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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-489-CWD

**FMC CORPORATION'S BRIEF  
REGARDING DISCOVERY ON  
CLAIMS**

The Shoshone-Bannock Tribes ("Tribes") have a fundamental problem. They need to convince this Court to recognize and enforce a judgment, but that judgment was issued by a tribal court that they control. Federal courts do not enforce the judgments of a tribal court when the judgment was obtained from a system that lacked due process. In particular, federal courts do not enforce judgments if the judiciary was dominated by the opposing litigant, or where there was prejudice in the tribal court.

In Section IV.C. of its First Amended Complaint, FMC Corporation ("FMC") alleges that this Court should not enforce the Judgment issued by the Tribal Court of Appeals of

the Shoshone-Bannock Tribes (“Tribes”), because that court was controlled by the Tribes, denying FMC any semblance of a fair hearing. Although the Tribes deny these facts in their Answer, they also seek to deny FMC the right to discover further evidence of these facts. There is no basis for the Court to bar FMC’s discovery regarding its valid claim.

## **I. BACKGROUND**

In his Memorandum Decision and Order dated March 6, 2006 (“March 6, 2006 Order”) Judge Winmill issued an order requiring FMC “to apply to the Tribes for the permits” the Tribes contended were required. Mem. Dec. and Order, CV 98-0406-E-BLW (D. Idaho, March 6, 2006), ECF No. 94. This was the beginning of a long journey. As ordered, FMC immediately applied for the permits in March 2006, which began an eight-year process before the tribal courts, from 2006 through 2014. On May 20, 2014, the Tribal Court of Appeals issued a Judgment against FMC, ordering FMC to pay \$20,519,318.41 and to pay \$1.5 million to the Tribes each year forever and into eternity. May 20, 2014 Final Judgment (“Judgment”).

Section IV.C. of the First Amended Complaint explains that, in the Shoshone-Bannock Tribes’ Constitution and Bylaws (“Tribal Constitution”), the courts are politically subordinate entities to the Fort Hall Business Council (“Business Council”). Shoshone-Bannock Tribal Constitution Art. III §1; Art. VI. §1(k); Art. VI §1(s); *see* FMC’s First Am. Compl. (“Am. Compl.”) ¶¶ 260-66, ECF No. 10. There is only one political division of the Tribes – the Business Council. Every act of the Tribes, including judicial acts, is subject to the supervision and direction of the Business Council. Tribal Constitution, Art. III §1; Art. VI., §1(k); Art. VI §1(s); Am. Compl. ¶¶ 264-65. Section IV.C. of the First Amended Complaint also alleges specific facts demonstrating that the Shoshone-Bannock tribal courts are controlled by

and subject to the Business Council, which is also the beneficiary of the Judgment at issue.  
Am. Compl. ¶¶ 260-66.

The evidence is strong that the Business Council is the power and authority of the Tribes, and has ultimate control over all parts of Tribal operations, including of the tribal courts. This evidence was confirmed just a few weeks ago, when one of the Judges of the Shoshone-Bannock Tribal Court expressly declared this fact. In an open letter published in the Sho-Ban News on March 19, 2015, Tribal Court Judge Dave Archuleta complained that the Business Council had changed its position on the rules, to deny him the chance to run for a position on the Business Council. He then wrote the simple, but plain truth, that the tribal court judges are completely subject to the Business Council:

***We [tribal court judges] serve at the pleasure of the Fort Hall Business Council and can be removed at their will. That is the reality of the job.***

Dave Archuleta, Letter to the Editor, *Archuleta Perspective on FHBC Candidate Withdrawal*, Sho-Ban News, Mar. 19, 2015 at 4 (emphasis added).

FMC has also alleged that the tribal court judges serve at the pleasure of the Business Council, and are subject to its control. Am. Comp. ¶¶ 260-314. The Tribes deny this fundamental fact, yet also ask this Court to disallow any discovery of this important question. January 30, 2015 Answer to First Am. Compl. ¶¶ 260-314, ECF No. 12. In doing so, the Tribes seek to effectively dismiss FMC's due process claims by precluding evidence on this issue.

## **II. ARGUMENT**

### **A. A Claim of Lack of Due Process Is a Recognized Defense to the Enforcement of a Tribal Judgment.**

In Section IV.C. of the First Amended Complaint, FMC claims that the lack of due process provided in the tribal courts is a legal defense to the enforcement of the Judgment in

this Court. The legal criteria for whether to recognize and enforce tribal judgments was laid out by the Ninth Circuit in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), which derived the rules for tribal judgments from the established rules stated in the Restatement (Third) of Foreign Relations Law of the United States, and the decisions of the United States Supreme Court, concerning the comity granted to judgments of foreign courts. *Wilson*, 127 F.3d at 809-813.

Applying this pattern to tribal court judgments, the Ninth Circuit held that federal courts must not recognize or enforce tribal court judgments if: (a) the tribal court did not have both personal and subject matter jurisdiction; or (b) the defendant was not afforded due process of law. *Wilson*, 127 F.3d at 810. A federal court may also decline to recognize and enforce a tribal court judgment on equitable grounds, including if: (a) the judgment was obtained by fraud; (b) the judgment conflicts with another final judgment; (c) the judgment is inconsistent with the parties' contractual choice of forum; or (d) recognition of the judgment or the cause of action upon which it is based is against the public policy of the United States. *Wilson*, 127 F.3d at 810.

These are the criteria that are applied by the forum court, where the holder of the judgment seeks to enforce the judgment. This analysis is not for application by the foreign court (in this case, the Tribal Court of Appeals) from which the judgment was issued. Having issued such a judgment, that foreign court would always find that its judgments should be enforced elsewhere. This requirement that the foreign court provide due process would be wiped away if the foreign court was allowed to decide whether it had provided due process. The entire purpose of the due process requirement would be eliminated if the foreign court merely had to certify that it provided due process in order for its judgments to be enforced elsewhere.

For the same reason, the foreign court is not allowed to define the evidentiary record upon which the due process defense to comity will be addressed. If there is a concern that

a litigant was not treated fairly, the evidentiary record on whether the foreign tribunal provided due process *must* be created in the federal court that will be deciding whether to grant comity, not in the foreign tribunal. To deny discovery on this issue would bootstrap American courts into being a party to those due process violations. No legal authority supports the Tribes' claim that FMC was required to fully litigate its due process issues in the Tribal courts, the very subject of the inquiry regarding due process.

The Tribes' effort to disallow discovery would disregard *Wilson v. Marchington*, as if the Ninth Circuit had not issued this landmark ruling. The Ninth Circuit stated that "evidence 'that the judiciary was dominated by the political branches of government or by an opposing litigant'" supports a conclusion that the legal system is one whose judgments are not entitled to recognition. *Wilson*, 127 F.3d at 811. FMC has alleged sufficient facts to support its claim that the Tribes' "judiciary was dominated by the political branches of government" and "by [the] opposing litigant." *Wilson*, 127 F.3d at 811. FMC must be allowed to conduct discovery on that claim.

**B. FMC Has Alleged a Valid Claim to Prevent Enforcement of the Tribal Judgment, and Discovery Must Be Allowed on that Claim.**

It is presumed that a plaintiff has the right to take discovery regarding its valid and active claims. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). By seeking to deny discovery as to Section IV.C. of the Complaint, the Tribes are essentially seeking to eliminate or dismiss the valid claims alleged by FMC in Section IV.C. of its First Amended Complaint. But the Tribes have no basis for the dismissal of this claim.

In ruling on a motion to dismiss, the court accepts as true all allegations of material fact and construes them in the light most favorable to the non-moving party. *Cahill v.*

*Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9<sup>th</sup> Cir. 1996); *Navarro v. Block*, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). Indeed, factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6). *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9<sup>th</sup> Cir. 2001).

A complaint survives a motion to dismiss under Fed.R.Civ.P. 12(b)(6) if it contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint need not contain detailed factual allegations, but “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (alteration and internal quotation marks omitted). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff ultimately will prevail, but whether the plaintiff shall be allowed to offer evidence to bolster the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). When deciding whether to grant a motion to dismiss, the court generally “may not consider any material beyond the pleadings.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n19 (9<sup>th</sup> Cir.1990).

Section IV.C. of FMC’s Complaint provides ample basis for believing that the Tribes control the tribal courts and the particular tribal court that issued the Judgment at issue. FMC has alleged sufficient facts to satisfy Fed.R.Civ.P. 12(b)(6) standards, and the Court should allow FMC to conduct discovery on these claims.

C. **Discovery Is Allowed on the Threshold Question of Whether Comity Will Be Granted to a Foreign Judgment.**

Procedurally, a claimed lack of due process can be presented as a defense to enforcement of a foreign judgment after the party seeking enforcement makes a *prima facie* showing that there was subject matter jurisdiction, personal jurisdiction, and that there were

regular proceedings conducted according to a normal course of civilized jurisprudence. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1409 (9<sup>th</sup> Cir. 1995). In *Pahlavi*, the Ninth Circuit held that the defendant had met her burden by attaching various reports to her motion to dismiss that demonstrated the absence of an independent, fair judiciary in Iran. *Id.* Although specific evidence that she herself would be “treated badly by the regime” was not presented and this “weaken[ed] her position somewhat,” the Ninth Circuit concluded that no reasonable trier of fact could conclude, based on the evidence of unfairness, that the defendant would have received a fair trial. *Pahlavi*, 58 F.3d at 1413. Factors to be considered in such proof of the lack of due process include whether there was an opportunity for a fair trial before an impartial tribunal, whether there was a showing of prejudice in the court, and whether the judiciary was dominated by an opposing litigant. *Wilson*, 127 F.3d at 811. Discovery should be allowed to determine whether the Judgment met these factors.

Several cases have addressed the availability of discovery to consider the due process afforded in connection with a judgment from a foreign court. Generally, these cases show that discovery should be allowed in relation to the comity factors, but not in relation to the underlying merits of the claims adjudicated in the foreign court. For example, in the case of *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWx) 2004 WL 5615657 (C.D. Cal. May 18, 2004), the Central District of California was asked to decide whether to enforce a judgment from Nicaragua. The Court considered arguments and evidence related to the lack of impartial tribunals and due process in Nicaragua, and concluded that discovery should be conducted regarding the due process implications of Nicaraguan Special Law 364, which was alleged to impose an “exorbitant” price tag merely on the right to be heard and to deprive defendants of other legal protections. The court stated,

Shell Oil and the Nicaraguan Claimants have presented the declarations of two Nicaraguan lawyers, but the lawyers' interpretations of Special Law 364 are contradictory. *The parties, particularly the Nicaraguan Claimants who are the non-movants, should have an opportunity to conduct discovery regarding the due process implications of Special Law 364.* See 9 Wright & Miller, supra, § 2444 ("Discovery is available to the parties in preparing themselves on issues of foreign law. Oral and written examinations, interrogatories to parties, and requests for admission often are used to refine and sharpen disputed issues, to record expert testimony on foreign law, to determine the position taken by the opposing party's expert, and to gather information and foreign legal materials.").

*Id.* at 4 (emphasis added).

Other district courts have similarly received evidence on the foreign tribunal's procedures to determine whether litigants were afforded procedural fairness. One example is *Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307 (S.D. Fla. 2009), which rejected a request to enforce a Nicaraguan judgment after conducting an evidentiary hearing and receiving expert testimony and documentary evidence on the same Nicaraguan Special Law 364 at issue in the *Shell Oil* case. *Osorio*, 665 F.Supp.2d at 1327. The trial court concluded that the Nicaraguan trial court's procedures did not conform with the requirements of international due process of law, and that Nicaragua lacked a system of impartial judicial tribunals. *Osorio*, 665 F.Supp.2d at 1350-51.

The Southern District of New York held that "[i]t is settled law that the sparring concerning preliminary issues should not be permitted to degenerate into a full-blown trial on the merits... Accordingly, discovery concerning... the need for comity should be narrowly focused and not call for a detailed development of the entire case." *Base Metal Trading S.A. v. Russian Aluminum*, 00 CIV 9627 JGK FM, 2002 WL 987257 (S.D.N.Y. May 14, 2002) (holding that the depositions of Russian judicial system experts should be permitted but other discovery requests concerning the merits of the underlying case should not be permitted because discovery should



be allowed only on the issue of whether the Russian judgment was fair and complied with due process).

In *Baker & McKenzie Advokatbyra v. Thinkstream Inc.*, 2008 CA 2535, 20 So.3d 1109, 1120 (La. App. 1 Cir. Feb. 19, 2009), a Louisiana Court of Appeals held that a trial court abused its discretion by not granting motions to compel discovery to obtain information pertaining to the Swedish court's jurisdiction over the defendant's in the underlying case because the defendants had the burden to challenge the enforceability of the Swedish court's judgment allegedly obtained by "extrinsic fraud," and not allowing discovery would infringe on the defendant's ability to meet that burden. *Baker & McKenzie Advokatbyra*, 2008 CA 2535, at p.17, 20 So. 3d at 1120.

In *Evans Cabinet Corp. v. Kitchen Intern., Inc.*, 593 F.3d 135 (1st Cir. 2010), the First Circuit addressed whether the Massachusetts district court's grant of summary judgment that a Canadian court had personal jurisdiction over the parties in a contract dispute was proper. *Evans Cabinet Corp.*, 593 F.3d at 140. There, the court held that, despite the fact that the district court had converted a motion to dismiss into a motion for summary judgment for purposes of gaining discovery concerning personal jurisdiction, summary judgment was inappropriate because more facts were needed to ascertain whether the Canadian court had personal jurisdiction over the parties and the court remanded the case for fact finding (and presumably to engage in discovery and proceed to trial). *Evans Cabinet Corp.*, 593 F.3d at 148.

In *Burgan Exp. for Gen. Trading & Contracting Co. v. Atwood*, No. 2:12-CV-041, 2012 WL 4473210 (S.D. Ohio Sept. 26, 2012), the court was asked on summary judgment to enforce a Kuwaiti court's judgment. *Atwood*, 2012 WL 4473210, at \*10. The court refused to consider statements made "upon information and belief" because the defendants had already had

the opportunity to conduct discovery in the Ohio district court concerning the Kuwaiti due process issues. *Id.*<sup>1</sup> In summary, federal courts routinely acknowledge the availability of discovery in connection with due process issues when asked to enforce foreign judgments.

D. **Comity Questions Are Outside the Rule Limiting District Court Review to the Tribal Court Record.**

Although the Tribes argue that review of the Tribal Court judgment should be based on the record at the tribal court, the cases relied upon by the Tribes for this point are not cases that applied the comity factors provided in *Wilson v. Marchington*.

The case of *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006) dealt with the application of the *Wilson v. Marchington* comity factors to a tribal court judgment. *Burrell*, 456 F.3d at 1167-70. In *Burrell*, the tribal court had entered judgment in favor of its tribe, against an outsider who had been required to find justice in the tribal courts for a dispute between the outsider and the tribe. 456 F.3d at 1161. The Tenth Circuit held that the tribal court judgment would not be enforced because the outsider had been denied due process. 456 F.3d at 1175. In particular, the Tenth Circuit focused on the “significant procedural limitations” in the case, and on “whether effective litigation was limited by the nature or relationship of the parties.” 456 F.3d at 1172. In particular, the Tenth Circuit wrote:

As an initial matter, we note that the close relationship between the tribal court, the Pueblo, and the individual tribal officials causes us to **carefully scrutinize** the tribal court proceedings in this case.

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<sup>1</sup> See also *LG Display Co., Ltd. v. Obayashi Seikou Co. Ltd.*, 919 F. Supp. 2d 17, 22, 23 n.6. (D.D.C. 1-28-2013) (discovery was necessary to recognize the foreign judgment because it was not clear from the current information available to the court and parties whether both patents were included in the foreign judgment); *Society of Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005) (information about the basis for the awarded damages set forth in the English judgments and information relating to contractual intent and formation was not discoverable in the enforcement proceeding because they were related to the claims already litigated in the English courts).

456 F.3d at 1173 (emphasis added). The Tenth Circuit then carefully scrutinized the tribal court proceedings on a *de novo* basis, without relying on the tribal court's own view of its processes.

*Id.* After that scrutiny of the process, the Tenth Circuit held that the tribal court judgment was not entitled to recognition, under either principles of comity or collateral estoppel. *Id.*

The Tribes assert that the case of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) requires that this due process question must be based on the record developed in the tribal court. Lit. Plan., Att. A, Mar. 20, 2015, ECF No. 31-1. But in *Burrell*, the Tenth Circuit specifically rejected this same argument:

We disagree with the district court's conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations. **The Supreme Court's decisions in *Iowa Mutual and National Farmers* do not address due process;** rather, they hold that principles of comity require a federal court to give a tribal court the first opportunity to determine its own jurisdiction, subject to later review by a federal court. . . . Here, we conclude that both principles of comity applicable to the recognition of foreign judgments, and the collateral estoppel doctrine's requirement that a litigant have a full and fair opportunity to litigate an issue, are relevant to the case at hand.

*Burrell*, 456 F.3d at 1171 (emphasis added, citations omitted). The Tenth Circuit made it clear that the issue of comity comes after exhaustion is completed:

***After exhaustion is completed***, litigants may seek federal court review of a tribal court's ruling that it had jurisdiction. . . . But "[u]nless the district court finds the tribal court lacked jurisdiction or ***withholds comity for some other valid reason***, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *AT & T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002) . . . .

*Burrell*, 456 F.3d at 1168 (emphasis added).

For this point, *Burrell v Armijo* relied on the Ninth Circuit case of *AT&T v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which is a case arising from an appeal of a decision by Judge Edward Lodge of the District of Idaho. *Burrell*, 456 F.3d at 1168. In *AT&T Corp. v.*

*Coeur d'Alene Tribe*, the Ninth Circuit explained that the comity grounds were an exception to the limitation of district court review to the record at the tribal court. 295 F.3d at 903-04. The Ninth Circuit explained:

*Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason*, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.

. . . federal courts may not re-adjudicate 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.* (emphasis added). Applying these standards, the Ninth Circuit disregarded the findings of the Coeur d'Alene Tribal Court and Tribal Court of Appeals that they had subject matter jurisdiction over AT&T, and held that the tribal courts lacked jurisdiction to entertain the claim brought by the tribe in that case. *Id.* at 901.

These points were driven home in the case of *Bird v. Glacier Electric Coop.*, 255 F.3d 1136 (9th Cir. 2001). In that case, the Ninth Circuit reviewed *de novo* the claim that the defendant Glacier Electrical Cooperative, which was an outsider to the Blackfeet Tribe, was denied due process in connection with a judgment issued by the Blackfeet Tribal Court.

255 F.3d at 1141. The Ninth Circuit stated:

We conclude that the Co-op was necessarily prejudiced when, in closing argument, counsel used incendiary racial and nationalistic terms to encourage the all-Blackfeet jury's award against the non-Indian Co-op.

255 F.3d at 1152. To come to this conclusion, the Ninth Circuit explained that it considered due process claims *de novo*:

However, we review *de novo* claims of due process violations. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). If the tribal court violated due process, then the district court here had no discretion to recognize the tribal court judgment. *See Wilson v.*

*Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). Further, *de novo* review is required when reviewing a district court's summary judgment. . . . For these reasons, we review *de novo* whether the alleged due process violations precluded the district court's grant of comity here to the tribal court judgment.

255 F.3d at 1140-41. The Ninth Circuit proceeded to review the facts regarding the fairness of the proceeding, without any discussion of whether the Blackfeet Tribal Court or the Blackfeet Tribal Court of Appeals had considered their process as fair. *Id.*

The cases of *AT&T* and *Burrell* and *Bird* make it clear that the comity factors are addressed by the federal district court as part of a comity analysis, after the tribal court processes are complete and a judgment is issued.

E. **Reviewing a Judgment Under the Comity Standards is Distinct from Reviewing a Tribes' Assertion of Jurisdiction When Enforcement Is Not At Issue.**

In reviewing a tribal court judgment, the federal district court occupies two separate and distinct roles, depending on what kind of relief is sought by the parties. Different standards apply depending on whether the district court is asked to enforce the tribal court judgment under comity, or whether the court is sitting in more of an appellate posture, reviewing a tribal court determination of jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), which is a federal question.

In *Wilson* and *Bird*, the district court was asked to enforce a tribal court judgment, and the non-Indian opposing enforcement argued that principles of comity precluded enforcement. Both opinions relied upon a comity for foreign judgments analysis, which *Wilson* adapted in recognition of the "special considerations arising out of existing Indian law." *Wilson*, 127 F.3d at 810. Citing *Wilson*, the Ninth Circuit in *Bird* stated, "If the tribal court violated due process, then the district court here had no discretion to recognize the tribal court judgment."

*Bird*, 255 F.3d at 1140. Significantly, the Ninth Circuit in *Bird* did not require that the

district court review the due process issue based solely upon the tribal court record. In fact, *Bird* did not mention the jurisdictional question under *Montana* or look to the tribal court findings. Instead, the Ninth Circuit reviewed the claim of due process violations *de novo* based upon the record developed on summary judgment. *Id.*

In contrast, a different standard applies when a district court is reviewing a tribal court's jurisdictional determination. "The question of tribal court jurisdiction is a federal question of law, which we review *de novo*." *Smith v. Salish Kootenai College*, 434 F.3d 1129, 1130 (9<sup>th</sup> Cir. 2006). But *Smith*, in reviewing a non-Indian's challenge to a tribal court's jurisdictional ruling under *Montana*, further stated that "findings of fact" are reviewed for "clear error." *Id.* *Smith* incorporated tribal court findings that the defendant, Salish Kootenai College, was a "tribal entity or an arm of the tribes for purposes of federal Indian law regarding tribal court jurisdiction." *Smith*, 434 F.3d at 1134-35. Ultimately, the Ninth Circuit concluded that *Smith* "could and did consent to the civil jurisdiction of the Tribes' courts" (*Smith*, 434 F.3d at 1136) and it affirmed the district court's decision in favor of tribal jurisdiction. *Smith*, 434 F.3d at 1141. But no such deference to foreign court findings exists under the doctrine of comity.

Although principles of comity require exhaustion of tribal remedies before a non-Indian may challenge a tribe's jurisdiction (subject to exceptions not pertinent here), questions of comity that arise after exhaustion of tribal remedies, when a tribal litigant seeks federal court enforcement of a tribal court judgment, are treated differently than the limited federal question of whether to affirm a tribal court's jurisdictional determination. The two distinctly separately roles that the district court performs must be acknowledged.

F. **FMC Raised its Due Process Concerns to the Tribal Court.**

The Tribes argue that FMC should have argued to the Tribal Court of Appeals its position that the Tribal Court of Appeals was controlled by the Defendant Tribes. But the Tribes fail to acknowledge that two separate and distinct issues are pending before this Court. As explained above, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), requires that questions of *jurisdiction* be decided upon the tribal court record. *National Farmers Union* does not stand for the proposition that collateral issues related to a tribe's request to enforce a tribal court judgment, such as whether due process or other issues preclude granting comity, must also be based on the tribal court record. Notwithstanding the existence of two separate and distinct issues with separate and distinct standards of review, the record demonstrates that FMC did in fact raise its due process concerns in the tribal forum.

On several occasions, FMC raised these issues to the Tribal Court of Appeals, and the Tribal Court of Appeals ignored the problems FMC identified.<sup>2</sup>

Procedural due process issues first appeared in the Tribal Court of Appeals proceedings before the initial decision on jurisdiction was issued. In an Order dated November 7, 2011, after appellate briefing had been submitted and oral argument heard, the Tribal Court of Appeals asked both sides to simultaneously file proposed Findings of Fact and Conclusions of Law. The parties filed their respective proposed pleadings on February 10, 2012. The Tribes' proposed Findings and Conclusions raised new issues not previously briefed and contained numerous factual inaccuracies and assertions not supported in the record. On April 2,

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<sup>2</sup> Although the Tribes seek to limit this review to the record at the tribal courts, that record has not yet been compiled and transmitted to this Court. This makes it difficult for FMC to point to and provide the portions of the record where these concerns were raised within that record. The parties are working together on identifying and assembling the voluminous record in a manner that will facilitate district court review of the relevant jurisdictional determinations.

2012, FMC filed a Motion seeking leave to move to strike those improper proposed Findings and Conclusions. The Tribal Court of Appeals ignored FMC's Motion and on May 8, 2012 issued its Findings of Fact, Conclusions of Law, Opinion and Order that adopted almost verbatim the Tribes' proposed Findings and Conclusions.

Several post-decision issues arose, including the Tribes' request for and the Court's award of costs on appeal. The Tribes submitted a Memorandum for Costs and Attorney's Fees, which FMC opposed for multiple reasons, including the grounds that no Tribal law or ordinance provided for such an award, and that the Court had only granted costs, not attorneys' fees. FMC Opposition Brief, Jun. 22, 2012. FMC also raised the issue of its ignored Motion to Strike and further asked the Court to consider adding to the record a newly-discovered document that the Tribes had received from the Bureau of Indian Affairs ("BIA") while the Tribal Court case was pending and which demonstrated that the BIA had never approved a draft Hazardous Waste Management Act ("HWMA") of 2003 upon which the Tribes had relied. The Tribal Court of Appeals summarily dismissed these due process issues, as well as FMC's objection to the award of attorneys' fees and costs, in a series of confusing, contradictory, and unorthodox Orders issued in January and February 2013. The Tribal Court of Appeals set, and later cancelled, an evidentiary hearing on one month's notice on the Tribes' Counterclaims and the HWMA issue. Minute Entry and Order, Jan. 4, 2013.

Although the case had been remanded to the Tribal Court in the May 8, 2012 decision, the Tribal Court of Appeals notified the parties on January 12, 2013 that it was revoking that remand and instead would itself hold an evidentiary hearing to consider the Tribes' Counterclaims and to address whether tribal jurisdiction could be found under the second *Montana* exception. Findings of Fact and Conclusions of Law re Attorney's Fees and Costs,



Jan. 12, 2013. In that same decision, the Tribal Court of Appeals awarded attorneys' fees and costs to the Tribes on multiple grounds, including FMC's alleged bad faith in contesting jurisdiction in the first instance "where issues such as jurisdiction should have been obvious under the circumstances." Findings, at 14, ¶10, Jan. 12, 2013.

In response to these decisions, FMC filed two Motions for Clarification – first on January 14, 2013 and a second Motion for Clarification on January 25, 2013, both of which raised questions about the decision to revoke the remand and conduct an evidentiary hearing in the appellate court *after* the appellate court had decided all substantive issues on appeal, as well as the lack of clarity about the issues remaining for decision. The Tribal Court of Appeals ignored both Motions, however it did extend the date for the hearing to May 10, 2013. Finally, on April 22, 2013, the Tribal Court of Appeals issued a new Order that informed the parties that the May 10, 2013 hearing would be a status conference. Order, Apr. 22, 2013. From this Order, FMC also learned for the first time that two judges, Mary Pearson, and Fred Gabourie, Sr., were no longer assigned to the case and two new judges, Peter D. McDermott and Vern E. Herzog, Jr., were now assigned.

The assignment of two new judges was particularly important to FMC because it had recently obtained evidence of publicly-announced bias of Judges Pearson and Gabourie, who had presented their predisposition in favor of the Tribes' jurisdiction at a seminar held at the University of Idaho College of Law. FMC therefore brought forward again its objections and concerns regarding the prior panel's decisions that showed bias, partiality, and a pattern of turning a blind eye to unfavorable facts and law, for example the rejection of FMC's request to include the April 2008 BIA letter in the record. FMC filed two pre-hearing briefs on May 6, 2013 that presented the evidence of the prior panel's bias and urged the new panel to reject the

prior panel's decisions, to re-hear the case based upon the briefing already submitted, and to render a new, untarnished decision. FMC Pre-Hearing Brief re Case Management, May 6, 2013. FMC argued that continuing down the path started by the first panel would only serve to perpetuate the improprieties of the case, because all substantive decisions had already been made – the Tribal Court of Appeals had already found jurisdiction under both the first and second *Montana* exceptions, FMC had been ordered to pay a \$1.5 million permit fee to the Tribes, and the case was ripe for final judgment and commencement of federal court review. *Id.* The new panel rejected FMC's arguments, however, and proceeded with ordering an evidentiary hearing to receive evidence on the second *Montana* exception. The Tribal Court of Appeals decisions from that duplicative, predetermined evidentiary hearing are now at issue before this Court.

In summary, FMC made its record that due process was lacking at the Tribal Court of Appeals and sought to raise these issues as they became known to FMC and at junctures when the Tribal Court of Appeals was in a position to rectify them. In addition to bringing its due process concerns to the Tribal Court of Appeals, FMC fully litigated both its jurisdictional objections and the underlying merits of the Tribes' claims, which included claims for a Tribal special use permit for waste activities, a building permit for building demolition activities, and a claim for breach of contract. There can be no suggestion that FMC in any way waived its due process concerns or failed to bring them to the Tribal Court of Appeals' attention.

But the fact that FMC raised certain due process claims in the Tribal system does not preclude FMC's right to discovery on those claims in the federal court. As stated above, due process and comity are separate from the issue of tribal jurisdiction. They are determined, *de novo*, by the federal court based on the record before it after FMC is first afforded discovery

under the federal rules with respect to the claims alleged in Section IV.C. of the First Amended Complaint.

### III. CONCLUSION

FMC has stated a valid claim asking the district court not to enforce the tribal court judgment because that judgment was granted by a process that denied FMC due process. This Court should allow such discovery.

DATED this 7th day of April, 2015.

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Attorneys for FMC Corporation

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7<sup>th</sup> day of April, 2015, I filed the foregoing **FMC CORPORATION'S BRIEF REGARDING DISCOVERY ON CLAIMS** 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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