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] *Plains*

[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

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)

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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.

("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 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

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

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

Peter D. McDermott, Tribal Appellate Judge — Date: 5-16-14

Vern E. Herzog, Jr., Tribal Appellate Judge — Date: 5/16/14

John Traylor, Tribal Appellate Judge — Date: 5-15-14

CLERK'S CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below a copy of the foregoing has been served by the method indicated below, and addressed to the following:

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DATED this 16th day of May 2014.

Clerk of the Court