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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-BLW

MEMORANDUM IN SUPPORT OF THE SHOSHONE-BANNOCK TRIBES' MOTION FOR RECOGNITION AND AFFIRMANCE OF THE TRIBAL APPELLATE COURT DECISION UPHOLDING TRIBAL JURISDICTION UNDER THE FIRST *MONTANA* EXCEPTION AND FOR SUMMARY JUDGMENT ON JUDICIAL ESTOPPEL

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I. INTRODUCTION.

On this motion, the Shoshone-Bannock Tribes ("Tribes") respectfully seek an order recognizing and affirming the ruling of the Shoshone-Bannock Tribal Court of Appeals ("Tribal Appellate Court") that the Tribes have jurisdiction under the first *Montana* exception, *see Montana v. United States*, 450 U.S. 544, 565-66 (1981), to require the FMC Corporation ("FMC") to obtain a tribal waste storage permit and pay the annual permit fee of one million five hundred thousand dollars ($1,500,000.00) for as long as it stores waste on the Tribes' homeland, the Fort Hall Reservation ("Reservation"). *See* Ex. 1, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & 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.") (holding that the Tribes have jurisdiction under the first *Montana* exception, and that FMC is required to pay the annual permit fee as long as it stores waste on the Reservation); Ex. 2, Order of May 28, 2013 (new panel of the Tribal Appellate Court reaffirms prior panel's rulings that the Tribes have jurisdiction over FMC under the first *Montana* exception and that FMC is required to pay the annual $1.5 million permit fee to store waste on the Reservation, and rejects FMC's challenge to the validity of the Tribes' Hazardous Waste Management Act).[1]

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[1] Pursuant to that ruling, and a subsequent decision upholding tribal jurisdiction under the second *Montana* exception, *see* Ex. 3, Statement of Decision of April 15, 2014 ("2014 TCA Dec.") (statement of decision holding that the Tribes have jurisdiction under the second *Montana* exception announced from the bench at the conclusion of the trial); Ex. 4, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014 ("2014 TCA Op.") (setting forth the court's opinion that the Tribes have jurisdiction under the second *Montana* exception to require FMC to pay the annual permit fee to store waste on the Reservation), the Tribal Appellate 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 J. of May 16, 2014 ("Judgment").

As the Tribes show below, the Tribal Appellate Court correctly held that the Tribes have jurisdiction under the first *Montana* exception to require FMC to obtain a tribal waste storage permit and pay the annual permit fee. *See* 2012 TCA Op.; Order of May 28, 2013. FMC consented to tribal jurisdiction and secured the Tribes' permission to store waste on the Reservation in an agreement reached in 1998, which it then performed for four years. FMC also relied on that agreement to secure the Court of Appeals for the Ninth Circuit's affirmance of this Court's approval of a companion agreement that FMC had entered into with the United States. Accordingly, the Tribes respectfully seek recognition and affirmance of the Tribal Appellate Court's ruling, *see FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (affirming prior ruling of the Tribal Appellate Court holding that the Tribes have jurisdiction over FMC under the first *Montana* exception), and enforcement of the Judgment by an order of this Court.

II. JURISDICTION, BURDEN OF PROOF, AND STANDARD OF REVIEW.

A. Jurisdiction.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because federal law governs the existence of tribal jurisdiction under the *Montana* exceptions, *FMC*, 905 F.2d at 1314, and the recognition and enforcement of a tribal court judgment, *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997). As the Shoshone-Bannock Tribes is a federally-recognized Indian tribe with a governing body duly recognized by the Secretary of the Interior, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826, 26,830 (May 4, 2016), this Court also has jurisdiction under 28 U.S.C. § 1362.

B. Burden of Proof.

The Tribes have the burden of establishing jurisdiction under the first *Montana* exception. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *see* 2012 TCA Op. at 15.

C. Standard of Review.

The Tribal Appellate Court's legal ruling that the Tribes have jurisdiction over FMC under the first *Montana* exception is subject to *de novo* review by this Court. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (citing *FMC*, 905 F.2d at 1313-14). Review is limited to questions of federal law relevant to the tribal court's jurisdictional ruling as "federal 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.*; *see also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010) ("[t]he rule is clear that federal courts do not conduct de novo review over tribal court rulings under tribal law"). And "because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (citing *FMC*, 905 F.2d at 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978))).

The Tribal Appellate 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); *Water Wheel*, 642 F.3d at 808 (citing *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006); *FMC*, 905 F.2d at

1313-14). "A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (quoting *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011)). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *In re Rifino*, 245 F.3d 1083, 1086 (9th Cir. 2001) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

III. SUMMARY OF ARGUMENT.

FMC established numerous consensual relationships with the Tribes that satisfy the first *Montana* exception, under which "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. In 1997, FMC consented to tribal jurisdiction when it applied to the Tribes' Land Use Policy Commission ("LUPC") for a use permit to store waste on the Reservation. The LUPC granted FMC's permit application subject to specific conditions, including the payment of an annual permit fee to be calculated on a per-ton basis. Seeking better terms, FMC then entered into negotiations with the Tribes that resulted in a 1998 agreement under which FMC agreed to pay the Tribes a fixed fee of $1.5 million each year that it stores waste on the Reservation (the "1998 Agreement"). 2012 TCA Op. at 4-5, 14-15, 26-27, 40-42; Order of May 28, 2013 at 1. FMC then performed the 1998 Agreement from 1998 to 2001. 2012 TCA Op. at 14. By engaging in this conduct, FMC established consensual relationships that satisfy the first *Montana* exception. *Id.* at 15. And all of these consensual relationships have the requisite nexus to the Tribes' exercise of regulatory authority as they concern the same exact subject matter – the

storage of waste by FMC on the Reservation. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). FMC asserts that it was coerced into consenting to tribal jurisdiction and entering into the 1998 Agreement, but settlement with a government agency that is threatening to exert its regulatory authority or governmental power is not coercion. *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 529 (9th Cir. 1986).

FMC then reaffirmed the 1998 Agreement, and established another consensual relationship, when it entered into a Consent Decree to resolve claims brought against it by the United States under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k. 2012 TCA Op. at 15. FMC then relied on the 1998 Agreement when it sought affirmance of this Court's approval of the RCRA Consent Decree in the Ninth Circuit. The Consent Decree was approved, *United States v. Shoshone-Bannock Tribes* (*FMC I*), 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition), 2000 WL 915398, and as a result FMC is now estopped from denying the validity of the 1998 Agreement.

Finally, "[e]ven assuming the absence of FMC's contractual permit fee obligation under the 1998 Agreement," FMC entered into consensual relationships with the Tribes that authorize the Tribes to set the FMC permit fee at $1.5 million under applicable tribal law. 2012 TCA Op. at 27; *id.* at 20-35 (the Tribes' Land Use Policy Ordinance (Feb. 28, 1977) ("LUPO") (Ex. 6), the Land Use Policy Comm'n, Fort Hall Land Use Operative Policy Guidelines (Nov. 22, 1979) ("LUPO Guidelines"), as originally promulgated and as amended in 1998, the Hazardous Waste Management Act, Ordinance ENVR-01-S3 (Dec. 4, 2001) ("HWMA") (Ex. 7) and the Waste Management Act, Ordinance ENVR-05-S4 (Oct. 7, 2005) ("WMA") (Ex. 8) provide the LUPC with an independent basis to support the imposition of $1.5 million fee, separate from the 1998 Agreement).

The Tribes therefore have regulatory authority to impose the annual permit fee on FMC under the first *Montana* exception. Because the Tribes have regulatory jurisdiction, they also have adjudicative jurisdiction to resolve disputes over FMC's permit obligations, as shown by "earlier precedent" recognizing tribal civil adjudicative jurisdiction over non-Indians on the reservation. *Water Wheel*, 642 F.3d at 815 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Santa Clara Pueblo*, 436 U.S. at 65; *Williams v. Lee*, 358 U.S. 217, 220 (1959)). The Tribes are therefore entitled to affirmance of the Tribal Appellate Court's judgment on their first *Montana* exception claim. *See* Countercl. ¶¶73-79, Dkt. No. 12.

IV. TRIBAL JURISDICTION UNDER THE FIRST *MONTANA* EXCEPTION IS ESTABLISHED BY FMC'S CONSENT TO TRIBAL JURISDICTION, AND BY FMC'S NEGOTIATION, ENTRY, AND PERFORMANCE OF THE 1998 AGREEMENT.

Under the first *Montana* exception, a nonmember who enters into "consensual relationships with the tribe or its members," 450 U.S. at 565, consents to the exercise of tribal jurisdiction that has "a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656.[2] Under the law of the Ninth Circuit, the existence of a consensual relationship is determined by "consider[ing] the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 338). Under these clear rules, FMC is subject to tribal jurisdiction.

[2] The consensual relationship inquiry is a jurisdictional test, akin to the minimum contacts test that determines whether personal jurisdiction exists under the Due Process Clause of the U.S. Constitution. *Smith*, 434 F.3d at 1138.

A. FMC Established Consensual Relationships With The Tribes When It Consented To Tribal Jurisdiction And Agreed To Pay The Tribes' Annual Waste Storage Permit Fee.

As the Ninth Circuit found in *United States v. FMC Corp*. (*FMC II*), 531 F.3d 813 (9th Cir. 2008), "[a]round the same time as the United States-FMC negotiations over federal environmental laws were underway, the Tribes told FMC that tribal law required FMC to obtain certain tribal permits. FMC settled the tribal permit dispute by agreeing to pay the Tribes a fee of $1.5 million per year, beginning in 1998. FMC paid the fee each year from 1998 through 2001." *Id.* at 817.[3] The Circuit Court went on to state that a dispute existed over "whether their agreement required payments to continue after the plant shut down" and that "[a] key dispute (and one that continues through this appeal) is *whether FMC's operations remain subject to tribal jurisdiction*." *Id.* (emphasis added). The Tribal Appellate Court's decision confirms the Ninth Circuit's finding that FMC agreed to pay the annual permit fee in the 1998 Agreement, and demonstrates that FMC remains subject to tribal jurisdiction under that agreement.

1. FMC consented to tribal jurisdiction in proceedings before the LUPC when it negotiated and entered into the 1998 Agreement.

In August of 1997, FMC applied to the LUPC for a building permit to construct additional ponds to store waste generated in the production of phosphorus. 2012 TCA Op. at 4; Ex. 9, Letter from J. David Buttelman, Health, Safety & Envtl. Manager, FMC, to Tony Galloway, Chairman, LUPC (Aug. 1, 1997) (attaching Building Permit Application from FMC to LUPC (July 28, 1997)). In so doing, FMC stated it was reserving its position on tribal jurisdiction, as it had done in a prior agreement with the Tribes. Ex. 10, Letter from Sheila Bush,

[3] The Ninth Circuit made that determination even while holding that the Tribes lacked standing to enforce the terms of a consent decree that FMC had entered into with the United States in which FMC agreed to obtain tribal permits. *Id.* at 815, 816, 821-22.

Counsel, FMC, to Candy Jackson, Tribal Attorney, Shoshone-Bannock Tribes (Aug. 1, 1997) ("FMC Counsel's Letter of Aug. 1, 1997"). The LUPC responded that it could not grant a building permit without FMC submitting to tribal jurisdiction. 2012 TCA Op. at 4. [SOF ¶30].

FMC then resubmitted its application for a building permit, also applied for a use permit, and expressly consented to tribal jurisdiction over both applications. Ex. 11, Letter from J. David Buttelman, Health, Safety & Envtl. Manager, FMC, to Tony Galloway, Chairman, LUPC (Aug. 11, 1997) ("FMC's Aug. 11, 1997 Letter"); 2012 TCA Op. at 14. FMC's August 11, 1997 Letter expressly stated that:

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

FMC's Aug. 11, 1997 Letter (emphasis added); *see also* 2012 TCA Op. at 4, 14. This Letter constitutes "specific[] consent[] to the Tribes' jurisdiction." 2012 TCA Op. at 14.[4] [SOF ¶31].

[4] FMC contends that FMC's Aug. 11, 1997 Letter only "offered to abide by the 'zoning and permitting requirements as specified in the *current* Fort Hall Land Use Operative Policy Guidelines,' which provided for a $10 permit fee." First Am. Compl. for Decl'y J. & Injunctive Relief ¶30, Dkt. No. 10 ("Am. Compl."). That characterization is irrelevant and incorrect. It is irrelevant because FMC consented to tribal jurisdiction simply by filing its use permit application with the LUPC. *See Smith*, 434 F.3d at 1140 ("a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*.") Furthermore, the LUPC subsequently issued a decision on FMC's permit applications, which FMC did not appeal on that or any other ground; FMC instead chose to negotiate and enter into the 1998 Agreement, in which FMC did not reserve any objection to tribal jurisdiction. *See infra* at 10-11. In addition, the LUPO Guidelines (Ex. 14) (which became effective November 22, 1979, 2012 TCA Op. at 11-12) authorize the LUPC to impose reasonable conditions on any permit it granted, including the payment of a fee. 2012 TCA Op. at 33 (recognizing that "LUPC also ha[s] inherent authority to impose fees and a permitting structure under the [LUPO] and the Guidelines"). Finally, FMC's contention that the permit fee was $10 is also wrong, as that is the amount of the application *filing fee*. LUPO Guidelines §§ V-1-1(b) (requiring payment of a

Exercising the jurisdiction to which FMC had consented, the LUPC approved building and special use permits for FMC, subject to specific conditions requiring, *inter alia*, that FMC adhere to proposed temporary Amendments to Chapter V of the LUPO Guidelines (that were attached to the Apr. 13, 1998 Letter) that imposed an annual waste permit fee of three dollars ($3.00) per ton on hazardous waste and one dollar ($1.00) per ton on non-hazardous waste. 2012 TCA Op. at 4, 12; Ex. 12, Letter from LUPC to Paul Yochum, FMC (Apr. 13, 1998) ("Apr. 13, 1998 Letter"), Ex. 13, Apr. 1998 Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, § V-9-2(A).[5] [SOF ¶32]. FMC describes that letter as simply rejecting the "offer" FMC allegedly made in the Aug. 11, 1997 Letter, Am. Compl. ¶31. That contention fails because the LUPC's Apr. 13, 1998 Letter is, on its face, the LUPC's decision on FMC's permit applications.

FMC did not appeal the LUPC's decision on its permit applications, although it had the right to do so. LUPO, art. V, § 6. Instead, FMC negotiated better terms that were finalized in the 1998 Agreement, in which FMC agreed to pay the Tribes a fixed fee of $1.5 million each year that it stores waste on the Reservation. *See* 2012 TCA Op. at 4-5. The LUPC's May 19, 1998 letter set forth the basic terms of the agreement, which provides that FMC will pay the Tribes a fixed fee of $1.5 million a year to cover hazardous and nonhazardous waste storage

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Building Permit "application filing fee of $10.00"), V-5-1(b) (requiring payment of a Special Use Permit "application filing fee of $10.00").

[5] The permit fees imposed by the LUPC's decision were substantially less than those proposed by the LUPC in August of 1997, which would have imposed a hazardous waste storage fee of one hundred dollars ($100.00) per ton, and fifty dollars ($50.00) per ton for the storage of other wastes. Ex. 15, August 1997 Proposed Amendments Chapter V, §§ V-9-1, V-9-2. The LUPC subsequently adopted an annual fee of five dollars ($5.00) per ton on the storage of hazardous waste on the Reservation. Ex. 16, Shoshone-Bannock Tribes Land Use Policy Comm'n, Amendments to Chapter V: Fort Hall Land Use Operative Policy Guidelines § V-9-2(A) (May 18, 1998) ("May 1998 Guideline Amendments"); 2012 TCA Op. at 12.

beginning in 1998 and continuing each year thereafter. Ex. 17, Letter from LUPC to J. Paul McGrath, Senior Vice President & Robert J. Fields, Vice President, FMC (May 19, 1998). FMC responded to that letter by expressing its appreciation for the Tribes "agreeing to the fixed fee proposal that we discussed, which we understand will apply during the time these ponds are in operation," and by stating "we . . . intend to make the payments of $2.5 million on June 1, 1998, and $1.5 million on June 1 in the following years." Ex. 18, Letter from J. Paul McGrath, Senior Vice President, FMC, to LUPC (May 26, 1998). Shortly thereafter, FMC clarified that the language of the May 26 letter was "too narrow, and indeed it is our understanding . . . that the $1.5 million annual fee would continue to be paid for the future *even if the use of ponds 17-19 was terminated in the next several years*." Ex. 19, Letter from J. Paul McGrath, Senior Vice President, FMC, to Jeanette Wolfley, LUPC (June 2, 1998) (emphasis added). [SOF ¶33]. Tellingly, "FMC did not include any reservation of rights, nor did FMC object to tribal jurisdiction in the series of letter that compromise [sic] the agreement between the parties." 2012 TCA Op. at 14-15. FMC then performed the 1998 Agreement for four years, from 1998 until 2001. *Id.* at 14, 22. [SOF ¶37].

FMC entered into the 1998 Agreement voluntarily, *id.* at 22, and by its express terms established a consensual relationship that satisfies the first *Montana* exception. *Id*. at 4-5, 14-15, 26-27, 40-42. As FMC stated in a letter to the Tribes transmitting the annual payment for June 1, 2000 through May 31, 2001, "[a]s you know, in May and June 1998, FMC and the LUPC agreed to an annual fee of One Million Five Hundred Thousand Dollars ($1,500,000) per year for all hazardous and non-hazardous waste activities within the boundaries of the Fort Hall Reservation." 2012 TCA Op. at 23 (quoting Ex. 20, Letter from Paul Yochum, Plant Manager, Astaris LLC, to Curtis Farmer, Chairman, LUPC (June 1, 2000)). [SOF ¶37]. As the very

purpose of the 1998 Agreement was to satisfy FMC's obligation to obtain a permit under tribal law, FMC "should have reasonably anticipated that [its] interactions might 'trigger' tribal authority," *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 338). And the nexus between the 1998 Agreement and the Tribes' permitting laws, *see Atkinson*, 532 U.S. at 656, could not be clearer. The 1998 Agreement therefore established a consensual relationship between FMC and the Tribes. 2012 TCA Op. at 26-27, 40-42; Order of May 28, 2013 at 1. And as the Supreme Court has made clear, when a nonmember has entered into a contract with an Indian on the reservation, tribal jurisdiction also exists under the first *Montana* exception to resolve a dispute arising under that contract. *Plains Commerce*, 554 U.S. at 332-33 (citing *Williams*, 359 U.S. 217).

2. Even if FMC had not agreed to pay the annual permit fee, the consensual relationships it entered into with the Tribes established tribal jurisdiction over FMC and authorized the LUPC to impose the fee.

Even if FMC had not contractually agreed to pay the annual permit fee in the 1998 Agreement, the consensual relationships it entered into with the Tribes – by applying to the LUPC for a use permit, consenting to tribal jurisdiction over its permit application, securing a decision on its permit application and then negotiating the 1998 Agreement – satisfy the first *Montana* exception. And as those consensual relationships all concern FMC's obligation to obtain a tribal waste storage permit, they also have the requisite nexus to the Tribes' exercise of regulatory authority. Accordingly, the Tribes are authorized to require FMC to pay the annual permit fee, which is a proper form of regulation under the first *Montana* exception. *Plains Commerce*, 554 U.S. at 332-33 (citing *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)).

As the Tribal Appellate Court expressly held, "[e]ven assuming the absence of FMC's contractual permit fee obligation under the 1998 Agreement, applicable Tribal laws provide separate and independent authority for the LUPC to set the FMC permit fee at $1.5 million per year." 2012 TCA Op. at 27. The LUPO, the amended Guidelines, the HWMA, and the WMA provide the LUPC with an independent basis to support the imposition of $1.5 million fee, separate from the 1998 Agreement. *Id*. at 20, 27-35. Even before the LUPO Guidelines were amended by the LUPC in 1998,[6] the LUPC had authority to impose a permit fee on FMC. 2012 TCA Op. at 33. Moreover, the May 1998 Guideline Amendments expressly authorize the imposition of a waste storage permit fee on FMC. *Id.* § V-9-2(A) to (B);[7] 2012 TCA Op. at 29-30. [SOF ¶26]. Finally, the HWMA[8] and the WMA[9] independently authorize LUPC's

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[6] The LUPO Guidelines, as originally enacted, authorized the LUPC to amend their terms, LUPO Guidelines, ch. I, §§ I-7, I-7-1, and provide for those amendments to be effective "upon formal review thereof by the [LUPC], and review or approval of such amendments by the Business Council shall not be required." *Id.* § I-7-3; 2012 TCA Op. at 28.

[7] The May 1998 Guideline Amendments set out procedures and standards for issuance of permits, based on a finding that "hazardous waste and substances have been disposed of and stored on the Fort Hall Reservation for many years in a manner that was careless, improper and inappropriate and created conditions which are extremely dangerous and may cause adverse public health and environmental impacts." *Id*. § V-9-1. The purpose of the May 1998 Guideline Amendments is to "prevent further degradation of the environment and to protect the public health, safety, and welfare of Fort Hall Reservation residents" by "establish[ing] siting, disposing, and storage fees to reduce the amount of hazardous waste deposited, sited, or stored on the Fort Hall Reservation and associated hazards to the health and well-being of residents of the Fort Hall Reservation," and requiring the LUPC to "utilize the hazardous waste fees for administration, management and oversight of the existing hazardous waste disposal sites and storage on the Fort Hall Reservation . . . ." *Id.* The amendments require that permit fees be "deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund," and used "to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." *Id.* § V-9-2(B).

[8] The HWMA was enacted by resolution of October 19, 2001, and approved by the Bureau of Indian Affairs on October 26, 2001. Order of May 28, 2013 at 2-3; 2012 TCA Op. at 12. [SOF ¶27]. The HWMA requires a permit for the storage of hazardous waste, *id*. §§ 302(B), 409(C), and imposes a five dollar ($5.00) per ton annual storage fee for hazardous waste and one dollar

imposition of the $1.5 million fee. *Id.* at 30-35; Order of May 28, 2013 (new panel of the Tribal Appellate Court reaffirms that the HWMA was validly enacted). Acting under the authority of these enactments, the LUPC issued a letter to FMC on February 8, 2007 setting an annual special use permit fee of $1.5 million. 2012 TCA Op. at 9. *See* [SOF ¶8]. The imposition of that fee by the LUPC is a valid exercise of tribal regulatory authority under the first *Montana* exception.

B. The Tribal Appellate Court Properly Rejected FMC's Challenges To The 1998 Agreement.

1. The LUPC had authority to enter into the 1998 Agreement, which made codification of that agreement unnecessary.

The Tribal Appellate Court properly rejected FMC's claim that the 1998 Agreement had to be codified to be effective. "[T]he LUPC had delegated authority to enter into agreements under the [LUPO] as well as under general agency principles. An agency has 'such implied authority as is necessary to carry out the power expressly granted.'" 2012 TCA Op. at 33 (quoting *Warren v. Marion Cnty.*, 353 P.2d 257, 264 (Or. 1960)). And the 1998 Agreement was "a proper exercise of the LUPC's authority consistent with FMC's voluntary agreement." *Id.* at

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($1.00) per ton annual storage fee for non-hazardous waste, *id*. § 409(B). *See* 2012 TCA Op. at 33. The fees collected are "deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected." HWMA § 409(D).

[9] The Tribes enacted the WMA by resolution on September 8, 2005, and it was approved by the BIA by letter of October 7, 2005. 2012 TCA Op. at 12. [SOF ¶28]. The WMA authorizes the Tribes' Environmental Waste Management Program ("EWMP") to "protect the public health, safety, and welfare of the Tribal members and residents of the Reservation" by establishing a framework for the regulation and management of waste on the reservation and establishing procedures for the safe "generation, storage, treatment, disposal, and siting of wastes . . . ." WMA § 101(D)(1), (3). The WMA also authorizes the Tribes' EWMP to "[e]stablish . . . a comprehensive permitting program, including . . . the modification . . . of permits." WMA § 301(B). *See also* 2012 TCA Op. at 33 (quoting language from HWMA and WMA).

27.[10] Furthermore, FMC recognized that codification of the 1998 Agreement was not necessary to its effectiveness. "FMC voluntarily paid the $1.5 million annual permit fee for four (4) years without asserting the permit fee under the 1998 Agreement required . . . the Tribes to pass regulations specifically exempting FMC from such regulations." *Id.* at 22. And "the Tribes never tried to enforce a statutory per/ton fee against FMC and . . . upheld their end of the bargain in the 1998 Agreement." *Id.* Finally, if more were needed, the Tribal Appellate Court also expressly held that codification was not required because the 1998 Agreement was a binding contract, and codification of the exemption was not a material term of that contract. 2012 TCA Op. at 41-42.

2. The 1998 Agreement remains in effect as long as FMC stores waste on the Reservation.

The Tribal Appellate Court also properly rejected FMC's contention that the 1998 Agreement was no longer effective after the FMC Plant closed in 2001. FMC advanced that contention in a letter to the Tribes, Ex. 21, Letter from John T. Bartholomew, FMC, to Blaine J. Edmo, Chairman, Fort Hall Business Council (May 23, 2002) ("May 23, 2002 Letter"), to which it attached a memorandum prepared by FMC's Legal Department, *id.* Attach., FMC Legal Comments re: Tribal Waste Fee (May 22, 2002). The May 23, 2002 Letter offered to negotiate a resolution of the dispute, stating that absent agreement the matter "will, most likely, be decided in the courts." *Id.* *See* [SOF ¶38].[11] And that is exactly what happened. The Tribal Appellate

[10] Under the LUPO, the LUPC has authority to issue permits that are consistent with the purposes of the ordinance, LUPO Guidelines § V-5-2(a) (special use permits); *id.* § V-1-2(c) (building permits), and imposing a fee that enables the LUPC to engage in monitoring and oversight of activities necessary to protect Reservation lands and natural resources from the waste stored on the Reservation by FMC plainly furthers the purposes of the LUPO.

[11] Notably, nothing in FMC's letter or the memorandum from its Legal Department questioned the jurisdiction of the tribal courts to decide the matter.

Court held that "this issue is resolved by reference to FMC's letter from Paul McGrath to the Tribes dated June 2, 1998, in which he stated that the permit was not limited to ponds 17, 18 and 19, but that the permit covered the plant and that the $1.5 million annual fee would continue to be paid for the future *even if the use of ponds 17-19 was terminated*." 2012 TCA Op. at 27 (internal quotation marks omitted). "Because the original agreement contemplated the payment of the permit fee at the agreed upon rate continuing for several years, even if the use of certain ponds was terminated, the annual permit fee of $1.5 million was properly set by the LUPC and is upheld as valid by this Court as a proper exercise of the LUPC's authority consistent with FMC's voluntary agreement." *Id.* That holding is correct.

The Tribal Appellate Court's holding is confirmed by the affidavit of Robert J. Fields, the Division Manager of FMC's Phosphorus Equity, who was with Paul McGrath when the terms of the June 2, 1998 letter were agreed upon. Ex. 22, Aff. of Robert J. Fields. [SOF ¶39]. Mr. Fields's affidavit states that:

> During the last week of May, 1998, I participated in the RCRA Consent Decree negotiations regarding the FMC Pocatello plant along with Paul McGrath, FMC's Senior Vice President and General Counsel. During those meetings, Mr. McGrath and I had a discussion with Jeanette Wolfley, the lawyer for the Shoshone-Bannock Tribes, concerning the scope of the Tribes' Use Permit for the Pocatello plant. Ms. Wolfley told us that the Tribes objected to Mr. McGrath's May 26, 1998 letter accepting the Use Permit, because the letter could be read as attempting to limit the Use Permit to Ponds 17, 18 and 19. Ms. Wolfley stated that the Tribes intended the Use Permit to cover all wastes at the plant, and were concerned that limiting the Use Permit to Ponds 17, 18 and 19 would mean that FMC's agreement to pay $1.5 million per year would go away when those ponds were closed under the Consent Decree. Ms. Wolfley, therefore asked Mr. McGrath to acknowledge in writing that the Use Permit and the annual fee applied broadly to the entire facility. Mr. McGrath agreed and sent Ms. Wolfley his letter of June 2, 1998.

Id.

In sum, "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, 2012 TCA Op. at 14, and constituted a binding contract which remains in effect for as long as FMC stores waste on the Reservation, *id.* at 14-15, 26-27, 40-42.

3. FMC's contention that it was coerced into the 1998 Agreement has no merit.

FMC asserts that the Tribes "coerc[ed] FMC to acquiesce to Tribal governmental demands of purported authority," Am. Compl. ¶¶86, 88, and that "uninterrupted operation of the Pocatello Plant was in serious jeopardy if the parties were to litigate their jurisdictional dispute," *id*. ¶89. This contention is meritless because settlement with a government agency that may otherwise exert its regulatory authority or governmental power is not coercion. *Trans-Sterling*, 804 F.2d at 529. The fact that a government has the ability to exercise its authority if the private party does not settle or agree to the government's terms is not coercive, and does not place the other party in duress, because a party can only be placed in duress by "a wrongful or unlawful act." *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976). If the government threatens to take lawful action against a party, either by threatening enforcement of the law, *Trans-Sterling*, 804 F.2d at 529; *see United States v. Contents of Bank of Am.*, 452 F. App'x 881, 882-83 (11th Cir. 2011) (per curiam) (applying Florida law to find the threat of criminal prosecution does not constitute duress and will not justify rescission of a settlement agreement), or threatening to take some other action that it has the authority to take, *Hisel v. Upchurch*, 797 F. Supp. 1509, 1527 (D. Ariz. 1992), then it is not threatening to do anything wrongful or unlawful, and the agreement made with the private party to avoid the lawful action is not coercive. *See also PaineWebber, Inc. v. Bahr*, 97 F.3d 1460 (9th Cir. 1996), 1996 WL

540164, at *5 (employee was not coerced into signing Form U-4 required by the National Association of Securities Dealers when all securities brokers are required to sign them in order to deal). Accordingly, FMC's coercion claim has no merit.

Furthermore, FMC voluntarily entered into the 1998 Agreement, 2012 TCA Op. at 22, and it clearly did have another alternative – it could have litigated the jurisdictional issue at that time instead of making the 1998 Agreement with the Tribes. Under the Supreme Court's decision in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), FMC complains "it would have been required to litigate first in the Tribal Court, and then in the Tribal Court of Appeals, a process which could take years . . . ." Am. Compl. ¶89. But settling to avoid litigation does not amount to duress or coercion; if this were so, most settlements could be undone under the coercion/duress theory. *See Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger*, 861 P.2d 71, 77 (Idaho Ct. App. 1992) (holding defendants did not sign termination contract under duress; they had other alternatives besides settlement – they could have disputed their liability under the contract in a lawsuit); *Primary Health Network, Inc. v. State*, 52 P.3d 307, 312 (Idaho 2002) (insurance company claimed it was forced by the State to enroll an employee after open enrollment had ended under economic duress, but it had other alternatives; it could have simply refused to accept enrollment of state employee after open enrollment period had ended); *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp.*, 337 B.R. 475, 477 (S.D.N.Y. 2006) (approving settlement in which company paid DOJ and SEC $715 million in order "to avoid indictment, with all its disastrous consequences, and a $5 billion disgorgement and penalty claim by the SEC;" such a settlement was not "coerced").

As these cases demonstrate, duress "cannot result merely from the opposing party's insistence on a legal right and the other party's yielding to the insistence." *Saint Alphonsus*, 861

P.2d at 77. And even assuming *arguendo* that the exhaustion requirements set forth in *National Farmers* gave the Tribes some bargaining advantage,[12] the law is clear that one party's stronger bargaining position or greater leverage in the negotiation process does not prove coercion. *See PaineWebber*, 97 F.3d 1640, 1996 WL 540164, at *6 (holding that unequal bargaining power, where one party might feel more pressure than the other to agree to a contract, is not coercion); *Adelphia*, 327 B.R. at 477 ("where . . . 'coercion' results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion . . . it is what we call 'leverage'") (first ellipsis in original).

V. THE RCRA CONSENT DECREE REAFFIRMED THE 1998 AGREEMENT AND ESTABLISHED ANOTHER CONSENSUAL RELATIONSHIP BETWEEN THE TRIBES AND FMC.

FMC reaffirmed the 1998 Agreement in the Consent Decree it entered into with the United States to resolve claims brought against FMC under RCRA, *see* Consent Decree, *United States v. FMC Corp*., No. 4:98-cv-00406-BLW (D. Idaho entered July 13, 1999), ECF No. 28 ("RCRA Consent Decree" or "Consent Decree"). The Consent Decree also established a consensual relationship that supports tribal jurisdiction, 2012 TCA Op. at 15, because FMC expressly agreed in that Decree to obtain the tribal permits needed to implement its terms, Consent Decree ¶8. [SOF ¶35]. FMC then relied on the 1998 Agreement in its brief to the Ninth Circuit seeking affirmance of this Court's approval of the Consent Decree. Br. of Appellee FMC Corp., *United States v. Shoshone-Bannock Tribes* (*FMC I*), 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition) (No. 99-35821), 2000 WL 33996531, at *17-18, 22 ("2000 FMC

[12] Litigating the jurisdictional issue through tribal court and federal court is equally expensive and undesirable for the Tribes, as this current proceeding illustrates.

Br.").[13] [SOF ¶36]. As FMC prevailed in that litigation, it is also estopped from denying the existence of a consensual relationship under the 1998 Agreement.

A. In The RCRA Consent Decree, FMC Expressly Agreed To Obtain Tribal Permits, Which Established A Consensual Relationship Under The First *Montana* Exception.

The RCRA Consent Decree specifically provides that if "any portion of the Work[14] requires a federal, state, or *tribal* permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." *Id.* ¶8 (emphasis added). As the Tribal Appellate Court held, "Paragraph 8 of the Consent Decree contains specific provisions requiring FMC to submit to the Tribes' permitting process." 2012 TCA Op. at 15.[15] And indeed, FMC did just that by entering into the 1998 Agreement *before* it entered into the Consent Decree. Paragraph 8 of the Consent Decree therefore reaffirms the validity of the 1998 Agreement.

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[13] Briefs filed in the Ninth Circuit stage of the consent decree stage of the FMC Property litigation should properly be considered by the Court as arising in an earlier stage of this case, in which FMC was ordered, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW, 2006 WL 544505, at *4 (D. Idaho Mar. 6, 2006), ECF No. 94, and pledged, *FMC II*, 531 F.3d at 823-24, to exhaust tribal remedies before adjudicating tribal jurisdiction. This case returns to this Court following the exhaustion of tribal remedies by FMC. *See* Mem. Decision & Order, Dkt. No. 43.

[14] The "Work" means "all activities [FMC] is required to perform under this Consent Decree, together with its Attachments, except those required by Section XX (Record Retention)." RCRA Consent Decree § 1 (defining "Work"). In general, the Consent Decree required FMC to close certain ponds on the FMC Property that contained hazardous waste, construct a treatment plant capable of removing the hazardous characteristics of the waste generated by FMC, and comply with RCRA. The Decree also authorized FMC to place untreated hazardous waste in Ponds 17 and 18 until the treatment system that FMC was required to construct by the Consent Decree was on line, but in any event no longer than May 26, 2002. *Id.* Attach. A, Compliance Sched. ¶20.

[15] FMC also expressly agreed that it "shall not challenge the terms of this Consent Decree . . . ." Consent Decree ¶2.

That the Consent Decree required FMC to obtain tribal permits is confirmed by this Court's 2001 ruling on a motion brought by FMC asserting that it had complied with ¶8 of the Consent Decree simply by applying for tribal permits. Mem. Decision & Order at 3, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho Jan. 18, 2001), ECF No. 56. FMC sought an order declaring that: (a) by applying to the Tribes for a building permit to construct the Land Disposal Treatment Plant ("LDR Plant"), as the Consent Decree required it to do, FMC had complied with ¶8 of the Decree; (b) FMC could commence uninterrupted construction of the LDR Plant immediately to meet the deadline imposed by the Consent Decree; and (c) the Tribes were barred by *res judicata* from asserting that LDR Plant as proposed was not "environmentally protective." *Id*. The Court denied relief, holding that simply applying for a permit did not satisfy FMC's obligations under the Consent Decree. The "Consent Decree itself contemplated that FMC would need to go through the Tribes' land use planning system. Specifically, ¶8 of the Agreement provides that '[w]here any portion of the Work requires a . . . tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.'" *Id*. at 2 (ellipsis and alterations in original). FMC did not appeal that Order and remains bound by its terms.

To be sure, the Ninth Circuit subsequently held that the Tribes could not enforce the Consent Decree because they were not a party to that decree and thus lacked standing to do so. *FMC II*, 531 F.3d at 815, 816, 821-22.[16] But FMC – not the Tribes – brought the 2001 motion

[16] That action was begun in 2005 when the Tribes filed a motion in this Court seeking clarification of FMC's obligation to obtain tribal permits under the Consent Decree and related relief. This Court entered a Memorandum Decision and Order on March 6, 2006, *United States v. FMC Corp.*, 2006 WL 544505, ruling that FMC had agreed to submit to tribal jurisdiction in ¶8 of the Consent Decree and that the Tribes had jurisdiction over FMC under the "consensual

under which FMC's obligation to obtain tribal permits under the Consent Decree was adjudicated. Moreover, whether the Tribes have standing to enforce FMC's obligations under the decree and whether it establishes a consensual relationship with the Tribes are separate and distinct questions. Indeed, even while holding that Tribes could not enforce the Consent Decree, the Ninth Circuit expressly recognized that FMC had reached a separate agreement with the Tribes, under which "FMC agreed to pay the Tribes $1.5 million per year in lieu of applying for certain tribal permits." *Id.* at 815.[17] In addition, an agreement with the tribe itself is not necessarily required to establish a consensual relationship. It may instead be based on an agreement with tribal members, *Plains Commerce*, 554 U.S. at 332 (recognizing tribal jurisdiction under the first *Montana* exception over cases arising under agreements with tribal members), or with the federal government, if there is a nexus between the exercise of tribal jurisdiction and the federal agreement, *see generally Atkinson*, 532 U.S. at 656 (Indian trader license obtained by non-Indian from the Commissioner of Indian Affairs did not establish consensual relationship under first *Montana* exception because tax that the tribe sought to impose did not have a nexus to that relationship). The determinative question is whether the consensual relationship supports an expectation of tribal authority. *Water Wheel*, 642 F.3d at 818. The Consent Decree plainly does so – as this Court's 2001 ruling demonstrates – and the

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relationship" exception of *Montana*. FMC appealed the March 6, 2006 Order to the Ninth Circuit.

[17] The Ninth Circuit's ruling, which the Tribal Appellate Court recognized, 2012 TCA Op. at 15, is entirely consistent with the Tribal Appellate Court's determination that "the Tribes were involved in the process of District Court approval for the Consent Decree, and . . . Paragraph 8 of the Consent Decree contains specific provisions requiring FMC to submit to the Tribes' permitting process." *Id.*

nexus between the Consent Decree and the Tribes' waste storage permit and permit fee requirements could not be closer, since both concern precisely the same subject matter.

B. FMC Reaffirmed The 1998 Agreement In Proceedings Before The Ninth Circuit In Which The Circuit Affirmed This Court's Approval Of The RCRA Consent Decree.

In seeking to have the Ninth Circuit affirm this Court's Order approving the Consent Decree, *see United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho July 13, 1999), ECF No. 27, FMC reaffirmed its obligation to secure tribal permits under the 1998 Agreement and the Consent Decree. FMC represented to the Circuit that

> [T]he Tribes granted permits to FMC for its construction and use of Ponds 17 and 18. On April 13, 1998, FMC obtained a building and special use permit for both ponds from the Tribal Land Use Policy Commissioners, subject to payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department. It is difficult to understand how the Tribes can ask this Court to overturn the District Court's entry of the Consent Decree based on the fact that the Decree permits the operation of ponds that the Tribes have permitted and for which the Tribes have and will receive millions of dollars in use fees.

2000 FMC Br. at *17-18 (footnote and citation omitted). FMC added that "[t]he existing Consent Decree provides substantial benefits to the Tribes . . . ." *Id.* at *22. And the Ninth Circuit subsequently affirmed this Court's decision to approve the Consent Decree. *FMC I*, 229 F.3d 1161, 2000 WL 915398.

FMC's representation to the Ninth Circuit confirms the existence of a consensual relationship with the Tribes both under the 1998 Agreement and the RCRA Consent Decree, and reaffirms the 1998 Agreement.

C. FMC Is Judicially Estopped From Denying The Validity Of The 1998 Agreement.

Furthermore, as a result of its success in the litigation before the Ninth Circuit, FMC is now judicially estopped from arguing that the Tribes do not have the right to impose the permit

or collect permit fees. Accordingly, this Court should grant summary judgment in favor of the Tribes on the affirmative defense of judicial estoppel raised in its Answer to First Amended Complaint for Declaratory Judgment & Injunctive Relief § VIII ¶1, Dkt. No. 10.

Judicial estoppel prevents a party from gaining an unfair advantage by relying on contradictory arguments on the same legal issue to prevail in different proceedings. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Fort Hall Landowners Alliance, Inc. v. BIA*, 407 F. Supp. 2d 1220, 1224-25 (D. Idaho 2006) (quoting *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)). Estoppel is intended to prevent the perception that litigants can obtain favorable opinions by "playing 'fast and loose' with the court.'" *Rissetto*, 94 F.3d at 601 (quoting *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993)); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (quoting *New Hampshire*, 532 U.S. at 750). It applies when 1) a party's later position is clearly inconsistent with its earlier position, 2) the party succeeded in convincing the court to accept its prior position – including by obtaining court approval of a settlement, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012) – and 3) the party asserting the inconsistent position would achieve an unfair advantage if not estopped. *USW v. Ret. Income Plan*, 512 F.3d 555, 563 (9th Cir. 2008). These factors are met here.

On the first factor, FMC's current position is clearly inconsistent with its successful position before the Ninth Circuit in 2000. In the earlier case, FMC obtained the court's approval of a settlement in which it agreed to obtain all applicable tribal permits and approval for its "Work." FMC said that the Tribes could not argue that the Consent Decree violated RCRA, because the Tribes had permitted the same waste storage allowed in the Decree in exchange for a $1.5 million annual permit fee. 2000 FMC Brief at *17-18. In addition, FMC argued to the

Ninth Circuit that the Tribes had accepted the benefits of the Consent Decree because they would "receive millions of dollars in use fees" from FMC under the tribal permits. *Id.* at *18. That position is flatly inconsistent with FMC's current argument that federal law does not allow the Tribes to impose the annual permit fee.

On the second factor, FMC convinced the Ninth Circuit to accept its prior position. The court found that the district court had "appl[ied] the correct law" in approving the Consent Decree and rejecting the Tribes' objections. *FMC I*, 229 F.3d 1161, 2000 WL 915398, at *2. By obtaining approval for the consent decree, FMC induced the court to accept the material claims made in support of the settlement, and to lend its coercive power to the enforcement of FMC's agreement with EPA. *See Baughman*, 685 F.3d at 1133-34.

With respect to the third factor, FMC now seeks an unfair advantage by denying that the Tribes have jurisdiction to issue permits and require it to pay permit fees. FMC first sought to settle EPA's RCRA claims on favorable terms by entering a Consent Decree, and opposing the Tribes' appeal furthered that goal. FMC's representations that it was subject to tribal permits and would continue to pay permit fees served that purpose. Now FMC claims it does not have to comply with permits or pay fees because the Tribes have no jurisdiction over its conduct, which would give it the benefit of no longer having to pay for the privilege of storing waste on the Reservation. This volte-face doesn't just significantly strengthen FMC's current case against the permits: It *is* FMC's case. Changing positions in this manner is a quintessential attempt to gain an unfair advantage.

All three factors are met. FMC's changed jurisdictional position is barred here, and the Court should grant summary judgment on this affirmative defense in the Tribes' favor.

VI. THE CONSENSUAL RELATIONSHIPS BETWEEN FMC AND THE TRIBES ESTABLISH THAT THE TRIBES HAVE JURISDICTION TO IMPOSE THE ANNUAL PERMIT FEE ON FMC.

The Tribal Appellate Court correctly held that FMC entered into consensual relationships with the Tribes by consenting to tribal jurisdiction in the proceedings that led to the 1998 Agreement, by entering into that agreement, and by then engaging in the "actual performance of tendering such payment of the $1.5 million annual permit fee to the Tribes from 1998 to 2001." 2012 TCA Op. at 14-15. Furthermore, even if FMC had not agreed to pay the annual permit fee in the 1998 Agreement, its imposition is independently authorized by tribal law. *Id.* at 17-35. In addition, FMC reaffirmed the 1998 Agreement and established a consensual relationship when it expressly agreed to apply for the tribal permits needed to the implement the RCRA Consent Decree. *Id.* at 15. And it reaffirmed that obligation, as well as the 1998 Agreement, in the proceedings before the Ninth Circuit that resulted in the approval of the Consent Decree. *See supra* at 22-24. These consensual relationships have the requisite nexus to the Tribes' exercise of regulatory authority as they concern the same exact subject matter, *see Atkinson*, 532 U.S. at 656. Accordingly, the Tribal Appellate Court correctly held that the Tribes have regulatory jurisdiction over FMC under the first *Montana* exception. 2012 TCA Op. at 14-15.

As the Tribes have regulatory authority over FMC, recognition of tribal adjudicative jurisdiction would not conflict with "the Supreme Court's instruction that a tribe's adjudicative authority may not exceed its regulatory authority," *Water Wheel*, 642 F.3d at 809 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)), and turns instead on "earlier precedent," *id.* at 815, which recognizes tribal civil adjudicative jurisdiction over non-Indians on the reservation, *id.* (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 18; *Santa Clara Pueblo*, 436 U.S. at 65; *Williams*, 358 U.S. at 220). As the Supreme Court recently reaffirmed, when a nonmember has entered into a

contract with an Indian on the reservation, tribal jurisdiction exists under the first *Montana* exception to resolve a dispute arising under that contract. *Plains Commerce*, 554 U.S. at 332-33 (citing *Williams*, 359 U.S. 217); *Strate*, 520 U.S. at 457 (same). The Ninth Circuit rule is the same. Tribal adjudicative jurisdiction exists over "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into." *Smith*, 434 F.3d at 1136 (quoting *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (citing *Williams*, 358 U.S. at 217)) (ellipsis in original); *Water Wheel*, 642 F.3d at 805-06, 817 (expired business lease with tribe established a consensual relationship that authorized the exercise of tribal adjudicative jurisdiction); *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (commercial agreement, though not with the tribe directly, established a consensual relationship under the first *Montana* exception that authorized the exercise of tribal adjudicative jurisdiction). So too here.

VII. CONCLUSION.

Under the first *Montana* exception, the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee. The Tribal Appellate Court correctly so held, and accordingly its ruling should be recognized and affirmed and the Judgment enforced by an order of this Court.

DATED this 13th day of January, 2017.

SHOSHONE-BANNOCK TRIBES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January 2017, 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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