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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

FMC CORPORATION,

Plaintiff,

vs.

SHOSHONE-BANNOCK TRIBES,

Defendant.

Case No. 4:14-cv-489-CWD

MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY JURISDICTION TO THE TRIBES UNDER THE SECOND EXCEPTION TO *MONTANA*

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I. INTRODUCTION

"The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). This general rule prohibits any exercise of jurisdiction over FMC Corporation ("FMC") by the Shoshone-Bannock Tribes ("Tribes"), unless the Tribes carry their burden of proving one of the two narrow exceptions to *Montana's* general rule. To establish jurisdiction under the second exception, the Tribes must prove that FMC's conduct on its fee-owned lands within the Reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and thus "imperil[s] the subsistence or welfare" of the tribe. *Montana*, 450 U.S. at 566.

Speculation that a tribe may be harmed in some way does not satisfy this exception. *Evans v. Shoshone-Bannock LUPC*, 736 F.3d 1298 (9th Cir. 2013). Instead, "'the conduct' covered by that exception must do more than injure a Tribe; it must 'imperil the subsistence' of the tribal community" and tribal power "must be necessary to avert catastrophic consequences." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

The Tribal Court of Appeals ("Appellate Court") did not apply the legal standard established by the United States Supreme Court to prove the second *Montana* exception. Instead, the Appellate Court created its own standard, so that second *Montana* jurisdiction could be established with any wisp of a threat of impact, or even the *perception* by a Tribal member that there could possibly be a threat of impact. The Appellate Court's Decision rests on this erroneous, *de minimis* standard, which clearly does not establish jurisdiction under federal law.

The Tribes seek jurisdiction to enforce a $1.5 million annual permit fee. Nothing more. The Tribes cannot establish second *Montana* jurisdiction because paying the Tribes cash in perpetuity is not "necessary to avert catastrophic consequences." *Plains Commerce*, 554 U.S. at 341.

Moreover, the Appellate Court could not have found jurisdiction by following the correct legal standard. SOF 6-21, 169. For over 25 years, the FMC fee land[1] has been regulated by the U.S. Environmental Protection Agency ("EPA"). FMC and the EPA worked with the Tribes and the community to implement a comprehensive investigation and clean-up of FMC's former elemental phosphorus plant site (the "Site"). SOF 6-21, 173. EPA expressly determined that the work performed is fully protective of human health and the environment, both for the Tribes and for all residents. SOF 162-168.

EPA determined that the safest approach to minimize any risk presented at the FMC Site is to manage wastes in place. SOF 13, 143-147. The Tribes disagree, seeking an excavation and treatment approach that EPA determined would be recklessly dangerous and technically infeasible. SOF 192-194. If awarded jurisdiction to enforce the permit, the Tribes will inevitably attempt to use their jurisdiction to impose requirements on FMC that are contrary to EPA's decisions. Granting the Tribes' jurisdiction to act in conflict with EPA would be unprecedented and wrong.

II. STANDARD OF REVIEW

In *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990), the Ninth Circuit established that "federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question." *Id.* For that reason, "[f]ederal legal questions should therefore be reviewed de novo." *Id.* at 1313. "A decision regarding tribal court jurisdiction is reviewed de novo, and factual findings are reviewed for clear error." *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011).

[1] Under the Indian General Allotment Act and other federal laws, portions of the Fort Hall Reservation were allotted to individual members of the Tribes. In the 1910s and 1920s lands comprising the FMC property were passed through sale to non-Tribal members and eventually to FMC. The Indian Reorganization Act of 1934 ended the allotment of additional lands within the Fort Hall Reservation, but it did not restore to the Tribes the lands that had already been conveyed. SOF 196.

III. TO ESTABLISH JURISDICTION, THE TRIBES MUST PROVE THAT FMC'S CONDUCT ON ITS FEE LAND "*IMPERILS THE SUBSISTENCE OF THE TRIBAL COMMUNITY*" AND TRIBAL REGULATION IS "*NECESSARY TO AVERT CATASTROPHIC CONSEQUENCES*."

Montana's general rule is that Indian tribes do not have jurisdiction over non-member conduct taking place on a reservation. 450 U.S. 544; *Plains Commerce*, 554 U.S. at 329 ("the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land."), *quoting Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 430 (1989). The general rule "is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what [the Supreme Court has] called 'non-Indian fee land.'" *Evans*, 736 F.3d 1 at 1302-03 (quoting *Plains Commerce*, 554 U.S. at 328 ("non-Indian fee parcels have ceased to *be* tribal land")); *Plains Commerce*, 554 U.S. at 336 (emphasis in original); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 452 (1997).

The Tribes must satisfy one of two very narrow exceptions to *Montana*'s general rule to regulate FMC's conduct on its fee land. FMC has addressed why the Tribes cannot satisfy the first *Montana* exception in a separate brief. The second *Montana* exception is that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The second exception is to be applied in a "limited" manner, and the burden of establishing the second exception falls on the Tribe. *Id*. at 330.

The standard for the second *Montana* exception is strict, so that the exception does not "swallow the rule." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001); *Strate*, 520 U.S. at 457-58; *Plains Commerce*, 554 U.S. at 330. The Ninth Circuit held that "*Montana*'s second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has ***some adverse effect*** on the tribe.'" *Evans*, 736 F.3d at 1306 (emphasis added). Instead, the

non-member's conduct "must do more than injure the tribe, it must '***imperil the subsistence***' of the tribal community." *Id.* (emphasis added). The high threshold for the second *Montana* exception "requires that Tribal power must be ***necessary to avert catastrophic consequences***." *Plains Commerce,* 554 U.S. at 341 (emphasis added). The second exception is available only if the non-member's "'conduct' ***menaces*** the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce,* 554 U.S. at 341. "[T]he challenged conduct must be so severe as to 'fairly be called ***catastrophic*** for tribal self-government'" *Evans,* 736 F.2d at 1306. Proof of the second *Montana* exception cannot be based on "***generalized concerns***" or be "***speculative***." *Id.*

IV. THERE IS NO CONNECTION BETWEEN THE TRIBES' PERMIT AND ANY REGULATION OF FMC'S CONDUCT THAT IS "*NECESSARY TO AVERT CATASTROPHIC CONSEQUENCES*" TO THE TRIBES.

EPA is charged with enforcing the environmental requirements that are necessary to protect human health and the environment, including Tribal health and the environment.[2] As part of the United States' trust responsibility to the Tribes, EPA consults closely with the Tribes regarding the environmental requirements to be imposed on FMC. SOF 180-183. But ultimately EPA is the sole decision maker. At each stage of the environmental work required, EPA has made a finding that the work is protective. For example, EPA stated in the Interim Record of Decision Amendment:

> *The measures in this selected interim amended remedy will be protective of human health and the environment, comply with federal and state/tribal requirements that are applicable or relevant and appropriate within the scope of the selected interim amended remedy, and result in cost effective action and utilize permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable.*

2012 Interim Record of Decision Amendment, 328994, 328999.

[2] EPA has exercised its regulatory authority over the FMC Site under both the Resource and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA). SOF 2, 6-21.

To establish jurisdiction under the second *Montana* exception, the Tribes must prove that the EPA erred in finding that the environmental requirements imposed on FMC are protective of human health and the environment, and that compliance with EPA's requirements will result in "catastrophic consequences" to the Tribes. In *Evans v. Shoshone Bannock Tribes LUPC*, 736 F.3d 1298 (9th Cir. 2013), the Tribes attempted to regulate a non-member's conduct on fee-owned land, by requiring actions to protect groundwater and practices associated with the construction of a residence. *Evans*, 736 F.3d at 1306 n.8. The Ninth Circuit denied second *Montana* jurisdiction because "the Tribes fail[ed] to provide specific evidence showing that tribal regulation of" Evans' construction was "necessary to avert catastrophe." *Id.*

The Tribes' permit simply requires that FMC pay unrestricted funds for the Tribes' Business Council to use for any purpose whatsoever. No environmental requirements are included. SOF 67. Likewise, the Appellate Court's Decision and Judgment require only that FMC pay the Tribes $1.5 million per year forever.[3] The Court should deny enforcement of the Judgment because the Tribes failed to prove that payment of money is necessary to "avert catastrophic consequences" to the Tribal community.

V. THE TRIBAL COURT OF APPEALS COURT REJECTED THE FEDERAL LIMITS ON JURISDICTION UNDER *MONTANA'S* SECOND EXCEPTION

By statute, the Tribes explicitly reject the legal standards for tribal jurisdiction established by the Supreme Court. Law & Order Code, ch. I, § 2. Instead, the Tribes' Code asserts that the mere act of being within the exterior boundaries of the Reservation is consent to tribal jurisdiction. *Id.*, § 2(b). The judges of the Appellate Court swear an oath to support and defend this Law & Order Code, and they "serve at the pleasure of the Fort Hall Business Council and can be removed at their will." SHOBAN NEWS, March 19, 2015, at 4; Apr. 22, 2015 Aff., Doc. 38., Ex. 12, Doc. 38-

[3] Statement of Decision, dated April 15, 2014 (the "Decision"), and the Judgment and Order, dated May 16, 2014 (the "Judgment"). 008225; 008538.

12; Apr. 8, 2015 FMC Br., Doc. 36, at 3. The majority of the first panel of the Appellate Court publicly stated that their intent was to provide a decision that would "get around" the limitations on tribal jurisdiction established by the Supreme Court in *Montana*. May 6, 2013 Dec., 006560, 006599, Mar. 23, 2012 Trans. at 15:1-3. Since it is the official policy of the Tribes to reject the legal standards established by Supreme Court and Ninth Circuit, it is not surprising that the Appellate Court discarded these standards, in favor of an erroneous legal standard that was broad enough to find tribal jurisdiction in this case, and broad enough to essentially eliminate the limits on tribal jurisdiction.

For nearly eight years, from 2006 through 2014, the Tribes had the opportunity to offer evidence that FMC's conduct on its fee land has a substantial and direct effect on Tribal self-government in a manner that "imperil[s] the subsistence of the tribal community" or is "***catastrophic*** for tribal self-government." *Evans*, 736 F.3d at 1306 (emphasis added). But the Tribes presented no evidence of such current effects, and could only speculate about possible future effects.[4] Since speculation was the only any evidence that Tribes could offer, the Appellate Court was forced to abandon the federal standard and adopt a lowered standard so that any non-zero risk, or even any Tribal member's perception of a non-zero risk, was sufficient to establish jurisdiction.

This Court cannot find jurisdiction under the Appellate Court's *de minimis* standard because it is contrary to federal law. Nor can this Court give deference to any facts found by the Appellate Court because those facts are irrelevant to the federal legal standard.

[4] To help the Tribes on this point, the Appellate Court made it clear that it felt that the Tribes evidence of future speculative risks was relevant, but that FMC 's evidence of the actual engineering, technical, and procedural safeguards required by EPA to eliminate future risks was not relevant. Apr. 1, 2015 Trans., 007474, 007499, 007530; Apr. 2, 2014 Trans., 007570, 007598-007600.

A. Tribal Court of Appeals Erred by Failing to Follow Ninth Circuit Direction in Applying *Brendale v. Confederated Tribes*.

The Tribal Appellate Court bases most of its analysis on *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989). This is because "with only 'one minor exception, [the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.'" *Plains Commerce*, 554 U.S. at 333 (*quoting Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). That "minor exception" is one half of the *Brendale* case. The Appellate Court's analysis and application of *Brendale* is contrary to the Supreme Court's decision in *Brendale* and ignores recent Ninth Circuit precedent regarding analysis of the *Brendale* decision.

In *Evans*, the Ninth Circuit explained that, "In *Brendale*, the Supreme Court held, by a six to three margin, 'that the Yakima Indian Nation lacked authority to zone nonmembers' land within an area of the Tribe's reservation open to the general public [the "*open area*"]." 736 F.3d at 1303. However, there were five votes that "concluded that the Tribe retained zoning authority over nonmember land only in a *closed area*." *Id.* at 1303 (emphasis added) ("The Supreme Court recently emphasized the narrow scope of *Brendale*, explaining that the decision merely authorized tribal zoning 'on nonmember fee land isolated in "the heart of a *closed portion* of the reservation"' . . . ," quoting *Plains Commerce*, 554 U.S. at 333-34 and *Brendale*, 492 U.S. at 440).

The Ninth Circuit provided the analysis that the Appellate Court should have followed to determine whether FMC's fee land, located on a railroad track, a county highway, a federal freeway, and next to an airport and a wastewater treatment plant, was like the "closed" area in *Brendale*.

> To determine whether Brendale supports tribal court jurisdiction, we consider the character of the area in which Evans' property is located and the nature of Evans' project. Tribal zoning authority over non-Indian fee land is plausible only if (1) there is an arguable similarity between the area surrounding the fee land and the closed portion of the reservation described in Brendale; and (2) the intended use of the fee land would place the character of the surrounding area of the reservation "in jeopardy." *Atkinson*, 532 U.S. at 658 (quoting *Brendale*, 492 U.S.

at 443 (opinion of Stevens, J.)).

Evans, 736 F.3d at 1304.

In *Evans*, the Ninth Circuit held that "[t]he area surrounding Evans' property on the Fort Hall Reservation is dramatically different" than the closed area in Brendale, and that this area "does not in any way resemble the 'undeveloped refuge' in which the Brendale court permitted tribal zoning of non-Indian fee land." *Evans*, 736 F.3d at 1304-05.

> ***The area surrounding Evans' property bears no resemblance to the closed portion of the reservation in Brendale*.** At the time *Brendale* was decided, only three percent of the closed area of the Yakima reservation was owned in fee simple. *Brendale*, 492 U.S. at 438, 109 S. Ct. 2994 (opinion of Stevens, J.). The closed area was mostly forested, and the county government maintained no roads traversing this portion of the reservation. *Id.* at 438–39, 109 S. Ct. 2994 (opinion of Stevens, J.). The Yakima Tribe carefully limited and monitored the activities of nonmember visitors in the closed area, requiring all such nonmembers to obtain a permit before entering. *Id.* at 439, 109 S. Ct. 2994 (opinion of Stevens, J.). Notably, "[t]ribal police and game officers enforce[d] the courtesy permit system by monitoring ingress and egress at four guard stations and by patrolling the interior of the closed area." *Id.* (citing *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 750, 758 (E.D. Wash. 1985)).
>
> The controlling opinion in *Brendale* acknowledged that "logging operations, the construction of [Bureau of Indian Affairs] roads, and the transfer of a relatively insignificant amount of land in the closed area unquestionably ha[d] diminished the Tribe's power to exclude non-Indians from that portion of its reservation. . . ." *Brendale*, 492 U.S. at 441, 109 S. Ct. 2994 (opinion of Stevens, J.). Nevertheless, the closed area "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." *Id.* (internal quotation omitted). Against this backdrop, Justice Stevens held that "the Tribe has authority to prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the character of this unique resource by developing their isolated parcels without regard to an otherwise common scheme." *Id.*
>
> ***The area surrounding Evans' property on the Fort Hall Reservation is dramatically different***. To begin with, the area contains many residential properties owned and inhabited by nonmembers. Additionally, the City of Pocatello operates the Pocatello Regional Airport on non-Indian fee land a short distance from Evans' parcel. The area is traversed by a public road (Government Road), and includes farmland and a gravel pit. In short, ***the area of the Fort Hall Reservation near Evans' property does not in any way resemble the "undeveloped refuge" in which the Brendale Court permitted tribal zoning*** of

> non-Indian fee land. *Brendale*, 492 U.S. at 441, 109 S.Ct. 2994 (opinion of Stevens, J.).

Evans, 736 F.3d at 1304-05 (emphasis added).

FMC's fee land has the same character as the Evans property and bears no resemblance to the closed area in *Brendale.* The FMC Site and the surrounding lands are predominantly owned in fee and populated by non-Tribal members. The Tribes do not have the power to exclude non-members from FMC's fee land and the surrounding lands. As a result, the FMC Site is in an "open area" of the Fort Hall Reservation that has become an integrated portion of Power County and is not economically or culturally delimited by the Reservation boundaries. *See Brendale, supra* at 408-12.[5] Given the proximity and similarity between the Evan's property and the FMC Site, the Ninth Circuit would undoubtedly find that the FMC Site is in an "open area" of the Reservation.

The Appellate Court ignored the Ninth Circuit's analysis and treated FMC's fee land and the surrounding lands as a pristine and untouched "closed area." This fundamental legal error undermines the entire Decision.

B. The Tribal Court of Appeals Erred by Misusing *Brendale* to Lower the Standards for Tribal Jurisdiction.

The Tribal Appellate Court also misinterpreted *Brendale* as holding that "a mere possibility

[5] The Cities of Pocatello and Chubbuck provide all domestic water service in the vicinity of the FMC Site, or service is provided by privately-owned groundwater wells. SOF 197. The Idaho Department of Water Resources permits these groundwater wells. SOF 197. The City of Pocatello's wastewater treatment facility receives waste water from the FMC Site; no sewage disposal services in the vicinity have been built or maintained by the Tribes. SOF 197. Idaho Power and Utah Power provide all electrical service to the FMC Site. SOF 197. Intermountain Gas Company and Northwest Pipeline provide the natural gas infrastructure in the vicinity of the FMC Site. SOF 197. Petroleum delivery occurs in the vicinity via a pipeline owned by Chevron and by mobile equipment. SOF 197. Qwest provides telephone and cable services to the FMC Property. SOF 197. Nearly all of the roads in the area are constructed and maintained by the Idaho Transportation Department, Power County, and Bannock County. SOF 197. The Union Pacific Railroad provides railroad transportation adjacent to the FMC Site. Chubbuck, Pocatello, and the Power County Sheriff's Office provide emergency services, such as fire, medical and police protection. SOF 197. Census Bureau data proves that the area immediately surrounding the FMC Site is sparsely populated, and the great majority of the total population is non-Indian. SOF 198.

that the non-Indian owner's intended use of fee land would in the future impinge upon the tribal members' cultural and religious traditions" was enough to satisfy the second *Montana* exception. Apr. 15, 2014 Dec. 008225, 008255; May 16, 2014 Op. 008538, 008551. The Court's analysis ignores that *Brendale* involved two cases – the *Brendale "closed area"* case and the *Wilkinson "open area"* case. *Wilkinson* dealt with an open area (near the Yakima airport) that is directly analogous to the FMC Site. In *Wilkinson*, the Yakima tribe made a similar argument to the arguments made by Judge Traylor in the Decision:

> The open area is largely used for agriculture, upon which many tribal members depend for their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and ***could alter the flow and quantity of ground water***. Yakima Nation alleges that there is ***a substantial danger of severe erosion and runoff*** from the subdivision and that the contemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would ***interfere with Yakima Nation's interest in the integrity of its culture and way of life***. ***Sacred burial grounds*** are located in the area. Finally, Yakima Nation alleges that increased development would require additional police services.

Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 536 n.5 (9th Cir. 1987) (Ninth Circuit decision before appeal to the US Supreme Court) (emphasis added). In this case, the Tribes' claims mirror those of the Yakima Tribes which were held by the Supreme Court insufficient as a basis for tribal jurisdiction. Appellate Judge Traylor's opinion that "a mere possibility" that the condition of FMC's fee land would impinge on the Tribes' cultural and religious traditions is enough to establish jurisdiction under *Brendale* is clearly incorrect, because that same possibility was considered not enough for jurisdiction in the companion *Wilkinson* case.

C. The Tribal Court of Appeals Erred by Failing to Follow the Level of Proof Required by *Evans*.

The Tribal Appellate Court also erred by finding that the second *Montana* standard requires the Tribes to prove only the "threat of harm." Apr. 15, 2014 Dec. 008225, 008231. The Tribes took the same position in *Evans*, by arguing that the construction of a house near the FMC Site could

cause groundwater contamination. In *Evans*, this Court accepted that argument, stating that the Tribes described groundwater contamination as a "potential danger;" and that "the Tribes do not have to prove here that the conduct of plaintiffs caused groundwater contamination; they need only show that it would be plausible." 2012 WL 6651194, at *4, 5 (D. Idaho Dec. 20, 2012). The Ninth Circuit rejected this holding, stating the Tribes' concerns were simply "speculative" and that "the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem" of groundwater contamination. *Evans*, 736 F.3d at 1306. The Ninth Circuit wrote that "[t]o the extent the district court concluded otherwise, its findings are clearly erroneous." *Id.*

The Appellate Court's Decision is directly contrary to the Ninth Circuit's decision in *Evans*. ***First,*** the Tribes cannot rely on "speculation" regarding the impact of a substance on the Tribes in order to show a threat. ***Second***, when alleging contamination, the Tribes must show that the conduct of FMC at least "meaningfully exacerbates" an existing condition. ***Third***, the Tribes must also show that tribal regulation of FMC's conduct "is necessary to avert catastrophe." *Id.* The Decision fails each of these. ***First***, the only evidence offered by the Tribes was unquantified speculation that substances on-site might somehow escape containment and harm someone. ***Second***, the Tribes did not offer any proof that any substance from the FMC Site "meaningfully exacerbated" any existing condition. ***Third***, the Tribes did not prove how tribal regulation was necessary to avert any catastrophe. Without these proofs, the Decision and Judgment cannot be enforced.

D. The Tribal Court of Appeals Erred by Ruling that Any Non-Zero Risk Satisfies *Montana's* Second Exception.

The Tribal Appellate Court's Decision rests on a fallacious "non-zero risk" standard for second *Montana* jurisdiction. Apr. 15, 2014 Dec. 008225. The Decision requires that FMC prove an "elimination" of any threat (008240, 008245, 008248, 008250) and "absolute guarantees" of containment (008232) and an "elimination" of any contamination (008249-50) and an

"elimination" of any exposure (008250) and an "elimination" of any risk (008249). The Appellate Court ruled that containment was not enough to avoid second *Montana* jurisdiction, because the threat had to be "eliminate[d]":

> But that makes no sense to us. The very act of containment admits the existence of a threat. And containment does not eliminate the threat; by definition it only contains it.

Apr. 15, 2014 Dec. 008225, 008246. The Appellate Court also requires that risk, releases, and threats be completely eliminated:

> In that same document the EPA concludes (with our comments in parentheses):
>
> Implementation of engineering and source control actions will reduce ***(not eliminate)*** the levels of risk to human health and the environment and can be implemented in 2-3 years. Implementation of groundwater extraction will eliminate releases potentially impacting surface water and should ***(not absolutely)*** reduce ***(but not eliminate)*** the overall contamination levels in groundwater to cleanup levels protective of both groundwater and surface water, within approximately 100 years.

Apr. 15, 2014 Dec. 008225, 008249. The Decision rests on the slim factual finding that all threats have not been *completely eliminated*:

> Yet, nothing in any of the evidence presented demonstrates to any level of certainty that the EPA chosen remedies will be effective in eliminating the threat to tribal health and welfare.

Apr. 15, 2014 Dec. 008225, 008250.

This is directly contrary to the Ninth Circuit's holding in *Evans*, that "Montana's second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has ***some adverse effect*** on the tribe.'" *Evans*, 736 F.3d at 1306 (emphasis added), quoting *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1064-65 (9th Cir. 1999), quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)). The Decision not only rejects the *Evans* rule that "some adverse effect" is not enough, it goes even further, by holding that any non-zero risk is sufficient for tribal jurisdiction, regardless of how improbable or inconsequential that risk or how

infinitesimal the possibility of harm. There could be no clearer example of violating the Supreme Court's prohibition against the exception "swallow[ing] the rule." *Atkinson*, 532 U.S. at 654.

E. The Tribal Court of Appeals Erred by Ignoring the Federal Cases Requiring Proof of Harm to the Tribal Community as a Whole.

The Decision also asserts that any possibility of a risk to *any individual* would be enough to prove second *Montana* jurisdiction. But the federal cases require more than harm to an individual, but rather harm to the tribal community. In *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997), the Ninth Circuit ruled that "the ***possibility of injuring multiple tribal members*** does not satisfy the second *Montana* exception under *Strate*." (emphasis added). *Evans*, *Montana* and *Plains Commerce* all state that the non-member conduct must be so severe as to ***"imperil the subsistence"*** of the ***tribal community***. *Evans*, 736 F.3d at 1306 (emphasis added). In *Brendale*, 492 U.S. at 431, the Supreme Court required that "[t]he impact must be ***demonstrably serious."*** (emphasis added).

In *Strate*, the Supreme Court ruled that conduct of a non-member that resulted in serious injuries to an individual in an auto accident was not sufficient for second *Montana* jurisdiction. The Supreme Court stated: "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation ***endanger all in the vicinity, and surely jeopardize the safety*** of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 457-58 (emphasis added). *Strate* explained that the question is whether non-member conduct "would trench unduly on tribal self-government," not whether an individual may be harmed. In *Burlington*, the Ninth Circuit denied tribal jurisdiction, even after the deaths of two tribal members who had been struck by a train, ruling that the tribal interest in the safety of its members was not enough to satisfy the second *Montana* exception. *Burlington*, 196 F.3d at 1065. Although the tribe argued that the deaths deprived the community of "potential council members, teachers and babysitters," the Ninth Circuit ruled that "the Supreme Court has

declined to employ this logic in connection with the second *Montana* exception." *Id.* In *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998), a Lewis County officer arrested a tribal member inside the reservation, the tribal member brought suit against the officer in tribal court, and the tribal court awarded a verdict against the officer and the County. The tribe argued that jurisdiction was proper because the tribe had "***an interest in the safety*** of its members." (emphasis added). The Ninth Circuit rejected this, stating that, "Under the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *Id.*

Under the *Strate* line of cases, had there been proof that FMC's negligent waste disposal practices killed one or more tribal members, that still would not be enough to establish tribal jurisdiction. But under the Appellate Court's analysis, a future threat that the wastes *might someday* cause harm to *an individual* is sufficient. This is error.

F. The Tribal Court of Appeals Erred by Rejecting the Scientific Approach to Analysis of Risk of Harm.

The Ninth Circuit and other federal courts have provided clear guidance on how to analyze the risk of harm from a source. The question of general causation – whether a substance is capable of causing harm – is separate and distinct from the question of specific causation – whether the substance caused harm or will cause harm. As this Court has explained, there is a difference between an inquiry regarding general causation versus an inquiry regarding specific causation. *Adams v. United States*, 2009 WL 1259025 (D. Idaho, May 4, 2009). A general causation inquiry focuses on "whether exposure to a substance for which defendant is responsible . . . is capable of causing a particular injury or condition in the general population." *In re Hanford Nuc. Res. Litig.*, 292 F.3d 1124, 1133 (9th Cir. 2002). But to ultimately prevail, a plaintiff must show general causation *and* specific causation. Specific causation "refers to whether a particular individual suffers from a particular ailment as a result of exposure to a substance." *Id.*; *Adams*, 2009 WL

1259025, at *3. *Adams* dealt with harm to crops from a herbicide. This Court recognized that questions of the causation of harm depended on (1) the amount of the substance, (2) the impact of the substance on the plants, (3) the transport of the substance via the wind, (4) the sensitivity of the crops to the substance, and (5) observable symptoms of damage from the substance. *See id.* 2009 WL 1259025, at *3. Thus, a full analysis of risk involves (1) an assessment of the source of the risk, (2) how the source might be transported away from its location, (3) what exposure could occur if transported to a receptor, (4) the dose to the receptor that results from the exposure, and (5) the risk or harm connected to that dose.

The Tribes offered only evidence of "general causation," or that certain substances at the FMC Site are capable of causing harm. The Tribes did not introduce any "specific causation" evidence of transport, exposure, dose, and risk to an individual or group. SOF 137. The witnesses presented by the Tribes testified as follows:

Tribal Witness	Testimony
Susan Hanson	Wastes contained are hazardous and should be removed. 007482-007505.
Kelly Wright	Wastes contained are hazardous and should be removed. 007505-007535; 007571-007581.
Jerrold Leiken	Wastes are hazardous, but no opinion of actual effect. 007652-007710.
Peter Orris	Wastes are hazardous, but no opinion of actual effect. 007711-007762.
David Reisman	Excavation technology could be developed and tried. 007582-007615.
Nathan Small	Tribal members perceive that there is environmental contamination. 007791-007807.
Claudeo Broncho	Tribal members perceive that there is environmental contamination. 007807-007811.

The Tribes' key expert witnesses were Peter Orris and Jerrold Leiken, specialists in occupational health and toxicology. SOF 138. These doctors testified that the wastes on Site were hazardous, which no one disputes. But they had no opinion of any actual harm, they had no knowledge of any exposures or harm caused, they had no modeling to show any harm, they had conducted no clinical exams to determine if any harmed had occurred, and they had no

epidemiological studies showing any harm. SOF 138. No other Tribal witnesses offered any specific causation evidence. 007652-007710 (Leiken); 007711-007762 (Orris).

The Tribes' experts had "no information about actual harm." Apr. 3, 2014 Trans. 007752. Instead, they were testifying about the existence of substances that could constitutes a "threat," without more. 007733, 007740. For example, radioactive materials are used at hospitals to treat thyroid disease. 007734-007735. According to Orris, these radioactive materials pose a "threat" to workers, patients and visitors to the hospital: "[t]he threat is inherent in the use of these materials." 007735. Orris concedes that the hospital employs administrative and engineering controls to control the risk, and that government regulates to confirm the hospital is following proper controls. 007735-007736. But, according to Orris, a visitor in the lobby at the hospital is exposed to the "threat" from radioiodine stored in the radiotherapy department, even though administrative, engineering and government controls are in place to protect the visitor. *Id.*

The Appellate Court relied on Orris' and Leiken's testimony to find that "the stored waste [at the FMC Site] creates a 'threat' of significant concern for tribal health and welfare." April 15, 2014 Dec. 008225, 008233. But testimony that wastes are present at the Site does not prove any actual risk to the Tribes, any more than proof that a hospital uses radioactive materials proves an actual risk to a hospital visitor.

In contrast, FMC provided evidence that no specific causation could be found arising from the substances at the FMC Site. The witnesses presented by FMC on risk were as follows:

FMC Witness	Testimony
Rob Hartman	Contamination has been present for 65 years, and has been fully defined. The EPA remedy is fully protective of human health and the environment. 007866-007898; 007946-007968.
Barbara Ritchie	FMC has worked closely with EPA for 20 years to effect continuous control of any risks at the Site. 007997-008002; 008014-008053.

Nick Gudka[6]	Based on a study of potential pathways to exposure and risk to human health, the FMC Site presents no excess human health risk. 007969-007990.
Linda Hanna[7]	Based on a study of potential pathways to exposure and risk to the environment, the FMC Site presents no excess ecological risks. 007990-007996.
Joe Alvarez[8]	There is no radiological risk from the FMC Site. 008072-008078.
Dr. Jeffery Mandel[9]	Long term studies of FMC Plant workers and the Tribal Health Study do not show any adverse impacts related to the FMC Site. 008092-008108.
Dr. Tom Gesell[10]	There is no radiological risk to the Tribal community from slag at the FMC Site. 008059-008072.
Marianne Horinko[11]	EPA has fulfilled its purpose of protecting human health and the environment in relation to the FMC Site. 008125-008158.

The FMC witnesses testified that the FMC Site presents no risk of harm to the Tribal community. Their testimony was based on their analysis of both general and specific causation, including contaminants present on the FMC Site, possible pathways for transport of those contaminants off site, the exposures and doses that would result, and, what harm, if any, could follow.

[6] Mr. Gudka has a B.Sc. from the University of St. Andrews and a M.S. in Environmental Engineering from the Virginia Polytechnic Institute. 007969-007970.

[7] Dr. Hanna has a B.S. in Chemistry, a Ph.D in Biomedical Engineering from the University of Pennsylvania, and she did her post-doctoral study at the John Hopkins School of Public Health. 007990.

[8] Dr. Alvarez has a Masters in Environmental Engineering Health Physics and a Ph.D in Physics, with expertise in radiological human and environmental risk assessment. 008072.

[9] Dr. Mandell is an M.D. and a MPH. in Epidemiology, a Professor of the Minnesota School of Public Health, a Diplomat of the American Board of Internal Medicine and the American Board of Preventive/Occupational Medicine, and a Fellow of the American College of Occupational and Environmental Medicine. 008093.

[10] Dr. Gesell is professor emeritus in the Department of Nuclear Engineering and Health Physics at Idaho State University. He was Director of the Department of Energy Radiological and Environmental Sciences Laboratory, a Fellow of the Health Physics Society and a Distinguished Emeritus Member of the National Council on Radiation Protection and Measurements. 008059-008060.

[11] Ms. Horinko is the former EPA Assistant Administrator for the Office of Solid Waste and Emergency Response and the former Acting Administrator of EPA. 008127-008130.

G. The Tribal Court of Appeals Erred in Ruling that a Tribal Member's Perception of Harm Is Sufficient for Tribal Jurisdiction.

The Tribes' only other attempt to show harm was the testimony of Claudio Broncho and Nathan Small, who testified that tribal members *perceive* there is off-Site contamination from the FMC Site that impacts Tribal members. But subjective perception does not prove harm. Faced with only testimony regarding the perception of harm, the Appellate Court held that scientific measurements and statistics regarding contamination and risk do not matter, because they are "non-Indian measurements." Apr. 15, 2014 Dec. 008225, 008253. The Court held that "the answer to the question of whether a tribe's health and welfare has been directly affected" does not "necessarily [need to] be shown only by statistical analysis or scientific measurement." *Id*. 008254. The Appellate Court ruled that jurisdiction was established if Tribal members merely *perceive* that there is any risk, and then change a custom or tradition based on that perception. *Id*. 008254-008255. The Court reasoned that such an impact "cannot be measured by EPA standards." *Id.* 008254.

According to the Appellate Court, it is enough if a tribal member subjectively feels there is a risk, even if that feeling has no factual basis. Judge Gabourie of the first Appellate Court panel does not agree. He warned against relying on the lay evidence to establish scientific risk:

> And you sit as a – as an appellate court justice, and you're starting to read the cases that come down from the tribal court And you're saying to yourself, you know, We know that the – there's pollution, that the food that they're eating is polluted, the water's polluted, but ***nobody proved it***. ***And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses***. You need chemists and whatever to get out of testifying. It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."

May 6, 2013 Dec., 006560, 006598, Mar. 23, 2012 Trans. at 30:10-22. The second panel ignored this warning, and held that a tribal member's perception of risk was sufficient for second *Montana* jurisdiction. This is clear legal error, which cannot be upheld by this Court.

H. The Tribal Court of Appeals Erred by Allowing the Tribes to Speculate about Future Risk.

Early in the trial, the Tribal Appellate Court ruled that FMC would not be allowed to introduce evidence of EPA's regulation and oversight to ensure the effectiveness of the cleanup and provide actions and remedies for future contingencies.

> Documents created by EPA state that if FMC complies with all the remedial requirements issued by the EPA, containment should be accomplished.
>
> But all of that speaks to the future and is itself speculative. We are not here to try and guess what might happen in the future. . . .
>
> Again, our responsibility is not to gauge what might happen in the future. Rather, we must look to determine if there is a threat or impact on the tribes in the here and now. 008243.

At the same time, the Appellate Court admitted and relied on the Tribes' perceptions and speculations about hypothetic potential disasters. An additional error committed by the Appellate Court is its contradictory position relying on the Tribes' speculations of what will occur in the future but rejecting FMC's evidence of EPA's oversight and contingency plans to ensure protectiveness in the future.

VI. BEYOND THESE LEGAL ERRORS, THE EVIDENCE AT TRIAL CLEARLY FAILED TO ESTABLISH *MONTANA'S* SECOND EXCEPTION

The Tribal Appellate Court's rejection of the federal standard for establishing second *Montana* jurisdiction is enough in itself to require that this Court reject tribal jurisdiction. But even if the Appellate Court had followed the correct legal standard, it could not have found tribal jurisdiction. The evidence failed to establish that anything on the FMC Site "imperil[ed] the subsistence" of the tribal community, or that tribal regulation was "necessary to avert catastrophic consequences." *Plains Commerce*, 554 U.S. at 341.

A. Although the FMC Site Has Existed for 67 Years, the Tribes Did Not Even Attempt to Establish a Single Adverse Health Effect.

The FMC Plant operated for 52 years, from 1949 until December 2001, and it has now

been 67 years since the Plant began operations. SOF 118, 124 For the last 27 years, EPA, FMC and other agencies have conducted multiple environmental and health studies, evaluating the contamination present at the Site and surrounding areas, and the risks presented by that contamination. SOF 7, 8 The Tribes had access to exhaustive reports and reams of data from these studies, yet they did not even attempt to prove a single adverse health effect in the Tribal population. SOF 102, 124, 123, 127, 132

In *Plains Commerce*, the Supreme Court rejected tribal jurisdiction under *Montana's* second exception because "[t]he land in question here has been owned by a non-Indian party for at least 50 years, during which time the project of tribal self-government has proceeded without interruption." 544 U.S. at 341. Similarly, FMC has owned its fee land within the Reservation for 67 years, during which time Tribal self-government has proceeded without interruption.

B. Human Health Studies Establish that There Is No Evidence of an Adverse Health Impact to FMC Site Workers.

Wastes have been present at the FMC Site since shortly after the Plant began operation.[12] The risks presented by those wastes were greater before Plant shutdown, closure of the waste management ponds, and the performance of the CERCLA Interim Remedial Action. Evidence of harm from such wastes would be clear and provable by scientifically-measurable facts. But the Tribes could not prove any such harm. Moreover, human health studies have conducted by independent experts found no evidence of harm.

FMC's expert, Dr. Mandell, testified that, between 1977 and 2000, epidemiologists from the University of Minnesota conducted multiple epidemiological human health studies of FMC Plant workers. Those studies establish that long-term exposure to the contaminants at the FMC Site did not cause any adverse health impacts to Plant workers—the most exposed population, and the

[12] From the beginning, Plant operations involved management of phosphorus containing process water and disposal of slag and other wastes on Site.

one that would be the first to manifest any adverse health impacts because Plant worker exposures were many times greater than exposures to Tribal members and others outside Plant boundaries. SOF 126

In 2006, researchers from the Oregon Health & Science University and the Northwest Portland Area Indian Health Board conducted an independent human health study of the Tribal community. The Tribes participated in the design and implementation of that study. The study failed to find adverse health impacts to Tribal members that were attributable to the FMC Site. SOF 127

The Appellate Court acknowledged that FMC's expert witnesses testified "that there has been no evidence presented to demonstrate that any tribal members have actually suffered any negative effects from the FMC OU." 008244 The Court did not dispute that there was no such showing by the Tribes. Rather, the Court wrote that "we do not believe that . . . that there needs to be a showing that tribal members have actually suffered negative physical effects from the threatened act." *Id.* The Court's holding is directly contrary the federal standard for establishing the second *Montana* exception.

C. Extensive Work by the EPA Has Assured that Tribal Members Are Not Subjected to Any Excess Risk from the FMC Site.

EPA has diligently exercised its authority over the FMC Site under the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to protect the surrounding community and the environment from adverse consequences due to wastes present at the FMC Site. SOF 6-8, 153-173 In light of these extensive efforts, the Tribes cannot show any risk to the Tribal community from the FMC Site.

1. The EPA has thoroughly overseen and regulated the FMC Site, to protect human health and the environment.

During the first 40 years of the FMC Plant's operations, state and federal environmental laws had not yet been developed. In 1989, FMC's Plant Site and the Simplot's adjacent phosphate fertilizer plant site were added to the CERCLA National Priorities List as the Eastern Michaud Flats Superfund Site ("EMF Superfund Site"). SOF 6 The EMF Superfund Site was divided into three "Subareas": (a) the FMC Operable Unit ("FMC OU"), comprising FMC's fee land; (b) the Simplot Operable Unit ("Simplot OU"); and (c) the Off-Plant Operable Unit ("Off-Plant OU"), comprising property not owned by Simplot or FMC. Id. FMC and Simplot performed extensive sampling and analyses of surface and subsurface soils, groundwater, surface water, sediment, aquatic and terrestrial ecology and air, including 60,000 groundwater analyses, 3,600 air samples, 7,500 surface water and sediments analyses, and soil samples along 16 compass directions up to more than 3 miles from the FMC and Simplot plant boundaries. SOF 6-8, 154 With these data, FMC and Simplot developed the remedial investigation/feasibility study ("RI/FS") for the EMF Superfund Site. EPA conducted baseline ecological and human health risk assessments concurrently with the RI/FS conducted by FMC and Simplot. SOF 155-156

In June 1998, EPA issued a Record of Decision (the "June 1998 ROD") for the EMF Superfund Site. The June 1998 ROD was implemented for the Simplot site. However, when worldwide energy prices forced FMC to shut down its Plant in December 2001, FMC agreed to conduct a set of supplemental studies to characterize the Site after shutdown of Plant operations. SOF 15-16

FMC conducted the supplemental studies between May 2007 and August 2010. During this period, FMC (a) installed 902 soil borings; (b) collected 1,456 soil samples; (c) performed 24,009 laboratory analyses; (d) performed 500 radon measurements; and (e) performed 663,779 gamma dose rate measurements. SOF 151-160 Based on these data, FMC submitted and EPA approved

supplemental reports providing further information regarding the Site. SOF 161 FMC also performed a supplemental feasibility study that evaluated the potential remedial alternatives using CERCLA remedy selection criteria to identify a preferred alternative that addressed both human health and environmental risks at the FMC Site. EPA approved FMC's supplemental feasibility study in July 2011. SOF 160

EPA determined that the nature and extent of contamination at the FMC OU had been sufficiently characterized to evaluate and select specific remedial actions. EPA selected a remedy for the FMC Site that would be protective of human health and the environment, and released the Proposed Plan for the remedy for public comment in September 2011. SOF 17, 162-173

In September 2012, after careful evaluation of the comments provided by FMC, the Tribes and others, EPA issued an Interim Record of Decision Amendment ("IRODA") that sets forth EPA's selected soil and groundwater interim remedy to address hazardous substances at the FMC Site. SOF 18, 166 EPA concluded that this remedy would be protective of human health and the environment:

> The selected interim amended remedy is protective of human health and the environment by eliminating, reducing, or controlling risks posed by the FMC OU through containment of contaminated soils, engineering controls, and institutional controls; installation and operation of a groundwater extraction and treatment system; and long-term groundwater monitoring and gas monitoring.

IRODA at 73. EPA's Interim Remedy requires remedial action only within the FMC Site.[13] SOF 133, 166 In June 2013, EPA issued a Unilateral Administrative Order ("UAO") directing FMC to perform the Interim Remedy. SOF 18, 174-178 The work on the Interim Remedy has been

[13] EPA's Interim Remedy includes: (a) installation of engineered evapotranspiration ("ET") soil barrier caps over areas on Site that are potential sources of groundwater contamination; (b) installation of engineered "gamma" soil barrier caps at areas containing slag fill and ore; (c) installation of a groundwater extraction and treatment system that will capture and contain all contaminated groundwater at the FMC Sitefence line, and treat the extracted groundwater; and (d) long-term monitoring and maintenance.

underway for several years. The soil remedy construction is now over 90% complete. SOF 19-21, 175-178.

EPA will continue to monitor and regulate the FMC Site to ensure that EPA's Interim Remedy will remain effective no matter what unexpected events may occur in the future. SOF 179 In addition, EPA is conducting additional studies to re-evaluate the IRODA's conclusion that there are no technically feasible methods to excavate and treat phosphorus-contaminated soils in the quantities and depths found at the FMC Site. In addition, CERCLA requires that EPA review the Interim Remedy and the final CERCLA remedial action every five years to ensure that the remedies remain protective.[14] SOF 183 In the 27 year period since EPA began environmental regulation of the FMC Site, no event has occurred—whether anticipated or unanticipated—that posed any imminent threat to Tribal health. SOF 131

RCRA regulates the management, treatment, storage and disposal of hazardous wastes. SOF 9. 143 Due to the RCRA Bevill exemption, the FMC wastes were not subject to RCRA regulation as mineral processing wastes until EPA finalized certain regulations in 1990. In 1998, EPA and FMC entered into the RCRA Consent Decree which set forth the requirements for operation and closure of FMC's RCRA-regulated ponds. The RCRA Consent Decree was approved by this Court over the Tribes' objections, and this Court's decision was affirmed by the Ninth Circuit. SOF 144-146

The Tribes have been actively involved in every phase of EPA's work. EPA entered into a written Memorandum of Understanding ("MOU") with the Tribes as part of the CERCLA process to formally establish parameters for consultation, communication, and funding to support the Tribes' participation in EPA's development and selection of environmental studies and

[14] These Five-Year Reviews are required by CERCLA § 121(c) and its implementing regulations, the National Contingency Plan ("NCP") at 40 C.F.R. Pt. 300.430(f)(4)(ii) and are conducted at all Superfund sites.

remediation requirements for the FMC site. SOF 132 EPA also consulted extensively with the Tribes regarding the requirements included in the RCRA Consent Decree. SOF 10, 11, 180-182 Consistent with the United States' trust responsibility to the Tribes, the EPA has: (a) diligently enforced RCRA and CERCLA requirements applicable to the FMC site; and (b) engaged in extensive consultation with the Tribes to ensure that their concerns are fully considered. EPA will continue to carry out these actions in fulfillment of the federal trust responsibility to the Tribes. SOF 13, 14, 180-182

The federal courts will not approve a final CERCLA remedial action for the FMC Property that imperils the political integrity, the economic security or the health or welfare of the Tribes or leaves open any realistic possibility that the FMC Site will have "catastrophic consequences" to the Tribes. The Tribes can obtain recourse from the federal courts if they believe EPA's decisions are not sufficiently protective of Tribal health.

2. The substances and risks present at the FMC Site have been thoroughly analyzed and characterized, and none present a threat to the Tribes.

EPA's analysis of risks at the FMC Site fall into four categories: (1) phosphorus-containing wastes in the RCRA and CERCLA ponds, (2) soil contamination, (3) impacts to groundwater, and (4) evaluating any impacts off-site via aerial deposition or groundwater flow. These risks have been thoroughly analyzed and characterized, and none presents any threat to the Tribal community. SOF 16.

Media	Contaminants of Concern	Evidence
Ponds	Phosphine	- Largest concern is phosphine from RCRA ponds, due to lining required by EPA. - No fenceline detections of phosphine in past 10 years.
Soil	Radiologicals	- No levels of risk above risk guidelines in off-site area.
Groundwater and Surface Water	Heavy Metals	- No wells offsite show any contamination.
	Arsenic	- Below MCL at spring that is the source. - 95% is from Simplot. - FMC's portion not discernable from background levels.

	Orthophosphates	- 98% from Simplot. - FMC's portion would not cause any harmful effect.
Offsite	Fluoride	- No ecological or human health risk found. - Most significant substance found is from fluoride, which is an air emission from Simplot's operating plant.

a. RCRA and CERCLA Ponds.

Elemental phosphorus spontaneously combusts when exposed to air. For the entire time the Plant operated, the water used to prevent combustion of elemental phosphorus was managed in large surface water impoundments. These are referred to as the RCRA and CERCLA Ponds.

The RCRA Ponds were utilized for waste disposal after RCRA requirements became applicable to the Plant in 1990. SOF 120 The RCRA Ponds are newer, larger and lined, in comparison to the ponds from before 1990 that are managed under CERCLA. SOF 121

After the RCRA Consent Decree was lodged with this Court in 1998, this Court considered the Tribes' objections to the Consent Decree. In 1999 this Court entered an order rejecting the Tribes' objections and entering the RCRA Consent Decree. The District Court ruled that the trust responsibilities of the EPA and the United States do not allow the Tribes to prescribe the environmental regulatory measures the United States should pursue. 000717. This Court also disagreed with the Tribes' assertions that FMC should be forced to remove elemental phosphorus wastes from the ponds, instead of closing and capping the ponds with the waste in place, stating:

> The Court is convinced that the capping requirements are adequately environmentally protective – the record contains no legitimate basis on which the Court could conclude that capping allows an unreasonable health risk to go unchecked. 000717-18 (emphasis added).

The Ninth Circuit affirmed the District Court's entry of the Decree. *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000) (unpublished). The Ninth Circuit also rejected the Tribes' attempt to override EPA's decision to leave the waste in place:

> We disagree with the Tribes' assertions of error. The Tribes contend that the FMC waste must be dredged and treated rather than capped in ponds. However, RCRA

> permits closure of waste ponds either by removing the wastes, or by leaving the wastes in place and installing a protective cap. . . . ***[T]he Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment***.

Id., 229 F.3d 1161, 2000 WL 915398, at *2 (emphasis added). The Tribes should not be able to make the same argument that the RCRA ponds are a threat to them, when this Court and the Ninth Circuit previously addressed and dismissed this argument.[15] SOF 13

Between 1999 and 2005, FMC completed and certified final closure of the RCRA Ponds pursuant to EPA-approved closure plans and the RCRA Consent Decree. SOF 14, 120, 147 Nearly all of the Tribes' arguments about phosphine gas "threats" relate to the RCRA ponds. The Tribes cannot re-litigate whether FMC's closure of the RCRA ponds "poses a threat to human health and the environment" when this Court has already determined that it does not, and the Ninth Circuit has affirmed that decision.

Moreover, even if the Tribes are allowed to re-litigate issues of the release of gases from the RCRA ponds, the Tribes could not produce any evidence that these ponds present any imminent health risk to anyone. In thousands of fence line air monitoring results, there were no detections of phosphine. SOF 148-152. Moreover, when phosphine gas has been detected near the RCRA ponds, EPA and FMC have acted promptly to implement corrective measures and environmental monitoring that confirmed the response is fully protective of human health and the environment. Id.

As for the CERCLA ponds, EPA has confirmed that they do not pose a risk to human health:

> The current CSM for the CERCLA RAs does not anticipate that they will produce

[15] Compare the Ninth Circuit determination that the capped RCRA ponds do not present a threat to human health and the environment to the Opinion of the Tribal Appellate Court, which states the opposite: "[T]he evidence shows that the agency's containment plan, by design, leaves the threat in place for generations to come." Opinion at 5 (emphasis added).

> phosphine gas in quantities that would pose a significant risk to human health and the environment. Because the CERCLA ponds were not lined, there are no significant levels of water that remain commingled with the waste. Also, because the waste is generally dry, there is no free water with which elemental phosphorus can react with to produce appreciable levels of phosphine.

SOF 153.

b. Soil contamination.

The Interim Remedy requires installation of specifically designed covers to protect future workers working full time at the Site. *See* IRODA, at 28. Soil contamination at the site does not present any risk to the Tribes for several reasons. **First**, Tribal members have no right to trespass on the FMC Site. **Second,** even if trespassers did visit the site, their risk would necessarily be less than the lifetime workers the remedy protects. **Third**, as stated above, soil contamination at the FMC Site was been present for 67 years. Yet, the Tribes were unable to offer any proof that FMC site soils have caused, or are likely to cause, any harm to anyone outside the FMC Site boundaries. **Fourth**, the Interim Remedy ensures that all in soil contamination is contained on-site. Off-site soils and ambient air have been extensively sampled and the data confirms that there are no off-site risks from Site soils. **Fifth**, since the Appellate Court's April 2014 decision, FMC has completed all but a minor portion of the soil remedy. **Sixth**, the IRODA explains that Site soils do not present any threat to the Tribes: "Elemental phosphorus in subsurface soil is solid, largely insoluble, and immobile." IRODA at 102. This means, it's not going anywhere, it's not migrating, and it's not leaching. Further, the IRODA explains that capping on-site soils is the by far the safest remedy: "The risks associated with excavating elemental phosphorus at the FMC OU far exceed the risks associated with managing it in place." IRODA at 17 (emphasis added).[16]

[16] This does not compel a conclusion that leaving the elemental phosphorus in place poses any off-site risk to the Tribes. In fact, EPA concluded that off-site risks would be considerable if it were to select the excavation and treatment remedy advocated by the Tribes. EPA stated, "The largely uncontrolled conditions during excavation would expose workers to risks from fire, dermal, and respiratory hazards. Respiratory hazards could also affect downwind residents, adjacent

c. Groundwater and surface water.

The Tribes also cannot argue that groundwater or surface water present any risk to the Tribes. Groundwater testing has shown that no excess levels of arsenic or heavy metals[17] are found in any groundwater wells outside the FMC Site. SOF 135 The shallow aquifer under the FMC Site has been studied extensively for many years. These studies prove that arsenic and orthophosphates seep down from the Simplot gypsum stack into groundwater under the Simplot site, a portion of which then travels under the FMC Site and out at FMC's northern boundary. Id. This groundwater and groundwater flowing directly from the Simplot OU then flows into the Portneuf River through springs. Groundwater contamination is over 95% from Simplot. Id. The IRODA states: "The primary source of phosphorus and other COC [contaminant of concern] loading to groundwater and ultimately surface water is from the Simplot OU."

> Simplot has calculated mass loading and estimates that FMC-impacted groundwater migrating downgradient from the Former Operations Area northern boundary accounts for less than 5 percent of the total arsenic and total phosphorus mass load to EMF-impacted groundwater migrating to the river, as reported in the Groundwater Extraction and Monitoring System Remedial Design Report (Simplot, 2010).

The Tribes identify the groundwater contaminants as an alleged threat to the Portneuf River, but ignore the critical fact that FMC's 5% contribution is not a threat to the River or the Tribes. Id. Moreover, the Interim Remedy requires FMC to install a groundwater extraction and treatment system that will ensure the FMC OU groundwater contamination does not contribute to an exceedance of Clean Water Act standards in the Portneuf River. Id.

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facility employees, and travelers on Highways 30 and 86." IRODA at 99-100. In contrast, under the EPA-selected remedy there is no exposure pathway and therefore no risk to the Tribes.

[17] Arsenic, heavy metals and orthophosphates are the contaminants of concern for groundwater beneath the FMC OU.

d. Investigations of Offsite Impacts.

After exhaustive study, EPA concluded that contaminants in soils, surface water, and air in the Off-Plant OU related to FMC's operations do not present a risk. SOF 135 No off-site drinking water wells are contaminated. Id. Sampling establishes that the groundwater in the Off-Plant OU already meets federal drinking water quality criteria. *Id.* Fluoride is the only ecological contaminant. *Id.* EPA has determined fluoride levels "below ecological levels of concern," and after 2001, Simplot became the sole source of fluoride emissions. *Id.* Measurements of the radioactivity in the Off-Plant OU establish that radium levels are not a risk to human health or the environment. *Id.* Approximately 40,000 measurements of phosphine gas emissions show no detections of phosphine (0.00 parts per million) at the FMC fence line. The Agency for Toxic Substances and Disease Registry ("ATSDR") evaluated air quality impacts from the EMF Site and found that the Site presents no public health hazard. SOF 136.

VII. THE TRIBAL COURT OF APPEALS' DECISION ASSUMES THAT THE TRIBES HAVE AUTHORITY TO REGULATE FMC'S PERFORMANCE OF CERCLA AND RCRA REQUIREMENTS.

The Tribes' case is a direct attack on EPA's authority. The Tribes continue to object to EPA's decision that the safest way to handle the phosphorus wastes is to contain the wastes in place. SOF 190-195 The Tribal Appellate Court recognized that its Decision was simply siding with the Tribes against the EPA:

> The EPA and the plaintiff have had many meetings on this issue and while the EPA has solicited the plaintiff's input the two disagree about the best methods to employ to reduce or eliminate the threat.
>
> . . . .
>
> We considered the evidence showing that the EPA has not always implemented the tribes' desired remedies; and a document wherein the EPA stated that the EPA does not have to do what the tribes ask. We wondered if this approach truly provided protection of the tribes' interests.

008240. The Decision holds that the Tribes' desires regarding the Site are superior to EPA's

decisions: "EPA does not have to do what the tribes ask," so the Tribes are not adequately protected. (008240.)

Even if the Tribes were given jurisdiction, they would have no authority to regulate FMC's conduct. FMC dismantled, decontaminated, and removed the Plant and equipment following Plant shutdown in 2001. All of the activities at the FMC Site are directed toward remediation in preparation for future uses, and they are directed and overseen by the EPA, pursuant to the RCRA and CERCLA. SOF 195 Thus, the only conduct of FMC that the Tribes could regulate is conduct already ordered and supervised by EPA. FMC cannot alter its conduct without direction from EPA.

The Tribes have not and cannot establish any right to require EPA or the federal courts to impose regulations or requirements on FMC that EPA and the federal courts do not believe necessary to protect human health and the environment. The Tribes have had every opportunity, and they will continue to have every opportunity, to provide comments to EPA regarding the environmental requirements that the Tribes believe EPA should impose on FMC. The fact that the Tribes do not agree with every requirement EPA has imposed on FMC is not a basis for this Court to find that EPA has failed to perform its trust responsibilities to the Tribes.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court established that tribes do not have jurisdiction over the actions of federal and state officials. In *Hicks*, a state game warden went onto the reservation to execute on a search warrant to find evidence of poaching by a tribal member. The accused tribal member, Hicks, complained that the search warrant was improperly executed, and brought a 1983 action against the game warden. The Supreme Court held that the tribal court did not have jurisdiction over a state officer pursuing this investigation.

The Supreme Court ruled that, in *Montana*, the Court "obviously did not have in mind States or state officers acting in their governmental capacity." 533 U.S. at 372. The Supreme Court explained that such authority was not necessary to protect tribal self-government:

> Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 359. The Supreme Court also required that "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. The Supreme Court stated:

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.'

Id. at 364. The Supreme Court also explained that the Tribes were not without recourse if the state officers act unlawfully, because "the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal or state-law rights." *Id.* at 373.

In 1999, the Tribes opposed the RCRA Consent Decree, asserting that "FMC should be forced to remove hazardous wastes stored in waste ponds instead of merely capping those ponds." 000717. In accordance with *Hicks*, this Court rejected the assertion of Tribal authority over EPA's decisions, explaining that "[a] principle [*sic*] flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental remediation measures the United States should pursue." *Id.*

The Appellate Court is again attempting to substitute its judgment for the informed judgment of the EPA regarding the risks and the appropriate remedy.

- The Appellate Court directly challenged EPA's authority by rejecting EPA's measurement approach, stating "EPA testing strategies were not sufficient to protect the health and welfare of tribal members." (008246.)
- The Appellate Court overruled EPA's determination that phosphine at the ponds "pose[s] no risk to human health or roaming mammalian or avian species." *Id.* The Court found that phosphine *did pose* such a risk. (008251.)

- The Appellate Court overruled EPA's determination that "if FMC complies with all the remedial requirements issued by the EPA, containment should be accomplished." (008243.) Instead, the Tribal Appellate Court found that "[t]he remedial actions of the EPA might in fact fail," and that this possibility of failure was sufficient to justify tribal jurisdiction. *Id.*

The Appellate Court's Decision is contrary to this this Court's RCRA Consent Decree ruling, which provided the Tribes an extensive ability to participate in EPA decision making, but left a single government entity—the EPA—with the final say.[18]

VIII. THE TRIBAL COURT OF APPEALS ERRED BY FAILING TO DETERMINE THAT TRIBAL JURISDICTION WAS NECESSARY TO PROTECT TRIBAL SELF GOVERNMENT.

The second *Montana* exception requires that the conduct the Tribes seek to regulate impact "the political integrity, the economic security or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court cautioned:

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Id. at 564.

According to *Plains Commerce,* even where a nonmember has expressly consented to jurisdiction, the regulation must arise from the need to preserve tribal self-government or control internal relations among tribal members:

> Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional American courts in a number of significant

[18] Similar to their position in 1999 regarding the RCRA Consent Decree, the Tribes now object to the CERCLA Interim Remedy because it includes capping and management in place—rather than excavation and treatment—of soils containing elemental phosphorus. EPA rejected the Tribes' requested excavation and treatment remedy as unsafe, infeasible, and unwarranted. EPA also decided that there is no currently known technology to excavate and treat the elemental phosphorus-containing soils without creating a high risk of exposing elemental phosphorus to ambient air, resulting in spontaneous combustion that involves the release of phosphorus gases. EPA's studies showed that the Tribes' proposed excavation remedy would present dangerous risks to remediation workers, emergency responders, adjoining Simplot plant workers and the surrounding communities during the entire 20- to 40-year period that EPA estimates it would take to complete such excavation and treatment.

> respects." And non-members have no part in tribal government — they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. ***Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.***

554 U.S. at 337 (emphasis added) (citations omitted) (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896), citing *Montana*, 450 U.S. at 564).

In *Hicks*, the Supreme Court explained that "the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" 533 U.S. at 359 (emphasis in original) (quoting *Montana*, 450 U.S. at 564). In *Atkinson*, the Supreme Court rejected tribal jurisdiction because *Montana* granted Indian tribes nothing "beyond what is necessary to protect tribal self-government or to control internal relations." 532 U.S. at 658-59. The Appellate Court's Decision cannot be enforced because it fails to recognize this requirement, and fails to make any factual findings or determination regarding this requirement.

IX. THE TRIBAL COURT OF APPEALS ERRED BY FAILING TO REQUIRE A CONNECTION BETWEEN HEALTH AND WELFARE JURISDICTION AND THE REMEDY GRANTED TO THE TRIBES

The Tribal Appellate Court made another fundamental legal error, by failing to connect the Tribes' permit to any protection of tribal health or welfare. In *Evans*, the Ninth Circuit explained that there was no second *Montana* jurisdiction, because "the Tribes fail[ed] to provide specific evidence showing that tribal regulation of" Evans' construction was "necessary to avert catastrophe." 736 F.3d at 1306 n.8. The Judgment at issue here does not provide any remedy for the alleged risk, it does not clean up anything, it does not monitor anything, and it does not change any aspect of the EPA's regulation of the site. Instead, the Judgment would simply require FMC to

pay unrestricted funds to the Tribes, which the Business Council would be free to use for any purpose. The Appellate Court did not explain how this cash would solve any of the effects that it said were concerns. Under *Evans*, there was no proof offered that such funds were "necessary to avert catastrophe." The Court should deny enforcement of the Judgment for this reason alone.

X. CONCLUSION

The evidence in the record before this Court does not prove that that FMC Corporation's conduct on its fee-owned land within the Reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and thus "imperil[s] the subsistence or welfare" of the tribe. *Montana*, 450 U.S. at 566. The Court should issue a judgment ruling that the Shoshone-Bannock Tribes do not have jurisdiction over FMC Corporation under the second exception to *Montana*. The Court should also permanently enjoin the Tribes from taking any action to enforce the Tribal Court of Appeals' Judgment, demand the annual payments, or assert regulatory jurisdiction over FMC.

DATED this 13th day of January, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2017, I filed the foregoing **MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY JURISDICTION TO THE TRIBES UNDER THE SECOND EXCEPTION TO *MONTANA*** 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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