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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

FMC CORPORATION,

Plaintiff,

vs.

SHOSHONE-BANNOCK TRIBES,

Defendant.

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

MEMORANDUM OF FMC CORPORATION IN RESPONSE TO THE MEMORANDUM IN SUPPORT OF TRIBAL JURISDICTION OVER FMC UNDER THE FIRST EXCEPTION TO *MONTANA*

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I. INTRODUCTION

Chief Justice John Marshall's groundbreaking decisions on tribal jurisdiction recognized the "inherent sovereignty" of Indian tribes. Over time, the Supreme Court moved away from inherent tribal sovereignty as the basis for tribal jurisdiction over non-Indians. Instead, the Supreme Court held that states – not tribes – had jurisdiction over non-Indian conduct on a reservation, ***unless state authority was precluded by Congressional legislation***. The trend toward state jurisdiction over non-Indian conduct on reservations eventually resulted in *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978), *rev'd*, 604 F.2d 1162 (9th Cir. 1979), *rev'd sub nom., Montana v. United States*, 450 U.S. 544, 563 (1981), the Supreme Court's "pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A–1 Contractors*, 520 U.S. 438, 445 (1997). In *Montana*, the Supreme Court held that Indian tribes do not have jurisdiction over nonmember conduct taking place on an Indian reservation, unless it was authorized by Congress or is proven to be within one of two narrow exceptions. *Montana v. United States*, 450 U.S. 544 (1981). The first exception applies if the tribe carries its burden of proving that the nonmember[1] entered into a "consensual relationship[] with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001).

In 1998, FMC Corporation ("FMC") resolved a dispute with the Shoshone-Bannock Tribes ("Tribes") over the Tribes' threatened exercise of their governmental powers by agreeing to pay the Tribes an annual permit fee of $1.5 million during the time FMC's Pocatello elemental

[1] The Court in *Montana* referred to "nonmembers" and "non-Indians" interchangeably.

phosphorus manufacturing plant (the "Plant") was in operation. The Tribes claim that FMC's resolution of this dispute and payment of a permit fee establish "consensual relationship" under the first *Montana* exception.

As explained in FMC's First *Montana* Opening Brief, federal courts have found a "consensual relationship" that meets the requirements of the first *Montana* exception in ***only*** three categories of cases: "commercial" cases, "trust land" cases and "waiver" cases. FMC's First *Montana* Opening Brief at 9-23. FMC's resolution of the dispute and payment of the $1.5 million permit fee do not establish a "consensual relationship" under the first *Montana* exception.

- FMC's resolution of its dispute with the Tribes by payment of a permit fee is not a "commercial" case. FMC did not voluntarily enter into a contract or agreement with the Tribes to operate a revenue-generating business on the Fort Hall Reservation ("Reservation"). As the owner of fee land within the Reservation, FMC had the right to build and operate its Plant, as it did from 1949 to 2001, without the Tribes' permission and without any contract or agreement with the Tribes.

- This is not a "trust land" case. No portion of FMC's Plant is located on tribal lands. The Tribes' inherent sovereign power to limit or exclude access from tribal land, and the lesser power to regulate nonmember conduct on tribal land, does not apply to FMC's fee land.

- This is not a "waiver" case. FMC did not voluntarily enter the tribal courts to bring claims against tribal members arising out of conduct that had occurred on tribal ***land.***

Federal courts ***have never held*** that a tribe can regulate nonmember conduct ***on fee-owned land*** within the reservation under the first or the second *Montana* exception.[2] In each

[2] The sole exception is *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (a second *Montana* exception case), in which a majority of the Justices held that the tribes had the right to limit activities and control access by nonmembers within the "closed" portion of the reservation. But the Court held that the tribes had no such right in the "open

case in which a court has held that the first *Montana* exception applies, the court's decision is based on the fact that the tribes' inherent powers include the power to exclude or limit access of nonmembers from the reservation, and the lesser power to regulate conduct on ***tribal land***. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

Moreover, federal courts ***have never held*** that a non-Indian's agreement to resolve a dispute with a tribe in response to the threatened exercise of tribal governmental power establishes the first *Montana* exception. Such a holding would violate the Supreme Court's admonition that the *Montana* exceptions are "limited ones" and cannot be construed in a manner that would "swallow the rule," or "severely shrink" it. *Plains Commerce*, 554 U.S. at 330; *Atkinson*, 532 U.S. at 650; *Strate*, 520 U.S. at 458.

In addition, the Tribes cannot meet their burden of proving that they have jurisdiction under the first *Montana* exception because tribal regulation is not necessary to protect tribal self-government or control internal relations, and Congress has delegated jurisdiction to regulate FMC's compliance with environmental requirements to the EPA, not to the Tribes.

II. SUPREME COURT PRECEDENT HAS ESTABLISHED THAT THE TRIBES DO NOT HAVE JURISDICTION TO REGULATE FMC'S CONDUCT ON ITS FEE-OWNED LAND.

Both FMC's and the Tribes' opening briefs present the central issue to be decided by this Court as: "Whether the Tribes have jurisdiction to regulate FMC's conduct on its fee-owned lands within the boundaries of the Fort Hall Indian Reservation?" A more accurate statement of the issue to be decided by this Court is the issue decided by the U.S. Supreme Court in all cases

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portion" of the reservation. FMC's fee land has the same attributes as the "open portion" of the Yakima reservation. Under *Brendale*, the Tribes do not have the right to regulate FMC's conduct.

involving tribal jurisdiction: "Do the tribes *or the state* have jurisdiction to regulate the conduct of non-Indians on lands within the boundaries of a tribal reservation?" Fundamental to the Supreme Court's tribal jurisdiction decisions is the Court's recognition that the state and the tribe cannot both have jurisdiction to regulate the same conduct because of the irreconcilable conflicts that would result. That fundamental principle is presented by this case because the Tribes seek to regulate FMC's performance of environmental cleanup requirements that Congress has expressly delegated (not to the state) but to the federal Environmental Protection Agency ("EPA").

A. Development of the Supreme Court's Jurisprudence on Tribal Jurisdiction.

The Supreme Court first recognized the sovereignty of Indian tribes in three cases that became known as the "Marshall Trilogy": *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). Chief Justice John Marshall's opinion in *Worcester* relied on two fundamental principles: the recognition of inherent tribal sovereignty, and the recognition that Congress also had the right and authority, or plenary power, to protect tribes from state law. *Worcester*, 31 U.S. at 556-57.

Starting in 1881, in cases such as *United States v. McBratney*, 104 U.S. 621 (1881), *United States v. Kagama*, 118 U.S. 375 (1886), *Draper v. United States*, 164 U.S. 240 (1896), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court affirmed that the federal government had plenary authority over tribes, but held that the inherent sovereignty of states took precedence over tribal treaty rights; in particular when state citizens were involved in conduct on a reservation. From this time forward, the Supreme Court continued to narrow tribal jurisdiction over non-Indians.

The Supreme Court mentioned inherent tribal sovereignty as a source of tribes' authority to regulate the conduct of non-Indians on tribal lands in *Williams v. Lee*, 358 U.S. 217 (1959). But within three years of deciding *Williams*, the Court held that tribal jurisdiction over non-Indians was based not on inherent tribal sovereignty, but rather on the rationale that states had authority over non-Indians on tribal lands ***unless it was precluded by congressional legislation***. *Organized Vill. of Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962). Both *Kake* and *Metlakatla* failed even to mention "inherent tribal sovereignty" as a basis for tribal jurisdiction and instead relied exclusively on federal authority to prohibit application of state law over tribal affairs. Taken together, these cases ensured that state law applied on tribal lands unless it was explicitly precluded by the actions of Congress. For example, in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the issue was whether the State of Montana could tax cigarette sales between a tribal member and nonmembers on the reservation. The court upheld the tax on the grounds that no Congressional legislation existed to prevent state taxation of nonmembers on the reservation.

Only two years after *Moe*, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court extinguished tribal criminal authority over nonmembers on the reservation. The *Oliphant* court relied on the principle that tribal authority extended over tribal members but did not extend over nonmembers ***unless explicitly delegated by Congress***. In *United States v. Wheeler*, 435 U.S. 313 (1978), the Court expanded the *Oliphant* principle into a general rule limiting all tribal sovereignty over nonmembers on the reservation: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Wheeler*, 435 U.S. at 326.

These cases set the stage for the Supreme Court's decision in *Montana v. United States*, *supra*. In *Montana*, the Supreme Court totally rejected "inherent Indian sovereignty" as a basis for tribal regulation of non-Indians and held that "Indian tribes do not have the power, nor do they have the authority to regulate non-Indians *unless so granted by an act of Congress*." *United States v. Montana*, 457 F. Supp. 599, 609 (D. Mont. 1978), *rev'd*, 604 F.2d 1162 (9th Cir. 1979), *rev'd sub nom., Montana v. United States*, 450 U.S. 544, 101 (1981) (emphasis added). The *Montana* court further limited tribal sovereignty when it explained, "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." *Montana*, 450 U.S. at 564 (emphasis added), citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams*, 358 U.S. at 219-20; *Kagama*, 118 U.S. at 381-82; *McClanahan v. State of Ariz. Tax Comm'n*, 411 U.S. 164, 171 (1973).

The *Montana* court recognized only two narrow exceptions to the general rule that tribes do not have jurisdiction over non-Indians, the first of which is the "consensual relationship" exception. With these newly constructed exceptions, the Supreme Court codified the existing case law by citing specific cases that would qualify for one of the two exceptions. The cases listed in *Montana* as illustrative of the first *Montana* exception all involve tribal regulation of non-Indians entering the Indian reservation to engage ***in commercial economic activity on tribal land***. *Williams v. Lee*, 358 U.S. 217 (1959) (declaring tribal jurisdiction over lawsuit arising out of sales transactions between nonmember and tribal member on *tribal land*); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upheld tribal permit tax on nonmember owned livestock grazing on *tribal land* leased by the nonmember); *Buster v. Wright*, 135 F. 947 (1905)

(upholding tribal permit tax on nonmembers for privilege of conducting commercial business on *tribal land*); *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (acknowledging tribal jurisdiction over on-reservation cigarette sales to nonmembers on *tribal land*).

Since *Montana*, every case in which a court has found the first *Montana* exception to have been established has involved a tribe's regulation of nonmember conduct ***on tribal land***. *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986) (nonmember entered into a commercial contract with the White Mountain Apache Tribe to supply concrete to a housing project to be constructed on *tribal land* within the reservation); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (FMC voluntarily entered into commercial mineral leases on *tribal lands* for the purpose of mining phosphorus shale); *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032 (9th Cir. 1999) (nonmember voluntarily entered into a commercial lease of *tribal property*); *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (a nonmember entered into a 32 year commercial lease of valuable *tribal land* on the Colorado River); *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013) (a nonmember voluntarily entered into a commercial contract with the tribe to develop and manage a tourist attraction located on *tribal land*).

In each of the foregoing cases, the nonmember *affirmatively and on its own initiative*, sought out a *commercial agreement* with the tribes for the purpose of operating a revenue generating business on *tribal land*. None of the first *Montana* cases recognizes, or even suggests, that the exception would apply to a nonmember's resolution of a dispute with a tribe in response to the tribe's threatened exercise of tribal governmental powers.

By the same token, federal courts have consistently denied tribal jurisdiction under the first *Montana* exception where the subject of the tribal regulation or lawsuit occurred on *lands owned in fee* within the reservation. *Montana*, 450 U.S. 544 (the tribes do not have jurisdiction to regulate hunting and fishing by nonmembers on *fee land*); *Strate*, 520 U.S. 438 (tribal courts do not have jurisdiction to entertain a civil action arising out of an accident that occurred on a federally granted right-of-way[3] over reservation land); *Atkinson*, 532 U.S. 645 (the tribes do not have jurisdiction to impose a hotel tax on a commercial business located on *fee land*); *Plains Commerce*, 554 U.S. 316 (the tribes do not have jurisdiction over the sale of *fee land* within the reservation); *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (cause of action arose on non-Indian *fee land* within the reservation; no jurisdiction in tribal courts); *Yellowstone Cnty. v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (county taxed *fee land* within reservation; no jurisdiction in tribal courts to enjoin the county).

Recent Supreme Court cases have expanded the reach of *Montana*'s general rule to apply not only to land transferred in fee to a nonmember under the General Allotment Act,[4] but also to any land over which the tribe lost the authority to exclude or limit access. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the court held that lands appropriated by Congress, whether or not it was for the process of allotment, were automatically transferred in status from tribal to fee lands and, thus, the tribe lost jurisdiction over nonmembers on those lands. In *Strate*, the court

[3] Federally granted rights-of-way are treated as *fee land* within the reservation. *Strate*, 520 U.S. 438; *Big Horn Cnty. Elec. Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000).

[4] *Montana* relied on the transfer of fee title to land from a tribal member to a nonmember pursuant to the General Allotment Act of 1887, 25 U.S.C. § 331, as the basis for loss of tribal jurisdiction.

held that, even though the tribe retained ownership of the land, a federal highway right-of-way removed the exclusive rights of the tribe over the highway and so changed the status of the lands from tribal to fee. Consequently, the tribe lost authority over the lands and nonmember conduct on those lands. In *Hicks*, Justice Scalia explained that the right-of-way acquired for the State's highway in *Strate* "rendered that land equivalent to alienated, *non-Indian land*." *Hicks*, 533 U.S. at 392. Other cases in which a State or federal right-of-way over tribal lands has been held to deny tribal jurisdiction include: *Burlington N. RR. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (cause of action arose on railroad right-of-way within the reservation; no jurisdiction in tribal courts); *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (cause of action arose on state highway within reservation; no need to exhaust claims in tribal courts); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (cause of action arose on U.S. highway within reservation; judgment of tribal court not entitled to recognition in United States courts).

In *Montana*, the Supreme Court held that tribes retained jurisdiction over nonmembers on *tribal lands*. *Montana*, 450 U.S. at 557. But in *Atkinson*, the Supreme Court questioned its earlier ruling that protected trial sovereignty over nonmembers *on tribal lands.* The concurrence by Justice Souter, joined by Justices Kennedy and Thomas, expanded and explicitly incorporated tribal lands into *Montana's* general rule that tribes do not have authority over nonmembers unless authorized by Congress or evidence establishes one of the *Montana* exceptions:

> Under *Montana*, the status of territory within a reservation's boundaries as tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the exceptions to *Montana's* "general proposition" that "the inherent sovereignty power of an Indian tribe do[es] not extend to the activities of nonmembers of the tribe." *That general proposition is, however, the first principle, regardless of whether*

> *the land at issue is fee land, or land owned by or held in trust for an Indian tribe*.

Atkinson, 532 U.S. at 659-60 (emphasis added).

Only 27 days after *Atkinson*, the Supreme Court decided *Nevada v. Hicks, supra*, further undermining tribal authority to regulate nonmember conduct on tribal lands. The *Hicks* court held that it was up to Congress to allow tribal authority over nonmembers:

> Where non-members 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."

Hicks., 533 U.S. at 359 (emphasis added). Further, the Court held:

> Internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members" . . . . The examples show, we said, that Indians have 'the right . . . to make their own laws and be ruled by them."

Id. at 60-61. The Tribes' attempt to regulate FMC's activities in cleaning up its fee lands under the control and jurisdiction of the EPA has nothing whatsoever to do with the Tribes' control of any aspects of tribal internal relations listed by the Supreme Court in *Hicks.*

Finally, in *Plains Commerce*, the Supreme Court's most recent decision interpreting *Montana*,[5] Chief Justice Roberts describes the boundaries of tribal jurisdiction established by the Supreme Court in *Montana* and the cases that followed. First, he explains that, as a general matter, tribes do not possess authority over non-Indians:

[5] The Supreme Court's 2016 decision in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), is a per curium decision by an equally divided court.

> We have frequently noted, however, that the "sovereignty that the Indian tribes retain is of a unique and limited character." *Id.*, at 323, 98 S.Ct. 1079. *It centers on the land held by the tribe and on tribal members within the reservation*. *See United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) (tribes retain authority to govern "both their members and their territory," subject ultimately to Congress); *see also Nevada v. Hicks*, 533 U.S. 353, 392, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) ("[T]ribes retain sovereign interests *in activities that occur on land owned and controlled by the tribe*)."
>
> [T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: "[T]he inherent sovereign powers of an Indian tribe *do not extend to the activities of nonmembers of the tribe.*" *Montana*, at 450 U.S., at 565, 101 S.Ct. 1245. As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing person[s] within their limits *except themselves*."

Plains Commerce, 554 U.S. at 328 (emphasis added). From the first sentence of their brief, the Tribes emphasize that FMC's waste is stored on "the Tribes' homeland." Tribes' First *Montana* Opening Brief at 1. But, as Justice Scalia explains in *Hicks*, *supra*, and as Justice Roberts states in *Plains Commerce*, the transfer of tribal lands in fee, or even the grant of a federal highway right-of-way, makes the land "non-Indian land" which the tribe and tribal members have no right to occupy, use or regulate. *Plains Commerce*, 554 U.S. at 328, citing *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992); *Goudy v. Meath*, 203 U.S. 146, 149-50 (1906); *In re Heff*, 197 U.S. 488, 502-03 (1905); *Bourland*, 508 U.S. at 689; *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 430 (1989). Moreover, Chief Justice Roberts emphasizes that the first exception to *Montana*'s general rule does not apply unless the activity to be regulated is necessary to protect tribal self-government:

> *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, 101 S.Ct. 1245, allowing these to be regulated to the extent necessary "to protect tribal self government [and] to control internal relations," id., at 564, 101 S.Ct. 1245. *See Big Horn Cty. Elect. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (C.A.9 2000).

Plains Commerce, 554 U.S. at 332.

B. The Tribes Cannot Meet their Burden of Establishing the First Exception to Montana's General Rule that Tribes Do Not Have Jurisdiction Over Non-Indians, Especially on Fee Land.

In support of their argument that the first *Montana* exception applies in this case, the Tribes cite the Ninth Circuit's statement that the existence of a "consensual relationship" is determined by:

> "consider[ing] the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 338).

Tribes' Opening First *Montana* Brief at 6. The Ninth Circuit's very next paragraph states:

> Johnson owned and operated Water Wheel ***on tribal land*** for more than twenty years and had extensive dealings with the CRIT before the lease expired. Additionally, Johnson was on notice through ***the lease's explicit terms*** *that Water Wheel, its agents, and employees* ***were subject to*** **CRIT [tribal] laws**, regulations, and ordinances.

Water Wheel, 642 F.3d at 818 (emphasis added).

None of the factors upon which the Ninth's Circuit's *Water Wheel* ruling is based are present in this case. In addition, in *Water Wheel*, the Ninth Circuit relies extensively on the Supreme Court's decisions in *Strate*, *Hicks*, and *Plains Commerce*, all of which hold that tribal jurisdiction under the first *Montana* exception is based on a tribe's inherent powers to exclude or limit access of nonmembers and to regulate conduct on ***tribal land*****.**

Lacking any federal case precedent to support their argument, the Tribes ask this Court to interpret the language "consensual relationship . . . through commercial dealing, contracts, leases, or other arrangements," as the Tribes argue it should be interpreted. As this Court is well aware, the meaning of language that is urged upon the court by one party or the other has no legal significance where the party's argued interpretation is unsupported by any case law precedent. To the contrary, the fundamental principles of precedent and *stare decisis* require the court to look to precedent for guidance as to the meaning of this phrase. *See, e.g.*, 20 AM. JUR. 2D *Courts* § 125 (explaining that the doctrine of *stare decisis* and precedent permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our legal system; and that the doctrine ensures predictability of the law and the fairness of adjudication).

In this case, the Tribes' argued interpretation of the language the Supreme Court used to define the first exception to *Montana*'s general rule is not only unsupported, it is contrary to the application of that language by the Supreme Court and the Ninth Circuit. In *Plains Commerce*, Chief Justice Roberts explains that, in *Montana*, the Supreme Court defined the scope of the first exception by referencing prior cases, all of which involved nonmember conduct ***on tribal land***. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); *Williams v. Lee*, 358 U.S. 217 (1959); and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980). Justice Roberts then emphasizes that all of the Supreme Court's decisions since *Montana* also limit the first exception to nonmember conduct ***on tribal land***:

> Our cases since Montana have followed the same pattern, permitting regulation of certain forms of nonmember conduct on ***tribal land***. We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources

> removed by nonmembers from ***tribal land***. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). We have approved tribal taxes imposed on leasehold interests held in ***tribal lands,*** as well as sales taxes imposed on nonmember businesses within the reservation. *See Kerr–McGee*, 471 U.S., at 196-197, 105 S.Ct. 1900. We have similarly approved licensing requirements for hunting and fishing on ***tribal land.*** *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Plains Commerce, 554 U.S. at 333. Justice Roberts explains that the only exception, *Brendale*, which allowed the tribe to regulate nonmember land in the "closed portion" of the Yakima reservation where the tribe had the authority to limit access, "fits the general rubric":

> Tellingly, with only "one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, supra, at 360, 121 S.Ct. 2304 (emphasis added). . . . The exception is *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, and ***even it fits the general rubric noted above***: In that case, we permitted a tribe to restrain particular uses of non-Indian fee land through zoning regulations. While a six-Justice majority held that *Montana* did not authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers, 492 U.S., at 430-431, 109 S.Ct. 2994 (opinion of White, J.); *id.*, at 444-447, 109 S.Ct. 2994 (opinion of STEVENS, J.), five Justices concluded that *Montana* did permit the Tribe to impose different zoning restrictions on nonmember fee land isolated in "the heart of [a] closed portion of the reservation," 492 U.S., at 440, 109 S.Ct. 2994 (opinion of STEVENS, J.), though the Court could not agree on a rationale, *see id.*, at 443-444, 109 S.Ct. 2994 (same); *id.*, at 458-459, 109 S.Ct. 2994 (opinion of Blackmun, J.).

Plains Commerce, 554 U.S. at 333. Justice Roberts explains that the rationale for the first exception to *Montana* is rooted in the tribe's power to exclude persons from tribal land:

> The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The tribe's "traditional and undisputed power to exclude persons" from tribal land, *Duro*, 495

> U.S., at 696, 110 S.Ct. 2053, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. *See Bourland, supra*, at 691, n. 11, 113 S.Ct. 2309 ("Regulatory authority goes hand in hand with the power to exclude").

Id. at 335. Thus, the Tribes' argued interpretation of the first exception to *Montana* is contrary to Supreme Court (and Ninth Circuit) precedent, as carefully explained by Chief Justice Roberts in *Plains Commerce*.

III. EACH OF THE TRIBES' THREE ALLEGED BASES FOR JURISDICTION FAILS TO ESTABLISH FIRST *MONTANA* JURISDICTION.

A. The 1997 Buttelman Letter Does Not Establish a Consensual Relationship under the First *Montana* Exception.

Turning now to the specific acts that the Tribes allege establish the first exception to *Montana*, none meet the test. First, the Tribes claim that the 1997 Buttelman Letter established a "consensual relationship" under the first *Montana* exception. It did not. In 1997, FMC's process water management ponds were nearing full capacity and FMC could not operate the Plant without constructing new ponds.[6] FMC attempted to avoid a dispute with the Tribes by submitting a building permit application to the Tribes for the new ponds, in which FMC *expressly stated:*

> In submitting this application, FMC reserves its position with respect to jurisdiction over the activities of non-Indians on fee land within the boundaries of an Indian reservation, as previously expressed in the settlement of the NOSAP litigation last year. Specifically, by submitting this application, FMC does not consent to the jurisdiction of the tribes over zoning or waste regulation matters, nor does it intend to create a "consensual relationship."[7]

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[6] *See* 001471-78.

[7] *See* 001627 and 001402.

The Tribes refused to accept FMC's building permit application unless FMC provided consent to the Tribes' jurisdiction. SOF 35-36.[8]

Jurisdictional disputes between the Tribes and FMC had been ongoing for many years. In prior disputes, the Tribes had filed a lawsuit in tribal court and arranged for the tribal court to issue a temporary restraining order against FMC[9] and the Tribes had attempted to force a shutdown of the Plant by blocking access to the Plant at the railroad line, public intersections and interstate highways. *See* 001605. FMC knew that if it built the new ponds without reaching an accommodation with the Tribes, the Tribes would apply the same coercive tactics as they had before.

In order to resolve the dispute, FMC sent an August 11, 1997 letter to the Tribes (the "1997 Buttelman Letter") offering to consent to "the zoning and permitting requirements ***as specified in the current Fort Hall Land Use Operative Policy Guidelines***," which required only: (a) submission of building and special use permit applications, and (b) payment of a $10 permit application fee.[10] Less than two weeks later, the Tribes advised FMC that they had adopted Amended Guidelines that would impose new, more onerous requirements, including a fee that would amount to $180 million per year.[11] On September 11, the Tribes informed FMC that

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[8] References herein to the FMC Corporation Statement of Facts are set forth as "SOF," followed by the paragraph numbers containing the supporting facts and record citations.

[9] In November 1995, the Tribes filed suit in tribal court alleging that FMC had failed to obtain a permit from the Tribes to construct a nonhazardous waste landfill. The tribal court promptly issued a temporary restraining order prohibiting FMC's use of the landfill. SOF 31. FMC and the Tribes settled the lawsuit (the NOSAP Litigation) with the express provision that, in doing so, FMC was not consenting to tribal jurisdiction. *Id.*

[10] *See* 001470.

[11] *See* 001608.

building permits for the ponds were granted, but that the use permit was not approved.[12] By adopting new Guidelines and refusing to grant the use permit, the Tribes rejected FMC's offer to consent to the Operative Policy Guidelines *current as of the date of the Buttelman Letter*.

The 1997 Buttelman Letter does not establish a consensual relationship under the first *Montana* exception because FMC's activity (building the ponds) was done on FMC's fee land – not tribal land – and because the 1997 Buttelman Letter was given to resolve a dispute with the Tribes over their threatened exercise of governmental powers. Moreover, any "consent" evidenced by the 1997 Buttelman Letter is limited to submitting a building permit application and paying a $10 fee, both of which occurred 20 years ago.

B. The 1998 Letters Do Not Establish a Consensual Relationship under the First *Montana* Exception.

In 1998, FMC, the EPA and the Department of Justice ("DOJ") were engaged in settlement negotiations that culminated in the RCRA Consent Decree. The Tribes attended the negotiation sessions in Seattle.[13] FMC and the Tribes had not resolved the dispute over the Tribes' threatened enforcement of a use permit fee for FMC's new ponds, which were necessary to continue to operate the Plant. While the negotiations with the EPA and DOJ were ongoing, the Tribes advised FMC that they had adopted the Chapter V Amendments, which included a fee schedule that would result in an annual fee for FMC's Plant of more $100 million.[14] The Tribes asserted that they could enforce these regulations against FMC.

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[12] *See* 002167-78.

[13] The Tribes were invited to attend in recognition of the United States' trust responsibilities to Indian tribes.

[14] *See* 002610.

FMC's choices were to: (a) shut down the Plant; (b) contest the Tribes' jurisdiction in both the tribal courts and the federal court for several years at significant cost; or (c) attempt to negotiate a lower annual fee with the Tribes. Once again, FMC knew that if it continued to operate the Plant without reaching an accommodation with the Tribes, the Tribes would attempt to force a shutdown of the Plant by blocking access, by filing a lawsuit in tribal court, and by arranging for the tribal court to issue an order prohibiting use of the new ponds. Moreover, because the Tribes made their $100 million permit fee demand during the RCRA Consent Decree negotiations between FMC, EPA and DOJ, FMC was justifiably concerned that an unresolved dispute between FMC and the Tribes would jeopardize the likelihood of successfully completing FMC's consent decree negotiations with the United States.[15] Completion of the RCRA Consent Decree negotiations and resolution of the dispute with the Tribes was of such great importance that FMC's negotiating team was led Paul McGrath, FMC's Senior Vice President and General Counsel.[16]

All the foregoing factors caused McGrath to select the only rational choice for resolving FMC's dispute with the Tribes – to negotiate a lower fee. Negotiations between McGrath and the Tribes' attorney, Jeanette Wolfley, resulted in a resolution whereby FMC would pay a fee of $1.5 million per year, plus a $1 million startup grant in lieu of the fee schedule in the Chapter V Amendments. McGrath confirmed the resolution in letters to Wolfley dated May 26 and June 2, 1998 (the "1998 Letters"). SOF 38-40. In return, the Tribes confirmed that they would enact a Hazardous Waste Act to expressly include FMC's fixed fee so it could not be increased or

[15] *See* 002110.

[16] *Id*.

changed in the future.[17] *See* FMC's Memorandum in Support of Motion to Deny Tribes Jurisdiction under First *Montana* Exception ("FMC's Opening Brief") at 23-35.

FMC's resolution of the Tribes' threatened exercise of their governmental powers to enforce the Tribes' use permit fee requirements is not a "consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" under Supreme Court and Ninth Circuit precedent.

- FMC did not voluntarily enter into a contract or agreement with the Tribes to operate a revenue generating business on ***tribal land*** within the reservation, as is the case in all the federal court "commercial" cases. No portion of FMC's Plant is located on ***tribal land*** where the Tribes have the power to limit or exclude access from tribal land, as federal courts have done in relation to "trust land" where the court's decision under the first *Montana* exception is based on the tribe's inherent power to exclude or control access to tribal land.

- This is not a "waiver" case where FMC voluntarily entered tribal courts to bring claims against tribal members arising out of conduct that had occurred on ***tribal land.***

- No federal court has ever held, or even suggested, that resolution of a dispute with a tribe in response to the tribe's threatened exercise of its governmental powers could establish the first *Montana* exception.

Moreover, the 1998 Letters, which the Tribes cite as the primary basis for jurisdiction, do not include any language by which FMC consents to tribal jurisdiction. SOF 44. Notably, in 2005 when the Tribes filed a motion for clarification of the RCRA Consent Decree and argued that they had jurisdiction to enforce tribal permitting requirements, FMC promptly responded

[17] May 19, 1998 Letter from Land Use Policy Commission (Tribes) to P. McGrath, R. Fields (FMC): "As we explained during our meeting, the Chapter V Amendments to the Operative Guidelines is [sic] only temporary for this year. Accordingly, within the year, the Hazardous Waste Program will be drafting a Hazardous Waste Act that will include either specific classes or exemptions to insure that FMC's fixed fee of $1.5 million remains the same in the future. As part of the process, the FMC Corporation can participate in the public hearing and comment period." 002110.

that the Tribes did not have jurisdiction over FMC under the RCRA Consent Decree and FMC had never consented to the Tribes' jurisdiction:

> The FMC plant property is not owned by the United States for the benefit of the Tribes or any of their members, is not owned in fee by the Tribes or any of their members, and is not leased by the United States to the Tribes. FMC has never granted the Tribes the right to occupy any of the FMC plant property, nor has FMC granted the Tribes any right to exclude others from those lands. The Consent Decree does not include a requirement that FMC obtain any specific Tribal permits for Consent Decree Work. *FMC has voluntarily sought Tribal permits for certain activities and entered into various settlement agreements with the Tribes. But in each case, FMC has expressly reserved its right to contest Tribal jurisdiction over FMC's activities at the FMC Property.*[18]

In *Plains Commerce*, Justice Roberts relied on the nonmember's prompt denial of consent to jurisdiction, along with other factors, in holding that the tribes did not have jurisdiction under the first *Montana* exception. *Plains Commerce*, 554 U.S. at 341.

C. The RCRA Consent Decree Does Not Establish Tribal Jurisdiction.

The Tribes claim that "FMC reaffirmed the 1998 Agreement in the Consent Decree it entered with the United States"; that the "Consent Decree also established a consensual relationship that supports tribal jurisdiction"; and that FMC "relied on the 1998 Agreement in its brief to the Ninth Circuit seeking affirmance of this Court's approval of the Consent Decree." Tribes Opening First *Montana* Brief at 18.

This Court's March 6, 2006 Memorandum Decision and Order[19] ("March 2006 Decision") held that "[t]he [RCRA] Consent Decree is another example" of a consensual

[18] *See* 001577 at 001590.

[19] *See* 002530-47.

agreement, because "the Tribes are an ***intended beneficiary*** of that Decree," 002544-45 (emphasis added), and that the first exception to *Montana* is satisfied by the 1997 Buttelman Letter and 1998 Letters. But on appeal the Ninth Circuit held that the Tribes were not a party to, or an intended beneficiary of, the RCRA Consent Decree and, therefore, the Tribes had no right to enforce the Decree. *United States v. FMC Corp.*, 531 F.3d 813, 824 (9th Cir. 2008). The Ninth Circuit vacated the March 2006 Decision in its entirety, and remanded the case with instructions to dismiss the action.[20] *Id.* at 824. Essentially, the Tribes ask this Court to flaunt the Ninth Circuit's decision and again give the Tribes rights under the RCRA Consent Decree that the Ninth Circuit has ruled the Tribes do not have.

The Ninth Circuit's decision and vacation of the March 2006 Decision eliminates the RCRA Consent Decree as a basis for a finding of tribal jurisdiction. Since the RCRA Consent Decree cannot be enforced by the Tribes, it cannot be the basis for a finding that FMC "enter[ed into a] ***consensual*** relationship" with the Tribes. *Montana*, 450 U.S. at 565 (emphasis added).

IV. THE TRIBES' OTHER ARGUMENTS ALSO FAIL TO PROVE TRIBAL JURISDICTION.

A. There Is No "Bait and Switch" Consent Jurisdiction.

The Supreme Court and the Ninth Circuit require a direct subject matter and temporal nexus between the alleged "consensual relationship" and the regulation the tribe seeks to enforce. *Atkinson*, 532 U.S. at 656 ("[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'"); *Big Horn*,

[20] SOF 88-90.

219 F.3d at 951; *FMC*, 905 F.2d at 1315 ("at some point the commercial relationship becomes so attenuated or stale that *Montana*'s consensual relationship requirement would not be met").

The 1997 Buttelman Letter stated that FMC would consent to tribal jurisdiction under the Operative Policy Guidelines current as of August 11, 1997. Even if the 1997 Buttelman Letter could be deemed a consent to jurisdiction under the first *Montana* exception (which it cannot for the reasons stated above), submission of a building permit application and payment of a $10 permit fee, under Operative Policy Guidelines that were in effect in August 1997, would not meet either the subject matter nor temporal nexus test to establish tribal jurisdiction to require FMC to pay $1.5 million per year in perpetuity under a later ordinance, the Chapter V Amendments,[21] that the Tribes adopted in April 1998 – many months after the August 1997 Buttelman Letter.

The 1998 Letters resolved the dispute over the Tribes' threatened enforcement of the Chapter V Amendments. Section V-9-2 of the April 1998 Chapter V Amendments specifically provides for payment of "Disposal Fees," and the Amendments include a fee schedule that applies to the volume of wastes *generated and disposed* each year. *See* FMC's First *Montana* Opening Brief at 29-30. The Amendments define "storage" as "temporary placement of waste not constituting disposal." Thus, FMC's permanent placement of wastes on its fee land is "disposal," not "storage," as those terms are defined by the Chapter V Amendments. When FMC shut down the Plant, it ceased disposal of wastes subject to the Chapter V Amendments. McGrath's June 2, 1998 Letter expressly states FMC's understanding that the $1.5 million permit fee "***covers the plant***." *Id.* at 28-29. Even if the 1998 Letters consented to tribal

[21] SOF 39.

jurisdiction (which they did not for the reasons stated above), FMC's consent was limited to paying the fee during the time the Plant operated, generated, and disposed of wastes.

The Tribes attempt to get around the fact that the Chapter V Amendments apply to "disposal," and not to the "storage," by claiming that FMC's permit fee is required by the Tribes' 2001 Hazardous Waste Management Act (the "HWMA"). The 2001 Hazardous Waste Management Act was proposed by the Tribes as a new standalone ordinance, separate from the Chapter V Amendments that were part of the Land Use Policy Guidelines. Section 409 of the draft 2001 HWMA set a hazardous and nonhazardous fee that applied to "a disposal site *or storage* within the exterior boundaries of the Fort Hall Reservation" that would be calculated based on the "estimated weight of hazardous or nonhazardous waste at the disposal or storage site."[22] But the 1998 Letters cannot be read to consent to jurisdiction under the HWMA, which was not proposed by the Tribes until three years later.

The Tribes also claim jurisdiction under the 2005 Waste Management Act (the "WMA"). The Tribes did obtain BIA approval of the 2005 Waste Management Act, as is required by the Tribes' Constitution. 262125. Like the HWMA, the WMA provides in general terms for waste fees to be charged for both storage[23] and disposal. But the WMA merely authorizes the Tribes' Waste Management Department to promulgate regulations specifying the applicable fees. The Tribes have never promulgated any such regulations. Again, the 1998 Letters cannot establish FMC's consent to tribal regulations that were not even proposed until seven years after McGrath's letters were provided to the Tribes.

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[22] The fees set were $5.00/ton for hazardous waste and $1.00/ton for nonhazardous waste.

[23] Storage is defined as *the temporary placement* of waste at a site.

The first *Montana* exception does not include a "bait and switch" function whereby consent to one tribal ordinance establishes consent to any ordinance of any nature that the tribe later chooses to adopt. The first *Montana* exception cases require a direct subject matter and temporal nexus, and they prohibit an application of the exception that "would swallow the rule." *Plains Commerce*, 554 U.S. at 330; *Atkinson*, 532 U.S. at 655; *Strate v. A-1 Contractors*, 520 U.S. at 458. There is no basis for the Tribes to allege that jurisdiction can be based on a "bait and switch" whereby they require acceptance of jurisdiction under one limited ordinance, and then substitute that ordinance for different ordinances with different fees.

B. The Tribes' Passage of Waste Ordinances Does Not Confer Jurisdiction Over FMC.

The Tribes argue that their passage of the tribal ordinances, including the 1998 Chapter V Amendments, the 2001 HWMA and 2005 WMA, creates tribal jurisdiction over FMC. Tribes' Opening First *Montana* Brief at 12-13. The Tribes argue that "even assuming the absence of FMC's contractual permit fee obligation under the 1998 Agreement, applicable tribal laws provide separate and independent authority for the LUPC to set the FMC permit fee at $1.5 million per year." *Id.* The Tribes' argument is consistent with the Tribe's Law and Order Code, which asserts jurisdiction over any person within the Reservation boundaries. SOF n.2.

The Tribes' argument that they have jurisdiction over FMC simply because FMC owns land within the Reservation and the Tribes have passed ordinances regulating waste management is directly contrary to *Montana*'s general rule that Indian tribes do not have jurisdiction, either legislative or adjudicative, over nonmember conduct taking place on an Indian reservation, especially on nonmember fee land. *Montana*, 450 U.S. at 565-66; *Brendale*, 492 U.S. at 430;

Strate, 520 U.S. at 445-56; *Plains Commerce*, 554 U.S. at 328. Absent proof of an exception to *Montana*'s rule, the Tribes' argument fails.

C. The Tribes Have the Burden of Proving Consent, and FMC Does Not Have to Prove Coercion.

The Tribes argue that they have jurisdiction over FMC under the first *Montana* exception because FMC's resolution of the 1998 dispute regarding the Tribes' threatened enforcement of their special use permit requirement was not the result of "coercion" by the Tribes. Tribes Opening First *Montana* Brief at 5. In support of their argument, the Tribes cite cases holding that "settlement with a government agency that may otherwise exert its regulatory authority or governmental power is not coercion." *Id.* at 16-18. Once again, the Tribes' argument misses the point.

First, FMC does not have the burden of proving that its decision to resolve the dispute with the Tribes over their threatened enforcement of a tribal ordinance was the result of "coercion." Instead, it is the Tribes' burden to establish jurisdiction under the first *Montana* exception, which requires that the Tribes prove a "consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. It is the Tribes' burden to prove consent. It is not FMC's burden to prove coercion.

As set forth above, the Tribes cannot cite any first *Montana* exception case in which a tribe has established jurisdiction to regulate nonmember conduct on fee land in an "open area" of the reservation. Nor can the Tribes cite any case in which the first *Montana* exception has been applied to the resolution of a tribe's threatened exercise of its governmental powers. Nor can the Tribes cite any first *Montana* exception case that requires the nonmember to prove that it was coerced into resolving a dispute with the Tribes.

Even if first *Montana* jurisdiction could be established on fee-owned land, the Tribes would still need to prove that the nonmember entered into a consensual relationship with the Tribes. That "consensual relationship" simply cannot be proven when the relationship began with the Tribes' assertion of their governmental power, and with threats of enforcement using governmental power. The Tribes have no means of proving consent in these circumstances.

Second, the Tribes argue that threats by a government to take lawful action against a wrongdoer cannot be considered coercion:

> If the government *threatens to take lawful action* against a party, either by threatening enforcement of the law, *Trans-Sterling*, 804 F.2d at 529; *see United States v. Contents of Bank of Am.*, 452 F. App'x 881, 882-83 (11th Cir. 2011) (per curiam) (applying Florida law to find the threat of criminal prosecution does not constitute duress and will not justify rescission of a settlement agreement), or *threatening to take some other action that it has the authority to take*, *Hisel v. Upchurch*, 797 F. Supp. 1509, 1527 (D. Ariz. 1992), then it is not threatening to do anything wrongful or unlawful, and the agreement made with the private party *to avoid the lawful action* is not coercive.

Tribes' Opening First *Montana* Brief at 16 (emphasis added).

In this case, the Tribes must first have established jurisdiction over FMC under federal law before the Tribes would have the *lawful right* to enforce their special use permit fee requirement. But in this case there was not even a claim of jurisdiction until after the Tribes began threatening jurisdiction that they did not have. Thus, even if the issue of "coercion" was relevant to establishing the first *Montana* exception (which it is not), none of the state law cases cited by the Tribes would be relevant to the issue.

D. Judicial Estoppel Does Not Require that this Court Grant Jurisdiction to the Tribes.

The Tribes claim the FMC is "judicially estopped" from arguing that the Tribes do not have the right to impose the permit fee because:

> in seeking to have the Ninth Circuit affirm this Court's Order approving the Consent Decree, *see United States v. FMC Corp.*, . . . FMC represented to the Circuit that . . . FMC obtained a building and special use permit for both ponds from the Tribal Land Use Policy Commissioners, subject to payment of a $1 million startup fee and a $1.5 million annual permit fee . . . . It is difficult to understand how the Tribes can ask this Court to overturn the District Court's entry of the Consent Decree based on the fact that the Decree permits the operation of ponds that the Tribes have permitted and for which the Tribes have and will receive millions of dollars in use fees.

Tribes' Opening First *Montana* Brief at 22-23.

"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50 (citation and internal quotation marks omitted). Although judicial estoppel is "probably not reducible to any general formulation of principle . . . several factors typically inform the decision whether to apply the doctrine in a particular case." *Id.* at 750 (citations and internal quotation marks omitted). "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation marks omitted). "A third consideration is whether the party seeking to

assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751.

The Tribes' judicial estoppel argument fails for the simple reason that the Ninth Circuit's decision approving this Court's entry of the Consent Decree was based on its rejection of the Tribes' arguments opposing entry of the Consent Decree, not on anything FMC did or said. The Ninth Circuit based its opinion on EPA's assertion of RCRA claims and it expressly held that EPA had satisfied its "general trust duty to the Tribes." *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161, 1162 (2000).

Moreover, FMC's argument that operation of the ponds is not reason for the Ninth Circuit to disapprove entry of the Consent Decree is consistent – not inconsistent – with the Ninth Circuit's decision:

> 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. See 40 C.F.R. § 265.228. The Tribes presented no evidence that the ponds must be closed under 40 C.F.R. § 265.312, which applies to landfills, rather than under § 265.228, which applies to surface impoundments. RCRA's Land Disposal Restrictions requiring treatment of the waste do not go into effect for FMC's plant until May 26, 2002, if FMC satisfies the requirements for a two-year extension. 40 C.F.R. § 268.5. Furthermore, the Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment.

Id.

E. This Court and the Ninth Circuit Have Held that the Tribes Do Not Have Authority to Impose Environmental Requirements on FMC.

The Tribes request this Court to grant them jurisdiction to regulate FMC's conduct on fee land within the boundaries of the Reservation by requiring FMC to pay an annual permit fee of $1.5 million in perpetuity, which the Tribes contend is due under various tribal hazardous waste ordinances and on the grounds that FMC entered into a consensual relationship under the first *Montana* exception. Further, the Tribes ask this Court to grant them jurisdiction under the second *Montana* exception to regulate FMC's conduct in performing the environmental cleanup of FMC's fee land. In addition to the other reasons stated in FMC's memoranda opposing the Tribes' requests under the first and second *Montana* exceptions, this Court should deny the Tribes' requests because they have already been determined by this Court and the Ninth Circuit that the Tribes do not have authority to override the EPA's determination of the appropriate remedy for the FMC site.

In response to the Tribes' objection to entry of the RCRA Consent Decree between the United States and FMC, this Court held:

> A principle flaw in the Tribes' opposition [to the Consent Decree] 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*.

United States v. FMC, Order, dated July 13, 1999, 000716 at 000717 (emphasis added). Affirming this Court's Order, the Ninth Circuit held:

> The Tribes argue that the United States violated its trust duty to the Tribes. We disagree.
>
> We have held that "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been

> placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). RCRA is not aimed specifically at protecting Indian tribes, see *State of Washington, Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir.1985) ("RCRA does not directly address the problem of how to implement a hazardous waste management program on Indian reservations."), and thus the United States does not have a specific trust duty to enforce RCRA on fee land within the Tribes' reservation.
>
> Moreover, the record discloses a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC. The United States therefore satisfied its general trust duty to the Tribes. *See Morongo Band of Mission Indians*, 161 F.3d at 574.

United States v. Shoshone-Bannock Tribes, 229 F.3d at 1161.

As with the RCRA, the United States does not have a specific trust duty to enforce CERCLA on fee land within the Tribes' Reservation. Thus, granting the Tribes jurisdiction to regulate FMC's performance of environmental cleanup of its fee lands under the second *Montana* exception would directly conflict with this Court's and the Ninth Circuit's holdings that the United States (EPA) has exclusive jurisdiction to determine and enforce cleanup requirements on FMC's fee land, subject only to the United States' trust responsibilities to the Tribes.

The Tribes' contention that the first *Montana* exception permits the Tribes to impose a hazardous waste permit fee on FMC fails for similar reasons. First, the Supreme Court's decisions cited above establish that tribes do not have jurisdiction over the conduct of nonmembers unless Congress has expressly delegated such jurisdiction to the tribes, or one of the limited *Montana* exceptions applies. Here, Congress has ***not delegated*** jurisdiction over environmental cleanup requirements to the Tribes; in fact, Congress has gone one step further by expressly delegating that jurisdiction to EPA. To apply the first *Montana* exception in this case

would go against all the Supreme Court precedent that defines the first exception and establishes the criteria for its application. Moreover, it would be directly in conflict with Congress' delegation of jurisdiction to the EPA, which has been affirmed by the prior decisions of this Court and the Ninth Circuit that directly apply to the relationship between the United States, the Tribes and FMC.

V. CONCLUSION

The Tribes ask this Court to roll back over 200 years of Supreme Court and Ninth Circuit jurisprudence and find that FMC's 1998 Letters establish a "consensual relationship" between the Tribes and FMC under the first *Montana* exception. The Tribes' request must fail.

- The Supreme Court, the Ninth Circuit and other federal courts have limited the first *Montana* exception to cases in which a nonmember (a) voluntarily entered into a commercial contract with the tribe to operate a revenue generating business on the tribal land; or (b) a nonmember voluntarily entered the reservation to conduct a commercial activity on tribal land; or (c) a nonmember voluntarily entered the tribal courts for the purpose of litigating claims against a tribal member that arose out of conduct that occurred on tribal land.

- The Supreme Court, the Ninth Circuit and other federal courts have, without exception, refused to apply the first *Montana* exception in cases where the nonmember conduct occurs on fee land owned by the nonmember or on land over which the Tribes have given up some measure of control.

- No federal court has ever applied, or even suggested that, the first *Montana* exception could be established by a nonmember's agreement to resolve a dispute with a tribe involving the tribe's threatened exercise of its governmental powers.

- There has been no Congressional delegation of authority to the Tribes to enforce the environmental requirements imposed on FMC's fee land within the Reservation. To the contrary, Congress has delegated to EPA sole authority to determine and enforce the environmental requirements applicable to FMC's fee land, limited only by EPA's proper discharge of the United States' trust responsibility to the Tribes. Granting the Tribes jurisdiction to regulate FMC's payment of permit fees under tribal hazardous waste ordinances or FMC's performance of environmental requirements on its fee land would set up a conflict

between the Tribes and FMC and be contrary to the Supreme Court's fundamental recognition that dual tribal/state or tribal/federal jurisdiction is unworkable.

DATED this 27th day of February, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of February, 2017, I filed the foregoing **MEMORANDUM OF FMC CORPORATION IN RESPONSE TO THE MEMORANDUM IN SUPPORT OF TRIBAL JURISDICTION OVER FMC UNDER THE FIRST 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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