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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 TRIBAL APPELLATE
COURT DECISION UPHOLDING
TRIBAL JURISDICTION UNDER THE
SECOND MONTANA EXCEPTION**

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I. INTRODUCTION

The Shoshone-Bannock Tribes (“Tribes”) respectfully seek an order recognizing and affirming the decision of the Shoshone-Bannock Tribal Court of Appeals (“Tribal Appellate Court”), that under the second *Montana* exception, *see Montana v. United States*, 450 U.S. 544, 565-66 (1981), the Tribes have jurisdiction to require the FMC Corporation (“FMC”) to comply with the Tribes’ waste storage permitting laws and pay the annual permit fee to store waste on the Fort Hall Reservation (“Reservation”). *See* Ex. 1, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014, *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) (“2014 TCA Op.”) (opinion upholding Tribal jurisdiction under the second *Montana* exception); Ex. 2, Statement of Decision of Apr. 15, 2014 (“2014 TCA Dec.”) (statement of decision announced from the bench at the conclusion of the trial).¹ Tribal jurisdiction exists under the second *Montana* exception when “the conduct of non-Indians on fee lands within its reservation . . . threatens *or* has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566 (emphasis added). In this case, the enormous quantity of the highly toxic and mobile waste that FMC stores on Reservation fee lands has a

¹ By separate motion, the Tribes seek an order recognizing and affirming the Tribal Appellate Court’s ruling that the Tribes also have jurisdiction over FMC under the first *Montana* exception. *See* Motion of the Shoshone-Bannock Tribes for Recognition and Affirmance of Tribal Appellate Court Decision Upholding Tribal Jurisdiction Under the First *Montana* Exception and Memorandum In Support of said motion; Ex. 3, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012 (“2012 TCA Op.”) (upholding tribal jurisdiction under the first *Montana* exception, and requiring FMC to pay the annual permit fee as long as it stores waste on the Reservation); Ex. 4, 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 permit fee, and rejects FMC’s challenge to the validity of the Tribes’ Hazardous Waste Management Act).

threatened and direct effect on the lands, waters, and natural resources on which the Tribes rely to make the Reservation their “permanent home” under article 4 of the Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673 (“1868 Treaty”). Accordingly, the Tribes have jurisdiction over FMC and respectfully seek affirmance of the Tribal Appellate Court’s ruling and enforcement of its Final Judgment of May 16, 2014 (Ex. 5) by an order of this Court.

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

A. Jurisdiction

This Court has jurisdiction over the Tribes’ counterclaim, and thus over this motion, for the reasons stated in the Tribes’ Memorandum in Support of Motion for Recognition and Affirmance of the Tribal Appellate Court’s Decision Upholding Tribal Jurisdiction Under the First *Montana* Exception and for Summary Judgment on Judicial Estoppel (“Tribes’ First *Montana* Mem.”) at 2-3, which are incorporated herein.

B. Burden of Proof

The Tribes have the burden of establishing jurisdiction under the second *Montana* exception. 2014 TCA Op. at 4; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

C. Standard of Review

The standard of review for the Tribal Appellate Court’s second *Montana* exception decision is set forth in Tribes’ First *Montana* Mem. at 3-4, and is incorporated herein.

III. SUMMARY OF ARGUMENT

Under the second *Montana* exception, the Tribes may exercise jurisdiction to protect tribal members from noxious uses of land that threaten tribal welfare. *Plains Commerce*, 554 U.S. at 336. FMC’s use of Reservation fee land to store waste poses such a threat because of the

volume, toxicity, and mobility of the contaminants in that waste, which sits uphill from critical tribal resources that are found in the Portneuf River Valley below. FMC now stores twenty-two million (22,000,000) tons of phosphorus production waste on the Reservation. 2014 TCA Op. at 2. [SOF ¶41]. That waste accumulated over a period of more than fifty years, during which time the federal government did nothing to stop FMC from using the Reservation as a dumpsite. [SOF ¶75]. EPA finally became engaged at the FMC site in 1990,² but to date it has not required FMC to remove any of the waste from the Reservation.³ Today, phosphorus saturates the soil, sits in numerous waste storage ponds, and is buried in twenty-one (21) abandoned railroad tanker cars on FMC's Reservation fee lands (the "FMC Property").⁴ *Id.* at 6-7. [SOF ¶¶46, 50]. Phosphorus is toxic to humans when inhaled, ingested, or absorbed, and explodes or catches on fire when exposed to air. *Id.* at 2, 6-7. [SOF ¶47]. Worse still, when exposed to water or moisture, phosphorus generates phosphine, a poisonous gas. *Id.* at 7. [SOF ¶48]. The

² EPA named the FMC Property to the National Priority List in 1990, *see* National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 35,502, 35,507 (Aug. 30, 1990), and after lengthy delay, EPA issued an interim order in 2012 that applies to the area designated as the FMC Operable Unit ("OU"), Ex. 6, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* (2012) ("IRODA"). The FMC OU includes six (6) waste storage ponds and the groundwater underneath the FMC Property. *Id.* at 1-2. Other Reservation lands owned by FMC are regulated by EPA under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, in accordance with the Consent Decree entered into in 1999, *see United States v. FMC Corp.*, No. 4:98-cv-0406-BLW (D. Idaho entered July 13, 1999), ECF No. 28, and pursuant to subsequent orders issued by EPA, IRODA at 8. The RCRA area contains eleven (11) ponds, IRODA at 205 fig.1, 209 fig.5.

³ EPA intends to allow all of the waste to remain on the Reservation indefinitely, 2014 TCA Op. at 5, 9, deeming it too dangerous to move anywhere else, IRODA at 77-78.

⁴ The term "FMC Property" as used herein refers to all lands owned by FMC, and thus has the same meaning as the term "FMC Facility" as used in the IRODA. *See id.* at 2 (defining the term FMC Facility to refer to all areas owned by FMC); 209 fig.5 (showing the Former Elemental Phosphorus (P4) Production Area, CERCLA Ponds, RCRA Ponds, And Slag Pile); *id.* at 210 fig.6 (Location of Equipment and Infrastructure Prior to Plant Closure Within The Former Operations Area).

groundwater beneath the FMC Property is also contaminated – with phosphorus, arsenic and other heavy metals – and that contaminated water flows into the Portneuf River and then through the Reservation. *Id.* at 8-9. [SOF ¶¶52, 54-55, 58-59, 62]. In addition, the surface of the FMC Property is covered with millions of tons of radiation-emitting slag, which is carcinogenic. *Id.* at 14. [SOF ¶71].

The Reservation is the Tribes’ “permanent homeland,” *Swim v. Bergland*, 696 F.2d 712, 714 (9th Cir. 1983), [SOF ¶20], and the Tribes’ welfare – indeed, the very continuation of their culture and separate existence – depends on the Tribes’ ability to protect the lands, waters and natural resources of the Reservation. 2014 TCA Op. at 11-15; 2014 TCA Dec. at 7, 12, 17-31. The Portneuf River, located in the valley below the FMC Property, is a critical tribal resource. The River enters the Reservation northwest of Pocatello and flows northwest to the American Falls Reservoir, IRODA at 206 fig.2 (“EMF Regional Setting”).⁵ The River provides water and sustains fish and plants that are relied on by the Tribes and their members for subsistence, cultural, and religious purposes. 2014 TCA Dec. at 16, 29-30; 2014 TCA Op. at 8, 12-13. [SOF ¶¶21, 43]. The Fort Hall Bottoms, located along the north bank of the Portneuf River as it flows towards the American Falls Reservoir, *see* IRODA at 206 fig.2, are also a critical tribal resource. The Bottoms support cultural and religious activities, including the Sun Dance, and subsistence hunting, fishing and gathering, 2014 TCA Dec. at 16, 29-30; 2014 TCA Op. at 8, 12-13; IRODA at 4. [SOF ¶¶22, 43].

The contaminants on the FMC Property are released by natural forces – “erosion and storm water runoff, extensive use of hazardous wastes as fill, disposal of elemental phosphorus-

⁵ Before the Tribal Appellate Court, FMC did not contest EPA’s findings or conclusions. 2014 TCA Dec. at 28; 2014 TCA Op. at 6 n.2.

contaminated wastes in CERCLA ponds and potential migration of soil [constituents of concern (CoCs)] to groundwater from infiltration from surface runoff,” IRODA at 21, and the prevailing wind, *id.* at 9. [SOF ¶¶44]. FMC’s waste has already contaminated the Portneuf River, the Fort Hall Bottoms, and other Tribal lands, and has had a serious and substantial impact on tribal subsistence, religious, and ceremonial activities. 2014 TCA Op. 8, 13-14; 2014 TCA Dec. at 29. [SOF ¶¶52-62]. FMC’s use of Reservation land to store waste also poses a constant threat to the Reservation’s lands, waters, and natural resources, which will continue as long as the waste is stored uphill from the River valley below. [SOF ¶¶40-44]. In these extraordinary circumstances, in which the Reservation was used as a hazardous waste dump by FMC for over half a century, tribal jurisdiction exists under the second *Montana* exception to allow the Tribes to protect their homeland under their own waste permitting laws.

IV. UNDER THE SECOND *MONTANA* EXCEPTION THE TRIBES HAVE JURISDICTION OVER NOXIOUS USES OF RESERVATION FEE LANDS OWNED BY NON-INDIANS.

A. The Second *Montana* Exception Applies To Harm And Threatened Harm To Tribal Lands, Waters, And Natural Resources Relied On By Tribal Members For Subsistence, Cultural, And Religious Purposes.

Tribal jurisdiction exists under the second *Montana* exception when “the conduct of non-Indians on fee lands within its reservation . . . threatens *or* has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566 (emphasis added). As the Tribal Appellate Court held, “[t]he use of the disjunctive ‘or’” shows that the exception is satisfied by establishing harm *or* the threat of harm, and therefore a catastrophe is not required for the exception to apply. 2014 TCA Op. at 11-13. Instead, “[t]he logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal

relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated.” *Plains Commerce*, 554 U.S. at 334-35.

Here the Tribes seek to regulate FMC’s use of Reservation lands to store toxic waste to protect its members from threats to the lands, waters, and natural resources on which the Tribes’ welfare and security depends. As the Supreme Court held in *Plains Commerce*, “the tribe may quite legitimately seek to protect its members from noxious uses [of non-Indian fee land] that threaten tribal welfare or security” *Id.* at 336. To be sure, in *Plains Commerce* the Court held that the resale of non-Indian owned fee land to another non-Indian is not subject to tribal regulation under the second *Montana* exception; but that was so because “[o]nce the land has been sold in fee simple to non-Indians and passed beyond the tribe’s immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government.” *Id.* No such issue is presented here.⁶ As the Supreme Court has long recognized, uses of non-Indian fee

⁶ The *Plains Commerce* Court went on to note that one commentator had suggested that under the second exception, “tribal power must be necessary to *avert* catastrophic consequences,” *id.* at 341 (quoting Nell Jessup Newton, et al., *Cohen’s Handbook of Federal Indian Law*, § 4.02[3][c], at 232 n.220 (2005 ed.)) (emphasis added), and added that the resale of non-Indian fee land, though “quite possibly disappointing to the Tribe” was not “catastrophic.” *Id.* But the Court prefaced those comments by stating that its ruling was based on “the same reasons we explained above,” where the Court had held that the resale of fee land is not a cognizable impact under *Montana*, and went on to conclude that the second exception was inapplicable because the sale of non-Indian fee land “hardly ‘imperl[s] the subsistence or welfare of the Tribe.’” *Id.* (quoting *Montana*, 450 U.S. at 566) (alteration in original). Thus, the decision applied, rather than altered, the *Montana* standard. As *Plains Commerce* set no new standard under *Montana*, nor did the Ninth Circuit do so in *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), when it quoted the *Plains Commerce* Court’s discussion of the second *Montana* exception, including the Court’s reference to “catastrophic” risks. *See id.* at 1306 (quoting *Montana*, 450 U.S. at 566; *Plains Commerce*, 554 U.S. at 341). *Evans* is also inapposite here as it concerned the construction of “a single-family house in an area that has already seen comparable development,” *id.* at 1305, while in this case, FMC seeks to store an unprecedented quantity of hazardous and non-hazardous waste on the Reservation indefinitely, 2014 TCA Op. at 6. Furthermore, in *Evans*, “the Tribes had only generalized concerns about waste disposal and fire hazards and [the Ninth Circuit determined] that their concerns were

land that threaten tribal natural resources – which is the issue here – are subject to tribal jurisdiction under the second *Montana* exception. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), tribal jurisdiction over non-Indian fee land was upheld to protect the tribe’s interest in a part of the Reservation that “‘remain[ed] an undeveloped refuge of *cultural and religious significance*, a place where tribal members may camp, hunt, fish, and gather roots and berries in the *tradition of their culture*.’” 2014 TCA Op. at 12 (quoting *Brendale*, 492 U.S. at 441) (alteration in original). And in *Plains Commerce*, the Court reaffirmed *Brendale*, holding that it properly applied the *Montana* decision “to restrain particular uses of non-Indian fee land through zoning regulations.” 554 U.S. at 333 (emphasis omitted). The Ninth Circuit too has squarely held that non-Indian conduct that poses a threat to tribal natural resources is subject to tribal jurisdiction under the second *Montana* exception. *Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (threats to tribal water resources establish tribal jurisdiction under the second *Montana* exception); *see also Rincon Mushroom Corp. v. Mazzetti*, 490 F. App’x 11, 13 (9th Cir. 2012) (forest fires and contamination of tribal water quality are threats sufficient to establish tribal jurisdiction under the second exception).

speculative as they did not focus on Evans’s specific project.” *Id.* at 13 (citing *Evans*, 736 F.3d at 1306) (emphasis added). In this case, “the Tribes have demonstrated concrete threats and specific impacts from FMC’s conduct, specifically the storage of millions of tons of toxic waste. These concerns are not based on speculation. Rather, the Tribes’ concerns have been bolstered and substantiated by testimony from multiple experts and other witnesses as well as public record documents issued by the EPA.” *Id.* And that threat is both “real [and] catastrophic.” *Id.* Indeed, if a catastrophe impact were required under the second exception, the destructive effect of FMC’s storage of waste on tribal natural and cultural resources would satisfy that requirement. *Id.* at 11, 14.

B. The Tribes Protect The Lands, Waters, And Natural Resources Of The Reservation By The Exercise Of Their Jurisdiction.

The Tribes reside on the Fort Hall Reservation, 2012 TCA Op. at 3; Ex. 7, Trial Tr., Vol. IV, Test. of Nathan Small (“NS Test.”) at 891:20-892:1, 900:1-13; *Swim*, 696 F.2d at 714 (“the Fort Hall Indian Reservation [was] created by the 1868 Treaty and companion Executive Orders as a permanent homeland for the Shoshone-Bannock Tribes”). [SOF ¶20]. As promised in the 1868 Treaty, the Reservation includes a “reasonable portion[] of the ‘PortNeuf’” country. 1868 Treaty, art. 2; NS Test. at 893:22-894:1. The Portneuf River enters the Reservation northwest of Pocatello and then flows northwest to the American Falls Reservoir, which lies partly within the Reservation. NS Test. at 894:2-11; IRODA at 206-07, figs.2 (showing the regional setting of the FMC Property) & 3 (showing the eastern boundary of the Reservation). [SOF ¶21]. Under settled federal law, the Tribes hold rights to the natural resources of the Reservation, including hunting, fishing, and gathering rights, *see Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), and rights to its waters, *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963), *abrogated on other grounds by California v. United States*, 438 U.S. 654 (1978); Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, § 4, 104 Stat. 3059, 3060 (ratifying the Fort Hall Indian Water Rights Agreement), under which the Tribes have the right to use waters “on, as well as adjacent to, the Reservation.” H.R. Rep. 101-831 (1990), 1990 WL 200557. [SOF ¶20].

1. Pursuant to tribal law, the Tribes exercise jurisdiction over the Reservation to protect the lands, waters, and natural resources of their homeland.

The Tribes protect the lands, waters and natural resources of their homeland under tribal law, pursuant to the Land Use Policy Ordinance (Feb. 28, 1977) (“LUPO”) (Ex. 8), Land Use Policy Comm’n, Fort Hall Land Use Operative Policy Guidelines (Nov. 22, 1979) (“LUPO

Guidelines”) (Ex. 9), the 1998 amendments to Chapter V of the LUPO Guidelines (“May 1998 Guideline Amendments”) (Ex. 10), the Hazardous Waste Management Act, Ordinance ENVR-01-S3 (Dec. 4, 2001) (“HWMA”) (Ex. 11), and the Waste Management Act, Ordinance ENVR-05-S4 (Sept. 8, 2005) (“WMA”) (Ex. 12). [SOF ¶¶24-28].

The LUPO requires a permit from the Land Use Policy Commission (“LUPC”) for all industrial and commercial uses of Reservation land and natural resources, and for all uses of land which are contrary to the provisions of the LUPO, *e.g.*, the use of land zoned industrial for commercial purposes. *Id.* art. III, §§ 1-2; art. V, § 1.⁷ [SOF ¶24]. The LUPO is administered pursuant to the LUPO Guidelines, [SOF ¶25], which authorize the LUPC to impose reasonable conditions on a permit, 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”).⁸ In 1998, the LUPC enacted the May 1998 Guideline Amendments to “establish 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” *Id.* pmb.⁹ [SOF ¶26]. The May 1998 Guideline

⁷ The LUPO was enacted by the Business Council by resolution of April 26, 1975, and approved by the BIA on February 3, 1977 and March 9, 1977. 2012 TCA Op. at 11. The LUPO was later amended, effective February 2, 2010, *see* Ex. 13, Amended Land Use Policy Ordinance ch. 9(E), but as the issues in this case were all determined under the LUPO as it existed prior to the effective date of the amended Ordinance, all references in this memorandum are to the LUPO as it existed prior to its amendment.

⁸ The LUPO Guidelines were originally enacted by resolution of August 24, 1979, submitted to the BIA on the same day, and became effective November 22, 1979. 2012 TCA Op. at 11-12.

⁹ The LUPO Guidelines authorize the LUPC to amend their terms after allowing for public comment, or if the LUPC deems it necessary, a public hearing. LUPO Guidelines §§ I-7, I-7-1. Amendments are 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; *see* 2012 TCA Op. at 28. [SOF ¶26].

Amendments impose an annual hazardous waste storage fee of five dollars (\$5.00) per ton, *id.* § V-9-2(A) to (B), which is to 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). [SOF ¶26]. The HWMA¹⁰ also 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 (\$1.00) per ton annual storage fee for non-hazardous waste, *id.* § 409(B). *See* 2012 TCA Op. at 33. Waste storage fees collected under section 409 “shall be deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected.” HWMA § 409(D). [SOF ¶27]. In addition, the WMA¹¹ authorizes the Tribes’ Environmental Waste Management Program to establish a framework for the regulation and management of waste on the reservation and procedures for the safe “generation, storage, treatment, disposal, and siting of wastes” WMA § 101(D)(1), (3). In 2010, the Tribes promulgated regulations under the WMA that established cleanup standards for contaminated soils. IRODA at 19. [SOF ¶28]. The LUPO, the LUPO Guidelines, the May 1998 Guideline Amendments, and the HWMA authorize the LUPC to set the annual permit fee for a waste storage permit for FMC at one million five hundred thousand dollars (“\$1.5 million”), 2012 TCA Op. at 29-30, 33, as the LUPC did on February 8, 2007, *id.* at 9. [SOF ¶8].

¹⁰ The Tribes enacted the HWMA by resolution of October 19, 2001, and the Bureau of Indian Affairs approved it on October 26, 2001. Order of May 28, 2013 at 2-3; 2012 TCA Op. at 12. [SOF ¶27].

¹¹ The Tribes enacted the WMA by resolution of September 8, 2005. The BIA approved the WMA by letter dated October 7, 2005. 2012 TCA Op. at 12. [SOF ¶28].

2. The second *Montana* exception does not require a tribe to show that no other government has jurisdiction over the use of the non-Indian owned fee land at issue.

The Tribal Appellate Court also correctly held that the exercise of jurisdiction over the FMC Property by EPA does not deprive the Tribes of jurisdiction under the second *Montana* exception to protect the Reservation and its resources. 2014 TCA Op. at 5 (quoting *Montana v. U.S. EPA*, 137 F.3d at 1141). In *Montana v. U.S. EPA*, the State argued that tribal jurisdiction should be found to exist “only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have provided fruitless.” 137 F.3d at 1140. The State urged that Justices Stevens’ and White’s opinions in *Brendale* supported that position. But the Ninth Circuit rejected the argument, holding that “there is no suggestion [in those opinions] that inherent authority exists only when no other government can act.” *Id.* at 1141. So too here. As the Tribes’ rights to the Reservation’s lands, waters, and natural resources are elements of its sovereignty, and those resources are relied on to sustain tribal culture and subsistence, the use of tribal law to protect those resources falls squarely within the purpose of the second *Montana* exception, which is to protect “the right of reservation Indians *to make their own laws* and be ruled by them.” *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)) (internal quotations omitted) (emphasis added). Finally, the Tribes cannot rely exclusively on the federal government to protect the Reservation and its resources as it was the federal government’s *inaction* for over fifty (50) years that enabled FMC’s waste to accumulate to its current level, IRODA at 117, and EPA intends to leave that waste on the Reservation indefinitely, *id.* at 8, deeming it too dangerous to move anywhere else, *id.* at 77-

78.¹² Under *Montana*, the Tribes can protect their own rights under their own laws – for they would otherwise be defenseless.

V. THE TOXIC, IGNITABLE, RADIOACTIVE, AND MOBILE WASTES THAT SATURATE THE FMC PROPERTY THREATEN AND HAVE A DIRECT EFFECT ON THE RESERVATION’S LANDS, WATERS, AND NATURAL RESOURCES THAT SATISFIES THE SECOND MONTANA EXCEPTION.

A. The Twenty-Two Million Tons Of Waste FMC Stores On The Reservation Threaten The Tribal Resources In The Portneuf River Valley Below.

From 1947 to 2001, FMC operated the largest elemental phosphorus production plant in North America on the FMC Property, 2014 TCA Dec. at 24; IRODA at 7, and “engaged in the production, treatment, and storage of hazardous and non-hazardous waste” 2014 TCA Op. at 2. [SOF ¶40]. The FMC Property consists of one thousand four-hundred and fifty (1450) acres of land that FMC holds in fee, IRODA at 1, most of which is on the Reservation. 2014 TCA Op. at 2; IRODA at 207 fig.3 (showing location of FMC Property and boundaries in relation to the Reservation).¹³ [SOF ¶40].¹⁴ During World War II, a large portion of the FMC

¹² When the federal government finally took action, lengthy delays and errors made its actions ineffective to protect tribal interests. Eight years after the FMC Property was named to the National Priority List, EPA announced the *Record of Decision: Declaration, Decision Summary, and Responsiveness Summary for Eastern Michaud Flats Superfund Site Pocatello, Idaho* (1998) (“1998 ROD”) (Ex. 14). [SOF ¶75]. But the 1998 ROD was fundamentally flawed, and was never implemented on the FMC Property. IRODA at 15, 26. Fourteen years later, EPA issued the IRODA, in which it decided to leave all of the waste on the Reservation indefinitely, 2014 TCA Op. at 5, 9; IRODA at 8.

¹³ On the eastern border, the FMC Property abuts the J. R. Simplot Company Don Plant. *Id.* at 206 fig.2 (showing location of FMC Property and Simplot Property in relation to the area). Both the FMC and Simplot properties are within the Eastern Michaud Flats (“EMF”) Superfund Site, as is a third area, known as the “off-site area.” 55 Fed. Reg. at 35,507; IRODA at 1. The off-site area is “all land surrounding the FMC and Simplot Plants with contamination originating from the Plants,” 1998 ROD at 15, and is later referred to by EPA as the Off-Plant OU, IRODA at 6. The Off-Plant OU, “includes agricultural areas, rangeland for cattle grazing within the Fort Hall Indian Reservation and Bureau of Land Management (BLM) lands, and some residences.” Ex. 15, MWH, *Supplemental Surface Soil Radionuclide Investigation Report for the Off-Plant OU 1-2* (2010) (“Surface Soil Report”). [SOF ¶40 n.19].

Property was used as a moving target range by the U.S. Army, and still contains shell debris. Ex. 16, Trial Tr., Vol. IV, Test. of Jennifer Stevens at 996:9-21; Ex. 17, Map Showing Moving Target Range (showing target range and shell debris area). [SOF ¶40]. FMC now stores more than twenty-two million (22,000,000) tons of hazardous and non-hazardous waste on that property. 2014 TCA Op. at 2; Mem. Decision & Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW, 2006 WL 3487257, at *1 (D. Idaho Dec. 1, 2006), ECF No. 119, at 2 (stating that the declaration of Rob Hartman, FMC’s Vice-President, provides the approximate weight of waste materials potentially subject to a tribal weight-based fee, and estimates that if a fee of \$5 per ton were imposed, the permit fee would be about \$110,000,000); Decl. of Rob Hartman, *id.* (D. Idaho filed May 5, 2006), ECF No. 104-3, at 2 (estimating the volume of materials at 22,135,050 tons).¹⁵ [SOF ¶41].

The FMC Property backs against the Bannock Range at an elevation of five thousand feet (5000 ft.), while the Portneuf River valley sits at an elevation below four thousand four hundred feet (4400 ft.). IRODA at 206 fig.2 (showing regional setting of the FMC Property). SOF ¶42. The groundwater elevation has a similar profile. South of the FMC Plant, the groundwater elevation is four thousand four hundred and fifty feet (4450 ft.) and at the Portneuf River and Batiste Springs it is at or about four thousand three hundred and eighty-three feet (4383 ft.). *Id.* at 212 fig.8 (“Shallow Groundwater Flow Paths and Areas Beneath the FMC Facility”). [SOF

¹⁴ Neither the IRODA, nor the RCRA Consent Decree, address the risk of storing hazardous waste on lands used as a target range by the U.S. Army.

¹⁵ These docket entries should properly be considered by the Court as documents entered 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, *United States v. FMC (FMC II)*, 531 F.3d 813, 823-24 (9th Cir. 2008), to exhaust tribal remedies before adjudicating tribal jurisdiction. FMC has done so, and returned the case to this Court by filing its Amended Complaint. See Mem. Decision & Order, Dkt. No. 43.

¶42]. Groundwater flows under virtually the entire FMC Property, generally to the northeast from the western and central areas of the property, and north from its eastern and central areas to Batiste Springs and the Portneuf River. *Id.* The wind on the FMC Property blows in the same direction – predominantly from the southwest. Surface Soil Report fig. 1-2 (showing Wind Rose). [SOF ¶42].

In the valley below the FMC Property, the Portneuf River flows beside the area known as the Fort Hall Bottoms. Both are critical tribal resources. [SOF ¶21-22, 43]. The waters of the Portneuf River, and the fish and plants they sustain, are needed by tribal members for subsistence, cultural, and religious purposes. 2014 TCA Dec. at 16, 29-30; 2014 TCA Op. at 8-9, 12-13; Ex. 18, Trial Tr., Vols. I-II, Test. of Kelly Clyde Wright (“KW Test.”) at 133:3-4 (“[Tribal members] swim in [the Portneuf]. They fish in it. They drink the water.”); NS Test. at 898:10-899:15 (tribal members fish for trout, sucker, whitefish, and crustaceans in the Portneuf River); *id.* at 896:5-21; Ex. 19, Trial Tr., Vol. IV, Test. of Claude M. Broncho (“CB Test.”) at 957:5-958:18 (tribal members hunt small animals, and gather plants and medicines along the River). [SOF ¶43]. The Fort Hall Bottoms are located along the north bank of the Portneuf River as it flows towards the American Falls Reservoir, and extend from north of Batiste Spring to the American Falls Reservoir. *See* IRODA at 206 fig.2 (“EMF Regional Setting”). The Bottoms are important to the Tribes for religious and cultural purposes, and as hunting, fishing and gathering grounds. *Id.* at 4 (“The river runs through an area of the Reservation known as *the Bottoms*, where many of Shoshone-Bannock traditional and ceremonial activities occur, including fishing and gathering of native plants.”); CB Test. at 955:23-956:20; Ex. 20, Trial Tr., Vol. I, Test. of Susan Hanson (“SH Test.”) at 51:7-8; KW Test. at 131:1-6; NS Test. at 896:12-897:19, 899:3-7. The Bottoms are also used extensively for the Sun Dance ceremony and related

activities. CB Test. 956:1-20. During the Sun Dance, families of dancers relocate their homes to the Bottoms, where they build temporary houses, and gather plants for cultural practices. CB Test. at 959:14-960:20. [SOF ¶22].

The waste FMC stores on the FMC Property is released by natural forces including “erosion and storm water runoff, extensive use of hazardous wastes as fill, disposal of elemental phosphorus-contaminated wastes in CERCLA ponds and potential migration of soil [constituents of concern] to groundwater from infiltration from surface runoff,” IRODA at 21, and the prevailing wind, *id.* at 9. [SOF ¶44]. And as we show next, that waste has a direct and threatened effect on the lands, waters, and natural resources of the Reservation because it is toxic, radioactive, and mobile.

B. The Phosphorus That Saturates The FMC Property Is Toxic, Reactive, Ignitable, And Both Impacts And Threatens Tribal Health And Welfare.

Phosphorus permeates the FMC Property. “EPA estimates that there are as much as 16,000 tons of phosphorus in the ground contaminating approximately 780,000 cubic yards of soil weighing approximately 1 million tons.” 2014 TCA Op. at 6 (citing IRODA at 21, 78, & tbl. 2).¹⁶ [SOF ¶¶45-46]. And that estimate does *not* include the elemental phosphorus in the substantially larger ponds that are subject to the RCRA Consent Decree. IRODA at 83, 108.

¹⁶ During FMC’s phosphorus processing activities, phosphorus leaked from the plant area directly into the soil below, 2014 TCA Op. at 6; IRODA at 24-25, 138-39, where it migrated approximately eighty-five (85) feet below ground to groundwater, IRODA at 25. The leakage of phosphorus from FMC’s former facility is “at a scale unprecedented anywhere in the United States” IRODA at 83, 138-39; *see* SH Test. at 90:15-20. As a result, a plume of solid elemental phosphorus now sits beneath the Former Phosphorus Production Area. *Id.* at 8, 209 fig.5 (showing location of that area); *id.* at 210 fig.6 (showing location of Furnace Building and other plant structures). The RCRA and CERCLA ponds are also contaminated with phosphorus that was contained in the water (known as “phossey water”) used to isolate elemental phosphorus from air and to slurry waste to the ponds. *Id.* at 8.

FMC also buried twenty-one (21) railroad tanker cars on the FMC Property in 1964 with ten to twenty-five percent (10-25%) of their capacity in phosphorus sludge remaining inside. 2014 TCA Op. at 7-8 (citing 2014 TCA Dec. at 10; IRODA at 104 (reporting that “the railcars may contain about 10 to 25% of their total capacity as elemental phosphorus sludge.”))¹⁷ The railcars were not designed for the long-term storage of phosphorus sludge underground, and the level of corrosion in them is unknown; they could corrode – and may have already – to the point where phosphoric acid produced by the phosphorus is released into the soil. 2014 TCA Op. at 8 (citing 2014 TCA Dec. at 10).¹⁸ [SOF ¶¶50-51, 66].

Phosphorus is toxic, ignitable, and reactive – and therefore very dangerous.¹⁹ It is toxic to humans when inhaled, ingested or absorbed through the skin. *Id.* at 6 (citing IRODA at 78); Ex. 22, Trial Tr., Vols. III-IV, Test. of Dr. Peter Orris (“PO Test.”) at 737:2-21 (phosphorus is a constant threat because of its acute toxic effects). Phosphorus is also reactive and pyrophoric, meaning that it bursts into flames or explodes when exposed to air. 2014 TCA Op. at 6 (citing IRODA at 77). Its dangers were vividly illustrated by the trial testimony of tribal witness Claude Broncho, who saw ducks spontaneously ignite as they took off from FMC’s phosphorus containment ponds. *Id.* at 6-7 (citing 2014 TCA Dec. at 18); CB Test. at 962:11-12, 964:22-

¹⁷ The railcars are buried under 80 to 100 feet of clay and radioactive slag, 2014 TCA Op. at 7-8; IRODA at 104, in an area designated by EPA as RA-F1. IRODA at 209 fig.5, 233 tbl.5.

¹⁸ FMC witness Rob Hartman testified that the burial of the railcars would not meet present standards for the burial of hazardous waste. 2014 TCA Dec. at 11; *see* Ex. 21, Trial Tr., Vols. V-VI, Test. of Rob Hartman (“RH Test.”) at 1383:1-8. [SOF ¶50].

¹⁹ EPA determined that elemental phosphorus in concentrations exceeding 1000 ppm is a principal waste threat at the FMC OU and presents a significant threat to human health and the environment if exposure occurs. IRODA at ii. A principal waste threat is one that is highly toxic or highly mobile and cannot be reliably contained or would present a significant risk to human health and the environment if exposure occurs. *Id.* at ii-iii. [SOF ¶47 n.25]. Nevertheless, EPA has not established a cleanup level for the phosphorus on the property; instead, EPA states that “will be documented in a future decision document.” *Id.* at 38.

965:25. When phosphorus reacts, it also “produces numerous chemical byproducts, which further react to form phosphoric acid aerosols” which are highly toxic. 2014 TCA Op. at 6; IRODA at 77 (“[t]he reaction in air produces phosphorus pentoxide (P₂O₅), phosphorus trioxide, plus lower oxides and hydrolysis products, including phosphine.”).²⁰ [SOF ¶¶47-48]. And as phosphorus remains reactive for thousands of years, 2014 TCA Op. at 7; 2014 TCA Dec. at 22; IRODA at 147 (acknowledging Tribal concern that “phosphorus may remain active for thousands of years.”) [SOF ¶47], it threatens tribal health and welfare for that same period.

The phosphorus on the FMC Property also migrates off the property to the Portneuf River Valley below. EPA has found that “[i]gnitable-reactive elemental phosphorus and other hazardous substances containing wastes, including high concentrations of arsenic, along with gamma radiation are in FMC OU soils and groundwater,” and that “[p]recipitation infiltration into FMC OU contaminated soils causes the migration of these hazardous substances toward and

²⁰ By contrast, EPA listed phosphorus as a contaminant of concern in the 1998 ROD, but did not address the risks to air presented by phosphorus or its oxidation products. *Id.* at 48-49. Remarkably, EPA did not even collect data on concentrations of phosphorus and its products at that time. *Id.* App. B at B-12. EPA admitted that when elemental phosphorus is exposed to air it burns and forms “phosphate oxides which absorb and react with moisture in the atmosphere to form phosphoric acid” and that “[w]hen phosphoric acid dissolves in water (as it would if it were inhaled and contacted mucous secretions in the lungs), it ionizes forming various phosphate ions.” *Id.* But it dismissed any concerns by stating that

[s]ubstantial amounts of phosphate ions are naturally present throughout the body and play an essential role in many bodily processes. Phosphates and phosphoric acid are also ingredients in many foods and beverages and are generally regarded as safe in that use by the FDA. Therefore, the small quantities of phosphoric acid and phosphate that might be absorbed through the lungs as a result of periodically inhaling the products of phosphorus emissions from the site would not be expected to result in adverse systemic health effects after being absorbed and neutralized by the body.

Id. EPA corrected that grossly mistaken position in the IRODA, and now recognizes the extreme dangers of phosphorus and its byproducts. IRODA at 77-78. *See infra* at 16-17 (toxicity of phosphorus), 17 (toxicity of phosphine).

into the Portneuf River, and terrestrial exposure to these soils results in gamma radiation exposures as documented in [the IRODA].” Ex. 23, Unilateral Administrative Order for Remedial Design & Remedial Action, *FMC Corp.*, No. CERCLA-10-2013-0116, at 7 (EPA June 10, 2013) (“2013 UAO”). EPA also recognizes that “[e]xposure of buried pyrophoric elemental phosphorus – containing wastes to ambient air results in combustion and/or explosion, depending on the quantity and concentration exposed.” *Id.* Nevertheless, EPA has decided that the phosphorus on the FMC Property will remain on the Reservation indefinitely, capped and managed in place, contending that it is too dangerous to move anywhere else, *id.* at iii, 77-78, and too costly as well, *id.* at iii, 65, 84.²¹ [SOF ¶49]. At the same time, EPA admits that “[t]he remedial action for soils identified in this IRODA, including capping or covering of contaminated soils and institutional controls, *does not reduce toxicity, mobility, or volume of* contaminants through treatment because no treatment occurs.” IRODA at 60 (emphasis added). [SOF ¶49]. Furthermore, those remedial actions that EPA did order have not yet been implemented. 2014 TCA Op. at 9, 11. [SOF ¶77]. More specifically, “[n]ot all the ponds on the FMC site have been capped,” nor are they all lined – the CERCLA ponds are not lined with synthetic liners, and that “the cap designs have not yet received EPA approval” 2014 TCA Dec. at 13. [SOF ¶77]. EPA also determined that the railcars should be capped and left in place, IRODA at 100. [SOF ¶51]. And while EPA states that “[s]hould monitoring data indicate the

²¹ In making that decision, EPA rejected the Tribes’ position that the phosphorus contaminated soils should be removed from the Reservation, IRODA at 44-48 (evaluating soil alternatives), 67 (selecting alternative 3, which will keep the phosphorus contaminated soil on the Reservation). [SOF ¶49]. EPA also postponed any decision on whether the Tribes’ soil cleanup standards, which require removal of the contaminated soils, are “applicable or relevant and appropriate requirements” (“ARAR”) which it must satisfy in a final order issued under CERCLA. *Id.* at 19. The Tribes promulgated their WMA Soil Cleanup Standards in 2010, *see supra* at 10. [SOF ¶28].

presence of any threat to human health or the environment, additional actions will be evaluated at that time,” IRODA at 154, that simply means EPA will wait until contaminants are leaking from the buried railcars before it will consider whether to take action. [SOF ¶51].

In sum, the phosphorus that saturates the soil on the FMC Property and sits in buried and deteriorating railcars on that property both threatens and affects the lands, waters, and natural resources of the Reservation, and thus tribal health and welfare because it is toxic, reactive, ignitable, and mobile. 2014 TCA Op. at 14-15.

C. Arsenic And Phosphorus From The Waste Stored On The FMC Property Contaminate Reservation Ground And Surface Waters.

The Tribal Appellate Court correctly held that “[t]he heavy metals, including arsenic and phosphorus, leaching into the groundwater at the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes by flowing into the Portneuf River.” *Id.* at 15. Arsenic is carcinogenic and is the primary groundwater risk driver for the FMC OU. IRODA at 236 tbl.6 (Summary of Groundwater Risks for the FMC OU). In addition to being a carcinogen, arsenic has neurological effects. Ex. 24, Trial Tr., Vol. III, Test. of Dr. Jerrold Leikin (“JL Test.”), 491:16-19; PO Test. at 750:22-23, 769:3-11. [SOF ¶¶56, 57]. “EPA considers arsenic and phosphorus to be the primary groundwater COCs for th[e FMC] OU and the primary groundwater COCs for the EMF Site,” and found that “[a]rsenic is responsible for most of the human health risks associated with groundwater ingestion,” while “[p]hosphorus is responsible for most of the calculated ecological risks associated with groundwater at the FMC OU and EMF Site.” IRODA at 90. [SOF ¶54].²²

²² Other CoCs identified by EPA for groundwater include fluoride, nitrate, radium-226, selenium, thallium, gross alpha, and gross beta, all of which EPA reports have been detected at the FMC OU in quantities exceeding the groundwater maximum containment levels (MCLs).

Arsenic and phosphorus in the soil on the FMC Property migrate through the soil column until they reach the groundwater underneath the property, *id.* at 31-32, and then flow north-east from the FMC Property to the Portneuf River, *id.* at 4, 22, 212 fig.8, 219 fig.15. “Virtually all” the groundwater that flows under the FMC Property discharges into the Portneuf River at Batiste and “the Spring at Batiste Road.” Ex. 25, MWH, *Groundwater Current Conditions Report for the FMC Plant Operable Unit 2-14* (2009) (“Groundwater Report”).²³ [SOF ¶54]. As a result “[a]rsenic and phosphorus are continually flowing in the groundwater from FMC’s land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms.” 2014 TCA Op. at 8, 12; RH Test. at 1348:6-13; Ex. 26, Trial Tr., Vol. VII, Test. of Barbara Ritchie (“BR Test.”) at 1620:1-1621:3. [SOF ¶54].

The groundwater migrating underneath the FMC site to the Portneuf River near Batiste Springs contaminates those waters, IRODA at 22, and threatens drinking water supplies. 2014 TCA Dec. at 27 (quoting 2013 UAO at 9). [SOF ¶56]. Arsenic concentrations in FMC groundwater have been as high as 2600 micrograms per liter, with levels of thirty-seven (37) micrograms per liter at Batiste Springs, more than three times above the EPA MCL of ten (10)

IRODA at 90. The concentration of several of the groundwater contaminants is mapped in the IRODA. *Id.* at 213 fig.9 (arsenic), 214 fig.10 (potassium), 215 fig.11 (sulfate), 216 fig.12 (nitrate), 217 fig.13 (total phosphorus/orthophosphate), 218 fig.14 (selenium). [SOF ¶53].

²³ The groundwater flows generally to the northeast from the western and central areas portions of the property (where most of the CERCLA and RCRA ponds are located), and north from its eastern portion to Batiste Springs and the Portneuf River. *Id.* at 2-13. [SOF ¶54]. Contaminants from the FMC site enter the “shallow aquifer” that is located in the earth above the “deep aquifer.” *Id.* at 4-5. The hydraulic head variation and the inferred groundwater flow patterns at the FMC site are shown at fig.2.2-2 of the Groundwater Report. As demonstrated by the flow pattern map, the wells at the FMC site show a “trough” in hydraulic levels, *id.* at 2-7, that extends through the area of heaviest contamination at the site, *see id.* at 5-30 to 5-31, including plumes of several heavy metals and phosphorus derivatives, *id.* figs. 5.1-2 to 5.1-9. Groundwater from the south of the site flows into this trough and travels along it, continuing north-east until it reaches the Portneuf River. *Id.* fig. 2.2-2. [SOF ¶55].

micrograms per liter. IRODA at 32. Those measures pose a carcinogenic risk to people who may drink the water, PO Test. 762:13-763:3, and are a threat to human health. *Id.* at 769:3-11, 769:18-24. The phosphorus levels in water discharging near the Portneuf River have been measured as high as twenty-nine (29) milligrams per liter, which is many times higher than the EPA’s target of 0.075 milligrams per liter. IRODA at 31-32. [SOF ¶56]. Phosphorus in the Portneuf River has “resulted in significant reduction in the natural [dissolved oxygen] levels of the river, which results in substantial risk to ecological receptors.” *Id.* at 35. The phosphorus carried into the surface water of the Portneuf River degrades water quality and aquatic habitats in the River by creating excessive blue-green algal growth and affects other forms of aquatic life by increasing mortality and decreasing their reproduction and growth rates. *Id.* at 33. Contaminants in the River are killing aquatic animals and affecting the life cycles of aquatic plants on the Reservation. *Id.* at 32-33. [SOF ¶¶58, 60].

The water in the Portneuf River is culturally and spiritually significant to tribal members. CB Test. at 956:18-20. The intermingling of contaminated groundwater with the surface water of the Portneuf River directly affects subsistence fishing, hunting, and gathering by tribal members, as well as their ability to rely on the River and the resources it supports for ceremonial and religious purposes, including those related to the Sun Dance. 2014 TCA Dec. at 16, 29. [SOF ¶61]. The contamination has also had a destructive effect on tribal cultural practices that rely on the Fort Hall Bottoms. 2014 TCA Op. at 11 (citing 2014 TCA Dec. at 29-31).²⁴ [SOF

²⁴ The Fort Hall Bottoms is a sacred and culturally important area to the Tribes. CB Test. at 955:23-956:20; KW Test. at 131:1-6. The Bottoms are used extensively for the Sun Dance ceremony and related activities. CB Test. 956:1-20. During the Sun Dance, families of dancers relocate their homes to the Bottoms, where they build temporary houses, cook food and use plants gathered there for cultural practices. *Id.* at 959:14-960:15. The Bottoms are also culturally significant as a hunting, fishing, and gathering ground where tribal members can

¶61]. The Tribal Appellate Court found it was an uncontroverted fact that FMC had interfered with the customs and traditions of the Tribes' members, 2014 TCA Dec. at 29-30, and held that *Brendale* demonstrates that such interference is catastrophic. 2014 TCA Dec. at 30-31.

In the IRODA, EPA proposes the installation of a wastewater system to extract and treat the contaminated groundwater beneath the FMC Property, and the construction of earthen caps over the ponds to prevent continued rainwater infiltration at the site. IRODA at 20, 52-53.²⁵ “However, such intervention programs are in the design phase only, and have not yet been implemented.” 2014 TCA Op. at 8. And in any case, EPA concedes that the restoration of the groundwater to the MCL established by EPA will take 100 years or more. IRODA at 18, 20, 53, 124. [SOF ¶62].

In these circumstances, tribal jurisdiction to protect the Reservation's water resources plainly exists under the second *Montana* exception. *Montana v. U.S. EPA*, 137 F.3d at 1141. Indeed, when a threat to water resources is posed, the distinction between trust and fee land is practically meaningless. “A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.” *Id.* (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981)). Furthermore, the Tribes' concurrent jurisdiction over the water resources of the Reservation – including those on the FMC Property – is already recognized by

conduct ceremonies and engage in cultural activities guaranteed by the Fort Bridger Treaty with the United States. *Id.* at 955:21-22. But impacts to the groundwater have turned the Bottoms into a “dead area” where elders tell tribal members not to go for cultural practices. *Id.* at 960:5-6. And algae growing in the Portneuf and the possibility of fugitive dust affecting plant life have robbed the area of its spiritual and medicinal values to tribal members. *Id.* at 961:12-24. [SOF ¶61].

²⁵ By contrast, in the 1998 ROD, EPA determined that no treatment of groundwater was necessary, stating that “[c]urrent evidence suggests that ground water associated with the FMC Plant is not spreading and contaminant concentrations are not increasing.” *Id.* at 77.

EPA. In 2008, EPA determined that the Tribes were eligible for Treatment as a State under the Clean Water Act, 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8, holding that the Tribes have jurisdiction over the Reservation's water resources under the second *Montana* exception, including those located on non-Indian owned fee land. Ex. 27, Letter from Elin D. Miller, Reg'l Admin., EPA, to Alonzo A. Colby, Chairman, Ft. Hall Bus. Council, Re: Approval of the Shoshone-Bannock Tribes for Treatment in the Same Manner as a State (TAS) for Sections 303(c) and 401 of the Clean Water Act, Decision Doc. at 7-8 (2008) ("EPA Decision"). Applying the rule that the second *Montana* exception does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future," *Montana v. U.S. EPA*, 141 F. Supp. 2d 1259, 1262 (D. Mont. 1998) (quoting *Montana v. U.S. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135, 1140-41 (9th Cir. 1998)), EPA concluded that "both actual and potential non-member activities" on leased trust and fee land in the Reservation, EPA Decision at 10; *id.* App. I at 15-23, including at the FMC Property, *id.* App. I at 21-22, pose threats to tribal waters that justify the exercise of tribal jurisdiction, *id.* App. I at 9-12. In so holding, EPA expressly found that the contamination of the surface waters of the Reservation threatens the Fort Hall Bottoms, and tribal members who rely on those waters and lands for hunting, gathering, and religious and cultural practices. *Id.* App. I at 9-11. [SOF ¶23].

D. Phosphine Gas Will Threaten The Tribes For As Long As Phosphorus Is Stored On The Reservation.

Phosphine gas is produced by the exposure of elemental phosphorus to water, 2014 TCA Op. at 7; IRODA at 77, or by its reaction to moisture, and thus can be generated in the fill within the FMC Property that contains elemental phosphorus, *id.* at 21. [SOF ¶63]. Phosphine gas is highly toxic and deadly to humans at certain levels; indeed, it is the active ingredient in some

poisons. 2014 TCA Op. at 7 (citing IRODA at 77); *see also* Ex. 28, Unilateral Administrative Order for Removal Action, *FMC Idaho LLC*, CERCLA-10-2007-0051, at 11 (“2006 UAO”); Ex. 29, Unilateral Administrative Order for Removal Action, *FMC Corp.*, CERCLA 10-2010-0170, at 9 (“2010 UAO”); JL Test. 485:5-12 (phosphine is a “very toxic gas” that “essentially can destroy the lungs from the inside”); PO Test. at 745:12-746:7 (medical dangers of phosphine). The National Institute of Occupational Safety and Health has determined that phosphine gas is immediately dangerous to life and health at fifty (50) parts per million (based on a thirty (30) minute exposure). 2006 UAO at 11. Phosphine gas is also reactive at high concentrations, meaning that it will burn or explode when exposed to air. *Id.*; 2010 UAO at 9. When it burns, phosphine gas produces a dense white cloud of phosphorus pentoxide, which is a severe respiratory tract irritant. 2006 UAO at 11. [SOF ¶64].

Because phosphorus permeates the FMC Property, the risk of its generation is constant, as the record shows. [SOF ¶63]. In 2006, after the RCRA ponds had been closed, drained of water, covered with soil caps, with temperature and pressure monitoring and gas collection systems installed, monitoring detected phosphine in Pond 16S – which is located entirely on-Reservation – at levels of concentrations thousands of times higher than that which is immediately dangerous to human life, and several times higher than the concentration at which phosphine gas will ignite when exposed to air. 2006 UAO at 8, 10-11; Ex. 30, MWH, *Site-Wide Gas Assessment for the FMC Plant Operable Unit*, App. A (2010). The Tribes discovered the problem at that pond. KW Test. at 270:19-271:4; *see* Ex. 31, Photograph (taken by Kelly Clyde Wright, described at KW Test. at 267:13-268:18, 271:17-273:1); 2006 UAO at 10. FMC reported to EPA that phosphine gas was collecting in the well casings for temperature monitoring points installed at Pond 16S pursuant to EPA’s final closure plan for that pond, and was likely

accumulating there to the concentration at which phosphine auto-ignites (20,000 ppm). 2006 UAO at 8, 10. EPA subsequently determined that phosphine gas was being generated within the cap on Pond 16S and released at concentrations that “may present an imminent and substantial endangerment to human health and the environment.” 2006 UAO at 11. EPA required FMC to implement a plan to remove and treat gas under the cap to reduce the concentration of dangerous gases in Pond 16S. *Id.* App. A. [SOF ¶66].

But phosphine was generated at dangerous levels again in 2010, which led EPA to issue another Unilateral Administrative Order to address phosphine gas which this time was leaking through temperature monitoring wells at Pond 15S. 2010 UAO at 10-11. Routine maintenance and calibration work for the monitoring equipment had to be postponed on multiple occasions for the safety of on-site workers. *Id.* FMC later determined that phosphine gas was being released from Pond 15S as a result of repair work that FMC had undertaken on a drainpipe at the pond site. *Id.* at 11. FMC also detected dangerously elevated concentrations of phosphine gas outside of a lift station on Pond 15S. *Id.* at 12. Phosphine concentrations in ambient air following work on temperature monitoring equipment were also unusually high at Ponds 8E and 17. *Id.* at 12-13. In response to this “imminent and substantial endangerment to public health or welfare,” *id.* at 13, EPA ordered FMC to design and implement gas treatment systems for Ponds 8E, 15S, and 17, develop monitoring plans for the other ponds, and implement treatment systems at those other ponds if they began releasing phosphine gas, *id.* App. A. [SOF ¶67].

But that monitoring is not adequate. As the Tribal Appellate Court found, the Idaho Department of Health and Welfare stated in a letter to EPA dated June 1, 2010 that a Ph.D. Toxicologist had evaluated air sampling submitted by the EPA and concluded that:

Reports from EPA for the last 10 years indicate that fence line phosphine readings have been non-detect on the instrument used...This instrument is

adequate, though once-a-day monitoring at a few points along the fence is not adequate to determine if there is a risk to the public from phosphine. Without more frequent monitoring data collection, it is not possible to know what current risk, if any, there is to the public at the fence line.

2014 TCA Dec. at 20-21 (quoting Ex. 32, Letter from Kai Elgethun, Pub. Health Toxicologist/Health Assessor, Idaho Dep't of Health & Welfare, to Greg Weigel, EPA Idaho Operations Office, at 2 (June 1, 2010) (“Elgethun Letter”)) (ellipsis in original). The Tribal Appellate Court determined that this evidence corroborated the testimony of an expert witness for the Tribes, a former EPA official, that EPA’s testing strategies were not sufficient to protect the health and welfare of tribal members. *Id.* at 21; Ex. 33, Trial Tr., Vol. II, Test. of David Reisman (“DR Test.”) at 331:18-332:23 (inadequacy of gas monitoring at perimeter of the FMC Property). [SOF ¶68].

The Tribal Appellate Court correctly held that the threat posed by the phosphine gas generated on the FMC Property extends to members of the Tribes. “EPA, in its 2010 Unilateral Administrative Order for Removal Action noted the following: ‘Potential receptors of the phosphine, released from the RCRA Ponds include . . . members of the Shoshone Bannock Tribes.’ Even if this potential has been lessened, we saw no evidence to indicate it has been eliminated or that it will ever be eliminated.” 2014 TCA Dec. at 19-20 (ellipsis in original); [SOF ¶65]; *see also* PO Test. at 747:1-748:14; JL Test. 505:12-508:20. That is correct. Phosphine is heavier than air and can migrate to low-lying areas. Elgethun Letter at 2; PO Test. 757:5-12 (phosphine can migrate and in cold weather hugs the ground and can settle in a depression). In 1999, FMC detected that levels of phosphine “along Highway 30” were high, “[s]o high that it triggered notification of any occupants to the north of Highway 30, which in this instance, was Drag City Raceway.” RH Test. at 1321:6-18. FMC notified the owner of the raceway, who declined to evacuate. *Id.* at 1322:19-1323:2. And in the IRODA, EPA warned

that the reactivity of phosphorus to air produces phosphine and other gases and that “[c]louds of combustion obscure visibility (a problem for adjacent highways and the Pocatello Airport).” IRODA at 77. [SOF ¶65]. The “adjacent highways” are Reservation lands, as is the Pocatello Airport, and tribal lands lie in between. *Id.* fig.2 (EMF Regional Setting). [SOF ¶65].

Despite that history, the IRODA offers only that “a gas monitoring plan will be developed and implemented as part of the selected interim remedy to ensure [remedial action objectives] and cleanup levels are met,” *id.* at 70-71, and that “EPA’s RCRA program is developing additional strategies to treat and manage phosphine gas production within the RCRA pond area,” *id.* at 15. [SOF ¶68].

E. The Slag On The FMC Property Threatens And Has A Direct Effect On The Tribes’ Health And Welfare.

The Tribal Appellate Court correctly held that “[t]he millions of tons of slag deposited and remaining on the FMC site, which emit gamma radiation in excess of EPA human health standards, threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.” 2014 TCA Op. at 14; *see* IRODA at 229 tbl.2 (reporting volume and type of fill, including slag, on the FMC Property). The slag on the FMC Property contains radium-226, which emits gamma radiation in excess of EPA human health standards. *Id.* at 21, 28, 231 tbl.4 (Maximum Detected Groundwater Concentrations and Maximum Contaminant Levels), 232-34 tbl.5 (Summary of Risks for the FMC OU); 241 tbl.8 (Contaminants of Concern in Groundwater and Cleanup Levels for the FMC OU; 242 tbl.9 (Contaminants of Concern in Soil and Clean up Levels for Risk Drivers for the FMC OU). [SOF ¶71]. Radium-226 is a carcinogen. *See* IRODA at 94, 112-13; Ex. 34, Hanna Assocs., Inc. – Integrated Risk Mgmt., *Comprehensive Letter Report Documenting Potential Human Health Risks for Site COCs in the Off-Plant OU as Addendum to Off-Plant OU Supplemental Surface*

Soil Radionuclide Investigation Report (Apr. 25, 2011) (“HHRA”) at 8, 13.²⁶ EPA describes radium-226 as the CoC “which poses the greatest potential health risk in soil” after exposed phosphorus. *Id.* at 112. The slag also poses a risk to air quality by emitting radon gas and alpha, beta, and gamma particles from the radium into the air. *Id.* at 113. [SOF ¶71]. EPA determined that the primary human receptors of radiation from radium in the slag are “current and future workers” who could be exposed to direct gamma exposure from slag and other wastes, or could incidentally inhale or ingest slag dust. *Id.* at 94. But there is also a general risk to “[p]ersons traversing the FMC OU” who “could inhale or ingest contamination as slag dust” *id.* at 113, which would be delivered via windblown particles, *id.*

The slag on the FMC Property has also contaminated Reservation lands off the FMC Property. FMC sold slag for use in construction off the FMC Property until about 1995, *see* 1998 ROD at 12; RH Test. at 1204:20-24.²⁷ Twenty percent (20%) of the roads within the Reservation contain slag, and over 100 residents of the Reservation have been exposed to doses of gamma radiation in amounts that exceed background levels. Ex. 36, Auxier & Assocs., Inc., *Elemental Phosphorus Slag Exposure Study, Phase I Final Report* at iii, tbl.4 (1999) (Individual TLD Results Fort Hall). Twenty-two (22) Reservation roads contain slag that emits radiation at

²⁶ Dr. Orris testified that the contaminants in the slag, namely alpha and beta gross, radium-226, polonium-210, thorium, and uranium, generate radiation and are carcinogenic. The radiation they generate causes cancer in humans and animals, and at higher dose levels, lung disease as well. PO Test. at 733:18-734:7, 737:22-738:10, 739:2-3, 739:8. [SOF ¶71].

²⁷ In 1996, EPA issued an Administrative Order on Consent (“1996 AOC”), to which FMC and the Monsanto Company were parties, in which EPA determined that “the handling or use of slag as a construction material in buildings, roads and other construction in Southeast Idaho may present an imminent and substantial endangerment to public health or the environment” and FMC agreed to take action to address “the release of radionuclides associated with elemental phosphorus slag in Southeast Idaho.” Ex. 35, Administrative Order on Consent, *Monsanto Co.*, No. 10-96-0045-RCRA at ¶¶1.1, 8.1 (EPA 1996).

a level of twenty (20) microrems or greater per hour. Ex. 37, Auxier & Assocs., Inc., *Surveys of Community Properties for Elemental Phosphorus, Fort Hall Reservation, Idaho* at 4 fig.1, 5 tbl.1 (1998).²⁸ Slag is also dispersed by wind, and EPA has determined that fugitive dust from the former FMC Plant has dispersed contamination to soil off-site. *Id.* at 9.²⁹ Radioactive particles blown by the wind from the FMC Property intermingle with on-Reservation surface soil on land to the northeast and west of the FMC Property, *see* Surface Soil Report at figs.1-2, where they were detected in sampling done by FMC's contractor, HHRA at tpls.2a-9a. These radioactive contaminants were found on land owned by the Tribe, as well as fee lands used for agricultural purposes. *See id.* at 9-10, 12. [SOF ¶72].

Furthermore, EPA's interim remedy will actually bring more soil with radioactive contaminants onto the Reservation. EPA is requiring that six inches of surface soil be scraped from off-Reservation lands owned by FMC, identified as RA J in the IRODA, *id.* at 205 fig.1 (showing area subject to selected interim remedy for soils),³⁰ and brought onto the Reservation for storage. "[RA J] contains windblown dust primarily from FMC and Simplot ore handling areas, and some slag was applied to the surface for roads and parking." *Id.* at 45. EPA has ordered FMC to bring the contamination from FMC's Northern Properties to the Reservation in

²⁸ A rem is the measure of the radiation deposited into someone or something, calculated according to the biological damage done to that object. *See* Plexus Scientific-Nuclear Solutions Div., *Basic Concepts*, <http://www.iem-inc.com/information/radioactivity-basics/basic-concepts> (last visited Jan. 9, 2017); David Close & Lisa Ledwidge, *Measuring Radiation: Terminology and Units*, Inst. for Energy & Env'tl. Research, <http://ieer.org/resource/classroom/measuring-radiation-terminology/> (last visited Jan. 9, 2017). A millirem is one-thousandth of a rem; a microrrem is one-millionth of a rem.

²⁹ As long ago as the 1998 ROD, EPA recognized that "[d]eposition of airborne materials such as cadmium, fluoride, radium, and zinc has occurred in the Plant and Off-Plant Areas since the Plants began operation." *Id.* at 30. [SOF ¶72 n.34].

³⁰ RA J is also known as Parcel 3 of FMC's Northern Properties, *see* IRODA at 207, fig. 3 (showing location of Northern Properties). [SOF ¶73 n.36].

order “to prevent exposure to residents and future workers to elevated levels of radionuclides in surface soil.” IRODA at 68. [SOF ¶73].

Finally, neither EPA nor FMC can stop the emission of radon-222 or alpha, beta, and gamma particles by radium-226, because these dangers are produced by the atomic instability of radium-226 itself, rather than as a result of external factors. According to EPA, radium-226 has a half-life of 1600 years, EPA, *Radionuclide Basics: Radium*, Radiation Protection, <https://www.epa.gov/radiation/radionuclide-basics-radium> (last visited Jan. 5, 2017), so the slag will continue to emit radiation long into the future. Faced with these immutable scientific facts, EPA has selected an interim remedy under which FMC will bury the radioactive slag under soil and keep it on site indefinitely. IRODA at 44-45, 68. Notably, there is no treatment available for radium contaminated soils. *Id.* at 58. Furthermore, EPA’s remedy will not totally protect people on the site from excess radiation from radium-226. EPA’s remedial goal is to reduce radiation emissions to 2.5 pCi/g, which is over twice as high as the FMC site’s background environmental radiation level of 1 pCi/g. *Id.* at 113.³¹ This means that, even after a protective cap is put in place, the site will still emit radiation that has a measurable increase on the excess cancer risk from radiation at the site. *Id.* In Dr. Orris’s opinion, the gamma radiation levels at the FMC Property are a threat to human health, as is the use of slag in the community for other purposes

³¹ The abbreviation pCi/g stands for “picocurie per gram.” Curies measure the number of atoms decaying per second in a given amount of material. See Idaho State Univ., *Radiation Related Terms*, Radiation Information Network, <http://www.physics.isu.edu/radinf/terms.htm> (last visited Jan. 5, 2017). One curie is roughly equivalent to the amount of radiation created by one gram of radium-226; a picocurie is roughly equivalent to the amount of radiation given off by one trillionth of a gram of radium-226. See David Close & Lisa Ledwidge, *Measuring Radiation: Terminology and Units*, Inst. for Energy & Env’tl. Research, <http://ieer.org/resource/classroom/measuring-radiation-terminology/> (last visited Jan. 9, 2017). So, the emissions of gram of material measuring 2.5 pCi is roughly equivalent to the radiation emissions of 2.5 trillionths of a gram of radium-226.

because it will continue to emit radiation in those other areas. PO Test. at 768:18-21. [SOF ¶71].

F. EPA's Long Delayed Remedial Actions Do Not Deprive The Tribes Of Jurisdiction Under The *Montana* Exception.

As the Tribal Appellate Court correctly held, the exercise of jurisdiction over the FMC Property by EPA does not deprive the Tribes of jurisdiction under the second *Montana* exception, 2014 TCA Op. at 5; *see supra* at 11-12, and in any event, the remedial actions ordered by EPA are not adequate to protect tribal interests, *id.* at 9.

In the first place, federal inaction permitted FMC's waste to accumulate to the 22 million tons now stored on the Reservation. IRODA at 117 ("No wastes in the FMC OU, no waste material addressed by the IRODA, were subject to enforceable regulation when they were disposed of."); *id.* at 151 (until 1990, elemental phosphorus production and associated waste generation and storage, including the storage of waste in ponds or surface impoundments, was exempt from the provisions of RCRA governing hazardous waste permitting and management). And even though EPA has regulated the FMC Property under CERCLA since 1990, *see* 55 Fed. Reg. at 35,507, it has never required FMC to remove any of the waste from the Reservation, and now intends to keep it there indefinitely deeming it too dangerous to move anywhere else. IRODA at 77-78, 154. In short, EPA's reliance on Reservation lands for use as a hazardous waste dump does not protect tribal interests. [SOF ¶76].

EPA's regulation of the FMC Property under CERCLA has also been deeply flawed. The 1998 ROD overlooked the threat represented by phosphorus – analogizing it to a food or beverage, 1998 ROD, App. B. at B-12, dismissed the threat of groundwater contamination from

the FMC Property, *id.* at 77, was never implemented on the FMC Property,³² and was later acknowledged by EPA to be fundamentally flawed. IRODA at 15, 26, 52. And the containment plan EPA set forth in the IRODA sixteen years later is not yet operative. “Although the EPA has been involved at this site since 1990, remedial actions chosen by the EPA have not been implemented. [2014 TCA Dec. at 15.] Many of EPA’s proposed remedial actions are still in design phase only, and the threat at the site still remains today.” 2014 TCA Op. at 9 (citing IRODA at 19).³³ Finally, “EPA’s IRODA is itself only an interim measure, and according to the IRODA, a final Record of Decision will not be available for five to ten years.” *Id.* (citing IRODA at 19). [SOF ¶77].

Similarly, the history of EPA’s exercise of jurisdiction over the contamination on the FMC Property under RCRA shows that it has repeatedly failed to recognize threats to the

³² A consent decree was negotiated between FMC and the United States for that purpose, but the United States withdrew from that consent decree. Mem. Decision & Order, *United States v. FMC Corp.*, No. 4:99-cv-00296-BLW (D. Idaho Oct. 11, 2000), ECF No. 33. The Court can take judicial notice of the contents of this Order, as it is a proceeding in another court that has “a direct relation to matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979)). *Accord Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011).

³³ More specifically, the Tribal Appellate Court found that: (a) “[n]ot all the ponds on the FMC site have been capped,” nor are they all lined – the CERCLA ponds are not lined with synthetic liners; (b) “the cap designs have not yet received EPA approval;” (c) “the monitoring plan for phosphine gas at the ET caps has not yet been drafted;” (d) “any monitoring required by the EPA is being done by FMC and not outside contractors;” (e) “FMC witness Barbara Ritchie . . . testified that . . . [n]one of the remedial actions set forth in the 2012 IROD[A] have been completed and that it will take 2-4 years to do so” 2014 TCA Dec. at 13; RH Test. at 1345:8-1346:25; BR Test. at 1644:18-1647:3. And while EPA determined that the area where the tanker cars are buried should be capped, no remedial action to address this threat has yet been taken. 2014 TCA Dec. at 7, 11. Nor has EPA developed its plan for the wastewater extraction system to the point where it can be practically implemented. 2014 TCA Op. at 8. Even if these plans are implemented, EPA estimates that groundwater remediation could take over a century. IRODA at 53-54.

Reservation's lands, waters and natural resources, and to the Tribes or their members. Pursuant to the RCRA Consent Decree, FMC ceased use of the toxic containment ponds covered by RCRA, drained them of water, covered them with soil caps, and installed monitoring and gas collection systems on the ponds. 2006 UAO at 8. And in January 2005, FMC certified to EPA that it had completed implementation of the remediation plan in the RCRA Consent Decree. *Id.* at 9. But in 2006, high levels of deadly phosphine gas were detected at a pond that had been capped under the Consent Decree, *id.* at 10, and EPA required FMC to implement a plan to remove and treat gas under the cap to reduce the concentration of dangerous gases in Pond 16S. *Id.* App. A. [SOF ¶78]. And then again in 2010, EPA found that “[h]igh concentrations of phosphine accumulating within the RCRA Ponds and being released may present an imminent and substantial endangerment to public health or welfare or the environment.” 2010 UAO at 13. EPA ordered FMC to design and implement gas treatment systems for Ponds 8E, 15S, and 17, develop monitoring plans for the other ponds, and implement treatment systems at those other ponds if they began releasing phosphine gas. *Id.* App. A. [SOF ¶67]. In sum, the remedy EPA provided under the RCRA Consent Decree failed to contain the phosphine.

Furthermore, EPA is an independent federal agency and “does not have to do what the Tribes ask.” 2014 TCA Op. at 10. EPA rejected the Tribes’ position that the phosphorus contaminated soils should be removed from the Reservation. *See supra* at 18 n.21. EPA also postponed any decision on whether the Tribes’ soil cleanup standards, which require removal of the contaminated soils, are ARARs which it must satisfy in a final order issued under CERCLA. *Id.* at 19. In the IRODA, EPA reversed its position – EPA had earlier stated that the “Tribes have the ability to set laws and regulations for reservation lands. EPA interprets the requirement to meet state and federal laws and regulations to include tribal laws and regulations.” 1998 ROD

at App. B, B-19. Plainly, EPA's decisions are not based on the Tribes' positions. And finally, the Tribes cannot enforce the decisions that EPA does make. *See FMC II*, 531 F.3d at 815-16. [SOF ¶80].

G. The Tribes Have Jurisdiction Under The Second *Montana* Exception To Require FMC To Obtain A Waste Storage Permit And Pay The Annual Permit Fee.

For the reasons just shown, the Tribal Appellate Court correctly held that FMC's use of its Reservation fee lands to store waste has a threatened and direct effect on the political integrity, economic security, or health or welfare of the Shoshone-Bannock Tribes that satisfies the second *Montana* exception, and that the Tribes therefore have civil jurisdiction over FMC under that exception. 2014 TCA Op. at 4, 11-15. Acting in the exercise of that authority, the Tribes established an annual permit fee of \$1.5 million, *id.* at 2, which is "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." May 1998 Guideline Amendments § V-9-2(B). Under settled federal law, the imposition of that fee is a valid exercise of the Tribes' regulatory authority. *Strate*, 520 U.S. at 457 (the proper application of the first *Montana* exception is illustrated by decisions authorizing the imposition of a tribal permit tax, namely *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947, 950 (9th Cir, 1905)). The Tribes also have jurisdiction to adjudicate FMC's challenges to the permit fee. As the Tribes have regulatory jurisdiction over FMC, recognition of adjudicative jurisdiction over disputes concerning the permit fee would not conflict with "the Supreme Court's instruction that a tribe's adjudicative authority may not exceed its regulatory authority," *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011) (citing *Strate*, 520 U.S. at 453), and its existence turns on "earlier precedent," *id.* at 815.

As that precedent recognizes tribal civil adjudicative jurisdiction over non-Indians on the reservation, *id.* (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978); *Williams*, 358 U.S. at 220), the Tribes have adjudicative jurisdiction to resolve disputes concerning the applicability of the permit fee to FMC, *see* 2014 TCA Op. at 4; 2012 TCA Op. at 14-15.

VI. CONCLUSION

The Tribes respectfully submit that this Court should recognize and affirm the ruling of the Tribal Appellate Court that the Tribes have civil jurisdiction over FMC under the second *Montana* exception, and recognize and enforce its Judgment of May 16, 2014 by an appropriate order.

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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