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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF IDAHO**

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| FMC CORPORATION,<br><br>Plaintiff,<br><br>vs.<br><br>SHOSHONE-BANNOCK TRIBES,<br><br>Defendant. | Case No. 4:14-CV-489-BLW<br><br>**MEMORANDUM IN SUPPORT OF THE SHOSHONE-BANNOCK TRIBES' MOTION FOR SUMMARY JUDGMENT ON DUE PROCESS AND PERSONAL JURISDICTION, AND RECOGNITION AND ENFORCEMENT OF THE TRIBAL APPELLATE COURT'S JUDGMENT** |

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## I. INTRODUCTION

For a federal court to recognize and enforce a tribal court judgment under principles of comity, the tribal proceedings must conform to "the basic tenets of due process," *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997), which means that "there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* As the Shoshone-Bannock Tribes ("Tribes") show below, the due process requirement for recognition and enforcement of a tribal court judgment, *see id.*, was satisfied in the proceedings that resulted in the Shoshone-Bannock Tribal Court of Appeals ("Tribal Appellate Court") entering judgment against the FMC Corporation ("FMC") on May 16, 2014.[1] FMC had every opportunity to assert due process claims in tribal court, and under the exhaustion doctrine established by the Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), it was required to do so in order to preserve such claims for later federal court review. Mem. Decision & Order at 4,

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[1] *See* Ex. 1, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp.*, Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2014 TCA Op.") (upholding Tribal jurisdiction under the second *Montana* exception and holding FMC responsible for the payment of special use permit fees to the Tribes); Ex. 2, Statement of Decision of Apr. 15, 2014 ("2014 TCA Dec.") (Statement of Decision on the second *Montana* exception announced from the bench following trial); Ex. 3, Order of May 28, 2013 (new panel of the Tribal Appellate Court reaffirms that the Tribes have jurisdiction over FMC under the first *Montana* exception and that FMC entered into an agreement with the Tribes in 1998 to pay the $1.5 million permit fee each year, and rejects FMC's challenge to the validity of the Tribes' Hazardous Waste Management Act); Ex. 4, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012 (upholding Tribal jurisdiction under the first *Montana* exception and holding FMC responsible for the payment of special use permit fees to the Tribes) ("2012 TCA Op."); Ex. 5, Final J. of May 16, 2014 ("Judgment").

*FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-CV-489-BLW, 2015 WL 6958066 (D. Idaho Nov. 9, 2015) ("Order of Nov. 9, 2015"), Dkt. No. 43. As FMC preserved only its claim that two judges on the first panel of the Tribal Appellate Court to hear this case were biased, *id.* at 2, its due process challenge is limited to that contention, which it may advance based only on "same material it presented to the Tribal Appellate Court, specifically the transcript of the [judges'] public comments." *Id.* at 5.

FMC's due process challenge fails because a new panel of the Tribal Appellate Court was appointed to conduct further proceedings in the case, and at FMC's request the new panel reconsidered the rulings of the prior panel that FMC claimed reflected judicial bias. Following that review, the new panel reaffirmed those rulings, *see* Order of May 28, 2013, and conducted all further proceedings in the case. That eliminated any basis for FMC's bias attack on two judges who sat on the first panel. In any event, FMC's due process claim has no merit. The public comments of the two judges to which FMC objects were made at a legal education seminar directed at improving the practice of law in tribal courts, and were presented in conformance with applicable federal and tribal law. Furthermore, the judges' remarks did not mention FMC or this case, and explicitly recognized their duty to be impartial.

The Tribes also show that FMC's assertion that the Tribal Court Judgment cannot be enforced because it is allegedly a penal judgment has no merit. FMC's penal judgment contention furnishes neither a mandatory nor a discretionary reason for a federal court to decline to enforce a tribal court judgment under the principles of comity set forth in *Wilson*, 127 F.3d at 810 (listing mandatory and discretionary factors). Nor would it be appropriate to adopt such a factor, as federal law *already* establishes that a tribal court judgment based on the exercise of jurisdiction under the exceptions of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), is a

civil judgment, and whether those exceptions are satisfied is *already* a factor under the comity principles of *Wilson*, 127 F.3d at 814-15. Finally, assuming *arguendo* that the comity analysis includes a penal judgment factor, FMC's claim would still fail. The Tribal Court Judgment is not penal under the correct definition of that term because it is not based on a criminal law, is not a punishment of any kind, and has none of the elements of a penal judgment.

Accordingly, the Tribes are entitled to recognition and enforcement of the Tribal Court Judgment. *See id.* at 811.[2]

## II. JURISDICTION, BURDEN OF PROOF, AND SUMMARY JUDGMENT STANDARD

### A. Jurisdiction.

This Court has jurisdiction over the Tribes' counterclaim, and thus over this motion, under 28 U.S.C. § 1331 because federal law governs the existence of tribal jurisdiction under the

[2] Recognition of a tribal court judgment under principles of comity also requires that the tribal court have personal and subject matter jurisdiction in the case, *id.* at 810-11. Both are present here. FMC did not challenge personal jurisdiction in Tribal Court, and in any event the Tribal Court had personal jurisdiction over FMC based on its storage of waste and ownership of property on the Reservation. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945) (exercise of personal jurisdiction proper where based on "minimum contacts" with the forum state); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 819 (9th Cir. 2011) ("Johnson lived on tribal land, which on its own serves as a basis for personal jurisdiction."); *see also* Law & Order Code, ch. I, § 2(b) (Trial Court has original jurisdiction over "[a]ll civil actions arising under this Code or at common law in which the defendant is found within the Fort Hall Reservation and is served with process within . . . ."); *id.* § 2.1 (Trial Court has jurisdiction over any "cause of action in the Shoshone-Bannock Tribal Court wherein the cause of action arose within the exterior boundaries of the Fort Hall Reservation . . . .") (relevant excerpts of Law & Order Code attached as Ex. 6). And the Tribal Appellate Court correctly held that the Tribes have subject matter jurisdiction over FMC under both *Montana* exceptions, as the Tribes' separate motions for recognition and affirmance of those rulings show. *See* Mem. in Supp. of Mot. of the Shoshone-Bannock Tribes for Recognition and Affirmance of Tribal Appellate Court Decision Upholding Tribal Jurisdiction Under the First *Montana* Exception; Mem. in Supp. of Motion of the Shoshone-Bannock Tribes for Recognition and Affirmance of Tribal Appellate Court Decision Upholding Tribal Jurisdiction Under the Second *Montana* Exception.

*Montana* exceptions, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990), and the recognition and enforcement of a tribal court judgment, *Wilson*, 127 F.3d at 813. This Court also has jurisdiction under 28 U.S.C. § 1362, 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).

**B. Burden of Proof and Standard of Review.**

FMC bears the burden of demonstrating that the tribal proceedings did not afford due process. *See Schweiker v. McClure*, 456 U.S. 188, 196 (1982) ("the burden of establishing a disqualifying interest rests on the party making the assertion"); *Ohno v. Yasuma*, 723 F.3d 984, 991 (9th Cir. 2013) (under California Uniform Foreign-Country Money Judgments Recognition Act the party opposing recognition has the burden of showing noncompliance with due process). To satisfy that burden FMC must overcome the "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011) (habeas petitioner failed to overcome "presumption that judicial officers act impartially").

FMC's due process claim is reviewed *de novo* by this Court, *id.* (citing *Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d 1136, 1140-41 (9th Cir. 2001)).[3]

[3] In making this determination, a federal court may look to the Indian Civil Rights Act ("ICRA") and the due process cases involving foreign tribunals for analogical support. *Bird*, 255 F.3d at 1142, 1143 n.12. The former provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law," 25 U.S.C. § 1302(a)(8), and the latter that "unless a foreign country's judgments are the result of outrageous departures from our notions of 'civilized jurisprudence,' comity should not be

### C. Summary Judgment Standard.

A grant of summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "A fact is 'material' only if it might affect the outcome of the case, and a dispute is 'genuine' only if a reasonable trier of fact could resolve the issue in the non-movant's favor." *Fresno Motors, LLC v. Mercedes-Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). *Accord Battelle Energy Alliance, LLC v. Southfork Sec., Inc.*, 3 F. Supp. 3d 852, 857-58 (D. Idaho 2014).

## III. STATEMENT OF FACTS

On May 8, 2012, a panel of the Tribal Appellate Court consisting of Judges Gabourie, Pearson, and Silak issued an opinion in the appeals taken by the Tribes and FMC from the Trial Court's decisions in this matter. Ex. 7, Findings of Fact & Conclusions of Law, Op. & Order of May 8, 2012 at 3 ("Opinion of May 8, 2012"). The Tribes then brought a motion to correct the Opinion of May 8, 2012, *see* Ex. 8, Mot. to Correct Order (June 7, 2012), to which FMC responded, *see* Ex. 9, FMC Corp.'s Resp. to Tribal Appellants' Mot. to Correct Order (June 22, 2012). And on June 26, 2012, the court issued an amended opinion. 2012 TCA Op. The court held that the Tribes have jurisdiction under the first *Montana* exception to require FMC to obtain a waste storage permit and pay the annual permit fee, and that FMC is required to pay the fee for as long as it stores waste on the Reservation, *id.* at 11, 14-15, 26-27, 40-42. The court further

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refused." *Bird*, 255 F.3d at 1142 (quoting *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (quoting *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)).

held that the Trial Court erred by: (a) not permitting the Tribes' discovery concerning the parties' 1998 Agreement, *id.* at 37, (b) dismissing the Tribes' breach of contract counterclaim without permitting discovery, *id.* at 54, (c) failing to consider evidence on whether the Tribes have jurisdiction under the second *Montana* exception, *id.* at 38, and (d) dismissing the Tribes' air quality permit counterclaim, *id.* at 54. [SOF ¶12]

Following briefing and oral argument, the Tribal Appellate Court issued an order awarding fees and costs to the Tribes, Ex. 10, Findings of Fact, Conclusions of Law, Op. & Order re Attorney Fees & Costs of Jan. 14, 2013 ("Order of Jan. 14, 2013"), which it amended and reissued on February 5, 2013, Ex. 11, Am. Findings of Fact, Conclusions of Law, Op. & Order re Attorney Fees & Costs, *Nunc Pro Tunc* of Feb. 5, 2013 ("Order of Feb. 5, 2013"). In that order, the court also determined that in the interest of time, further proceedings on the second *Montana* exception, breach of contract and tribal air permit issues would be conducted by the Tribal Appellate Court, rather than the Trial Court, to which those issues had previously been remanded, *see* 2012 TCA Op. at 62. Order of Feb. 5, 2013 at 1-2 (revoking remand to Trial Court in interest of time), 13 (finding that the Law & Order Code authorizes the Tribal Court of Appeals to revoke the remand order), 18-19 (revoking remand). [SOF ¶13]

The Tribal Appellate Court initially scheduled a hearing for February 7, 2013 on the Tribes' counterclaims, and on whether the Tribes' Hazardous Waste Management Act ("HWMA") and Waste Management Act ("WMA") had been validly approved, which FMC had raised anew in its Response to the Tribes' Motion to Correct Order, and directed the parties to file witness lists for the hearing by January 28, 2013. Ex. 12, Minute Entry & Order of Jan. 7, 2013 ("Jan. 7 Minute Entry & Order"). But shortly thereafter, both FMC and the Tribes moved for clarification of the Jan. 7 Minute Entry & Order, *see* Ex. 13, FMC Corp.'s Mot. for

Clarification of Minute Entry & Order (Jan. 14, 2013) ("FMC First Mot. Clar."); Ex. 14, FMC Corp.'s Second Mot. for Clarification (Jan. 25, 2013) ("FMC Sec. Mot. Clar."); Ex. 15, Tribes' Mot. for Clarification & Mot. to Continue Feb. 7, 2013 Evidentiary Hr'g (Jan. 24, 2013), and on January 28, 2013, the Tribal Appellate Court vacated the February 7, 2013 hearing, Ex. 16, Notice Vacating Hr'g of Jan. 28, 2013. The court subsequently issued a new order that: (a) acknowledged the confusion created by its prior order, which the court found was entered erroneously; (b) informed the parties that all Tribal Appellate Court matters had been suspended pending receipt of federal funding; (c) continued the February 7 hearing to an unspecified time; (d) and directed the parties to stipulate to a trial schedule that would provide for the parties to conduct discovery, address evidentiary issues, and file pre-trial motions on the issues presented in Tribes' two counterclaims, the Tribes' request for attorneys' fees and costs, and the Tribes' demand that FMC obtain an air permit. Ex. 17, Corrected Minute Entry & Order, *Nunc Pro Tunc* of Feb. 1, 2013 ("Order of Feb. 1, 2013") at 1-2. The order also specifically provided that the court would "accept pre-trial motions as to any evidence that this Court doesn't have authority to revoke a remand to the trial Court in an effort to save the parties additional time and money by hearing the foregoing issues itself." *Id.* at 2. [SOF ¶14]

On April 22, 2013, the Tribal Appellate Court issued an order informing the parties that on May 10, 2013, Chief Judge Silak and newly-seated Judges McDermott and Herzog would hold a status conference to consider how to proceed with regard to the issues that the prior panel had determined would be the subject of further proceedings, namely "evidence of the second *Montana* exception to jurisdiction, breach of contract and failure to obtain air permits in appellants [sic] counterclaim." Ex. 18, Order of Apr. 22, 2013 at 1. The new panel also informed the parties that on May 10, 2013, the Tribal Appellate Court would hear oral argument

on FMC's claim that the HWMA was not effective because it had not been properly approved. *Id.* at 2. And finally, the new panel stated that it would determine the amount of attorneys' fees to be awarded to the Tribes at the conclusion of the proceedings. *Id.* at 1. [SOF ¶15]

In response to that order, FMC filed two briefs. Ex. 19, FMC Corp.'s Pre-Hr'g Br. Re: Case Management (May 6, 2013) ("FMC Pre-Hr'g Br."); Ex. 20, FMC's Corp.'s Pre-Hr'g Br. Regarding Lack of Approval of Hazardous Waste Management Act (May 6, 2013) ("FMC Pre-Hr'g HWMA Br."). In the first of those briefs, FMC argued that the court should reconsider the rulings of the prior panel, and that if the new panel agreed with those rulings, it should then conclude the proceedings; but that if the new panel did not agree with those rulings, it should vacate the rulings of the prior panel and proceed anew. FMC Pre-Hr'g Br. at 9-10. FMC supported this request by asserting that it "ha[d] obtained new evidence regarding public statements made by two of the judges from the prior appellate panel" at a conference on tribal courts held at the University of Idaho College of Law on March 23, 2012. FMC's counsel had attended that seminar in March of 2012, Ex. 21, Decl. of Maureen L. Mitchell In Supp. of FMC Corp.'s Pre-Hr'g Br. Re Case Management at 2 (May 6, 2013) ("Mitchell Decl."), and FMC had obtained a videotape of the seminar on January 10, 2013, First Am. Compl. For Decl'y & Injunctive Relief ¶303 ("Am. Compl."), Dkt. No. 10 (reciting that FMC received the videotape on January 10, 2013), from which it had a transcript prepared, Mitchell Decl. at 3; *id.* Ex. B, Verbatim Tr. from Video Recording ("Sem. Tr."). FMC claimed that two judges on the prior panel, Judge Gabourie and Judge Pearson, made statements at the seminar that showed they were biased. FMC Pre-Hr'g Br. at 3-5. In its second brief, FMC asserted that the Tribes' Hazardous Waste Management Act ("HWMA") had not been validly approved, that the Tribal Appellate Court's contrary ruling was incorrect, and that "the Court should vacate its Opinion and

Amended Opinion, supplement the record with [the letter on which FMC's position relied], and reconsider this appeal." FMC Pre-Hr'g HWMA Br. at 11. [SOF ¶16]

Following the May 10, 2013 hearing at which both parties appeared by counsel, the new panel of the Tribal Appellate Court reconsidered and reaffirmed the prior panel's determinations as follows. On the first *Montana* exception issue, the court "concluded it has previously ruled that this court does have jurisdiction over respondent FMC Corporation under the first *Montana* exception, thus no further evidence will be received on this issue." Order of May 28, 2013 at 3. *See* 2012 TCA Op. at 12-15 (previously adjudicating that issue). On the breach of contract issue, the court held "there is no necessity in taking further evidence under [the] breach of contract claim due to the fact that this court previously ruled FMC voluntarily entered into a contract in 1998 with the Shoshone Bannock Tribes for payment of 1.5 million per year." Order of May 28, 2013 at 1. *See* 2012 TCA Op. at 40-42 (previously adjudicating that issue). The new panel further held that the Tribes' Hazardous Waste Management Act was properly approved by the BIA Superintendent on October 26, 2001, that it had not been disapproved by the Secretary of the Interior within the ninety-day period afforded by the Tribal Constitution for the Secretary to do so, and that it was, therefore, the law of the Tribes. Order of May 28, 2013 at 1-3. And on the question whether the second *Montana* exception authorizes tribal jurisdiction in this case, the court held that "it will grant an evidentiary hearing" and set forth a schedule for those proceedings. *Id.* at 3. [SOF ¶17]

The parties subsequently stipulated to a modification of the pre-trial schedule. Ex. 22, Stipulation to Continue Trial Date, Enlarge Trial Time, & Extend Pretrial Deadlines (Oct. 17, 2013). The stipulation provided, *inter alia*, for discovery to close on February 17, 2014, allowed each party to call the fact and expert witnesses listed in attachments to the stipulation, subject to

those witnesses being made available for deposition before the close of discovery, and required final exhibit lists to be filed with the court. *Id.* at 1-2. The court approved the parties' stipulation, set a deadline for the filing of pre-trial motions, ordered the filing of pre-trial briefs, and scheduled the evidentiary hearing to commence on April 1, 2014. Ex. 23, Order of Oct. 28, 2013. Shortly after that order was issued, Judge Traylor joined the panel in place of Judge Silak. *See* Ex. 24, Order of Nov. 15, 2013 (showing Judge Traylor to be on the panel). [SOF ¶17]

The hearing on the second *Montana* exception was held before Judges McDermott, Herzog, and Traylor from April 1 through April 15, 2014, at which both parties presented arguments and evidence. 2014 TCA Op. at 1. The Tribal Appellate Court announced its decision from the bench at the conclusion of the hearing, 2014 TCA Dec. at 1, and issued its opinion on May 16, 2014, holding that "the Tribes have met their evidentiary burden of demonstrating that the second *Montana* exception has been met." 2014 TCA Op. at 4-5. The court entered a separate judgment the same day, ordering FMC to pay the Tribes' unpaid tribal storage permit fees from 2002 onward and the costs and attorney's fees awarded the Tribes in the Judgment. *See* Final J. of May 16, 2014; Ex. 25; J. & Order for Att'ys Fees & Costs of May 16, 2014 ("Tribal Court Judgment"). [SOF ¶18].

## IV. AT FMC'S REQUEST, A NEW PANEL OF THE TRIBAL APPELLATE COURT RECONSIDERED AND REAFFIRMED THE RULINGS OF THE PRIOR PANEL THAT FMC CLAIMED REFLECTED BIAS, WHICH ELIMINATED ANY BASIS FOR FMC'S BIAS CLAIM.

After the new panel of the Tribal Appellate Court informed the parties it would hold a status conference on May 10, 2013 to consider the issues set out in the Order of Apr. 22, 2013, FMC filed a brief to address "the question of case management in the context of the Tribal Defendants' counterclaims." FMC Pre-Hr'g Br. at 3. Stating that "[t]his appeal is at a critical

juncture," *id.*, FMC then – for the first time – objected to the remarks of Judges Gabourie and Pearson at the legal education seminar that its counsel had attended more than a year earlier. FMC stated that "[s]ince issuance of the [2012 TCA Op.], FMC has obtained new evidence regarding public statements made by two of the judges from the prior appellate panel" at a conference on tribal courts held at the University of Idaho College of Law on March 23, 2012, which "demonstrated that they considered their roles as appellate judges to be to advance Tribal interests and advocate for Tribal governments in disputes with non-Indian litigants." FMC Pre-Hr'g Br. at 3-4.[4] FMC said that the new panel now had a choice to make. *Id.* at 9. "If the new panel believes the existing record in the Tribal Courts is sufficient to support the [Opinion of May 8, 2012, the 2012 TCA Op., the Order of Jan. 14, 2013, the Order of Feb. 5, 2013,] and [the May 29, 2012] Judgment, the Tribal Court proceedings should be concluded so that FMC can challenge those opinions in the federal courts." *Id.* at 10. Alternatively, "[i]f the new panel believes that the [Opinion of May 8, 2012, the 2012 TCA Op., the Order of Jan. 14, 2013, the Order of Feb. 5, 2013,] and [the May 29, 2012] Judgment are not supported by the existing

[4] As the seminar was held on March 23, 2012, FMC could have moved to disqualify Judges Gabourie and Pearson even before the first panel issued the Opinion of May 8, 2012. *See* Law & Order Code, ch. I, § 3.9. Its decision not to raise the issue until after the new panel was seated indicates FMC was using the bias argument for strategic reasons. By that conduct, FMC waived its objections. *See United States v. Rogers*, 119 F.3d 1377, 1382 (9th Cir. 1997) ("Rogers cannot be permitted to sit back and take his chances at resentencing with Judge Tevrizian only to return several months later with his disqualification claims in the hope of obtaining a more favorable sentencing disposition before a different judge."); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992) (affirming denial of motion for new trial and disqualification where delay in filing motion "suggests that the recusal statute is being misused for strategic purposes"); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 432-33 (4th Cir. 2011) (waiting several months to file recusal motion "smack[ed] of gamesmanship" where motion was filed after an adverse ruling).

record in the Tribal Courts, all of those Opinions and Judgment should be vacated before there are any additional proceedings before this Court." *Id.* FMC cautioned that "[i]f the new panel adopts the appellate opinions of the former panel, the bias demonstrated by that panel will be a significant issue before the federal courts." *Id.* at 24.

In sum, the only relief FMC sought based on its assertion of bias was reconsideration of the prior panel's rulings, and a decision by the new panel to either reaffirm or vacate those rulings. FMC did not move for relief from the prior panel's rulings based on the "new evidence" to which its brief referred, although it could have done so, Law & Order Code ch. III, § 3.60(b)(2) (permitting a party to move for relief from an order based on newly discovered evidence that could not have been discovered in time to move for a new trial if the motion is filed within a year after the order was entered).[5] Indeed, FMC did not file any motion with its brief, nor did it cite even a single case to support its assertion of bias. FMC sought only to have the court reconsider the prior panel's rulings based on the existing record. And the Tribal Appellate Court did just that, although it did not follow FMC's direction that the court choose one of the two options identified by FMC.[6] In the Order of May 28, 2013, the new panel of the

[5] FMC's failure to do so made such relief unavailable. *See United States v. Sarno*, 73 F.3d 1470, 1499 (9th Cir. 1995) (appellant may not raise bias concern with Court of Appeals after raising issue with District Court by pleading without filing a proper motion); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 327 (9th Circ. 1995) (bias allegation waived where not accompanied by required affidavit).

[6] Nor would it have been proper for the court to do so. FMC proposed that if the court believed the record was sufficient to support the prior rulings, it terminate the litigation. FMC Pre-Hr'g Br. at 10. That could not be done because there plainly were issues that remained to be decided in the case, including the applicability of the second *Montana* exception and whether the HWMA was validly in effect. Order of Apr. 22, 2013 at 2. Nor would it have been proper for the court to simply vacate all prior opinions in the case if the court determined that the prior rulings were

Tribal Appellate Court reconsidered and reaffirmed the rulings of the prior panel, and ordered further proceedings on the second *Montana* exception issue pursuant to a schedule set by the court. On the first *Montana* exception, the court "concluded it has previously ruled that this court does have jurisdiction over respondent FMC Corporation under the first Montana exception, thus no further evidence will be received on this issue," *id.* at 3, reaffirming the decision of the prior panel, *see* 2012 TCA Op. at 12-15 (adjudicating that issue). On the breach of contract issue, the court held "there is no necessity in taking further evidence under [the] breach of contract claim due to the fact that this court previously ruled FMC voluntarily entered into a contract in 1998 with the Shoshone Bannock Tribes for payment of 1.5 million per year," Order of May 28, 2013 at 1, again reaffirming the prior panel's ruling, *see* 2012 TCA Op. at 40-42 (adjudicating that issue). On the question whether the second *Montana* exception authorizes tribal jurisdiction in this case, the court held that "it will grant an evidentiary hearing," Order of May 28, 2013 at 3, which also reaffirmed the prior panel's rulings, 2012 TCA Op. at 17 (Tribes should have an opportunity to present evidence of jurisdiction under the second *Montana* exception); Order of Feb. 5, 2013 at 1-2 (revoking remand to Trial Court in interest of time); Order of Feb. 1, 2013 at 1-2 (reaffirming revocation of remand order and specifically inviting the filing of motions contending that the Tribal Appellate Court does not have such authority; also

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not supported by the record, as FMC had neither filed a motion seeking such relief, nor provided any legal support for such relief in its brief. Instead, FMC asserted that unless the prior rulings of the Tribal Appellate Court were vacated, "any further proceedings in this Court are unnecessary and improper. FMC should have the right to challenge the prior panel's Opinions and Judgment in the federal courts based on the evidence in the record at the time those Opinions and Judgment were issued by the Tribal Court of Appeals." FMC Pre-Hr'g Br. at 9.

the directing parties to stipulate to a schedule for pre-trial proceedings).[7] And on the validity of the HWMA, the court held that it was properly approved by the BIA Superintendent on October 26, 2001, had not been disapproved by the Secretary of the Interior within the period afforded by the Tribal Constitution for the Secretary to do so, and that the HWMA is therefore the law of the Tribes. Order of May 28, 2013 at 1-3.

The Tribal Appellate Court's decision to reconsider and reaffirm the rulings of the prior panel resolved the issue posed by FMC in its brief and made it unnecessary for the court to separately consider FMC's attack on the impartiality of Judges Gabourie and Pearson. Furthermore, neither Judge Gabourie nor Judge Pearson had any role in the rulings set forth in the Order of May 28, 2013, or in any subsequent proceedings in the case. Accordingly, the Order of May 28, 2013 resolved any due process concerns that could have been raised by FMC based on Judges Gabourie's and Pearson's legal education presentations. *See Keating*, 45 F.3d at

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[7] The Tribal Appellate Court's first *Montana* exception decision, *see* 2012 TCA Op., did not make it unnecessary to decide whether jurisdiction existed under the second exception, as FMC had urged. *See* FMC Pre-Hr'g Br. at 21. The Trial Court had affirmed the existence of tribal jurisdiction over FMC under the *Montana* decision, but did not specifically address either *Montana* exception. Ex. 26, Op., *FMC Corp. v. Shoshone-Bannock Tribes, Fort Hall Business Council*, C-06-0069, C-07-0017, C-07-0035, at 15 (Shoshone-Bannock Tribal Ct. Nov. 13, 2007). When the Tribes appealed the Trial Court's decisions to the Tribal Appellate Court, the Trial Court's failure to address tribal civil jurisdiction under the *Montana* exceptions was expressly included as an issue to be considered in the appeal. Ex. 27, Appellant's Am. Notice of Appeal at 3 (June 5, 2008). Furthermore, the Supreme Court regularly considers the applicability of the second *Montana* exception in determining whether tribal jurisdiction exists under *Montana*, whether or not that issue was addressed by the court below. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340-41 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656-57 (2001). Finally, it is also well settled that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (quotation omitted).

327 (no bias where agency official who made public remarks allegedly showing bias resigned before issuance of recommended and final decisions); *Bender v. Dudas*, No. Civ. A. 04-1301 RBW, 2006 WL 89831, at *16 (D.D.C. Jan. 13, 2006) (no due process violation where the administrative decisions at issue were not made by person who made comments allegedly reflecting bias).

## V. THE PRESENTATIONS MADE BY JUDGES GABOURIE AND PEARSON AT A LEGAL EDUCATION SEMINAR ON TRIBAL COURTS WERE ENTIRELY PROPER.

Even if FMC had properly presented its bias claim as a basis for invalidating the rulings of the prior panel of the Tribal Appellate Court, its claim would fail because the remarks of Judges Gabourie and Pearson at the legal educational seminar on tribal courts were entirely proper, as shown by the transcript of the Judges' public comments.

### A. The Judges' Participation In The Legal Education Seminar At The University Of Idaho Law School Was Proper Under Federal And Tribal Law.

At a legal education seminar held on March 23, 2012 at the University of Idaho Law School, entitled "Tribal Courts: Jurisdiction and Best Practices," Mitchell Decl. at 2, Judges Gabourie and Pearson made presentations on "The Importance of Tribal Appellate Courts," Sem. Tr. at 1.[8] Their presentations were focused on how to improve tribal appellate court practice, and were specifically intended for persons practicing law in tribal courts. *Id.* at 6.[9] Both judges

[8] FMC secured a copy of a video recording of the Judges' presentation and caused a transcript to be made, which FMC lodged with the Tribal Court of Appeals. Mitchell Decl. at 3. The transcript is incomplete, however, as many statements were inaudible on the video recording. That precludes a complete understanding of the Judges' remarks.

[9] Before beginning, Judge Gabourie asked the audience:

were well qualified to address that topic. Judge Gabourie had previously served as a state court judge in California, a prosecutor for the Coeur d'Alene Tribe, and the chief judge for the Kootenai Tribe of Idaho. *Id.* at 5. He had also served as co-chair of the Idaho Tribal-State Court Forum, and as a contributing author to *The Tribal Court Benchbook on Child Support Enforcement and Related Laws* and *The Tribal Court Benchbook* of the State of Idaho. *Id.* Judge Pearson, a member of the bar in Oregon, Idaho, and Washington, "went to work for the Northwest Intertribal Court system in 1989," which had "a circuit-riding system" that "use[d] different panels in different tribes." *Id.* at 21. She had also previously served as Chief Judge for the Spokane Tribe and for the Coeur d'Alene Tribe. *Id.* at 4. Both Judges made their commitment to impartiality clear in their presentations. Judge Gabourie stated that "every court has – should be impartial" and emphasized that "a good opinion comes [from] both sides, both parties." *Id.* at 9. Judge Pearson emphasized that "the appellate court has to look at making findings of fact, conclusions of law, instead of just writing an opinion," and after expressing mild disagreement with federal court review of tribal court decisions, concluded that "you know, [you] just need to make sure that you do the job right." *Id.* at 19.

The Judges' presentations fell squarely within the parameters established by federal and tribal law. The federal Code of Judicial Conduct specifically provides that subject to certain limits, "[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Code of Conduct for United States

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> How many practice law or intend to practice law in tribal courts, representing tribes? That's pretty good. The reason I say that, is because our conversation this morning is going to be specifically for that area . . . . Specifically for tribal courts . . . .

Sem. Tr. at 6.

Judges Canon 4(A)(1). Similarly, tribal law provides that "[a] judge may speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice . . . subject to the requirements of this Code." Ex. 28, Shoshone-Bannock Code of Judicial Conduct R. 4(C).[10] Such presentations may properly include discussion of disputed issues. "[J]udges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches." *Republican Party of Minn. v. White*, 536 U.S. 765, 779 (2002). Indeed, the federal Code of Judicial Conduct expressly states that "[t]he prohibition on public comment on the merits [of a pending matter] does not extend to . . . scholarly presentations made for purposes of legal education." Code of Conduct for United States Judges Canon 3(A)(6); *In re Complaint of Judicial Misconduct*, 632 F.3d 1289 (9th Cir. 2011) (judge's public expressions of "his thoughts on racial and religious tolerance post–9/11, the direction of immigration law [specifically that '[c]riminalization of immigration laws' constituted '[i]nstitutionalized racism'] and a campaign finance controversy . . . fall squarely within the ambit of protected speech and are precisely the kind of activity that the Code of Conduct encourages"). In sum, the Judges' presentations comported fully with applicable law.

In any case, the high standard that must be met to show a denial of due process is plainly not met here. A party alleging bias on the part of an adjudicator carries the burden of showing "a

[10] This Court can consider provisions of tribal law not in the record as legislative facts, which do not require judicial notice because they do not involve the facts of this case and only have relevance to the Court's legal reasoning. *Owino v. Holder*, 771 F.3d 527, 534 n.4 (9th Cir. 2014). *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 297-98 (D.N.M. 2015).

risk of actual bias or prejudgment" which is "too high to be constitutionally tolerable" such that it overcomes the "presumption of honesty and integrity in those serving as adjudicators . . . ." *Withrow*, 421 U.S. at 47; *see also Sivak*, 658 F.3d at 927. Furthermore, "a decisionmaker [is not] disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (citation omitted). As a result, while "'[a] fair trial in a fair tribunal is a basic requirement of due process.' . . . 'most matters relating to judicial disqualification [do] not rise to a constitutional level,'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (alterations in original) (citations omitted), and disqualification on due process grounds is proper only in "extraordinary" cases, *id.* at 887. This is not such a case.

**1. The Judges' remarks properly discussed the importance of developing a complete factual record when exhausting tribal remedies.**

Judge Gabourie explained the purposes of the exhaustion doctrine and how to fulfill those purposes in plain terms, stating that

> [E]very time that the appellate court sits on a case, they should keep in mind that that case may go to the federal court system. If it goes to the federal court system, you may have a judge there that knows very little about tradition. He may not even care about tradition and culture, unless . . . the appellate court's decision has been molded so that it's to teach him all about the tradition of that particular tribe.

Sem. Tr. at 16. Judge Gabourie also underscored the obligation of an appellate court to remain impartial:

> The appellate court has to take the case and mold it. We know that every court has – should be impartial. And a good – a good decision – excuse me – a good opinion comes both sides, both parties. Because both parties rely on a good opinion, strong opinion.

*Id*. at 9. These comments comport with federal law. The exhaustion doctrine furthers "the orderly administration of justice in the federal court . . . by allowing *a full record to be developed in the Tribal Court* before either the merits or any question concerning appropriate relief is addressed." *National Farmers*, 471 U.S. at 856 (emphasis added). In addition, "[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and *will also provide other courts with the benefit of their expertise* in such matters in the event of further judicial review." *Id*. at 857 (emphasis added). And as the exhaustion doctrine is federal law, it applies in every case, including those in which tribal tradition and culture are at issue. In sum, Judge Gabourie properly told tribal court practitioners that a good decision is based on a complete record that fully informs the court on all relevant issues, including issues of culture and tradition, that a good decision requires both parties' full participation, and that the court is an impartial decisionmaker.

Judge Gabourie went on to explain the role that expert witnesses may play in developing the factual record in tribal court, especially on matters that relate to tribal traditions:

> *You can't say, This is our tradition, and it's been a long time. You know, that doesn't count*. You've got to have some good scientific expert witnesses to testify, and that's why you remand that case back to the tribal court to get the testimony of that expert witnesses, you know. And then you develop that case from the appellate court to – which will go to . . . the United States District Court, and a good chance that judge will recognize and get a real quick education on what . . . that tribe is all about.

Sem. Tr. at 16-17 (emphasis added). Judge Gabourie illustrated that point by referring to the expert testimony relied on by the Ninth Circuit in *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001). Sem. Tr. at 25.

Judge Pearson echoed the same points, emphasizing that "it's really important to make a record at the trial court level," *id.* at 18, explaining that in *Bugenig*, "the tribe laid out the history

of the tribe," and stating that "you need to look at that history and lay it down in the opinion. The tribal court needs to lay it down in the opinion. And then, of course, that has to be repeated at the appellate court level. So the appellate court has to look at making findings of fact, conclusions of law, instead of just writing an opinion." *Id.* at 18-19. FMC seizes on the comment of Judge Pearson that followed these remarks, that "[y]ou have to lay it out for these non-Indian judges that are – *I don't think they have the authority to be looking at our decisions, but they're doing it.* So, I guess you know, just need to make sure that you do the job right." FMC Pre- Hr'g Br. at 12 (quoting Sem. Tr. at 19 and adding emphasis). But Judge Pearson made clear that to "do the job right," a tribal appellate court has to make findings of fact and conclusions of law so that a federal court can review those findings after tribal remedies are exhausted. As Judge Pearson went on to explain, "[f]indings of fact are really important. The history of the tribe and how it got to where it is and why have the statutes you have are really important to put down in writing so the non-Indians will understand why you've done what you've done." Sem. Tr. at 19. Even while expressing mild disagreement with federal court review, Judge Pearson made clear that "they're doing it," and that as a tribal court judge "you just need to make sure that you do the job right." *Id.* at 19.

**2. The Judges' seminar remarks on Supreme Court decisions do not show bias.**

FMC objects that Judges Gabourie and Pearson "criticized the Supreme Court's landmark decision in *Montana*, which they stated 'has just been murderous to Indian tribes.'" Am. Compl. ¶290. Read in context, however, the Judges' remarks simply pointed out that the *Montana* decision has had an unfavorable impact on tribal jurisdiction, and that tribal appellate court review is important to the exhaustion of tribal remedies. A fuller excerpt of Judge Gabourie's comments make this clear:

> But most tribes do not support a good, strong appellate court. And that's what we need to do, because some of these cases are so darn important, they . . . end up reaching out to the United States Supreme Court for a decision, like *Montana*, which is a narrowly – which has just been murderous to Indian tribes.

Sem. Tr. at 12. That observation colorfully asserts that *Montana* has had an unfavorable impact on tribal jurisdiction, which the Supreme Court has also recognized. *Plains Commerce Bank*, 554 U.S. at 333 (reviewing the impact of the *Montana* case on tribal jurisdiction over nonmember activity). And while there was no tribal court decision for the Supreme Court to review in *Montana*, *see* 450 U.S. at 549, the exhaustion of tribal court remedies is now required, including tribal appellate remedies, *LaPlante*, 480 U.S. at 16-19. In these circumstances, it is reasonable to suggest, as Judge Gabourie did, that review by a tribal appellate court is important to judicial decision-making by tribal and federal courts. Judge Gabourie further explained that "*Hicks vs. Nevada* is another case that . . . did not have a good appellate court decision to support that tribe," Sem. Tr. at 12, and that too is correct. In *Hicks*, the tribal appellate court had affirmed tribal court jurisdiction, 553 U.S. 353, 357 (2001), but that decision was plainly not helpful, as the Court did not rely on it in the opinion. Similarly, the "bad" decisions to which Judge Pearson referred were those in which a full record was not developed in the tribal court, which in turn prevents effective federal court review of the tribal court decision. When a full record is developed in the tribal court, and tribal appellate court remedies are exhausted, "we're not going to have bad decisions like *Bo*[*u*]*rland* and *Strate* and so forth . . . [and] [w]e can avoid some of those bad decisions if we go to federal court, *if it's all laid out before that*." Sem. Tr. at 29 (emphasis added).

Finally, even if the Judges' remarks did involve some criticism of Supreme Court decisions, that is not a basis for finding bias. In *United States v. Morgan* (*Morgan IV*), 313 U.S.

409, 420-21 (1941), the Supreme Court held that the Secretary of Agriculture's public letter to the New York Times, criticizing the Supreme Court's earlier decision in *Morgan v. United States* (*Morgan II*), 304 U.S. 1 (1938), did not invalidate his subsequent exercise of administrative authority over the same dispute. "That he not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court." *Morgan IV*, 313 U.S. at 421. As the Court explained:

> In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

*Id.* *Accord In re Charges of Judicial Misconduct*, 769 F.3d 762, 785 (D.C. Cir. 2014) ("criticizing the Court does not constitute judicial misconduct");[11] *In re Charges of Judicial Misconduct*, 404 F.3d 688, 699 (2d Cir. 2005) (finding that a judge's public critique of *Bush v.*

[11] In *In re Charges of Judicial Misconduct*, the D.C. Circuit Judicial Council found comments regarding Supreme Court decisions that were far more pointed and critical did not amount to misconduct. A federal appellate judge said at a law school lecture on the death penalty "that the Supreme Court went on a real judicial law-making binge in the 1970s," *id.*, 769 F.3d at 784 (citation and internal quotation marks omitted), "that the whole area of law was like a zoo throughout the 1980's, and that the Court went on a new spree in the early 2000's micromanaging the death penalty," *id.* (citations and internal quotation marks omitted), and expressed fear that the Court may continue to do so in a pending case. *Id.* at 795-96. The judge also expressed the view the Supreme Court should not "be allowed to conclude that 'evolving standards of decency' render this punishment 'unconstitutional.'" *Id.* at 784. The Judicial Council found that such remarks were authorized by Canon 4 and came within the "scholarly" discussion exception in Canon 3(A)(6). *Id.* at 785-86.

*Gore* did not raise an issue of incompetence or misconduct). These principles apply equally to tribal court judges.

**3. The Judges' seminar comments regarding tribal court practice and judicial administration were appropriate.**

FMC contends that Judge Gabourie's statement, "you better have a good appellate court decision to get around that *Montana* [decision]" evidences intent to "evade" Supreme Court precedent. Am. Compl. ¶291. To the contrary, to "get around" *Montana*'s general rule, one of its "exceptions" to the general presumption against tribal jurisdiction must be shown to apply. *See* 450 U.S. at 565-66. Parties that seek to establish the applicability of one of those exceptions are following, not evading, precedent. And a ruling on such an issue requires a tribal court opinion that fulfills the purposes of the exhaustion doctrine in order to permit federal court review. *See* Sem. Tr. at 28-29. That was the context in which Judge Gabourie stated that a good opinion is needed to "get around" *Montana* – one that is impartial, *id.* at 9, relies on expert evidence as necessary, *id.* at 30-31, 40, corrects errors made in the court below, *id.* at 10, 40, explains tribal law, *id.* at 16, and sets forth legal reasoning that will be convincing to a federal court in an enforcement or review action, *id.* at 11-13.

FMC also alleges that Judge Gabourie was advocating for decisions in favor of tribal jurisdiction "that would more likely be affirmed by the federal courts" because he "told the audience that the tribal 'appellate courts have got to step in' and 'be sure to protect the tribe.'" Am. Compl. ¶¶293-94. However, read in context of the Judges' presentations as a whole, "to protect the tribe" means to fulfill the obligations imposed on tribal appellate courts by the *National Farmers* and *LaPlante* decisions to set out in full the basis for the tribal court's ruling. That can only be done if tribal court practitioners do their job as well. Indeed, that remark

followed a discussion of the importance of expert witness testimony to establish the impact of pollution on tribal residents and natural resources, as well as any finding on tribal tradition and history, and the need in some instances for an appellate court to remand a case to the trial court for further development of the record through expert testimony. Sem. Tr. at 30-31. According to the transcript, Judge Gabourie and Pearson then said:

> So the appellate courts have got to step in and – and, in their own way, *make a good, balanced decision, a hundred-percenter for both sides, but be sure to protect the tribe.* And that's my own opinion, that last sentence. Don't blame (inaudible)
>
> JUDGE PEARSON: (Inaudible); we're not guaranteeing anybody anything.

*Id.* at 31 (emphasis added).

Judge Gabourie's admonition that appellate courts must "make a good, balanced decision, a hundred-percenter for both sides," and Judge Pearson's caution that "we're not guaranteeing anybody anything," indicate that the Judges recognized their duty of impartiality and integrity. This defeats FMC's bias allegations. *In re Charges of Judicial Misconduct*, 769 F.3d at 783 ("Given that preface to her remarks [that she would follow the law in her judicial duties], we do not find a violation of the misconduct rules"). Finally, even if the text could be read to support FMC's inference that the Judges' remarks were advocacy for the tribal position, such an inference would not be sufficient to overcome the presumption of "honesty and integrity," *Withrow*, 421 U.S. at 47, that applies to Judges Gabourie and Pearson. The making of such a statement to an audience of tribal court practitioners is done to encourage their use of best

practices, not to decide a case.[12] *See* Sem. Tr. at 40 ("We're just trying to give you best practices.")

**4. The Judges' seminar comments regarding mining companies do not reflect pre-judgment of this or any other case.**

FMC contends that Judges Gabourie and Pearson "made specific comments about mining and manufacturing companies that appeared to clearly implicate the FMC site, even though they did not specify a particular litigant and had not heard any evidence in court regarding the investigation of the FMC site . . . ." Am. Compl. ¶295. FMC's Amended Complaint quotes Judge Gabourie as saying "there are tribes that have had mining and other operations going on, on the reservation . . . and then the mining company or . . . manufacturing company, disappears," and if a case comes before a tribal court where "[w]e know that the – there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it," that "tribal courts have got to realize that you need expert witnesses" like "chemists" and "[i]t may cost a little, but . . . the appellate court is in a position of remanding that case back and say 'do it.'" *Id*. ¶295. FMC also quotes Judge Pearson's statement "companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they go out of business. And they leave you just sitting. And you need to know what you can do as you're sitting as a judge with those cases coming toward you." *Id*. ¶296. FMC asserts these statements indicate Judge Gabourie had erroneously pre-judged that food had been polluted, and

[12] Finally, the statements at issue here do not indicate that the Judges were "not capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville*, 426 U.S. at 493 (internal quotation marks omitted). Thus, FMC's due process claim fails in any event.

Judge Pearson had erroneously pre-judged that groundwater was polluted. *Id*. ¶298. That claim has no merit.

In the first place, FMC's bias contentions are defeated by its own admission that the Judges' remarks about mining company conduct were made "without specify[ing] a particular litigant." *Id*. ¶295; *see In re Marshall*, 721 F.3d 1032, 1044 (9th Cir. 2013) ("That several of [a judge's] comments [at a press conference] might be construed as a vague reflection on a disputed jurisdictional issue does not, alone, compel a finding of apparent bias."); *Bender*, 2006 WL 89831, at *16 (statements by agency official did not reflect bias toward Bender where they were "exceedingly vague and do not identify Bender by name, and Bender's contention that the statements were specifically directed at him is highly conjectural").[13]

Furthermore, a plain reading of the Judges' seminar remarks shows that they could not have been referring to the instant proceeding. First, this case is not about mining or the abandonment of mined property. FMC makes no claim in this case that it ever engaged in

[13] Even if the remarks were about FMC, they would come within the "scholarly presentations" exception. *In re Judicial Misconduct*, 769 F.3d at 795-96 (judge's remarks at law school lecture came within "scholarly presentation" exception if they commented on merits of a pending case). That exception does not require judges to be neutral in academic presentations and indeed requiring neutrality could contradict the Code's encouragement of judges "to contribute to the law, the legal system, and the administration of justice including *revising* substantive . . . law . . . ." *Id.* at 797 (citing Canon 4). Furthermore, to the extent that the Judges' remarks came from their experiences on the bench, that would not provide a basis for questioning a judge's impartiality. The Supreme Court has said that "opinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion . . . ." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

mining activity on the FMC Property.[14] FMC was instead engaged in the production of elemental phosphorus on the property from 1949 to 2001, which generated waste that FMC continues to store on the Reservation. 2014 TCA Op. at 1-2; Ex. 29, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* 7, 83 (2012). Second, this case arises from FMC's desire to maintain a *continued presence* on the Reservation, not from its abandonment of the FMC Property. The entire dispute in this case is over whether FMC is required to obtain a permit to continue to store waste on the FMC Property and pay the annual permit fee. *See* 2012 TCA Op. at 3-10; 2014 TCA Op. at 1-3. The description of a mining company that "disappears" and of companies that "go out of business" and "leave you just sitting" does not apply to FMC, which has not gone out of business or left the Fort Hall Reservation, much less to this case. Nor do Judge Gabourie's seminar remarks regarding expert testimony, Sem. Tr. at. 16-17, indicate pre-judgment of the pollution on the FMC Property on the Reservation. These remarks make no reference to FMC, the Tribes, or the Fort Hall Reservation. Instead, the remarks are entirely consistent with Judge Gabourie's straightforward and proper assertion that tribal courts should not rely exclusively on lay testimony to find pollution, but also need expert witnesses, and that an appellate court should

[14] To be sure, FMC previously mined phosphorus ore on the Reservation, but this was done at another location – the Gay Mine, which is the subject of a separate proceeding under CERCLA, in which a remedial investigation is now ongoing pursuant to an agreement reached in 2010 between FMC, JR Simplot Company, EPA, and the Tribes. *See Gay Mine*, U.S. EPA, http://yosemite.epa.gov/R10/cleanup.nsf/sites/gaymine (last visited Dec. 21, 2016). *See also FMC*, 905 F.2d at 1312 (distinguishing FMC's phosphorus production plant from the other Reservation areas where it obtained phosphate shale).

remand the case to the tribal court for development of expert witness testimony when necessary. Sem. Tr. at 16-17, 30-31.

Finally, FMC's contention is also unreasonable in light of the history of mining contamination on Indian reservations in or near Idaho. In fact, both Judges had worked for tribes that were directly affected by two large and high-profile Superfund sites in that region.[15] The Midnight Mine Superfund site is located on the Spokane Indian Reservation near Spokane, Washington. It is the site of a defunct open pit uranium mine, *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ, 2007 WL 2477361, at *1 (E.D. Wash. Aug. 28, 2007), that the government ordered closed decades ago, *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ, 2008 WL 4621566, at *19-21 (E.D. Wash. Oct. 17, 2008); *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1059 (E.D. Wash. 2007). The site contains approximately thirty-three million tons of radioactive and hazardous contaminants that migrate into surface water and pose threats to human health and the environment on the reservation, *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ, 2007 WL 2405040, at *1 (E.D. Wash. Aug. 17, 2007), including an increased threat of cancer from eating food gathered from the area or using local water in

[15] This Court may take judicial notice of adjudicative facts when they are not subject to reasonable dispute because they are generally known in the Court's jurisdiction or are reported by and can be readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The publicly-known facts about these mining sites, which were reported in the local media and are taken from or corroborated by the findings of this Court and the Eastern District of Washington, satisfy this standard as applied by the Ninth Circuit. *Singh v. Ashcroft*, 393 F.3d 903, 906 (9th Cir. 2004); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 258-59 & n.4 (9th Cir. 2013); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1290 n.1 (9th Cir. 1986); *see Von Saher*, 592 F.3d at 960 (taking notice of what information was in the public realm, but not its veracity).

sweat lodge ceremonies, *Villegas v. United States*, 963 F. Supp. 2d 1145, 1150 (E.D. Wash. 2013).

The Bunker Hill Mining and Metallurgical Complex Superfund Site in Idaho includes part of the Coeur d'Alene Reservation and is "one of the largest, if not the largest, Superfund site in the nation . . . ." *United States v. Hecla Ltd.*, Nos. 96-0122-N-EJL, 91-0342-N-EJL, 94-0206-N-HLR, 2011 WL 3962227, at *4 (D. Idaho Sept. 8, 2011). Over a century of mining activity left "widespread contamination" on the site, *United States v. Asarco Inc.*, 430 F.3d 972, 976 (9th Cir. 2005), including approximately 64,390,000 tons of mining tailings released into waterways, *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1102-06 (D. Idaho 2003), resulting in continuing damages to the natural resources, *id.* at 1122-24, which is correlated with increased cancer risks in an area that includes part of the Coeur d'Alene Reservation, Paul Koberstein, *Out of the Earth, into Our Lungs*, Cascadia Times, Nov. 2000, *available at* http://www.times.org/archives/2000/november2000/bunkerhill.htm.

Both Judges worked for the tribes affected by these mining sites. Judge Gabourie served as a prosecutor for the Coeur d'Alene Tribe, Sem. Tr. at 5, and Judge Pearson served as Chief Judge of the Spokane Tribe from 1996 to 2002, and for the Coeur d'Alene Tribe from 2004 to 2009, *id.* at 4. These high-profile cases were being were reported on, or were the subject of litigation, throughout the terms of their service with the affected tribes.[16] Their statements

[16] *See* Mark Matthews & Paul Larmer, *Pollution in Paradise*, High Country News, Nov. 25, 1996, *available at* http://www.hcn.org/issues/94/2910; Koberstein, *Out of the Earth, into Our Lungs*; *Mining Company to Pay Coeur d'Alene, State of Idaho and US Government*, Indian Country Today Media Network (June 16, 2011), *available at* http://indiancountrytodaymedianetwork.com/2011/06/16/mining-company-pay-coeur-dalene-state-idaho-and-us-government-38602 (last visited Dec. 21, 2016); Press Release, Office of Pub.

reflect what media reports and case law showed, namely Tribes in and near Idaho have been affected by contamination left behind at defunct mining operations.

## VI. THE TRIBAL COURT JUDGMENT IS A CIVIL JUDGMENT AS A MATTER OF FEDERAL LAW, AND CANNOT BE RECLASSIFIED AS PENAL UNDER PRINCIPLES OF COMITY.

FMC asserts that the Tribal Court Judgment cannot be enforced by a federal court under principles of comity because it is allegedly a penal judgment. Am. Compl. ¶¶327-29. That claim fails because whether a tribal court judgment is penal is neither a mandatory nor a discretionary reason not to enforce the judgment under principles of comity, *Wilson*, 127 F.3d at 810 (listing mandatory and discretionary factors). Even if it were, FMC's claim would fail because it misstates the definition of penal judgments, and under the correct standard, the Tribal Court Judgment is not penal because it is not based on a criminal law, is not a punishment of any kind, and lacks the core elements of a penal judgment.

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Affairs, Dep't of Justice, Hecla Mining Company to Pay $263 Million in Settlement to Resolve Idaho Superfund Site Litigation and Foster Cooperation (June 13, 2011), *available at* http://www.justice.gov/opa/pr/hecla-mining-company-pay-263-million-settlement-resolve-idaho-superfund-site-litigation-and; Becky Kramer, *Spokane Tribe Members Worked Gladly in Uranium Mines*, Spokane Spokesman-Review, June 5, 2011, *available at* http://www.spokesman.com/stories/2011/jun/05/i-watch-them-die-young-and-old/; Warren Cornwall, *Radioactive Remains: The Forgotten Story of the Northwest's Only Uranium Mines*, Pacific NW Magazine, Feb. 24, 2008, *available at* http://www.seattletimes.com/pacific-nw-magazine/radioactive-remains-the-forgotten-story-of-the-northwests-only-uranium-mines/; Press Release, Office of Pub. Affairs, Dep't of Justice, Cleanup Agreement Reached at Former Uranium Mine on Spokane Indian Reservation in Northeastern Washington (Sept. 30, 2011), *available at* http://www.justice.gov/opa/pr/cleanup-agreement-reached-former-uranium-mine-spokane-indian-reservation-northeastern.

### A. A Tribal Court Judgment Based On The Valid Exercise Of Jurisdiction Under The *Montana* Exceptions Cannot Be Construed To Be Penal.

Whether a judgment is penal is neither a mandatory nor a discretionary reason to decline to recognize and enforce a tribal court judgment under *Wilson*. The only mandatory factors are that the proceedings must afford the litigants due process, and the tribal court must have personal and subject matter jurisdiction. *Wilson*, 127 F.3d at 812-13. Federal courts also have discretion to decline to recognize and enforce a tribal court judgment that was obtained by fraud, conflicts with another final judgment that is entitled to recognition, is inconsistent with the parties' contractual choice of forum, or is against the public policy of the United States or the state in which recognition is sought. *Id.* at 810, 812-13. But there is no penal judgment factor. And that alone defeats FMC's contention.

Nor would it be proper to adopt such a factor, as the Supreme Court has already set forth the rules for determining whether an exercise of tribal jurisdiction is civil or criminal, and whether an exercise of tribal civil jurisdiction is valid under federal law. Indian tribes generally lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). But tribal civil jurisdiction is not "similarly restricted," *LaPlante*, 480 U.S. at 15 (citing *National Farmers*, 471 U.S. at 854-55 & nn.16-17), and "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," under the *Montana* exceptions. *Montana*, 450 U.S. at 565. Thus, an exercise of tribal power under the *Montana* exceptions is civil in nature, and accordingly so is the judgment. The penal judgment factor on which FMC relies cannot be adopted under principles of comity because it would deny effect to decisions of the Supreme Court that *already* control whether an exercise of tribal jurisdiction is civil or criminal and if civil, whether it is

valid. And that question is *already* a factor in the comity analysis. *Wilson*, 127 F.3d at 814-15 (determining whether tribal civil jurisdiction exists by applying the *Montana* exceptions).

**B. FMC's Claim Fails In Any Event Because It Relies On An Incorrect Standard For Whether A Judgment Is Penal.**

Assuming *arguendo* that the comity analysis under *Wilson* includes a penal judgment factor, FMC's claim would still fail because it relies on the wrong standard to determine whether a judgment is penal. FMC alleges, without citing any authority, that a judgment is penal if it is a "penalty or fee" that must be "paid entirely to the Business Council and the LUPC, rather than to any individual." Am. Compl. ¶329. That is not the standard, as settled law shows. *Huntington v. Attrill*, 146 U.S. 657, 668, 674-75 (1892); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1218-20 (9th Cir. 2006) (en banc) (per curiam); *Stone v. Travelers Corp.*, 58 F.3d 434, 438-39 (9th Cir. 1995); *Rivera v. Anaya*, 726 F.2d 564, 567 (9th Cir. 1984). Instead, "the whole class of penal laws" is constituted by "'criminal laws,' that is to say, laws punishing crimes . . . ." *Huntington*, 146 U.S. at 674-75 (citing *Dennick v. Cent. R.R. of N.J.*, 103 U.S. 11 (1880)). Furthermore, the factors that indicate a law is criminal, and therefore penal, are not present here. Those factors include: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted). *Accord Rivera*, 726 F.2d at 567.

The Tribal Court Judgment is not a penal judgment because it is not based on a criminal law and does not punish a criminal offense. It simply requires FMC to compensate the Tribes for storing waste on the Reservation in accordance with its agreement to do so and tribal law. FMC's agreement to pay the annual permit fee, set forth in the 1998 Agreement, is a voluntary agreement, entered into by FMC in order to bring its generation, disposal, and storage of waste on the Reservation into compliance with tribal law. 2012 TCA Op. at 4. Similarly, the tribal laws that require FMC to obtain a permit to store waste on the Reservation and to pay the annual permit fee – the LUPO, the LUPO Guidelines, the May 1998 Guideline Amendments and the HWMA – are all regulatory, not penal.[17] They have none of the characteristics of penal laws. *Kennedy*, 372 U.S. at 168-69. They were not enacted as part of the Tribes' Criminal Code, *cf.* Law & Order Code, ch. XVI, and do not impose punishments or refer to the activities they regulate as crimes. They do not impose affirmative restraints or further the "traditional aims of punishment," retribution and deterrence. They have no scienter requirements. Finally, the Tribes' regulation of FMC's activities has a clear "alternative purpose" to punishment: To protect tribal members and the Reservation's resources by restricting where certain land uses take place and collecting permit fees to fund the operation of the Tribes' Hazardous Waste

[17] Land use regulations like the Tribes' permitting laws have traditionally been viewed as regulatory actions, not punishments. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Lucas. v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (referring to zoning and land use laws as "regulatory").

Program, *see* Ex. 30, LUPO Guidelines May 1998 Chapter V Amendments, § V-9-2(B). In sum, the Tribal Court Judgment cannot be construed to be penal under any definition.[18]

## VII. CONCLUSION

For the reasons shown above and in the Tribes' separate motions for recognition and affirmance on the two *Montana* exceptions, the Tribes are entitled to an order recognizing and enforcing the judgment of the Tribal Appellate Court rendered against FMC on May 16, 2014.

DATED this 13th day of January, 2017.

SHOSHONE-BANNOCK TRIBES

*/s/ William F. Bacon*
William F. Bacon, General Counsel

ECHO HAWK LAW OFFICE

*/s/ Paul C. Echo Hawk*
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[18] By contrast, in *Yahoo! Inc.*, 433 F.3d at 1218-19, the Ninth Circuit determined that a French judgment, enjoining Yahoo from publishing material on the Internet on pain of monetary sanctions, was unlikely to ever be enforced against Yahoo in California because it was a penal judgment, and therefore would not receive comity in the state's courts. The French judgment was penal for three reasons: by its own terms, it imposed a "penalty" on Yahoo!; it found that Yahoo! had violated a French Penal Code provision that imposed criminal penalties; and the penalty was "primarily designed to deter Yahoo! from creating, in the words of [the French court's] order, 'a threat to internal public order.'" *Id.* at 1219-20. The Tribal Court Judgment has none of these qualities.

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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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