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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 MOTION FOR SUMMARY JUDGMENT ON DUE PROCESS AND ENFORCEMENT OF JUDGMENT**

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The government of the Shoshone Bannock Tribes ("Tribes") exists to protect the interests of the Tribes and its members. While that is entirely proper, this means that the Tribes' government system has no purpose to pursue the interests of anyone other than members of the Tribes. Given this fact, there is no basis to believe that the tribal government's judicial system would provide any protection for nonmembers of the Tribes. And, when that system is asked to decide whether a nonmember should pay the Tribes millions of dollars forever to the tribal government, it cannot be asserted that the system would be "impartial" or would be without "prejudice." *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997).

In this case, this manifested itself in both panels of the Tribal Appellate Court actively and purposefully acting to deprive FMC of due process. To put the actions of the Tribal Appellate Court in context, this Memorandum will first discuss the fundamental lack of due process that is inherent in tribal courts. *Infra* at Section I. The Memorandum will then detail the specific due process violations committed by the two Tribal Appellate Court panels.

For these reasons, the Court cannot recognize the Judgment issued by this system.

I. THE QUESTION OF WHETHER THE TRIBAL SYSTEM DUE PROCESS UNDER *WILSON V. MARCHINGTON* MUST BE ANSWERED ON A *DE NOVO* BASIS.

This Court is to consider *de novo* the question of the tribal court system providing due process, and whether that system can be considered "impartial" or would be without "prejudice." *Bird v. Glacier Elec. Co-op.*, 255 F.3d 1136, 1140-41 (9th Cir. 2001); *Wilson*, 127 F.3d at 811. Claims of due process violations are always reviewed with a *de novo* standard of review. *Standards of Review*, Ninth Circuit, III-11, http://www.ca9.uscourts.gov (hereinafter referred to as "Ninth Circuit Standards."). The Court has no discretion to recognize a tribal court judgment that is not based on due process. *Bird*, 255 F.3d at 1140-41. That means that the Court must

determine the due process and comity questions without reference to the opinions of the court being reviewed. With *de novo* review, the reviewing court must consider the matter anew, as if there had previously been no decision rendered. Ninth Circuit Standards at (v)(ii). *De novo* review means that the reviewing court views the case from the same position as the reviewed court. *Id.* Review under a *de novo* standard is "independent." *Id.* "When *de novo* review is compelled, no form of appellate deference is acceptable." *Id.*

The Tribes' brief assumes that this Court will not conduct a *de novo* review of whether due process was provided. Instead, the Tribes assume that this Court will limit its determination to the Tribal Court record. But following that approach would be error, and would not constitute the required *de novo* review of the fairness of the Tribal Courts.

II. THERE IS NOTHING IN THE TRIBAL COURT SYSTEM THAT PROTECTS ANY DUE PROCESS RIGHTS OF A NONMEMBER OF THE TRIBES.

Due process is not form over substance. Due process is not established by erecting a façade. A thin veneer of appearances does not mean that due process is available. Rather, the question whether the system is "impartial" and without "prejudice" requires an examination of whether the nature of the system itself is designed and operated in a way that ensures that the rights and interests of all parties are given fair consideration.

The analysis of whether the system is "impartial" and without "prejudice" begins with the concerns the Supreme Court has already expressed regarding the fairness of tribal forums for outsiders. The Supreme Court has instructed:

> Tribal sovereignty, it should be remembered, is ***"a sovereignty outside the basic structure of the Constitution."*** ***The Bill of Rights does not apply to Indian tribes***. Indian courts ***"differ from traditional American courts in a number of significant respects."*** And ***non-members have no part in tribal***

> ***government*** — they have no say in the laws and regulations that govern tribal territory.

Plains Commerce Bank v. Long Family Land Co., 554 U.S. 316, 337 (2008) (emphasis added).

A. The Fundamental Foundations of Due Process Are Missing.

Nothing in the Tribes' Brief addresses any of the inherent problems with a system that requires a citizen to be judged by courts that owe their allegiance and their compensation to the opposing party. The Tribes ignore the concerns of the Supreme Court on these points.

Outside the Structure of the United States Constitution. Tribes and tribal courts are "outside the basic structure of the Constitution." *Plains Commerce*, 554 U.S. at 337. Even though citizen members and nonmembers are both full participants under the United States Constitution, the nonmember loses those constitutional rights in the tribal members' judicial system. For this reason, it is "a serious step" to subject a citizen to a sovereignty outside this Constitutional structure. In *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment), which deals with tribal criminal authority, Justice Kennedy wrote:

> Lara, after all, is ***a citizen of the United States***. ***To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step***. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

541 U.S. at 212 (emphasis added). Citizens of the United States have a right to be protected by the structure of the Constitution, separate from the protections afforded by the Bill of Rights:

> ***[T]he constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted***. . . . ***The political freedom guaranteed to citizens by the federal structure is a liberty***

> ***both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights*. . . . *The individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores*.**

Lara, 541 U.S. at 213-14 (Kennedy, J. concurring) (emphasis added); *see also Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

Lack of Consent of Governed. Tribal authority over nonmembers violates the principle that governments derive their powers from the consent of the governed. "It is a fundamental belief of our republic that Governments 'deriv[e] their just Powers from the Consent of the Governed.'" *Duro v. Reina*, 495 U.S. 676 (1990); *see* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "And non-members have no part in tribal government – they have no say in the laws and regulations that govern tribal territory." *Plains Commerce*, 554 U.S. at 337.

Tribal Constitution Protects Only Tribal Members. The Tribal Constitution promotes Tribes' general welfare and to benefit tribal members and their posterity. It affords no rights or protections to nonmembers. SHOSHONE-BANNOCK TRIBES CONST. & BYLAWS ("Tribal Const.") pmbl. Article II of the Tribal Constitution restricts membership of the Tribes to a limited group of people. TRIBES CONST. art. II, § 1. The Tribal Constitution's Bill of Rights limits its protections only to "members of the tribes." TRIBES CONST. art. VII, §§ 1-4.

Bill of Rights Does Not Apply. "The Bill of Rights does not apply to Indian tribes." *Plains Commerce*, 554 U.S. at 337; *Duro*, 495 U.S. at 676. And the Tribes have not volunteered to allow nonmembers the protection of the Bill of Rights within their system.

ICRA Provides No Protection. There is also no effective source of protection against tribal government overreach, because there is no federal cause of action against a tribe for violation of the provisions of the Indian Civil Rights Act of 1968. *Duro*, 495 U.S. at 693.

No Effective Review of Tribal Court Decisions. Because tribal court judgments cannot be removed or appealed to state or federal courts, there is no mechanism for review of their decisions on matters of non-tribal law. *Nevada v. Hicks*, 533 U.S. 353 (2001) (Souter, J., concurring). Thus, the merits of significant errors in this case (such as the perpetual contract ruling, or the unapproved ordinance) cannot be reviewed on their merits.

Sovereign Immunity Prevents Any Liability for Misconduct. Because of sovereign immunity, the Tribes cannot commit any wrong that would ever subject the Tribes to liability for such misconduct. Our federal and state governments waive sovereign immunity by statute in certain circumstances, and actions of those governments are also subject to civil rights actions. But the Tribes have no need to restrain any conduct based on any fear of liability for damages, because such liability does not exist.

Tribal Courts Are Subordinate to Business Council. As one Tribal Court judge wrote: "We [tribal court judges] serve at the pleasure of the Fort Hall Business Council and can be removed at their will. That is the reality of the job." SHOBAN NEWS, March 19, 2015; Apr. 22, 2015 Aff., Dkt. 38, Ex. 12, Dkt. 38-12; Apr. 8, 2015 FMC Br., Dkt. 36, at 3. "Tribal courts are often 'subordinate to the political branches of tribal governments.'" *Duro*, 495 U.S. at 693; *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

Litigating Against Unitary Government. Another missing procedural protection is the separation of powers. FMC was not litigating against one independent branch of tribal government before another independent branch. Instead, the Tribes have a unitary government, where the Business Council is the legislative, the executive, and the judicial branch rolled into one. With no division of powers, when FMC litigated against the Business Council that wanted

fees from FMC, it was also litigating against the same Business Council that had power to appoint the judges, and the same Business Council that could change the laws at any time.

Tribal Laws Are Often Unknowable. Another missing due process protection is the ability to know what laws are in effect. Tribal law can "be unusually difficult for an outsider to sort out." *Duro*, 495 U.S. at 384-85 (Souter, J., concurring). That was certainly true in this case, where a central issue is whether the key ordinance was validly enacted by the Tribes.

B. The Tribes Ignore the Key Cases.

Bird v. Glacier Electrical Co-op., 255 F.3d 1136 (9th Cir. 2001), is the only officially reported case in which the Ninth Circuit has applied the *Wilson* analysis to determine whether due process was provided to a nonmember of a tribe in connection with a judgment entered against that nonmember. In *Bird*, the Ninth Circuit ignored an unfair decision of the tribal courts, and denied enforcement of the judgment for failure to provide the nonmember due process. But the facts of the present case are an even more fundamental denial of due process than what occurred in *Bird*. ***First***, the judgment in *Bird* involved an award of damages to other tribal members, who did not have control over the court or jury. In this case, the award of damages is to the Business Council itself, which does possess control over the court. ***Second***, the defendant in *Bird* was an electrical co-operative that had been intimately involved in tribal lands and in tribal arrangements. ***Third,*** in *Bird*, the inappropriate and irrelevant statements were made only by attorney for the plaintiff, while in this case the inappropriate statements were made by the judges in a judge-decided case. ***Fourth***, the judgment in *Bird* was a one-time award, while in this case, the judgment is for $1.5 million for every year for all eternity.

The Tribes also ignore the Tenth Circuit case of *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). In *Burrell*, the nonmember had consented to deal with the tribe by entering into a

long term lease with the tribe and by farming the tribally owned land for a number of years. After some years, this close relationship broke down, and tribal members took over the land and stole the Burrell's hay crop. The Tenth Circuit refused to enforce the tribal court's judgment, based on "the close relationship between the tribal court, the tribe, and the tribal officials." *Burrell*, 456 F.3d at 1173. The facts in this case are more extreme than the facts in *Burrell*. ***First***, the *Burrell* case involved tribal lands, while this case involves fee-owned land. ***Second***, the *Burrell* case involved a farmer who had entered into a long term relationship with the tribe. ***Third***, the *Burrell* case dealt with the nonmember's loss of the right to farm for a term, while this case involves a judgment against FMC for payment of $1.5 million each year into eternity.

III. A SYSTEM THAT LACKED PROTECTIONS FOR DUE PROCESS FOR NONMEMBERS FAILED TO PROVIDE DUE PROCESS TO THE NONMEMBER.

In this case, the absence of systemic protections to protect the due process rights of non-members manifested itself in actions that violated the due process rights of FMC.

A. The Operations of the Tribes' Judicial System Is Hidden from Outsiders.

This case involves the selection of the judges who were assigned to handle this matter. But that process is not transparent, and it is unknown how these judges were selected. When FMC requested discovery in this action to determine this, the Tribes resisted. Dkt. 35; Dkt. 38. This prohibited FMC from conducting discovery to find out how these judges were selected. Dkt. 43. By doing so, the Court prohibited discovery regarding (a) the participation of the Tribes' counsel in selecting the judges, (b) the role of the Business Council in setting the compensation and term of service for these judges, (c) the protocols for terminating a judge after ruling against the Tribes, (d) contacts between the Tribes and the judges during the proceedings, and (e) whether any nonmember has ever prevailed against the tribal government in these courts.

Not only is the tribal judicial system managed in the dark, but the tribal laws are also "unusually difficult for an outsider to sort out." *Duro*, 495 U.S. at 384-85 (Souter, J., concurring). Unlike even small municipalities, the Tribal law is not available online or through any formal system of publication, so there is no independent source where an outsider can go to find the tribal laws. The only repository of tribal law appears to be the tribal counsel's office.

B. The Only Judge Who Dared to Rule Against the Business Council Disappeared from the Case.

The Tribal Court Judge examined the facts of this case, and determined that there was no statutory basis for the $1.5 million fee the Tribes sought to impose, and held that "the imposition of the $1.5 million fee is void." May 21, 2008 Opinion, 004357, at 004374. The Business Council "was not pleased with the decision" of the Tribal Court Judge. Tr. Ans., Dkt. 12, p. 148. That May 21, 2008 Opinion was the last involvement of the Tribal Court Judge in this case. It appears that opinion was also the last act by that Judge in any Tribal Court matter.

Although this Court's order barred further discovery of this, we do know that after the Business Council's displeasure, no part of this case ever saw its way back to this Judge. This was emphasized in May and June 2012, when the Appellate Court stated that "[t]his matter is remanded for the Trial Court" for consideration of the second *Montana* jurisdiction. May 8, 2012 Opinion, 006165, 006227; June 26, 2012 Opinion, 006262, at 6323-24. But then, six months later, on January 14, 2013, the Appellate Court abruptly switched direction and stated that "[t]his Court REVOKES the remand portion of the May 8, 2012 Order" and heard the issue of second *Montana* jurisdiction itself. Jan. 14, 2013 Opinion, 006464, 006481-82. No party had

requested that the Appellate Court supplant the Tribal Court or the Land Use Policy Commission ("LUPC") in this role, and doing so violated the administrative review nature of the case.[1]

The Appellate Court's remand to the Tribal Court would raise awkward questions. On remand, the case should have gone back to the Tribal Court Judge. But that Judge seems to have disappeared from the case. Alternatively, if the case were sent to another Tribal Court Judge, there would be difficult questions regarding what happened to Judge Maguire. Thus, somehow without any briefing from the parties, the Appellate Court suddenly revoked its remand, and decided to hear the factual issues itself.[2]

C. Treating This Case as an Administrative Review Action, the Appellate Court Strictly Limited FMC to the Administrative Record.

This Tribal Court proceeding originated in 2006 as an application for permits to the LUPC. Statement of Facts ("SOF") 55-59. The LUPC issued a notice for a hearing on these permit applications, required that written comments be provided before the hearing, and stated that the hearing would be closed after the comments were submitted. SOF 60. FMC complied with this and submitted a variety of evidence to the LUPC, including evidence that the Tribes

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[1] Several weeks later, the Appellate Court stated that it was taking this *sua sponte* action "in the interests of time." Feb. 5, 2013 Order, 006510, at 006511. But that seems doubtful, since the case proceeded quickly in the Tribal Court and stalled dramatically before the Appellate Court. The Petition for Judicial Review was before the Tribal Court for only ***22 months***, from August 2006 to May 2008. Aug. 4, 2006 Ver. Pet. 003034; May 21, 2008 Opinion, 004357. The case was then before the Appellate Court for ***six (6) years, or 72 months***. May 21, 2014 Judgment, 008574. The Appellate Court was by no means any faster venue.

[2] This revocation had the double benefit of not only avoiding the awkward remand to Judge Maguire, but also ensuring that there could be no appeal of the factual findings from the hearing. However, "access to appeal or review" is an element of due process required by *Wilson*. *Wilson*, 127 F.3d at 811; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement") § 482 cmt. b (1987); *see Burrell*, 456 F.3d at 1159, 1173 ("[W]e are troubled by the lack of a tribal appellate court to review the second tribal judge's decision.").

had no jurisdiction under the first or second *Montana* exceptions. SOF 61. The Tribes did not submit any evidence whatsoever. SOF 62. The only record before the LUPC was the evidence submitted by FMC. SOF 62. In spite of this, the LUPC found that it had jurisdiction, contrary to the evidence submitted by FMC. SOF 64-65.

1. The Business Council denied FMC's request to add 113 pages of evidence to the administrative record.

The case then proceeded as a review of the LUPC's agency determination, limited to the LUPC record. In its appeal to the Business Council, FMC had offered the affidavits of two experts who provided evidence that the fee of $1.5 million per year imposed by the LUPC was unreasonable in relation to similar fees charged in other jurisdictions. Jun. 9, 2006 FMC Appeal, 002597, 002604, 002625, 002734. These affidavits amounted to ***113 page***s of evidence. 002625-738. FMC explained that these new affidavits were necessary because the fees imposed by the LUPC were not foreseen at the time of the hearing before the LUPC. Jul. 5, 2006 Reply, 002766 at 002769; Feb. 22, 2008 FMC Br., 004164, 004197-98.[3] But the Business Council treated the case strictly as an administrative review action, and struck these affidavits "as being untimely and not part of the record in this matter." Jun. 14, 2007 Dec., 003021; *see* Jul. 24, 2006 Dec., at 2787. Stating that FMC "could have submitted" these documents to the LUPC, the Business Council affirmed the LUPC determination based on the LUPC record, without allowing

[3] FMC also explained that the LUPC and Business Council had previously allowed the Tribes to take significant liberties with the record. FMC pointed out that the Business Council allowed the Tribes to submit its June 26 brief after the Business Council's deadline of June 9, 2006. 002766, at 002767-68. FMC also explained that the LUPC had allowed the Tribes to submit 2,233 pages of materials after the LUPC's submission deadline of April 18, 2006. Jul. 5, 2006 FMC Reply, 002766, at 002768-69; *see* Apr. 21, 2006 Written Comment 00359, 000359-2592 (2,233 pages). FMC also explained that the Business Council had considered evidence outside the record to justify the large fee, while excluding the expert evidence FMC offered. Feb. 22, 2008 FMC Br., 004164, 004197.

this evidence. SOF 74-75; Jun. 14, 2007 Dec., 003021. The Tribal Court also treated the appeal as a review of the LUPC's agency determination. May 21, 2008 Opinion, 004357, at 004369.

2. The Appellate Court denied FMC's request to include a two-page letter from the BIA in the Administrative Record.

In its decision, the Business Council wrote that it had properly adopted the 2001 Hazardous Waste Management Act ("HWMA"), which was the statutory basis for the fees imposed on FMC. July 21, 2006 Decision, 2787. FMC argued to the Tribal Court that this law had not been approved by the Bureau of Indian Affairs ("BIA"), and was therefore not validly enacted. Nov. 27, 2007 FMC Mot., 004041, 004041-46. In response, on April 8, 2008, the Tribes wrote to the BIA, asking whether the BIA had approved the HWMA. Apr. 11, 2008 Letter, 006624-25, attached to May 6, 2013 Pre-Hearing Br., 6610, 6624-25; *see* Mar. 21, 2008 Tribes' Resp. Br., 4205, at 4231; FMC Reply, 4262, at 4286.

The BIA quickly responded on April 11, 2008, telling the Tribes that the HWMA had not been validly approved. May 6, 2013 FMC Br., 006610, at 006624-25. The Tribes then kept this vital information to themselves. A few days later, the Tribes went to the Tribal Court and represented that the BIA had given the HWMA an "unconditional approval." Apr. 15, 2008 Hrg. 004305, at 004326. But the Tribal Court nevertheless found, based on other evidence, that the HWMA had not been approved. May 21, 2008 Opinion, 004357, at 004373. The Tribes later argued again to the Appellate Court that the BIA had approved the HWMA, again without revealing the BIA's contrary letter. Tribes Br., 004469, at 004547-48. In May 2012, the Tribal Court of Appeals issued an opinion agreeing with the Tribes on this point. *Compare* Findings, 006065 at 006093-94, *with* Opinion, 006165 at 006194-95.

In about May 2012, four years after the letter was sent to the Tribes, FMC received a copy of the BIA's April 11, 2008, letter, by means of a FOIA request. May 6, 2013 Pre-Hearing Br., 006610, at 006617. FMC immediately provided this evidence to the Tribal Court of Appeals, explaining that the Tribes had not provided this key evidence. Jun. 22, 2012 FMC Resp., 006253, 006260-61; May 6, 2013 Pre-Hearing Br., 006610 at 6614. FMC sought to add ***two (2) pages*** to the record. 006260-61. The BIA letter showed that there was no statutory basis for the Tribes' fee. But the Appellate Court excluded this letter because its submission was not "timely." May 28, 2013 Order, 006626, at 006627. Limiting the case to the administrative record, the Appellate Court ruled that FMC should have brought this document forward earlier, during the time the Tribes were withholding it. May 28, 2013 Order, 006626, at 006627.

D. After Denying FMC's Requests to Add a Few Pages to the Record, the Appellate Court then *Sua Sponte* Allowed the Tribes to Add More than 250,000 Pages to the Closed Record.

As explained, the Tribes had submitted no evidence whatsoever to the LUPC. SOF 62. As a result, there was no evidence to support second *Montana* jurisdiction. In its Opinion, the Appellate Court had found jurisdiction under the first *Montana* exception. Jun. 26, 2012 Opinion, 006262, 006273-75. But there was no evidence in the LUPC record supporting second *Montana* jurisdiction. SOF 60-62. The Appellate Court's June 26, 2012, Decision had to concede that "[t]here is insufficient evidence in the" record to support jurisdiction pursuant to the second *Montana* exception. Jun. 26, 2012 Opinion, 006262, at 006276-77; SOF 109.

That should have been the end of the second *Montana* exception in this case. But this absence of evidence did not cause the Court to simply dismiss the second *Montana* exception as a basis for jurisdiction. Nor did the Court tell the Tribes that they were limited to the administrative record they had created. Instead, apparently in their role of "protect[ing] the

Tribe," the Appellate Court allowed the Tribes to go backwards in time six years and present the evidence the Tribes had failed to submit to the LUPC in 2006. Because of this finding of "insufficient evidence," the Appellate Court allowed the Tribes to submit four days of testimony and 254,129 pages of documents in support of second *Montana* jurisdiction. Tribal Court Record Index, PTX0001-2024, 008575-262704; Trial Transcripts 007474-7811.

In summary, when FMC asked to submit ***113 pages*** of evidence ***six weeks*** after the LUPC decision, in order to respond to unexpected aspects of that decision, these affidavits were excluded as "untimely and not part of the record in this matter." Jun. 14, 2007 Decl., 003021. Similarly, when FMC had asked to submit ***two (2) pages*** of a letter the Tribes had withheld undermining the statutory basis for the Tribes' claim, the Appellate Court ruled that this submission was not "timely." May 28, 2013 Order, 006626, at 006627. But somehow, the Court *sua sponte* decided to allow the Tribes to submit ***254,129 pages*** of evidence ***eight (8) years*** after the LUPC decision, and this was not "untimely" or "not part of the record in this matter." 003021. The Tribes were given this opportunity simply because the Tribes had lost on that point and the Appellate Court wanted them to win, as shown by the Court's own statements.

E. The March 2012 Public Seminar Explains the Tribal Courts' Double Standard Regarding the Record.

The May 2012 finding that the evidence presented to the LUPC was "insufficient" to prove second *Montana* jurisdiction should have been the end of the review of the LUPC's administrative determination. May 8, 2012 Opinion, 006165, at 006179-80; Jun. 26, 2012 Opinion, 006262, at 006276-77; SOF 109. The record was closed. The LUPC determination had been upheld. There should never have been a hearing on the second *Montana* exception.

So why did the Appellate Court allow the Tribes the entire second Montana hearing, while denying FMC the right to add 115 pages to help its case? The system itself answers that question. This question was answered more explicitly in the presentation made by the majority of the Appellate Court on March 23, 2012. Mitchell Dec., 006560, 006569-6609. Two judges of the Court gave this presentation completing their May 8, 2012, opinion that would be released seven weeks later, which granted the Tribes this second chance.

In this presentation, Judge Gabourie first explained his disagreement with the key decisions of the Supreme Court on tribal jurisdiction, which are contrary to tribal interests:

> ***Montana v. United States*, 450 U.S. 544 (1981):** "[H]as just been murderous to Indian tribes." 006580. "[Y]ou better have a good appellate court decision to get around that." 006583.
>
> ***Nevada v. Hicks*, 533 U.S. 353 (2001):** "And *Hicks v. Nevada* is another case that – that I think did not have a good appellate court decision to support that tribe." 006580.
>
> ***Strate v. A-1 Contractors*, 520 U.S. 438 (1997):** "That case, in my view, of course, I think Judge Ginsburg made a mistake." 006581.
>
> ***South Dakota v. Bourland*, 508 U.S. 679 (1993):** "And I think *Borland* epitomizes a poor appellate court decision." 006576.

(Emphasis added). Judge Pearson agreed with Judge Gabourie on this point, saying:

> JUDGE PEARSON: And ***we're not going to have <u>bad decisions like Borland and Strate and so forth</u>***. That's what we're trying to tell you. ***<u>We can avoid some of those bad decisions</u>*** if we go to federal court, ***<u>if it's all laid out before that</u>***.

006597 (emphasis added). Judge Gabourie gave his opinion that an Appellate Court opinion is important to "get around" the Supreme Court decisions against tribal interests:

> And sure, tribal sovereignty is -- is the thing we all look at. Every -- every tribe has tribal sovereignty. But if it's narrowed down, each year it's narrowed down to -- to fit within the very slim scope, say, for instance, of *Montana*, ***boy, you better have a good appellate court decision <u>to get around</u> that***. Because *Montana* has

> – has, of course, the second – the second exception in *Montana* is the most important one to tribes today. . . . My opinion. Excuse me.

006583 (emphasis added).[4]

The judges then explained how to "get around" the Supreme Court decisions. Judge Gabourie explained that "[y]ou've got to have some good scientific expert witnesses to testify, and that's why you remand that case back to the tribal court to get the testimony of expert witnesses." 006584-85. Judge Pearson agreed:

> So what Fred's been trying to tell you – and I think that maybe some of you, if you're just still law students, may not understand – is ***it's really important to make a record at the tribal court level***. . . . ***And we're sitting on one now that we know is going to go up, so we're saying our prayers as well as reading the cases and trying to do the – the history***.

006586 (emphasis added). Judge Gabourie explained that "[t]he appellate court has to take the case and mold it" in order to convince the federal court to adopt the Tribes' opinion:

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

006584 (emphasis added). Judge Gabourie then explained that if an appellate judge sees "weak spots" in the case, the appellate judge should remand it to straighten it out:

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[4] The Tribes argue that judges should be allowed to express their opinions regarding the law. While the canons allow some criticism of the decisions of the Supreme Court, "the question is whether that language crossed a line that would denigrate public confidence in the judiciary's integrity and impartiality." "That line is crossed when a judge not only criticizes the Court, but suggests an intention not to follow its holdings." *In re Charges of Judicial Misconduct*, 769 F.3d 762, 786 (D.C. Cir. 2014). This evidence shows that these judges had no intent to follow the holdings of the Supreme Court cases, but only to "get around" those cases. 006583.

> And you have to take a case -- ***sometimes you have to take a case, and you see weak spots in that case as an appellate judge, and you remand it back***. Because you have the right, in most -- under most law and order codes, that you can hear that case trial de novo. ***You remand that case back to straighten certain things out***.

006578 (emphasis added).

The majority of the Appellate Court did not see their role as applying laws impartially to the parties, but rather as key advocates for the interests of tribes across the country:

> PROFESSOR EAGLEWOMAN: So in a sense, the tribal court has to anticipate, this -- any decision that we have that involves someone who's not a tribal member could eventually be reviewed in federal court and ***lead to bad law for all tribes in the nation***.
>
> JUDGE PEARSON: ***Absolutely***.

006597 (emphasis added). Judge Pearson later explained this responsibility further, stating:

> And ***you have to be thinking about, not only that tribe that you're sitting for, but how it's going to affect all of Indian country*** if it goes up in a federal case. That's a lot of responsibility. It's really important that you think about those things.

006603-04 (emphasis added). Judge Gabourie said to "be sure to protect the tribe."

> ***So the appellate courts have got to step in*** and -- and, in their own way, make a good, balanced decision, a hundred-percenter for both sides, but ***be sure to protect the tribe***. And that's my own opinion, that last sentence. Don't blame (inaudible) --

006599 (emphasis added). The goal was to expand tribal power nationwide, rather than quibble about the rights to fairness for any non-members.

The majority of the Appellate Court made these statements on March 23, 2012, recommending remands to provide the best possible advocacy for Indian tribes. Six weeks later, that Appellate Court issued its Opinion in this case, doing as they had previewed, by giving the Tribes "the opportunity to present" the evidence that the Tribes had not submitted to the LUPC.

May 8, 2012 Opinion, 006165; 006181; 006227. This free pass was granted because the Court wanted to advocate for the Tribes on the second *Montana* exception, but the Tribes had not submitted any evidence. The Appellate Court was not acting as an umpire calling balls and strikes, but was acting as the manager guiding the Tribes to victory. That is not due process.

F. The Appellate Court Had Decided the Facts of the Case Before Hearing Any Evidence.

The Tribes argue that the Judges' comments regarding mining companies and environmental damage must somehow relate to other cases or locations. Tr. Br. 25-30. But this attempt ignores that the same pre-evidence statements made at the seminar were repeated by the same Judges in their written opinion in this case six weeks later.

On May 8, 2012, the Appellate Court had written that there was "insufficient evidence" to establish second *Montana* jurisdiction. May 8, 2012 Opinion, 006165, 006181. But six weeks before, on March 23, 2012, Judge Gabourie had decided that the food and water consumed by tribal members had been polluted, while acknowledging that there was no proof:

> JUDGE GABOURIE: You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and ***then the mining company or whatever, manufacturing company, disappears***. ***They leave, you know***. They've -- they've either dug everything they could, and then the ground is disturbed, sometimes polluted beyond repair. . . . And you're saying to yourself, you know, ***We know that the -- there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it. And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses. You need chemists and whatever to get out of testifying.*** It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."

006598 (emphasis added). Judge Pearson had also pre-judged this issue:

> If you're a law student and you're going to practice law, as well as if you're a judge and you're going to be hearing cases, you know where -- ***companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and then they go out of business. And they leave you just sitting***.

006605-06 (emphasis added). The Tribes cannot assert that these statements did not relate to this case, because they were also repeated in this case. Six months later, and long before the evidence was presented at the April 2014 hearing, the Appellate Court again expressed the same opinions that the Tribes' litigation of this case "will benefit more than 5,500 Tribal members ***by protecting the health of those members*** . . . ." Jan. 14, 2013 Opinion, 006464, at 006477. The Court also ruled in January 2013 that the FMC site "***would have been abandoned*** and left to the Tribes to clean-up, had the government not stepped in." 006477. These statements mirror those made at the presentation, even though there was no such factual record. The Court knew nothing about these scientific, human health, and environmental issues.[5] The Court pre-judged this case.

G. The Appellate Court Chose Idaho Law When It Helped the Tribes, and Ignored Idaho Law When It Hurt the Tribes.

Idaho law bars the Tribes' claim. Idaho law holds that a contract indefinite as to term is terminable at will by either party upon reasonable notice. Jul. 15, 2010 FMC Br. 004873, at 004934. Idaho contract law does not generally allow perpetual contracts that have no ending.

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[5] The Appellate Court seemed to believe that whatever the Tribes believe about the environment must automatically be superior to FMC's position. But the question of whether the Tribes' proposed approach for the FMC site cleanup would be more protective than the EPA selected remedial action has never been litigated. Even the second panel of the Appellate Court did not address that question. The evidence shows that the Tribes' preferred method of cleanup poses a much greater risk of harm compared to the method that the EPA has selected. But the Appellate Court appear to believe that the Tribes' approach would be more protective, without any evidence of that opinion. This case has never been about a fair determination of whether the Tribes' approach is more protective than FMC's approach. Instead, from the beginning, the LUPC has only wanted money. April 25, 2006 LUPC Decision at 6.

004873, at 4935; *Barton v. State*, 659 P.2d 92, 94 (1983). This law bars the judgment against FMC, because the alleged contract had no duration term and FMC gave notice of termination. SOF 49. But this Idaho law was ignored by the Appellate Court, while also ruling that "Tribal Law and Custom do not apply to this case," and that it would follow Idaho state law. The Appellate Court applied Idaho law in order to award attorney fees against FMC, Feb. 5, 2013 Findings, 006510, at 006525 & 006517-19, while ignoring the Idaho law that would require the Tribes' case to be dismissed. The Tribal Court applied Idaho law when it favored the Tribes, and ignored Idaho law when it favored FMC.

H. The Tribal Courts Ignore Federal Law on Tribal Jurisdiction.

Further evidence of the systemic bias in the Tribal Courts is the opinion provided by the second panel. The majority of the first panel explained that the Supreme Court precedent on tribal jurisdiction was wrongly decided, and that Tribal Courts should find a way to "avoid" or "get around" those decisions. 006597 (Judge Pearson: "We can avoid some of those bad decisions . . . ."); 006582 (Judge Gabourie: "[Y]ou better have a good appellate decision to get around [*Montana*]."). The opinion of the second panel followed this instruction by completely ignoring the legal standards. The standard of the second panel, allowing second *Montana* jurisdiction for any non-zero risk, or for even any tribal member's perception of a risk, cannot be considered an honest attempt to apply the law to the facts of the case. Apr. 15, 2014 Decision, 008225; May 16, 2014 Opinion, 008516; *see* FMC Response Brief on Second Montana Jurisdiction, filed contemporaneously herewith. The analysis of the Appellate Court should be seen for what it is – a clumsy attempt to help Tribes' counsel advocate for a limitless legal

standard helping all tribes.[6] That clumsy attempt itself is evidence that there is no possibility of an "impartial" decision in the Tribal Court system.[7]

I. There Is No Excuse for the Clear Prejudice of the Appellate Court.

The Tribes spend the bulk of their brief making excuses for the statements made by the majority of the Appellate Court at the public seminar. Tribes Br., 15-30. But their excuses fail.

First, the Tribes suggest that the Judges' remarks were merely academic instructions regarding the importance of "developing a complete factual record in tribal court." Tr. Br. 19. That excuse may have had merit if the Judges had merely instructed the Tribes to do better next time by submitting their evidence to the agency. But that is not what happened. Instead, these Judges actually "molded" this case by improperly giving the Tribes a second chance in this case.

Second, the Tribes argue that the Judges' remarks "do not show bias." Tr. Br. 20-24. They try to re-cast the statements as an impartial discussion of the law. However, a plain reading

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[6] The second panel's advocacy for the Tribes is even stronger evidence of the bias of the system than the explicit pronouncements of the first panel. Judge Gabourie did not go so far as to advocate that the legal standards themselves be changed. He was urging that the Tribal Courts "get around" the legal standards by using their judicial power to "mold" the factual evidence. Confident in his prejudgment that there must be some harm from the FMC site, Judge Gabourie only advocated to give these Tribes a second chance to prove the harm that he was sure would be there. 006598. But, when that second chance happened, the Tribes could not show any actual or imminent harm, and the Appellate Court was forced to retreat to advocating to lower the legal standards themselves.

[7] The second panel's advocacy for the Tribes is also shown by facts that strongly suggest the second panel had also decided on the result in advance. Before closing statements, Judge Herzog stated: "Counsel, after you make your closing arguments, we plan on delivering the decision of the court tomorrow morning. So we feel we will have already decided this case and completed it. So any post-trial motions on that will fall on deaf ears." 008161. And rather than take the time to fairly and impartially consider the "mountain of evidence" presented before making its decision, Judge Traylor admitted that he wrote the panel's decision as the hearing was progressing, and he read the panel's final decision from the bench on the morning immediately after closing statements. 008203.

of the transcript undermines this argument. Only an advocate for tribal interests would want a dispute on these topics to be decided by these judges.

Third, using case law regarding judicial bias from Article III courts, the Tribes argue that the legal predilections of a single judge are not enough to disqualify that judge from a case. But those are cases enjoying the complete Article III protections of an independent judiciary, lifetime appointments, a right of a citizen to vote in the process, and levels of appeal. On the contrary, there is no Article III protection in this case. Those cases do not apply here.

Fourth, under *Wilson*, the question is whether there is a "showing of prejudice in the tribal court" and whether the tribunal was "impartial." *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997). The Tribes' citations to cases regarding disqualification of judges do not state the same standard as the standard stated in *Wilson*. *Id.*

Fifth, the cases regarding judicial bias support FMC's position that this tribal adjudication violated due process, and cannot be enforced under the United States Constitution. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), due process required a judge to recuse himself from consideration of a pending case involving the company that provided him a large campaign donation. 556 U.S. at 877-78. "Significant and disproportionate influence" in putting the judge into the position was sufficient to prove a denial of due process:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when <u>***a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case***</u> by raising funds or directing the judge' election campaign when the case was pending or imminent. . . .
>
> Just as <u>***no man is allowed to be a judge in his own cause***</u>, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause.

556 U.S. at 884 (emphasis added). The Business Council had much more than a "significant" influence in placing the judges on this case. And there was more than "a possible temptation" to rule for the government that set compensation and the length of the judges' terms:

> ***Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation*** to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." . . . And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

Caperton, 556 U.S. at 885, 886.

Sixth, the Tribes argue that comments by the first panel carry no weight because, after a hearing, the second panel "affirmed" the decisions of the first panel. But that misses the point. Judges Gabourie and Pearson instructed tribal appellate judges to protect the interests of tribes by remanding cases with "weak spots" in order to supplement the record with testimony favorable to the tribes. The second panel then did just what Judges Gaborie and Pearson suggested, by remanding the case *to themselves* in an attempt to fill in the "weak spots" in the Tribes' second *Montana* case. And they went even further, by advocating the erroneous "non-zero risk" standard to get around the true legal standards for second *Montana* exception.

Due process violations can be shown based on the statements of adjudicators, indicating statements showing their prejudgment of the facts. In *Cinderella Career and Finishing School, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the Ninth Circuit held that FTC committed a due process violation because its Chair made statements that indicated prejudgment of the law and facts of a particular case while the appeal was pending before him, even though he did not name names and the statements did not directly track the allegations of the case. 425 F.2d at 592.

Also, in judicial bias cases, a due process violation can be shown either by statements showing actual bias, or by circumstances showing an appearance of partiality.

> In some cases, the proceedings and surrounding circumstances may demonstrate ***actual bias*** on the part of the adjudicator. *See Taylor v. Hayes*, 418 U.S. 488, 501-04, 94 S.Ct. 2697, 2704-06, 41 L.Ed.2d 897 (1974); *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 591 (D.C.Cir.1970). In other cases, the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create ***an appearance of partiality*** that violates due process, even without any showing of actual bias.

Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995) (emphasis added). The current case includes both (a) statements demonstrating bias, and (b) circumstances showing control over the courts.

Because the court was biased in favor of, and controlled by, the Tribes, the appointment of a new panel did not cure any defects in the system. In *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), the ALJ's recommendations were adopted by the Acting Director after the prior Director resigned, and therefore the prior Director only played a "minor role" in the case. 45 F.3d at 327. Nevertheless, due process did not allow the determination to stand. *Id.*; *see also Cinderella Career*, 425 F.2d at 592 ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."). The Ninth Circuit has held:

> We therefore hold that where one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process. The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. ***Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process.***

Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995) (emphasis added). Also, in *Stivers*, the Ninth Circuit considered the due process violations as an integrated whole, rather than as individual violations, looking both at "evidence of Pierce's pecuniary interest . . . along with the evidence of discriminatory treatment by the Board." *Stivers*, 71 F.3d at 742. In this case, the structural deficiencies of the court, the biased actions undertaken by the court and the public statements of the justices combine together to show partiality and a violation of due process.

IV. THE DISTRICT COURT ERRONEOUSLY BARRED DISCOVERY REGARDING WHETHER THE TRIBAL COURT SYSTEM PROVIDED DUE PROCESS TO A NONMEMBER OPPOSING THE TRIBAL GOVERNMENT.

The Tribes rely on the erroneous rule requiring non-members to argue to the tribal court judges whether they and the system are "impartial" and without "prejudice." *Wilson*, 127 F.3d 805 at 811. This Court adopted that rule, extending the exhaustion rule for jurisdiction as found in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), to apply to comity issues involving due process. But that rule has been squarely rejected by the Tenth and Ninth Circuits.

In *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006), the Tenth Circuit reversed the District of New Mexico for making exactly the same ruling. The Burrells had entered into a long-term lease of tribal-owned farm land, and alleged that the tribal government essentially chased them off the ground and stole their crops. 456 F.3d at 1163. After losing in the tribal court, the Burrells filed a case in the federal court. Before the District Court, the Burrells argued that it was impossible to get due process before a tribal court that was controlled by the same tribal leadership that stole their crops. 456 F.3d at 1165, 1170. The District Court held that the Burrells could not raise this issue because of *Iowa Mutual* and *National Farmers*:

> The district court, however, ruled that a federal court's authority to re-adjudicate issues resolved in tribal court because of a due process failure was contrary to the Supreme Court's decisions in *Iowa Mutual* and *National Farmers*.

456 F.3d at 1171. On appeal, the Tenth Circuit rejected the District Court's rule:

> We disagree with the district court's conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations. ***The Supreme Court's decisions in Iowa Mutual and National Farmers do not address due process***; rather, they hold that principles of comity require a federal court to give a tribal court the first opportunity to determine its own jurisdiction subject to later review by a federal court . . . .

456 F.3d at 1171 (emphasis added).

In rejecting the extension of *Iowa Mutual* and *National Farmers* to due process issues, the Tenth Circuit followed the Ninth Circuit case of *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which explained that comity was not included in exhaustion:

> ***Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason***, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.
>
> . . . [T]he rule that federal courts may not re-adjudicate questions – whether of federal, state or tribal law – already resolved in tribal court ***absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason***.

295 F.3d at 903-04 (emphasis added). The Ninth Circuit demonstrated this rule in *Bird v. Glacier Electric Co-op*., 255 F.3d 1136 (9th Cir. 2001), where it explained that, under a *de novo* standard of review, the district court had "no discretion to recognize the tribal court judgment" if it violated due process. 255 F.3d at 1140-41. The Ninth Circuit did not consider the opinions of the tribal courts, and refused enforcement, even though "[t]he Co-op did not object to" the improper argument that was the basis of the claim of lack of due process. 255 F.3d at 1140.

This Court's rule would require the Ninth Circuit to overrule both *AT&T Corp.*, and *Bird,* and simultaneously create a split with the Tenth Circuit under *Burrell*. That is not likely to occur.

V. THE JUDGMENT SHOULD NOT BE ENFORCED BASED ON THE DISCRETIONARY FACTORS PROVIDED IN *WILSON V. MARCHINGTON*.

As explained in FMC's Opening Brief, a federal court may decline to recognize and enforce a tribal court judgment on equitable grounds, including (a) if "the judgment conflicts with another final judgment that is entitled to recognition," or (b) if "recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States." *Wilson*, 127 F.3d at 810. The Court should exercise this discretion in this case, because the Tribes seek to supersede the EPA regarding the safest remediation of the FMC site:

- "Plainly, EPA's decisions are not based on the Tribes' positions." Tr. Br. 34.
- "EPA rejected the Tribes' position that the phosphorus contaminated soils should be removed from the Reservation." Tr. Br. 33.
- "EPA is an independent federal agency and 'does not have to do what the Tribes ask.'" Tr. Br. 33.
- "And even though the EPA has regulated the FMC Property under CERCLA since 1990, . . . it has never required FMC to remove any of the waste from the Reservation, and now intends to keep it there indefinitely deeming it too dangerous to move anywhere else." Tr. Br. 31.
- "[I]n any event, the remedial actions ordered by the EPA are not adequate to protect tribal interests." Tr. Br. 31.
- "EPA's regulation of the FMC Property under CERCLA has also been deeply flawed." Tr. Br. 31.
- "In making that decision [to cap in place], EPA rejected the Tribes' position that the phosphorus contaminated soils should be removed from the Reservation." Tr. Br. 18.

This Court previously instructed that the United States' trust responsibilities "do not allow the Tribes to prescribe the environmental remediation measures the United States should pursue."

July 13, 1999 Order, 000716 at 000717. Under *Wilson*, the Court should not enforce this Judgment, allowing the EPA to continue in its decisions as to how best to handle the FMC site.

VI. THE PENAL JUDGMENT RULE BARS ENFORCEMENT OF THE TRIBAL COURT JUDGMENT.

The Tribes offer only two arguments against the application of the penal judgment rule to this Judgment. Neither of those arguments has any merit.

A. The Penal Judgment Rule Is an Essential Part of Comity.

The Tribes first argue that the penal judgment rule is not part of the comity analysis articulated in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). But *Wilson* did not involve the penal judgment rule as part of the comity analysis, because Mary Jane Wilson was seeking to enforce a judgment for $246,100 to personally compensate her for injuries she suffered in a traffic accident. 127 F.3d at 807. That judgment was clearly based on "a grant of a civil right to a private person" and the penal judgment rule did not apply. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219 (9th Cir. 2006). The Judgment in this case does not award money to a private individual as compensation for a private injury. Instead, this Judgment orders payment to the Business Council and LUPC, as governmental entities, as a payment of "the Annual Tribal Waste Storage Permit Fee." 008573.

The Ninth Circuit in *Wilson* explained that "the recognition and enforcement of tribal judgments must inevitably rest on the principles of comity." 127 F.3d at 809. The Ninth Circuit pointed to "the Restatement (Third) of Foreign Relations Law of the United States" as providing the criteria for the recognition of foreign judgments. 127 F.3d at 810. The Restatement includes both Section 482, used in *Wilson*, and Section 483, which provides the companion penal judgment rule. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

§§ 482-83 (1987). Section 483 was adopted by the Ninth Circuit in *Yahoo! Inc.*, 433 F.3d at 1219-20 (9th Cir. 2006). These two adjacent sections show that the rule is an integral part of the comity analysis that *Wilson* followed.

The penal judgment rule is also part of the comity analysis of the United States Supreme Court. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L. Ed. 268 (1825); *Wis. v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888), *overruled in part on other grounds by Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278 (1935); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964); *Pasquantino v. United States*, 544 U.S. 349, 360-61 (2005). The penal judgment rule is also codified into statute. *See* Uniform Foreign-Country Money Judgments Recognition Act, § 3 (July 21, 2005); IDAHO CODE § 10-1403(2) (2016). The penal judgment rule is so integral to comity that it applies even to the enforcement of judgments of sister states under the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1.

The Ninth Circuit in *Wilson* recognized that "special considerations arising out of existing Indian law merit some modification in the application of comity to tribal judgments." 127 F.3d at 810. But these "special considerations" weigh in favor of including the penal judgment rule as part of the comity granted to tribal judgments, which supports the position repeatedly emphasized by the Supreme Court limiting tribal jurisdiction to the authority necessary to protect tribal self-government or control internal relations:

> 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 v. United States, 450 U.S. 544, 564 (1981) (emphasis added). In *Plains Commerce*, the Supreme Court wrote:

> Even then, the regulation must stem from the tribe's inherent sovereign authority ***to set conditions on entry, preserve tribal self-government, or control internal relations***.

554 U.S. at 337 (emphasis added). This same direction is repeated in numerous other United States Supreme Court decisions. *Hicks*, 533 U.S. at 359; *Atkinson Trading Co., Inc. Shirley*, 532 U.S. 645, 658-59 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *Lara*, 541 U.S. at 212 (Kennedy, J., conc. in judgment); *S.D. v. Bourland*, 508 U.S. 679, 694-95 (1993); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). A power to impose penal judgments on nonmembers of the tribe is not "necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. The states have existed for centuries without this power. The rule leaves a jurisdiction with the power to enforce its penal judgments within the bounds of its own jurisdiction. Tribes do not need the power to enforce penal judgments outside of those bounds.

B. The Penal Judgment Rule Bars Judgments Awarding Money to the Government or the Public.

The Tribes also argue that the Judgment at issue here is not a "penal" judgment for purposes of the penal judgment rule. Tr. Br. 32-33. The Tribes attempt to re-characterize the penal judgment rule to apply only to criminal proceedings. Tr. Br. 32-33. That argument is clearly wrong.[8] A judgment is a penal judgment if it is a fee that must be paid to the government. FMC Br. 28-29. Section 483 refers to judgments for "taxes, fines, or penalties":

[8] The penal judgment rule applies to civil judgments issued in civil cases. While it is true that the Supreme Court has generally precluded tribal criminal jurisdiction over non-Indians, that limitation is not the penal judgment rule. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676, 693 (1990). *Oliphant* and *Duro* reflect the Supreme Court's concern that there are constitutional limits against allowing tribes jurisdiction over nonmembers in tribunals that do not provide constitutional protections to nonmembers. The penal judgment rule supports *Oliphant* and *Duro* by barring tribes from using their governmental powers to exercise authority over those who have no constitutional protections within the tribal system, and who have no right to participate in the tribal government.

> Courts in the United States are not required to recognize or to enforce judgments for ***the collection of taxes, fines, or penalties rendered by the courts of other states***.

RESTATEMENT § 483. The term "penal judgment rule" is simply shorthand for the rule relating to "taxes, fines, or penalties." The Ninth Circuit referred to the rule in this way:

> This is consistent with the Restatement's declaration that "[c]ourts in the United States are not required . . . to enforce judgments [from foreign countries] for the collection of . . . ***fines or other penalties***." Restatement § 483; *see also* 30 Am.Jur.2d Execution and Enforcement of Judgments § 846 (2004) ("Courts in the United States will not recognize or enforce a penal judgment rendered in another nation.").

Yahoo!, Inc., 433 F.3d at 1219. The Supreme Court has written that the rule applies "to all suits in favor of the State for ***the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties***." *Wisconsin*, 127 U.S. at 290 (emphasis added). A penal judgment is one where "[t]he cause of action was not any private injury, but solely the offence committed against the State by violating her law" and where "[t]he prosecution was in the name of the State, and ***the whole penalty, when recovered, would accrue to the State***." *Wisconsin*, 127 U.S. at 299 (emphasis added). The rule is codified to bar enforcement of "a fine or other penalty."

> (b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is: . . . (2) ***a fine or other penalty***;

IDAHO CODE § 10-1403(2) (2016); National Conference of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act § 3 (July 21, 2005) ("UNIFORM LAW") (emphasis added). The Uniform Law is based on the principle that: "Foreign-

country judgments for taxes and judgments that constitute ***fines or penalties*** traditionally have not been recognized and enforced in U.S. courts." UNIFORM LAW, § 3, cmt. 4 (emphasis added).

> Courts generally hold that the test for whether a judgment is a fine or penalty is determined by ***whether its purpose is remedial in nature, with its benefits accruing to private individuals***, or ***it is penal in nature, punishing an offense against public justice***.

UNIFORM LAW § 3, cmt. 4 (emphasis added).

The Full Faith and Credit Clause does not require that sister states enforce a penal judgment from another state. *Nelson v. George*, 399 U.S. 224, 229 (1970). States do not enforce the judgments of other states that impose civil penalties to enforce zoning ordinances. In *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (Nev. 2011), the Nevada Supreme Court found that the rule barred the enforcement of a civil statutory penalty for violation of a zoning ordinance by the improper placement of a sign in California:

> Thus, here, the central question is whether the statute provided civil penalties as a means ***to punish a violator for an offense*** against the public or whether the statute created ***a private right of action to compensate*** a private person or entity.
>
> We conclude that Oakland was not a private entity enforcing a civil right. Instead, pursuant to [California law], Oakland filed suit, with the permission of the Alameda County District Attorney, seeking ***penalties for Desert Outdoor's violations of Oakland zoning ordinances***.

City of Oakland, 127 Nev. 533, 267 P.3d 48; *see also Schaefer v. H.B. Green Trans. Line*, 232 F.2d 415 (7th Cir. 1956) (holding that Illinois statutory 10% penalty for failure to permit review of corporate books could not be enforced in Iowa). Just as in *City of Oakland*, the Tribes seek to enforce their zoning ordinance by means of a fee that goes to the government.

The Judgment at issue here goes to the Business Council and the LUPC and is to enforce the Tribes' planning and zoning and waste regulations. Apr. 30, 2015 Opinion, 008538, at 008538-39. The Appellate Court explained that these zoning regulations are the "single issue":

> This case revolves around ***a single issue***. The Shoshone-Bannock Tribes wish to exercise civil jurisdiction for purposes of ***planning and zoning***, ***and hazardous waste management regulation*** over on-reservation fee land owned by the defendant, FMC.

008538 (emphasis added). The Judgment is based on "an annual $1.5 million special use permit fee for FMC's storage of hazardous waste" under the land use ordinance. 008539.

The penal law rule covers remedies that go to the public, rather than to private individuals. In *Wisconsin v. Pelican Insurance Co.*, the Supreme Court explained that the penal law rule applies "to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." 127 U.S. at 290. A Wisconsin judgment for a penalty against a Louisiana insurance company for failure to properly register was not enforceable because "[t]he cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." *Wisconsin*, 127 U.S. at 299. The judgment was not to be enforced because it compelled "the offender to pay a pecuniary fine by way of punishment for the offence." 127 U.S. at 299. Similarly, the Court in *Huntington v. Attrill*, 146 U.S. 657 (1892), explained that the test whether a law is penal is "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." 146 U.S. at 668. A penal judgment is based on "a breach and violation of public rights and duties, which affect the whole community, considered as a community." *Id.* The distinction is "whether its purpose is to punish an offence

against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." 146 U.S. at 673-74. In *Yahoo! Inc.*, the Ninth Circuit explained the distinction as either "a punishment of an offense against the public, or a grant of a civil right to a private person." *Yahoo!, Inc.*, 433 F.3d at 1219; *see also Banco Nacional*, 376 U.S. at 413 n.15.

Based on these rules, the Judgment at issue in this case is clearly a penal judgment, or a judgment for a "fine or other penalty." ***First***, the funds go to the Tribal government, and not to any particular individual. ***Second***, the Judgment is not measured in any way by any amount of compensation to any individual. ***Third***, the fee is based on a land use and waste ordinance, rather than a claim for damage. ***Fourth***, the fee is a flat amount paid for violating a law the Tribes, rather than a calculation of any compensation or damage. ***Fifth***, the fee is based on an offense against the public or the Tribes as a whole, and not to any particular individual. This Judgment falls squarely within the penal judgment rule, and is barred by that rule.

VII. ARTICLE III OF THE UNITED STATES CONSTITUTION BARS ENFORCEMENT OF THE TRIBAL COURT JUDGMENT AGAINST FMC.

Article III of the United States Constitution protects FMC from being forced into a judicial system that does not have Article III protections. Judge Neil Gorsuch has explained:

> ***The Constitution assigns "[t]he judicial Power" to decide cases and controversies to an independent branch of government populated by judges who serve without fixed terms and whose salaries may not be diminished***. U.S. Const. art. III, § 1. . . . After all, the framers lived in an age when judges had to curry favor with the crown in order to secure their tenure and salary and their decisions not infrequently followed their interests. Indeed, ***the framers cited this problem as among the leading reasons for their declaration of independence***. The Declaration of Independence ¶ 11; *Stern*, 131 S.Ct. at 2609. ***And later they crafted Article III as the cure for their complaint, promising there that the federal government will never be allowed to take the people's lives, liberties, or property without a decisionmaker insulated from the pressures other branches may try to bring to bear***. *Stern*, 131

> S.Ct. at 2609. To this day, one of the surest proofs any nation enjoys an independent judiciary must be that the government can and does lose in litigation before its "own" courts like anyone else.

In re Renewable Energy Dev. Corp., 792 F.3d 1274, 1277-78 (10th Cir. 2015) (emphasis added).

Given this limitation, a citizen should not be required to adjudicate a dispute in a court without the Article III protections. As explained in *Stern v. Marshall*, 131 S. Ct. 2594 (2011):

> In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, ***"'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"*** *Ibid*. (quoting 1 Montesquieu, Spirit of Laws 181).

Stern, 131 S. Ct. at 2608-09 (emphasis added).

> ***Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges***. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, ***the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges."*** 1 Works of James Wilson 363 (J. Andrews ed. 1896).

Stern, 131 S. Ct. at 2609 (emphasis added).

The protections of Article III are a constitutional right of individual citizens of the United States. "The structural principles secured by the separation of powers protect the individual as

well." *Stern*, 131 S. Ct. at 2609 (quoting *Bond v. United States*, 131 S. Ct. 2355 (2011)).

Article III protects citizens from exercise of the "judicial Power" by entities outside Article III:

> Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III.

Stern, 131 S. Ct. at 2609. Article III does not permit a citizen to be required to adjudicate a dispute before judges who owe allegiance only to a tribe, with no Article III protections.

VIII. CONCLUSION

The Tribal government serves the interests of the Tribes, rather than the interests of nonmembers. This Tribal judicial system was asked whether a nonmember should pay the Tribal government that organized it large sums. There is no basis for believing that this system would be "impartial" in answering that question. *Wilson*, 127 F.3d at 811. Instead, fundamental principles of government lead to the conclusion that the Tribal Court will rule in favor of the power that governs it. In this case, due process took a back seat to protecting the Tribes.

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 MOTION FOR SUMMARY JUDGMENT ON DUE PROCESS AND ENFORCEMENT OF JUDGMENT** 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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