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** Montana June 14, 2012 CONSENT

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 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-

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[1] AR 000346-000348, ER 000199-201 and AR 000349-AR 000354, ER 000202-ER 000207).
[2] Winmill Opinion, supra, at p. 3, ER 000219, AR 002812.
[3] Supra, at p. 6 and , ER 000213-214, AR 002815-2815.

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.

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") 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").

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[4] ER 000636-000639, AR 003021-3024,
[5] Notice of Appeal, June 02, 2006, ER 000850, AR 004376. Amended Counterclaim, ER 000238-000274.

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 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

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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.

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."

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[7] McGrath letter of June 2, 1998, toTribal 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.

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 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.

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

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 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.

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

[11] ER 000471, AR 000370. P. 11 of Fed. Dist. Ct. Docket.
[12] ER 000199-207, AR 000346-000354.

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.
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> 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 that 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 6 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 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

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 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.

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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.
* * * *

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); Glus 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 Tribes 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 Council adopted the 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, including, for the first time, an assertion that the 1998 Agreement was subject to the Tribes adopting certain regulations. FMC failed to make the

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[15] ER 000135, AR 002119.

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]

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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 was the resolution rescinded and thus was effective and approved.

These 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 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, § I-6.) Sections I-7, I-7-1, 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 I-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

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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!!)

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.

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-01-S3 which enacted the HWMA subject to final review by the tribal attorneys.[18] Attached to Resolution ENVR-01-S3 was a Certification of Ordinance ENVR-01-S3 dated October 19, 2001 to be signed by the Superintendent.[19] The Resolution approving the HWMA specifically referenced Article VI, Section 1(l) 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(l). The Resolution, Certification, and

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

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.

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. VI, 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 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,

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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.