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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-BLW

MEMORANDUM OF FMC CORPORATION IN RESPONSE TO MEMORANDUM IN SUPPORT OF RECOGNITION OF JURISDICTION UNDER THE SECOND EXCEPTION TO *MONTANA*

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The attempt by the Shoshone-Bannock Tribes ("Tribes") to establish jurisdiction over FMC Corporation ("FMC") under the second exception provided in *Montana v. United States*, 450 U.S. 544, 566 (1981), collapses under the weight of a cascade of failures. ***First***, the Tribes cannot show how the required payment of money under the Judgment[1] will do anything to avert any harm to the Tribes. **Second**, the Tribes cannot justify the non-zero risk standard advocated by the Tribal Court of Appeals ("Appellate Court"), nor can this Court enforce the Judgment based on that legally erroneous standard. ***Third***, the Tribes' facts about any threat to tribal health and welfare are limited to general evidence or "generalized concerns" that certain substances at the FMC Site are hazardous, without any specific evidence that such substances will be released, or transported off-site, or result in any exposure or harm to any individual. ***Fourth***, the Tribes cannot prove that the Environmental Protection Agency ("EPA") will not adequately discharge its responsibility at this site to protect human health and the environment. ***Fifth***, the Tribes cannot establish how anything FMC has done is likely to do any harm whatsoever to tribal self-government or to internal relations within the Tribes. Tribal jurisdiction under the second *Montana* exception is simply not available in this case; the Judgment cannot be enforced.

I. THE COURT MUST DECIDE THE FEDERAL QUESTION OF TRIBAL JURISDICTION ON A *DE NOVO* BASIS.

Upon review of an exhausted tribal court decision, federal legal questions should be reviewed *de novo*. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). Tribal courts "ordinarily have the first opportunity to determine the extent of their own jurisdiction," *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), and federal

[1] Judgment and Order for Attorneys' Fees and Costs, dated May 16, 2014, 008555.

courts show "some deference to a tribal court's determination of its own jurisdiction." *FMC*, 905 F.2d at 1313. However, "the quintessentially federal character of Native American law," requires that "the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States" must "be founded on federal law." *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997). In this case, the Appellate Court's opinion is based entirely on the legally erroneous conclusion that any non-zero risk, or even the perception of a non-zero risk, is enough for a tribe to establish jurisdiction under the second *Montana* exception.

To establish jurisdiction over FMC's conduct on its fee owned land under the second *Montana* exception, the Tribes have the burden to prove that FMC's conduct "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 Montana standard requires evidence that the "subsistence or welfare" of "the tribe" as a whole has been "imperil[ed]." *Id.*

As explained previously by FMC, the Appellate Court ignored the Supreme Court and Ninth Circuit case law that defines the standard for establishing the second *Montana* exception. Instead, the Appellate Court focused on the word "threatens," and wrongly defined a "threat" to include any non-zero risk, or even the mere "perception" of such a risk. Applying that erroneous definition of a "threat," the Appellate Court found that the mere presence of hazardous substances on FMC's fee land is sufficient to establish the second *Montana* exception, even though – in the 68 years that those hazardous substances have been present on FMC's fee land – there is no evidence that hazardous substances have migrated off FMC's land and had any impact on the Tribal community, never mind an impact that imperils the very subsistence of that community. Moreover, the Appellate Court refused to accept that Congress has delegated

jurisdiction to regulate FMC's conduct to the EPA and that EPA has formally determined the environmental cleanup requirements that it imposed on FMC under RCRA and CERCLA are "protective of human health and the environment," including tribal health and the environment.[2]

The non-zero risk legal standard is wrong, as demonstrated by any number of cases, including *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013), in which the Ninth Circuit previously instructed these Tribes that conduct challenged under the second *Montana* exception "must be so severe as to 'fairly be called catastrophic for tribal self-government.'" 736 F.3d at 1306. No deference is owed to the Appellate Court's determinations of a "threat" under this legally erroneous non-zero risk standard because they are not factual findings, but rather conclusory legal determinations under a deeply flawed interpretation of the federal case law regarding tribal jurisdiction under the second *Montana* exception. The word "threat" is like other legally significant words that reflect legal conclusions, rather than factual findings. The federal courts routinely hold that conclusions that may appear to be factual are subject to *de novo* review as legal determinations.[3]

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[2] EPA stated that the CERCLA interim cleanup action "will be protective of human health and the environment, comply with federal and state/tribal requirements that are applicable or relevant and appropriate . . . ." IRODA at 328999. The RCRA Consent Decree and EPA's Unilateral Administrative Orders regarding actions to remove and treat phosphine gas the RCRA Ponds required that cleanup action necessary to "ensure protection of human health and the environment." *See, e.g.* June 14, 2010 Unilateral Administrative Order, 318153, at 318172.

[3] This includes determinations such as **probable cause**, *Ornelas v. United States*, 517 U.S. 690, 699 (1996); **reasonable suspicion**, *id.*; *United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999); **actual malice**, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)**; exigent circumstances**, *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000); **whether a person was in custody**, *United States v. Female Juvenile (Wendy G.)*, 255 F.3d 761, 765 (9th Cir. 2001); **waiver of marital privilege**; *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003); **breach of ERISA fiduciary duties**, *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004); **waiver of right to counsel,** *United States v. Hantzis*, 625

By erroneously defining the legal standard to be any "non-zero risk," the Appellate Court provided no assistance to this Court. The Appellate Court's determinations that the facts of this case meet that standard are meaningless, because the standard itself means literally next to nothing. By using this non-zero risk standard, the Appellate Court avoided any actual examination of the level of risk arising from FMC's operations on its fee-owned land. Because the Appellate Court erred so significantly in the legal standard for second *Montana* jurisdiction, any factual determinations relative to that standard are meaningless. As a result, there is nothing in the Appellate Court's decision for this Court to provide any deference to. Rather, this Court should only decide *de novo* the legal question of whether the Appellate Court's legal standard was correct.

II. THE TRIBES CANNOT PROVE CONDUCT THAT "IMPERILS THE SUBSISTENCE OF THE TRIBAL COMMUNITY" OR THAT POSES "CATASTROPHIC RISKS."

The Tribes have a high threshold to meet their burden to proof to establish the second *Montana* exception. The general rule is that Indian tribes do not have jurisdiction over non-member conduct taking place on a reservation. *Montana*, 450 U.S. 544. This 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 at 1302-03. Under the second *Montana* exception, tribes may have jurisdiction over conduct on fee owned land "when that conduct threatens or has some direct effect on the political integrity, the

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F.3d 575, 579 (9th Cir. 2010); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); **ineffective assistance of counsel**, *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011); **fair use**, *Kelly v. Arriba Soft Corp*., 336 F.3d 811, 817 (9th Cir. 2003); and **obscenity**, *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

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 *Montana* standard requires evidence that the "subsistence or welfare" of "the tribe" as a whole has been "imperil[ed]." *Id.*

Because of the general rule, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). This second exception is "limited" and is to be applied in a manner so that the exception does not "swallow the rule." *Atkinson*, 532 U.S. at 655; *Strate v. A-1 Contractors*, 520 U.S. 438, 457-58 (1997); *Plains Commerce*, 554 U.S. at 330.

"*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 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). It is available only if the non-member's "'conduct' ***menaces*** the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* "[T]he challenged conduct must be so severe as to 'fairly be called ***catastrophic*** for tribal self-government'" *Evans*, 736 F.2d at 1306. And proof of the second *Montana* exception cannot be based on "***generalized concerns***" or be "***speculative***." *Id.*

It is understandable why the Tribes would seek to lower these standards. Tr. Br. 6, nn.6, 7. The Tribes argue that "a catastrophe is not required for the exception to apply." Tr. Br. 5. But the Tribes cannot avoid the fact that the United States Supreme Court has ruled in *Plains Commerce* that the second *Montana* exception requires conduct that can "fairly be called ***'catastrophic'*** for tribal self-government." 554 U.S. at 341 (emphasis added). The Ninth Circuit

has instructed these Tribes specifically that they must prove that the nonmember conduct "poses ***catastrophic*** risks." *Evans*, 736 F.3d at 1306 (emphasis added).

Like the Appellate Court, the Tribes argue that the word "threaten" used by the Supreme Court in *Montana* somehow widens the exception sufficiently to "swallow the rule." Tr. Br. 5. *Atkinson*, 532 U.S. at 655. But the word "threaten" has been in the *Montana* standard since *Montana* was decided, and no such rule-swallowing exception has been allowed. Instead, the term "threaten" has been defined narrowly as explained above.

The Tribes also cite *Montana v. United States E.P.A.*, 137 F.3d 1135 (9th Cir. 1998), and seem to imply that the second *Montana* standard is somehow different in relation to rivers and waters. That is not the case. In that case, the Ninth Circuit allowed the EPA to treat the tribes as states under Clean Water Act Section 518 (33 U.S.C. § 1377) to facilitate tribal participation in certain, specifically-identified statutory programs, such as setting water quality standards impacting their reservation. 137 F.3d at 1138. However, this status did not confer enforcement authority on the tribe. It only allowed the tribe to set standards that would be subject to EPA review and approval. Even if the tribes applied for enforcement authority, the permits would still be issued by the EPA and "enforced in federal, not tribal, courts." 137 F.3d at 1142.[4]

[4] It is also unclear how much of the 1998 decision in *Montana v. EPA* remains valid, after the Supreme Court's 2008 decision in *Plains Commerce*, the Ninth Circuit's 2013 application of the *Plains Commerce* standard in *Evans*, and EPA's 2016 reinterpretation of the jurisdictional analysis. In 1998 in *Montana v. EPA*, the Ninth Circuit seemed to state that "generalized findings" on the relationship between water quality and human health and welfare were sufficient and that the impact on health and welfare need only be "serious and substantial." The Supreme Court later held that the second *Montana* exception requires proof that tribal regulation must be "*necessary to avert catastrophic consequences*." *Plains Commerce*, 554 U.S. at 341 (emphasis added). Following *Plains Commerce*, the Ninth Circuit held that the conduct the tribes seek to regulate "must be so severe as to 'fairly be called *catastrophic* for tribal self-government;'" and that proof of the second *Montana* exception cannot be based on "*generalized*

The Tribes' discussion of the second *Montana* standard relies on the same misinterpretation of *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) that was attempted by the Appellate Court. As explained further below, the Ninth Circuit has explained that *Brendale* can be the basis for tribal authority only if (1) there is an arguable similarity between the area in question and the closed portion of the reservation in *Brendale*, and (2) the intended use of the fee land would place the character of the surrounding area in jeopardy. *Evans*, 736 F.3d at 1304. Because neither of these standards are met here, *Brendale* supports FMC's assertion that no tribal authority exists.

III. THE TRIBES FAIL TO SHOW HOW THE PAYMENT OF MONEY UNDER THE PERMIT SERVES IS "NECESSARY TO AVERT CATASTROPHIC CONSEQUENCES" TO THE TRIBES.

The Judgment the Tribes seek to enforce does nothing other than order the payment of money from FMC to the Tribes. 008573. It does not and cannot impose any environmental requirements because this Court and the Ninth Circuit have already decided that EPA, not the Tribes, has the exclusive authority to determine and enforce environmental requirements on FMC's fee land. It does not direct the change of any practice at the FMC Site. The direction to

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concerns" or be "*speculative*." *Evans*, 736 F.2d at 1306. EPA, which has no agency expertise in application of federal Indian common law jurisdiction principles (*Montana v. EPA*, 137 F.3d at 1140), subsequently reinterpreted Section 518 as a Congressional delegation to Indian tribes to regulate surface waters on their entire reservations, subject to eligibility requirements of Section 518. 81 FED. REG. 30,183 (May 16, 2016). In *Montana*, the Supreme Court held that the "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations … cannot survive *without express congressional delegation*." *Montana*, 450 U.S. at 564 (emphasis added). To the extent that *Montana v. EPA* remains valid, it turns on express Congressional delegation of regulatory authority under a federal statute. No such Congressional delegation is present in this case to support of far-reaching tribal authority.

pay cash to the Tribes does not purport to advance any environmental purpose whatsoever. The Judgment also does not impose any limitations on the use of these funds. 008573.

In their brief, the Tribes argue that fees required by the May 1998 Guidelines are to be "deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund" and used "to pay the reasonable and necessary costs of administering the Hazardous Waste Management Program" ("Program"). Tr. Br. 10. The Tribes also argue that waste storage fees collected under the October 2001 Hazardous Waste Management Act ("HWMA") "shall be deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected." Tr. Br. 10. This still does not advance any environmental purpose. ***First***, it is not clear what statutory authority governs the $1.5 million per year that is supposed to be paid under the Judgment. 008573. Without any definition of what statute controls the payments, it is not possible to say that such a statute would direct expenditures to any environmental purpose. ***Second***, there is nothing to require that the Program use the funds to improve the FMC Site. ***Third***, even if what the Program would do with the funds were known, there is no proof that such an activity would provide any environmental protection.

Moreover, FMC has paid the costs incurred by EPA, the State of Idaho, *and the Tribes* for their oversight activities under both CERCLA and RCRA. FMC has paid more than $350,000 in tribal oversight costs. 008021 (Barbara Ritchie). The Tribes' claim that the permit fee monies are necessary to fund the Tribes' participation with EPA and the State in protecting tribal interests is simply untrue.

But, beyond all of these points, the fact is that the Program answers to the Business Council, the entity that is FMC's opposition in this case. As stated by the Program director, "we all answer to the Fort Hall Business Council." 007517 (Testimony of Kelly Wright). Based on

the Tribal Constitution, the Fort Hall Business Council is the only governing body for the Tribes, and promulgates and enforces all of the tribal ordinances, and is responsible for the economic affairs and budget of the Tribes. TRIBAL CONST. art. III, § 1; art. VI, § 1. The Business Council has full power over all appropriations of all of the tribal funds. TRIBAL CONST. art. VI, § 1(f), (g), (h). Any money that comes into the Tribes is controlled by the Business Council. And even if an ordinance limits the use of funds in any way, the Business Council can use its plenary power over ordinances to simply revoke or amend that ordinance. As a result, the Tribes cannot prove that any portion of the amount FMC is ordered to pay would be dedicated to any improvement of any environmental condition relating to the FMC Site.

IV. THE TRIBES FAIL TO DEFEND THE APPELLATE COURT'S *DE MINIMIS* STANDARD FOR *MONTANA'S* SECOND EXCEPTION.

In 2012, after six years of litigation, the Appellate Court found that there was "insufficient evidence" in the administrative record to support the Tribes' exercise of jurisdiction under the second *Montana* exception, writing:

> ***There is insufficient evidence in the Tribal Court record to support the Tribe's exercise of jurisdiction under the second* Montana *exception*** related to conduct that threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe.
>
> Although proof of only one *Montana* exception is required, and although the Trial Court erred by failing to address the criteria discussed therein, ***there is insufficient evidence in the record of this case*** to find that the Tribes may also exercise jurisdiction over FMC pursuant to the second exception stated in *Montana*."

006262, 006276-77 (emphasis added). Even though the issue of the permits had proceeded before four levels of administrative appeals (that is, (1) to the LUPC, (2) to the Business Council, (3) to the Tribal Court, and (4) to the Tribal Court of Appeals), even the Appellate Court had to concede that there was no evidence in the record to support second *Montana* jurisdiction.

That should have ended the administrative appeal. There was no evidence supporting second *Montana* jurisdiction in the administrative record, so no finding could be made on that point. It also was not necessary to address the issue, because the Appellate Court had found jurisdiction under the first *Montana* standard. But, as one of the panel members had stated a few months earlier, tribal "appellate courts have got to step in" and "be sure to protect the tribe." SOF 99. So that is what the panel did. The Appellate Court decided that the "Tribes should have the opportunity to present evidence" that the second *Montana* exception was met. 006262, 006277. Ultimately, the Appellate Court decided that this evidence would be presented to the Appellate Court itself, rather than being considered by the LUPC or any of the other levels of administrative review. 006476.

After giving the Tribes this second chance, the first panel was replaced by a new panel. 006531. The new panel then heard the evidence at the April 2014 hearing. After hearing the evidence of harm and effect, the new panel then issued its decision, in which the panel re-cast the second *Montana* standard to require merely proof of any non-zero risk, or even the perception of a non-zero risk by a tribal member. It can be inferred that the Appellate Court adopted this *de minimis* standard because the evidence presented by the Tribes at the hearing failed to establish the second *Montana* exception under the correct federal legal standard.

A. The Tribes' Position Is Contrary to *Brendale v. Confederated Tribes*.

The Appellate Court erred in its application of *Brendale*, and ignoring the Ninth Circuit direction in *Evans* on this point:

> 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."

Evans, 736 F.3d at 1304. Neither of these requirements are met in this case. The first element cannot be met because the Ninth Circuit previously ruled in *Evans* that the area near the FMC site "does not in any way resemble" the closed area in *Brendale*. 736 F.3d at 1304-05. The second element also cannot be met, because the FMC Site has been used in this way for over half a century, and because it borders the Simplot facility, which also manufactures phosphorus products. Moreover, the area includes an interstate freeway, a state highway, railroad tracks, gas pipelines, power transfer stations, a wastewater treatment plant, and an airport, among other similar uses. SOF 197-198. The work of remediating the FMC Site under EPA direction does not "place the character of the surrounding area 'in jeopardy.'" *Evans*, 736 F.3d at 1304. The Tribes' case fails on the basis of these Ninth Circuit standards alone.

B. The Tribes Lack Any Jurisdiction Over FMC in This Open Area of the Reservation.

The Appellate Court relied on *Brendale* as the source for its *de minimis* legal standard that "a mere possibility 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. But the Appellate Court erred on this point by failing to recognize that *Brendale* involved two separate cases. The Appellate Court wrongly relied on the *Brendale* "closed area" case, which is inapplicable because the FMC Property is not in a "closed area" of the Reservation. The Appellate Court simultaneously ignored the companion *Wilkinson* "open area" case, which established that in open areas, the Tribes simply lack jurisdiction. 736 F.3d at 1305 n.7. In relation to such an open area, the Ninth Circuit explained that"[t]he Supreme Court's rejection of tribal zoning power over fee land in the open area reflects the rule that tribes

generally lack authority to regulate nonmember activity on non-Indian fee land." *Evans*, 736 F.3d at 1305 n.7. The FMC Site is an "open" area under *Brendale* and *Wilkinson*. The tribes in the *Wilkinson* case alleged impacts on groundwater, and impacts on culture, way of life and burial grounds if development was allowed in the open area. *Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 536 n.5 (9th Cir. 1987). As made clear in *Evans*, because this area is an "open" area, the Tribes lack jurisdiction in this area – even though there would be impacts on groundwater, erosion, and interference with culture and way of life.

C. The Tribes Fail to Deal with the Other Requirements Stated in *Evans*.

Evans v. Shoshone-Bannock Tribes, 736 F.3d 1298 (9th Cir. 2013), was an exhaustion case, requiring the Tribes only to prove that jurisdiction was "plausible" because Evans' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Evans*, 736 F.3d at 1305. The Tribes identified a variety of alleged problems flowing from Evans' project, including: (1) groundwater contamination; (2) improper disposal of construction debris; (3) increased risk of fire; (4) degradation of hunting grounds and fisheries, and (5) substandard construction practices. *Id.* at 1306 n.8. This Court concluded that these concerns "plausibly" supported jurisdiction; and therefore Evans was required to exhaust tribal remedies before presenting the jurisdictional issue to the federal courts.

The Ninth Circuit reversed this Court's decision. *Evans*, 736 F.3d at 1305. Beyond the fact that Evans' land was not located in a "closed area" of the Reservation, the Ninth Circuit rejected each of the Tribes' concerns, even under a "plausible" standard:

- Regarding the ***groundwater contamination***, the Ninth Circuit explained that "the Tribes proffer no evidence showing that Evan's construction would ***meaningfully exacerbate*** the problem." *Evans*, 736 F.3d at 1306 (emphasis added).

- Regarding the increased ***risk of fire***, the Ninth Circuit called this a "***generalized concern***" and "***speculative***" because it did not focus on the specifics of the project at issue. *Id.* at 1306 (emphasis added).
- Regarding the ***improper disposal of debris***, the Ninth Circuit called this "speculative" because it did not focus on the specifics. *Id.* at 1306.
- Regarding the ***substandard construction practices***, the Ninth Circuit wrote that the Tribes' concern again was "speculative." *Id.* at 1306 n.8.
- Regarding the ***degradation of hunting grounds and fisheries***, the Ninth Circuit held that the Tribes' concern was "speculative." *Id.* at 1306 n.8.

In this case, FMC has exhausted its tribal remedies. The Tribes therefore cannot meet the burden of proof by a showing that tribal jurisdiction is "plausible." Tribes must actually prove that they have jurisdiction over FMC. Yet, to meet this higher standard, the Tribes again offer generalized concerns and speculations, which were not sufficient even under the "plausible" standard in *Evans*. The Tribes response to *Evans* is that the *Evans* case dealt with a single house, while this case deals with a Superfund site. But the scale of the harm alleged does not change the question whether the allegation is "speculation" or "generalized," or whether tribal regulation is "necessary to avert catastrophe." The standards established by the Ninth Circuit in *Evans* should be applied even more rigorously in this exhausted case.

D. The Tribes Do Not Attempt to Defend the Appellate Court's Non-Zero Risk Standard for *Montana's* Second Exception.

The Appellate Court ruled that even the containment of a source of risk is not enough to prevent second *Montana* jurisdiction. Apr. 15, 2014 Dec. 008225, 008246. The Appellate Court ruled that containing a risk admits the existence of a "threat," saying that "[t]he 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. In their brief, the Tribes do not attempt to defend the Appellate Court's non-zero risk standard.

E. The Tribes Avoid the Requirement of Proof of Harm to the Tribal Community as a Whole.

The Tribes focus only on whether FMC's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." But the Tribes have not offered any evidence to prove the second half of the *Montana / Plains Commerce* standard: that FMC's conduct will "imperil the subsistence of the tribal community" and that tribal power is "necessary to avert catastrophic consequences." *Montana*, 450 U.S. at 566; *Plains Commerce*, 554 U.S. at 341.[5] Nor have the Tribes proven that FMC's conduct "may intrude on the internal relations of the tribe or threaten self-rule; or that FMC's behavior "implicates tribal governance and internal relations." *Plains Commerce,* 554 U.S. at 335. These limitations on tribal jurisdiction arise because "[b]y virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to [1] managing tribal land, [2] 'protect[ing] tribal self government,' and [3] 'control[ling] internal relations.'" *Id.* at 334. The Tribes point to no evidence that their tribal government has been impacted, or that the Tribes are any less able to control the internal relations among the members of the Tribes.

[5] The Supreme Court and the Ninth Circuit have emphasized that the catastrophic impact must be on "the tribal community." Threats to individual members of the tribe are not sufficient. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

F. The Tribes Fail to Provide Any Scientific Approach to Analysis of Risk of Harm.

Like the evidence the Tribes presented to the Appellate Court, the Tribes' brief avoids connecting the source of risk to any actual harm to the Tribes. The Tribes emphasize evidence of generic causation, or that a substance is capable of causing harm. But the Tribes fail to present any evidence of specific causation, or that the substances present on FMC's land have actually caused harm or will actually cause harm. There is a difference between general causation versus specific causation. *Adams v. United States*, 2009 WL 1259025 (D. Idaho, May 4, 2009). To prove that a substance *capable* of causing a harm has *actually caused* harm generally requires (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. *See Adams*, 2009 WL 1259025, at *3. There is no such connection between hazard and harm found in the Tribes' brief, just as there was no such connection presented to the Appellate Court.

G. A Tribal Member's Perception of Harm Is Not Sufficient for Tribal Jurisdiction.

The Tribes' brief refers to the testimony of tribal members who allege, without any measurements of actual impact, that their perception of substances from FMC has adversely impacted their cultural practices at the Fort Hall Bottoms. Tr. Br. 21 n.24. This follows the Appellate Court's holding 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 Appellate Court ruled that the second *Montana* exception does not need to "be shown only by statistical analysis or scientific measurement." *Id*., at 008254. Instead, the Appellate Court and the Tribes argue that second *Montana* jurisdiction is established if tribal

members merely *perceive* that there is any risk, and then change a custom or tradition based on that perception. *Id.*, at 008254-008255. The Appellate Court reasoned that such an impact "cannot be measured by EPA standards." *Id.*, at 008254. But the second *Montana* exception must be proven under federal law. There must be measurements that show that a substance attributed to FMC actually caused the condition the tribal members perceive. Obviously, if jurisdiction can be founded on unsubstantiated tribal perceptions of harm unconnected to scientific measurements, the standard would "swallow the rule." *Atkinson*, 532 U.S. at 654.

H. The Tribes' Speculations of Future Risk Fail to Address the Actual Steps to Prevent Future Risk.

The Appellate Court also believed that the Tribes could establish a "threat" by speculation about potential events in the future, while believing that FMC's proof of actual actions taken to prevent future harm was irrelevant.

For example, the Appellate Court held that the Tribes had proven a "threat" by offering evidence that that phosphine gas could be released from the ponds, and then be transported to a tribal population, and somehow harm people, without any evidence of how a release would happen, how the gas would be transported, what exposure would occur. 008225-57; 008552. At the same time, the Appellate Court dismissed undisputed evidence of EPA's formal determination that its selected CERCLA remedy:

> is protective of human health and the environment by eliminating, reducing, or controlling risks posed by the FMC OU [fee land] 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 329082. The Appellate Court ignored FMC's undisputed evidence that EPA had required, and FMC had implemented, engineering measures (including pond lining and capping

systems, gas capture and extraction systems, gas treatment systems) and extensive phosphine gas monitoring plans, all of which are designed specifically to prevent future harm from occurring. *See, e.g.*, 007868; 007882; 007896-97; 007950; IRODA 328994 at 329082, 329115; 328997-98; 328968-90 (Framework for Post-Closure Phosphine Monitoring). The Appellate Court also ignored undisputed evidence that the phosphine gas monitoring stations installed downgradient of the ponds at FMC's fence line had ***never detected*** the presence of phosphine gas: 41,000 individual results were 0.00 ppm for phosphine gas. 007950. Instead, the Appellate Court ruled that it had no responsibility "to gauge what might happen in the future," and wrote that "[w]e are not here to try and guess what might happen in the future." 008243.

In their opening brief, the Tribes argue that the engineering steps have not happened, and that the CERCLA remedy is long delayed. But installation of almost all caps, the gas extraction and treatment systems, and the phosphine gas monitoring plans has already been completed. Mitchell Decl. ¶ 2; 331452 at 331471-331488 (FMC RCRA Pond UAO Removal Action Completion Report). This actual work to prevent the future risk of harm stands in contrast to the absence of any evidence from the Tribe that such work will not adequately contain the risk.

V. THE TRIBES HAVE NOT PROVEN *MONTANA'S* SECOND EXCEPTION, BECAUSE THE TRIBES CANNOT CONNECT THEIR CONCERNS TO ANY ACTUAL HARM.

In this case, the Tribes point to a set of concerns that are similar to what they pointed to in *Evans*, including (1) ponds, (2) soil, (3) slag, and (4) water. As in *Evans*, the Tribes offer speculation about potential sources of harm, but do not prove that the potential sources have or will cause any actual harm. Even the Tribes' own expert Susan Hanson testified that "[y]ou need to go in, and see what wastes there are, where they are at, and who can be exposed to them." 007485. Risk assessment requires not only a characterization of the hazards of substances, but

also an analysis of the complete pathway to human exposure, including an analysis of whether the degree of exposure will actually result in any negative health effects. ATSDR Public Health Assessment, 0072891, at 072909. The Tribes' evidence generally offers only descriptions of the source characteristics of the contaminants, without attempting to prove the normal steps of risk analysis required to show risk of harm to the tribal community, including (1) source characteristics and release, (2) how the substance would be transported from the FMC Site to the tribal community, (3) what exposure would result to the tribal community, and (4) what harm would come from this exposure. This failure of proof exists for each substance at issue.

A. There Is No Harm Offsite from Phosphine from the RCRA Ponds.

As explained by FMC in other briefs, the design of the RCRA ponds was directed by the EPA, and approved by both this Court and the Ninth Circuit. FMC Opening Br., Dkt. 67-4, at 27. The design of the RCRA ponds required and approved under the Consent Decree anticipated the accumulation of phosphine under the RCRA approved caps. 007895-97. The RCRA Ponds were closed in compliance with closure plans approved by EPA. 007868. In spite of this, the Tribes now focus most of their concerns on this same phosphine gas that is a consequence of the RCRA Consent Decree design. Moreover, the Tribes have nothing but "speculation" to connect the phosphine inside the RCRA caps to any harm to the Tribes or its members. Because this EPA remedy is in place, the Tribes cannot prove that additional regulation by the Tribe "is necessary to avert catastrophe." *Evans*, 736 F.3d at 1306 n.8.

Source Characteristics. It is true that phosphine gas is hazardous. It is also true that phosphine gas is generated under the RCRA caps site through a reaction between elemental phosphorus (P4) and water. 317997. It is also true that phosphine gas can collect underneath the

RCRA caps, which were mandated by the RCRA Consent Decree. 345116. But these facts fail to accurately characterize the nature of the phosphine gas on the FMC site.

First, these facts fail to explain that this issue of gas under the caps is an issue inherent in the design of the RCRA ponds, which have already been approved by this Court and the Ninth Circuit. And phosphine gas is not generated in CERCLA ponds, due to the absence of water. 345121; 329024.

Second, these facts fail to acknowledge the existence of the gas treatment systems in place to treat the phosphine gas under the caps. The buildup of phosphine under caps at the RCRA ponds has been addressed through deployment of portable and fixed treatment systems. 007896-97; 317995 at 318007-08. These systems treat the phosphine built up under the RCRA caps, by removing and extracting the phosphine gas, and converting it into harmless substances using carbon filters. 331452 at 331483-85. These gas treatment systems have proven to be very effective in reducing phosphine levels under the caps. *Id.*

Third, the Tribes have presented no evidence that any failure of the gas treatment systems has ever caused any harm to humans. If there were going to be any harm from failures of these systems, that harm would be expected to be found first in the site workers who operate and maintain these systems. But even these on-site workers working closely with these gas treatment systems have not experienced any exposures that posed a risk to their health, as measured by continuous phosphine monitors they wear as required by the RCRA pond work rules. 007897; 007951; 345905-07.

Fourth, the Tribes fail to explain that the EPA has procedures in place to oversee and regulate how FMC maintains and monitors the gas treatment systems in order to ensure protection of human health and the environment. 328968; 316497; 324778.

Fifth, the Tribes have offered no model or projection assessing any likelihood that phosphine would be released from the RCRA ponds or gas treatment systems in the future. They have no analysis of how the RCRA ponds would be breached or upset, and they have no analysis of what exposures would occur if there were such a breach. On the other side, FMC provided evidence that the caps for the RCRA ponds were designed to withstand wind and water erosion over a 500-year period of time. 007896.

Transport. The Tribes fail to deal with the fact that phosphine gas dissipates in air very quickly, making it difficult to transport far from its source. SOF 151. In light of this fact, the Tribes have no evidence of any phosphine being transported from the FMC Site to any offsite location since 1999, when the plant was operating and the ponds were uncapped. 007950. And the Tribes have offered no model or analysis for how phosphine will be transported offsite, even if it were released from the RCRA ponds. 007950.

Exposure. The Tribes fail to deal with the fact that, in tens of thousands of air monitoring results taken at the FMC Site fence line, there have been no positive detections of phosphine. SOF 148-152; 007950. FMC provided evidence of a study of measurements of phosphine at the fenceline of the FMC Site, which showed that over 41,000 measurements for phosphine were taken in 2011 and 2012 at the fenceline of the FMC Site, and that all of these measurements measured phosphine at 0.0 ppm. 007950. These measurements were taken at 12 stations around the perimeter of the FMC Site, with readings taken every four hours, 24 hours a day, seven days a week. 007950. The Tribes also fail to deal with the fact that there has been extensive sampling of soil gases for phosphine which have also failed to find any significant

amounts of phosphine in soil gases.[6] 331316 at 331336-37. Likewise, the Tribes have presented no evidence of any phosphine exposures outside of the FMC Site.[7] With no evidence of phosphine gas outside the FMC Site, the Tribes have no possibility of proving any exposure to phosphine to any individual.

Harm. The Tribes have not presented any evidence of any harm from any release of phosphine gas to any person or to the environment outside the FMC Site boundaries. There is simply no proof that there has ever been any adverse effect whatsoever from phosphine from FMC at any location.

B. There Is No Harm Offsite from Elemental Phosphorus in the Soil at the FMC Site.

The Tribes have nothing but "speculation" to connect elemental phosphorus contamination in the soil under protective caps on the FMC Site to any harm to the Tribes.

Source Characteristics. It is true that elemental phosphorus (P4) exists in soils within the FMC Site boundaries. 328994 at 329026. It is also true elemental phosphorus will

[6] This included 420 measurements of soil gas at the ponds, of which 383 were measured at 0.00 ppm for phosphine gas, and the other 37 results were below OSHA levels. 007895. As of 2014, the soil gas sampling data results at the RCRA pond caps were all 0.00 ppm. 008051.

[7] The Tribes refer to a June 2010 letter from Kai Elgethun of the Idaho Department of Health and Welfare, for the proposition that the once-a-day fence line monitoring was not adequate to determine the exposure to phosphine gas. Tr. Br. Dkt. 65-1, at 25-26. Of course, that criticism fails to prove any actual exposures of phosphine gas at the fenceline. Also, FMC has provided the evidence that these conclusions about the monitoring were not based on the full facts, and were incorrect. Jun. 4, 2010 Letter from Robert Forbes, 345908-345910. Also, the Tribes' point on this is negated by the fact that the EPA has approved all of the components of FMC's fenceline monitoring system, including equipment, plans, calibrations, and procedures. Dec. 14, 2010 EPA Letter, 324778. Also, on December 8, 2010, Dr. Elgethun wrote a later letter to EPA confirming that phosphine was not a public health hazard. 324767-77.

spontaneously combust when exposed to air. *Id.* But it is also true that, when elemental phosphorus is contained in soils beneath the surface of the ground, elemental phosphorus is solid, largely insoluble, and immobile.[8] IRODA at 329111.

Some elemental phosphorus has migrated downward in the soil in the vicinity of the furnaces due to the heat of the furnaces, which allowed liquid elemental phosphorus to descend through the soil column. But, with the furnaces gone, that heat source was eliminated and the elemental phosphorus cooled into its immobilized, non-soluble solid form. IRODA at 329148.

The risk of elemental phosphorus in soils is effectively being eliminated by placement of soil caps over the contaminated soils. This reduces the risk of contact with the elemental phosphorus in the soils. Moreover, FMC has implemented institutional controls to ensure that there will never be any residential use over these soil caps. 329191. FMC has also implemented controls to protect future site workers from excavating site soils that may contain elemental phosphorus. 331965. For all of these reasons, there is no evidence for how elemental phosphorus in soils under the protective soil caps could be released outside the FMC Site.

[8] The Tribes have similar problems in relation to the railroad cars buried in the slag pile. There is simply no evidence that any substances in the railroad cars has moved or will move anywhere. Although these railroad cars were buried in 1964 or 1965, in the 50 years since the cars were buried, all the evidence, including groundwater monitoring well results, shows that no contaminants in the railroad cars has leaked out. 008051. The CERCLA remedial action includes a cap over the part of the slag pile where the cars are buried. The cap will prevent any contaminants that might leak out of the rail cars from migrating to groundwater. 007964. FMC provided evidence that groundwater monitoring wells located downgradient of the location of the buried railcars show that no contaminants are leaking out of the railroad cars. 007966.

Transport. As explained above, elemental phosphorus in soil is solid, largely insoluble, and immobile.[9] IRODA at 329111. Given this fact, the Tribes have not been able to provide any evidence of elemental phosphorus contaminated soil being transported offsite. The Tribes make allegations that fugitive dust was transported from phosphate ore and slag from the FMC site, but those allegations are based on different conditions that existed almost twenty years ago, when the plant operated, and before the soil caps were put into place. Tr. Br. Dkt. 65-1, at 28-29. As of the present, all contaminated soils posing a threat to onsite workers have been or are being capped. Mitchell Decl., Dkt. 67-5, ¶ 2. In sum, the Tribes have no evidence and no model indicating any means by which elemental phosphorus in soils covered by caps will be transported offsite.

Exposure. As explained above, elemental phosphorus in soil is solid, largely insoluble, and immobile. IRODA at 329111. Given this fact, the Tribes have not been able to provide any evidence that elemental phosphorus in soil is causing an exposure to persons offsite. On the contrary, there have been extensive studies of soils and the environment in the areas surrounding FMC, and elemental phosphorus has not been found in the soil in those soils.[10] 343815 at 343825.

Harm. The Tribes also have no evidence of any harm to any person or animal or any plant from any presence of phosphorus in soil related to the FMC Site.

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[9] The Tribes state that elemental phosphorus is "mobile." Tr. Br. Dkt. 65-1, at 19. But that is not correct as a matter of scientific fact. IRODA 329111 ("Elemental phosphorus in subsurface soil is solid, largely insoluble, and immobile.")

[10] The ecological contaminants of potential concern (COPCs) were fluoride, arsenic, cadmium, lead, mercury, selenium, vanadium, and zinc. 343829.

C. There Is No Harm Offsite from Radiological Constituents in Soil Within the FMC Site.

There is nothing but "speculation" to connect the contamination from radiological constituents in soil within the FMC Site to any harm to the Tribes or its members.

Source Characteristics. Phosphate ore has a radiological profile, which means that it contains a variety of radioactive materials that occur naturally in the earth and its minerals. 008062. The ground on the FMC Site in the vicinity of the ore stockpile area retains traces of phosphate ore and other production residues with that same radiological profile. 328997. If no action were taken, prolonged exposure of workers working over long periods of time with exposure to these radiological constituents in these ores and production residues could create risk to those workers. 329077. However, this risk has been and is being limited by placing soil caps over the soils impacted by phosphate ores and production residues containing radiological constituents. *Id.* The Tribes have offered no evidence for how these constituents covered by protective soil caps will be released outside the FMC Site.

Transport. There is no evidence of how soil containing radiological constituents will be transported offsite. The Tribes' allegations of prior airborne transport of radioactive particles blown by the wind from the FMC Site relate to historical conditions that existed almost twenty years ago, when the plant operated.[11] Tr. Br. Dkt. 65-1, at 29 (citing Off-Plant OU Supplemental Soil Radionuclide Investigation Report, 316340 at 316342). The Tribes have not provided any

[11] After the FMC Plant was shut down in 2001, all of the buildings, processing equipment and residual phosphorus materials were removed from FMC's property. There was no more production of slag or any other waste material. 007869-70. The air emissions went to zero. 007869-70; 007893. The ore pile, which had been a source of air emissions and soil contamination, was removed. 007871-72.

model or other evidence of how soil with radiological constituents will be transported from beneath the soil caps to any location offsite.

Exposure. The Tribes have no evidence showing any exposure to radiological constituents in the soil outside the FMC Site that is significantly different than background levels. 324117 at 324118. FMC showed that there was no such exposure to radiological constituents offsite, including a study by an EPA contractor that showed that offsite radionuclide concentrations in soil were below a level of health concern. 007893; 324118.

Harm. The Tribes also fail to provide any evidence of any harm to any individual or the environment from any radiological constituents in soil released from the FMC Site.

D. There Is No Harm Offsite from Slag from the FMC Site.

There is no evidence to connect the slag under caps to any harm to the Tribes.

Source Characteristics. It is true that phosphate ore has a radiological profile. 008062. When phosphate ore is processed, the same radiological profile continues in the resulting slag. 007531 (K. Wright); 008071. The slag remaining after extraction of the phosphorus from the ore was stored in piles on the FMC Site. 007874. This slag is in the form of a glassy and very hard rock. 008075. If not remedied, prolonged exposure over long periods of time to radiation from this slag could create risk to onsite workers. 329103. But this risk is reduced at the FMC Site by placement of soil caps over the slag pile. 329103. These soil caps have been directed by the EPA in the Interim Remedy based on protection of onsite workers. *Id.* These soil caps limit gamma radiation emissions from the slag to background levels. 329122. Much of this capping of the slag piles has already occurred, and more is currently underway. Mitchell Decl. ¶ 2.

Transport. There is no evidence of slag from the slag piles being transported offsite at this time. The Tribes offer no model or evidence for how slag would be transported offsite. In

prior years, slag was used as a durable and inexpensive material for roads and occasionally for building foundations. 008063-65. However, that practice ended and no longer continues. 075123 at 075125. No amount of tribal regulation of the FMC Site will affect slag that has come to be located in offsite areas.

Exposure. The evidence shows that there is no significant radiological exposure from the slag piles located on the FMC Site to the general public or tribal members or to any person outside the FMC Site. 008060; 071374. There is no radiological exposure from the slag pile that could affect tribal members off the FMC Site. 008069; 008074; 071375. FMC presented evidence that, even before installation of the Interim Remedy cap on the slag pile, radiological exposures present no risk to FMC Site workers and there is no reason to restrict access to the Site for workers or the public. 008075.

In relation to slag formerly used as construction material, there is no evidence of any exposure to any tribal member. FMC presented evidence that the slag used in road and home construction in the Pocatello area presents no risk to human health. 008077. FMC also presented testimony that the radiological levels in the slag pile are so low that it could be leveled out, planted with grass, and used as a children's ballfield, and it would still present zero risk to human health. 008078. Of more than 1,472 houses surveyed in the southeastern Idaho area (including Soda Springs, Pocatello, and Fort Hall), only nine houses exceeded the threshold for conducting additional evaluation, which all homeowners declined. 008065. None of the houses tested reached the threshold warranting active reduction in radiation levels. 008064-65.

The Tribes refer to slag previously having been used in roads on the Reservation. Tr. Br. Dkt. 65-1, at 28. However, that evidence fails to define any exposure to any individual from slag

used in road materials. Since individuals rarely live on roadways, it would be difficult for the Tribes to prove a significant dose from slag used in roadways, and the Tribes have not done so.

Harm. In relation to slag in the slag piles that are covered by protective caps, there is no evidence of any harm to any person or animal or plant from any slag from the slag piles at the FMC Site. In relation to slag previously used as construction material, an extensive study of community risks posed by the use of this material found no harm. 008069-70; 337842 (Potential Radiation Exposure to Street Exposure Staff re: Slag Dust).

E. There Is No Harm Offsite from Arsenic from the FMC Site.

There is nothing but speculation to connect the small amounts of arsenic[12] in groundwater attributable to FMC offsite to any harm to the Tribes.

Source Characteristics. Arsenic exists at background levels in the earth and water. 007980. It is true that excessive levels of arsenic can be toxic to humans. It is also true that arsenic has been released from phosphorus bearing wastes in the Simplot gypsum stacks and in the FMC waste ponds. *Id.* When stormwater enters the contaminated soils, arsenic and heavy metals can seep down from the Simplot gypsum stacks and the FMC ponds into the groundwater, and that the groundwater flows into the surface water of the Portneuf River. *Id.*

But the Tribes fail to explain that more than 95% of this arsenic released from groundwater to Portneuf River at Batiste Springs is from Simplot. 007892. FMC presented evidence that FMC contributes less than 3% of the arsenic released from groundwater to the

[12] Arsenic is the principal contaminant of concern in relation to potential human health impacts from groundwater migrating from the FMC Site. Tr. Br. Dkt. 65-1, at 19. EPA has not found any risk from any other heavy metals in the offsite areas. IRODA 329035. Orthophosphates, a contaminant of concern for ecological impacts, are discussed below.

Portneuf River at Batiste Springs. 007889. The concentration of arsenic allocated to FMC at the location where groundwater flows into the Portneuf River would be at most 2 parts per billion, which is below the Maximum Contaminant Level (MCL) of 10 ppb. 007982-83. FMC also showed that the groundwater entering the Portneuf River at Batiste Springs have contaminant levels that are below Safe Drinking Water Act standards. 007889; 007981-82. The most recent sampling shows that the total arsenic in water at this location is now below the 10 ppb MCL, which means that FMC's allocable concentration is now much less than 2 parts per billion. 007889. The naturally occurring background concentration of arsenic in the area is 14 parts per billion. 007982-83.

Transport. The Tribes' proof in relation to the transport of arsenic to any point offsite suffers from two significant problems. ***First***, the capping of the FMC Site pursuant to the IRODA effectively cuts off the flow of precipitation and stormwater that previously provided the hydraulic transport mechanism for arsenic to migrate downwards from the CERCLA ponds and other impoundments to the shallow groundwater aquifer. 329145. The Tribes have no proof of what the arsenic releases will be after the capping remedy. ***Second***, there is no evidence of how any arsenic in the water at Batiste Springs would be transported and diluted to any point downstream where such water is utilized by any individual for any purpose. There is no model or other evidence regarding the transport of arsenic from the FMC Site from Batiste Springs to any point downstream where such water is utilized for any purpose.

Exposure. The Tribes have not presented any evidence of any exposure to arsenic from FMC sources, let alone exposure at unacceptable levels, to any person outside the FMC Site. There are no drinking water wells downgradient from the FMC Site, and therefore no exposure pathway for individuals to be exposed to drinking that water. 007894. On the other hand, FMC

presented evidence that the groundwater in the deep aquifer beneath the FMC Site meets Safe Drinking Water Act standards, and that the groundwater in the shallow aquifer meets Safe Drinking Water Act standards at the boundary of the FMC Site. 007883, 007884.

Harm. There is no evidence of any harm from the arsenic from the FMC Site, nor could there be, as levels of FMC arsenic at Batiste Springs are well below the MCL. 007889.

F. There Is No Harm Offsite from Orthophosphates from the FMC Site.

There is nothing but "speculation" to connect the small amounts of orthophosphates attributable to FMC to any harm to the Tribes. The Tribes cannot show that any contribution of FMC will "meaningfully exacerbate" the problem of orthophosphates in the Portneuf River.

Source Characteristics. Orthophosphates are present in surface water from many sources, including fertilizers and chemicals used extensively in agriculture. 316498 at 316622. It is true that orthophosphates in water can lead to algae blooms and degradation of aquatic life in water. 008046. It is also true that orthophosphates are released from locations on the Simplot facility and from the FMC Site. 316623. Orthophosphates can seep down from the Simplot gypsum stack and from FMC ponds into the groundwater, which then flows into the river. *Id.*

But the Tribes fail to explain that the studies show that less than 1%, and perhaps less than 0.1%, of the orthophosphates in the Portneuf River are attributable to FMC. 007889. FMC also showed that the contamination level for groundwater entering the Portneuf River at Batiste Springs are below Safe Drinking Water Act standards. 007889; 007981-82. The Tribes also fail to explain that, pursuant to the EPA Interim Remedy, FMC is designing and implementing a groundwater extraction and treatment system that will significantly reduce offsite impacts from orthophosphates. 332028 at 332093-96. That groundwater extraction and treatment system will be subject to EPA approval and direction. *Id.*

Transport. The Tribes' proof in relation to the transport of orthophosphates to any point offsite suffers from two significant problems. ***First***, the capping of the FMC Site pursuant to the IRODA effectively cuts off the flow of precipitation and stormwater that previously provided the hydraulic transport mechanism for orthophosphates to migrate downwards from the CERCLA ponds and other impoundments to the groundwater aquifer. 329145. That capping will significantly reduce orthophosphate releases, further minimizing FMC's contribution of orthophosphates to the Portneuf River. ***Second***, there is no evidence of how much the concentration of orthophosphates from FMC Site sources would be reduced by dilution at points downstream. There is no model or other evidence quantifying the transport and dilution of FMC orthophosphates between their outflow to any point downstream. There is also no evidence distinguishing FMC's orthophosphates from the other 99% of the orthophosphates from other sources. For these reasons, there is no evidence that FMC's minimal contribution to orthophosphates "meaningfully exacerbates" the existing orthophosphate conditions in the Portneuf River. *Evans*, 736 F.3d at 1306.

Exposure. The Tribes have no evidence of the levels of FMC orthophosphates present at the Fort Hall Bottoms or any other point downstream of the FMC Site.

Harm. The Tribes also have no evidence that any harm to the ecology of the Fort Hall Bottoms is attributable to any degree to FMC's orthophosphates.

G. Studies of Offsite Areas Have Failed to Show Any Risk from Any FMC Source to Human Health or the Environment.

FMC also presented evidence of the studies conducted on the offsite areas beyond the FMC Site boundaries. That evidence included extensive sampling and analyses conducted under EPA's oversight which showed that there are no risks to human health in areas off of FMC's

Site. 007977-79. The evidence showed that contaminants present on the FMC Site are not impacting offsite groundwater. 007979. The evidence also showed that contaminants present on the FMC Site are not impacting offsite soils. 007984-85.

FMC provided evidence from the experts who had studied the offsite impacts from FMC's Site. They gave their opinion (a) that the FMC Site has no impacts on the Shoshone-Bannock Tribes, 007985 (Nick Gudka); (b) that there are no risks to ecological receptors from FMC Site contaminants, 007993-94 (Linda Hanna), (c) that the marginal ecological risks from fluoride are caused by air emissions from Simplot, 007994-95 (Linda Hanna); and (d) that the marginal ecological risks from orthophosphates are caused by emissions from Simplot, 007994-95 (Linda Hanna). The expert evidence showed that "[t]here is no impact of the FMC Operable Unit in the off-site area with respect to ecological risks," 007995 (Linda Hanna), and that "there is no impact to the health and welfare of the Tribe." 007985 (Nick Gudka).

H. Human Health Studies relating to the FMC Site Do Not Show Any Impact on Human Health.

It is undisputed that the contaminants currently present at the FMC Site have been there virtually since the Plant started operations in 1949; and that, for most of FMC's operating history, releases of those contaminants have occurred at levels that are much higher than today. 008106. FMC presented evidence of a series of high quality epidemiological studies of FMC Plant workers, the most exposed population, which were conducted over the 50 year period from 1949-2000. 262733; 262764; 262897. Those studies showed no long-term adverse health impact related in any way to employment at the FMC plant. 008095-008106. Because these studies show no health impacts to the long term FMC worker population, contaminants at the FMC Site could not have any adverse health impacts on tribal members. 008106.

FMC also provided evidence that a health study of these Tribes failed to show any evidence of adverse health impacts to tribal members from the FMC Site. 008106-107; 008108. Given these facts, the FMC Site today, with much of the CERCLA and RCRA cleanup work completed, cannot possibly "imperil the subsistence or welfare of the tribal community."

The Tribes failed to prove any likelihood that any of their "generalized concerns" would result in any actual harm or effect, or any harm to tribal self-government. Instead, the Tribes simply expressed "generalized concerns" as they did in *Evans*, in hopes that the Court would not force them to actually connect those concerns to any actual effect. That approach was rejected in *Evans*, and will be rejected again here, because no such harm can be proven.

VI. THE TRIBES CANNOT MEET THEIR BURDEN OF PROVING THAT EPA'S SUPERVISION OF THE SITE HAS BEEN OR WILL BE "CATASTROPHIC" AND "IMPERIL THE SUBSISTENCE" OF THE TRIBAL COMMUNITY.

In order to assert second *Montana* jurisdiction, the Tribes must prove that the EPA's environmental remediation decisions for the FMC Site "threaten[] or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" and thus "imperil the subsistence or welfare of the" Tribes. *Montana*, 450 U.S. at 566.

But the EPA has made it clear that its remediation decisions are "protective of human health and the environment." 328994 at 328999; 008133; 008139; 008153. The CERCLA remedial action is based on extensive sampling, measurements, laboratory analyses, and study.[13]

[13] The CERCLA Interim Remedy is based on a mountain of measurements and studies, including the studies in the Remedial Investigation and the Supplemental Remedial Investigation. These studies include: (a) 101 groundwater monitoring wells measuring 60,000 chemical analyses for contaminants of concern (37 metals and salts, 101 organic constituents, 27 radionuclides), 007879; (b) sampling in the Portneuf River, including surface water, sediment, and terrestrial ecology (mice and ground based animals, 007879; (c) offsite air and soil sampling at locations 360 degrees around the FMC Site and for a distance of up to 3 miles from the FMC

The EPA's CERCLA remedial action decision is designed to protect future workers on the FMC Property, because EPA has determined that there are no exposure pathways that create a risk of FMC Site contaminants impacting offsite human health and welfare. 007963-64.

Because the EPA has found that there is no offsite health risk, for the Tribes to meet their burden that the FMC Site "imperil[s] the subsistence or welfare of" the Tribes, the Tribes are forced into a frontal assault on the EPA decision making and EPA authority that resulted in the EPA decision that the current remediation is "protective of human health and the environment."

In *Evans*, the Ninth Circuit denied second *Montana* jurisdiction to these Tribes because "the Tribes fail[ed] to provide specific evidence showing that tribal regulation of" the project was "necessary to avert catastrophe." *Evans*, 736 F.3d at 1306 n.8. The Tribes must make a showing that a "catastrophe" will result if EPA regulation continues with EPA's present decisions and direction. The Tribes have no way of meeting this standard, but hope that merely alleging that the Tribes disagree with EPA will be sufficient to prove that the EPA approach involves more risk than the Tribes' approach:

- The Tribes contend that FMC's use of Reservation land to store waste also poses a constant threat to the Reservation's lands, water, and natural resources, and will continue as long as the waste is stored. Dkt. 65-1, at 5.

- The Tribes contend that they cannot rely exclusively on the federal government to protect the Reservation and its resources as it was the federal government's *inaction* for over fifty (50) years that enabled FMC's waste to accumulate to its current level, IRODA at 329126, and EPA intends to leave that waste on the

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Site, 007879, (d) 1,500 soil samples with 24,000 analyses and 500 radon measurements, 007881; (e) sampling for phosphine breathing zone samples, air samples, soil gas samples, flux chamber samples, and surface scans of areas looking for phosphine, and (f) soil gas samples that were analyzed for all gases, including hydrogen sulfide, hydrogen cyanide, and hydrogen fluoride, 007882. All of these laboratory analyses were performed by EPA-approved laboratories and the results of all of the split samples taken by EPA and the Tribes matched the results of the samples collected by FMC's contractors. 007965.

Reservation indefinitely, *id.* at 329017, deeming it too dangerous to move anywhere else, *id.* at 329086-87.[12] Dkt. 65-1 at 11-12 (emphasis in original).

- The Tribes criticize that when the federal government finally took action, lengthy delays and errors made its actions ineffective to protect tribal interests. Dkt. 65-1 at 12 n. 12.

- The Tribes complain that EPA recognizes that "[e]xposure of buried pyrophoric elemental phosphorus–containing wastes to ambient air results in combustion and/or explosion," but that EPA has decided that the phosphorus on the FMC Property will remain on the Reservation indefinitely, capped and managed in place, contending that it is too dangerous to move anywhere else, *id.* at 328997, 329086-87, and too costly as well, *id.* at 329074, 329093. Dkt. 65-1, at 18.

- The Tribes complain that, in making that decision, EPA rejected the Tribes' position that the phosphorus contaminated soils should be removed. IRODA 328994 at 329053-56 (evaluating soil alternatives), 329076 (selecting alternative 3, which will keep the phosphorus contaminated soil on the Reservation.). Dkt. 65-1 at 18 n.21.

The Tribes also claim that they would be "defenseless" if they cannot regulate FMC. Tr. Br., at 12. But the Tribes are no more "defenseless" than every other citizen of the United States and of the State of Idaho who rely on the protection of the EPA and the IDEQ. The Tribes have the same defenses against environmental degradation and damage as every other common citizen of the United States. The question in this case is whether the Tribes should be given some additional set of privileges beyond the privileges to address environmental conditions given to every other citizen. The Tribes have every right that every other citizen has to assert complaints, influence policy, advocate, and urge stricter environmental controls to the EPA.

This Court and the Ninth Circuit have held that the Tribes have no authority to determine or enforce environmental cleanup requirements at the FMC Site. *See* FMC Response Brief on First *Montana* Jurisdiction, filed contemporaneously herewith. Granting the Tribes jurisdiction to regulate FMC conduct in performing the environmental cleanup of its fee land would directly conflict with the prior decisions of this Court and the Ninth Circuit.

VII. THE TRIBES HAVE NO ARGUMENT THAT TRIBAL JURISDICTION IS NECESSARY TO PROTECT TRIBAL SELF GOVERNMENT.

As explained in FMC's other response briefs, the Supreme Court has emphasized:

> 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.

Montana, 450 U.S. at 564. In *Plains Commerce*, the Supreme Court wrote that "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). This same direction is repeated in numerous United States Supreme Court decisions. *Nevada v. Hicks*, 533 U.S. 353, 359 (2001); *Atkinson*, 532 U.S. at 658-59; *Strate*, 520 U.S. at 459; *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., conc. in judgment); *South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). These standards cannot be met, because there is no proof that Tribal self-government is in jeopardy in any way.

VIII. CONCLUSION.

The Court must deny the Tribes' attempt to establish jurisdiction over FMC under the second *Montana* exception. ***First***, the required payment of money will do nothing to avert any possibility of harm to the Tribes. ***Second***, the Appellate Court's non-zero risk standard is error. ***Third***, the Tribes have not proven any pathway to any harm to any tribal member. The Tribes' case continues to rely on speculation on these points, which is the approach the Ninth Circuit rejected in *Evans*. ***Fourth***, the Tribes cannot prove that EPA's oversight will fail. ***Fifth***, the Tribes have failed to prove how anything FMC has done could harm tribal self-government. The Tribes have failed to prove jurisdiction under the second exception to *Montana*.

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 **RESPONSE 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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