of Pond 15S . . . ." Letter from Idaho Dep't of Health and Welfare at 1. Pond 15S is approximately 400 meters south of a road and 600 meters south of an interstate highway that crosses the Reservation. *Id.* at 3.

The EPA wrote in the 2010 UAO: "Action is necessary to protect receptors from inhalation of phosphine at RCRA Ponds, and to minimize the risk of fire and explosion from high concentrations of phosphine gas at the RCRA Ponds." 2010 *UAO* at 14. "Receptors," in the jargon of the EPA, are individuals who may be exposed to phosphine gas. The EPA wrote that "receptors" included individuals "at or near the facility boundaries," such as railroad and power company workers, bicyclists and pedestrians on "old Highway 30," and "members of the Shoshone-Bannock Tribes." *Id.* at 13. The EPA concluded in 2010, as it had in 2006, that the "[h]igh concentrations of phosphine accumulating within the [FMC] RCRA Ponds and being released" "constitute an imminent and substantial endangerment to public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a)." *Id.* at 13–15. The EPA issued a "time critical removal Action Memorandum on June 11, 2010, for Ponds 8E, 15S and 17 and the other RCRA Ponds, requiring air monitoring and action to remove and treat phosphine gas . . . ." *Id.* at 13.

David Reisman, a former EPA official who worked at the EPA for thirty-six years, including several years at the FMC site, testified before the Tribal Court of Appeals that the threat of phosphine gas

being released from the FMC site—both onsite and offsite—is "always there." Reisman testified that when he visited the FMC site and walked on the caps on the RCRA ponds he observed visually that "they were not well maintained." He testified further, "I think the data bears out that there is moisture and air getting under the cap, and mixing with the waste stream in one fashion or another." Reisman noted that some phosphine gas is already escaping because of the nature of the evapotranspiration cap. He testified that at a landfill site near Las Vegas, repeated downpours of rain had caused part of an evapotranspiration cap to slide off the landfill, exposing the waste. If the caps at the FMC site were to similarly crack or slide off, Reisman testified, massive clouds of phosphine gas at lethal exposure levels would be released.

Reisman testified that proper monitoring to detect releases of phosphine gas was not being done at the FMC site. According to Reisman, monitoring remained "a big question mark" under the 2012 IRODA. *See also* Testimony of Rob Hartman, Vice President of FMC Idaho (discussing how a monitoring plan for phosphine gas "has not been developed"). Reisman testified that FMC does not have an early warning system in place, stating that he "hope[d] that all parties would look into some early warning system in case some of the catastrophic events would occur." Another expert witness described the monitoring at the FMC site as "completely inadequate."

The record establishes that FMC's RCRA ponds on the Reservation continue to generate lethal amounts of phosphine gas that accumulate beneath the pond covers. As the district court wrote, this phosphine gas "pose[s] a constant and deadly threat to the Tribes"

and "a real risk of catastrophic consequences should containment fail." *FMC Corp. v. Tribes*, 2017 WL 4322393 at *11.

iii. FMC's Arguments

FMC makes two arguments in its brief against jurisdiction under the second *Montana* exception. Both arguments fail.

First, FMC argues that the hazardous waste on its site is contained, is "actively monitored by FMC and EPA," and poses little danger to the Tribes. FMC writes, "The record does not remotely support jurisdiction under the second *Montana* exception." FMC's argument fails to take into account what is actually in the record.

The hazardous waste at the FMC site constitutes a serious and continuous threat. The district court summarized:

> [T]he EPA has taken substantial steps to contain the toxic waste and prevent harm. But the threat remains. . . . Because the EPA intends to leave the waste on the site indefinitely, and because the waste's toxicity has such a long life—decades if not longer—there is a real risk that no matter how well its containment system is designed, the system may fail. . . . EPA reports demonstrate that the waste sites are not reservoirs of passive liquid that can be contained with a simple dam. Instead, these sites are generating lethal gases that accumulate under pressure beneath the pond covers. In other words, they pose a constant and deadly threat to the Tribes, a real risk of catastrophic consequences should

> containment fail. And despite the best efforts of the EPA, there have releases of these toxic gases. . . . This dangerous threat can only be contained, not removed or treated. . . . It is so toxic that there is no safe way to remove it, ensuring that it will remain on the Reservation for decades.

FMC Corp. v. Tribes, 2017 WL 4322393 at *10–11.

Second, FMC argues that our decision in *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013), compels the conclusion that the Tribes lack jurisdiction. *Evans* is light years away from the case before us. In *Evans*, we held that the Tribes' Land Use Policy Commission did not have jurisdiction under the second *Montana* exception to require a nonmember to obtain tribal permits for the construction of a single-family home. We held that the Tribes had not established that the construction of one single-family home on fee land in an area of the Reservation that already "contain[ed] many residential properties owned and inhabited by nonmembers"—unlike the area in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), which was closed to the general public—threatened or had some direct effect on the political integrity, economic security, or the health or welfare of the Tribes. *Id.* at 1303–06. In stark contrast to *Evans*, the threats from the FMC site, as Dr. Orris testified, "are not minimal annoyances. They are the threat of catastrophic health reactions, including death."

iv. Nexus

The district court held that due to the extensive contamination at the FMC site, the Tribes had established jurisdiction under the second *Montana* exception. However, as a matter of comity, the court refused to enforce the judgment of the Tribal Court of Appeals under the second exception. In the view of the court, the Tribes had failed to sufficiently explain the connection between the $1.5 million annual permit fee and the threat posed by the hazardous waste. Citing *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the court wrote:

> Having jurisdiction under the second *Montana* exception, the Tribes are authorized to assess a permit fee that has some nexus to the costs of supplementing the EPA's program to fully protect the health and safety of Tribal members. Yet the Tribes have never explained why an annual fee of $1.5 million is necessary to provide that supplemental protection.

FMC Corp. v. Tribes, 2017 WL 4322393 at *12.

The district court was mistaken in holding that the Tribes had jurisdiction under the second *Montana* exception and, at the same time, holding that the Tribal Court of Appeals' judgment was not entitled to comity. The nexus question is part of the jurisdictional question. Once jurisdiction is established, lack of nexus is not a ground for denying comity under *Marchington*.

We take it as a given that there must be some nexus between a basis for jurisdiction under *Montana* and a tribal action taken in the exercise of that jurisdiction. For example, if the Tribes had insisted under the second *Montana* exception that FMC

disinvest from its businesses in China, such insistence would have been an unreasonable exercise of jurisdiction. However, there is nothing in *Montana* requiring that nexus be narrowly defined. There is nothing, for example, requiring the Tribes to show that the $1.5 million annual use permit fee be spent on supplemental measures, beyond those now being taken by the EPA, to protect against hazards posed by FMC's hazardous waste. There is evidence in the record suggesting that the Tribes have spent approximately $1.5 million annually on measures to monitor and mitigate the dangers posed by FMC's hazardous waste, and indeed that the Tribes might spend more if funds were available. But we need not rely on that evidence alone to find nexus.

A more-than-sufficient nexus may be shown by comparing fees charged on the open market for hazardous waste storage, on the one hand, to the $1.5 million annual fee charged by the Tribes, on the other. FMC's own evidence in the Tribal Court of Appeals showed that as of 1995, commercial hazardous waste disposal facilities charged between $50 and $250 per ton for bulk disposal (the type of materials typically disposed of at FMC's facility). Given the extreme danger posed by FMC's hazardous waste, it is an open question whether anyone could be persuaded to accept its waste at any price. But assuming that someone would be willing to accept FMC's hazardous waste, and using a midrange fee of $150 per ton, the one-time fee for disposing of FMC's 22 million tons of hazardous waste would be $3.3 billion. Compared to $3.3 billion, an annual fee of $1.5 million is an extraordinary bargain.

Although we conclude that the Tribes can establish nexus in this case by showing that they

charge less than the open market fee for comparable activity, we do not mean thereby to suggest that a tribe in some circumstances might not be able to charge substantially more than an open market fee, or might not be able to forbid waste storage or other activities entirely. We need not hypothesize cases not before us. It is enough for current purposes to show that there is a more-than-sufficient nexus between the storage of FMC's highly dangerous—potentially catastrophically dangerous—waste and the $1.5 million annual use permit fee to warrant the assessment of that fee under *Montana*'s second exception.

2. Adjudicatory Jurisdiction

A tribe's adjudicatory jurisdiction over nonmembers may not exceed its regulatory jurisdiction. *Strate*, 520 U.S. at 453, 117 S.Ct. 1404; *Water Wheel*, 642 F.3d at 814 (noting that the Supreme Court has "articulated the general rule that a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction"). However, the Supreme Court has never decided whether a Tribe's adjudicatory jurisdiction is necessarily as extensive as its regulatory jurisdiction. *See Water Wheel*, 642 F.3d at 816. Where as here, we hold that the Tribes had regulatory jurisdiction, we are thus presented with the question of whether they also had adjudicatory jurisdiction.

The Court has held that "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.' " *Strate*, 520 U.S. at 453, 117 S.Ct. 1404 (citation omitted); *see also Iowa Mut. Ins. Co.*, 480 U.S. at 18, 107 S.Ct. 971 ("Tribal authority over the activities of

non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." (internal citations omitted)); *Knighton*, 922 F.3d at 906 (discussing the same); *Water Wheel*, 642 F.3d at 814 (discussing the same). In two recent cases—both involving nonmember conduct on tribal land—we have held that tribes had adjudicatory jurisdiction. *See Knighton*, 922 F.3d at 906–07; *Water Wheel*, 642 F.3d at 814–16. In both cases, we based our holding on the existence of regulatory jurisdiction, the nature of the tribal sovereign interests, long-standing principles of Indian law, and congressional interest in tribal self-government. Based on those same factors, we conclude that the Shoshone-Bannock Tribal Court of Appeals had adjudicatory jurisdiction over the Tribes' claims in this case. *See Knighton*, 922 F.3d at 907 (concluding the same); *Water Wheel*, 642 F.3d at 816 (concluding the same). As we stated in *Water Wheel*, "Any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government." 642 F.3d at 816.

B. Due Process

We held in *Wilson v. Marchington* that a federal court must "reject a tribal judgment if the defendant was not afforded due process of law." 127 F.3d at 811. "Due process, as that term is employed in comity, . . . [requires] that there has been opportunity for a full and fair trial before an impartial tribunal that

conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* Comity, however, "does not require that a tribe utilize judicial procedures identical to those used in the United States Courts." *Id.* We must "be careful to respect tribal jurisprudence" as well as tribes' customs and traditions. *Id.* "Extending comity to tribal judgments is not an invitation for [us] to exercise unnecessary judicial paternalism in derogation of tribal self-governance." *Id.* "However, the tribal court proceedings must afford the defendant the basic tenets of due process or the judgment will not be recognized by the United States." *Id.* FMC argues it was denied due process. We disagree.

FMC's primary argument is that two judges on the Tribal Court of Appeals—Judges Gabourie and Pearson—were not impartial. In support of its argument, FMC cites the judges' remarks at the conference sponsored by the University of Idaho College of Law. FMC's argument fails for two reasons.

First, Judges Gabourie and Pearson did not make any statements at the conference indicating bias against FMC. At several points in their remarks, both judges emphasized the importance of impartiality. Transcript of *Tribal Courts: Jurisdiction and Best Practices* ("Transcript") at 9 and 19 (stating "every court has—should be impartial"; "a good opinion comes [from] both sides, both parties. Because both parties rely on a good opinion, strong opinion."; you "need to make sure that you do the job right"). Although Judges Gabourie and Pearson criticized

various Supreme Court opinions, including *Montana*, disagreement with an opinion of the Supreme Court does not indicate that judges cannot faithfully apply that opinion to the case before them. If such were the case, federal and state judges would need to recuse themselves with some frequency. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 779, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) ("[J]udges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches."); *In re Complaint of Judicial Misconduct*, 632 F.3d 1289, 1289 (9th Cir. 2011) ("The Code of Conduct encourages judges to 'speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.' Engaging in such law-related activities—including speeches that comment on current events and legal developments—is permitted not only because judges are citizens, but because they are particularly knowledgeable on such topics." (internal citations omitted)); *In re Charges of Judicial Misconduct*, 769 F.3d 762, 785 (D.C. Cir. 2014) ("[C]riticizing the [Supreme] Court does not constitute judicial misconduct. . . . It would be all but impossible for a judge to urge changes in the course of the law, or even to comment on substantive legal issues, without being able to reference and criticize decisions of the Supreme Court. Not surprisingly, then, there is a long tradition of lower court judges criticizing the Court on issues of constitutional law [and other areas].").

Judge Pearson did mention at one point that she had a "big case" that she believed was "going to go up," and that she was saying prayers, reading cases, and

trying to do the history. However, she said nothing about the merits of the case. *Cf. In re Charges of Judicial Misconduct*, 769 F.3d at 787–88 ("[N]otwithstanding the general prohibition on commenting on the merits of pending or impending matters, the Code contains an exception for offering such comments in the context of 'scholarly presentations made for purposes of legal education.' " (citing Canon 3A(6) of the Judicial-Conduct Rules)).

Second, to the degree Judges Gabourie and Pearson's remarks may be thought to have indicated bias against FMC, a reconstituted panel of judges considered the prior rulings of the Tribal Court of Appeals. The reconstituted panel revised one aspect of the court's prior decision and affirmed the others. A differently reconstituted panel then handled all proceedings going forward, including the hearing on jurisdiction under *Montana*'s second exception. The actions of the reconstituted panels eliminated any possible due process concerns arising from the remarks of Judges Gabourie and Pearson, and from their participation in earlier decisions of the Tribal Court of Appeals.

FMC makes other due process arguments, including that the Fort Hall Business Council improperly closed the record; that the Tribal Court of Appeals improperly rejected evidence from FMC as untimely; that the Tribal Court of Appeals, rather than the trial court, held an evidentiary hearing; and that the tribal courts are not independent from the Fort Hall Business Council. FMC has either waived these arguments or they are self-evidently meritless.

FMC's due process arguments are based in part on an underlying argument that, in FMC's words, tribal courts present "inherent risks . . . for denying

nonmembers" due process protections. The Supreme Court, our circuit, and our sister circuits have repeatedly rejected that and other similar arguments. *See, e.g.*, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855–57, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (requiring nonmembers to exhaust tribal court remedies and stating that exhaustion will "provide other courts with the benefit of [tribal court] expertise"); *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1249–50 (10th Cir. 2017) ("We also reject the officers' arguments that they will suffer undue bias and a lack of due process if subjected to tribal jurisdiction. The officers offer little support for their allegations, which boil down to baseless 'attacks' on the competence and fairness of the Ute Tribal Court. The Supreme Court has already explained that such arguments are contrary to federal policy . . . . The Court has also 'repeatedly' recognized tribal courts 'as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.' " (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 19, 107 S.Ct. 971; *Santa Clara Pueblo*, 436 U.S. at 65, 98 S.Ct. 1670; *Wheeler*, 435 U.S. at 332, 98 S.Ct. 1079 ("[T]ribal courts are important mechanisms for protecting significant tribal interests."))).

The Tenth Circuit recently wrote, "Although it is true that the Bill of Rights does not itself constrain tribal court proceedings, *see Talton v. Mayes*, 163 U.S. 376, 382–85, 16 S.Ct. 986, 41 L.Ed. 196 (1896), this does not leave the rights of nonmembers unprotected in tribal courts." *Norton*, 862 F.3d at 1249. "The Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301–04, expressly provides that no tribe may 'deny to *any*

person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.' " *Id.* at 1249–50 (citing 25 U.S.C. § 1302(a)(8)); *see also Iowa Mut. Ins. Co.*, 480 U.S. at 19, 107 S.Ct. 971 (noting that ICRA "provides non-Indians with various protections against unfair treatment in the tribal courts"). "Making good on these due process guarantees, nearly five decades of tribal cases applying ICRA show that tribal courts protect the rights of both member and nonmember litigants in much the same way as do federal and state courts." *Norton*, 862 F.3d at 1250. "[T]ribal courts often provide litigants with due process that 'exceed[s] the protections offered by state and federal courts.' " *Id.* (second alteration in original) (citing Matthew L.M. Fletcher, *American Indian Tribal Law* 325 (2011)).

"[E]mpirical studies demonstrate that tribal courts are even-handed in dispensing justice to nonmembers." *Id.*; *see, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Justice Systems*, 37 Ariz. St. L.J. 1047, 1047, 1051 (2005) ("Navajo appellate courts are remarkably balanced in hearing cases involving outsiders. . . . The court is both numerically balanced in its decisions regarding nonmembers . . . and qualitatively balanced, even in areas . . . that might seem particularly prone to bias. A less comprehensive review of decisions from other tribal court systems reveals a similar effort to decide issues fairly, even where it requires ruling against tribal members or the tribe itself."); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 578 (2000) (concluding from a

study of twelve years of decisions from approximately twenty-five tribal courts that "tribal courts have [not] succumbed to the temptation to favor the insider at the expense of outsiders").

Our own experience in reviewing tribal court decisions is consistent with the findings of these studies. Tribal courts, like all courts (including our own), make mistakes. But, contrary to the contention of FMC, tribal courts do not treat nonmembers unfairly.

C. Comity

Because we hold that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* bases, and that FMC was not denied due process, we recognize and enforce the Tribal Court of Appeals' judgments under principles of comity. *See AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d at 903. The judgment of the Tribal Court of Appeals is enforceable under both the first and second *Montana* exceptions. *See Wilson v. Marchington*, 127 F.3d at 810.

Conclusion

We hold that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions, and that the Tribal Court of Appeals did not violate FMC's right to due process. We hold that the judgment of the Tribal Court of Appeals is enforceable under principles of comity.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FMC CORPORATION Plaintiff, v. SHOSHONE-BANNOCK TRIBES, Defendant.	Case No. 4:14-CV-489-BLW **MEMORANDUM DECISION AND ORDER**

2017 WL 4322393

INTRODUCTION

In several pending motions, the Tribes and FMC ask the Court to determine whether the Tribes may enforce a Judgment imposed by the Tribal Appellate Court. That Judgment imposes an annual permit fee of $1.5 million. The Court heard oral argument on the motions and took them under advisement. For the reasons explained below, the Court finds that the Tribes had jurisdiction over FMC to impose the permit fees, and will grant the Tribes' motion to enforce the Tribal Court Judgment.

SUMMARY

For over 50 years, FMC operated a phosphorus production plant on 1,450 acres of property FMC owned in fee in Pocatello, Idaho, lying mostly within the Shoshone-Bannock Fort Hall Reservation. FMC's operations produced 22 million tons of waste products stored on the Reservation in 23 ponds. This waste is radioactive, carcinogenic, and poisonous. It will

persist for decades, generations even, and is so toxic that there is no safe method to move it off-site.

The waste's extreme hazards led the Environmental Protection Agency (EPA) to declare the site a CERCLA Superfund clean-up site and to charge FMC with violating the Resource Conservation and Recovery Act (RCRA). The EPA designed and implemented a program to contain the waste.

To avoid litigation over the RCRA charges, FMC negotiated with the EPA over a Consent Decree. As a condition of agreeing to that Consent Decree, the EPA insisted that FMC obtain Tribal permits for work FMC would do under the Consent Decree on the Reservation. The Tribes, however, were demanding $100 million for those permits, although they would drop the fee to $1.5 million a year if FMC consented to Tribal jurisdiction. To get the lower permit fee, and to satisfy the EPA's condition that they obtain Tribal permits, FMC consented to Tribal jurisdiction.

FMC challenged those permit fees in Tribal courts by producing evidence that the stored waste had caused no harm and the EPA's containment program foreclosed any need to impose substantial fees. The Tribes produced evidence that the waste was severely toxic, would remain so for generations, and could not be moved off-site. After hearing this evidence, the Tribal Appellate Court issued a Judgment against FMC requiring them to pay an annual fee of $1.5 million.

The parties brought this action to resolve the issue whether the Tribes could enforce that Judgment. The Court finds that the Tribes have jurisdiction over FMC. The source of the jurisdiction is based on FMC's

consent, discussed above, and the catastrophic threat FMC's waste poses to Tribal governance, cultural traditions, and health and welfare.

Having identified the *source* of the Tribes' jurisdiction over FMC, the Court turns next to the *scope* of that jurisdiction. To the extent that Tribal jurisdiction is based on FMC's consensual relationship with the Tribe to pay $1.5 million annually to store hazardous waste within the Reservation, the Tribes have jurisdiction to impose the $1.5 million annual fee for as long as the waste is stored there. The Tribal Appellate Court relied on this ground of jurisdiction to impose its Judgment, and the Court finds that the Judgment must be enforced on that ground.

To the extent that Tribal jurisdiction is based on the catastrophic threat FMC's waste poses to the Tribes, the amount of the annual permit fee must be closely tied to the threat. Here, the Tribal Appellate Court never identified the measures necessary to protect against the threat and their cost. Instead of using that calculation to arrive at the $1.5 million figure, the Tribal Appellate Court simply carried over that amount from the consensual relationship agreement between FMC and the Tribes. Using an agreed-upon figure is fine when the basis of jurisdiction is a consensual relationship, but when jurisdiction is based instead on a catastrophic threat, the amount of the Judgment must bear some relationship to the Tribes' need to protect against the threat. Because there is no such relationship in this record, the Court cannot enforce the Judgment on the basis of the catastrophic threat basis for Tribal jurisdiction. Nevertheless, the Court will enforce the Judgment because, as discussed above, it was

properly entered under the consensual relationship basis for Tribal jurisdiction.

FACTUAL BACKGROUND

History of the FMC Plant Cleanup

From 1949 to 2001, FMC and its predecessors operated an elemental phosphorus production plant on 1,450 acres of property FMC owned in fee in Pocatello, Idaho, lying mostly within the exterior boundaries of the Shoshone-Bannock Fort Hall Reservation. FMC historically stored the waste from its plant in ponds on that property. FMC has estimated that about 22 million tons of waste is contained in the 23 waste storage ponds on FMC's property. The waste includes hazardous materials such as arsenic, and radioactive materials that emit gamma radiation which exceeds the human health safety standards set by the Environmental Protection Agency (EPA). In 1990, the EPA declared the FMC plant a superfund clean-up site under CERCLA, and in 1997 charged FMC with violating RCRA, a law regulating the disposal of hazardous and non-hazardous solid wastes.

To resolve these RCRA charges outside of litigation, FMC began negotiation over the terms of a Consent Decree with the EPA. As a condition of any agreement, the EPA required that FMC obtain necessary permits for the clean-up work from the Tribes. The proposed Consent Decree would require construction of new waste storage ponds and a treatment facility on FMC's property within the Reservation boundaries, and so the Tribes were demanding that FMC obtain Tribal permits for this work. Because the EPA was insistent on FMC obtaining the necessary Tribal permits, FMC "was

justifiably concerned that an unresolved dispute between FMC and the Tribes would jeopardize the likelihood of successfully completing FMC's Consent Decree negotiations with the United States." *See FMC Response Brief (Dkt. No. 72)* at p. 18. According to FMC, resolution of the waste permit issue with the Tribes was "of such great importance that FMC's negotiating team was led Paul McGrath, FMC's Senior Vice President and General Counsel." *Id.*

McGrath faced a substantial obstacle—the Tribes were demanding $100 million to issue the permits. *See* 002610. Finding himself in a weak bargaining position, FMC's negotiator McGrath, "select[ed] the only rational choice for resolving FMC's dispute with the Tribes—to negotiate a lower fee." *See FMC Response Brief, (Dkt. No. 72)* at p. 18.

The Tribes were willing to negotiate a lower fee but only if FMC consented to Tribal jurisdiction. FMC described its analysis of the Tribes' demand: "FMC knew that contesting the Tribes' jurisdiction would take years. Although FMC vigorously disagreed with the Tribes' assertion of jurisdiction to compel compliance with the claimed permit requirement, FMC had no realistic alternative but to resolve its dispute with the Tribes in a manner that would enable continued operation of the Pocatello Plant . . . . Permanent shutdown of the Pocatello Plant at that time would have caused FMC severe economic damages." *See FMC's Statement of Facts (Dkt. No. 67-1)* at p. 9.

On August 11, 1997, FMC's Health Safety & Environmental Manager David Buttelman filed applications for permits with the Tribes and stated in an accompanying letter as follows:

> Through submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18 and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines.

See Exhibit 57. With FMC having consented to Tribal jurisdiction, the Tribes lowered their fee to $1.5 million a year to cover hazardous and nonhazardous waste beginning in 1998 and continuing "for every year thereafter . . . ." *See Exhibit 61.*

FMC responded to that letter on May 26, 1998, by expressing its appreciation for the Tribes "agreeing to the fixed fee proposal that we discussed, which we understand will apply during the time these ponds are in operation," and by stating "we . . . intend to make the payments of $2.5 million on June 1, 1998, and the $1.5 million on June 1 in the following years." *See Exhibit 62.* The Tribes' attorney Jeanette Wolfley objected to the language in this letter implying that the obligation to pay the fee would end with the closure of Ponds 17, 18 & 19. According to FMC's Division Manager, Robert Fields, Wolfly asked McGrath "to acknowledge in writing that the Use Permit and the annual fee applied broadly to the entire facility." *See Exhibit 66, Fields Affidavit.*

Fields testified that "McGrath agreed and sent Ms. Wolfley his letter of June 2, 1998." *Id.* In that letter, FMC clarified that the language of the May 26 letter was "too narrow, and indeed it is our understanding . . . that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19

was terminated in the next several years." *See Exhibit 63.*

FMC's resolution with the Tribes was a major factor in reaching an agreement with the EPA on the RCRA Consent Decree. Within just a few months of resolving the permit issues, FMC reached agreement with the EPA on the RCRA Consent Decree. By the terms of that Consent Decree, FMC agreed to pay a fine of $11.9 million and to close and cap the waste ponds in accordance with closure plans developed in coordination with the EPA—removal or treatment of the waste was deemed too expensive and too dangerous by the EPA. *See Interim Record of Decision Amendment (IRODA)* at pp. 1-2. To do the work necessary to comply with the Consent Decree, FMC was required to obtain Tribal permits, as set forth in paragraph 8 of the Consent Decree: "Where any portion of the Work requires a . . . tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals."

Prior Proceedings in the Federal Courts

The EPA did file an action against FMC but simultaneously presented the Consent Decree to this Court for approval to settle the lawsuit. The Tribes objected to the Consent Decree, seeking removal of the waste rather than capping of the ponds. The Court granted the Tribes motion to intervene, but found that "the capping requirements are adequately environmentally protective—the record contains no legitimate basis on which the Court could conclude that capping allows an unreasonable health risk to go unchecked," and approved the Consent Decree. *See Order (Dkt. No. 27) in U.S. v. FMC, CV-98-406-BLW.*

On appeal, the Ninth Circuit affirmed that decision, holding that "the Tribes have presented no evidence that capping the ponds poses a threat to human health and the environment." *See U.S. v. Shoshone-Bannock Tribes*, 229 F.3d 1161 at *2 (unpublished disposition) (9th Cir. 2000). In the proceedings before the Ninth Circuit, FMC argued that the Tribes had no right to object to the Consent Decree because the Tribes had "granted permits to FMC for its construction and use of Ponds 17 and 18 . . . subject to payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department." *See Brief of FMC, 2000 WL 33996531, at *17-18.* While not specially citing this argument, the Circuit did hold that the Tribes had been adequately consulted. *Shoshone-Bannock Tribes*, 229 F.3d at *2.

Between 1999 and 2005, FMC completed closure and capping of the RCRA Ponds pursuant to this Consent Decree and the EPA-approved closure plans. In 2005, FMC certified final closure of the last of the RCRA Ponds in accordance with EPA-approved closure plans. *See* 002371.

FMC paid the annual permit fee of $1.5 million under the 1998 agreement from 1998 to 2001. In December of 2001, FMC ceased all mineral processing operations at the site. When the fee became due for 2002, FMC objected, arguing its obligation had ended because (1) the Tribes failed to codify the fee to "ensure that [it] remains the same in the future"; and (2) the fee only applied to the disposal of waste, not its storage, and FMC had ceased disposing of waste. FMC refused to pay the $1.5 million fee and refused

to apply for any further permits as it continued with the RCRA clean-up efforts.

After negotiations failed, the Tribes filed a motion in *U.S. v. FMC, CV-98-406-BLW* asking the Court to clarify whether FMC had an obligation to obtain tribal permits for activities FMC undertook under the RCRA Consent Decree. This Court issued a decision on March 6, 2006, holding that (1) the Tribes had jurisdiction over FMC under the first *Montana* exception (*see Montana v. U.S.*, 450 U.S. 544, 565-66 (1981)), (2) FMC was required to apply for Tribal permits based on FMC's agreement to submit to tribal jurisdiction in ¶8 of the RCRA Consent Decree, (3) the Tribes were intended third-party beneficiaries of the Consent Decree and therefore had a right to enforce its terms; and (4) FMC was required to exhaust tribal remedies over any challenges to the Tribal permit decisions. *See U.S. v. FMC*, 2006 WL 544505 (D. Idaho 2006).

On appeal, the Ninth Circuit only addressed the third finding and reversed it, holding that the Tribes were merely incidental beneficiaries of the Consent Decree without standing to enforce its provisions. *U.S. v. FMC*, 531 F.3d 813 (9th Cir. 2008). The Circuit vacated this Court's decision and remanded the case with instructions to dismiss the action. *Id.* at 824. At the conclusion of its decision, the Circuit noted that FMC had "began the process of applying for tribal permits, which is the main relief that the Tribes have sought in this action" and that FMC's counsel during oral argument "represented to the court that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion." *Id.* at 824.

Initial Proceedings Before the Tribal Courts

FMC's application was granted by the Tribes' Land Use Policy Commission (LUPC) on the condition that FMC either resume paying the $1.5 million fee or pay a much higher fee based on the weight of the material stored in the ponds. FMC appealed that decision to the Fort Hall Business Council (FHBC), which affirmed the LUPC decision. FMC appealed the FHBC decision to the Shoshone-Bannock Tribal Court.

The Tribal Court issued two decisions. The first, issued on November 13, 2007, held that FMC was subject to Tribal jurisdiction, and the decision also dismissed the Tribes' breach of contract and air quality permit counterclaims. The second, issued on May 21, 2008, held that (1) FMC was required to obtain a Tribal Building Permit, but the Tribes could not impose a $3000 fee for that permit; (2) FMC was not required to obtain a special use permit; (3) the 1998 Agreement between the parties had not been incorporated into a tribal ordinance; and (4) the Tribes could not impose the $1.5 million permit fee because it had not been approved by the Secretary of the Interior under the Tribal Constitution.

The Tribes appealed that decision to the Tribal Appellate Court, and FMC cross-appealed. The three-judge panel for the Tribal Appellate Court consisted of Judges Gabourie, Pearson, and Silak. About three months before reaching any decision, but while the case was pending before them, Judge Gabourie and Pearson spoke at a conference on tribal courts held at the University of Idaho College of Law. The conference, held on March 23, 2012, was attended by

attorneys and members of the public, and was videotaped.

In their remarks, both Judges asserted that it was important for Tribes to obtain as much jurisdiction and sovereignty as possible, and explained how tribal appellate judges could issue decisions to achieve this goal for tribes. They criticized many of the principal United States Supreme Court decisions regarding tribal jurisdiction, labeling the *Montana* decision as "murderous to Indian tribes." *See* 006580. They were similarly critical of other Supreme Court decisions. Judge Gabourie told the audience that the tribal "appellate courts have got to step in" and "be sure to protect the tribe." 006599. They explained that the way to avoid "bad decisions" was for the tribal appellate courts to ensure that the record would support any decision on appeal through the federal courts. *Id.*

Judge Gabourie also made comments about the pollution left behind by companies who operated within reservation boundaries:

> You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and then the mining company or whatever, manufacturing company, disappears. They leave, you know. They've – they've either dug everything they could, and the then ground is disturbed, sometimes polluted beyond repair. And you sit as a – as an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself, you know, We know that

> the – there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it. And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses. You need chemists and whatever to get out of testifying. It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."

See 006598.

Judge Pearson made similar comments:

> If you're a law student and you're going to practice law, as well as if you're a judge and you're going to be hearing cases, you know where – companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they go out of business. And they leave you just sitting. And you need to know what you can do as you're sitting as a judge with those cases coming toward you.

See 006605-06.

About three months later, on June 26, 2012, Judges Gabourie, Pearson, and Silak issued an opinion holding that (1) the Tribes have jurisdiction under the first *Montana* exception to require FMC to obtain a waste storage permit and pay the annual fee; (2) Tribal ordinances (the Land Use Policy Ordinance and the Hazardous Waste Management Act (HWMA)) independently authorized the imposition of the waste storage permit fee on FMC; (3) the Tribal Court erred in dismissing the Tribes' air quality and breach of contract counterclaims without permitting discovery,

and in failing to consider whether the Tribes have jurisdiction over FMC under the second *Montana* exception.

In April of 2013, Judges Gabourie and Pearson were replaced on the panel with Judges McDermott and Herzog. Judge Silak—a former Justice of the Idaho Supreme Court—remained on the panel. Shortly thereafter, on May 6, 2013, FMC filed a brief with the Tribal Appellate Court, asking it to reconsider the rulings of the prior panel, and arguing that if the new panel agreed with those rulings, it should then conclude the proceedings; but that if the new panel did not agree with those rulings, it should vacate the rulings of the prior panel and proceed anew. FMC supported this request by asserting that it "ha[d] obtained new evidence regarding public statements made by two of the judges [Judges Gabourie and Pearson] from the prior appellate panel" at the conference held on March 23, 2012, which FMC claimed showed that those judges were biased.

On May 28, 2013, the new panel reconsidered and reaffirmed the prior panel's determinations. The new panel also decided to hold an evidentiary hearing to resolve whether the second *Montana* exception applied, and granted the parties a period of discovery on that issue.

Tribal Appellate Court Evidentiary Hearing

An evidentiary hearing was held from April 1 through April 15, 2014, with the Tribes and FMC presenting witness testimony, documentary evidence, and legal arguments regarding the second *Montana* exception. To summarize, the Tribes' evidence showed the serious toxicity of the stored waste and

the uncertainty over its geographic scope, while FMC's evidence highlighted the EPA's containment program, and showed that the agency's extensive testing and monitoring revealed no actual physical harm to humans and no measurable contamination of air or water to this point.

For example, the Tribes' evidence identified components of FMC's stored waste, including the following: (1) elemental phosphorus that leaked into the subsurface soil during production; (2) elemental phosphorus and chemical byproducts from the phosphorus production process suspended in contaminated water that are contained in ponds on the site; (3) phosphine gas produced by elemental phosphorus; (4) contaminated rail cars buried at the site that were used in the transport of elemental phosphorus; (5) contaminated groundwater containing arsenic and phosphorus that seeped into the groundwater from other sources of contamination on the site; and (6) millions of tons of slag that contains radioactive materials which emit gamma radiation in excess of EPA's human health safety standards.

Testimony showed that the elemental phosphorus contained in the soil and containment ponds is reactive, meaning that it will burst into flames when exposed to oxygen. This reaction also produces numerous chemical byproducts, which react to form phosphoric acid aerosols. The phosphorus itself is toxic when ingested, inhaled or absorbed, and will remain reactive for thousands of years. When exposed to water, elemental phosphorus produces phosphine gas, which is harmful and even deadly to humans at certain levels; indeed, it is the active ingredient in some poisons.

The Idaho Department of Health and Welfare evaluated an EPA air sample and notified the EPA that phosphine gas being released from a pond on FMC' s property was an urgent public health hazard to the health of people breathing the air in the proximity of Pond 15S, and that breathing the air for just a few seconds could cause measurable harm and could be lethal. The EPA responded to that notice and remedied the situation.

The EPA estimates that there are as much as 16,000 tons of elemental phosphorus in the ground, contaminating approximately 780,000 cubic yards of soil weighing approximately 1 million tons. But the EPA described as "significant unknowns" the "horizontal and vertical gradients in the concentrations of elemental phosphorous, the total mass of elemental phosphorous, and the form of elemental phosphorous in the soil." *See* 008543.

The Tribes' evidence showed that in 1964, FMC buried approximately twenty-one tanker rail cars on the FMC site. The tankers contained elemental phosphorus sludge, and instead of requiring workers to undertake the dangerous work of cleaning up this toxic material, FMC simply buried the rail cars, covering them with clay and then with radioactive slag. The evidence indicates the tankers contained from 200 to 2,000 tons of elemental phosphorus sludge, 10-25% of which remained in each of the tankers at the time they were buried. The level of corrosion of the tankers is unknown and it is possible that they either have or will corrode to the point of leakage from phosphoric acid produced by the phosphorus. EPA decided that the area where the tankers were buried should be capped and that no efforts to remove the tankers should be undertaken,

but it is undisputed that no remedial action to address this threat has been implemented.

Arsenic and phosphorus from the site are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms. This negatively affects the ecosystem and subsistence fishing, hunting and gathering by tribal members at the River, as well as the Tribes' ability to use this important resource as it has been historically used for cultural practices, including the Sundance. The EPA's Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello Idaho (2012) ("IRODA") calls for a decades-long regime of ground water monitoring and treatment to minimize risks. However, such intervention programs are in the design phase only, and have not yet been implemented. Uncontroverted evidence at trial showed that Tribal members' ability to take part in tribal cultural practices on the River has been compromised by FMC's contributions to contamination of the River. Although FMC tried to show that none of the groundwater seeping into the Portneuf is above EPA levels of concern, Rob Hartman's testimony did show that groundwater extraction systems have not been put into place at the FMC site, and that arsenic and phosphorus are actually traveling to the Portneuf River.

Although the EPA has been involved at this site since 1990, remedial actions chosen by the EPA have not been implemented. Many of EPA's proposed remedial actions are still in design phase only, and the threat at the site remains today. EPA's IRODA is itself only an interim measure, and according to the IRODA, a final Record of Decision will not be

available for five to ten years. In any event, EPA's plans are containment plans, which would keep the threatening hazardous wastes on fee land for the indefinite future.

FMC, on the other hand, presented evidence that EPA's containment program includes: (a) installation of engineered evapotranspiration ("ET") soil barrier caps over areas on site that are potential sources of groundwater contamination; (b) installation of engineered "gamma" soil barrier caps at areas on site containing slag fill and ore; (c) installation of a groundwater extraction and treatment system that will capture and contain all contaminated groundwater at the FMC Property fence line, and treat the extracted groundwater; and (d) long-term monitoring and maintenance of the soil caps and groundwater extraction and treatment system.

In addition, FMC produced evidence that between 1977 and 2000, independent epidemiologists from the University of Minnesota conducted multiple epidemiological human health studies of FMC's Pocatello Plant workers. Those studies establish that long-term exposure to the contaminants at the FMC Property did not cause any adverse health impacts to those workers whose exposures would be many times that of community members outside the Plant boundaries. *See* 262733; 262766; 262897. Similarly, in 2006, researchers from the Oregon Health & Science University and the Northwest Portland Area Indian Health Board conducted an independent human health study of the Tribal community. *See* 289037. The Tribes participated in the design and implementation of that study. *See* 289038. That study failed to find adverse health impacts to Tribal

members that could be attributed to contamination at the FMC Property. *See* 289053.

FMC presented evidence from the EPA that contamination at the FMC site has not affected water quality off-site. The EPA concluded that: (a) no off-site drinking water wells are contaminated from any substances emanating from the FMC Property (008022); (b) sampling conducted in 2012 and 2013 establishes that the off-site groundwater meets federal drinking water quality criteria (008027); (c) the Simplot plant is the source of 95% of total arsenic and more than 95% of the total phosphorus mass loading to EMF Superfund Site-impacted groundwater flowing into the Portneuf River (id.); (d) since 2001, Simplot is the sole source of fluoride emissions (007984); (e) measurements of the radioactivity establish that radium-226 levels are not a risk to human health or the environment (008069); and (f) Tribal members have not been exposed to phosphine gas, as shown by approximately 40,000 measurements of phosphine gas emissions taken since 2008 that show no detections of phosphine (0.00 parts per million) at the FMC property fence line (008151).

The Agency for Toxic Substances and Disease Registry ("ATSDR") evaluated air quality impacts from the site in 2006 after the shutdown of the FMC Pocatello Plant. *See* 285232. The ATSDR found that the Superfund Site currently presents no public health hazard. *See* 285240.

To summarize, neither side directly contradicted the other. The Tribes' evidence established without rebuttal that the waste is radioactive, carcinogenic, poisonous, and likely to remain toxic—and on the site—for decades. FMC's evidence established

without rebuttal that despite the toxicity of the waste, no measurable harm had yet occurred to humans or water quality, and the EPA's containment program would prevent any future harm.

Analyzing this evidence, the Tribal Appellate Court ultimately concluded that FMC's storage of millions of tons of toxic waste posed a serious threat, and has a direct effect on, "the political integrity, the economic security, or the health or welfare of the [Tribes]." *See* 008552. Consequently, the Court held that *Montana's* second exception applied, and that the Tribes had jurisdiction to require FMC to obtain permits for the remediation work.

Based on this ruling, the Appellate Court issued a Final Judgment against FMC, dated May 16, 2014, finding FMC liable for a permit fee of $1.5 million a year. The Judgment charges FMC with $19,500,000 in permit fees for the years 2002 up through the date of the Judgment in 2014, $928,220.50 in attorneys' fees, and $91,097.91 in costs, for a total of $20,519,318.41. Both sides agree that the Judgment imposes the $1.5 million fee in perpetuity with no ending date established.

FMC responded to this Judgment by filing this lawsuit in November 2014, requesting that this Court deny enforcement of the Judgment issued by the Tribal Appellate Court. The Tribes counterclaimed for an Order allowing them to enforce the Judgment.

LEGAL STANDARDS

The recognition and enforcement of tribal judgments in federal court rests upon principles of comity, which is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Wilson v. Marchington*,

127 F.3d 805, 809 (9th Cir. 1997) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)). As a general policy, "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Id.* At its core, comity involves a balancing of interests. "[I]t is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Id.* at 810. *Wilson* holds that "comity still affords the best general analytical framework for recognizing tribal judgments."

As a "general principle, federal courts should recognize and enforce tribal judgments." *Id.* However, federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law. *Id.* In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought. *Id.* "Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal

court." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903-04 (9th Cir. 2002).

FMC has challenged the Tribal Judgment on jurisdictional and due process grounds. The Court reviews the Tribal Courts' legal rulings *de novo*. *See FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (holding that in reviewing Tribal court judgments, "[f]ederal legal questions should therefore be reviewed *de novo*"). The Tribes have the burden of proving jurisdiction, while FMC has the burden of proving a lack of due process. *See generally Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995).[1]

The Court will turn first to the jurisdictional challenge.

ANALYSIS

First *Montana* Exception

The pending motions raise the issue whether the Tribes had jurisdiction to impose a $1.5 million fine on FMC for actions taken on land owned in fee by FMC within Reservation boundaries. In *Montana v. U.S*, 450 U.S. 544 (1981), the Supreme Court held that with two exceptions, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" on privately-owned fee lands within a reservation. *Id.* at 565. The

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[1] *Pahlavi* discusses but does not resolve the burden of proof on due process issues. But the discussion in that case clearly leans toward finding that the party claiming a lack of due process has the burden of proving that defense. *Id.* at 1409 (quoting with approval a leading federal court treatise so finding, and commenting that "a strong argument can be made that a claimed lack of due process should be treated as a defense").

Tribes have the burden of proving that one of the two exceptions apply here. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

The first exception provides that "a tribe may regulate through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565-66. In a decision issued 16 years after *Montana*, the Supreme Court described the scope of the first exception by explaining that what the Court "had in mind" was contained in a list of cases cited in *Montana*, including *Morris v. Hitchcock*, 194 U.S. 384 (1904), a case upholding a tribal permit tax on nonmember-owned livestock within boundaries of a reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997).

In the *Morris* case, the Chickasaw Nation required that any non-member grazing cattle on Reservation land must obtain a permit and pay a permit tax of 25 cents per head. Cattle owners who had contracts with individual Chickasaw Nation members to graze cattle on their land failed to pay the permit tax and were threatened with seizure of their cattle. The cattle owners responded by filing suit, claiming the Chickasaw Nation had no jurisdiction to impose the tax on non-Tribal members. The Supreme Court in *Morris* upheld the right of the Chickasaw Nation to impose the tax. More than ninety years later, the Supreme Court in *Strate* confirmed the correctness of that ruling by pointing to the consensual relationship between the cattle owners and individual members of the Chickasaw Nation as satisfying the consensual relationship prong of *Montana*.

The same type of consensual relationship exists here. In the series of letters discussed above, FMC agreed to obtain a Tribal permit to do the work necessary to comply with the Consent Decree. FMC then affirmed its consensual relationship with the Tribes by signing the Consent Decree, which required FMC to obtain Tribal permits. FMC then cited its consensual relationship with the Tribes to this Court and the Ninth Circuit as part of its argument that the Decree should be approved.

FMC complains that this agreement was a product of duress, but the Tribes only took advantage of their bargaining leverage, a long-standing practice in the sharp-elbowed corporate world in which FMC does business every day. FMC had a strong desire to obtain a Consent Decree from the EPA, but the EPA was insisting that FMC obtain Tribal permits. The Tribes, recognizing their superior bargaining position, used that leverage to extract a high price for the permits. FMC paid the price because the Tribal permit was a key component to obtaining the Consent Decree, which in turn was worth the price of the Tribal permit. This was a simple business deal, not the product of illegal duress or coercion. FMC cites no case law holding that *Montana's* exception does not apply when the consensual relationship is formed begrudgingly or by one party taking advantage of bargaining leverage.

FMC argues at length that it never agreed to submit to Tribal jurisdiction. This argument is a red herring. As *Montana, Strate* and *Morris* make clear, it is the consensual relationship that triggers Tribal jurisdiction, regardless of whether a separate agreement to submit to jurisdiction exists. Even if a party like FMC could preserve an objection to

jurisdiction at the same time it entered into a consensual relationship—a theory without legal support in FMC's briefing—FMC never made that objection before entering into the consensual relationship. Finally, even if the red herring argument is pursued, the exchange of letters discussed above shows that FMC agreed to submit to Tribal Court jurisdiction to obtain the permit they so badly wanted and needed.

For all of these reasons, the Court finds that the Tribal Courts had jurisdiction under *Montana's* first exception to resolve disputes over the Tribal permit FMC agreed to obtain authorizing it to dispose and store hazardous waste within Reservation boundaries.

Second *Montana* Exception

Tribal jurisdiction exists under the second *Montana* exception when "the conduct of non-Indians on fee lands within its reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. For a tribe to have authority over nonmember conduct, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 341 (2008). Thus, "*Montana's* second exception does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013). Rather, the challenged conduct must be so severe as to "fairly be called catastrophic for tribal self-government." *Plains Commerce*, 554

U.S. at 341 (internal quotation and citation omitted). The fine imposed by the Tribal Judgment must be "necessary to avert catastrophe." *Evans, supra* at 1306 n.8. (9th Cir. 2013).

Here, the EPA has taken substantial steps to contain the toxic waste and prevent harm. But the threat remains: The EPA itself found in 2013 that the toxic waste "may constitute an imminent and substantial endangerment to public health or welfare or the environment." *See 2013 Unilateral Administrative Order for Remedial Design and Remedial Action No. CERLCA-10-2013-0116 (June 10, 2013).* Because the EPA intends to leave the waste on the site indefinitely, and because the waste's toxicity has such a long life – decades, if not longer – there is a real risk that no matter how well its containment system is designed, the system may fail.

That risk becomes much less abstract when the containment system's ability to contain three lethal gases—phosphine, hydrogen cyanide, and hydrogen sulfide—is examined. According to the EPA, each of these gases is "immediately dangerous to life and health" at different concentrations. *See EPA Unilateral Administrative Order for Removal Action* at ¶¶ 20-23. In 1999, the EPA ordered FMC to close and cap pond 16S, located entirely within Reservation boundaries, and in 2005 FMC certified that it had capped and closed the pond in accordance with the EPA-approved closure plan. *Id.* at ¶ 12 at 332332. But a year later, in 2006, monitoring revealed that dangerous levels of phosphine gas, hydrogen cyanide gas, and hydrogen sulfide gas were "being generated within the cap at pond 16S." *Id.* at ¶ 19. In addition, air samples showed that hydrogen sulfide gas had

escaped from the pond and was being carried downwind. *Id.* In a later report, the EPA found that in 2005, 2006, 2007, and 2009, levels of phosphine gas in the surrounding air were high enough to require workers in the area to either delay work or leave the area for their safety. *See EPA Unilateral Administrative Order for Removal Action* at ¶¶ 17-23 at 5707-09.

It is true that these releases were discovered and stopped, and that there is no evidence that anyone was harmed. At the same time, however, these EPA reports demonstrate that the waste sites are not reservoirs of passive liquid that can be contained with a simple dam. Instead, these sites are generating lethal gases that accumulate under pressure beneath the pond covers. In other words, they pose a constant and deadly threat to the Tribes, a real risk of catastrophic consequences should containment fail. And despite the best efforts of the EPA, there have been releases of these lethal gases. Indeed the EPA itself has concluded in 2010 that "[c]oncentrations of phosphine, hydrogen cyanide and hydrogen sulfide gas accumulating within the Pond 16S cap *and being released* may present an imminent and substantial endangerment to human health and the environment." *Id.* at 19 (emphasis added). In even broader terms, the EPA concluded in 2013 that the waste sites "may constitute an imminent and substantial endangerment to public health or welfare or the environment." *See EPA Unilateral Administrative Order for Remedial Design and Remedial Action (June 10, 2013).*

The Tribal Appellate Court heard testimony from a former EPA official who worked at the agency for 36 years, David Reisman, who concluded that these

lethal gases were escaping from the waste sites and that the EPA's monitoring procedures were not sufficient to detect all the releases. *See Trial Transcript, Vol II at 331-33.* It is no wonder that the Tribal Appellate Court concluded that "[n]o evidence has been offered to rebut the conclusion that if any of the containment efforts fail for any reason, escape of the toxic waste or any of its by-products at certain levels could prove catastrophic to the tribe, its members, its environment, its health, safety and welfare." *See* 8547.

This dangerous threat can only be contained, not removed or treated. The EPA has concluded there is "no technologies that could reliably, safely, and effectively be utilized to excavate and treat the elemental phosphorus-contaminated wastes" at the site. *See 2012 Interim Record of Decision Amendment* at p. 78. Removal would involve excavating 780,000 yards of contaminated soil, much of it "at a significant depth (up to 85 feet bgs [below ground surface]) and unevenly distributed throughout the soil column." *Id.* The EPA concluded that safe treatment and removal was not technologically feasible, but even if it was, it would cost $4.7 billion, an amount one hundred times greater than the cost of containment ($47 million). *Id.* at pp. 65, 83-84.

And so there it sits. For how long? The EPA calculated its cost – the $47 million figure – by estimating that containment must continue for at least 30 years. *Id.* at p. 65 (also estimating that treating all the waste would take up to 44 years).

In *Evans*, the Circuit held that Tribes failed to show that a catastrophic risk was posed by the construction of a single-family house that might cause groundwater contamination, and that the Tribes

therefore lacked jurisdiction over the home builder under the second *Montana* exception. *Evans*, 736 F.3d at 1306. By comparison, the threat in this case is many levels of magnitude greater than the threat in *Evans*. FMC's waste is radioactive, carcinogenic, poisonous, and massive in size. It is so toxic that there is no safe way to remove it, ensuring that it will remain on the Reservation for decades. While the EPA's containment program is extensive, it has not prevented lethal phosphine gas from escaping. Moreover, the EPA cannot say how deep and widespread the deadly plume of phosphorus extends underground, beyond estimating that it already extends 85 feet below the surface.

Under the standard discussed in *Evans*, the record shows conclusively that a failure by the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the health and welfare of the Tribes. This is the type of threat that falls within *Montana's* second exception.

Due Process

Having found that the Tribal Appellate Court had jurisdiction to resolve disputes over FMC's hazardous waste permits, the Court turns next to FMC's argument that it was denied due process in the Tribal Courts. The governing legal standard was set forth in *Marchington*, 127 F.3d at 811:

> Due process, as that term is employed in comity, . . . [requires] that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in

> the tribal court or in the system of governing laws.

FMC argues that the Tribal Appellate Court was not impartial, citing the statements made by Judges Gabourie and Pearson, discussed above, showing that they were biased in favor of the Tribes. But FMC asked the Tribal Appellate Court to reconsider the ruling by those Judges, and that was done by a new panel that did not include either Judge Gabourie or Judge Pearson. So even if the prior panel was biased, a new panel was convened that independently came to the same conclusion, removing any due process concern.

That new panel was comprised of a former Justice on the Idaho Supreme Court (Judge Cathy Silak), a retired Idaho District Court Judge (Judge Peter McDermott), and a practicing attorney (Vern Herzog Jr.). After that decision was rendered, John Traylor replaced Cathy Silak on the panel that resolved the issue of the second *Montana* exception following an evidentiary hearing. Judge Traylor is a licensed attorney, was a former Trial Court Administrator for both the Tribal Courts and the Ada County State Courts in Idaho, and served as Director of Planning and Zoning for Ada County. He currently does private consulting work.

Each of these Judges has had a long and distinguished career in Idaho. There is no evidence whatsoever that they were biased in favor of the Tribes or against FMC. There is also no evidence that these Judges were stooges for the Tribal Council. The Judges all have careers that are independent of any reliance on the Tribal Council, and there is nothing in

the record suggesting that the Council had any influence over them.

After examining the entire record, the Court finds that FMC received a full and fair trial before an impartial Tribal Appellate Court, and can find no prejudice there or in the Tribal laws.

Comity Analysis

From the discussion above, the Tribes had jurisdiction under both the first and second *Montana* exceptions to resolve disputes over the permits issued to FMC allowing it to store toxic wastes within the Reservation boundaries. The next issue to resolve is whether the annual permit fee is so prejudicial or unfair to FMC that it cannot be enforced under the comity analysis in *Marchington*.

The scope of the Tribes jurisdiction depends on its source. If the source is the second *Montana* exception, the permit fee must have some relationship to the Tribe's obligation to protect the health and safety of Tribal members. Here, the EPA is undertaking a substantial role in protecting the Tribes. From the discussion above, the EPA's containment program is not fail-safe, and the Tribes are reasonable in their desire to provide an additional level of protection to supplement the EPA's program. Having jurisdiction under the second *Montana* exception, the Tribes are authorized to assess a permit fee that has some nexus to the costs of supplementing the EPA's program to fully protect the health and safety of Tribal members. Yet the Tribes have never explained why an annual fee of $1.5 million is necessary to provide that supplemental protection. For example, what are the monitoring or containment costs that the Tribes expect to incur to shore up the weak points in the

EPA's program? There may be legitimate reasons justifying the Judgment amount, but they have never been explained, and FMC has never had an opportunity to address them. Under *Marchington's* comity analysis, it would be unfairly prejudicial to enforce the permit fee imposed by the Tribal Appellate Court under the second *Montana* exception.

This conclusion changes when the Judgment is examined under the first *Montana* exception. Under *Montana's* first exception, Tribal jurisdiction is based on the consensual relationship between FMC and the Tribes. FMC agreed to obtain a use permit under the Amendments to Chapter V of the Fort Hall Land Use Operative Policy Guidelines, and pay a $1.5 million annual fee for that permit. What was FMC consenting to under those regulations? FMC agreed to obtain a permit to "store" hazardous waste "which may remain at the site for a perpetual period of time." *See Chapter V § 9-1(1)(A)(xiii).* Moreover, as discussed above, FMC agreed that its obligation would extend beyond three identified ponds and encompass all wastes at the plant.

Thus, FMC agreed to pay the annual permit fee for as long as it stored the waste on the site. The EPA has estimated that it will spend $47 million over 30 years to clean up FMC's mess. That is just over $1.5 million a year, about the same sum as FMC agreed to pay, an indication that the $1.5 million sum is neither exorbitant nor unfair.

FMC argues that its obligation to pay the fee should end when it closed its plant, but there is nothing in the negotiations or series of letters that conditions the annual fee on the FMC plant being operational. This absence was certainly noticed (or should have been noticed) by FMC's attorneys, but

FMC never attempted to negotiate any modifications to add such a condition. FMC was anxious to obtain the permit along with the Consent Decree, and so the inevitable delays that would result from negotiations over an expiration date would have been unacceptable to FMC. After all, the Consent Decree allowed FMC to dump the toxic mess it had created in the EPA's lap by paying a small fine of $11.9 million along with a few million dollars in construction commitments. That was a sweetheart deal and FMC was desperate to grab it. FMC's arguments that its cadre of attorneys had no idea that they were agreeing to a permit fee with no expiration date is ludicrous.

For all of these reasons, the Judgment passes *Marchington's* comity analysis under *Montana's* first exception.

CONCLUSION

Based on the analysis above, the Court makes the following findings as a matter of law: (1) The Tribes have jurisdiction over FMC under *Montana's* first and second exceptions to impose a requirement that FMC obtain a permit to store waste within the Reservation and charge a fee for that permit; (2) The Tribal judicial process generally, and the Tribal Appellate Court Judgment specifically, did not violate FMC's due process rights; (3) Under *Montana's* first exception, the Tribal Appellate Court properly exercised its jurisdiction to impose a $1.5 million annual permit fee for as long as the hazardous waste is stored within the Reservation; (4) Under *Montana's* second exception, the Tribal Appellate Court failed to properly exercise its jurisdiction when it did not explain why $1.5 million was needed each year to

protect against the threat posed by FMC's storage of hazardous waste within the Reservation.

Based on these findings, the Court will (1) grant the Tribes' motion to enforce the Judgment under *Montana's* first exception; (2) grant in part the Tribes' motion to enforce the Judgment under *Montana's* second exception, finding that the Tribes had jurisdiction under *Montana's* second exception, but refusing to enforce the Judgment on this ground because the Tribes failed to explain why $1.5 million was needed annually; (3) grant in part the Tribes' motion for summary judgment on the due process and enforcement issues, finding no due process violation, and finding that the Judgment shall be enforced under *Montana's* first exception but not the second exception; and (4) deny FMC's motion for declaratory judgment and an injunction against enforcing the Judgment

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED that the Tribes' motion to enforce the Judgment under *Montana's* first exception (docket no. 64) is GRANTED.

IT IS FURTHER ORDERED, that the motion to enforce the Judgment under *Montana's* second exception (docket no. 65) is GRANTED IN PART AND DENIED IN PART. It is granted to the extent it seeks a ruling that the Tribes had jurisdiction over FMC under *Montana's* second exception to impose an annual permit fee to store hazardous waste within the Reservation, but is denied to the extent it seeks to

enforce the Judgment of an annual permit fee of $1.5 million, for the reasons discussed above.

IT IS FURTHER ORDERED, that the motion for summary judgment on due process and to enforce judgment (docket no. 66) is GRANTED IN PART AND DENIED IN PART. It is granted to the extent it seeks a ruling that there was no due process violation, that jurisdiction was proper under both *Montana* exceptions, and that the Judgment is enforceable under *Montana's* first exception, but is denied to the extent it seeks a ruling that the Judgment is enforceable under *Montana's* second exception.

IT IS FURTHER ORDERED, that FMC's motion for declaratory judgment and permanent injunction (docket no. 67) is DENIED.

IT IS FURTHER ORDERED, that the Court will issue a separate Judgment as required by Rule 58(a).

DATED: September 28, 2017

[seal omitted]

s/ *B. Lynn Winmill*
B. Lynn Winmill
Chief Judge
United States District Court

FILED
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DWYER, CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FMC CORPORATION, Plaintiff-Appellant, v. SHOSHONE-BANNOCK TRIBES, Defendant-Appellant.	No. 17-35840 D.C. No. 4:14-cv-00489-BLW District of Idaho, Pocatello **ORDER**
FMC CORPORATION, Plaintiff-Appellant, v. SHOSHONE-BANNOCK TRIBES, Defendant-Appellant.	No. 17-35865 D.C. No. 4:14-cv-00489-BLW District of Idaho, Pocatello

Before: HAWKINS and W. FLETCHER, Circuit Judges, and BURY,* District Judge.

Plaintiff-Appellant FMC Corporation filed a petition for rehearing en banc on November 29, 2019 (Dkt. Entry 74). Judge W. Fletcher voted to deny the

* The Honorable David C. Bury, United States District Judge for the District of Arizona, sitting by designation.

petition for rehearing en banc, and Judges Hawkins and Bury so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

IN THE SHOSHONE-BANNOCK TRIBAL COURT
OF APPEALS
FOR THE FORT HALL RESERVATION, IDAHO

SHOSHONE-BANNOCK TRIBES LAND USE DEPARTMENT AND FORT HALL BUSINESS COUNCIL, Appellants and Counterclaimants, VS. FMC CORPORATION, Respondents.	Case Nos. C-06-0069 C-07-0017 C-07-0035 **OPINION, ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Shoshone-Bannock Tribal Court Opinion of Hon. Peter McDermott, Hon. Vern E. Herzog, and Hon. John Traylor, dated April 15, 2014, before the Shoshone-Bannock Tribal Court of Appeals, submitted and argued April 1, 2014 to April 15, 2014.

Opinion by Justice TRAYLOR:

Appellants/Counterclaimants the Shoshone-Bannock Tribes Land Use Department and Fort Hall Business Council are represented by William F. Bacon, Esq., Shoshone-Bannock Tribes, Pocatello, Idaho, and Paul Echo Hawk of the law firm of Kilpatrick, Townsend & Stockton LLP, Seattle,

Washington. Respondent FMC Corporation is represented by Lee Radford of the law firm of Moffatt Thomas Barrett et al, of Idaho Falls, Idaho, and Ralph Palumbo, David Heineck, and Maureen Mitchell of the Summit Law Group, Seattle, Washington.

I. BACKGROUND AND PROCEDURAL HISTORY

This case revolves around a single issue. The Shoshone-Bannock Tribes wish to exercise civil jurisdiction for purposes of planning and zoning, and hazardous waste management regulation over on-reservation fee land owned by the defendant, FMC. Since the late 1940s, FMC Corporation (and any subsidiary or other registered name by which FMC operated, collectively referred to herein as "FMC") has engaged in the production, treatment, and storage of hazardous and non-hazardous waste, much of it entirely within the boundaries of the Fort Hall Reservation, as part of its production of elemental phosphorus. FMC continues to store over twenty-two million (22,000,000) tons of hazardous and non-hazardous waste within the Reservation boundaries to this day. This waste includes radiation-emitting slag, elemental phosphorus (also known by its chemical abbreviation, "P4"), and a wide range of other heavy metals and other contaminants of concern. The federal Environmental Protection Agency ("EPA") has used its authority under CERCLA, 42 U.S.C. § 9601 *et seq.,* to declare FMC's elemental phosphorus plant as a national priority list superfund site. It monitors other contaminated parts of the FMC plant under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.

The Shoshone-Bannock Tribes Land Use Policy Commission ("LUPC") regulates waste activity within the boundaries of the Fort Hall Reservation through enforcement of the Tribes' Land Use Policy Ordinance ("LUPO") and Land Use Policy Guidelines ("Guidelines"). The Tribes have also enacted a number of other ordinances and tribal laws pursuant to their sovereign authority to protect the health and welfare of the Tribal members and Reservation natural resources, as shown by the evidence submitted at trial. On February 8, 2007, the LUPC issued a letter to FMC setting an annual $1.5 million special use permit fee for FMC's storage of hazardous waste on the reservation pursuant to the LUPO. On March 19, 2007, FMC posted a bond in the agreed upon amount of $1.5 million and appealed the LUPC's decision to the Fort Hall Business Council ("FHBC"). After accepting briefs from the parties and hearing oral argument on May 10, 2007, the FHBC affirmed the LUPC's decision on June 14, 2007. On June 29, 2007, FMC filed an appeal of the FHBC June 14, 2007 decision in Tribal Court. On February 22, 2008, FMC filed another appeal challenging the FHBC decisions applying tribal regulatory jurisdiction to it. On May 21, 2008, the Tribal Court held that the $1.5 million fee could not be imposed on FMC. On May 28, 2008, the Tribes filed an Appeal to the Tribal Court of Appeals, and on June 10, 2008, FMC filed a cross-appeal.

We note that on May 28, 2010 the Tribes filed an additional suit for the unpaid permit fees at issue in this case for the years 2007, 2008, 2009, and 2010. *See* Case No. C-10-0196. The parties filed a stipulation to stay that case pending outcome of the Court's decision in this case. Given the passage of

time during this case and in light of the applicable three (3) year tribal statute of limitations, the Tribes filed another case for unpaid fees covering the years from 2010 to 2013. *See* Case No. 2013-CV-OC-0214. The permit fee for 2014 is due on June 1, 2014. The issues in those cases are identical to the present case.

This Court held in June of 2012 that the Tribes have jurisdiction over FMC under the first exception of *Montana v. United States,* 450 U.S. 544 (1981), under which an Indian tribe may regulate, through taxation, licensing, or other means, the activities of non-Indians on fee land within the tribe's reservation who have entered into "consensual relationships with the tribe or its members . . . ." *Id.* at 565. The Tribes' jurisdiction under this exception was established in part by FMC's statement in an August 11, 1997 letter, sent to the Tribes when they first amended the LUPO to establish permitting fees for the storage of hazardous waste on the Reservation, in which FMC expressly consented to tribal permitting.

In the June of 2012 decision, the Court also ruled that the Tribal Court erred in not allowing the Tribes to present evidence to support the Tribes' argument that jurisdiction over FMC's waste storage activities on the Reservation is also supported by the second *Montana* exception, under which Indian tribes may regulate the conduct of non-Indians on fee land on the reservation that threatens or has some direct effect "on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. This Court held that the Tribes would be granted an evidentiary trial to present evidence on this issue. That trial was held before this Court from April 1, 2014 to April 15, 2014, at which the evidence presented was comprehensive. The Court listened to

the witnesses, considered all the evidence presented and gave all of it due consideration in reaching our decision. We find, based on the evidence summarized below in the findings of fact, that the Tribes have met their evidentiary burden of demonstrating that the second *Montana* exception has been met.

II. BURDEN OF PROOF

Appeals from the Shoshone-Bannock Tribal Trial Court are tried de novo on both questions of law and fact before the Tribal Court of Appeals. Shoshone-Bannock Law and Order Code, ch. 4 § 3. The standard of proof at any tribal civil trial is a preponderance of the evidence standard, under which an allegation is accepted as true if the evidence shows it is more likely than not to be true. *Id.* ch. 3 § 4.

To establish jurisdiction under the second *Montana* exception, the Tribes must demonstrate that the conduct of FMC on its fee land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. A tribe "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."[1]

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[1] We note that the Court's discussion of the second *Montana* exception in *Plains Commerce Bank* is *dicta.* The case involved the sale, by a non-Indian bank to non-Indians, of non-Indian fee land within a reservation. The Court distinguished tribal regulation of nonmember activity on non-Indian land from tribal regulation of the sale of non-Indian land, and found that the sale of such land was not "conduct" covered by the second *Montana* exception. 554 U.S. at 333-34, 341. By finding that *Montana* did not apply to the sale of non-Indian land, therefore, the Court's statements as to the *Montana* test are not a part of its holding.

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316,336 (2008). Under *Montana* tribes can take action to, for instance, mitigate on-reservation threats to the natural resources on which their members rely. *See, e.g., Bugenig v. Hoopa Valley Tribe,* 229 F.3d 1210, 1222 (9th Cir. 2000). Tribal jurisdiction under the second *Montana* exception may also exist concurrently with federal regulatory jurisdiction over a non-Indian's activities. *See South Dakota v. Bourland,* 508 U.S. 679, 695, 697-98 (1993) (remanding for review of bases for tribal jurisdiction, under *Montana,* over a flood control project regulated by the Army Corps of Engineers). As the Ninth Circuit held in *Montana v. EPA,* 137 F.3d 1135, 1141 (9th Cir. 1998), there is "no suggestion" in the *Montana* case law that "inherent [tribal] authority exists only when no other government can act."

III. FINDINGS OF FACT

1. The evidence presented at trial shows that the FMC's activities on its fee land have created an ongoing threat to the health, welfare and cultural practices of the Tribes and their members. EPA's regulatory involvement in the site emphasizes the severity of the threat, while the evidence shows that the agency's containment plan, by design, leaves the threat in place for generations to come. The evidence at trial also shows that FMC's waste creation and storage have some direct effect on the political integrity, economic security, or the health and welfare of the Tribes.

2. The evidence of FMC's activities on the Reservation shows an ongoing and extensive threat to human health. FMC created and continues to store millions of tons of toxic waste on its fee land within

Reservation boundaries. As described in EPA's Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho (2012) ("IRODA") at 7-9, that waste is present on the site in the following forms: elemental phosphorus that leaked into the subsurface soil during production; elemental phosphorus and chemical byproducts from the phosphorus production process suspended in contaminated water that are contained in ponds on the site; phosphine gas produced by elemental phosphorus; contaminated rail cars buried at the site that were used in the transport of elemental phosphorus; and contaminated groundwater containing arsenic and phosphorus that seeped into the groundwater from other sources of contamination on the site.[2] The site was also filled and graded using millions of tons of slag that contains radioactive materials which emit gamma radiation in excess of EPA's human health safety standards. *Id.*

3. The FMC production site on the Reservation was one of the major producers of elemental phosphorus in the world. IRODA at 83. The contamination on the FMC site is unprecedented, in the sense of scale, but also in observers' inability to determine its scope: "There are significant unknowns beyond the actual volume of contaminated soils, including the horizontal and vertical gradients in the concentrations of elemental phosphorous, the total mass of elemental phosphorous, and the form of elemental phosphorous in the soil." *Id.* EPA estimates that there are as much as 16,000 tons of elemental phosphorus in the ground, contaminating

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[2] This and all of the other EPA's conclusions in the IRODA were uncontested by FMC at trial.

approximately 780,000 cubic yards of soil weighing approximately 1 million tons. *Id.* at 21, 78, & tbl. 2.

4. The elemental phosphorus in the soil and in containment ponds at FMC's land is reactive, meaning that it will burst into flames when exposed to oxygen. *Id.* at 77. This reaction also produces numerous chemical byproducts, which react to form phosphoric acid aerosols. *Id.* The phosphorus itself is toxic when ingested, inhaled or absorbed. *Id.* at 78. The threat of elemental phosphorus was vividly described by Claudeo Bronco, who testified that he witnessed ducks spontaneously ignite as they took off from FMC's phosphorus containment ponds. Final Statement of Decision (filed April 15, 2014) ("SOD") at 18. FMC did not cross-examine the witness on this issue; although its attorneys clarified that these ducks were incinerated by an uncapped pond, this evidence still corroborates the potency of the threat posed by elemental phosphorus at the site. That phosphorus will remain reactive for thousands of years.

5. When exposed to water, elemental phosphorus produces phosphine gas, which is harmful and even deadly to humans at certain levels; indeed, it is the active ingredient in some poisons. IRODA at 77. In June 2010, the evidence shows, the Idaho Department of Health and Welfare evaluated an EPA air sample and notified the EPA that phosphine gas being released from a pond on FMC's property is

> an urgent public health hazard to the health of people breathing the air in the proximity of Pond 15S, including workers, visitors to the pond area and any potential trespassers in the pond area . . . breathing the air for just a few

> seconds could cause measurable harm and could be lethal . . . . People near the Pond 15S perimeter and immediately downwind of [15S] could also be breathing phosphine at levels that could cause respiratory tract irritation if exposed for 8 hours a day . . . .

SOD at 21. There are approximately 23 waste storage ponds on the site, some emitting these gases, along with hydrogen sulfide and hydrogen cyanide, both of which are also toxic. *See* Unilateral Administrative Order for Removal Actions, No. CERCLA-10-2007-0051 at 10-12 (Dec. 14, 2006).

6. FMC admitted that in 1964 it buried approximately twenty-one tanker rail cars on the FMC site, as shown by the Gordon Scherbel memo. SOD at 10. FMC chose to bury the tankers because they were clearly dangerous, as shown by Defense Exhibit# 5133. The tankers were used for shipping hazardous P4 sludge. *Id.* Because of the danger to employees who were charged with cleaning remaining sludge out of the tankers to prepare them for reuse, FMC buried the tankers without cleaning them. *Id.* The evidence indicates the tankers contained from 200 to 2,000 tons of elemental phosphorus sludge, 10-25% of which remained in each of the tankers at the time they were buried. *Id.* at 10-11. The tankers were buried, covered with clay and then with radioactive slag. *Id.* at 10. The level of corrosion of the tankers is unknown and it is possible that they either have or will corrode to the point of leakage from phosphoric acid produced by the phosphorus. *Id.* One of FMC's witnesses, Rob Hartman, testified that the method of burial of these tankers would not meet today's standards for burial of hazardous waste. *Id.* at 11. EPA decided that the area where the tankers were

buried should be capped and that no efforts to remove the tankers should be undertaken, but it is undisputed that no remedial action to address this threat has been implemented. *Id.* Weighing this evidence in light of the EPA's involvement at the site and uncontroverted evidence that FMC was not entirely forthcoming in its disclosure of the buried tankers, SOD at 10, the Court finds it to be true.

7. Arsenic and phosphorus from the site are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms. SOD at 12. This negatively affects the ecosystem and subsistence fishing, hunting and gathering by tribal members at the River, as well as the Tribes' ability to use this important resource as it has been historically used for cultural practices, including the Sundance. *Id.* at 16, 29. The EPA's IRODA calls for a decades-long regime of ground water monitoring and treatment to minimize risks. IRODA at 20. However, such intervention programs are in the design phase only, and have not yet been implemented. Uncontroverted evidence at trial showed that Tribal members' ability to take part in tribal cultural practices on the River has been compromised by FMC's contributions to contamination of the River. SOD at 16, 29. Although FMC tried to show that none of the groundwater seeping into the Portneuf is above EPA levels of concern, Rob Hartman's testimony did show that groundwater extraction systems have not been put into place at the FMC site, and that arsenic and phosphorus are actually traveling to the Portneuf River. *Id.* at 12.

8. FMC does not challenge that these materials do pose a threat. *Id.* at 21. Rather, it contends that if

certain methods suggested by the EPA are undertaken and properly implemented by FMC in the future, the risk will be contained. The EPA documents that were submitted contain similar statements. FMC presented testimony from a former EPA administrative employee, Mary Ann Horinko, that the EPA is complying with federal laws and its own regulations. *Id.* at 15. However, EPA's plans remain just that: Plans. Although the EPA has been involved at this site since 1990, remedial actions chosen by the EPA have not been implemented. *Id.* Many of EPA's proposed remedial actions are still in design phase only, and the threat at the site still remains today. EPA's IRODA is itself only an interim measure, and according to the IRODA, a final Record of Decision will not be available for five to ten years. IRODA at 19. In any event, EPA's plans are containment plans, which would keep the threatening hazardous wastes on fee land for the indefinite future.

9. The fact that the EPA is involved in this case actually demonstrates the severity of the threat. Absent a threat to public health and welfare, EPA would likely not be involved in this matter. In its 2013 Unilateral Administrative Order for Remedial Design and Remedial Action, No. CERCLA-10-2013-0116 (June 10, 2013), the EPA justified involvement at the FMC site on the grounds that conditions there "may constitute an imminent and substantial endangerment to public health or welfare or the environment." *Id.* at 9-10. FMC asserted that this language was nothing more than boilerplate used to assert EPA CERCLA jurisdiction, but the fact that the language is boilerplate does not mean it is not true, and FMC did not contest its truthfulness. SOD at 27. Even aside from this justification, the very act

of containment admits the existence of a threat. And containment does not eliminate the threat; by definition it only confines it.

10. Even if the EPA had shown itself to be effective in containing the threat, the evidence does not show that the EPA will or can adequately represent the Tribes in the protection of their interests. Tribal access to the EPA has also been insufficient to ensure the protection of tribal interests. Although the EPA and the Tribes have consulted on how to remediate the threat, Fort Hall Business Council Chairman Nathan Smalls testified that, in response to his repeated requests to testify at an EPA meeting on the FMC site, the EPA gave him ten minutes to testify and allowed him to submit a written narrative not to exceed ten pages. *Id.* at 15. The evidence shows that EPA has not always implemented the Tribes' desired remedies, and the EPA itself stated in a document entered into evidence that it does not have to do what the Tribes ask. *Id.* This evidence shows that the EPA does not necessarily represent tribal interests. And the EPA's assessments do not take into account tribal customs and traditions, which are unique to the Tribes and cannot be measured by non-Indian standards. *Id.* at 29.

11. FMC has not challenged the evidence that shows that elemental phosphorus exists on the contained property and will remain reactive for thousands of years. *Id.* at 22. No evidence has been offered to rebut the conclusion that if any of the containment efforts fail for any reason, escape of the toxic waste or any of its by-products at certain levels could prove catastrophic to the tribe, its members, its environment, its health, safety and welfare. *Id.*

12. The clear conclusion to be drawn from this evidence is that the activity of FMC on the property in question has created a threat that will likely not go away in the long term. The evidence shows that a threat of a catastrophe does exist here. The threat that the Court has found to exist is also "disruptive to the tribes' social welfare," as one expert witnesses stated. *Id.* at 23. That witness continued that these threats "are not minor annoyances; they are a threat of a catastrophic nature in health and reactions, including death. The threat from the FMC site is real, it is not a mere potential. The threat and the exposures are already present." *Id.* As another expert witness stated, "[e]lemental phosphorous levels at the FMC site would be catastrophic to the Shoshone Bannock Tribes." *Id.* And this threat is aside from the realized and ongoing destructive effects that contamination from the site is having on tribal members' cultural practices on the Portneuf River. *Id.* at 29-31.

IV. CONCLUSIONS OF LAW

A. The factual evidence establishes that the contamination on FMC's fee land poses a threat to the Tribes and tribal members. The legal question remains whether an actual catastrophe must occur before the second *Montana* exception is satisfied. FMC asserts that a catastrophe has not materialized and further contends that without a catastrophe having actually happened, the Tribes cannot meet the second *Montana* exception. As the cases applying the second *Montana* exception make clear, however, a tribe can exercise its jurisdiction before a catastrophe occurs in order to avert a threat to its members.

B. The *Montana* case expressly stated that the second exception is satisfied if the non-Indian conduct at issue "threatens or has some direct effect on . . . the health or welfare of the tribe." 450 U.S. at 566. The use of the disjunctive "or" between the words "threatens" and "has some effect" indicates there are two scenarios that can satisfy the second exception: 1) The threat of harm; or 2) actual harm. As the Supreme Court has said, "[t]he logic of *Montana* is that certain activities on non-Indian fee land . . . or certain uses . . . may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." *Plains Commerce*, 554 U.S. at 334-35 (emphasis added). This view is reflected in the respected Cohen's Handbook of Federal Indian law, which the *Plains Commerce* Court approvingly cited for the statement that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." *Id.* at 341 (citing Nell Jessup Newton, et al., Cohen's Handbook of Federal Indian Law § 4.02[3][c] at 232 n.220 (2005 ed.)) (emphasis added). The Court also said the second exception authorizes the tribe to exercise civil jurisdiction when non-Indian conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. *Id.* The word "menaces" connotes a threat of harm, rather than harm itself.

C. The fact that a threat of harm can justify tribal regulation is also demonstrated by *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,* 492 U.S. 408 (1989), in which the owner of on-reservation fee land was subject to tribal regulation despite having simply filed permits to construct

buildings and a sewage disposal system. *Id.* at 440 (Stevens, J.). No work had begun and nothing other than the filing of permits had taken place. Yet, the United States Supreme Court recognized the Tribe's civil jurisdiction over his activities merely based on what might happen. *Id.* at 443. In *Brendale,* the Court also recognized the tribe's interest in a part of their reservation that "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.* at 441 (emphasis added) (internal quotation marks omitted). *Brendale* has significance to this case, as the Shoshone-Bannock Tribes are seeking to enforce a land use policy ordinance permit requirement for the storage of toxic and deadly waste that generates the emission of deadly gases and contaminates ground water, both to protect the quality of their land and natural resources, and to protect their members' ability to take part in important cultural ceremonies that cannot be performed because of contamination in the Portneuf River. In sum, a catastrophe does not have to happen for the Tribes to assert jurisdiction in this case.

D. *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), is not to the contrary. In *Evans*, the Ninth Circuit Court of Appeals determined that the Tribes did not have civil jurisdiction over a matter involving the construction at a single residential house, stating that the Tribes had only generalized concerns about waste disposal and fire hazards and that their concerns were speculative as they did not focus on Evans's specific project. *Id.* at 1306. In the present case, the Tribes have demonstrated concrete threats and specific

impacts from FMC's conduct, specifically the storage of millions of tons of toxic waste. These concerns are not based on speculation. Rather, the Tribes' concerns have been bolstered and substantiated by testimony from multiple experts and other witnesses as well as public record documents issued by the EPA.

E. This case law shows that whether a catastrophe has occurred is not determinative of whether the Tribes may exercise jurisdiction under *Montana*. The second *Montana* exception permits the Tribes to act to "avert" catastrophe. Numerous experts testified that the activity on FMC's fee land continues to present a real, catastrophic threat to the Tribes. And this threat extends not only to the immediate environment and persons in the immediate vicinity, but also to members of the Shoshone-Bannock Tribes throughout the Reservation. Even if this potential may be mitigated by future action yet to be implemented, there is no evidence that it will be eliminated.

F. This Court finds that whether a tribe's political integrity, economic security, or health or welfare has been directly affected or threatened can be shown by means other than statistical analysis and scientific measurement. Indeed, in *Brendale*, the Supreme Court was satisfied that the second *Montana* exception requirements had been met when the Yakima Nation demonstrated a mere possibility that the non-Indian owner's intended use of fee land would in the future impinge upon the tribal members' cultural and religious traditions. In this case we have more than a mere possibility. We have an action completed. We have uncontroverted testimony that the activity of FMC has in fact interfered with the customs and traditions of the Shoshone Bannock

Tribal Members. That interference has a direct effect on the Tribes' political integrity, economic security, or their health or welfare. The impact on the Tribes in this case far outweighs the speculative chances of future interference brought out and approvingly recognized by the Supreme Court in *Brendale*. Indeed, if a catastrophic impact were required, *Brendale* shows that interfering with sacred tribal customs and traditions has such an impact.

G. Given these rules of law, the Court finds that the second *Montana* exception is satisfied because:

1. The millions of tons of slag deposited and remaining on the FMC site, which emit gamma radiation in excess of EPA human health standards, threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.
2. The as much as 16,000 tons of reactive and ignitable elemental phosphorus in the soil at the FMC site, that contaminate over 780,000 cubic yards of soil, threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Shoshone-Bannock Tribes.
3. The 23 waste ponds located on the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes because they contain reactive elemental phosphorus and other dangerous contaminants and emit toxic gasses.

4. The contaminated rail cars buried at the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.
5. The heavy metals, including arsenic and phosphorus, leaching into the groundwater at the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes by flowing into the Portneuf River.
6. The phosphine gas emitted from the waste ponds threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.

V. CONCLUSION AND ORDER

The Court concludes that the evidence presented shows by a preponderance of the evidence that FMC's activities on its on-reservation fee land have created a significant threat and have "some direct effect on the political integrity, the economic security, or the health or welfare" of the Shoshone-Bannock Tribes and that this threat exists today, and will continue to exist for the foreseeable future.

Therefore, the Court finds for the Shoshone-Bannock Tribes, and will enter a separate judgment accordingly for the annual tribal waste storage permit fees unpaid by FMC from 2002 to present. Costs and attorney fees in this case are awarded to the Tribes.

IT IS SO ORDERED

s/ Peter D. McDermott 5-16-14
Peter D. McDermott, Tribal Appellate Judge

s/ Vern E. Herzog, Jr. 5-16-14
Vern E. Herzog, Jr., Tribal Appellate Judge

s/ John Traylor 5-16-14
John Traylor, Tribal Appellate Judge

IN THE SHOSHONE-BANNOCK
TRIBAL COURT OF APPEALS
FOR THE FORT HALL RESERVATION, IDAHO

SHOSHONE-BANNOCK TRIBES LAND USE DEPARTMENT AND FORT HALL BUSINESS COUNCIL, Appellants and Counterclaimants, Vs. FMC CORPORATION, Respondents.	Case Nos. C-06-0069 C-07-0017 C-07-0035 **AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER RE ATTORNEY FEES AND COSTS, *Nunc Pro Tunc***

A hearing on this matter was held in the Shoshone-Bannock Tribal Court of Appeals on November 8, 2012, the Hon. Mary L. Pearson, presiding. Also present on a conference line were Chief Justice Fred Gabourie, Sr., and Justice Cathy Silak. Present in Court representing FMC Corp. (FMC) were Maureen Mitchell, who argued FMC's Opposition to an award of fees, and Lee Radford of Moffatt, Thomas, et al. The Shoshone-Bannock

Tribes (the Tribes) were represented by Paul C. Echo Hawk, Echo Hawk Law Offices, and William F. Bacon, General Counsel for the Tribes.

This Opinion addresses whether this Court's award of fees and costs to the Tribes in its May 8, 2012 decision favoring the Tribes is appropriate in this matter. FMC appeals from that Opinion, citing: A) Lack of jurisdiction of the Tribes over FMC, B) There Is No Tribal Law or Ordinance that Authorizes an Award of Fees and Costs, C) The Request is Untimely, D) No Attorney Fees is Appropriate, Even if Costs Were Awarded, E)Any Award of Tribal Costs must be limited to their documented costs on appeal, F) The Tribe's fees and costs memorandum is deficient, and G) An Award of Fees and Costs Would Have a Chilling Precedential Effect.

Based upon the briefs filed and oral argument, the Court took the matter(s) under advisement and now issues its opinion, that includes Findings of Fact, Conclusions of Law regarding the award of fees and costs to the Shoshone-Bannock Tribes, and this Court's Order Revoking Remand to the Trial Court for trial on several issues that were originally denied by the Trial Court before Judge Maguire. This Court does so in the interests of time.

Opinion by Justice Pearson.

BACKGROUND

The initial argument made by FMC Corp. of lack of jurisdiction by the Shoshone-Bannock Tribes over FMC is rejected out of hand. Jurisdiction was found at the Tribal Court trial level by adopting that jurisdiction found at the federal district court level. Although the federal district court level decision was

vacated with the appeal to the Ninth Circuit the jurisdiction issue did not change. Jurisdiction was found at the Tribal Appellate level. (See May 8, 2012, opinion FMC V. SBT, (3 cases), and expanded in *the Nunc Pro Tune* Opinion of June 16, 2012). This Court awarded fees and costs because this was such a difficult case, made even more difficult by FMC's continuous resistance to recognizing the sovereignty of the Shoshone-Bannock Tribes. This resistance was manifested in correspondence between the parties, in applications for permits, in the Federal District Court, District of Idaho, and at the Ninth Circuit Court of Appeals, when the United States sued FMC for violation of the Consent Decree and the Shoshone Bannock Tribes Intervened. (United States of America v. FMC, No. 06-35429, June 27, 2008.) citing Blue Chip Stamps vs. Manor Drug Stores, 421 U.S. 723, 750, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975),

The reason for the suit was that the Consent Decree entered in the Idaho District Court in case No. 4:98-cv-00406-BLW, between, the Environmental Protection Agency of the United States and the FMC Corp. was in danger of being violated and the Tribes wished to intervene.

The Consent Decree in Idaho District Court case No. 4:98-cv-00406-BLW, was between, the Environmental Protection Agency of the United States and the FMC Corp., and

> ". . . called for the closing of FMC's illegal hazardous waste ponds; construct a hazardous waste treatment plant to treat the facility's phosphorus waste so that it is no longer ignitable and reactive and will not leach metals in dangerous concentrations; and install plant-

> wide secondary containment upgrades for all pipes, tanks, and other units handling reactive or ignitable wastes in order to provide additional protection against releases due to leaks."

In that suit and in the appeals arising from the Counterclaims filed by the Shoshone-Bannock Tribes it was very obvious in 1998 that the Tribes' efforts were to protect their tribal members from the effects of the hazardous waste site.

That decision did not destroy this Tribes' jurisdiction over FMC. It merely determined that the Tribes were not third party beneficiaries to the Consent Decree, a very high standard to meet under federal case law. USA v. FMC, June 27, 2008.) . Instead it determined that the Tribes were incidental, not intended third party beneficiaries to the Consent Decree, and at the same time recognized that there was a split of authority on the subject that would not be settled until the issue was before the United States Supreme Court.[1] (USA v. FMC, June 27, 2008.)

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[1] Moreover, if Blue Chip Stamps were read broadly to preclude even intended third party beneficiaries from enforcing a consent decree, it would create a direct conflict with [Federal] Rule [of Civil Procedure] 71. Rule 71 clearly allows intended third party beneficiaries to enforce consent decrees, and Blue Chip Stamps should be read to avoid eviscerating Rule 71. Hook, 972 F.2d at 1015 (citations, internal quotation marks, and alterations omitted). . . .In short, under Ninth Circuit precedent, incidental third-party beneficiaries may not enforce consent decrees, but intended third-party beneficiaries may. Most other circuits arc in accord with our restrictive reading of the Supreme Court's statement in Blue Chip Stamps. . . . But see Aiken v. City of Memphis, 37 F.3d 1155, 1168 (6th Cir.1994) (en banc) ("The plain language of Blue Chip indicates that even intended third-party beneficiaries of a consent decree lack standing to

Even though the Ninth Circuit found that: A key dispute (and one that continues through this appeal) is whether FMC's operations remain subject to tribal jurisdiction." That Court recognized that it was the Tribal Court that would have to decide that issue and reported that:

> In closing, we note that, during the pendency of this appeal, FMC began the process of applying for tribal permits, which is the main relief that the Tribes have sought in this action. At oral argument, the Tribes expressed their concern that, if we were to hold that the Tribes lack standing to enforce the Consent Decree, FMC would withdraw its permit applications and undo the progress made to date on the proper resolution of this dispute. In response to questioning from the panel, FMC's lawyer represented to the court that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion. We accept that statement from counsel as binding on FMC.[6]

The Court then entered its orders vacating the Orders of March 6, 2006, and December 1, 2006, VACATED; REMANDED with instructions to dismiss this action. Costs on appeal were awarded to FMC Corporation.

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enforce its terms. Although other circuits have held to the contrary, we are unable to join them until the Supreme Court revisits the unequivocal language of Blue Chip." (citations omitted)). . . . The Tribes argue that, under Hook, they are intended third-party beneficiaries and not merely incidental third-party beneficiaries.

STANDARD OF REVIEW

We review de novo the trial court's determination of all issues and since the counterclaims were dismissed without attorney fees being raised, this is a *de novo*[2] determination.

THE ARGUMENTS

FMC raises eight arguments against an award of attorneys' fees and/or costs which are set out above and again below as each argument is discussed. Some of the arguments are in different order than employed by FMC.

A. This Court has Jurisdiction over the Parties and the Subject Matter Sufficient to Authorize an Award of Attorneys' Fees and Costs to the Tribes.

Before determining that an award of fees and costs was proper, this Court looked first to its own law. Shoshone-Bannock Tribes, Rules of Appellate Procedure and the Rules of Civil Procedure, found at Chapter I, § 2 provide that in a civil case:

> . . . the Court of Appeals may affirm, modify or reverse any judgment, decree, or order of the trial court and may remand the case and order a new trial or may direct entry of an appropriate judgment, decree or order, or require such other action or further proceedings as may be just in the circumstances.

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[2] Chap. IV, Sec. 2, provides_Section 2 for the Jurisdiction of the Court of Appeals: The Court of Appeals shall have jurisdiction to review final orders, commitments and judgments of the Shoshone-Bannock Tribal Court. On appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court. . . .

These three cases are all civil and costs are addressed at Chapter III, § 3.58, of the Shoshone-Bannock Law and Order Code:

> The court may enter judgment "that a party shall recover all costs" and that "[e]ntry of the judgment shall not be delayed for taxing of costs." (Chapter III, § 3.58)

These statutes create broad jurisdiction and authority in the Court of Appeals which includes entry of a judgment that includes costs as well authority to revoke the Remand portion of its May 8, 2012 Order, thus saving the time of a new trial which can then be appealed to this Court.

"Costs" may include both costs as well as reasonable attorney fees. When there is no specific code provision in the Tribal Law and Order Code, the Tribal Court is directed to look first to the Tribal custom and tradition, of the Shoshone-Bannock Tribes and then to applicable Federal Law.[3] As no evidence of custom and tradition was introduced to this Court it will look now to Federal Law.

A. Federal Law – The American Rule.

Federal Law follows the prevailing rule called the "American Rule" which provides that "the prevailing litigant is not ordinarily entitled to collect reasonable attorney fees from the loser," however; there are several common law exceptions to this rule.[4] These exceptions include: 1) the common benefit doctrine; 2) Bad Faith; and 3) cases in which the plaintiff acts

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[3] See Shoshone-Bannock Tribes Law and Order Code, Chapter III, Section 1.1.

[4] Alyeska, Pipeline Service Co, v, Wilderness Society, 421 U.S. 240, 24 and 263 (1975).

as a "private attorney general." (See Alyeska, 421 U.S. at 259.) 4) A fourth exception is found at Id., 263, that allows fees where the legislature has enacted a statutory exception.

FMC has challenged the "American Rule" as a legal principle and claims that FMC should not be penalized for defending or prosecuting a lawsuit. Fleishmann v. Maier Brewing Co., 386 U.S. 714, 718 (1967). The same is also true that an injured party will not be made whole if he bears the expense of a lawyer to obtain relief from the initial harm. Rodulfa v. United States, 295 F. Supp. 28 (D.D.C. 1969) appeal dismissed, 461 F.2d 1240 (D.C. Cir. 1972), cert. denied, 409 U.S. 949 (1972) (holding that, "a person who is successful in litigation is a part loser because he has to pay his own expenses and counsel fees, except a few minor items that are taxable as costs.")

The Tribes argue that the rule and each of its exceptions regarding the award of attorney fees and costs should apply to all of these court cases, as well as the cases before the Tribal Administrative Agencies. See New York Gaslight Club v. Carey, 447 U.S. 54 (1980); In re University Place/Idaho Water Center Project, 146 Idaho 527, 199 P.3d 102 (2008). This Court will first discuss the exceptions to the American Rule.

Exceptions to the American Rule

1. The Common Benefit Doctrine.

The first exception, to the Rule, has been used by the United States Supreme Court to allow attorney fees where a plaintiff acted on behalf of a larger group such as trustees or shareholders in a class action.[5] In

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[5] See Trustees v. Greenough, 105 U.S. 527 (1881).

Trustees cases, the court held that "if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest." Citing to: Mills v. Electric Auto-Lite Co. 396 U.S. 375 (1970)a stockholders derivative suit, and Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) which was a class action suit. In these cases, the Tribes have been acting as trustees for the more than 5,500 Shoshone-Bannock Tribal members. The actions of the Tribal Land Use Department and Tribal Business Council in enforcing Tribal ordinances and a contract between FMC and the Tribes, have benefited each and every member of the tribes that share in per capita gains (and losses), as well as using the money for hazardous waste matter protection.

2. The Bad Faith Exception.

This exception applies when the opposing party has "acted in bad faith, veraciously, wantonly, or for oppressive reasons." Hall v. Cole, 412 U.S. 1, 5, (1973). Justification for the bad faith exception can be found in actions leading to the lawsuit as well as litigation conduct. Id., at 15; see also Nepera Chemical, Inc. v. Sea-Land Service, 794 F.2d 688, 701 (D.C. Cir. 1986). In this case, the underlying conduct of FMC Corp. gave rise to the creation of a Federal Superfund Site located within the boundaries of the Fort Hall Reservation that the Tribes feared would be abandoned and left to the Tribes to clean-up, had the United States EPA not intervened and brought a CERCLA action against FMC.

3. The Private Attorney General Exception.

This exception applies that a party "should be awarded attorneys' fees when he has effectuated a strong Congressional Policy which benefited a large

class of people", in this case more than 5,500 Tribal members; "and where necessity and financial burden of private enforcement are such as to make the award essential." LaRaza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1973, aff'd 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 .S. 968 (1974).

Although Alyeska overturned the concept of a private attorney general for attorney fees, based on the primary reason that there was a difficulty "for the courts without legislative guidance to consider some statues important and some unimportant: and the fact that "the rational application of the private attorney general rule would immediately collide with the express provision of 28 U.S.C. 2412, which at that time specifically prohibited fee awards to the United States unless specifically provided by statute, Alyeska, 421 U.S. at 263-266, there is no such prohibition in Tribal law. Furthermore, it should be noted that Congress responded to Alyeska, by enacting the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. Sec. 1988(b) and several other statutes that authorize awards of attorneys' fees in specific situations. Furthermore, the special circumstances of these cases, in terms of the immensity and complexity of issues, the time demanded to represent the Tribes in these matters required private co-counsel for the Tribes who was acting on behalf of the Tribes and all Shoshone-Bannock Tribal members.

4. Where there is a Statutory Exception.

Where there is diversity between the parties, unless there is an applicable federal law, state law applies. Erie Railroad v. Tompkins, 304 U.S. 64 (1938). Idaho law provides that "the prevailing party shall be allowed a reasonable attorneys' fee to be set

by the court, to be taxed and collected as costs: in a civil action, including, "any commercial transaction unless otherwise provided by law." I.C. § 12-120(3). That same code section also applies to "cases on appeal". Freiburg v. J-U-B Engineers, Inc., 141 Idaho 415, 111 P.3d 100 (2005), regarding "appeal of declaratory judgment entered in a contract case." Hoffer v. Callister, 137 Idaho 291, 47 P.3d 1261 (2002) re: whether zoning violations constituted an encumbrance on title."

FMC Corporation is a Delaware Corporation and the Shoshone-Bannock Tribes and their Tribal entities reside in Idaho, thereby meeting the diversity requirement. This Court has earlier concluded based on the facts of these cases that FMC and the Tribes entered into a consensual relationship that created a contract for the storage of FMC's waste of several underground holding sites, within and upon the Fort Hall Reservation. (Pp. 61-62 of Original Findings, Conclusions and Order.) This was a commercial transaction that required a Tribal Permit and one that occurred at arm's length.

The language of the Shoshone-Bannock Tribes Law and Order Code, found at Chapter III, § 3.58, contains language similar to that of I.C. § 12-120. The U.S. Supreme Court has also held that "costs" includes attorneys' fees in actions brought under statutes that allow for cost awards. Marek v. Chesney, 473 U.S. 1 (1985). In addition to several federal statutes that allow awards of attorney fees, several statutes allowing only "costs" have been interpreted to also allow reasonable attorney's fees as part of the costs. See 28 U.S.C. § 1912 (interpreted to permit awards of attorney fees, 50 ALR Fed 652, 67 ALR Fed 319; 28 U.S.C. App. Rule 68 (addressed in

Marek); 28 U.S.C. App. Rule 38 (interpreted to permit awards of attorneys' fees, 50 ALR Fed 652, 78 ALR Fed 319).

Despite FMC's argument that an award of attorney fees for the administrative hearing portion of these cases should not be allowed, there is an Idaho statute that provides for a prevailing party to be awarded reasonable attorney fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law, at I.C. § 12-117. This Court reserves its decision on this exception until it hears the Tribes' evidence on Montana II to be heard at the February 2013 hearing.

5. There is an Idaho Statutory Exception for Cases Brought or Defended for Reasons That Are Frivolous, Unreasonable or Without Foundation.

Another Idaho statute allows for an award of attorney fees to the prevailing party upon a finding that the action was brought or defended frivolously, unreasonably, or was without foundation. See Kelly v. Silverwood Estates, 127 Idaho 624,903 P.2d 1321 (1995).

Unreasonableness, as well as lack of foundation, can be inferred from FMC's continued challenge to this Tribes' jurisdiction despite rulings by the Idaho Federal District Court as well as the Tribal Trial and Appellate Courts, that there is jurisdiction in this Court found in this Court's own laws and the first Montana exception's application to this case. The Statutory exception does not require this Court to find all three exceptions in order to find the other two.

The amount of fees and the period over which the Tribes are entitled to an award is the issue before this Court at this time.

C. The Tribes Request for Attorney Fees and Costs is Untimely.

FMC challenges the Tribes' request for attorney fees and costs as being untimely and therefore precluded from such an award on appeal. (p.4 of FMC brief.) They are in error. The Tribes previously requested an award of costs and attorney fees in Part XI of its Answer and Part V of the Counterclaim filed September 14, 2006, and in Part IV of the Amended Counterclaim filed October 2, 2006. FMC alleges that this issue should have been raised on appeal, pursuant to Chapter IV,§ 9, of the Shoshone-Bannock Tribes Law and Order Code. (See FMC's Brief p.5.) This position is unsupported in Idaho law. See DeWils Interiors, Inc. v. Dines, 106 Idaho 288, 678 P.2d 80 (1983); and when attorney fees has been the material issue on appeal, an award of attorney fees based on I.C. § 23-230(3) as an expense of appeal has been denied. Id. In contrast, in a contract issue, an award of attorney fees and costs has been supported where the commercial transaction comprises the core of the lawsuit. Id.; See also Troupis v. Summer, 148 Idaho 77, 218 P.3d 11238 (2009). This Court is acting as an appellate court on some issues and as a trial court on other issues, and is therefore entitled to attorney fees at both levels.

D. An Award of Attorney Fees as well as Costs is Appropriate in These Cases.

FMC argues that if this court is to award attorney fees they should only be awarded on appeal. (See FMC Brief, p. 6.) An award of attorneys' fees should

include an award for the appeal from the Fort Hall Business Council because that decision is filed as a complaint and treated as a civil case from that point forward. An appeal from the Trial Court to the Court of Appeals is filed as a civil action which also meets the language of Chapter IV, § 2. This civil action continued through both trials before Judge Maguire, and those appeals to this Appellate Court, as well as the Tribes' Counterclaim(s) and it too, should be accorded attorney fees and costs. This is so because the Tribes successfully defended its position regarding jurisdiction over FMC in this Court, and have expended an inordinate amount of time and money fighting this issue. Additionally, the Tribes still have to present evidence to this Court on the second Montana exception due to the Trial Court's ruling that excluded that evidence. The Administrative hearings, however, are not "civil" cases within the jurisdiction of this Court. (See Land Use Policy Ordinance, Chapter V, § 6, and Chapter III, § 3.58, and Chapter IV, §2.)

E. The Tribes' Memorandum of Fees and Costs is Not Sufficient as Originally Provided or as Supplemented Herein.

FMC has objected to the format of the Memorandum of Fees and Costs submitted by the Tribes. In response, the Tribes prepared a spreadsheet showing more detail and described as Exhibit "A". Errors that were found were corrected (with the exceptions noted previously). The methodology cited by the Tribes and outlined in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (DELAWARE VALLEY I) 478 U.S. 546, 562-569 1986), involved a two-step process. Id. The first step is to find a lodestar figure – calculated by

multiplying the number of hours spent on the litigation by a reasonable hourly rate. Id. The second step is to adjust the fee upward or downward based on consideration of a variety of factors. Id. To be entitled to an upward adjustment. A prevailing party must show that it would have been unable "to obtain counsel without any promise of a reward for extraordinary performance," and must present "Specific evidence as to what made the results it obtained . . . so 'outstanding.'" The party must also show "that the lodestar figure . . . was far below awards made in similar cases where the court found equally superior quality of performance." Id. Finally, to adjust a fee upward, a court must make "detailed findings as to why the lodestar amount was unreasonable, and in particular as to why the quality of representation was not reflected in the number of hours times the reasonable hourly rate." Id. The Supreme Court subsequently clarified that the time of paralegals and law clerks should be included in the amount of the award of attorney's fees. (Missouri v. Jenkins), 491 U.S. 274 (1989).

Since this matter is being continued to the February calendar for a hearing on the Shoshone-Bannock Tribes Counterclaims, this Court will require that the Tribes engage an expert witness to testify before the Appellate Panel at its May 2013 calendar, with the filing of briefs by both sides after the Tribes have submitted an additional bill for costs and fees subsequent to the February 2013 hearing before this Court makes an announcement of the final figure for the attorneys' fees award. Counsel for the Tribes should be prepared to include a final claim for fees and costs prior to the May 2013 hearing in order to give FMC an opportunity to object to the new

materials, and show hours spent in electronic research, rather than a flat dollar figure, the number of copies made each month on its final spread sheet rather than providing the Court with total figures for those items, and an estimate for the time spent in preparing for the May 2013 final hearing.. It would also be helpful to have a key to the initials of the lawyers, paralegals, law students, represented by initials for work done. The expert witness can advise this Court as to whether the Tribes' claim for fees and costs is reasonable and give FMC another opportunity to object to specific matters. Said briefing schedule will be provided to the parties at the February 7, 2013 trial on the Tribes' Counterclaims.

F. An award of Fees and Costs Will Have a Chilling Effect on Tribal Court Litigants.

FMC next argues that an award of attorney's fees and costs would have a chilling precedential effect on Tribal Court litigants. (FMC Corporation's Opposition to Appellant's Memorandum of Fees and Costs, pp. 7-8). This court, as well as the Trial Court have awarded fees and costs in cases in which either prosecution or defense has been specious or particularly difficult. For a run of the mill case, fees are not usually awarded, although costs may be.

G. Lack of Specificity.

Many of FMC's objections to the lack of specificity in the claim for attorneys' fees and costs have been answered by the Tribes. This is the same argument addressed in, however, there is still some lack of specificity in the statements that fail to identify who is doing the work (initials only are provided), there is a flat fee for the cost of making copies as well as electronic research rather than a breakdown of

numbers of copies and the time spent for the research at an hourly rate, rather than a flat fee for a month. Furthermore, it is unrealistic to expect the Appellate Justices to determine if the Attorneys Fees and Costs are reasonable, given their lack of resources and the need to hear the evidence of an expert witness regarding the reasonableness.

FINDINGS OF FACT

1. This Court finds that it has authority to enter a judgment for attorneys' fees that includes costs but declines to do so for the administrative hearings because the SBLOC only authorizes fees for "civil" cases and an administrative hearing is not a "civil" case. (See Shoshone-Bannock Tribes Law and Order Code, Chapter III, Section 1.1.)

2. This Court finds that the language of the statute authorizing an award of fees and costs is discretionary with the Court.

3. This Court finds that the language of the statute that authorizes the Appellate Court to enter an appropriate judgment, decree or order, or require such other action or further proceedings as may be just in the circumstances, includes the discretion to revoke a remand order.

4. This Court finds that under Chapter III, Section 1.1, it has authority to revoke the Remand Order found in the May 8, 2012 Order and does hereby Order the parties to prepare to put on evidence and argue the Tribes' Counterclaims previously denied, including evidence of the second Montana exception to Tribal jurisdiction, breach of contract, and failure to obtain air permits which were properly filed, and these claims are reinstated with

instructions for them to be reheard on February 7, 2013.

5. This Court finds that Tribal Law and Custom do not apply to this case.

6. This Court finds that same code section directs this Court to look next to federal law[6] that defines the American Rule and its exceptions.)

7. This Court finds that it is reasonable to follow those exceptions to the American Rule that apply to this case.

8. This Court finds that the "private attorney general" exception applies because a party "should be awarded attorneys' fees when he [they] has [have] effectuated a strong Congressional, in this case a Tribal, Policy which benefited a large class of people, and further finds that the Tribes litigated the issues in these cases that will benefit more than 5,500 Tribal members by protecting the health of those members as well as creating income to operate their hazardous waste program and this can be addressed at the February 2013 hearing.

9. This Court further finds that these actions were necessary and directs the Tribes to offer evidence of the need to hire private legal counsel to make the award essential. (See Alyeska, 421 U.S. at 259.)

10. This Court finds that FMC has "acted in bad faith, veraciously, wantonly, or for "oppressive reasons" sufficient to justify for the bad faith exception to the American Rule by its actions leading

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[6] See Shoshone-Bannock Tribes Law and Order Code, Chapter III, Section 1.1, Alyeska, Pipeline Service Co, v, Wilderness Society, 421 U.S. 240, 24 and 263 (1975).

to the lawsuit as well as litigation conduct, where the underlying conduct gave rise to the creation of a Federal superfund Site that would have been abandoned and left to the Tribes to clean-up, had the government not stepped in, and where issues such as jurisdiction should have been obvious under the circumstances.

11. This Court finds that in response to the American Rule Congress enacted over 200 Federal statutes that authorize awards of attorney fees, showing the Congress' legislative action was passed to overcome Supreme Court decisions denying awards of attorneys' fees.

12. This Court finds that the underlying basis of the appeal by FMC has always been related to the commercial transaction rather than the adequacy of any award, or lack thereof, of attorney fees at the trial court level is right per the case law, and that the state of the law does not support FMC's position re the fees.

13. This Court finds that it is unable to determine if the time and fees are fair and reasonable, for the work performed without an expert witness to review the current materials, and testify at the hearing to be held at the May 2013 calendar, unless decided upon submission of evidence and briefs.

14. This Court finds that the Shoshone-Bannock Tribes shall be awarded attorney fees and costs as authorized under Idaho statutes, the Shoshone-Bannock Law and Order Code cited above, and the federal case law.

15. This Court finds that an award to the Tribes for the proceedings before the Land Use Committee and the appeal to the Fort Hall Business Council are

denied because they do not fit the definition of a "civil case."

16. This Court finds that it is appropriate for the Tribes to engage an expert witness and prepare such findings to be filed with the Court and served on FMC no later than April 12, 2013, in order to give sufficient time to object to the expert's determination(s).

17. This Court finds that FMC shall have until a stipulated date in the future to object to the expert's findings, and the Tribes will have until two weeks after that date to answer.

18. This Court finds but there is still some lack of identity as to who is doing the work (initials only are provided); there is a flat fee for the cost of making copies as well as electronic research rather than a breakdown of numbers of copies, and the time spent for the research at an hourly rate; and this Court is not prepared to rule on the reasonableness of the fees and costs without input from an Expert.

19. This Court finds that it is appropriate that the SBTs shall have until the stipulated date to provide FMC with a list of their witnesses.

20. This Court finds that FMC shall have until two weeks after that date to provide its list of witnesses.

21. This Court finds that the American Rule does not apply to this case because there are too many exceptions to that Rule that do apply.

22. This Court finds that an award of fees and costs in this case does not set a dangerous precedent in this Court because both the trial court and the appellate court have previously awarded attorneys' fees and costs in cases that are particularly difficult and/or heinous.

CONCLUSIONS OF LAW

1. This Court concludes that it has authority to enter a judgment for attorneys' fees that includes costs, as well as the authority to enter an appropriate judgment, decree or order, or require such other action or further proceedings as may be just in the circumstances.

2. This Court concludes that it has authority to revoke the remand Order of May 8, 2012 and Order the parties to prepare to put on evidence and argue the counterclaims previously denied to the Tribes at the February 7, 2013 hearing, including evidence of the second Montana exception to jurisdiction, breach of contract, and failure to obtain air permits which were properly filed, and these claims are reinstated with instructions for them to be reheard at the February 7, 2013 Appellate Calendar.

3. This Court concludes that Tribal Law and Custom do not apply to this case,

4. This Court concludes that the SBLOC directs this Court to look next to federal law, and it has done so.

5. This Court concludes that it is reasonable to follow the exceptions to the American Rule that apply to this case.

6. This Court concludes that the Tribes litigated issues in these cases that will benefit more than 5,500 Tribal members by protecting the health of those members as well as creating income to sustain their hazardous waste program.

7. This Court concludes that the "private attorney general" exception applies because the Tribes "should be awarded attorneys' fees when [they]

he has effectuated a strong Policy which has benefited a large class of people, which it has done.

8. This Court concludes that these actions were necessary and directs the Tribes to offer evidence of a financial burden to the Tribes that caused the need to hire private enforcement to make the award essential.

9. This Court concludes that in response to the American Rule Congress enacted over 200 Federal statutes that authorize awards of attorney fees, showing the Congress' legislative action was passed to overcome Supreme Court decisions denying awards of attorneys' fees, and that the Shoshone-Bannock Law and Order Code shows the legislative intent of the Tribes.

10. This Court concludes that the underlying basis of the appeal by FMC has always been related to the commercial transaction rather than the adequacy of any award, or lack thereof, of attorney fees at the trial court level, and that the state of the law does not support FMC's position re the fees.

11. This Court concludes that it is appropriate for the Tribes to engage an expert witness and prepare such findings as to the reasonableness of the attorneys' fees, with attention to the failure to identify who is doing the work (initials only are provided), and concludes there is a lack of specificity for the cost of making copies and electronic research by providing a breakdown of numbers of copies and the time spent for the research at an hourly rate, to be addressed by this Court at its next authorized calendar to give sufficient time to file these specifics as well as allow FMC to object to the expert's determination(s).

13. This Court concludes that it is appropriate that the Tribes shall have until the stipulated date to file its Expert Witness Findings that shall include the specifics set forth above.

14. This Court concludes that FMC shall have until the stipulated date to object to the Tribes' Costs and Fees Expert and Specifics that include an award of paralegal and law clerks' fees as part of the attorneys' fee award.

15. This Court concludes that SBT shall have until the stipulated date to reply to the objections.

16. This Court concludes that an award of fees and costs in this case does not set a dangerous precedent because both the trial court and the appellate court have previously awarded attorneys' fees and costs.

Based upon the foregoing Findings of Fact and Conclusions of Law, this Appellate Court enters the following Order.

ORDER

IT IS HEREBY ORDERED AND THIS DOES ORDER THAT:

1. A final award of attorneys' fees and costs will be entered in this matter once the Tribes have introduced evidence that the fees and costs claimed are reasonable, necessary and specific at the scheduling that is set forth above: Specifics to be filed by the Tribes by dates stipulated, Objections filed by FMC by date stipulated, and the Tribes Reply by date stipulated, with the arguments to be heard on a date set by the Court Clerk on the Appellate Calendar; and

2. This Court REVOKES the remand portion of the May 8, 2012 Order, and

3. This Court Orders that the claims of the second Montana exception to tribal jurisdiction, breach of contract, and failure to obtain air permits were properly filed, and these claims are reinstated with instructions for them to be reheard at the next Appellate Calendar.

4. This Court Orders that the Tribes shall file their list of witnesses by a date stipulated at 5:00 p.m., and FMC shall have until one week later by 5:00 p.m. to file a witness list, unless the parties stipulate otherwise.

5. This Court Orders that the parties prepare to put on evidence of the specificity of the claim for attorneys' fees and the reasonableness of such fees and costs through an expert witness at the next Appellate hearing, based on the schedule set out in (2) above;

6. This Court's prior Order for FMC to obtain a Tribal Special Use Permit and pay the associated permit fee of $1.5 million for each of the years from 2002 up to including 2007, based upon the authority of the Tribes' Land Use Policy Ordinance, Operative Guidelines as amended, is upheld, and a separate judgment will be entered.

7. The Clerk is ordered to set aside the entire day for these subjects.

Dated this 31st day of January, 2013.

Nunc pro tunc.

s/ Fred Gabourie, (Sr.)

The Honorable Fred Gabourie, Chief Justice

The Honorable Mary L. Pearson, Associate Justice

The Honorable Cathy Silak, Associate Justice

IN THE SHOSHONE-BANNOCK
TRIBAL COURT OF APPEALS
FOR THE FORT HALL RESERVATION, IDAHO

FMC CORPORATION, Respondents, vs. SHOSHONE-BANNOCK TRIBES LAND USE DEPARTMENT AND FORT HALL BUSINESS COUNCIL, Appellants and Counterclaimants.	Case Nos. C-06-0069 C-07-0017 C-07-0035 **AMENDED, NUNC PRO TUNC FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER**

Appeals from the Shoshone-Bannock Tribal Court Opinions of Hon. Judge David Maguire dated November 13, 2007 and May 21, 2008, before the Shoshone-Bannock Court of Appeals, the Hon. Fred Gabourie, Chief Justice, Hon. Cathy Silak, and Hon. Mary L. Pearson, Appellate Justices, submitted and argued May 12, 2011.

Opinion by Justice Pearson.

Plaintiff FMC Corporation is represented by Lee Radford and Gary Dance of the law firm of Moffatt Thomas Barrett et al, of Idaho Falls, Idaho, and Ralph Palumbo, of the Summit Law Group, Seattle, Washington, and Lynn H. Slade and Wm. C. Scott, of Modrall Sperling, Albuquerque, New Mexico. Defendant/Counterclaimants are represented by Paul Echohawk of the law firm of Echohawk, Pocatello, Idaho, and Wm. F. Bacon, Esq., Moffatt Thomas Barrett Rock & Fields, Pocatello, Idaho for the Shoshone-Bannock Tribes.

I. STATEMENT OF THE CASE

The first appeal is Case No. C-06-0069, an Amended Complaint by FMC against the Tribes for a review of the Shoshone-Bannock Tribes (Tribes) Land Use Policy Commission's (LUPC) Findings of Fact and Decision of April 25, 2006, requiring FMC to first purchase a waste permit and subsequently to purchase a building permit[1] and the Fort Hall Business Council's (FHBC) affirmation of both of those Decisions on July 21, 2006.

The second appeal is Case No. 07-0017, a Verified Complaint for Review of the Fort Hall Business Council's March 5, 2007 decision affirming the April 25, 2006, Land Use Policy Commission's Decision (Appeal C-06-0069) affirmance denying FMC's Motion for a Stay.

Before seeking relief in the Fort Hall Tribal Court, FMC first filed a motion in the Federal District Court of Idaho, seeking a stay of the Tribes' efforts to enforce permitting requirements and to reconsider that

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[1] AR 000346-000348, ER 000199-201 and AR 000349-AR 000354, ER 000202-ER 000207).

Court's determination that FMC must apply to the Tribes for the necessary permits required under a Consent Decree entered July 13, 1999 between the United States Environmental Protection Agency (EPA) and the FMC. The District Court, Hon. Judge Winmill, denied the stay and reconsideration, and sent FMC back to the Tribes. In his analysis of the case, Judge Winmill recognized that FMC had appealed his decision of March 6, 2006 to the Ninth Circuit in an effort to avoid obtaining Tribal permits which his order had required and the Tribe had set a deadline for FMC to pay the $1.5 million or pay a weight-based fee that could exceed $100 million.[2] The District Court found jurisdiction over the Tribes by virtue of the tribes' intervention in the district court case in an effort to require FMC to pursue the Tribal permit process. The Court made a finding that the Tribes offer a process for obtaining a stay and FMC must first apply for such stay and exhaust any Tribal remedies before appealing any refusal to the District Court. The District Court denied the stay. When FMC requested the right to reserve discovery on the jurisdictional issue and raise the issue again after discovery was complete, this was denied by the District Court.[3] Appeal number three is Case No. C-07-0035 – FMC's Verified Complaint for review of the FHBC June 14, 2007, affirmation[4] of the LUPC's February 8, 2007 Decision setting the Special Use Permit Fee at $1.5 million.

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2 Winmill Opinion, supra, at p. 3, ER 000219, AR 002812.

3 Supra, at p. 6 and , ER 000213-214, AR 002815-2815.

4 ER 000636-000639, AR 003021-3024.

The Tribes appealed from Judge Maguire's November 13, 2007 decision to dismiss the Tribe's counterclaims and they appealed from Judge Maguire's May 21, 2008, decision reversing the decisions of the Fort Hall Business Council and the Land Use Policy Commission in all three consolidated appeals on June 02, 2008.[5] Oral arguments were heard in November 2010. Shortly thereafter FMC filed a request for a post hearing Brief and requested oral argument which was opposed by the Tribes but it was allowed and heard at the May 2011 appellate calendar.

This Appellate Opinion is also a review of the Tribes' sovereignty and its civil regulatory authority. FoSr the most part, the Appellate Panel has adopted the proposed Findings of Fact and Conclusions of Law of the Shoshone-Bannock Tribes, taking into consideration the objections filed by FMC without allowing oral argument on the objections.

II. FACTS AND PROCEDURAL BACKGROUND

Since the late 1940's, FMC Corporation (and any subsidiary or other registered name by which FMC operated, collectively referred to herein as FMC) has engaged in activities, including the production, treatment, and storage of hazardous and non-hazardous waste. Much of that activity occurred on fee land within the boundaries of the Fort Hall Reservation, and the storage of twenty-two million (22,000,000) tons of hazardous and non-hazardous waste continues on fee land within the Reservation boundaries to this day. The Shoshone-Bannock Tribes Land Use Policy Commission ("LUPC")

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[5] Notice of Appeal, June 02, 2006, ER 000850, AR 004376. Amended Counterclaim, ER 000238-000274.

regulates waste activity within the boundaries of the Fort Hall Reservation through enforcement of the Tribes' Land Use Policy Ordinance ("LUPO") and Land Use Policy Guidelines ("Guidelines").

On October 16, 1998, the United States Environmental Protection Agency (EPA) filed a complaint in the Idaho Federal District Court alleging FMC's multiple violations of the Resource Conservation and Recovery Act (RCRA). That same day in 1998 the United States filed with the Court a Consent Decree signed by the EPA and FMC, citing numerous violations of CERCLA by FMC and in which FMC agreed to pay a fine, and take a number of remedial actions. FMC admitted the allegations of venue, subject matter and personal jurisdiction, but did not admit any wrongdoing. In the Consent Decree, FMC consented to the "clean-up" of its Pocatello, Idaho plant, and also agreed to apply for Tribal permits. During the same time frame that FMC was negotiating with the EPA, FMC and the Shoshone-Bannock Tribes were also discussing FMC's compliance with the Tribes' land use permitting regulations. FMC was notified by the LUPC in August of 1997 that Amended Guidelines to the LUPO would be adopted, which would address the storage of hazardous and non-hazardous waste on the Reservation. Originally, FMC refused to submit to the jurisdiction of the Tribes in its application for the permit,[6] however, the Tribes refused to grant a permit

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[6] August 1, 1997 letter from Sheila G. Bush, Counsel for FMC to Candy Jackson, Tribal Attorney for Shoshone-Bannock Tribes submitting application for building permit for Ponds 17, 18, and 19, and refusing to submit to jurisdiction of the Shoshone-Bannock Tribes. ER 000280, AR 000023.

without FMC submitting to tribal jurisdiction. In response to that notification, the Health, Safety, and Environmental Manager for FMC, Dave Buttleman, sent a letter dated August 11, 1997 to the Shoshone-Bannock Tribes' LUPC:

> Through submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines. (emphasis added.)

On April 6, 1998, the LUPC sent out proposed amendments to the LUPO Guidelines proposing different permit fees for the storage of hazardous and non-hazardous waste. On April 13, 1998, LUPO sent FMC a letter setting forth the conditions upon which the Tribes would issue Building and Special Use Permits for Ponds 17, 18, and 19. In response to the proposed amendments, FMC and the Tribes met in Seattle, Washington in May of 1998 to discuss an agreement regarding FMC's obligations to the Tribes under the Chapter V regulations and to determine the terms and conditions of FMC's obtaining Tribal special use permits for waste ponds 17, 18, and 19. Thereafter, FMC and the Tribes corresponded in letters dated May 19, 1998, May 26, 1998, and June 2, 1998. Those letters provide in clear terms that FMC would obtain Tribal land use permits for its waste activities on the Reservation and pay the Tribes an initial payment of $2.5 million and thereafter pay an annual special use permit fee of $1.5 million each year, "even if use of ponds 17-19 was terminated", i.e.,

stopped being used for disposal in the next several years.[7] , and FMC would thereby obtain, and continue to have an exemption from the otherwise-applicable Tribal land use permitting regulations.[8]

FMC paid the annual permit fee of $1.5 million in accordance with the parties' agreement for approximately four (4) years without any apparent dispute regarding the fee. Then, prior to the annual permit fee payment due June 1, 2002, FMC indicated in its letter prepared by John Bartholomew to Tribal Chairman dated May 23, 2002, FMC's intention to cease payment of the annual permit fee. A memorandum was attached to that letter which expressed the FMC attorneys' reasoning why FMC was not obligated to pay the annual permit fee, including an argument that FMC' s obligation to pay the fee was conditioned upon the Tribes adopting certain regulations.[9] In response, the Tribes sent a letter to FMC explaining that the Tribes expected the annual permit fee payments to continue in reliance upon the contents of the letter dated June, 2, 1998, authored by FMC's General Counsel Paul McGrath to Tribal Attorney Jeanette Wolfley, which provided, "[t]he $1.5 million annual fee would continue to be paid for the future even if the use of the ponds 17-19 was terminated in the next several years.

The LUPC notified FMC by letter dated December 19, 2002, that FMC was in violation of Tribal land use regulations for failing to apply for and obtain a Tribal

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7 McGrath letter of June 2, 1998, to Tribal Attorney, Jeannette Wolfley, ER 000749, AR 003516.

8 (See May 26, 1998 letter ER 000746.)

9 ER 000139, AR 002140, May 23, 2002 letter from FMC's Bartholomew to SBT Chairman Edmo.

permit for the disposal and storage of hazardous waste on the Fort Hall Reservation.

FMC did not make the $1.5 million annual permit fee payment in 2002 and 2003, nor did FMC apply for and obtain the required Tribal land use permits for its waste activities on the Fort Hall Reservation. In letters dated April 6, 2004, April 16, 2004, and April 21, 2004, and May 5, 2004, the Tribes demanded that FMC comply with Tribal land use and air quality permitting requirements.

In response to the Tribes' demands for compliance, FMC again negotiated with the Tribes regarding the Tribes' permit process. Those negotiations, which included discussions of selling or leasing the FMC land, plant, water rights, etc., and a proposal that each parties' rights not be prejudiced were contained in a letter from FMC to Shoshone-Bannock Tribal Chairman Fredrick Auck, dated May 27, 2004:

> As long as FMC is working in good faith to transfer ownership or lease the real property, water rights, and plant assets as discussed with the Tribes, including how the process and consideration to be provided to FMC are defined, the Tribes will stay any regulatory enforcement of the Tribes' Land Use Department's April 16, 2004 and April 21, 2004, and May 5, 2004 letters and the Air Quality Program's April 6, 2004 letter.
>
> If the above is acceptable, neither party's rights, defenses, nor claims will be prejudiced in any manner whatsoever. If this is agreeable, please sign below where indicated.

The Tribes' agreed to FMC's proposed stay of enforcement of the Tribes' land use regulations and

accepted the terms outlined in the May 27, 2004 letter.[10]

On July 22, 2004, FMC sent the Tribes a letter proposing to transfer assets at the FMC Pocatello Plant site to the Tribes in exchange for the following: immunity from Tribal land use ordinances; the Tribes' agreement to support EPA's recommendations regarding CERCLA and RCRA compliance; the Tribes' agreement to FMC's proposed method of conducting reclamation at the Gay Mine; and the Tribes' agreement to release FMC from all natural resource damage claims.

On September 19, 2005, the Tribes filed a Motion for Clarification in United States v. FMC Corporation, Case No. CIV-98-0406-E-BLW, in the Federal District Court for the District of Idaho, seeking clarification of FMC's obligation under the RCRA Consent Decree to: 1) obtain all required Tribal permits for activities conducted at the FMC site; 2) allow Tribal representatives access to the FMC property to conduct inspections and monitor FMC's compliance with the Consent Decree; and 3) provide the Tribes with documentation of work activities in accordance with the Consent Decree.

The issues and proposal set forth in FMC's letter dated July 22, 2004, continued to be negotiated by the parties until FMC, by its Director of Operations John Bartholomew, sent the Tribes a letter dated December 6, 2005, which provided in pertinent part:

> In July of this year, FMC formally communicated the issues once again, as well as our continued willingness and commitment to

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[10] ER 000155, AR 002518, Letter of May 27, 2004.

> work with the Tribes in good faith. FMC's issues included resolution of jurisdiction matters, the site ROD, the Gay Mine, and NRD. Unfortunately, after several meetings the Tribal Council declined to engage in complete discussion of these matters, which negates the opportunity for Tribal redevelopment of the property. As a result, FMC now has no choice but to pursue other interested parties who are anxious to help their local communities capitalize on the current opportunity before it slips away.

This Court rejects FMC's claim that the statute of limitations was tolled by the Tribes filing a Motion for Clarification in Federal District Court on Sept 19, 2005 instead of December 6, 2005. On March 6, 2006, the Federal District Court entered a Memorandum Decision and Order addressing the Tribes' Motion for Clarification. In its decision, the Federal Court applied the test set forth in Montana v. United States, 450 U.S. 544 (1981), and rejected FMC's objection to the Tribes' jurisdiction over FMC's waste activities on the Fort Hall Reservation finding that the "consensual relationship" exception was met in three separate ways, thereby giving the Tribes "jurisdiction over FMC to enforce the terms of the Tribal permit system." The Federal District Court specifically held that Paragraph 8 of the RCRA Consent Decree, which provided "[w]here any portion of the Work requires a federal, state, or tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits and approvals," required FMC to apply for Tribal land use permits identified by the Tribes and that FMC is required to present its arguments

regarding applicability of particular permitting requirements in Tribal forums (the LUPC, FHBC, and Shoshone-Bannock Tribal Court) before seeking further relief in the Federal Court. FMC appealed from the Federal District Court's decision to the Ninth Circuit, which held that only the United States, not the Tribes, could enforce FMC's obligations under the RCRA Consent Decree. United States v. FMC Corp., 531 F.3d 813 (9th Cir. 2008). The Ninth Circuit decision, however, did not relieve FMC of its responsibility to apply for the necessary Tribal permits.

Following the Federal Court's Decision in March of 2006, FMC submitted applications for a Tribal special use permit and a Tribal building permit. On April 25, 2006, the LUPC granted FMC a special use permit and a building permit, conditioned on FMC paying the annual permit fee and providing the Tribes with hazardous waste storage information. FMC sought immediate relief in Federal Court by filing a motion to clarify or reconsider that court's March 6, 2006, decision.[11] FMC's requests were denied by the Federal Court on December 1, 2006. FMC then filed an Emergency Motion to Stay in the Ninth Circuit Court of Appeals on December 7, 2006, seeking an order enjoining the Tribes from enforcing the requirements of the LUPC's April 25, 2006 land use permit decisions.[12] The Tribes filed an objection with the Ninth Circuit on December 8, 2006, and the Ninth Circuit entered a denial of FMC's Emergency Motion to Stay on December 11, 2006.

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[11] ER 000471, AR 000370. P. 11 of Fed. Dist. Ct. Docket.

[12] ER 000199-207, AR 000346-000354.

FMC also timely appealed the LUPC decisions of April 25, 2006 to the Fort Hall Business Council ("FHBC") in accordance with Article V, Section 6 of the Land Use Policy Ordinance. In support of its appeal from the LUPC decision, FMC submitted a brief and a number of documents that were not previously provided to the LUPC. The FHBC correctly refused to take the additional documentation into account since it was not part of the LUPC's record, and ultimately affirmed the LUPC decisions. On August 8, 2006, FMC filed a timely appeal of the LUPC and FHBC decisions to the Shoshone-Bannock Tribal Court. On September 14, 2006, the Tribes filed an Answer denying FMC's allegations and two counterclaims alleging: (1) that FMC was subject to the Tribes' air quality permitting requirements, and (2) that the 1998 Agreement was a common law contract and FMC had breached the contract by not paying the $1.5 million fixed fee for each of the years from 2002 through 2007.

On February 8, 2007, the LUPC issued a letter to FMC setting an annual special use permit fee at $1.5 million due on the first day of June beginning in 2007. On March 19, 2007, FMC posted a bond in the amount of $1.5 million and appealed the LUPC's February 8, 2007, decision to the FHBC. After accepting briefs from the parties and hearing oral argument on May 10, 2007, the FHBC affirmed the LUPC's decision on June 14, 2007. On June 29, 2007, FMC filed an appeal of the FHBC June 14, 2007 decision in Tribal Court.

On November 13, 2007, the Tribal Court dismissed the air quality permit counterclaim subject to the Tribes' right to file a motion to sever the matter and have it handled separately and dismissed the contract

counterclaim holding that a common law contract did not exist between FMC and the Tribes.

On February 22, 2008, FMC filed an Opening Brief to its appeal from the FHBC's decisions issued July 21, 2006, March 5, 2007, and June 14, 2007. On May 21, 2008, the Tribal Court held that: (1) FMC was required to obtain a Tribal Building Permit, but that the Tribes could not impose the stated $3,000 permit fee; (2) no special use permit is required for industrial areas inside an area zoned industrial; (3) the agreement created through correspondence between the Tribes and FMC was not incorporated into a Tribal ordinance; and (4) the Tribes failed to meet the approval requirements for the imposition of fees to non-members under the Tribal Constitution and therefore the imposition of the $1.5 million fee is void.

On May 28, 2008, the Tribes filed an Appeal to the Tribal Court of Appeals and on June 5, 2008, the Tribes amended their Notice of Appeal, appealing from both the November 13, 2007, and May 21, 2008 decisions rendered by the Tribal Court. On June 10, 2008, FMC filed its cross-appeal, also alleging that the Trial Court erred in both the November 13, 2007 and May 21, 2008 decisions.

III. ISSUES ON APPEAL

This Court finds that the following are the issues on appeal before this Court.

A. Whether the Shoshone Bannock Tribes have jurisdiction over FMC with regard to land use regulation and the alleged breach of contract claim.

B. Whether the Trial Court erred by finding that Tribal regulations do not require FMC to obtain a Tribal special use permit and pay the applicable

permit fee for storing hazardous waste on the Reservation.

C. Whether the Trial Court erred in concluding that the LUPC had no authority or basis to impose the $1.5 million annual special use permit fee.

D. Whether the Trial Court erred by applying an incorrect and arbitrary standard of review in the appeal of the LUPC and FHBC decisions.

E. Whether the Trial Court erred by dismissing the Tribes' amended counterclaim alleging breach of contract.

F. Whether the Trial Court erred by ruling that FMC was estopped from asserting a statute of limitations defense.

G. Whether the Trial Court erred by dismissing the Tribes' counterclaim for FMC's failure to obtain required Tribal air quality permits.

H. Whether the Trial Court erred by dismissing the Tribe's counterclaim without allowing discovery as to remaining material issues of fact.

I. Whether the Trial Court erred by ruling that FMC must obtain a Building Permit for demolition.

J. Whether the Trial Court erred by finding that FMC is not required to pay the building permit fee in the amount of $3,000.00 as assessed by the LUPC.

IV. STANDARD OF REVIEW

The Shoshone-Bannock Tribes' Land Use Policy Ordinance and Law and Order Code establish the procedure and standard of review for appeals. Article V, Section 6 of the Land Use Policy Ordinance provides in pertinent part:

> Any person or persons aggrieved by a decision of the Commission may appeal such decision to

the Business Council within thirty (30) days of the final Commission decision, by filing a notice of such appeal with the Commission or the Commission Chairman. Upon receipt of such notice the Secretary of the Commission shall cause all records of said application including the Commission findings of fact and decision to be filed with the Tribal Secretary. The Tribal Secretary shall then notify the Chairman of the Business Council of such appeal and the appeal shall be heard by the Business Council. Any person aggrieved by a decision of the Business Council may appeal such decision to the Tribal Court within fifteen (15) days of the Business Council decision. Such appeal shall be effected by the filing of a complaint in the Tribal Court, verified by the plaintiff and accompanied by the same filing fee as a complaint in any civil action in Tribal Court.

On or after the filing of such complaint, said action shall be prosecuted, defended and treated as any civil action instituted in said Court. In the trial of such a case, however, it shall be presumed, prima facie, that the final action of the Commission, from which the appeal is taken is legal in each and every respect. Members of the Land Use Commission and Business Council shall not be personally liable for damages for actions performed within the actual or apparent scope of their authority described herein. The Business Council or any person aggrieved by a decision of the Tribal Court may appeal to the Tribal Court of Appeals as provided in the Law and Order Code

> for appeals in civil cases. The determination of the Tribal Court of Appeals shall be final.

The consolidated appeals in this case are before this Court pursuant to this procedure. Chapter IV, Section 2 of the Tribal Law and Order Code provides, "on appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the Trial Court."

V. APPLICABLE LAWS

This Court interprets the application and meaning of Tribal laws and common law in Tribal Courts. The inherent sovereignty and rights of the Shoshone-Bannock Tribes are reserved, recognized, and protected by the Fort Bridger Treaty of 1868. In accordance with the Indian Reorganization Act of 1934 the Tribes adopted a Constitution and Bylaws that guides the actions of the Tribal government. Pursuant to the Tribes' inherent and constitutional sovereign powers, the Shoshone Bannock Tribes enacted the Land Use Policy Ordinance of the Shoshone Bannock Tribes for the Fort Hall Reservation by resolution on April 26, 1975, which was approved by the BIA on February 3, 1977 and March 9, 1977.

The Tribes enacted by resolution of August 24, 1979, the Fort Hall Land Use Operative Policy Guidelines, which provide greater detail and clarification of the 1977 Land Use Policy Ordinance and established the Land Use Commission. The Guidelines were submitted to the BIA on August 24, 1979, and became effective November 22, 1979, based on the non-objection of the BIA within ninety (90) days. See Shoshone-Bannock Tribal Constitution,

Art. VI, Sec. 2; Pawnee Tribe v. BIA, 284 IBIA 5 (1995).

In 1992 the Tribes adopted an Air Quality Protection Act, and submitted the ordinance to the BIA for review and approval on August 19, 1992.

In 1997 the Tribes proposed Amendments to Chapter V of the Guidelines. A Public hearing was held on August 22, 1997, and the Amendment became effective April 6, 1998, per the language of the Amendments or May 18, 1998, per the memo. Chapter V, Section V-9-2 of the 1997 Amendments to the Guidelines provided for hazardous waste storage fees of $5.00 per ton.

The Tribes enacted the Hazardous Waste Management Act ("HWMA") by resolution on October 19, 2001. The BIA reviewed the HWMA on October 26, 2001, and the HWMA became effective on December 4, 2001, upon completion of legal review and the 30-day public comment period.

The Tribes enacted a Waste Management Act ("WMA") by resolution of September 8, 2005, and the BIA approved of the WMA by letter dated October 7, 2005.

The HWMA is superseded by the Tribes' WMA only to the extent that the HWMA is inconsistent with, or are contrary to, the purposes of the WMA. (WMA Ch. 10 §1003.) Because no provisions of HWMA are inconsistent with, conflict with, or are contrary to the purposes of the 2005 WMA, the 2001 HWMA fee schedule remains effective to date.

VI. ANALYSIS

A. The Shoshone Bannock Tribes have jurisdiction over FMC with regard to land use regulation and the alleged breach of contract claim.

FMC claims that the Tribes have no jurisdiction to regulate or adjudicate the conduct at the FMC Pocatello Property. The Tribes' assert that the LUPC, the FHBC and this Court have jurisdiction pursuant to the Shoshone-Bannock Tribal Constitution & Bylaws, the Fort Bridger Treaty of 1868, the following portions of the Shoshone-Bannock Tribal Law and Order Code: Chapter I, sections 1, 2, and 2.1; and Chapter III, sections 1, and 1.2, and other well-settled principles of general federal Indian law.

There is sufficient evidence in the record to support a finding that the Shoshone Bannock Tribes have jurisdiction over FMC with regard to land use regulation of the FMC property located within the exterior boundaries of the Fort Hall Reservation and with regard to the alleged breach of contract claim.

1. The federally imposed limitations of tribal jurisdiction do not preclude the Shoshone Bannock Tribes exercise of jurisdiction in this matter.

An analysis of tribal court jurisdiction over any non-Indian person or entity begins with Montana v. United States, 450 U.S 544 (1981). In Montana the United States Supreme Court held that an Indian Tribe could not regulate hunting and fishing by non-Indians on non-Indian fee land within the reservation. The Supreme Court in reaching its decision explained that there are two sources of tribal jurisdiction over non-members; either positive by law,

by way of statute or treaty, or through the inherent sovereignty of the tribe. Id. at 564.

The sovereignty of Indian tribes is of a unique and limited character. It centers on the land held by the Tribe and on tribal members within the reservation. Plains Commerce Bank v. Long Family Land & Cattle Co., Ins., 554 U.S. 316, 326, 128 S. Ct. 2709, 2718, 171 L.Ed.2d 457, (2008). The Supreme Court has stated that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." Plains Commerce Bank, 554 U.S. at 326; Montana, 450 U.S. at 565. This general rule restricts tribal authority over non-member activity taking place on the reservation, and is particularly strong when the non-member's activity occurs on non-Indian fee land." Plains Bank Commerce, 554 U.S. at 326; Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997). That general rule is subject to two exceptions. The first exception is that a tribe may regulate through taxation, licensing, or other means, "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." Montana, 450 U.S. at 565. The second exception is that a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Id. at 566. The burden rests on the tribe to establish that one of the two Montana exceptions are satisfied. Plains Bank Commerce, 554 U.S. at 327; Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 and 659 {2001).

Although Montana expressly addresses only the regulatory jurisdiction of tribes, there is nevertheless the presumption that if a tribe has regulatory authority under Montana to regulate activities of non-members, jurisdiction over disputes arising out of those activities exists in the tribal courts. Strate, 520 U.S. at 453.

a. The conduct between the Tribes and FMC meet the criteria for the consensual relationship exception outlined in Montana.

The record in this case contains sufficient evidence to support a finding of jurisdiction based upon consensual commercial dealings between FMC and the Tribes. FMC's agreement for payment and the actual performance of tendering such payment of the $1.5 million annual permit fee to the Tribes from 1998 to 2001 is precisely the type of commercial dealing contemplated in the first exception of Montana. This court finds of utmost significance the letter dated August 11, 1997, from FMC's Health, Safety, and Environmental Manager, J. David Buttleman, which references the commercial dealings between the parties and specifically consents to the Tribes' jurisdiction by stating, "[t]hrough the submittal of the Tribal 'Building Permit Application' and the Tribal 'Use Permit Application' for Ponds 17, 18 and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines." FMC did not include any reservation of rights, nor did FMC object to jurisdiction in the series of letters that compromise the agreement between the parties.

The Consent Decree entered in the Federal District Court regarding the RCRA violations and proposed remedies is another form of consensual relationship involving the same subject matter between these same parties and further supports a finding of jurisdiction. The record reflects that the Tribes were not conferred third-party beneficiary status to enforce the Consent Decree, but also demonstrates that the Tribes were involved in the process of District Court approval for the Consent Decree and that Paragraph 8 of the Consent Decree contains specific provisions requiring FMC to submit to the Tribes' permitting process.

The record reflects that both the LUPC and the FHBC were well aware of the 1998 agreement and the Consent Decree at the time that their relative decisions were rendered. The LUPC and FHBC also knew of the Federal Court's ruling regarding jurisdiction in decisions made after March of 2006.

This Court further finds the record supports the Trial Court's ruling on the issue of jurisdiction over the permitting process, and the ancillary issues related to it, based upon a consensual relationship after taking guidance from Judge Windmill's decision.

Because FMC and the Tribes engaged in a consensual relationship as evidenced by their commercial dealings evidenced by the agreements and the parties' joint involvement with the Consent Decree, the LUPC, the FHBC and Tribal Court have authority to exert their respective jurisdiction over FMC related to the regulatory and adjudicatory claims brought herein.

b. There is insufficient evidence in the Trial Court record to support the Tribe's exercise of jurisdiction under the second Montana exception related to conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

Although proof of only one Montana exception is required, and although the Trial Court erred by failing to address the criteria discussed herein, there is insufficient evidence in the record of this case to find that the Tribes may also exercise jurisdiction over FMC pursuant to the second exception stated in Montana.

This Court finds based on the record herein that FMC continues to store 22 million tons of hazardous and non-hazardous waste within the boundaries of the Fort Hall Reservation. Therefore, it is reasonable to conclude that if FMC does not bear the reasonable costs of completing the appropriate elimination or treatment of the hazardous waste, or pay the fees associated with the Tribal permits for the regulation of FMC's activities, then the expense regarding those activities will be incurred by the Tribes. However, without further evidence as to whether there will be addition costs and/or the possible impacts to the health of tribal members, particularly the unborn and future generations, this Court canno determine if such costs would threaten or cause a direct impact on the economic security of the Tribes. Based on the above grounds, this court finds that FMC's conduct or omissions may threaten or have some direct effect on the economic security of the Tribes. The same is true with regard to FMC's activities threatening or having

a direct impact on the health and welfare of Tribal members since the completion of the Consent Decree. FMC's activities, including the continued storage of reactive hazardous waste, resulted in the United States filing suit against FMC for violation of federal environmental law and regulations. See United States v. FMC Corporation, Case No. CV-98-0406-E-BLW. The record before this court contains the Consent Decree, which was created through negotiations with the United States Government for the clean-up of the Superfund Site. The environmental clean-up is supervised by the EPA and involves the Resource Conservation and Recovery Act (RCRA), which was enacted in 1976, setting a national goal of protecting human health and the environment from the potential hazards of waste disposal.

As with the consensual relationship status, the LUPC and FHBC had common knowledge of the economic risks and health and safety hazards as they made their respective permitting decisions.

Based on the facts and circumstances presented in the record, this court finds that the Shoshone-Bannock Tribes should have had the opportunity to present evidence that the high level of federal government involvement at the site and reports of actual and potential dangers to persons near the waste ponds would support a finding that FMC's activities threaten or have a direct impact on the health and welfare of Tribal members residing on the Fort Hall Reservation.

2. The Tribes have jurisdiction to consider the regulatory and contract claims pursuant to the Shoshone Bannock Tribes' Law and Order Code.

The Tribes' regulatory claims filed in this matter were brought pursuant to Article V, Section of the LUPO, which requires that the action "be prosecuted, defended and treated as any civil action instituted in said Court."[13] Chapter I, Section 2(b) of the Shoshone-Bannock Tribal Law & Order Code grants the Shoshone Bannock Tribal Court original jurisdiction over, "[a]ll civil actions arising under this Code or at common law in which the defendant is found within the Fort Hall Reservation and is served with process, within, or who is found outside the Fort Hall Reservation and is validly served with process." Absent some independent reason to the contrary, the Tribal Court has jurisdiction over the claims related to the interpretation and enforcement of the Land Use Policy Ordinance.

The Tribes' Amended Counterclaims were submitted in these proceedings pursuant to Chapter III of the Shoshone-Bannock Tribes Law & Order Code, governing the Rules of Civil Procedure. The Tribes assert that the counterclaim may be allowed as either a compulsory or a permissive counterclaim pursuant to Chapter III, Section 3.13.[14]

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[13] The pertinent portion of Article V, Section 6 of the Land Use Policy Ordinance is set forth fully in the Standard of Review section above.

[14] Chapter III, Section 3.13 provides in pertinent part:

(a) Compulsory Counterclaims

A pleading shall state as a counterclaim any claim which at the time of the serving the pleading the pleader has against

This Court finds that the Tribes' Amended Counterclaims arise out of the same transaction or occurrence that is the subject matter of FMC's claim, namely whether FMC agreed through correspondence with the Tribes to pay a certain amount for the storage of hazardous and non-hazardous waste within the boundaries of the Fort Hall Reservation, and that there are no third parties over whom the Tribal Court cannot acquire jurisdiction who are necessary for the adjudication of the claims filed by FMC and the Tribes. Because the conditions for pleading a counterclaim are met, the matters raised in the Tribes' Amended Counterclaims were thus properly before the Tribal Court pursuant to either a compulsory counterclaim Section 3.13(a) or a permissive counterclaim 3.13(b) of Chapter III.

B. The Trial Court erred by finding that Tribal regulations do not require FMC to obtain a Tribal special use permit.

The Tribes assign error to the Trial Court's decision that the Tribal regulations do not require FMC to Obtain a Tribal special use permit, which was

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any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of the third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

* * * *

based upon the Trial Court's interpretation of FMC's activity as "industrial activities in an industrial zone." Based on a review of the Tribal Law, the LUPO and the Guidelines, we hold that the Trial Court erred in finding that a special use permit was not required.

The LUPO established four (4) zone areas for the entire Reservation. See LUPO, Art. I, § 3. Each designated area sets forth the primary purpose of that area. Under the Guidelines, a special use permit is required for any activities or uses outside of the established zone areas. See Guidelines, Section V-5(2). The FMC plant is located in an Industrial Area. "Industrial Area" is defined as an area in which the primary use of the land is for industrial and manufacturing purposes or similar uses. See Guidelines, Ch. I, § 33. "Industrial" is defined as "Any use of land, including any related building or structure, involving the ***manufacturing and mechanized processing of any goods or materials for purposes of commercial distribution.***" Id. at § 32 (emphasis added). The terms "manufacturing" or "processing" is not defined under the Ordinance or Guidelines. The Webster's Third Dictionary defines "Manufacturing" as "to make a product suitable for use" and "Processing" as "to prepare for market, manufacture, or other commercial use by subjecting to some process."

We find that when FMC closed the plant in 2002 the primary activity was the storage of millions of tons of hazardous and non-hazardous waste and that no manufacturing or processing for commercial distribution occurred at the FMC plant from that time forward. Because the storage of hazardous waste involves no *"manufacturing or mechanized processing* of any good or materials *for purposes of commercial*

distribution," it cannot be characterized as "industrial" under the Tribal regulation and is not a permissible use within an Industrial Area.

An "Urban and Commercial Area" is defined in the Guidelines to include "[a]n area in which the primary use of the land is for . . . wreckage yards . . . ***refuse dumps or land fills or similar uses of a commercial nature"*** and "any similar uses of a commercial nature." Guidelines, Ch. 2, Def. § 81 (emphasis added). The Guidelines require a special use permit for "Urban and Commercial" uses within an area zoned as industrial. See Guidelines, Section V-5(2).

This court finds that the Trial Court's decisions regarding this issue of whether a special use permit is required is tainted by the Trial Court's failure to apply the correct standard of review on appeal. Because the discussion regarding the Trial Court's error in applying the incorrect standard of review is set forth fully below, we will not address it in greater detail at this time. However, it is worth noting here that the Trial Court failed to give adequate deference to the LUPC and FHBC interpretations.

In light of all of the facts in the record, this court finds that the LUPC reasonably interpreted the Guidelines and that the decision of the LUPC, upheld by the FHBC, to require that FMC obtain a special use permit for the storage of hazardous waste was based on a reasonable application of the Tribal law, Ordinance and Guidelines. Accordingly, we reverse the Trial Court's May 21, 2008 decision and find that FMC must obtain a Tribal special use permit for its waste storage activities on the Fort Hall Reservation because the storage of hazardous waste at a closed

facility does not fall within the definition of general industrial activities under the Guidelines.

C. The LUPC has the authority to require FMC to obtain a special use permit and pay the annual $1.5 million dollar permit fee for the storage of hazardous and non-hazardous wastes within the boundaries of the Reservation.

The Trial Court's May 21, 2008 decision found that the $1.5 million fee violated Article V, Sections (h) and (l) of the Tribal Constitution, which requires Secretary review for non-member "levy taxes or license fees" and Secretary review of "any ordinance directly affecting non-members of the Reservation."

The Trial Court erred in applying the APA standard of review and erred in failing to recognize that applicable Tribal land use laws and regulations (1998 Amendments to Chapter V of the Guidelines and the HWMA) also provided the LUPC with a separate and independent basis to support the LUPC February 8, 2007 decision setting FMC's permit fee at $1.5 million annually.

The Trial Court's May 21, 2008 decision correctly recognized that the Tribes' Land Use Policy Ordinance and Guidelines were properly approved in 1975 and 1979, and found that the LUPC had the authority to adopt the May 18, 1998 amendments to Chapter V of the Operative Guidelines. However, the Trial Court erred in failing to recognize that applicable Tribal land use laws and regulations (1998 Amendments to Chapter V of the Guidelines and the HWMA) also provided the LUPC with a separate and independent basis to support the LUPC February 8,

2007 decision setting FMC's permit fee at $1.5 million annually.

The Trial Court's May 21, 2008 decision correctly recognized that the Tribes' Land Use Policy Ordinance and Guidelines were properly approved in 1975 and 1979, and found that the LUPC had the authority to adopt the May 18, 1998 amendments to Chapter V of the Operative Guidelines. The same decision also held that the amendments to Chapter V of the Guidelines were never approved by the FHBC or BIA, and concluded that "a reading of the Constitution, the ordinance and the guidelines does not suggest that the Business Council delegated to the LUPC the broad authority to adopt fees and other requirements regarding hazard [sic] waste management as part of the zoning ordinance." The Trial Court further concluded that it was reviewing the LUPC's April 25, 2006 decisions under an APA review standard, and that it could not look to any Tribal law beyond the four corners of the LUPO and Guidelines in addressing the legitimacy of the LUPC action. The Trial Court then summarily concluded that a special use permit is not required for an industrial use in an industrial area.

The Trial Court erroneously concluded that the HWMA was never properly approved and thus could not be the basis of the LUPC's authority to impose a $1.5 million permit fee against FMC. The Court also erred in concluding that the WMA was not properly approved by the Secretary. The Trial Court's decision incorrectly suggests that the 1998 "Letters Agreement" is the only basis upon which the Tribes claim the right to assess a $1.5 million fee against FMC by having the letters agreement incorporated into the HWMA or WMA. The Trial Court then

rejected without explanation the Tribes' argument that FMC should be estopped from asserting that Secretary approval is required for the $1.5 million permit fee. The Trial Court Judge Maguire's decision then reversed the factual finding of the LUPC that FMC agreed to pay the permit fee for every year the waste remained on the FMC property within the Reservation boundaries. Judge Maguire reversed this factual finding without evidentiary support or providing an opportunity for discovery or for an evidentiary hearing.

1. Although the LUPC had the proper authority to assess the $1.5 million permit fee FMC should be equitably estopped from now asserting that the permit fee is void due to a lack of Secretary approval.

Although the LUPC was delegated authority to adopt the Chapter V amendments and also had authority under the properly approved HWMA to set the FMC permit fee, FMC should be equitably estopped from now arguing that Secretary approval is required for enforcement of the $1.5 million permit fee.

The Tribes' assert that FMC should be equitably estopped from escaping its obligations under the parties' 1998 Agreement by now asserting that Secretary approval was required for enforcement of the permit fee. The record in this matter supports the Tribes' assertion and this court holds that FMC is equitably estopped from asserting lack of approval from the Secretary of the Interior as a defense to the imposition of the $1.5 million fixed permit fee.

"The general doctrine [of equitable estoppel] is well understood and is applied by courts of law as well

as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim." Union Mut. Life Ins. Co. v. Wilkinson, 80 U.S. (13 Wall.) 222, 233 (1872); Gius v. Brooklyn Eastern District Terminal, 359 U.S. 231, 234 (1959); see generally, 3 Pomeroy on Equity Jurisprudence §§ 803-13 (5th ed. 1941).

There are several reasons supporting the application of equitable estoppel in the unique circumstance presented by this case. First, FMC voluntarily entered into an agreement in 1998 with the Tribes to be exempt from the Chapter V fee schedule in the Guidelines approved by the Secretary, by paying a flat annual fee of $1.5 million. Second, FMC voluntarily paid the $1.5 million annual permit fee for four (4) years without asserting the permit fee under the 1998 Agreement required Secretary approval or the Tribes to pass regulations specifically exempting FMC from such regulations. Third, the Tribes never tried to enforce a statutory per/ton fee against FMC and the Tribe upheld their end of the bargain in the 1998 Agreement. Fourth, the federal government was aware of the agreement between the Tribes and FMC and sent correspondence to the Tribes offering any assistance to foster the agreement between FMC and Tribes. Finally, the FMC payment was incorporated into the Tribes land use budget which was approved by the FHBC and the Secretary.

During 1997 and 1998, FMC requested to enter into negotiations for a flat fee for all hazardous waste storage fees and exemption from any future land use enforcement under Tribal land use laws and regulations. In 1998, an agreement was reached between the Tribes and FMC for a $1.5 million annual flat fee in lieu of a statutorily imposed fee. FMC

expressed its understanding of this agreement in a letter dated June 1, 2000, from FMC Plant Manager Paul Yochum to the LUPC which stated, "As you know, in May and June 1998, FMC and the LUPC agreed to an annual fee of One Million Five Hundred Thousand Dollars ($1,500,000) per year for all hazardous and non-hazardous waste activities within the boundaries of the Fort Hall Reservation."[15]

As evidenced from the letter above, both the Tribes and FMC believed they had an agreement where the Tribes had agreed not to enforce its land use permit requirements for waste storage in exchange for a flat $1.5 million annual permit fee. At that time, the LUPC had recently adopted the 1998 Amendments to the Land Use Operative Guidelines which included a $5.00 per ton hazardous storage fee schedule but no further action took place until 2001 when the Business adopted the Council Hazardous Waste Management Act. FMC was the sole entity on the Fort Hall Reservation subject to hazardous waste storage permit fees and formal passage of regulations was not urgent since the 1998 Agreement was in place. The Tribes relied on the 1998 Agreement in good faith and accepted the $1.5 million fixed permit fee from 1998 through 2001. FMC also enjoyed the benefits of the Agreement by avoiding the much higher permit fee that could have been assessed per the Chapter V amendments to the Guidelines.

Shortly before the 2002 permit payment was due to the Tribes, FMC expressed in a letter from FMC's John Bartholomew to the Shoshone-Bannock Tribal Chairman dated May 23, 2002, its intent not to pay the upcoming payment stating various reasons,

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[15] ER 000135, AR 002119.

including, for the first time, an assertion that the 1998 Agreement was subject to the Tribes adopting certain regulations. FMC failed to make the permit payment or to apply for and obtain the required Tribal land use permits in 2002 and subsequent years to date. The LUPC sent letters notifying FMC of their failure to pay and demand to comply with the 1998 Agreement on December 19, 2002, April 6, 2004, April 16, 2004, April 21, 2004, and May 5, 2004. Shortly after receiving the last letter from LUPC, FMC proposed via letter from FMC to Shoshone-Bannock Tribal Chairman Fredrick Auck dated May 27, 2004, that the Tribes stay any land use regulatory enforcement actions without prejudice to either party's "rights, defenses, [or] claims." The letter stated in relevant part:

> As long as FMC is working in good faith to transfer ownership or lease the real property, water rights, and plant assets as discussed with the Tribes, including how the process and consideration to be provided to FMC are defined, the Tribes will stay any regulatory enforcement of the Tribes' Land Use Department's April 16, 2004 and April 21, 2004, and May 5, 2004 letters and the Air Quality Program's April 6, 2004 letter
>
> If the above is acceptable, **neither party's rights, defenses, nor claims will be prejudiced in any manner whatsoever**. If this is agreeable, please sign below where indicated. (emphasis added.)

As demonstrated by the May 27, 2004 letter; the Tribes in good faith agreed not to bring enforcement action while the parties were negotiating. The Tribes

could have pursued Secretary approval of higher regulatory fees but did not do so based on the parties' stay agreement. As documented by the May 27, 2004 letter, the Tribes relied in good faith on the stay of enforcement proceedings with the express promise that it would not affect its enforcement rights. The Tribes and FMC ultimately were unable to reach agreement in 2004, and the LUPC thereafter sought to enforce the permit payment requirement for the prior years (2002 to present).

Although we have found elsewhere that the FHBC and Secretary properly approved the relevant laws and regulations (LUPO, Operative Guidelines, HWMA, and WMA), we also hold now that FMC is estopped from arguing Secretary approval was required to enforce the permit fee because FMC bargained for the Tribes' forebearance of passage and approval of a higher permit fee. To allow FMC to now successfully assert a Secretary approval requirement would unfairly prejudice the Tribes.

The evidence that FMC tendered the payment of the annual $1.5 million fixed fee for the years of 1998 to and including 2001 is uncontroverted. Likewise, there is no contention or proof by FMC that FMC contested the amount of the fee during that time, nor is there any record of correspondence from FMC to the Tribes or the Secretary urging Secretarial approval of the fixed fee. To sit silently by and acquiesce to the payment and status quo of the authority by which the payment was agreed upon supports this court's finding that, as a matter of equity, it would be unfair for FMC to assert a defect that FMC had an ability to remedy in a timely fashion, particularly where FMC chose instead not to take any action other than compliance with the agreement.

As part of the express language in the correspondence between the parties, the Tribes' were to not take any action to enforce their permitting regulations. The record reflects that the Tribes took no action of any kind to enforce the $1.5 million annual fee until FMC attempted to repudiate the agreement. When FMC bargained for the lower flat fee, the agreement induced the Tribes to stay regulatory enforcement action, and FMC enjoyed the benefits of the 1998 Agreement for four (4) years without ever raising the issue of Secretary approval. FMC's agreement in 1998 and the stay agreement to address ongoing negotiations as outlined in the May 27, 2004 letter waived FMC's right to assert Secretary approval requirement as a defense against the Tribes continued efforts to collect the agreed upon fee, and FMC's conduct merits application of the doctrine of estoppel as a matter of equity.

This Court also finds that estoppel is fair in consideration of the fact that the federal government was aware of the parties' 1998 Agreement. The Secretary also approved Tribal budgets that specifically incorporated FMC's permit payment as part of the budget for the land use programs.[16] These

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[16] Under Article VI, Section 2 of the Shoshone-Bannock Constitution "Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior shall be presented to the superintendent of the reservation who shall, within 10 days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of Interior, who may within 90 days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the council of such action." Here, neither the superintendent nor secretary disapproved nor

actions by the federal government demonstrate that the federal government encouraged, facilitated, and was well aware of the parties' 1998 negotiations and agreement regarding the payment of the permit fee as a condition of the storage of the hazardous waste by FMC. The Secretary's failure to rescind the Business Council's resolutions approving the $1.5 million fee demonstrates that Secretary approval was not necessary.

This Court finds based on the record herein that FMC did not suggest that Secretary approval was required for the fee when it entered the agreement in 1998, or during the four (4) years FMC voluntarily paid the fee from 1998 through 2001, and that FMC accepted the benefit of the 1998 Agreement for those four (4) years without ever raising the issue. Based on those facts and circumstances, this court further finds that FMC is estopped as a matter of equity from now asserting that the agreed-upon permit fee is invalid for lack of Secretary approval.

2. The special use permit fee was established by the parties' 1998 Agreement, to be paid annually even after use of the waste ponds was terminated.

Following negotiations to obtain FMC's compliance with Tribal land use permitting laws, FMC and the Tribes specifically agreed in 1998 that the LUPC would issue a permit for FMC's waste activities and that FMC would pay a $1.5 million annual permit fee for its waste activities at the FMC Pocatello facility. The terms and conditions of the Agreement were clearly set forth in a May 19, 1998

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was the resolution rescinded and thus was effective and approved.

letter from the Tribes to FMC. It is noteworthy that by letter dated June 2, 1998, FMC specifically acknowledged that the "$1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years." (ER 000053, AR 000336.)

In accordance with the 1998 Agreement, FMC paid $1 million initial cost and the $1.5 million LUPC waste permit fee in 1998, 1999, 2000, and 2001. However, no payments have been made from 2002 to the present. FMC claims that any permit fee payments related to the 1998 Agreement are no longer due because the plant is no longer operating under the same circumstances that existed in 1998. FMC's self-serving view of the Agreement fails to take notice of FMC's earlier acknowledgment that such change in circumstance was expected by the parties and would not substantially change the need for the permit fee.

Because the original agreement contemplated the payment of the permit fee at the agreed upon rate continuing for several years, even if the use of certain ponds was terminated, the annual permit fee of $1.5 million was properly set by the LUPC and is upheld as valid by this Court as a proper exercise of the LUPC's authority consistent with FMC's voluntary agreement.

The Trial Court's May 21, 2008 decision also erroneously found that "a reading of the 'Letters Agreement' does not persuade this Court that FMC agreed to pay a $1.5 million fee to the Tribes for every year that waste remained on its property." (May 21, 2008 Opinion at p. 16.) This finding is not supported by any evidence and is plainly inconsistent with the facts in this case. We find that this issue is resolved

by reference to FMC's letter from Paul McGrath to the Tribes dated June 2, 1998, in which "he stated that the permit was not limited to ponds 17, 18 and 19, but that the permit covered the plant and that the $1.5 million annual fee would continue to be paid in the future, even if the use of ponds 17, 18 and 19 was terminated." (ER 000053, AR 000336)

This Court reverses Judge Maguire's finding on this issue and affirms the LUPC finding that FMC is required to obtain a special use permit for its waste storage on the Fort Hall Reservation even after use of the waste storage ponds was terminated. (4/25/06 LUPC Decision on FMC Special Use Permit Application at p. 4.) (ER 000202-000207, AR 000349-000354)

3. Judge Maguire erred in finding that the Tribes do not have the proper authority based on Tribal laws to impose a special use permit fee for FMC's waste storage activity.

Even assuming the absence of FMC's contractual permit fee obligation under the 1998 Agreement, applicable Tribal laws provide separate and independent authority for the LUPC to set the FMC permit fee at $1.5 million per year.

a. The FHBC and Secretary approved the Land Use Policy Operative Guidelines, which included a provision authorizing the LUPC to adopt the 1998 amendments to Chapter V of the Land Use Policy Operative Guidelines relating to permit fees.

FMC argues on appeal that the land use permit fees imposed by the Commission are invalid because

the Secretary of the Interior did not approve the 1998 Amendments to the Land Use Policy Guidelines. We disagree. In 1977, the FHBC enacted the Land Use Policy Ordinance with Secretary Approval. Article IV of the Ordinance created the Land Use Policy Commission "empowered and charged with the administration and enforcement of this Ordinance."

In 1979, the Land Use Operative Guidelines, which were approved in a sufficient manner outlined in the Tribes' briefs, included provisions authorizing the LUPC to amend the Guidelines. Section I-6 of the Guidelines provides that "the Commission in its discretion may alter or amend the Guidelines based upon suggestions and Comments received." (Guidelines, Ch. I, § 1-6.) Sections I-7 , and I-7-3 of the Guidelines provide:

> Section I-7: Amendment
>
> Once given final approval by the Commission as set forth in Section I-6, these' Guidelines may be amended as follows:
>
> Section I-7-1 By the Commission
>
> The Commission may act on its own initiative to amend the Guidelines after allowing for a reasonable public comment period or, if deemed necessary by the Commission, after a public hearing.
>
> . . . .
>
> Section 1-7-3: Effectiveness of Amendments
>
> Any amendments to these guidelines shall become effective upon formal approval thereof by the Commission, and review or approval of such amendments by the Business Council shall not be required.

(Land Use Policy Operative Guidelines, §§ I-7, I-7-1, and I-7-3.) These provisions provide clear authority for the LUPC to amend the Guidelines without further approval from the Council or Secretary. Section I-4 "Interpretation" of the Guidelines states:

> In interpreting and applying the Ordinance and these Guidelines, the Commission shall strive:
>
> a) to accomplish the purposes of the Land Use Policy of the Tribes as set forth in the Preamble to the Ordinance and in Article I, Section 2 thereof;
>
> . . . .
>
> The provisions of these Guid[e]lines shall also be **interpreted and applied as minimum requirements** adopted for the promotion of the public health, safety, morals and general welfare of the Fort Hall Reservation and for the preservation of the purposes for which the Reservation was created by the Fort Bridger Treaty of 1868. **Tribal customs, traditions and culture shall govern to the extent that they impose higher or more restrictive standards** than these guidelines."

Guidelines at I-4 (emphasis added). These provisions demonstrate clear evidence of the power and approved authority of the LUPC to amend the Guidelines as long as the amendments met the "minimum" standard and satisfied the goals of the Ordinance Preamble and specific purposes set forth in the Ordinance. We find that the Chapter V amendments authorizing the assessment of the FMC permit fee at issue in this case were validly adopted.

Judge Maguire correctly found that the Chapter V amendments were properly approved, but erred in

concluding that additional formal approval from the FHBC and Secretary were required for the LUPC to set the FMC permit fee pursuant to the amended Guidelines. Although the amendments themselves were not submitted for formal approval after their adoption, the LUPO and Guidelines were properly approved and include provisions authorizing the LUPC to adopt amendments. The LUPC thus exercised its delegated authority to amend the LUPO Guidelines by adopting the amendments to Chapter V of the Guidelines. Judge Maguire erred in finding that the Tribe failed to meet the Tribes' Constitutional requirements for imposing fees on non-members with respect to the agreed-upon $1.5 million permit.[17] The LUPO and Guidelines were properly approved and gave the LUPC authority to amend the Guidelines to include the Chapter V permit fees. Accordingly, the Court finds and concludes that the LUPO, Guidelines, and amended Chapter V Guidelines provided the LUPC with proper authority to set the FMC permit fee at $1.5 million per year. The Trial Court's decision to the contrary is reversed.

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[17] In addition, Article VI, § 1(h) of the Tribes' Constitution references "taxes" and "license fees" that are subject to review by the Secretary when imposed on non-members doing business on the Reservation. Permit fees are not included in that provision, and FMC was not "doing business" on the Reservation when the LUPC issued the decisions setting FMC's permit fees. Judge Maguire thus erred in using this provision to invalidate the FMC special use permit fee. (this is a good point!!)

b. Even if the 1998 Amended Guidelines were not a basis of authority for LUPC to set the FMC permit fee, the HWMA and WMA were properly approved and provide authority for the LUPC's action in setting the FMC annual permit fee at $1.5 millions.

The Trial Court erred in concluding that the Hazardous Waste Management Act ("HWMA") was not properly approved. The record and governmental records demonstrate that the HWMA was approved by the FHBC and either approved or not opposed by the Secretary of the Interior within 90 days of its creation and is applicable law. Second, the Waste Management Act ("WMA"), which superseded inconsistent sections of HWMA, was also approved by the FHBC and the Secretary. Thus, all of the Tribe's ordinances regarding permitting authority for waste storage have been properly approved. Judge Maguire's May 21, 2008 finding that the HWMA and WMA were not properly approved is reversed for the reasons explained in more detail below.

2001 Hazardous Waste Management Act

On October 19, 2001 the Shoshone-Bannock Business Council approved Resolution ENVR-0l-S3 which enacted the HWMA subject to final review by the tribal attorneys.[18] Attached to Resolution ENVR-0l-S3 was a Certification of Ordinance ENVR-01-S3 dated October 19, 2001 to be signed by the,

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[18] Tribal attorney review was completed on December 4, 2001.

Superintendent.[19] The Resolution approving the HWMA specifically referenced Article VI, Section 1(1) of the Tribes' Constitution and Bylaws which provides that "ordinances directly affecting non-members of the reservation shall be subject to review by the Secretary of the Interior." See Shoshone-Bannock Tribes Constitution and Bylaws, Art. VI, § 1(1). The Resolution, Certification, and Ordinance were attached with a letter sent to the Superintendent Eric LaPointe on October 21, 2001. The letter to Superintendent LaPointe stated:

> Please find attached original Ordinance No. ENVR-01-S3, dated October 19, 2001, regarding the Hazardous Waste Management Act of 2001 for your consideration of dis/approval and which is to be returned for the files of the Shoshone-Bannock Tribes.

Id. The Certification, which was sent back to the Tribes signed by Mr. LaPointe and dated October 26, 2001, stated:

> Pursuant to the authority delegated to the Superintendent, Bureau of Indian Affairs, Fort Hall Agency, by virtue of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and **by the authorization of the Secretary of the Interior,** this resolution/ordinance of the Shoshone-Bannock Tribes of the Fort Hall Reservation is hereby approved.

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[19] Resolution ENVR-01-S3 dated October 19, 2001 refers to the HWMA as an "ordinance" in several places including the paragraph referencing the authority for the ordinance, the header, the certification section, and the Superintendent's approval stamp. The October 26, 2001 cover letter to the BIA Superintendent also referred to the HWMA as an "ordinance".

Id. (emphasis added). Therefore, it would appear that on October 26, 2001, the HWMA was properly approved by the Secretary of the Interior, however, this letter does not appear in the Court record and the Tribes will be allowed to supplement the record on remand. The November 22, 2004 from LaPointe confirms that his office recognized that the resolution authorized the tribal attorneys to review the draft ordinances and to seek public comment. LaPointe commented that the draft ordinances did not require the Department of Interior approval and it was LaPointe's understanding that tribal "attorney review is still in progress at this time." (Nov. 22, 2004.)

Even if the superintendent had not given his express approval on October 26, 2001, the failure of the Secretary to rescind the HWMA within 90 days would have satisfied the Secretarial reviewl requirement of the Tribes' Constitution and federal law despite the appearance of conflict in the letters from LaPointe dated October 26, 2001 and November 22, 2004. In Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 284, 288-89 (IBIA 94-95-A, 1994 WL 593097), the Interior Board of Indian Appeals held:

> BIA's authority to review and approve tribal legislation normally derives from tribal law, E.g., Kerr-McGee Corp. v. Navajo Area Director, 471 U.S. 195 (1985), Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). That is the case law here. When the Area Director approved appellant's law and order code in December 1984, he acted solely under authority of Article II, section (d) (iii), of appellant's Constitution. This provision gives the Secretary

> power to approve or disapprove a law and order ordinance within a period of 90 days from his receipt of the ordinance. Once that period has passed, the Constitution makes clear, the Secretary no longer has any authority to act on the ordinance. A necessary consequence of this limitation is that Secretarial approval given during the 90-day period cannot be revoked after the period has expired.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 26 IBIA 284, 288-89 (IBIA 94-95-A, 1994 WL 593097). The Shoshone-Bannock Tribal Constitution has a similar provision providing for Secretary review of Tribal resolutions and ordinances within a 90-day period. Article VI, Section 2 of the Shoshone-Bannock Constitution states:

> Any resolution or ordinance which by the terms of this constitution is **subject to review** by the Secretary of the Interior shall be presented to the superintendent of the reservation who shall, within 10 days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of Interior, who may within 90 days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the council of such action. (Emphasis added.) Shoshone-Bannock Tribal Constitution, Art. VJ, Sec. 2.

In this case, neither the Superintendent nor the Secretary disapproved the Tribal resolution approving the HWMA ordinance, nor was the

resolution/ordinance rescinded within the 90-day period which is all that is required by the Tribal Constitution and federal law.

2005 Waste Management Act

Further, on September 29, 2005, the Fort Hall Business Council enacted Ordinance ENVR-05-S4, establishing the Waste Management Act ("WMA"). The WMA incorporated the substance of and superseded the HWMA Act. See WMA, Chapter 10 § 1003. On October 7, 2005, Superintendent LaPointe approved Ordinance ENVR-05-S4. Shortly thereafter, on December 15, 2005, the Northwest Regional Office of the Bureau of Indian Affairs sent the Superintendent a memorandum confirming that the Ordinance was effective upon the Superintendent's October 7, 2005 approval. Under provisions of the WMA, including Section 1003, provisions of the HWMA not in conflict with the WMA remained in effect. Thus, the permitting authority under the HWMA was effective to provide an additional basis for the LUPC's April 25, 2006 permit decisions.

Judge Maguire erred in accepting FMC's argument that the LUPO and amended Guidelines were the sole basis for the April 25, 2006 LUPC permitting decisions.[20] While the LUPO and Guidelines as amended do grant the LUPC sufficient

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[20] The April 25, 2006 permit decisions reference the "Tribal land use laws and regulations" and "applicable Tribal laws and regulations" as a basis for its decisions. The HWMA was in effect as of December 4, 2001 and provides a proper basis of the Commission's authority to enforce Tribal land use permitting requirements. It is noteworthy that the FHBC also cited to the HWMA as authority supporting the LUPC action.

independent authority to assess the $1.5 million annual permit fee, the 2001 HWMA specifically requires a permit fee for storage of hazardous waste and was also approved by the Secretary prior to FMC's refusal to pay the agreed-upon $1.5 million fee due in June of 2002. Under Sections 301(B) of the 2001 HWMA and 2005 WMA, the Commission and/or its Program had express authority to **impose and modify** permit fees. See HWMA § 301 and WMA § 301 (emphasis added). Section 301(B) of the 2001 HWMA and 2005 WMA provide: **Section 301. Authorities.**

> The Program shall have the following duties and responsibilities regarding permitting:
>
> . . . .
>
> (B) establish and administer a comprehensive permitting program, including but not limited to the review of permit applications, the issuance or denial or permits, and the **modification,** suspension or revocation of permits. (AR 001967) (emphasis added).

And, Section 409 of the HWMA provides for a $5.00 per ton hazardous waste annual fee rate and a $1.00 per ton non-hazardous annual fee rate which was one of the reasons that the contract for $1.5 million was negotiated since that figure is less than would have resulted by using Section 409 of the HWMA.

The LUPC also had inherent authority to impose fees and a permitting structure under the Ordinance and the Guidelines. As stated above, the LUPC had delegated authority to enter into agreements under the Ordinance as well as under general agency principles. An agency has "such implied authority as is necessary to carry out the power expressly

granted." Warren v. Marion County, 353 P.2d 257, 264 (Or. 1960); see also Colorado v. Buckallew, 848 P.2d 904,908 (Colo. 1993). "Whether the authority be expressed or implied it necessarily carries with it, or includes in it as an incident, all the powers which are necessary or proper or usual as means to effectuate the purposes for which the agency was created." Nevada v. United States, 45 Ct. Cl. 254 (1910). We find that the Tribal Land Use Commission found it was necessary to implement a permitting program to carry out the purpose and goals of the Ordinance, Guidelines, HWMA, and WMA and to regulate and raise revenue to pay for programs and services provided by the Land Use programs. In sum, the Commission had express authority to carry out a permitting structure under LUPO, Guidelines as amended, the HWMA, WMA, and the inherent authority to do whatever was reasonably necessary to accomplish the goals of the Ordinance. Judge Maguire erred in basing his decision on the November 22, 2004 letter which, under the Tribes' Constitution and Pawnee Tribe of Oklahoma v. Anadarko Area Director, could not have rescinded the HWMA after the 90-day period of October 2001 when the HWMA was originally passed.

Judge Maguire also erred in concluding that the HWMA was not included as a basis for the LUPC decision and was submitted as a "new" argument on appeal. The April 25, 2006 LUPC special use permit decision states that its decision granting FMC a special use permit was based on "applicable Tribal laws and regulations," which include the HWMA. (4/25/06 LUPC Decision on FMC Special Use Permit Application at p. 4) (AR 000346-000354; ER 000199-000207). In addressing FMC's objection to the Tribes'

jurisdiction and applicability of Tribal land use permit requirements, the LUPC found that the Tribes "and the LUPC also have jurisdiction to enforce the Tribes' land use permitting laws by virtue of the Tribes' inherent sovereignty and pursuant to the Fort Bridger Treaty of 1868, the Tribes' Constitution and Bylaws, and the Tribal land use laws and regulations." (4/25/06 LUPC Decision on FMC Special Use Permit Application at p. 3-4) (AR 000346-000354; ER 000199-000207). The HWMA is an "applicable" Tribal law because it had been enacted and reviewed prior to the LUPC decision. There is no legal requirement that the LUPC cite to each specific regulation by chapter and verse providing authority for its decisions in order for its decisions to be accorded validity If a valid Tribal law provides authority for a LUPC decision, then that decision is valid. Both FMC and Judge Maguire imposed an artificially high standard for the LUPC that no other agency faces in state or county government, and neither FMC nor Judge Maguire offered any legal authority for such proposition.

Judge Maguire also erred in his analysis regarding "Incorporation of the 'Letters Agreement". The Court erroneously assumed that the only basis for FMC's permit fee obligation was incorporation of the 1998 Agreement into the LUPO, HWMA, or WMA. In fact, FMC's permit fee obligation arises separately and independently from two sources: 1) FMC's voluntary agreement to set the permit fee at 1.5 million annually under the 1998 Agreement; and 2) the $1.5 million permit fee set by the LUPC under the

authority of the LUPO, amended Guidelines of HWMA, and WMA.[21]

D. The Trial Court erred by applying an arbitrary standard of review in the appeal of the LUPC and FHBC decisions.

The Trial Court, in its May 21, 2008 decision, used 5 USC 706(2) [the Federal Administrative Procedure Act] as a framework for its decision and then relied upon "2 AmJur 2d, Administrative Law sections 50, 52, 54, 55 and 70 as a primer regarding the overall scheme of judicial review of administrative actions," And then concluded, in light of the rules relied upon, that "[the court] is not entitled to look beyond the four corners of the ordinance and its properly adopted amendments in order to determine the legitimacy of the LUPC action."

Indian tribes have the right "to make their own laws and be governed by them." Nevada v. Hicks, 533 U.S. 353, 361 (2001). The Trial Court and this Court are not bound by federal administrative law standards but may rely on them for guidance only

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[21] Although the 1998 Agreement is an independent basis for FMC's $1.5 million annual permit fee, Judge Maguire failed to recognize that the LUPC independently took action to set FMC permit fee at $1.5 millions per year pursuant applicable Tribal laws. See Letter dated February 8, 2007 from Tribes to FMC (setting FMC annual permit fee at $1.5 million). Judge Maguire erred by concluding that the "letters agreement" had to be incorporated into the LUPO. Judge Maguire's analysis ignored the fact that the LUPO set FMC's permit fee pursuant to Tribal laws in addition to the permit fee obligation under the 1998 Agreement.

where Tribal law does not apply. (See Tribal Law and Order Code, Ch. III. § 1.1.)[22]

In the appeal from the decisions of the LUPC, the Trial Court had to look no further than Article V, Section 6 of the Land Use Policy Ordinance, which is set forth fully in the Standard of Review Section above. In summary, a person who disagrees with the LUPC may appeal the decision to the FHBC. The FHBC will obtain a copy of the relevant records and the LUPC's findings of fact and decision, and then hold an appeal hearing. If the person then disagrees with the decision of the FHBC, the person may appeal to the Tribal Court. In Tribal Court the appeal of the LUPC/FHBC decisions are treated as any other civil action brought before the Court, meaning that any codified or common law claim or defenses may be raised, and that the Tribal Court Rules of Civil Procedure found in Chapter III of the Shoshone-Bannock Tribes Law & Order Code apply. Section 6 provides for one critical difference from a standard civil case though, which is the exception that in the trial of the appeal, *the Trial Court is to presume, prima facie,* that the final action of the LUPC is legally valid in each and every respect. This did not occur.

In addition to the deference detailed directly in. Article V, Section 6, a Tribal governing body should

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[22] Section 1.1 of Chapter III of the Tribes' Law and Order Code provides in part:

In any matters that are not covered by the provisions of this Code, or by any Ordinances or customs and usages of the Tribe, the court shall apply any laws of the United States that may be applicable and any authorized regulation of the Interior Department of the United States.

also be given greater deference than a typical federal or state agency based upon principles of traditional Indian sovereignty and the congressional goal of encouraging tribal self-sufficiency and self-determination. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987). This notion is further supported by a review of the split of power between federal legislative bodies and agencies as compared and distinguished from the interaction between the FHBC and the LUPC. Under the Guidelines, the FHBC grants to the LUPC the authority to *"act on its own initiative* to amend the Guidelines after allowing for a reasonable public comment period or, if deemed necessary by the Commission, after a public hearing." Guidelines at Section I-7-1 (emphasis added). Although the grant of authority found in Section 1-7-1 is relative to the LUPC's legislative function, it is consistent with a finding that the LUPC acts with more autonomy than similar federal or state agencies that rely on congressional delegation, and that the LUPC's decisions are given more deference than such other agencies.

Appeals of civil matters in the Shoshone Bannock Tribal Court are also governed by Chapter IV, Section 2 of the Tribal Law and Order Code, which provides, "on appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the Trial Court."

This Court finds that the Trial Court abused its discretion and erred by applying a standard of review patterned after the Federal A.P.A., which is totally inconsistent with the standard set forth in the Tribal law. The Trial Court's error resulted in an incomplete record, clearly erroneous factual findings and

interpretations of law that caused substantial prejudice to the Tribes' due process and substantive legal rights in a number of ways.

The Trial Court's limitations based on the application of the federal style standard of review deprived the Tribes of the opportunity to conduct discovery and present evidence as would be done in any new civil trial. This Court finds that a proper application of the standard of appellate review of the LUPC/FHBC decisions would have allowed the Tribes to investigate and present evidence regarding the existence, scope, terms, and performance of the parties' 1998 Agreement. That additional information would have been relevant to prove whether regulatory incorporation of the FMC $1.5 million permit fee was a material term of the parties' 1998 Agreement. The Tribes were thus denied an opportunity to show that such incorporation was immaterial, unnecessary, and not a concern to FMC until the May 23, 2002, letter from FMC's Bartholomew, which first proposed that the Tribes' had materially breached the 1998 Agreement as a basis for FMC's own attempted repudiation of that Agreement.

Relying only on the "four comers of the ordinance," insisting on a closed record, and refusing to accept Tribal documents as evidence, are reversible error and the case should be remanded to the TTrial CourtCourt. To allow the Tribes a fair opportunity to submit evidence to rebut contentions made by FMC regarding the approval of the Chapter V amendments to the Operative Guidelines, as well as relevant factual and legal information about the Tribal HWMA and WMA. A review of the record indicates that the proposed evidence would have proven that Tribal

laws that required FMC to obtain Tribal permits and pay the assessed fees were properly approved and valid.

This Court finds that the LUPC/FHBC and Tribal Court have jurisdiction over FMC with regard to the regulatory actions and breach of contract counterclaim, as well as the first prong of the Montana case. This Court also finds that the Trial Court's limitations prejudiced the Tribes' presentation of meaningful evidence as to whether the Tribes could exercise jurisdiction over FMC's conduct pursuant to the second Montana exception, and whether FMC's waste activity on the Reservation directly impacts or threatens the Tribes' economic security, or political integrity, and health and welfare of the Tribes. This Court further finds that the absence of evidence may be the only logical explanation for the Trial Court's failure to even address the second Montana exception as an additional independent basis for the Tribes' jurisdiction over FMC despite the fact that FMC was a hazardous waste site.

Based upon the independent reason and ground that the Trial Court applied the wrong standard of review, the following Trial CourtCourt Findings and Conclusions are hereby overruled:

1) that there was no basis for the $3,000 fee for the building permit;
2) that the imposition of the $1.5 million fee is void;
3) that FMC's activities constituted industrial activities in an industrial zone;

4) that the 1998 amendments to the Land Use Policy Guidelines required approval of the Secretary of the Interior; and
5) that the HWMA and the WMA were never officially approved by the Department of Interior.

The foregoing stated issues are remanded for further proceedings consistent with this Court's holding herein, unless the issue has otherwise been dispositively decided elsewhere herein. (Is this correct?)

Because the Tribes' at all times have urged the Tribal Court to follow the standard of review set forth in the Tribal Law and Order Code, and because Judge Maguire erred by not following that standard, this Court should reverse his ruling and apply a correct standard to these proceedings. (In assessing costs how can we charge FMC for this Court's own errors?)

D. The Trial Court erred by dismissing the Tribes' amended counterclaim alleging breach of contract.

After FMC filed a civil complaint against the Tribes appealing the LUPC/FHBC administrative decisions in Tribal Court, the Tribes filed an Answer and Counterclaim, pursuant to the permissive and compulsory counterclaim provisions in Article V, Section 6 of the Land Use Policy Ordinance and Chapter III, Section 3.13 of the Tribal Law and Order Code. The counterclaim asserted that FMC's failure to pay the annual permit fee from 2002 to 2008 constitutes a material and substantial breach of the parties' 1998 contract and agreement. FMC filed a Motion to Dismiss the Tribes' Counterclaims on October 16, 2006, pursuant to Tribal Law & Order

Code Chapter III, Section 3.12(b)(2) and (6)[23], asserting three reasons why the Tribes' counterclaims should be dismissed: 1) that the Tribal Court did not have jurisdiction to consider a counterclaim in an administrative appeal; 2) that the Tribal Court lacks jurisdiction over FMC and subject matter of the Tribes' counterclaims; and 3) that the Tribes' counterclaim is barred by the applicable statute of limitations. It is noteworthy that FMC's Motion to Dismiss did not assert as grounds for dismissal either that the 1998 Agreement was not a contract, or that administrative enforcement was the Tribes' exclusive remedy.

The Trial Court entered a decision on November 13, 2007, dismissing the Tribes' common law breach of contract counterclaim based on a finding that the 1998 agreement between the Tribes and FMC was not a contract, and characterizing the negotiations as merely an agreement to incorporate the permitting fees into the statutory framework of the ordinance. The Trial Court further held that the LUPO's specific

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[23] Section 3.12(b) of Chapter 111 of the Tribal Law & Order Code provides in relevant part:

Section 3.12 Defenses and Objections

. . . .

(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under section 3.19. . . .

enforcement provisions were intended to be the sole remedy for FMC's failure to comply with the permitting requirements of the Land Use Planning Act.

The Trial Court erred by dismissing the counterclaim based upon the court's finding that no contract existed between the parties and finding that the LUPO provisions were the sole remedy at law.

1. The 1998 agreement between the Tribes and FMC is a contract.

It is a well settled point of common law that a valid contract exists when the following elements are found: an offer; an acceptance; consideration; and a mutual meeting of the minds as to the purpose and material terms of the contract. Based upon the record, this court finds that the Tribes have demonstrated the existence of each of the elements of a valid contact by competent evidence.

FMC and the Tribes engaged in a series of communications, including meetings and correspondence via letters throughout May and June of 1998. The parties discussed FMC's obligations to the Tribes and the impact of the proposed land use regulations. There is sufficient evidence in the letters to show that FMC and the Tribes reached a contractual agreement with the purpose of controlling the amount of risk or financial burden FMC would bear while maintaining compliance with the Tribes land use code. The terms included an obligation on FMC to obtain Tribal land use permits for its waste activities on the Reservation, FMC's payment to the Tribes of a one-time start-up grant fee in the amount of $2.5 million for the initial year, FMC's payment for a special use permit fee in the fixed amount of $1.5

million to be paid annually as long as FMC stores the waste on the Reservation, even if the use of waste ponds 17-19 was terminated in the next several years. In exchange for the fixed special use permit fee, FMC would be allowed to store the hazardous and non-hazardous waste at its site, FMC would enjoy an exemption from the otherwise-applicable Tribal land use permitting regulations, the Tribes would not seek any other permits or impose conditions on FMC other that the fixed amounts described above, and the Tribes would enact the Hazardous Waste Management Act with a specific provision for either an exemption from the regulations for FMC or with the specific fixed fee for FMC.

It is uncontested that FMC tendered the initial start-up grant payment and then paid the annual special use permit fee in the fixed amount of $1.5 million in accordance with the parties' agreement for approximately four years without any apparent dispute regarding the fee. It is also uncontested that th Tribes did not seek to regulate FMC beyond the agreed upon fee until FMC discontinued payment of the fee and proposed its own unilateral release from the contract. The performance of the parties demonstrates that there was a meeting of the minds in 1998 and that a valid contract was formed. The Court finds and concludes that the parties' 1998 agreement clearly constitutes a contract and satisfies the contract elements of an offer, acceptance, and valuable consideration.

FMC has argued that the Tribes' failure to adopt regulations within one year of the parties' agreement justified FMC in ceasing to perform it annual payment obligation. We disagree. Based on the record and arguments of the parties, we find that the

actual codification of FMC's exemption was not a material term of the parties Agreement. FMC only raised this issue four years after the agreement was made in an effort to rationalize its decision to cease payment after its business operations terminated.

2. The Fort Hall Business Council and the Land Use Planning Commission are proper parties to assert the Tribes' counterclaims.

FMC claims that the Fort Hall Business Council and Land Use Planning Commission are not proper entities to bring the Tribes' alleged counterclaims, arguing that the LUPC is limited to "administration and enforcement" of the Land Use Ordinance, as provided in Article IV, Section 1, and that the Business Council "has no authority to sue in its own name." In support of its claim, FMC asserts that the "agencies" in this matter have no authority to consider or advance claims beyond the scope of their statutory authority. See New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1 (2002) ("an agency literally has no power to act . . . unless and until Congress confers power upon it."). FMC is incorrect.

This court finds that there is a sufficient basis in Tribal law to support enforcement by both the FHBC and the LUPC, without resorting to clarification from federal case law. See Chapter III Section 1.1 of the Shoshone-Bannock Tribes' Law and Order Code (generally providing that the applicable law in Tribal civil actions is: taken from the Law and Order Code and any additional ordinances adopted by the Shoshone-Bannock Tribes; if not covered there, then the traditional customs and usages of the Shoshone-Bannock Tribes control; if not covered there, then the Court shall apply any laws of the United States that

may be applicable and any authorized regulation of the Interior Department of the United States).

The Corporate Charter of the Shoshone-Bannock Tribes was issued by the Secretary of Interior pursuant to the Act of June 18, 1934, (48 Stat. 984). Section 4 of the Charter authorizes the Fort Hall Business Council to "exercise all the corporate powers hereinafter enumerated." Included in the list of powers is the authority to: "engage in any business that will further the economic well-being of the members of the tribe or to undertake any activity of any nature whatever . . . ."; "make and perform contracts and agreements of every description . . . with any . . . corporation"; and to "sue and be sued in courts of competent jurisdiction within the United States." See Sections 5(e), 5(f), and 5(i) respectively. Article VI, Section l(f) of the Tribal Constitution and By-Laws provides authority for the Business Council to "undertake and manage all economic affairs and enterprises in accordance with the terms of a charter that may be issued to the Shoshone-Bannock Tribes by the Secretary of th Interior." Prior to the enactment of any of the foregoing documents, the Shoshone-Bannock Tribes were recognized by the United States as sovereign nations with the power to treat with the United States. (Treaty of Fort Bridger of 1868.) The Fort Hall Business Council is the product of those sovereign nations.

Based upon the authorization provided in the Corporate Charter and Tribal Constitution and By-Laws, the FHBC has the authority and standing to pursue enforcement of the 1998 Agreement through the amended counterclaim filed in Tribal Court.

The plain language of the Land Use Ordinance and Guideline do not restrict enforcement solely or

exclusively to administrative actions, and grant the LUPC with authority to enforce the Tribes' claim and seek any appropriate legal remedy in Tribal Court. Section 4 of Article VII of the Land Use Policy Ordinance provides:

> 4. Legal Action
>
> In case any building or structure is erected, constructed or used, or any land or natural resource within the outer confines of the Fort Hall Reservation is used, in violation of any provision of this Ordinance, the Shoshone-Bannock Tribes, in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceedings to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance, or use.

The LUPC's authority is further defined in Chapter VIII, Section VIII-4 of the Guidelines, which provides in pertinent part:

> Judicial Procedures
>
> The Commission shall file, on behalf of the Shoshone-Bannock Tribes, a civil complaint in the Tribal Court against any person violating any provision of the Ordinance, as implemented in these Guidelines, whenever the correction of any violation cannot be achieved by administrative procedures. The pleadings and procedures in any such civil action shall be the same as authorized generally for civil actions by the Law and Order Code of the Shoshone-Bannock Tribes. The Commission may in any such civil action seek any appropriate legal relief, including but not limited

> to an order enjoining or compelling action by any violator in order to secure compliance by the violator with the provisions of the Ordinance, as implemented in these Guidelines.

Because the Ordinance and Guidelines specifically authorize the LUPC to seek all available legal remedies to enforce the Ordinance, and because the contract between the parties has been deemed to be for the purpose of applying a special use permit fee at an agreed upon fixed amount as a special exception to the usual fees in the Ordinance, the prosecution of the Tribes' breach of contract claim in its Amended Counterclaim will not be denied for lack of authority or standing.

3. Issues raised by FMC regarding the defenses of termination, repudiation, or the Tribes' alleged breach of the contract are not yet ripe.

FMC claims that even if the 1998 agreement constitutes a contract, there are defenses to enforcement of the contract including: that the correspondence did not include a specified end date and therefore any contract derived therefrom is improperly perpetual and terminable at will; that FMC repudiated or opted out of the agreement when John Bartholomew sent the Tribes a letter dated May 23, 2006, stating that FMC took the position that the $1.5 million fee need not be paid on June 1, 2002, or any subsequent year; and that FMC should be relieved of its contractual duties because the Tribes failure to enact the Hazardous Waste Management Act with a specific provision for either an exemption from the regulations for FMC or with the specific fixed fee for FMC is a material breach of the contract.

The issues raised by FMC appear to be alternatives for this court to consider should the court find that the. dismissal of the Tribes' counterclaim was an error. As stated above, this court does find error in the Trial Court's dismissal of the Tribes' counterclaim. However, the issues regarding termination, repudiation or breach were not addressed in the Trial Court's Opinions dated November 13, 2007 or May 21, 2008, nor were they raised by FMC in any complaint. The only mention of termination is on page 15 of the November 2007 Opinion where it states, "FMC's position has been that when it shut down the plant, its obligation to comply with the ordinance terminated." The Trial Court does not make any ruling in regard to that statement, before any hearings on the merits of the counterclaim can be heard. Because a remand to Trial Court is necessary to address the merits of the Tribes' counterclaim, any defenses to the breach of contract claim are properly raised in that forum, and this court declines to speculate on those issues.

E. The Trial Court correctly ruled that FMC was not entitled to assert as a defense the Tribal law statute of limitations.

FMC asserts that the Tribes' breach of contract counterclaim is barred by Chapter III, Section 3.64 of the Shoshone-Bannock Tribal Law and Order Code, which requires that a breach of contract claim be filed within three (3) years of the date of the breach. FMC argues that the Tribal Law and Order Codes' limitations provision is a jurisdictional statute, relying on John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008). FMC further argues that the Trial Court erred by finding that FMC was estopped from asserting the statute of limitations

defense, which is relevant only because this Court has already found that the Trial Court erred by dismissing the Tribes' Amended Counterclaim.

1. The limitation provision of the Shoshone Bannock Law and Order Code is a general statute of limitations rather than jurisdictional.

"Statutes of limitations are not designed to punish the plaintiff, but rather protect the defendant from unfair prejudice." Cachil Dehe Band of Wintun Indians of Colusa Indians v. California 629 F. Supp. 2d 1091, 1104, affd, 618 F.3d 1066 (9th Cir. 2010) and reconsideration denied, 649 F. Supp. 2d 1063, and affd in part, rev'd in part, 618 F.3d 1066 (9th Cir. 2010). "The purpose of a statute of limitations is to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Id. (quoting Weber v. Mobile Oil Corp., 506 F.3d at 1315 (10th Cir. 2007) (internal quotation and citation omitted)).

Chapter III, Section 3.64 of the Shoshone-Bannock Law and Order Code provides:

> Limitations of Actions
>
> Subject to the provisions of the Consumer Code, the Court shall have no jurisdiction over any action brought more than three (3) years after the cause of action accrued.

Where no other Code provision defines how the limitation is to be applied or interpreted, the Court must consider the plain language of the Code, and if there is a matter not covered by the provisions of the Code, then the Court will give due consideration to the Tribes' customs, traditions and the concept of

Tribal justice. See Shoshone-Bannock Tribes Law and Order Code, Chapter III, Section 1.1.[24]

Although the term "jurisdiction" is found in Section 3.64, there is no distinction included in the Code section regarding cases against the sovereign, which is a condition to the "jurisdictional" statutes of the type relied upon by FMC. See John R. Sand & Gravel Co, 552 U.S. at 140 (finding that statute of limitations was jurisdictional in suit filed against the United States in the United States Court of Federal Claims). In contrast to the specialized jurisdictional statutes, Section 3.64 is generally applied to all civil cases in Tribal Court. This Court recognizes that cases brought in Tribal Court are commonly litigated by persons representing their own interest without the assistance of an advocate or attorney, and that judges are tasked with upholding the Tribes' laws and are to see that justice is done is the cases brought in Tribal Court.

Under the circumstances of its general application to all participants in civil cases brought in Tribal

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[24] In all civil cases, the Shoshone-Bannock Tribal Court shall apply the provisions of this Law and Order Code and any additional ordinance hereafter adopted by the Shoshone-Bannock Tribes.

In any matters that are not covered by the provisions of this Code or by Ordinance, the Court shall apply the traditional customs and usages of the Shoshone-Bannock Tribes and for any doubt arising as to the customs and usages of the Tribe, the Court may request the advice of counselors familiar with these customs and usages.

In any matters that are not covered by the provisions of this Code, or by any Ordinances or customs and usages of the Tribe, the Court shall apply any laws of the United State[s] that may be applicable and any authorized regulation of the Interior Department of the United States."

Court, Section 3.64 must be read as a common statute of limitation provision that protects against stale or unduly delayed claims, rather than as a harsh jurisdictional bar to a litigant's cause of action such as the type of statute of limitations applicable in the Federal Court of Claims. As such, a claim that the limitation section applies must be brought as an affirmative defense at the pleadings stage and will be subject to forfeiture and waiver.

2. The Trial Court did not err by finding that FMC was estopped from asserting a statute of limitations defense.

Section 3.64 of the Tribal Rules of Civil Procedure requires the filing of a cause of action within three (3) years from the time the cause of action occurred. Because the breach of contract alleged by the Tribes' began to accrue either on May 23, 2002, based upon the letter from John Bartholomew to the Chairman of the FHBC indicating that FMC was taking the position that it would not pay the annual $1.5 million fee on June l, 2002, or any subsequent year, on June 1, 2002, based upon the Tribes' claim that the payment due was not received on that date, and because the Tribes' Counterclaim was filed September 14, 2006, there must be some exception to the statute of limitations otherwise the Tribes' claim will be time barred.

The Trial Court found that FMC was equitably estopped from asserting the statute of limitations defense through December 2005 where FMC and the Tribes had engaged in correspondence including: the communications in 1997; the May 23, 2002, response letter from FMC regarding the Tribes' demand for payment, which stated, "I, [John Bartholomew], and FMC are willing to enter into good faith discussions

leading to a successful resolution of this situation;" the letter dated May 27, 2004, in which the parties agreed through John Bartholomew and Fred Auck that "[n]either party's rights, defenses nor claims will be prejudiced in any manner whatsoever;" the exchange of letters between the Tribes and FMC in July and November of 2004 regarding ongoing negotiations; and the letter from John Bartholomew that indicated that FMC was terminating negotiations with the Tribe.

A party to a lawsuit cannot make representations or engage in conduct to make the other party believe that a delay will not prejudice claims, and then seek later to take advantage of a statute of limitations. See Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 234 (1959). The "maxim that no man may take advantage of his own wrong . . . has frequently been employed to bar inequitable reliance on statutes of limitations." Id. at 233.

In order to obtain equitable estoppel, a party must show: (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice. Willig v. State, Dept. of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Quasi-estoppel is a similar doctrine which "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." C & G, Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003). This doctrine applies

when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. Id. at 145. To prove quasi-estoppel, it is not necessary to show detrimental reliance; instead, there must be evidence that it would be unconscionable to permit the offending party to assert allegedly contrary positions. Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002). Similarly, a party may be subject to a waiver, which is a voluntary, intentional relinquishment of a known right and "the party asserting the waiver 'must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment.'" Fullerton v. Griswold, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006) (quoting Margaret H. Wayne Trust v. Lipsky, 123 Idaho 253, 256, 846 P.2d 904,907 (1993)).

Although the Trial Court used the words "equitably estopped," there is no explanation provide in the court's opinion to demonstrate that the court was applying the strict technical elements of equitable estoppel. What is clear from the Opinion is that the Trial Court considered FMC's ongoing communications and negotiations with the Tribes regarding the issue of FMC's conduct on the Fort Hall Reservation and all the matters related thereto, such as payment, transfer of assets, or waiver of tribal applications. The correspondence between the parties supports a finding that: (1) FMC knowingly and voluntarily entered into a waiver due to the

"relinquishment of rights" as outlined in the May 27, 2004, letter; (2) that FMC' s current position of attempting to assert the statute of limitations defense is different than the position taken in 2004 to hold action during negotiations; (3) that the Tribes were induced to cease action during the negotiation period; and (4) that it would now be unconscionable to permit FMC assert a statute of limitations defense inconsistent with the benefit derived from the passage of time and non-enforcement by the Tribes. In particular, the letter dated May 27, 2004, with the phrase, "[n]either party's rights, defenses nor claims will be prejudiced in any manner whatsoever," is sufficiently broad to induce the Tribes' to not pursue enforcement action through the courts while negotiations continue. The language in that letter is also sufficiently broad enough to include any legal claim, remedy, or defense that could be raised be either party, including any administrative claim or the common law breach of contract claim based on the same set of facts and circumstances. There is no evidence or circumstances to suggest that FMC was surprised or prejudiced by the passage of time, or that necessary evidence is now unobtainable to FMC.

Although the factors relate more closely to state court elements of quasi-estoppel and waiver, as a matter of Tribal Law, we find that the Trial Court's conclusion that FMC is estopped from asserting the statute of limitations defense as a matter of equity is not an error.

3. Even if the Trial Court erred by finding that FMC was equitably estopped from asserting the statute of limitations defense, the time for filing the Tribes' claim was tolled.

The facts which support the tolling of the statute of limitations are set forth in the correspondence between the Tribes and FMC. The letters demonstrate the following pertinent timeline:

- May 23, 2002, FMC's proposed repudiation letter;
- June 1, 2002, FMC failed to make the previously agreed upon annual $1.5 million payment;
- December 19, 2002, Notice of Violation was sent by the Tribes;
- During 2003 the Tribes took public comment on the proposed Hazardous Waste Management Act, which included submissions from FMC;
- April of 2004, letters from, Tribes demanding that FMC comply with the special use permit and building permit requirements;
- May 27, 2004, FMC proposed "stay" letter;
- September 16, 2004, meeting regarding issue of required permits;
- October 6, 2004, Tribes' letter to FMC demanding a cease of activity not in compliance with Tribal regulations;
- August 10, 2005, Tribes' formal demand that FMC obtain permits for waste storage, treatment and disposal;

- August 25, 2005, Tribes' letter to FMC demanding compliance with the LUPO and permitting requirements;
- December 2005, negotiations are terminated as evidence by John Bartholomew's letter indicating that FMC was attempting to sell the property to other interested parties;
- September 14, 2006, Tribes' filed counterclaim alleging breach of contract; and
- Continuing from 2002 to present – FMC has stored waste on the Fort Hall Reservation without payment of either the agreed upon fee or any other permit fee as required by the Tribes.

Of particular significance is the May 27, 2004 letter. It was drafted by FMC during a time when the Tribes had recently sent FMC the letter dated April 16, 2004, which specifically demands that FMC obtain a special use permit for the hazardous waste ponds, other solid waste, treatment of pond water and the slag pile, and further requested that FMC provide a projection for the amount waste in terms of volume/mass. The May 27, 2004, letter acknowledges that regulatory enforcement is at issue, seeks a stay of such enforcement based upon good faith negotiations to transfer the property, an indicates the parties' agreement that their respective "rights, defenses, [and] claims will [not] be prejudiced in any manner whatsoever. . ."

Although the reference in FMC's letter is specifically to regulatory enforcement, the context and circumstances reasonably include a tolling or stay of any claim based upon the same issues. It would be inconsistent to require that the Tribes' file a

breach of contract claim at that time, which would have been within the three year statute of limitations, and also expect the filing of that claim to not undermine the "good faith" negotiations.

Applying tolling based solely on the stay agreement, the three year statute of limitation would begin June 1, 2002, and run until May 27, 2004, then cease until December · 6, 2005, when the negotiations had broken down and terminated. The third year would then run from December 6, 2005, until December 6, 2006. Because the Tribes' filed the Counterclaim on September 14, 2006, the filing would not be subject to the defense raised by FMC.

In addition to the tolling described above, the time limitations may also be tolled due to other proceedings raised in various courts between 2006 and the present. In Swam v. Upper Chesapeake Medical Center, 397 Md. 528, 542, 919 A.2d 33, 41 (Ct. App. Maryland 2007), the Court stated that "[s]tatutes of limitations are designed primarily to assure fairness to defendants on the theory that claims, asserted after evidence is gone, memories have faded, and witnesses disappeared, are so stale as to be unjust." That court denied the application of the statute of limitations defense because the defendant "was fully put on notice of the [plaintiffs] claim" and allowed for the tolling of the statute of limitations during the pendency of the suit filed in the wrong forum. Id.

The Tribes' filed a Motion for Clarification of Consent Decree in Federal Court on September 19, 2005. The Tribes' filed the counterclaim for breach of the 1998 Agreement after the Federal Court ordered FMC to submit to the Tribal administrative process and after FMC did not pay the permit fee even after

the Land Use Commission granted FMC the relevant land use permits. The Ninth Circuit overturned the Federal District Court's ruling by decision rendered in 2008.

Given the circumstances, the Tribes pursuit of remedies in the federal forum demonstrate that the Tribes have exercised reasonable diligence in asserting the Tribes' related issues of permitting applications, enforcement of ordinances and the breach of the parties 1998 Agreement for a particular fixed special use fee. The record does not support a finding that FMC was not on notice of the Tribes' claims or that FMC was prejudiced by the Tribes' filing of the counterclaim in September of 2006.

Because there are sufficient ground in the record to support the Trial Court's holding that FMC should, as a matter of equity, be estopped from asserting a statute of limitations defense, this Court affirms Judge Maguire's November 13, 2007, decision in that regard.

F. The Trial Court erred by dismissing the Tribes' counterclaim for FMC's failure to obtain Tribal air quality permits.

The Tribes asserted in the Counterclaim that FMC failed to obtain air quality permits. FMC argued that the issue was not properly part of the administrative appeal, that the Tribes' lack jurisdiction over FMC's activities on FMC's fee land, that FMC is regulated by the EPA under the Clean Air Act, and that the plant is now closed with no further emissions. The Tribes countered stating that there is sufficient evidence of jurisdiction, that reference was made to air quality permits in 2005 correspondence between the parties and a nexus exists between the air quality regulation

and other permitting issues, that the Tribes have independent inherent authority to regulate air quality without any federal delegation of authority, and that there is no federal pre-emption of that regulation.

The Trial Court's November 13, 2007, decision states, "'The numerous issues involving this [air quality permit] dispute leave the court with an abiding belief that it should not become a part of the record of this administrative appeal. Whether or not there are emissions which are subject to 'Air Quality Act' and how such emissions are handled is a matter for the Air Quality Officer to review. Further, the issues of tribal jurisdiction and federal pre-emption make this an even more complicated problem." The court, citing to Sections 3.20 and 3.21 of the Tribal Rules of Civil Procedure, then dismissed the Tribes' counterclaim regarding FMC's failure to obtain Tribal air quality permits "subject to the Tribe's right to file a motion to sever the matter and have it handled separately."

As discussed herein, Chapter III, Section 3.13 of the Tribal Law and Order Code requires that the Tribes to file a compulsory counterclaim in this action or risk having the claim barred. At a minimum, the Tribes may file a permissive counterclaim involving the same parties and similar claims. Multiple claims against the same party may be brought in the same suit pursuant to Chapter III, Section 3.18 of the Law and Order Code, which provides in pertinent part:

> Section 3.18 Joinder of Claims and Remedies
>
> (a) Joinder of Claims
>
> A party asserting a claim to relief as an original claim **counterclaim,** cross-

> claim, or third-party claim, may join either as independent or as alternate claims, as many claims, legal or equitable as he has against an opposing party.

There is no authority in the Law and Order Code for the Trial Court to limit the Tribes' claims against FMC in the manner described in the Opinion entered November 13, 2007. The Trial Court's reliance on Chapter III, Sections 3.20 and 3.21 is misplaced. Those sections relate entirely and exclusively to the permissive joinder of parties and the improper joinder of parties respectively. The cited code sections have no bearing on the joinder of claims.

The court's concerns regarding the evidence of jurisdiction and complicated legal issues are matters that would properly be addressed during the consolidated trial of the parties' claims and counterclaims. It is clear from the Opinion and record that the Trial Court did not consider the factual allegations in the case in the light most favorable to the non-moving party in the context of FMC's Motion to Dismiss.

Because the incorrect standard was used and because the Trial Court did not correctly apply th appropriate sections of the Law and Order Code, this Court is compelled to overrule the Trial Court's dismissal of the Tribes' counterclaim regarding the issue of FMC obtaining air quality permits, and remands the issue of air quality permits for further proceedings consistent with this ruling.

G. The issue whether the Trial Court erred by dismissing the Tribes counterclaim without allowing discovery as to remaining material issues of fact is currently moot.

Because this Court has decided that the Trial Court erred by dismissing the Tribes' counterclaim, and is remanding that portion of the case for further proceedings, the issue of whether discovery was improperly denied is moot. This Court directs the Trial Court to proceed with the counterclaim as a new case in civil court subject to all of the provisions of the Tribal Law and Order Code, including Chapter III, Civil Procedure. Any discovery that remains outstanding can be conducted in that action.

H. The Trial Court did not err by ruling that FMC must obtain a building permit for demolition.

In the Opinion dated May 21, 2008, the Trial Court expressed deference to the LUPC's decision and affirmed the LUPC's authority to require a building permit, based upon the combination of the Guidelines and inclusion of the Uniform Building Code of 1997 (UBC) and based upon an independent requirement for a "use permit" for demolition activities in an industrial zone.

FMC asserts on cross-appeal that the Trial Court erred by affirming the Tribes' right to require a building permit with respect to demolition activities at the FMC site. FMC proposes several claims in this regard. FMC first claims that the LUPC acted beyond its authority by requiring a building permit and associated fee. FMC next claims that there is no legal basis for the LUPC's building permit decision because

the Ordinance relied up by the LUPC has a plain meaning of "construction," which does not include demolition, and because the LUPC's decision merely states that, "FMC is subject to the Tribes' land use permitting system," without providing any further detail or explanation as to how the LUPC reached its conclusion. FMC further asserts that, 1) the LUPC did not defer to the 1997 Building Code, 2) that the FHBC had no authority to apply a "new interpretation" of Tribal Law to FMC's permit application, and 3) the Tribal Court had no obligation to defer to such "interpretation" where the unambiguous definition already existed in another portion of the guidelines.

1. The LUPC has authority to require that FMC obtain a building permit.

The LUPC has the authority to require FMC to obtain the building permit pursuant to Sections l(h) and l(s) of Article VI of the Shoshone-Bannock Tribes Constitution and Chapter V of the 1979 Land Use Operative Guidelines.

By signing the Consent Decree, FMC agreed to apply for and obtain any permit required by the Tribes to perform work at the FMC site. Section IV, General Provisions, paragraph 8, of the Consent Decree provides in pertinent part:

> Where any portion of the work requires a federal, state, or tribal permit or approval, [FMC] shall submit timely and complete applications, and take all other actions necessary to obtain all such permits or approvals.

Paragraph 76 of Section IV of the Consent Decree also provides in pertinent part:

> [FMC] shall be responsible for obtaining any federal, state or local permits for any activity at the FMC Pocatello Plant, including those necessary for the performance of the work required by this Consent Decree.

In its decision clarifying the Consent Decree, the Federal District Court specifically declared that FMC was to submit to the Tribal permit process for "hazardous waste storage, treatment and disposal, and an additional building permit for the *demolition* activities." (Emphasis added).

FMC's argument that the building permit is void on its face for lack of compliance with Fort Hall Operative Policy Guidelines Chapter V, Section V-7-3 is without merit. The Building Permit is allowed without public hearing and does not require the LUPC to render any specific reasons for its decision unless the applicant is denied. (See Fort Hall Land Use Operative Policy Guidelines, Chapter V, Section V-1-1.)

Based on applicable Code sections, the Consent Decree, and review of the record herein, this Court finds as a matter of Tribal Law that the LUPC had authority to require that FMC obtain a building permit for demolition.

2. The LUPC stated sufficient grounds for its decision, and the FHBC did not apply grounds inconsistent with the LUPC in the FHBC decision.

After review of the record, this Court finds that FMC's argument does not take into account the entire basis and grounds for the LUPC decision. The LUPC decision does state that, "FMC is subject to the Tribes' land use permitting system," but also provides that,

"The building permit application is approved pursuant to Chapter V of the 1979 Land Use Operative Guidelines." The LUPC's stated reliance on Chapter V of the Guidelines supports a conclusion that the UBC was considered as an applicable regulation by the LUPC. Though the LUPC decision does not provide an extensive explanation of its reasoning or application of the permitting system, the Guidelines or the UBC, the citation to the Guidelines sections relied upon provides a sufficient basis to support the LUPC decision.

FMC's argument that the FHBC prospectively applied a new interpretation of Tribal Law is similarly flawed. In its July 21, 2006, decision, the FHBC stated, "For the purpose of interpreting the Land Use Policy Ordinance, Operative Guidelines, and Land Use rules and regulations in general the governing body of the Shoshone Bannock Tribes shall use as a source of interpretation the Uniform Building Code. The UBC definition of construction includes demolition." As stated above, the LUPC applied Chapter V of the Guidelines, and by implication the UBC, as part of its decision to require a building permit for demolition. The FHBC application of Chapter V would also lead them to conclude that the UBC is applicable. The FHBC's decision was not applying any new interpretation, but was instead merely more detailed in its description.

3. It was not Trial Court error to give deference to the LUPC decision.

A court should give deference to an agency interpretation if reasonable See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Deference under Chevron is premised on the theory that an ambiguity constitutes

an implied delegation of authority from Congress to the agency to fill the statutory gaps. Id. at 844. In the context of tribal agencies, the same principal would apply with the implied delegation coming from the FHBC and the LUPC filling the gap left in the code or ordinance. Such deference includes cases in which an agency interprets a term, where the interpretation is more expansive than the stated definition in the regulations and where such definition is not exhaustive. See Federal Exp. Corp. v. Holowecki, 552 U.S. 389 (2008) (upholding the EEOC Commission's interpretation of the term "charge" even though the term was defined in the EEOC regulations). The agency's position should be accepted unless it is "plainly erroneous or inconsistent with the regulation." Id. at 6, citing Auer v. Robbins, 519 U.S. 452 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

The definition of "construction" is found in Chapter II, paragraph 20 of the 1979 Fort Hall Land Use Operative Policy Guidelines. Chapter V, Section V-1-4 of the Guidelines also provides that, "[a]ll construction or location work authorized under any Building Permit issued by the Commission shall comply with all of the provisions and standards set forth in the most current edition of the "Uniform Building Code." Section 106 of the Uniform Building Code requires permits for the demolition of buildings or structures, with a provision for exceptions not at issue here. See UBC § 106.1. The Uniform Building Code also has provisions for addition requirements when demolition of any building is involved. See UBC §3303.9.

Like Holowecki, the applicable regulations in this case contained a defined term, "construction", but it was not an exhaustive definition, because the same term is expanded within another relevant regulation – here the UBC.

As a matter of Tribal Law, where an agency's interpretation is based upon a reasonable application of the regulations, the court shall give deference to such interpretation. Because the record reflects that the LUPC's decision relied upon a reasonable application of all relevant regulations, the Trial Court's decision to give it deference is hereby affirmed.

4. The Trial Court did not err by concluding that "construction" included demolition.

When interpreting a statute that appears to have conflicting provisions, it should be read to make both provisions have force. Korte v. United States, 260 F.2d 633, 636 (9th Cir. 1958). Both the definition of "construction" under the Guidelines as well as the section adopting all provisions and standards of the UBC should be given effect. Clark v. Portland General Elec. Co., 111 F.2d 703, 706 (9th Cir. 1940) (holding that in construing a statute, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature). Another rule of statutory interpretation provides that where codes or statutes address similar issues and there is some potential conflict, the specific will control over the general. See Mickelsen v. City of Rexburg, Idaho 305, 612 P.2d 542 (1980) (City's 1968 beer ordinance which was more comprehensive and later in time controlled over 1940 ordinance addressing the same issue).

Both rules of statutory construction apply in this case. The definition of "construction" in the Guidelines is intended to be consistent with the UBC, which is made applicable to specific situations involving building permits by another section of the same Guidelines. The term construction should thus be read to include all applicable terms provided in the Guidelines and the UBC, including demolition. The UBC also contains more specific requirements regarding demolition than the Guidelines. Where the UBC is incorporated by Chapter V of the Guidelines, and was applicable at all times during the contested proceedings, the more specific and comprehensive regulations should apply.

Because the rules of statutory construction and interpretation support a finding that the term "construction" includes "demolition," this Court affirms the Trial Court Trial Court's finding that a building permit was properly required for the demolition of FMC structures.

5. The Trial Court correctly concluded that there was an independent ground for FMC to obtain a use permit for the demolition.

The Trial Court went beyond giving deference to the LUPC in the May 2008 Opinion and also determined that, "a use permit would be required for FMC for demolition activities conducted in an industrial zone." The Trial Court applied the provisions of Chapter II, Section 65 and Chapter V, Section V-5(1) and (2) in concluding that while a special use permit is not required for industrial activity in an industrial zone, FMC's disassembly of the FMC plant was not the continuation of an industrial activity and would require a "use permit"

for FMC's demolition activity. This independent alternative basis for the building or use permit for the demolition was not assigned as error by FMC.

Based upon the grounds and reasons discussed herein, this Court affirms the Trial Court's conclusion that FMC must obtain a building or use permit for FMC's demolition activity.

I. **The Trial Court erred by finding that FMC** is **not required to pay the building permit fee in the amount of $3,000.00 as assessed by the LUPC.**

The LUPC approved FMC's building permit for the demolition activity pursuant to Chapter V of the 1979 Land Use Policy Operative Guidelines on the condition that FMC pay a three thousand dollar ($3000.00) permit fee and list the contractors and subcontractor that would work on the site. The Trial Court accepted the Tribes' assertion of authority to require the building permit, but stated, "[n]owhere in the ordinance is there a requirement for a fee of $3,000.00 as a condition to obtaining a building permit." The court then ruled that the imposition of the $3,000.00 fee was in excess of the authority of the LUPC granted by the ordinance. It is apparent from the Trial Court's May 21, 2008, Opinion that the court considered the LUPC decision requiring the building permit to include a reliance on the 1997 Uniform Building Code, but also believed that the LUPC was limited to the maximum fee provided in its own ordinance.

The Tribes agree that a ten dollar ($10.00) application fee is set forth in Article V, Section 3 of e Land Use Policy Ordinance and in Chapter V, Section V-1-l(b) of the Guidelines, but assert that the

Trial Court's conclusion overlooks valid authority set forth in the UBC for the LUPC to impose the stated fee for FMC's demolition activity and that there is a rational basis for the fee, even if not explained in any detail by the LUPC.

Chapter V, Section V-1-4 of the Guidelines provides in pertinent part, "[a]ll construction or location work authorized under any Building Permit issued by the Commission shall comply with all of the provisions and standards set forth in the most current edition of the "Uniform Building Code."

According to Section 107.2 of the 1997 Uniform Building Code, permit fees are assessed for each permit as set forth in Table 1-A. That section further provides:

> The determination of value or valuation under any of the provisions of this code shall be made by the building official. The value to be used in computing the building permit and building plan review fees shall be the total value of all construction work for which the permit is issued, as well as finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems and any other permanent equipment.

Because the Trial Court's opinion rendered solely on a review of the ordinance or Guidelines without reference to the fee schedule set forth in the UBC, the Trial Court's decision must be reversed.

This court next considers whether there is some rational basis for the LUPC's calculation for the three thousand dollar permit fee to allow reinstatement of the fee without remand. The Tribes assert that the fee would correspond to the sixth row of Table 1-A.

The fee described there is, "993.75 for the first $100,000.00 plus $5.60 for each additional $1,000.00 or fraction thereof, to and including $500,000.00." A three thousand dollar permit fee would correspond to work of a true value of approximately four hundred and fifty-eight thousand dollars ($458,000.00).

Schedule A of FMC' s permit application indicates that ten (10) separate buildings and structures were to be removed. However, the "Value of Proposed Works" portion of the permit form provides, "no cost to FMC." FMC's report of the valuation is contrary to the purpose of the application and interferes with the Tribes' accurate application of the fee schedule.

The Tribes' are not limited to reliance on a defective application when determining an appropriate fee amount. The cost of demolition, safety measures, and clean-up necessary to complete the work for removing all ten buildings are all factors that one would reasonably expect to be considered. See UBC Chapter 1, section 106 and Chapter 33.

As discussed above, the LUPC decision was rendered in a general manner without specific details as to how the UBC was applied. However, it is clear to this court that the LUPC did consider the provisions of UBC in its decision making process. While additional clarification in the LUPC decision would be a better practice to avoid contested issues such as this, this Court cannot find that the fee imposed by the LUPC was without a rational basis, and therefore overrules the Trial Court's conclusion and finds that the $3,000.00 fee should be reinstated.

VII. CONCLUSION

Based on the foregoing, we affirm the LUPC and Business Council decisions appealed by FMC. We

affirm the Trial Court's finding of Tribal jurisdiction over FMC, and for the reasons contained in this decision, evidence included in the record, and arguments advanced by the Tribes in briefing, find that the Tribes have jurisdiction over FMC's waste storage activities on the Reservation under at least the first exception set forth in Montana v. United States. The Tribes have jurisdiction over FMC under the consensual relationship exception based on the 1998 contractual agreement, the 1998 Consent Decree, and FMC's specific consent to Tribal jurisdiction in the 1997 Buttleman letter. Further, the Trial Court erred in limiting and foreclosing the Tribes' offer of evidence that the Tribes could exercise jurisdiction over FMC's waste activities on the Fort Hall Indian Reservation and whether those activities threaten or directly impacts or threatens the Tribes' health, and welfare, political integrity, and economic security of Tribal members, particularly its children and this case should be remanded to the Trial Court for the taking of additional evidence from both parties as to that issue. We reverse the findings and conclusion of the Trial Court on all other points inconsistent with these findings and conclusions.

The portion of the Trial Court's November 13, 2007 decision dismissing the Tribes' counterclaim for breach of contract based on FMC's failure to abide by the parties' 1998 Agreement is reversed, and this Court finds based on the record that the 1998 Agreement is an enforceable contract and that FMC agreed to pay an annual permit fee of $1.5 million per year for the years 2002, 2003, 2004, 2005, 2006, and 2007. We conclude as a matter of Tribal law that a breach of contract claim was properly filed by the Tribes based on the existence of an enforceable

contract in 1998 between the Tribe and FMC in which FMC agreed to pay the annual $1.5 million permit fee for waste storage even after the use of the Ponds terminated. We do not address years after 2007 because only the years 2002-2007 are presently at issue in these consolidated appeals.

This Court further finds that FMC agreed to the jurisdiction of the Tribes and its Court as well as applying for Tribal permits only because they were forced to do so by the Consent Decree entered in the Federal District Court of Idaho and as soon as the work which they had consented to perform was accomplished and they were released by the United States, FMC refused to make any further payments to the Tribes despite their earlier 1998, agreements. In fact, FMC went so far as to close its Pocatello, Idaho plant rather than pay the Shoshone-Bannock Indian Tribes what they promised, instead leaving hazardous waste in at least ponds 17, 18, and 19. Based upon the foregoing findings of fact and conclusions of law, the court enters the following order:

IT IS HEREBY ORDERED:

1. This matter is remanded for the Trial Court to properly consider evidence offered by either party to show that the FMC waste activities on the Fort Hall Indian Reservation would impact or threaten the Tribes' economic integrity, and health and welfare of Tribal members and Tribal children.

2. FMC is ordered to obtain a Tribal special use permit and pay the associated permit fee of $1.5 million for each of the years from 2002 up to and including 2007, based upon the authority of the Tribes' Land Use Policy Ordinance, the Operative

Guidelines as amended, and the HWMA/WMA, which authorize the LUPC to assess the $1.5 million permit fee, and FMC shall comply with the conditions set forth in the LUPC's April 25, 2006 decision, including FMC's obligation to pay the annual permit fee of $1.5 million per year.

3. Pursuant to Chapter 4, Section 2, Chapter 3, Section 3.58, and other applicable provisions of Tribal law, this Court directs that judgment be entered in favor of the Tribes against FMC in the amount of One Million and Five Hundred Dollars and No Cents ($1,500,000.00) for each year from 2002 up to and including 2007, and a separate judgment shall be issued by the Court as provided in the Law & Order Code.

4. The Trial Court's dismissal of the Tribes' counterclaims for breach of contract and FMC's failure to obtain air permits were properly filed, and the claims are reinstated with instructions on remand for the Trial Court to properly consider the claims.

5. The Trial Court's May 21, 2008, decision finding that FMC is not required to pay the building permit fee assessed by the LUPC is upheld because the Fort Hall Business Council failed to act on that issue.

6. Costs on appeal are awarded to the Tribes in accordance with the Court's authority under Chapter 4, Section 2 of the Law and Order Code. The Tribes are ordered to submit a cost bill to the Appellate Panel for costs incurred to date within thirty (30) days of the entry of this Order and FMC will have fifteen (15) days to respond.

DATED: This _14th day of _June, 2012.

The Honorable Fred Gabourie, Chief Justice

* * *

DATED: This _14th day of _June, 2012.

s/ Fred Gabourie, (Sr.)
The Honorable Fred Gabourie, Chief Justice

s/ Mary L. Pearson
The Honorable Mary Pearson, Associate Justice

* * *

s/ Cathy Silak
The Honorable Cathy Silak, Associate Justice

SHOSHONE-BANNOCK TRIBAL COURT
FORT HALL RESERVATION, IDAHO
CIVIL DIVISION

FMC CORPORATION, a Delaware Corporation, Plaintiff, vs. SHOSHONE-BANNOCK TRIBES' FORT HALL BUSINESS COUNCIL and SHOSHONE-BANNOCK TRIBES' LAND USE POLICY COMMISSION, Defendants.	CASE NO. C-06-0069 C-07-0017 C-07-0035 **OPINION**

INTRODUCTION

This is an appeal by FMC Corporation ("FMC") from Decisions by the Shoshone-Bannock Land Use Policy Commission ("LUPC") and the Shoshone-Bannock Tribe Fort Hall Business Council ("FHBC") regarding FMC's applications for a building permit and a special use permit. Three cases involving common issues pertaining to the building permit and the special use permit have been consolidated. Those cases are as follows:

Case No. C-06-0069. Complaint for Review of Permit Decisions Regarding Building Permit and Special Use Permit. That Amended Complaint petitioned this Court to review the Decision of the LUPC's Findings of Fact dated April 25, 2006, and the affirmation of those Decisions by the FHBC on July 21, 2006.

Case No. C-07-0017. Verified Complaint for Review of Fort Hall Business Council's March 5, 2007, Decision denying FMC Corporation's Motion for Stay of the April 25, 2006, Land Use Policy Ordinance ("LUPO") Decision.

Case No. C-07-0035. Verified Complaint for Review of Fort Hall Business Council's June 14, 2007, Decision affirming the LUPC's February 8, 2007, Letter Decision, setting the special use permit fee at $1.5 million.

Each of these cases involved common questions of fact regarding the issuance of the building permit and the special use permit by the LUPC.

ISSUES PRESENTED

1. Is FMC required to comply with the permit requirements for demolition activities at the FMC plant? As a corollary to that question, has the LUPC properly exercised its authority with respect to the issuance of the building permit and the imposition of a $3,000 fee?

2. Is FMC required to comply with the requirements of the LUPC regarding the issuance of a special use permit and the imposition of a $1.5 million annual fee for the storage of hazardous and non-hazardous waste on the Reservation?

HISTORY

The best place to start with respect to this appeal is 1997. In that year, FMC and the United States Environmental Protection Agency ("EPA") were negotiating terms to comply with the Resource Conservation and Recovery Act ("RCRA"). These negotiations were designed to, and ultimately led to, a consent decree between the EPA and FMC with respect to storage and disposal of hazardous waste by

FMC at its plant near Pocatello. During this period of time, FMC was also in communication with the LUPC regarding its activities at the FMC plant.

In that year, FMC applied for and obtained a building permit for the work to be done on two new ponds. In addition, FMC submitted an application for a Tribal Use permit with respect to ponds 17 and 18. FMC Ex. 4 AR 000018.

Subsequently, sometime in August 2007, FMC was notified by the LUPC that it had adopted, or was proposing to adopt, Amended Guidelines to the LUPC with respect to the storage of hazardous and non-hazardous waste on the Reservation. Amended Complaint C-06-69 Par. 23. Thereafter, on about April 6, 1998, the LUPC sent out different proposed amendments to the Fort Hall Land Use Operative Policy Guidelines ('Guidelines') to the LUPO proposing different fees for the storage of non-hazardous and hazardous waste. Amended Complaint C-06-69 par. 24 Ex. E. At that time, the Tribe sent Paul Yochum of FMC a letter outlining the minutes of a meeting on April 6, 1998, in which the LUPC discussed special use permits for ponds 17, 18 and 19. The LUPC stated that it would approve the 1997 Application upon compliance by FMC with respect to requirements A through L. See FMC Ex.5 AR. 003027.[1]

A meeting was held in Seattle between representatives of FMC and the Shoshone-Bannock Tribes ("Tribe") to discuss the question of hazardous and non-hazardous waste permits. An agreement

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[1]See Sections F and G pertaining to Amendments V-9-1, Hazardous Waste Siting Fee, and V-9-2, Hazardous and Non-Hazardous Waste Disposal Fee.

was reached between FMC and the Tribe with respect to annual payments to the tribe in lieu of storage fees envisioned under the Chapter V. Section 9 Guidelines. The agreement was outlined in three letters (Letters Agreement) dated May 19, May 26 and June 2, 1998. FMC agreed to pay $1.5 million per year and to pay a one-time start-up fee of $1,000,000. The agreement provided:

> It is agreed between the Land Use Policy Commission and FMC Corporation that beginning on June l, 1999, and for every year thereafter, FMC Corporation will pay an annual hazardous and non-hazardous fixed permit established in Chapter V of the Fort Hall Policy Guidelines."

The letter further stated that the Chapter V amendments to the Guidelines that the Tribe intended to adopt were only temporary. The Tribe planned on adopting a hazardous waste program and drafting a hazardous waste act that would include specific classes or exemptions to ensure that FMC's fixed fee of $1.5 million remain the same in the future. In a letter dated May 26, 1998, Paul McGrath filled in a few more of the details regarding the agreement and outlined FMC's position that the permitting related to construction of ponds 17, 18 and 19. He stated in his letter that the fee would apply during the time that the ponds were in operation. Mr. McGrath also talked about the conditions set forth in the April 13, 1998, letter, stating that they would be "discussed with representatives of the Tribe's EPA, the Department of Justice and FMC in connection with the resolution of environmental issues at the plant." Mr. McGrath stated:

> We believe these issues and the other issues raised by the Amended Guidelines will be satisfactorily worked out.

Mr. McGrath followed up with another letter on June 2, 1998, in which he stated that the permit was not limited to ponds 17, 18 and 19, but that the permit covered the plant and that the $1.5 million annual fee would continue to be paid in the future, even if the use of ponds 17, 18 and 19 was terminated. FMC Ex. 6 AR 000333. FMC paid the $1 million start-up fee and the $1.5 million dollar annual fee for the years 1998, 1999, 2000 and 2001. Since 1998, there is no record of the LUPC or the Tribe incorporating the "Letters Agreement" into its LUPO or its subsequently prepared Hazardous Waste Management Act or its Waste Management Act.

On about March 29, 1999, a proposed Consent Decree was filed with the U.S. District Court outlining an agreement between the EPA and FMC with respect to violations of federal environmental laws, including the RCRA that FMC and the EPA had worked out with respect to cleanups at the FMC facility.

The Tribe objected to the proposed Consent Decree and filed a motion to intervene in order to object to some of its proposed conditions.

On July 13, 1999, Federal Judge Lynn Winmill approved the Consent Decree over the objections of the Tribe. Even though the Tribe was not signatory to the Agreement, the Consent Decree addressed the question of permits in several locations. Under Section IV, General Provisions, paragraph 8, was the following:

> Where any portion of the work requires a federal, state or tribal permit or approval, defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

Further, in paragraph 76, is the following:

> This Consent Decree shall not be construed as a ruling or a determination of any issue related to any federal, state, tribal or local permit if required in order to implement this Consent Decree or required in order to continue or alter operations of the FMC Pocatello plant (including, but not limited to, construction, operation or closure permits required under RCRA, and the defendant shall remain subject to all such permitting requirements. The defendant shall be responsible for obtaining any federal, state or local permits for any activity at the FMC Pocatello plant, including those necessary for the performance of the work required by this Consent Decree.

In 2001, FMC shut down operations at the facility. By 2002, all operations had ceased and FMC notified the Tribe that it would no longer be paying the $1.5 million per year fee. Affidavit of Tony Galloway Case 06-69 Ex. G.

Thereafter, negotiations between the Tribe and FMC continued on a wide number of issues, including the possibility of the Tribe taking over the facility in exchange for a release of any liability or potential liability for permit fees or other obligations. On

December 19, 2002, the Tribe sent out a Notice of Violation regarding FMC's failure to obtain appropriate permits for the storage of waste on the Reservation. The notice claimed a $5.00 per ton fee which was different than either of the previous fees. Tony Galloway Affidavit Case 06-69 Ex. H.

FMC continued to refuse to apply for permits through the Fort Hall LUPC. Finally, on September 19, 2005, the Tribe filed a motion for a clarification of the Consent Decree, specifically addressing the issue of required Tribal permits for activities conducted at the FMC site.

The dispute over the permits came to a head when U.S. District Court Judge Lynn Winmill entered his order dated March 3, 2006, and decided "the sole issue is whether the Consent Decree requires FMC to comply with Tribal permitting requirements."

Judge Winmill emphatically stated that FMC had the obligation to comply with the permitting process identified and required by the Tribe. Specifically, Judge Winmill pointed to the letter dated December 9, 2005, from Paul EchoHawk to Rob Hartman of FMC. Declaration of William Scott Case 06-69 Ex. E. In that letter, the Tribe outlined the requirements for FMC to apply for and obtain a special use permit for hazardous waste storage, treatment and disposal, and an additional building permit for the demolition of activities currently under way at the FMC site. The letter went on to state that the regulations were required under the Tribe's LUPO, the Guidelines and the 1997 Uniform Building Code.

The letter went on to state that "under Article V of the Shoshone-Bannock Tribe's Land Use Policy Ordinance, FMC is required to obtain the necessary

permits, including, but not limited to, special use permits for storage, treatment and disposal of hazardous waste, and demolition of buildings and structures at the FMC plant." Under Chapter IV, Section IV-2.2(a), and Chapter V, Section V-1.1(4) of the Guidelines, and Chapters 1 and 33 of the 1997 Uniform Building Code, FMC is required to obtain permits for building and demolition of buildings and structures.

As a result of the Court's order, FMC filed a building permit application and special use permit application on March 20, 2006.

The building application included a check for $20, a color sketch marked "SKMAR 2006" and attached as Schedule A. The schedule showed the buildings which were to be removed. In addition, there was an exhibit to FMC's application which discussed the jurisdiction over a building permit for the demolition of the buildings at the FMC site. FMC Ex. 16, AR 000275.

FMC's Tribal special use permit included a check for $10, along with a discussion about the demolition activities at the site and a discussion about jurisdiction. FMC Ex. 17, AR 000291.

A public hearing concerning the applications for the building permit and the special use permit was held on April 25, 2006. The LUPC made separate findings regarding the building permit and the special use permit.

The Findings of Fact and Decision regarding the building permit included a response by the Tribe to FMC's argument that the Tribe did not have jurisdiction over FMC. The Tribe defended its jurisdictional rights on the basis of the Federal

Court's March 6, 2006, letter and other FMC activities which the Tribe considered submission to jurisdiction. The Tribe went on to find that the building permit was approved pursuant to Chapter V of the 1979 Guidelines. The permit was issued conditioned upon receipt of a fee of $3,000 and a list of the contractors and subcontractors that would be on-site working on demolition and dismantling activities at the FMC plant. FMC Ex. 18 AR000346.

The LUPC also entered Findings of Fact and Decision regarding the application for a special use permit. Again, the Tribe responded to FMC's objection to jurisdiction.

The LUPC found that FMC's activities at the FMC plant required a special use permit. The LUPC went on to find that:

> FMC voluntarily agreed in 1998 to obtain a special use permit for its waste activities, even after use of the waste storage ponds are terminated. The Land Use Policy Commission hereby grants FMC a special use permit for the disposal and storage of waste at the FMC Pocatello plant located on the Indian Reservation, subject to the requirements and conditions set forth below:
>
> 1. Permit Fee. The fee for the above-referenced permit for the fee agreed to by the Tribe and FMC in 1998, which is an annual fee of $1.5 million.
>
> ***
>
> In the event FMC does not acknowledge the 1998 agreement, the permit fee will be calculated according to the Tribe's land use

> laws and regulations, including the formula set forth in the Land Use Policy Operative Guidelines as amended.
> ***

The permit also required FMC to provide to the LUPC, within 15 days, information regarding the quantity in tons of waste currently at the FMC Pocatello plant, along with a description of the types of waste materials at the plant. FMC Ex. 19 AR 000349.

FMC promptly appealed the Decisions to the FHBC.

The FHBC heard the appeal on July 12, 2006, and filed a written Decision on July 21, 2006.

The Decision contained eight numbered paragraphs. The first paragraph related to Judge Winmill's March 6, 2006, Decision regarding the land use permit requirements.

Paragraph 2 struck from the record the affidavits of Marlis Palumbo and Morris Azose because they had not been presented to the LUPC prior to the time it made its Decision.

Paragraph 3 discussed the approval of the Guidelines. The FHBC made the Finding that Article VI of the Tribe's Constitution requiring Department of Interior approval for the resolutions and ordinances does not apply to guidelines.

Paragraph 4 determined that the Guidelines were properly amended by the LUPC in 1998. Paragraph 5 found that even if the Guidelines were not properly amended in 1998, the Secretary of the Interior approved the 2001 Hazardous Waste Management Act, providing a waste storage fee of $5 per ton. The Court also found that FMC applied for and paid $1.5

million per year to the Tribe for a Special Use Waste Storage Permit between 1998 and 2001. The FHBC affirmed the Decision of the LUPC. FMC Ex. 21 AR 002787.

FMC filed a motion in Federal Court to stay enforcement of the permit requirements.

In a Decision dated December 1, 2006, Judge Winmill denied FMC's petition for a stay based on the understanding the FMC could file a petition with the Business Council for a stay of the permitting requirements.

FMC also requested that the Court reconsider the jurisdictional issue, which the Court denied. FMC was ordered to provide relevant information to the Tribe regarding its hazardous waste.

The Court stated:

> The Court therefore anticipates that FMC will provide the necessary information and the Tribe will set a permit fee. After exhausting Tribal appeals on both the merits of the fee and any application for stay, FMC may, if necessary, present the issues to this Court for resolution.

The Court also made this observation:

> FMC has stated that it is willing to provide the Tribe with information on the waste so long as the provision of that information is not deemed a waiver of any legal rights, including the right to object to the Tribe permit process. The Court agrees that it is not a waiver of any rights and this should satisfy FMC's concerns.

Subsequent to the Court's Decision in December 2006, the LUPC re-established the fee requirement,

but also established an escrow account for receipt of the funds pending a determination of FMC's appeal.

FMC filed a request for a stay with the FHBC. The FHBC affirmed the decision of the LUPC and denied the motion for a stay. Verified Complaint C-07-0017 Ex. A.

FMC also appealed from the decision of the LUPC dated February 8, 2007. The Business Council affirmed the decision of the LUPC on June 14, 2007. Verified Complaint C-07-035 Ex. A. All of these cases have been appealed and have been consolidated.

LAND USE POLICY ORDINANCE

The "Ordinance-Land Use Policy of the Shoshone-Bannock Tribes," hereinafter "Ordinance," is a zoning ordinance and was adopted in two parts. The first part was adopted by the FHBC and approved by the Secretary of the Interior in 1975. The Guidelines were approved by the FHBC on August 24, 1979. The Guidelines were designed to assist the LUPC in the implementation of the ordinance. The Guidelines set forth specific requirements for zoning the entire Reservation into agricultural, mining, industrial and commercial/residential areas. The Guidelines provide specific requirements regarding applications for permits for uses within those four designated areas.

A building permit is required for the construction of any structure on the Reservation. Chapter V, §V-1.

A use permit is required for any industrial activity within an industrial area involving the construction of buildings or the change in use of buildings. §V-6.

A special use permit is required when a use of the property is inconsistent with the zoning plan adopted by the Council. §V-5. Chapter II, Definitions, § 65.

Building permits can be issued without a public hearing, but a hearing can be held if the LUPC believes it will assist in gathering facts necessary to reach a decision. § V-1-1. The standards for issuance of the permit at found at §V-1-2.

Special use permits and use permits require a public hearing and require specific findings by the LUPC.

In determining whether or not to grant a special use permit, the LUPC is required to comply with §V-5-2 of the Guidelines. Further, the LUPC shall give detailed consideration to the specific evaluation factors listed in the application for a special use permit. See the application filed by FMC for those evaluation factors. FMC Ex. 17 AR 000293.

With respect to use permits, a use permit is required for "the initial development of or change in any industrial use; including agricultural industries within any area zoned as industrial." The standards for issuance are found in § V-6. The standards for issuance of a use permit are found in § V-6-2. § V-7 is the procedure for a public hearing regarding permits and issuance of a written decision. § V-7-3 requires "such written decision shall include specific factual findings relied upon in support of the decision, as well as analysis of how the Commission applied the applicable standards in these guidelines in reaching its decision."

CHAPTER V GUIDELINES

The most important portions of the Guidelines for the purpose of this Decision are Chapter V of the Guidelines,§§ V-9-1 and V-9-2. These amendments pertain to annual hazardous waste siting fees: § V-9-1, Disposition of Revenue, and § V-9-2, Hazardous

and Non-Hazardous Waste Disposal Fees. These were adopted by the LUPC on May 18, 1998. There is no indication that these amendments to Chapter V were ever approved by the FHBC or by the Bureau of Indian Affairs Department of the Interior.

To summarize the Chapter V Guidelines, they impose substantial fees on persons who dispose, generate, store or treat hazardous wastes within the exterior boundaries of the Fort Hall Indian Reservation. There is a permit fee scale, depending upon the waste volumes. In addition, there is also an annual fee for hazardous waste and non-hazardous waste based on volume.

STANDARD OF REVIEW

The parties have suggested several standards for reviewing the Decisions by the LUPC and its subsequent affirmation by the Business Council.

FMC suggests the Federal Administrative Procedure Act, 5 U.S.C. 706(2) or the Tribal Administrative Procedures Act §17(G). Under those standards, this Court must determine if administrative action is (1) violative of the Tribe's Constitution or applicable law; (2) not within the agency's lawful authority or jurisdiction; (3) clearly erroneous in light of the entire record; or (4) arbitrary or capricious.

The Tribe urges the Court to look at the APA acts only for guidance and urges great deference to the Tribe under the standards set for in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

The Court finds that 5 USC 706(2) provides a reasonable framework for the review of the actions taken by the LUPC and the approval by the Business

Council with respect to the building permit and the special use permit filed by FMC and which are the subject of this issue.

Further, the Court has used 2 AmJur 2d, Administrative Law, §§50, 52, 54, 55 and 70 as a primer regarding the overall scheme of judicial review of administrative actions.

The review of any administrative procedure requires a comparison of the agency decision against the ordinance authorizing the action, keeping in mind any constitutional, statutory or other limitations. In addition, the decision-making process must substantially follow the requirements of the ordinance under which the decision is made.

Further, an administrative agency is not entitled to conduct its affairs in a legislative capacity when it is acting in a quasi-judicial capacity. In other words, even if an agency is authorized to engage in rule-making, it is not entitled to create new rules during the time it is ruling on applications or permits that have been applied for pursuant to existing ordinances. *FCC v. Pacific Foundation 438 U.S. 726 (1978).*

THE FOUR CORNERS OF THE ORDINANCE

In light of the above rules, this Court does not believe that it is entitled to look beyond the four corners of the ordinance and its properly adopted amendments in order to determine the legitimacy of the LUPC action. Further, it is the Court's position that it is reviewing the agency action of the LUPC whose decisions were affirmed by the FHBC.

BUILDING PERMIT

FMC has taken the position that it was not required to apply for and obtain a building permit

with respect to its demolition activities at the FMC site. A review of the ordinance in question, with respect to a building permit, does not clearly show that demolition is one of the activities that requires a building permit. See Chapter 2, Definitions, § 14.; Chapter V, § V-1.

The Tribe responded by saying that under the 1997 Uniform Building Code, demolition is considered to be construction and a building permit is required. Giving deference to the LUPC, this Court affirms the authority of the LUPC to require a building permit. Further, it is clear that a "use permit" would be required for FMC for demolition activities conducted in an industrial zone. See the definition of "use permit" and the requirements for a use permit under the ordinance. This bolsters the Court's belief that the Tribe's demand for a building permit is reasonable.

But the analysis cannot stop there. Nowhere in the ordinance is there a requirement for a fee of $3,000 as a condition to obtaining a building permit. The imposition of the fee is in excess of the authority of the LUPC granted by the ordinance.

The Court affirms the right of the Tribe to require a building permit. However, a $3,000 fee, not being a part of the ordinance, is stricken from the requirements. The other requirements are not in dispute and are affirmed.

SPECIAL USE PERMIT

A special use permit is not required for industrial activities in an industrial zone. Chapter 2, Def., §. 65.; Chapter V-5 (1) (2). On the other hand a "use permit" would be required for FMC's activities.

APPLICABILITY OF THE MAY 18, 1998 AMENDMENTS -- §§ V-9-1 AND V-9-2

The Tribe argues that a "special use permit" is required under the Hazardous Waste amendments of Chapter V, §§ 9-1 and 9-2, and it is entitled to charge fees under those guidelines. A permit is required under those guidelines even though it is not called a "special use permit." FMC argues that the LUPC cannot adopt such amendments on its own. Article V, §§ l(k) & (l) of the Tribe's Constitution gives the Tribe the power to enact ordinances. Those powers can be delegated to subordinate boards pursuant to§(s). The question is whether or not the Business Council delegated the authority to the LUPC to adopt amendments like §§ 9-1 and 9-2. Article 4 of the Guidelines to the Ordinance gives the LUPC the authority to administer and enforce the ordinance. The Guidelines to the Ordinance provide the authority of the LUPC to make amendments. See §§ 1-7 of the Guidelines. An "amendment" is defined as a change in the wording of the Guidelines. But a reading of the Constitution, the ordinance and the guidelines does not suggest that the Business Council delegated to the LUPC the broad authority to adopt fees and other requirements regarding hazard waste management as part of the zoning ordinance. This is especially true considering the magnitude of the fees and other requirements under the May 18, 1998, amendments. As early as August 1997, the LUPC recognized the need for an ordinance regarding this issue. Amended Verified Complaint C-06-69 Ex. D.

However, the FHBC has clearly ratified the actions of the LUPC with respect to the issuance of the May 18, 1998, Amendment.

Throughout this entire process, the FHBC has been aware of the actions of the LUPC and has endorsed and approved the LUPC's actions.

In light of the ratification of the LUPC's activities, FMC's argument that the LUPC did not have the authority to approve the May 18, 1998, Amendment is unsupported.

INCORPORATION OF THE "LETTERS AGREEMENT"

The Tribe urges this Court to incorporate the "Letters Agreement" into the May 18, 1998, Guideline amendments. Alternatively, the Tribe urges the Court to incorporate the "Letters Agreement" into the Hazardous Waste Act or the Waste Management Act. The "Letters Agreement" is the basis upon which the Tribe claims the right to assess a fee of $1.5 million dollars against FMC. To state the obvious, nowhere in the LUPO, the Guidelines, the proposed amendments or any of the other Hazardous Waste Acts is there any provision for a permitting fee of $1.5 million dollars for FMC in lieu of any other charge. When the LUPC or the Business Council conduct a hearing to determine if a permit is to be issued, they are acting in a quasi-judicial capacity. As such, they are fact finders. They are not entitled to amend the ordinance to incorporate additional requirements for the issuance of a permit. *FCC v. Pacific Foundation,* 438 U.S. 726 (1978). *Cooper v. Board of County Commissioners of Ada County,* 101 Idaho 407, 614 P.2d 947 (1980). *Seafarers Int'l Unioni of N. Am. V. Coast Guard, 81 F. 3d 179 (D.C. Cir. 1960).*

The Tribe also argues that FMC agreed to the fee and therefore it should be estopped from paying. However, a reading of the "Letters Agreement" does

not persuade this Court that FMC agreed to pay a $1.5 million dollar fee to the tribe for every year that waste remained on its property. Both sides contemplated substantial work in negotiating agreements and ordinances regarding non-hazardous and hazardous waste after the exchange of letters. Further, FMC's payments of the fee cannot be construed as action which caused the tribe to forgo the adoption of an enforceable ordinance incorporating the "Letters Agreement".

CONSTITUTIONALITY OF THE FEE

Article V, §1(h), of the Tribe's Constitution provides as follows:

> To levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Reservation.

Subsection (l) of Article V provides as follows:

> To safeguard and promote the peace, safety, morals and general welfare of the Fort Hall Reservation by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting non-members of the Reservation shall be subject to review by the Secretary of the Interior.

The May 18, 1998, amendments to the Land Use Policy Guidelines were not approved by the Secretary of the Interior.

In its briefs, the Tribe argues that the authority for the imposition of the $1.5 million fee could be inferred from the adoption of the Hazardous Waste

Management Act of 2001. This argument was not included in the decision-making process of the LUPC when it approved the special use permit for FMC. After the first round of hearings regarding the special use permit, the Tribe attempted to incorporate this argument into its subsequent decisions regarding the special use permit. Even assuming that the Hazardous Waste Management Act of 2001 could be a basis upon which to argue for the imposition of a $1.5 million fee, this Court finds that the Hazardous Waste Management Act was never officially approved by the Department of the Interior. (See the letter from the United States Department of the Interior dated November 22, 2004, addressed to NancyMurillo, Chairperson, FHBC, and signed by Eric J. LaPointe, Superintendent, attached to Preface of the Hazardous Waste Management Act of 2001.)

Further, the Waste Management Act of October 7, 2005, appears to have been approved by the FHBC on September 8, 2005, but there is no indication that it was ever forwarded to the Secretary of the Interior for review and approval.

This Court has searched for case law interpreting the requirement for approval by the Secretary of the Interior and has not found much that would provide assistance in this area. However, this Court determines that any ordinance which attempts to impose a fee on a non-member of the Tribe must be approved by the Secretary of the Interior. If it is not, the ordinance is void as to those non-members.

CONCLUSION

The Court affirms the issuance of the building permit, but strikes the requirement of a $3,000 fee.

The Court reverses the Decision of the LUPC with respect to the special use permit. The Court finds that no special use permit is required for industrial activities inside an area zoned industrial.

There has been no incorporation of the so-called "Letters Agreement" into any of the ordinances adopted by the Tribe.

The Tribe has failed to meet the approval requirements for the imposition of fees on non-members, contrary to its own Constitution and the imposition of the $1.5 million fee is void.

For the above reasons, the Court finds that a special use permit is not required.

DATED this 21 May of May, 2008.

s/ David H. Maguire
Tribal Judge David H. Maguire