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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FMC CORPORATION, Plaintiff, vs. SHOSHONE-BANNOCK TRIBES, Defendant.	Case No. 4:14-cv-00489-EJL-CWD **SHOSHONE-BANNOCK TRIBES MEMORANDUM OPPOSING DISCOVERY ON SECTION IV.C OF FMC's COMPLAINT**

INTRODUCTION

Pursuant to this Court's Order of March 23, 2015, the Shoshone-Bannock Tribes consider below "whether discovery should be allowed on the issues covered in Section IV.C of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief (Dkt. 10)." Order of March 23, 2015, *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-cv-489-EJL-CWD (D. Idaho filed Nov. 13, 2014), Dkt. No. 33. Discovery should not be allowed because FMC was required to exhaust

tribal remedies in this case, *United States v. FMC Corp.*, 531 F.3d 813, 823-24 (9th Cir. 2008), and under the exhaustion doctrine this case is to be decided based on the record made in the Shoshone-Bannock Tribal Court of Appeals, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed"); *FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) ("the [*National*] *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the 'orderly administration of justice in the federal court.'"). Furthermore, FMC may pursue here only such claims as were raised first in the Tribal Court of Appeals, *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416-17 (9th Cir. 1986) (a party's failure to challenge a tribal judge "for bias or on competence grounds precludes [that party] from raising this question in the federal courts"), and may rely only on evidence that was first presented to the Tribal Court of Appeals, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011) (district court reliance on declaration not presented to tribal court was reversible error as "the district court's review is akin to appellate review of the tribal court record"). Accordingly, there is no basis on which FMC may seek to conduct discovery on the issues raised in Section IV.C of the First Amended Complaint for Declaratory Judgment & Injunctive Relief, Dkt. No. 10 ("Compl.").

FMC cannot avoid this result by asserting its due process claim under the principles of comity set forth in *Wilson v. Marchington*, 127 F.3d 805, 809-13 (9th Cir. 1997) because a party seeking to deny comity recognition to a judgment entered in another forum may rely only on the claims that it presented to the first forum, provided that it had the opportunity to do so. *British*

Midland Airways Ltd., v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974). FMC was given ample opportunity to present its claims in the Tribal Court of Appeals, and accordingly the comity determination in this case is to be made by reviewing such claims as FMC made in the Tribal Court of Appeals, based on the record before the Tribal Court of Appeals. In sum, FMC may not conduct discovery on the issues raised in Section IV.C of the First Amended Complaint.[1]

I. OVERVIEW OF TRIBAL PROCEEDING AND FMC'S COMPLAINT.

FMC brought this action after exhausting tribal remedies in accordance with the Ninth Circuit's decision in *FMC Corp.*, 531 F.3d at 823-24. The proceedings before the Tribes were concluded by decisions of the Shoshone-Bannock Tribal Court of Appeals, which is the highest court in the Tribal judiciary.

As this Court recognized nearly forty years ago in *Brunette v. Dann*, 417 F. Supp. 1382, 1385 (D. Idaho 1976), the tribal judiciary was established by the Business Council in the exercise of its power "[t]o promulgate ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Fort Hall Reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers," Ex. 1, Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho ("Tribal Constitution"), art. VI, § 1(k),[2] and "[t]o adopt resolutions regulating the procedure of the council itself and of other

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[1] We consider here only the question presented in this Court's Order of March 23, 2015, and reserve for later presentation the Tribes' contention that FMC has waived its due process claim. *See* Answer to First Amended Complaint for Declaratory Judgment & Injunctive Relief & Counterclaim, Dkt. No. 12 ("Answer and Counterclaim"), Answer, § VIII, ¶2.

[2] The Tribal Constitution was adopted under the terms of the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479. Tribal Constitution, Certificate of Adoption. As the Supreme Court noted in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the Bureau of

tribal agencies and tribal officials of the reservation," *id.* art. VI, § 1(r). Acting under these "powers and duties," the Business Council adopted the Law and Order Code of the Shoshone-Bannock Tribes ("Law and Order Code"), which defines the tribal court system, and sets forth its jurisdiction and powers. *Brunette*, 417 F. Supp. at 1385-86. The Law and Order Code "establishes a systematic method of appeal and establishes an appellate court," in which "the appellant is entitled to a trial de novo," and the court "has broad power to affirm, reverse or direct entry of 'an appropriate judgment.'" *Brunette*, 417 F. Supp. at 1385-86; Law and Order Code, ch. IV, § 2 ("On appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court."). In the exercise of these powers, the Tribal Courts are also subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. *Brunette*, 417 F. Supp. at 1384-85.

In the proceedings below, the Tribal Court of Appeals held the Tribes have jurisdiction to require FMC to obtain a permit to store hazardous waste on Reservation fee lands owned by FMC (the "FMC Property") and to pay the agreed upon annual permit fee of one million five hundred thousand dollars ($1,500,000.00), and that FMC is liable for the permit fees which it has not paid. *See* Ex. 2, Amended, Nunc Pro Tunc Findings of Fact, Conclusions of Law, Opinion & Order of June 26, 2012, *FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't*, Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2012 TCA Op."); Ex. 3, Order of May 28, 2013, *id.*; Statement of Decision of April 15, 2014, *id.* ("2014

Indian Affairs assisted in drafting tribal constitutions adopted under the IRA, *id.* at 198. As a result, many tribal constitutions adopted under the IRA contain similar terms, *Cohen's Handbook of Federal Indian Law* § 4.04[3][a][i], at 257 (Nell Jessup Newton ed., 2012), and "typically include language authorizing the legislative branch of government to promulgate a law and order code, establish a 'reservation court,' and 'define its duties and powers,'" *id.* § 4.04[3][c][iv][B], at 265. The Tribes' Constitution, art. VI, § 1(k), contains that language, as well.

TCA Dec.") (statement of decision announced from the bench at the conclusion of the trial); Ex. 4, Opinion, Order, Findings of Fact & Conclusions of Law of May 16, 2014, *id*. ("2014 TCA Op.") (setting forth the court's opinion). Pursuant to those decisions, the court entered judgment against FMC on May 16, 2014 for the unpaid permit fees, attorney fees, and costs, in a total amount of twenty million, five hundred nineteen thousand, three hundred eighteen dollars and forty-one cents ($20,519,318.41). *See* Ex. 5, Final Judgment of May 16, 2014, *id*. ("Tribal Court Judgment").

In the first decision, the Tribal Court of Appeals upheld tribal jurisdiction based on the first exception set forth in *Montana v. United States*, 450 U.S. 544 (1981), under which a tribe may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members, *id.* at 565-66. Following briefing and oral argument by counsel for the parties, 2012 TCA Op. at 1, 3, the court held that "FMC's agreement for payment and the actual performance of tendering such payment of the $1.5 million annual permit to the Tribes from 1998 to 2001" established a consensual relationship under the first *Montana* exception and constituted a binding contract, *id.* at 14-15, 26-27, 40-42. The court also held that FMC had established a consensual relationship when it expressly agreed to apply for the Tribal permits needed to implement a Consent Decree that it entered into with the United States in 1998 to resolve claims brought against it under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k. 2012 TCA Op. at 15. The court further determined that even if FMC had not entered into an agreement to pay the annual permit fee to the Tribes, the imposition of that permit fee was independently authorized by Tribal law. *Id*. at 17-35 (the Tribes' Land Use Policy Ordinance ("LUPO"), the LUPO Guidelines, as amended in 1998, the Hazardous Waste Management Act, and the Land Use Policy Commission's letter decision of February 8, 2007

independently authorize the Tribes to impose the annual permit fee). Finally, the court held that the Trial Court had erred in failing to consider evidence on whether the Tribes have jurisdiction over FMC under the second *Montana* exception. *Id.* at 38. The court initially remanded that issue for consideration by the Trial Court, *id.* at 62-63, but subsequently determined that the issue would be heard by the Tribal Court of Appeals, *see* Ex. 6, Amended Nunc Pro Tunc Finding of Fact, Conclusions of Law, Opinion & Order of February 5, 2013 at 2, *FMC Corp*., Nos. C-06-0069, C-07-0017, C-07-0035 ("TCA Order of Feb. 5, 2013") (revoking remand to Trial Court in interest of time); *id*. at 13 (finding that the Law and Order Code authorizes the Tribal Court of Appeals to revoke the remand order); *id*. at 18-19 (revoking remand).

These rulings were reaffirmed by a new panel of the Tribal Court of Appeals that was appointed to conduct the remaining proceedings in the appeal. Order of May 28, 2013, *id*. at 1-3. That order was issued following a May 10, 2013 hearing at which FMC appeared by counsel, *id.* at 1, prior to which FMC had submitted two briefs, Ex. 7, FMC Corp.'s Pre-Hearing Brief Re: Case Management (May 6, 2013), *id*. ("FMC Pre-Hearing Case Br."); Ex. 8, FMC's Corp.'s Pre-Hearing Brief Regarding Lack of Approval of Hazardous Waste Management Act (May 6, 2013), *id*. ("FMC Pre-Hearing HWMA Br."). In the former brief, FMC stated that it "ha[d] obtained new evidence regarding public statements made by two of the judges from the prior appellate panel" at a conference on tribal courts held at the University of Idaho College of Law on March 23, 2012, which FMC claimed showed that two judges on the prior panel, Judge Gabourie and Judge Pearson, were biased. FMC Pre-Hearing Case Br. at 3-5. The evidence was not, however, newly discovered. FMC's counsel had attended that seminar in March of 2012, Ex. 9, Declaration of Maureen L. Mitchell In Support of FMC Corp.'s Pre-Hearing Brief Re Case Management at 2 (May 6, 2013), *id*. ("Mitchell Decl."), and FMC had obtained a videotape

of the seminar in January of 2014, from which a transcript was prepared that was attached to the declaration of its counsel, *id*. at 3; *id.* Ex. B; Compl. ¶303 (reciting that FMC received the videotape on January 10, 2013). In its brief, FMC told the court that "[u]nless the Judgment and all prior Opinions of the Tribal Court of Appeals are vacated in their entirey [sic], any further proceedings in this Court are unnecessary and improper. FMC should have the right to challenge the prior panel's Opinions and Judgment in the federal courts based on the evidence in the record at the time those Opinions and Judgment were issued by the Tribal Court of Appeals." FMC Pre-Hearing Case Br. at 9.[3] If the court did not do so, FMC said that "[it] will bring the issue of the bias, prejudice, and predeterminations of two of the prior panel's members to the federal courts." *Id*. at 5.

The new panel of the Tribal Court of Appeals did not take the course urged by FMC. On the first *Montana* exception issue, the court "concluded it has previously ruled that this court does have jurisdiction over respondent FMC Corporation under the first Montana exception, thus no further evidence will be received on this issue." Order of May 28, 2013 at 3. *See* 2012 TCA Op. at 12-15 (adjudicating that issue). On the breach of contract issue, the court held "there is no necessity of taking further evidence under breach of contract claim due to the fact that this court previously ruled FMC voluntarily entered into a contract in 1998 with the Shoshone-Bannock Tribes for payment of 1.5 million per year." Order of May 28, 2013 at 1. *See* 2012 TCA Op. at 40-42 (adjudicating that issue). The new panel further held that the Tribes' Hazardous Waste Management Act was properly approved on October 26, 2001. *Id.* at 1-3. And on the question whether the second *Montana* exception authorizes tribal jurisdiction in this case, the court held

[3] FMC took the same position in its other brief – that the Tribal Court of Appeals should vacate the prior opinions it had issued in the case and reconsider the entire case. FMC Pre-Hearing HWMA Br. at 11-12.

that "it will grant an evidentiary hearing" and set forth a schedule for those proceedings, which included a discovery deadline of October 18, 2013. *Id.* at 3. The parties subsequently stipulated to a modification of that schedule that provided for discovery to close on February 17, 2014 and the hearing to commence on April 1, 2014. Ex. 10, Stipulation to Continue Trial Date, Enlarge Trial Time, & Extend Pretrial Deadlines (Oct. 18, 2013), *id*. ("Oct. 18, 2013 Stipulation"). That stipulation was approved by the Tribal Court of Appeals. Ex. 11, Order of October 28, 2013, *id*.

In its second decision, the Tribal Court of Appeals upheld tribal jurisdiction based on the second *Montana* exception, which authorizes the exercise of tribal jurisdiction over nonmember conduct that threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Following a fifteen-day hearing, at which both parties appeared by counsel, presented evidence, and submitted briefs, 2014 TCA Op. at 1, 4; 2014 TCA Dec. at 1-2, the court held that the enormous quantity of the hazardous and non-hazardous waste stored by FMC on the Fort Hall Reservation ("Reservation"), the toxicity of the contaminants in the waste, and the mobility of those contaminants, have a threatened and direct effect on the lands, waters, and natural resources of the Fort Hall Reservation, and on the health, welfare, and culture of the Tribes and their members, which satisfies the *second* Montana exception. 2014 TCA Dec. at 19-28; 2014 TCA Op. at 14-15. Pursuant to those decisions, the Tribal Court of Appeals entered judgment against FMC on May 16, 2014. *See* Tribal Court Judgment.

FMC subsequently brought this action. Its complaint alleges that the Tribes do not have jurisdiction over its activities on the FMC Property under the *Montana* decision, Compl. § IV.A-B, that the Tribal Court of Appeals Judgment cannot be recognized or enforced under the Ninth Circuit's decision in *Wilson*, 127 F.2d at 810, because FMC was allegedly not afforded due

process of law in the Shoshone-Bannock Tribal Courts, Compl. § IV.C.1-3, and because the Tribal Court Judgment is allegedly contrary to decisions made by EPA, and is alleged to be a penal law, *id.* § IV.C.3, D. On those grounds, FMC seeks declaratory and injunctive relief. *Id*. § V. The Tribes have answered FMC's complaint, Answer §§ I-VI, asserted defenses and affirmative defenses, *id*. §§ VII-VIII, and counterclaimed for recognition and enforcement of the Tribal Court of Appeals' judgment under the principles of comity set forth in *Wilson*, 127 F.2d at 810, Counterclaim §§ I-IX. And FMC has answered the Tribes' Counterclaim.[4]

II. DISCOVERY IS NOT PROPER IN THIS CASE BECAUSE UNDER SETTLED LAW FMC'S CHALLENGE TO TRIBAL AUTHORITY IS DECIDED BASED ON THE TRIBAL COURT RECORD.

Under well-settled law, the issues in this case are to be decided based on the record that was before the Tribal Court of Appeals. FMC is therefore not entitled to discovery on the matters addressed in Section IV.C of the Complaint.[5] Furthermore, FMC may pursue in this action only claims that were first presented to the Tribal Court, and may rely only on facts that appear in the Tribal Court record. Accordingly, there is no basis on which FMC may seek to conduct discovery in this Court on the claims alleged in Section IV.C of the Complaint.

A. Under The Exhaustion Rule Of *National Farmers Union* The Claims Alleged In FMC's Complaint, Including Those Alleged In Section IV.C, Must Be Decided On The Record Made In The Tribal Court Of Appeals, And Discovery Is Neither Necessary Nor Proper.

In *National Farmers Union*, 471 U.S. at 856-57, the Supreme Court held that parties must generally exhaust tribal court remedies before bringing a civil action involving Indians and relating to reservation affairs in federal court under the federal question statute, 28 U.S.C. §

[4] Plaintiff's Answer to Defendant's Counterclaim, Dkt. No. 25.

[5] Section IV.C includes virtually all of the allegations on which FMC relies to support its claim that the Tribal Court Judgment is not entitled to recognition and enforcement by this Court, with the exception of its assertion that the Tribal Court Judgment is a penal law. *See* Compl., § IV.D, ¶¶327-329.

1331.[6] The court gave three reasons for requiring the exhaustion of tribal remedies. The first is that the Court's support for Congress' commitment to encouraging tribal self-government and self-determination "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases of the challenge." 471 U.S. at 856. The second is that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.* Allowing the Tribal Court "a full opportunity to determine its own jurisdiction and to rectify any errors it may have made" also minimizes the risks of a "procedural nightmare" that might develop were the federal case to proceed before the tribal proceedings had concluded. *Id*. at 856-57 (footnotes omitted). The third is that "exhaustion of tribal remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id*. at 857.

Shortly thereafter, the Court extended the exhaustion rule to cases brought in federal court under the diversity statute, 28 U.S.C. § 1332, and held that it requires exhaustion of tribal appellate remedies as well. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-19 (1987). In so

[6] As the Ninth Circuit recently explained, the Supreme Court has established four exceptions to the rule, under which exhaustion is not required:

> (1) when an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) when the tribal court action is patently violative of express jurisdictional prohibitions; (3) when exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; and (4) when it is plain that tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no purpose other than delay.

Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 847 (9th Cir. 2009) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)) (quotation marks omitted).

holding, the Court rejected the argument that exhaustion should not be required in diversity cases in order to protect non-Indians from local bias and incompetence, ruling that the alleged incompetence of tribal court does not provide an exception to the exhaustion rule, and that "the Indian Civil Rights Act provides non-Indians with various protections against unfair treatment in the tribal courts." *Id*. at 19 (citation omitted). Finally, the Court made clear that "[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigation of issues raised by [a party's] claim and resolved in the Tribal Courts." *Id*. at 19.

There is no question that the exhaustion rule applies to this case, as the Ninth Circuit expressly held that FMC was required to exhaust tribal remedies in this matter. *FMC Corp.*, 531 F.3d at 823-24. Accordingly, FMC was required to first present "the factual and legal bases for [its] challenge" to the tribal court, *Nat'l Farmers Union*, 471 U.S. at 856, including any claimed due process violations, *LaPlante*, 480 U.S. at 19 (claims of bias and incompetence do not excuse exhaustion of tribal remedies). And in this Court, FMC is barred from pursuing any claims – again including due process claims – that were not presented first to the tribal court. *A & A Concrete*, 781 F.2d at 1416-17 (claimed due process violation based on bias and incompetence of tribal court judge was subject to exhaustion rule, and a party's failure to present that claim in tribal court "precludes [that party] from raising this question in the federal courts"). The exhaustion rule also requires a party to present the evidence on which it relies to challenge tribal authority to the tribal court first, and in federal court a party may rely only on the evidence that was so presented. *LaRance*, 642 F.3d at 817 n.9 ("Because the district court's review is akin to appellate review of the tribal court record," it was error for the district court to rely on evidence that was not before the Tribal Court.). In these circumstances, there are no grounds on which

discovery could be sought by FMC in this case. Because a party is barred from relying on evidence that is not already in the record, evidence that might otherwise be obtained through discovery is neither relevant, nor likely to lead to the discovery of relevant evidence. *See* Fed. R. Civ. P. 26(b)(1) (limiting discovery to "nonprivileged matter that is relevant to any party's claim or defense").

Once tribal remedies have been exhausted, this Court reviews the tribal court decision based on the record of the tribal proceedings. As the Ninth Circuit explained in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990), "the [*National*] *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the 'orderly administration of justice in the federal court.'" The standards of review to be applied to a tribal court decision are well-settled. Questions of federal law relevant to tribal jurisdiction are reviewed de novo. *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (citing *FMC*, 905 F.2d at 1313-14).[7] The tribal court's findings of fact are reviewed under "a deferential, clearly erroneous standard of review," which "accords with traditional judicial policy of respecting the factfinding ability of the court of first instance." *FMC*, 905 F.2d at 1313. *Accord Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1206 n.1 (9th Cir. 2001); *LaRance*, 642 F.3d at 808 (9th Cir. 2011) (citing *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006)).

[7] Review is limited to questions of federal law that are relevant to a tribal court's decision on tribal jurisdiction. *Id.* "[F]ederal courts may not readjudicate questions – whether of federal, state or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." *Id*. And because "tribal courts are competent law-applying bodies," the tribal court's determination of its own jurisdiction is entitled to "some deference." *FMC*, 905 F.2d at 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978)).

These rules apply to FMC's challenge to the Tribal Court Judgment and the decisions of the Tribal Court of Appeals on which it is based. Accordingly, this case is to be decided based on the record made in the Tribal Court of Appeals. And in this Court, FMC may pursue only claims that were first presented to the Tribal Court, and may rely only on evidence that was first presented to the Tribal Court of Appeals. There is therefore no basis on which FMC may seek to conduct discovery in this Court on the claims alleged in Section IV.C of the Complaint (or indeed, any other part of the Complaint).

B. Under The Comity Rules Set Forth In *Wilson v. Marchington*, The Claims Alleged In FMC's Complaint, Including Those Alleged In Section IV.C, Must Be Decided On The Record Made In The Tribal Court Of Appeals, And Discovery Is Neither Necessary Nor Proper.

FMC cannot avoid these rules by relying on the principles of comity set forth in *Wilson v. Marchington* as a basis for seeking discovery in this case. Under those principles, a party opposing recognition of a tribal court judgment must show that the grounds on which it relies were presented to the court that issued the judgment, provided that it had the opportunity to do so. And any claims not so presented are forfeited.[8] As FMC had a full opportunity to present its claims to the Tribal Court of Appeals, this Court is to determine whether to grant comity to the Tribal Court Judgment based on the record made in the Tribal Court of Appeals.

The *Wilson* decision establishes that "as a general principle, federal courts should recognize and enforce tribal judgments" under principles of comity. 127 F.3d at 810. Comity "'is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.'"

[8] These are the same requirements imposed by the exhaustion rule, s*ee supra* at 9-12, which is also based on considerations of comity. *LaPlante,* 480 U.S. at 15-17 & n.8.

Id. at 810 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). "As a general policy, '[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *Id.* at 809 (quoting *Somportex Ltd. v. Phil. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)) (alteration in original).

A federal court has authority to recognize and enforce a tribal court judgment as a matter of comity provided that: (1) the tribal court had both personal and subject matter jurisdiction;[9] and (2) the defendant was afforded due process of law. *Id.* at 810.[10] Due process means "there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* at 811.[11] "Federal courts must also be careful to respect tribal jurisprudence along with the special

[9] In brief, the requirements of personal jurisdiction are satisfied when the defendant is physically present in the forum state, *LaRance*, 642 F.3d at 819 (citing *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990)), and when the defendant "has sufficient minimum contacts with the forum state such that the suit does not offend 'traditional notions of fair play and substantial justice,'" *id.* at 820 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The requirements of subject matter jurisdiction that are relevant here are set forth in the two *Montana* exceptions. *See Wilson*, 127 F.3d at 814-15 (applying *Montana* exceptions to determine whether tribal court had subject matter jurisdiction over non-Indian in highway accident case).

[10] Federal courts also have the discretion to decline to recognize and enforce a tribal judgment on equitable grounds where it is shown that: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment is against public policy. *Id*.

[11] In assessing whether due process was afforded, a federal court is to look to the Indian Civil Rights Act ("ICRA") for analogical support. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1143 n.12 (9th Cir. 2001). The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law . . ." 25 U.S.C. § 1302(8). While the ICRA is enforceable in federal court only by habeas corpus, *Bird,* 255 F.3d at 1143 n.12 (citing *Santa Clara Pueblo*, 436 U.S. at 69-72), its protections are available to non-Indians who are subject to tribal jurisdiction, *id.* (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 196 n.6 (1978)). In considering whether due process was afforded in the tribal court, a court may also consider the cases addressing that issue in the context of foreign tribunals, in which the Ninth Circuit has held that "unless a foreign country's judgments are the

customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance." *Bird*, 255 F.3d at 1142 (quoting *Wilson*, 127 F.3d at 811). And finally, review under principles of comity does not extend to the merits of the case, which "should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion . . . that the judgment was erroneous in law or in fact." *Id.* at 1141 n.8 (quoting *Hilton*, 159 U.S. at 202-03).

Under the principles of comity set out in *Wilson*, just as under the exhaustion rule of *National Farmers Union*, a party must advance any claim that it had the opportunity to present in the forum whose judgment is challenged; any claim not so advanced is waived. *British Midland*, 497 F.2d at 871 ("[W]e not only look with skepticism, but we flatly reject the due process complaint of a party who 'was given, and * * * waived, the opportunity of making the adequate presentation in the [foreign court].'" (quoting *Somportex*, 453 F.2d at 441) (ellipsis in original). To be sure, in some circumstances, an opportunity to present a claim is not available, in which case the lack of due process may be shown by extrinsic evidence. *See, e.g.*, *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (sister of the former Shah of Iran could not appear in the courts of Iran because to do so would subject her to personal danger; lack of due process in the courts of Iran instead shown by extrinsic evidence). But no such circumstances exist here.

The Tribal Court of Appeals provides parties before it with a full opportunity to advance their claims. As this Court held in *Brunette*, the Tribal Court of Appeals provides "a systematic method of appeal," under which appellants are entitled to a trial de novo, 417 F. Supp. at 1385-

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result of outrageous departures from our notions of 'civilized jurisprudence,' comity should not be refused." *Id*. at 1142 (quoting *British Midland*, 497 F.2d at 871 (quoting *Hilton*, 159 U.S. at 205)).

86, and in which the proceedings are subject to the Indian Civil Rights Act, *id.* at 1384-85. In *Brunette,* this Court held that a claim against the Chief Judge of the Fort Hall Indian Court, the predecessor of the Shoshone-Bannock Tribal Court, for violation of the Indian Civil Rights Act must be heard first in Tribal Court, ruling that "[t]he same principles of comity that apply in federal court-state court relations are forcefully applicable in federal court-tribal court relations," and rejecting the contention that exhaustion of tribal remedies would be futile. 417 F. Supp. at 1385-86.[12]

And FMC had a full opportunity to present its claims and objections in the Tribal Court of Appeals, which considered the appeals before it *de novo*. Law and Order Code, ch. IV, § 2 ("On appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court."). The issues addressed in the Tribal Court of Appeals' first decision were briefed and argued by counsel for the parties. 2012 TCA Op. at 1, 3. That ruling was then reaffirmed by the Court in the Order of May 28, 2013, following a hearing at which both parties appeared by counsel, prior to which FMC had submitted two briefs. *See supra* at 6-7. The Court also set a schedule for the proceedings on the second *Montana* exception, which included a discovery deadline. *Id.* at 3. The parties subsequently stipulated to a modification of the schedule, Oct. 18, 2013 Stipulation, which the Tribal Court of Appeals approved, Order of October 28, 2013. The

[12] At the time that *Brunette* was decided, the law permitted a party to enforce the Indian Civil Rights Act ("ICRA") in a civil action in federal court. *Brunette*, 417 F. Supp. at 1384-85. The Supreme Court subsequently held that the ICRA does not waive tribal sovereign immunity, nor does it provide a private cause of action for injunctive and declaratory relief in federal court, and that its terms are instead enforceable in federal court only under the ICRA's habeas corpus provision, 25 U.S.C. § 1303. *Santa Clara Pueblo*, 436 U.S. at 56-70. Enforcement of the ICRA is otherwise the exclusive responsibility of the tribal courts. As the Court explained, "[t]ribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id*. at 65 (footnote omitted).

second *Montana* exception issues were the subject of a fifteen-day hearing, at which both parties appeared by counsel, presented evidence, and submitted briefs. 2014 TCA Op. at 1, 4; 2014 TCA Dec. at 1-2. Accordingly, FMC plainly had ample opportunity to present its claims to the Tribal Court of Appeals.[13]

For these reasons, FMC may pursue in this Court only claims that were first presented to the Tribal Court of Appeals, and those claims are to be decided by this Court based on the record made in the Tribal Court of Appeals. There is therefore no basis on which FMC may seek to conduct discovery in this Court on the claims alleged in Section IV.C of the Complaint. Were the law otherwise, the principles of comity set forth in *Wilson* could be used to negate the exhaustion rule in its entirety. The first purpose of the exhaustion rule is to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Union*, 471 U.S. at 856. If claims could be asserted under *Wilson* that were not presented to the tribal court at the exhaustion stage, that purpose would be virtually negated. The second purpose of the rule is to afford the tribal court the opportunity "to rectify any errors it may have made," which minimizes the risks of a "procedural nightmare." *Id.* at 856-57. That purpose too would be defeated if a tribal court decision could be invalidated for reasons that the tribal court was never asked to consider. And finally, requiring exhaustion "encourage[s] tribal courts to explain to the parties the precise basis for accepting jurisdiction, and . . . provide[s] other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 856. That purpose could not be fulfilled if a party could withhold

[13] In *Bird*, the Ninth Circuit held that a closing argument made in tribal court that was "replete" with appeals to racial prejudice presented an "extraordinary case" in which a claim of plain error would be considered even "absent a contemporaneous objection . . . ." 255 F.3d at 1148. But the Court considered that claim based on the tribal court record – more specifically, the text of the closing argument made in tribal court. *See id.* at 1149-52. No such circumstances are present here and *Bird* offers no support for discovery here in any event.

claims from the tribal court for later assertion in a comity challenge. For these reasons, too, the principles of comity set forth in *Wilson* do not authorize discovery in this case.

III. CONCLUSION

For the foregoing reasons, the Tribes respectfully submit that FMC should not be allowed discovery on the allegations set forth in Section IV.C of FMC's First Amended Complaint for Declaratory Judgment and Injunctive Relief, Dkt. 10.

Dated this 7th day of April 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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