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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

SHOSHONE-BANNOCK TRIBES' RESPONSE TO DKT. NO. 67-2, MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY ENFORCEMENT FOR FAILURE OF DUE PROCESS

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I. INTRODUCTION

Under the exhaustion doctrine established by the Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987), FMC was required to assert its due process claims in tribal court in order to preserve such claims for later federal court review. Mem. Decision & Order at 4, *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-CV-489-BLW, 2015 WL 6958066 (D. Idaho Nov. 9, 2015) ("Nov. 9, 2015 Order"), Dkt. No. 43. As this Court held in the Nov. 9, 2015 Order, FMC preserved only its claim that two Judges on the first panel of the Tribal Appellate Court to hear this case were biased, *id.* at 4-5, and therefore its due process challenge is limited to that contention, which it may advance based only on "same material it presented to the Tribal Appellate Court, specifically the transcript of the [judges'] public comments." *Id.* at 5. Nowhere in FMC's Memorandum In Support of Motion to Deny Enforcement for Failure of Due Process, Dkt. 67-2 ("FMC DPBr.") does FMC move for reconsideration of the Nov. 9, 2015 Order, even though most of the arguments that it makes have been waived. Furthermore, none of the arguments FMC makes has merit.

FMC's challenge based on the statements of two Tribal Appellate Court Judges at a legal education seminar – the only argument it preserved – fails because a new panel of the court reconsidered the decisions in which those Judges participated and, in any event, the two Judges' remarks complied with applicable law and do not show bias. The waived arguments, which attack the Tribes' governmental structure and the conduct of the Tribal Court proceedings, and rehash FMC's already-rejected argument seeking discovery, are barred by the Nov. 9, 2015 Order and have no merit in any case. And finally, the Judgment is not a penal judgment; nor is Article III of the U.S. Constitution a bar to enforcement of the Judgment. In sum, FMC was provided due process in the proceedings before the Tribal Appellate Court that were concluded by the entry of

judgment against the FMC Corporation ("FMC") on May 16, 2014,[1] and that judgment is entitled to recognition and enforcement by this Court.[2]

II. STANDARD OF REVIEW

FMC bears the burden of demonstrating that the tribal proceedings did not afford due process.[3] *See Schweiker v. McClure*, 456 U.S. 188, 196 (1982) ("the burden of establishing a disqualifying interest rests on the party making the assertion"); *Ohno v. Yasuma*, 723 F.3d 984, 991 (9th Cir. 2013) (under California Uniform Foreign-Country Money Judgments Recognition

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[1] *See* Ex. 1, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp*., Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2014 TCA Op.") (upholding Tribal jurisdiction under the second *Montana* exception and holding FMC responsible for the payment of special use permit fees to the Tribes); Ex. 2, Statement of Decision of Apr. 15, 2014 ("2014 TCA Dec.") (Statement of Decision on the second *Montana* exception announced from the bench following trial); Ex. 3, Order of May 28, 2013 (new panel of the Tribal Appellate Court reaffirms that the Tribes have jurisdiction over FMC under the first *Montana* exception and that FMC entered into an agreement with the Tribes in 1998 to pay the $1.5 million permit fee each year, and rejects FMC's challenge to the validity of the Tribes' Hazardous Waste Management Act); Ex. 4, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012 (upholding Tribal jurisdiction under the first *Montana* exception and holding FMC responsible for the payment of special use permit fees to the Tribes) ("2012 TCA Op."); Ex. 25, J. & Order for Att'ys Fees & Costs of May 16, 2014 ("Judgment").

[2] The facts on which FMC's legal arguments rely do not support its position, and are incorrect for the reasons shown below, and as shown by the Tribes' Mem. Supp. Shoshone-Bannock Tribes' Mot. Sum. J. Due Process, Dkt. 66-1 ("Tribes' DPBRr.") at 5-10, and the Statement of Facts In Supp. of Mots. of the Shoshone-Bannock Tribes for Recognition and Affirmance of Tribal Appellate Court Decisions Upholding Tribal Jurisdiction Under the *Montana* Exceptions, and Mot. for Summary Judgment On Due Process and Personal Jurisdiction and For Recognition and Enforcement of the Tribal Court Judgment, Dkt. 64-2. Furthermore, FMC has failed to show that any of the facts found by the Tribal Appellate Court are clearly erroneous.

[3] FMC contends that the party seeking enforcement must make a *prima facie* showing of subject matter jurisdiction, personal jurisdiction "and that there were regular proceedings conducted according to a normal course of civilized jurisprudence." FMC DPBr. at 3. The cases that FMC cites in support of this statement, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), and *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995), do not support this contention. The *AT&T* court did not adopt such a rule because that case did not involve a claim for lack of due process, and the court in *Bank Melli Iran* expressly declined to adopt such a standard, 58 F.3d at 1409.

Act the party opposing recognition has the burden of showing noncompliance with due process). To satisfy that burden FMC must overcome the "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011) (habeas petitioner failed to overcome "presumption that judicial officers act impartially"), and the principle that "the federal policies promoting tribal self-government and self-determination instruct [federal courts] to provide great deference to tribal court systems, their practices, and procedures." *Burrell v. Armijo*, 456 F.3d 1159, 1173 (10th Cir. 2006) (citing *National Farmers*, 471 U.S. at 856). FMC also bears the burden of showing that the Judgment should not receive comity under the discretionary factors of *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). *See Somportex Ltd. v. Phil. Chewing Gum Corp.*, 453 F.2d 435, 440-41 (3d Cir. 1971) (quoting *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)) (under comity foreign judgment "should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment").

FMC's due process claim is reviewed *de novo* by this Court, Nov. 9, 2015 Order at 5, and in accordance with the standards applicable to review of tribal court decisions under the tribal court exhaustion doctrine. *Id.* at 2-4.[4]

[4] FMC's statement of this standard is improperly supported. FMC cites to the "Ninth Circuit Standards of Review." FMC DPBr. at 3 n.1, 4, 24 n.12. These are not a legal authority. They are part of an outline, last updated in 2012, prepared by the court's staff as a research guide for attorneys. *See* Standards of Review, U.S. Cts. for the Ninth Cir., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368 (last visited Feb. 23, 2017). The Standards website states that this guide is not intended to "express the opinion of the Ninth Circuit Court of Appeals" and expressly warns that it might not reflect the most current case law. *Id.* As such, this guide's interpretative summary of selected cases has no independent legal authority. FMC also incorrectly relies on *Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996), FMC DPBr. at 3, which applied a de novo standard to a due process challenge to a federal district court's procedures on direct appeal, and did not involve comity or tribal jurisdiction.

III. THE PRESENTATIONS TWO TRIBAL APPELLATE JUDGES MADE AT A LEGAL EDUCATION SEMINAR WERE ENTIRELY PROPER AND DO NOT ESTABLISH A DUE PROCESS VIOLATION.

As the Tribes have previously shown, FMC's challenge to the Tribal Appellate Court proceedings based on the presentations by Judges Gabourie and Pearson must be rejected because: (1) any bias was eliminated by the new panel's reconsideration of the rulings of the panel on which they participated, and (2) their remarks at a law school seminar were entirely proper and provide no basis for questioning their panel's decisions. Tribes' DPBr. at 10-30. FMC's arguments do not unsettle either of these conclusions.

In the first place, FMC's due process challenge fails because a new panel of the Tribal Appellate Court, on which neither Judge Gabourie nor Judge Pearson sat, was appointed to conduct further proceedings in the case, and at FMC's request the new panel reconsidered the rulings of the prior panel that FMC claims reflect judicial bias.[5] Following that review, the new panel reaffirmed those rulings, *see* Order of May 28, 2013, and conducted all further proceedings in the case. That eliminated any basis for FMC's bias attack on two judges who sat on the first panel. Tribes' DPBr. at 10-15.

Furthermore, FMC's due process attack on the seminar remarks of Judges Gabourie and Pearson fails because it is advanced primarily by extracting individual statements from the educational context in which they were made, and pretending they were made in this case. FMC contends that Judge Gabourie's and Judge Pearson's[6] remarks communicated that "it was

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[5] FMC asserts that the new panel did not reconsider the prior panel's ruling. FMC DPBr. at 16-17. But the plain text of the Order of May 28, 2013 rejects that contention, as we have previously shown. Tribes' DPBr. at 12-14.

[6] FMC alleges that Judges Gabourie and Pearson, are "member[s] of a tribe," FMC DPBr. at 13, but provides no factual support for that assertion, and offers no legal reason to find bias on that basis. The Tribes' understanding is that Judge Pearson is not a member of a tribe. Later, FMC

important for Tribes to obtain as much jurisdiction and sovereignty for Indian tribes as possible," and "explained how tribal appellate judges should issue decisions to achieve this goal for tribes." FMC DPBr. at 14. To illustrate, FMC alleges that the Judges were arguing that tribal appellate courts should advocate the tribe's position in order to "make a better record that would more likely be recognized by the federal courts." *Id.* This mischaracterizes their remarks, which read in context address the importance of developing a full record in tribal court, to fully inform the tribal appellate court on all relevant issues, including issues of culture and tradition, so that the tribal appellate court can fulfill its responsibilities under the tribal court exhaustion doctrine. Tribes' DPBr. at 18-20. The Judges also emphasized that a good decision requires both parties' full participation, and that the court is an impartial decisionmaker. *Id.* at 18-19. FMC also cites Judge Gabourie's statement that "you better have a good appellate court decision to get around that [*Montana* decision]," FMC DPBr. at 14, but that informal observation is correct. To avoid *Montana*'s general rule, one of its exceptions must be shown to apply. Tribes' DPBr. at 23.

FMC also alleges that Judges Gabourie and Pearson criticized Supreme Court decisions, FMC DPBr. at 14, but no meaningful discussion of a Supreme Court decision omits commentary on the decision, pro and con, especially in an educational setting, and such remarks do not show bias in any event. Tribes' DPBr. at 21-23. FMC quotes Judge Gabourie's statement that the *Montana* decision "has been murderous to Indian tribes," FMC DPBr. at 14, but the unfavorable

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implies that Judge Traylor, a member of the second panel, was biased because he was a "former employee of the Tribes . . . ." *Id.* at 16. It provides no authority to support such an inference. A judge's past associations, standing alone, are not sufficient to show bias. *See In re United States*, 666 F.2d 690, 696-97 (1st Cir. 1981). Moreover, all judges are *current* employees of sovereign governments, but are still presumed to fairly adjudicate cases, *see Spokane Cnty. Legal Servs., Inc. v. Legal Servs. Corp.*, 614 F.2d 662, 668 (9th Cir. 1980), including those against the government and its officers, *see Withrow*, 421 U.S. at 47; *Sivak*, 658 F.3d at 927. And Judge Traylor was himself only one of three members of the panel, which went on to rule unanimously against FMC.

impact of *Montana* on tribal jurisdiction has also been recognized by the Supreme Court. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333 (2008) (reviewing the impact of the *Montana* case on tribal jurisdiction over nonmember activity). And that statement was made to underscore the importance of tribal appellate courts to the tribal court exhaustion doctrine, which makes it important for those courts to "do the job right" as Judge Pearson stated. Tribes' DPBr. at 20-21. Finally, even if those remarks were critical of the Supreme Court decisions, that would not provide a basis for finding bias. *Id*. at 21-22 (citing cases).

FMC points to Judge Gabourie's statement that the tribal "appellate courts have got to step in" and "be sure to protect the tribe," FMC DPBr. at 14, but read in context, it is clear Judge Gabourie was referring to a tribal court's obligation under the law to set forth the basis for its decision in clear terms that fulfill the tribal court's obligations under the tribal court exhaustion doctrine, Tribes' DPBr. at 23-24. That is how a tribal appellate court protects the tribe. Equally important, though ignored by FMC, Judges Gabourie and Pearson expressly recognized their obligation to be impartial and to follow the law. *Id.* at 20, 24. Those statements defeat FMC's contentions. *Id.* at 24 (citing *In re Charges of Judicial Misconduct*, 769 F.3d 762, 783 (D.C. Cir. 2014) ("Given that preface to her remarks [that she would follow the law in her judicial duties], we do not find a violation of the misconduct rules")).

FMC also contends the Judges' statements about mining and manufacturing companies evidence bias, but its concession that those remarks do not mention FMC, First Am. Compl. Decl'y & Injunctive Relief ¶295, Dkt. No. 10 ("FMC Compl."), defeats that claim, Tribes' DPBr. at 26, and in any event, those remarks cannot be construed to refer to the FMC Property at issue in this case because that property is not used for mining, has not been abandoned, and instead continues to be used by FMC to store waste, *id.* at 26-30. FMC cites Judge Gabourie's reference to water

pollution to support its claim of prejudgment on the contamination of the FMC Property, FMC DPBr. at 15. But those remarks did not mention FMC or this case, and were made to emphasize that tribal courts should not rely exclusively on lay testimony, rather than experts, to find pollution, and that an appellate court should remand an appeal for the development of expert witness testimony when necessary. Tribes' DPBr. at 27-28.[7]

Finally, FMC's conduct in failing to present its due process arguments to the Tribal Courts, its decision to hip-pocket its arguments based on the remarks of Judges Gabourie and Pearson for more than one year, and its failure to make a motion of any kind when it did object to those remarks, reflect gamesmanship. By that conduct FMC waived its due process attacks. *Id.* at 11-12 & n.11.

[7] FMC also cites to the Tribal Appellate Court order concerning attorneys fees and costs, FMC DPBr. at 14-15 & n.6. *See* Ex. 10, Findings of Fact, Conclusions of Law, Op. & Order re Att'y Fees & Costs of Jan. 14, 2013 ("Order of Jan. 14, 2013"); Ex. 11, Am. Findings of Fact, Conclusions of Law, Op. & Order re Att'y Fees & Costs, *Nunc Pro Tunc* of Feb. 5, 2013 ("Feb. 5, 2013 Order"). FMC asserts that in the Order of Jan. 14, 2013, the Tribal Appellate Court prejudged the existence of the contamination on the FMC Property even though "[t]here was no evidence for this point at the time." FMC DPBr. at 15 n.6. But the statements in the Order of Jan. 14, 2013 to which FMC refers concerned only the applicability of exceptions to the American Rule on attorneys fees, not the second *Montana* exception. Furthermore, the court ordered that further proceedings would be held before a final award of attorneys fees and costs would be made, Order of Jan. 14, 2013 at 18; Feb. 5, 2013 Order at 18, and those proceedings were conducted by the new panel. Judgment at 1-2. And before the Order of Jan. 14, 2013 was issued, the court had made findings concerning the RCRA litigation and the RCRA Consent Decree, 2012 TCA Op. at 4, 7-8, 15, and had found that "it is reasonable to conclude that if FMC does not bear the reasonable costs of completing the appropriate elimination or treatment of the hazardous waste, or pay the fees associated with the Tribal permits for the regulation of FMC's activities, then the expense regarding those activities will be incurred by the Tribes." *Id.* at 16. The court did not, however, determine whether the evidence then before the court satisfied the second *Montana* exception, ruling instead that further proceedings were required to make that determination. *Id.* at 16-17. Finally, neither Judge Gabourie nor Judge Pearson sat on the panel that later adjudicated the second *Montana* exception issue, which eliminated any claim of bias based on the Order of Jan. 14, 2013. *See supra* at 4.

IV. THE DISTRICT COURT PROPERLY DENIED FMC DISCOVERY ON CLAIMS IT HAD WAIVED IN TRIBAL COURT.

FMC argues that in the Nov. 9, 2015 Order, this Court erred in ruling that FMC was not entitled to discovery on its due process challenges. FMC DPBr. at 19-24. Although it appears to be seeking reconsideration of that order, it has not filed any such motion. It could have done so in a timely manner after Nov. 9, 2015 Order was issued. *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1066 (D. Idaho 2005) ("a motion for reconsideration must be filed within ten (10) days of the court's order"). Doing so now, fifteen months later, in the course of court-ordered briefing on dispositive motions, *see* Case Mgmt. Order, Dkt. No. 48, ¶¶2-3 (referring to briefing on "dispositive motions"), is too late. For that reason alone, FMC's arguments should be rejected.[8] Even assuming, *arguendo*, that those arguments were properly presented, they should be rejected.

In the Ninth Circuit a motion for reconsideration of a court order is treated analogously to a Rule 59(e) motion to alter or amend a judgment. *Wilderness Soc'y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2009 WL 1033711, at *1-2 (D. Idaho Apr. 16, 2009) (citing *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1519 (9th Cir. 1984)). Reconsideration can be granted only when there has been "(1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or to prevent manifest injustice," *Mangeac v. Armstrong*, No. 1:08-CV-239-BLW, 2010 WL 4117054, at *2 (D. Idaho Oct. 19, 2010) (quoting *Louen v. Twedt*, No. CV-F-04-6556 OWW/SMS, 2007 WL 915226,

[8] FMC's hip-pocket approach to this issue is akin to its decision to withhold its attack on the seminar remarks of Judges Gabourie and Pearson for over a year, until after the Tribal Appellate Court had issued the 2012 TCA Op., and to then insert its objections in a later brief, without filing any motion seeking relief, presumably to mark the issue for later presentation to the federal courts. *See* Tribes' DPBr. at 10-12. In this instance, rather than filing a timely motion for reconsideration of this Court's Nov. 9, 2015 Order, FMC simply states its objections, probably for later citation in the event of an appeal to the Ninth Circuit.

at *4 (E.D. Cal. Mar. 26, 2007)), and then only when supported by "facts or law of a strongly convincing nature . . . ." *Bennion v. United States*, No. CV04-614-N-EJL, 2007 WL 676679, at *1 (D. Idaho Mar. 1, 2007) (quoting *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996)). No such showing is made here.

FMC offers the conclusory assertion that the Court committed "clear error," FMC DPBr. at 19, but in support of this argument it simply recapitulates the arguments it put before this Court during the briefing on the discovery issue resolved by the Nov. 9, 2015 Order. FMC's only new argument is a short assertion, with no supporting legal authority, that the Court's ruling was an impermissible retroactive application of "a new rule." FMC DPBr. at 21. As shown *infra*, this assertion is wrong, and would fail even if FMC had filed a timely motion for reconsideration. In plain terms, FMC is simply trying to get "one additional chance to sway the judge," which is not a sufficient, "strongly convincing" basis for reconsideration. *See Bennion*, 2007 WL 676679, at *1 (citing *Ill. Cen. Gulf R.R. v. Tabor Grain Co.*, 488 F. Supp. 110, 122 (N.D. Ill. 1980) (rehash of arguments previously presented is not basis for revision of a court's order)).

That FMC's arguments are simply a rehash of its earlier-filed briefs on the discovery issue is evident by comparing the arguments it now makes with those it made earlier. FMC again cites the decision in *Bank Melli Iran*, in which the Ninth Circuit considered "extrinsic" evidence of the nature of the Iranian court system and the relationship of Shams Pahlavi to the former Shah of Iran, as it did earlier. *Cf.* FMC DPBr. at 19-20, *with* FMC Corp.'s Br. Re. Dis. Cls., Dkt. No. 36 at 7 *and* FMC Corp.'s Resp. Br. Re. Dis. Cls., Dkt. No. 37 at 9. *Bank Melli Iran* is inapposite here because the court there held that American courts typically took judicial notice of the fact that American litigants did not have fair access to Iranian justice. 58 F.3d at 1412. Indeed, the court in that case relied on decisions from three other appellate courts which "recognize that in the early

to mid-1980s Americans could not get a fair trial in Iran" and information provided by Pahlavi (and not controverted by the banks) that Iran: prevented U.S./Iranian nationals from leaving the country; was a state sponsor of terrorism; denied litigants fair trials; gave U.S. claimants "little reasonable expectation of justice;" and threatened civil proceedings with the threat of interference by a separate revolutionary court. *Id.* at 1411-12. FMC makes no such showing here. Yet it states that "[t]his Court's holding that FMC was required to litigate the due process issue in the Tribal courts is the legal equivalent of requiring Shams Pahlavi to argue to the revolutionary Iranian tribunals that they would not provide her a fair system of justice." FMC DPBr. at 20. No such equivalency exists. In fact, the court ruled in *Bank Melli Iran* that Pahlavi could "could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf." 58 F.3d at 1413. In stark contrast, FMC personally appeared with counsel before the Tribal Courts, argued, and presented witness testimony in the Tribal Court proceedings. FMC was treated fairly.

FMC also recycles its argument that the exhaustion rule in *Iowa Mutual* and *National Farmers* is inapplicable to cases involving enforcement of foreign judgments. *Cf.* FMC DPBr. at 21, *with* Dkt. No. 36 at 11-14 *and* Dkt. No. 37 at 4-5. However, as this Court earlier ruled, the Supreme Court has said that "'allegations of local bias and tribal court incompetence . . . are not exceptions to the exhaustion requirement,'" and "[i]f a litigant could avoid exhaustion by simply arguing bias, he would sneak under the higher standard required by *National Farmers* that he show harassment or bad faith, rendering that standard a nullity." Nov. 9, 2015 Order at 3-4 (quoting *Burrell*, 456 F.3d at 1168) (ellipsis in original).

As in the prior briefing, FMC contends again that the decisions in *AT&T*, *Burrell*, and *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001), support its position. *Cf.* FMC DPBr.

at 22-24, *with* Dkt. No. 36 at 10-13 *and* Dkt. No. 37 at 3, 5. That is not so. FMC asserts that in *AT&T*, the Ninth Circuit "explained that comity was an exception to any restriction to the tribal court record . . . ." FMC DPBr. at 22. It did not. The Ninth Circuit instead held the exhaustion rule required the district court to determine whether the tribal court had jurisdiction before reviewing the tribal court decision. 295 F.3d at 904-05.

Burrell does not support FMC's position either. In that case, the Tenth Circuit dismissed non-Indian plaintiffs' claims against a tribe based on tribal sovereign immunity, 456 F.3d at 1173-74, after concluding that the tribal court judgment (which had dismissed the case on the same grounds) was not entitled to recognition under principles of comity because of a lack of due process, *id.* at 1165, 1173. Furthermore, the *Burrell* court made clear that the exhaustion rule applies to claims of tribal court bias and incompetence. *Id.* at 1168 (citing *Iowa Mut.*, 480 U.S. at 19), as this Court held in the Nov. 9, 2015 Order at 3-4. Thus, if a party has such claims, *Burrell* requires that it raise them first in tribal court. Nevertheless, FMC contends that the Nov. 9, 2015 Order is inconsistent with the *Burrell* Court's reversal of the district court's "conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations." FMC DPBr. at 22 (quoting *Burrell*, 456 F.3d at 1171). That assertion fails because this Court did not hold that FMC may not challenge the Judgment on due process considerations, only that it may not do so with respect to claims which FMC had the opportunity to present to the Tribal Courts, but failed to present. Nov. 9, 2015 Order at 4. The plaintiffs in *Burrell* had no such opportunity. The Tenth Circuit held, applying collateral estoppel and *Wilson*, that the plaintiffs were denied the opportunity to fully litigate their claims, noting that the tribal judge held two days of hearings and then never ruled on the plaintiffs' claims, and that a subsequent judge issued a ruling without

conducting further proceedings, *id.* at 1173. In contrast, FMC does not, and cannot, complain that it was denied the opportunity to litigate its due process complaints before the Tribal Courts.[9]

FMC also relies again on the Ninth Circuit decision in *Bird*. *Cf.* FMC DPBr. at 23 *with* Dkt. No. 36 at 12-13 *and* Dkt. No. 37 at 3. In *Bird*, the court applied the plain error rule to racially inflammatory statements in a closing argument to which no objection was made until the case reached the Ninth Circuit. *Bird*, 255 F.3d at 1148. No such circumstances exist here, and in any event the remedy afforded in *Bird* "is available only in 'extraordinary cases.'" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (quoting *Bird*, 255 F.3d at 1148). FMC points to the *Bird* court's statement that the district court's ruling on the due process issue would be reviewed de novo, FMC DPBr. at 23, but the issue was resolved based on the tribal court record – specifically, the closing argument made in that court, *see* 255 F.3d at 1149-52.[10]

At the same time, FMC ignores the most relevant precedent, namely the due process cases involving foreign tribunals, *see id.* at 1142, 1143 n.12 (due process cases involving foreign tribunals may provide analogical support in adjudicating due process claims involving tribal courts). In those cases, the courts have consistently held that issues not presented to the foreign tribunal may not be relitigated in enforcement actions, including due process defenses. *See British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) ("we flatly reject the due process complaint of a party who 'was given, and * * * waived, the opportunity of making the

[9] FMC contends that the due process requirement "would be wiped away if the foreign court was allowed to decide whether it provided due process." FMC DPBr. at 21. But requiring FMC to preserve its objections by first presenting them to the tribal courts does not do so, as the federal court reviews the tribal court ruling after tribal remedies have been exhausted.

[10] There was no tribal court ruling on that issue because no objection was made in that court. *Id.* at 1148. Had there been a tribal court ruling, the Ninth Circuit plainly would have considered it. *See id*. at 1143 (due process review must defer to customs and practices reflected in tribal law).

adequate presentation in the [foreign court].'") (ellipsis in original) (quoting *Somportex*, 453 F.2d at 441). Accordingly, only claims that were made in the Tribal Appellate Court may be heard in this case. Discovery on those claims is improper because it would result in relitigation of that court's decisions, *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 1001 (10th Cir. 2005) (district court properly denied discovery in recognizing the judgment of an English court because discovery would have resulted in relitigation of the issues decided in the English courts), and unnecessary because evidence not presented to the Tribal Appellate Court by FMC when it was exhausting tribal remedies may not be relied on in this case, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011).

FMC also argues that the Nov. 9, 2015 Order is contrary to the *de novo* standard of review that applies to FMC's due process claim. As that order shows, there is no conflict between the two. The exhaustion rule required FMC to present its claim to the Tribal Appellate Court, so that it has "an opportunity to cure the problem, make a complete record, and provide its expertise for review by the federal district court . . . ." *Id.* at 4. The *de novo* standard of review applies to those arguments that were raised in the Tribal Appellate Court by FMC, which may be considered based on only the materials that were presented to the Tribal Appellate Court. *Id.* at 7.[11]

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[11] FMC relies on *Crowell v. Benson*, 285 U.S. 22 (1932), to assert that it "violates the United States Constitution to assign the consideration of due process issues to the originating court." FMC DPBr. at 23 n.11. The Supreme Court has held otherwise, recognizing that tribal courts are the proper forum in which to seek protection of the individual rights protected by the Indian Civil Rights Act, 25 U.S.C. § 1302, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), that tribal remedies must be exhausted before seeking review of tribal court jurisdictional rulings in federal court, *National Farmers*, 471 U.S. at 856-57; *Iowa Mut.*, 480 U.S. at 16, and that allegations of bias and incompetence are not exceptions to the exhaustion rule, *Iowa Mut.*, 480 U.S. at 18-19. *Crowell* is inapposite in any event, as it involved the scope of federal judicial review of an administrative officer's determination of facts underlying the officer's jurisdiction to determine the rights of private parties in maritime law. The Court construed the statute to permit redetermination of jurisdictional facts by a court in an action for an injunction against an administrative officer's decision. 285 U.S. at 62. The Court's reasoning relied on the allocation

Finally, FMC contends that this Court's ruling was retroactive and "did not exist as of the time of these Tribal court proceedings," thus prejudicing FMC. FMC DPBr. at 21. But that is so of all judicial rulings – they exist only after the decision is made. And the principles of law that required FMC to present its due process claims in tribal court were well settled at the time. *See* Nov. 9, 2015 Order at 2-4. FMC's failure to exhaust its due process claims instead shows FMC was "'sandbagging the [tribal] court – remaining silent about [its] objection and belatedly raising the error only if the case does not conclude in [its] favor.'" *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (quoting *Puckett v. United States*, 556 U.S. 129, 134 (2009) (some internal quotation marks omitted)). And the consequences of sandbagging are waiver. *Id.*

V. FMC WAIVED ITS DUE PROCESS ATTACK ON THE TRIBES' GOVERNMENTAL STRUCTURE, WHICH SETTLED LAW SHOWS FULLY COMPORTS WITH FEDERAL LAW.

FMC contends that the Tribes' governmental structure cannot provide due process on the grounds that: the Business Council "will receive and spend any funds obtained through the courts," "has ultimate control over all parts of Tribal operations, including over the Tribal courts, which are politically subordinate entities to the Business Council," and that "[t]here is no separation of powers," or "institutional system in place to provide nonmembers due process." FMC DPBr. at 7-8, 10. These assertions fail on several grounds.

A. FMC Waived Its Structural Attack On The Tribal Government.

This Court has already ruled that FMC failed to preserve its contention that "[t]he Tribal Courts are improperly influenced by the Business Council" because FMC did not present it to the

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of authority between federal administrative officers in maritime matters and courts, and is distinct from the question here regarding judicial enforcement of a foreign judgment. Similarly, *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), involved the scope of judicial review of an immigration officer's determination of an individual's claim of citizenship in deportation proceedings.

Tribal Courts and is therefore "precluded from raising . . . it in this Court." Nov. 9, 2015 Order at 4.[12] And as shown *supra* at 8-14, that determination was correct.

B. The Structure Of The Tribes' Judiciary Comports With Due Process.

The Tribes' government, including its judiciary, is structured under the terms of a Tribal Constitution (Ex. 32) adopted under the Indian Reorganization Act (codified in sections of 25 U.S.C. ch. 45). 2012 TCA Op. at 11. Under the Tribal Constitution, the Tribes' governing body is the Fort Hall Business Council, *id.* art. III, § 1, which is constitutionally empowered to establish a tribal court and define its duties and powers, *id.* art. VI, § 1(k). Under that authority, the Business Council established the Shoshone-Bannock Tribal Courts as a separate entity and defined their duties and powers in the Law and Order Code.[13] The propriety of the structure of the Tribal

[12] FMC's factually unsupported argument that tribal laws are "unknowable" was waived for the same reason. FMC DPBR. at 1, 18. FMC raises this argument only to bolster its argument that the Tribal Appellate Court's rejection of the BIA Superintendent's 2008 Letter regarding the enactment of the Shoshone-Bannock Tribes Hazardous Waste Management Act, Ordinance ENVR-01-53 (Dec. 4, 2001) ("HWMA") (Ex. 31), allegedly reflects the tribal court system's inherent inability to provide due process. *See* FMC DPBr. at 17-18. But FMC never argued in the tribal courts that the HWMA was unknowable or that it was deprived of due process, which it could have done in its briefing on the 2008 Letter. *See* FMC Corp.'s Resp. to Tribal Appellant's Mot. to Correct Order at 2-4 (filed June 22, 2012) ("FMC's First HWMA Br.") (Ex. 9); Pre-Hearing Brief Regarding Lack of Approval of HWMA (filed May 6, 2013) ("FMC's Second HWMA Br.") (Ex 20). Nor did FMC argue that the Tribal Appellate Court's Order of May 28, 2013 rejecting the 2008 Letter violated its due process, which it could have done in a timely motion for new trial for procedural irregularities. Law & Order Code, ch. III, § 3.59(a)(1); *see id.* ch. III, § 3.1 (rules of procedure apply to civil appeals), § 3.54(a) (decrees and orders are "judgments"). Moreover, the facts show that tribal law is also not "unknowable" to FMC. FMC had access to tribal law as a repeat litigator in tribal court that has been involved in tribal permitting and judicial processes for years, *see* FMC Compl. ¶¶21-25; *United States v. FMC Corp.* (*FMC II*), 531 F.3d 813, 815-16, 818 (9th Cir. 2008), including FMC involvement in the notice-and-comment procedures on the amendments to the LUPO Guidelines, *see* Tribes' Resp. to Dkt. No. 67-3 at § III.A. As a sophisticated participant in the tribal legal process, FMC knew how to obtain tribal laws or object in tribal court if they were not immediately available.

[13] As the Supreme Court noted in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the BIA assisted in drafting tribal constitutions adopted under the IRA, *id.* at 198. As a result, many tribal constitutions adopted under the IRA contain similar terms, *Cohen's Handbook*

Judiciary was long ago recognized by this Court in *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976), in which the court found the Tribal Courts were properly established by the Business Council in the exercise of its constitutional powers, that the Tribes' Law & Order Code defines the tribal court system, sets forth its jurisdiction and powers, and that it "establishes a systematic method of appeal and establishes an appellate court," in which "the appellant is entitled to a trial de novo," and the court "has broad power to affirm, reverse or direct entry of 'an appropriate judgment.'" *Id.* at 1385-86.[14] In addition, the Tribal Courts are subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1326, *Brunette*, 417 F. Supp. at 1384-85, which protects the due process rights of all persons subject to tribal jurisdiction, 25 U.S.C. § 1302(a)(8).

The tribal judiciary is comprised of a chief judge, two associate judges, a contracted special judge and three appellate judges. *See* Law and Order Code, ch. I, § 1 (creation and establishment of the Tribal Court); *id.*, ch. IV, § 1 (creating a Court of Appeals). The Judicial Council oversees the tribal judiciary, including investigation of complaints and discipline, Ex. 33, Shoshone-Bannock

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of Federal Indian Law § 4.04[3][a][i], at 257 (Nell Jessup Newton ed.) (2012 ed.), and "typically include language authorizing the legislative branch of government to promulgate a law and order code, establish a 'reservation court,' and 'define its duties and powers,'" *id.* § 4.04[3][c][iv][B], at 265. The Tribes' Constitution, art. VI, § 1(k), contains that language as well.

[14] FMC sets out passages from concurring opinions of Supreme Court justices about the exercise of tribal adjudicatory authority over non-Indians, FMC DPBr. at 4-7, but the Court's precedent recognizing the existence of such authority, including in the cited opinions, continues unaltered. Those same concerns were referred to by the Court in *Plains Commerce* to explain why the sale of fee land is not subject to tribal regulation, which the Court contrasted with noxious uses of fee land that threaten tribal welfare or security, over which tribes clearly have authority under the Court's second *Montana* exception precedent, 554 U.S. at 336. The Court also made clear that those concerns are also immaterial under the first *Montana* exception when a nonmember has consented to tribal jurisdiction "expressly or by his actions." *Id.* at 337 (quoting *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring)). In sum, *Plains Commerce* rejects these attacks. FMC also contends that tribal court decisions should be enforced only when there is "significant voluntary participation in the nonmember in the tribal process," citing *Bird*, 255 F.3d at 1140-41 and *Burrell*, 456 F.3d 1159, FMC DPBr. at 9, but those cases do not turn on whether the nonmember's participation was voluntary, but whether they received due process.

Tribes Judicial Council Ordinance § 2 (Apr. 27, 2010), and selects qualified candidates for appointment as tribal judges by the Business Council, *id.* § 2(D). The Chief Judge serves a term of five years, and Associate Judges serve a term of three years. Law and Order Code, ch. I, § 3.4. Tribal judges are also subject to a Code of Conduct. *See* Ex. 34, Shoshone-Bannock Tribes Code of Judicial Conduct (May 14, 2010). Finding that "[a]n independent and honorable tribal judiciary is indispensable to justice in our community," the Code of Judicial Conduct requires tribal judges to "be faithful to the law and maintain professional competence in it" and "perform judicial duties without bias or prejudice." *Id*. R. 1(A), 3(B)(2), (5). It further requires tribal judges, *inter alia*, to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," to "not be swayed by partisan interests, public clamor, political pressure, or by fear of criticism," and to avoid extra-judicial activities that "cast reasonable doubt on the judge's capacity to act impartially as a judge." *Id*. R. 2(A), 3(B)(2), 4(A)(1). A judge must "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." *Id*. R. 3(E)(1).

C. FMC Had A Full And Fair Trial Before An Impartial Tribunal.

The proceedings before the LUPC, Business Council, Trial Court, and Tribal Appellate Court were conducted in accordance with tribal law, including the Law and Order Code, the LUPO, the Tribal Court rules, and applicable federal law, including the Indian Civil Rights Act. FMC appeared and participated in these proceedings through counsel, including the administrative proceedings before the LUPC on FMC's applications for tribal permits, Ex. 35, Findings of Fact & Decision, *In re FMC Application for Bldg. Permit* at 1 (LUPC Apr. 25, 2006); Ex. 36, Findings of Fact & Decision, *In re FMC Application for Special Use Permit* at 1 (LUPC Apr. 25, 2006); Ex. 37, LUPC Letter Decision, *In re FMC Special Use Permit Fee* (LUPC Feb. 8, 2007); the hearings on FMC's appeals of the LUPC's decisions to the Business Council, Ex. 38, FHBC

Decision, *In re FMC's Appeals of the Apr. 25th, 2006 Land Use Permit Decisions* (FHBC July 24, 2006); Ex. 39, FHBC Decision, *In re FMC Corp.'s Renewed Motion to Stay* (FHBC Mar. 7, 2007); Ex. 40, FHBC Decision, *In re LUPC Decision Dated Feb. 8, 2007* (FHBC June 14, 2007), the hearings before the Trial Court on FMC's appeals of the LUPC decisions, Ex. 41, Op. of May 21, 2008, *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, Nos. C-06-0069, C-07-0017, C-07-0035, at 8-10 (Shoshone-Bannock Tribal Ct. May 21, 2008); Ex. 26, Op. of Nov. 13, 2007, *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, Nos. C-06-0069, C-07-0017, C-07-0035, at 9-10, 16 (Shoshone-Bannock Tribal Ct. May 21, 2008), and the hearings before the Tribal Appellate Court on FMC's appeal and the Tribes' appeal, including the trial of the second *Montana* exception issue, 2012 TCA Op.; 2014 TCA Op. at 1-3, 5.

The appeals to the Tribal Appellate Court were heard *de novo*, as required by the Law and Order Code. Law and Order Code, ch. IV, § 2 ("On appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court."). FMC was provided the opportunity to secure documents and the attendance of witnesses in the Tribal Appellate Court.[15] *Id*. FMC appeared at hearings before the Tribal Appellate Court, presented argument, and submitted evidence. 2012 TCA Op. at 3; 2014 TCA Op. at 4; 2014 TCA Dec. at 1.

D. FMC's Claim That The Structure Of The Tribal Government And The Role Of The Business Council Denied It Due Process Have No Merit.

FMC's attacks on the structure of the Tribes' government and the role of the Business Council have no merit because there was no prejudice in the constitutional structure of tribal government or in the system of laws pursuant to which that government, including the judiciary,

[15] *See* Law and Order Code, ch. IV, § 10 (authorizing the Tribal Appellate Court to subpoena the attendance of witnesses and to compel the production of books, records, documents or other "things necessary to the disposition of the case on appeals"). *See* Tribes' DPBr. at 5-10.

operates. Nor was the tribal judiciary dominated by the political branches of government or by an opposing litigant.

1. The Tribes' governmental structure did not prevent due process in the tribal proceedings.

FMC alleges that the Business Council "will receive and spend any funds obtained through the courts," FMC DPBr. at 7, that the LUPC is "subordinate" to the Business Council, *id.* at 11, which also controls the Tribal Courts through its legislative and budget authority, including its power to set judicial compensation, and its authority to "restructure the Tribal courts" and to suspend and remove judges, *id*. at 11-12. FMC contends that that these powers tainted the decision-making process on FMC's permit applications. *Id*. These allegations should be rejected on multiple grounds.

First, FMC's attack on the responsibilities the Constitution assigns to the Business Council fails because the structure of tribal government, including its courts, is determined in the exercise of tribal inherent sovereign authority, *Santa Clara Pueblo*, 436 U.S. at 56. Congress has made the exercise of tribal sovereign authority subject to the requirements of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1326, but the Act does not limit a tribe's right to structure its government as it wishes. Indeed, "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies," *Santa Clara Pueblo*, 436 U.S. at 66 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)), and in some tribal constitutions that were adopted under the Indian Reorganization Act, 25 U.S.C. § 5123, judicial power is vested in the tribal council, *Santa Clara Pueblo*, 436 U.S. at 66, as it is in the Tribes' constitution. *See supra* at 15-16 & n.13.

Second, FMC's structural attack fails for lack of a concrete and specific showing that the institutional features to which it now objects resulted in a due process violation. *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 240 (9th Cir. 1976) ("So long as the Tribes do not violate the Indian Civil Rights Act, they may structure their government in any

manner they please."); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994) ("[a]bsent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial").

Third, FMC's assertion that the Business Council has an interest in the funds to be paid as fees as a result of the Judgment lacks merit as the amended Fort Hall Land Use Operative Policy Guidelines ("LUPO Guidelines") (Ex. 30) dedicate the fees to LUPC costs related to the Hazardous Waste Management Program. LUPO Guidelines §§ V-9-1(C), V-9-2(B). The parallel contention that the LUPC has an interest in the funds has no merit for the same reason. Neither the Business Council nor the LUPC have a sufficient interest in the permit fees to present due process concerns. *See Dugan v. Ohio*, 277 U.S. 61, 64-65 (1928) (mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge); *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 847 (9th Cir. 1997) (Rent Board's dual role as adjudicator and executive body funded by registration fees did not provide "strong," incentive that "reasonably warrant[s] fear of partisan influence on [the] judgment" to violate due process) (alterations in original).

Fourth, the Business Council's budget and appointment authorities do not taint the tribal decisionmaking process because they are comparable to Congress's power to appropriate funds for the federal courts, U.S. Const. art. I, § 9, cl. 7 (requiring appropriations), and to confirm and impeach judges, *id*. art. II, § 4 (providing for removal from office of federal officers); art. I, § 2, cl. 5 (impeachment by House); art. I, § 3, cl. 6 (Senate tries impeachments), which has not prevented the federal courts from passing on the lawfulness of congressional enactments or Executive action, *see Doe v. McMillan*, 412 U.S. 306, 343-44 (1973) (Rehnquist, J., concurring in part and dissenting in part) ("We have jurisdiction to review the completed acts of the Legislative

and Executive Branches."). Tribal law also contains checks and balances which assure the tribal judiciary's capacity to adjudicate cases to which the Business Council is a party. The Business Council's authority to suspend or remove Tribal Court judges is limited by the requirement that such action be taken only upon recommendation of the Judicial Council. Judicial Council Ordinance § 3.[16] And the grounds for judicial discipline are limited to those set out in Section 3 of the Judicial Council Ordinance and Chapter I, § 3.8 of the Law and Order Code, which specifically requires reasonable cause, and that a written statement of such cause be provided to the judge at least five days before the public hearing which must be held to hear the charges, at which the judge must be provided an opportunity to answer any and all charges,[17] and in accordance with the Tribal Constitution, and other applicable tribal law. Furthermore, tribal judges are required by law, *inter alia* to "be faithful to the law and maintain professional competence in it," "perform judicial duties without bias or prejudice" and "not be swayed by partisan interests, public clamor, political pressure, or by fear of criticism." *Id.* R. 1(A), 3(B)(2), (5). Tribal judges must take an oath to uphold the law, including federal law.[18]

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[16] FMC's attacks on the LUPC based on the Business Council's budgetary, lawmaking, and appointment powers, FMC DPBr. at 11 & n.4, have no merit because FMC provides no evidence that such authority resulted in any bias, *id.* at 11. And FMC's reliance on the Business Council's power to remove members of the LUPC to show bias lacks any factual basis because the Amended LUPO of 2010 (Ex. 42) to which FMC cites, FMC DPBr. at 11 n.4, was not in effect times when the LUPC made the decisions at issue in 2006 and 2007. [SOF ¶24 & n.12]. At that time, the LUPO permitted the Business Council to remove a LUPC member only if the member was convicted of a felony, otherwise a LUPC member could be removed only by tribal voters at a recall election, *id.*, art. IV, § 1.

[17] The procedures in the Judicial Council Ordinance are "an alternative to, and cumulative with the removal of judges by the original supervisory control of members of the judicial system by the Council." *Id.* § 3(H).

[18] Law and Order Code, ch. I, § 3.2. The full oath is set out below:

> "I, _____, do solemnly swear that I will support and defend the Constitution of the United States against all enemies; that I will carry out faithfully

2. FMC's allegations that the Business Council exercised undue influence and other attacks based on the proceedings have no merit.

FMC's contentions that the Business Council manipulated the administrative and judicial proceedings to "favor one party over the other," FMC DPBr. at 10, lack factual basis. The LUPO provides a right of appeal from decisions of the LUPC to the Business Council. *Id.* art. V, § 6. But apart from its role as the appellate tribunal in the administrative process, in which capacity it reviews decisions of the LUPC, the Business Council exercised no authority over the decision makers in the FMC matter. Instead, the LUPO provides for an appeal to be taken to the Trial Court, and then if requested to the Tribal Appellate Court. FMC appealed all three of the Business Council decisions to the Trial Court in accordance with Article V, § 6 of the LUPO by filing a verified complaint in the Trial Court. Ex. 43, Verified Compl., *FMC Corp. v. Shoshone-Bannock Tribes*, No. C-06-09 (Aug. 4, 2006); Ex. 44, Verified Compl., *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, No. C-07-0017 (Mar. 16, 2007); Ex. 45, Verified Compl., *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, No. C-07-0035 (June 29, 2007). And subsequently, the Trial Court's decisions were reviewed by the Tribal Appellate Court. [SOF ¶¶11-12, 17-18]. The only role the Business Council had in these proceedings was as a party named in the complaints filed by FMC.

> and impartially the duties of my office to the best of my ability; that I will cooperate and promote, and protect the best interests of the Shoshone Bannock Tribes in accordance with the Constitution and Bylaws contained within the corporate charter of the Shoshone Bannock Tribes of the Fort Hall Reservation, Fort Hall, Idaho. I will support and defend the Law and Order Code of the Shoshone Bannock Tribes and the resolutions and ordinances duly passed by the Business Council of the Shoshone Bannock Tribes. I will support and defend the treaties of the Shoshone Bannock Nation."

Id.

FMC also contends that the Tribal Appellate Court applied state law inconsistently to rule against FMC, and that "the second panel revised the procedures midstream so as to avoid a remand to the Tribal Court judge who had ruled against the Tribes," as evidence of the absence of due process. FMC DPBr. at 10, 16. Neither contention has merit. FMC relies on the Feb. 5, 2013 Order to support the former contention. But that order discussed state law only in considering whether the Tribes could recover attorney's fees from FMC under the statutory exception to the American Rule on attorney's fees. On that narrow issue, the court applied diversity principles, discussed Idaho law, but ultimately expressly declined to decide the issue until after the proceedings on the second *Montana* exception were concluded. *Id.* at 8-9. And that issue was never revisited. Accordingly, the Feb. 5, 2013 Order cannot be relied on to show the inconsistent application of state law in this case.

Nor can that order be relied on to show that the Tribal Appellate Court denied FMC due process by deciding to hear the second *Montana* exception itself. In the Feb. 5, 2013 Order, the court determined that in the interest of time, further proceedings on the second *Montana* exception issue would be conducted in the Tribal Appellate Court, rather than the Trial Court. *Id.* at 1-2 (revoking remand to Trial Court in interest of time), 13 (finding that the Law & Order Code authorizes the Tribal Appellate Court to revoke the remand order), 18-19 (revoking remand). Those same determinations had earlier set forth in the Jan. 14, 2013 Order which the court amended and reissued as the Feb. 5, 2013 Order. Furthermore, shortly after the Jan. 14, 2013 Order was issued, the court expressly provided FMC an opportunity to object to that process if it wished to do so. Ex. 17, Corrected Minute Entry & Order, *Nunc Pro Tunc* of Feb. 1, 2013 at 2 (specifically providing that the court would "accept pre-trial motions as to any evidence that this Court doesn't have authority to revoke a remand to the trial Court in an effort to save the parties additional time and money by

hearing the foregoing issues itself."). FMC filed no such motion. Feb. 5, 2013 Order at 1-2 (discussing contents of FMC's briefing). If it had any objection to that process it waived it. And in any event, that process comports with federal law. *Brunette*, 417 F. Supp. at 1385-86 (tribal court system "establishes an appellate court," in which "the appellant is entitled to a trial de novo," and the court "has broad power to affirm, reverse or direct entry of 'an appropriate judgment.'").

FMC also contends that the Tribal Appellate Court's determination in the 2012 TCA Op. and May 28, 2013 Order, that the HWMA had been approved according to the Tribes' Constitution and was effective reflected bias because the Trial Court had ruled to the contrary, and the Tribes had not disclosed to the Trial Court a letter from the BIA Superintendent regarding approval. FMC DPBr. at 12-13, 17-18. But the Tribal Appellate Court considered this issue twice and decided against FMC both times on grounds that made the 2008 letter immaterial to the outcome.

In 2012, FMC argued to the Tribal Appellate Court that a 2004 letter from the BIA Superintendent, showed that the HWMA had never been validly approved. Ex. 46, FMC Corp.'s Resp. Br. & Br. Supp. Cross-Appeal at 35-36 (filed July 15, 2010). The court determined that, under Interior Board of Indian Appeals precedent and Article IV, § 2 of the Tribal Constitution, the HWMA became law, regardless of whether the Superintendent approved it in 2001, because tribal resolutions become law if not disapproved by the Secretary within ninety days. 2012 TCA Op. at 31-32 (quoting *Pawnee Tribe of Okla. v. Anadarko Area Dir., BIA*, 26 IBIA 284, 288-89 (1994), 1994 WL 593097). FMC repeated its contention in briefing to the new appellate panel in 2013, now supporting it with the BIA Superintendent's 2008 letter, as well as the already-

considered 2004 letter. FMC HWMA Br. at 5-6.[19] The court reaffirmed its decision in the May 28, 2013 Order at 2-3, relying on the same legal authorities it had in the 2012 TCA Op.

FMC further argues the case should have been limited to the LUPC record because it was a review of LUPC's administrative action and that the Tribal Appellate Court had already determined jurisdiction under the first *Montana* exception, so review of the second exception was "unnecessary." FMC DPBr. at 17. However, the Court's receipt of evidence was consistent with the Law and Order Code, ch. IV, § 2, which provides for trial de novo by the Court of Appeals. Also, as the Tribes have explained, Tribes' DPBr. at 14 n.7, the Tribal Appellate Court's consideration of the second *Montana* exception is consistent with Supreme Court jurisprudence and the procedural posture of the appeal.[20] FMC also argues that making an initial determination regarding the second *Montana* exception in the final court of appeal denied FMC "any 'access to

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[19] The Tribal Appellate Court properly found FMC's submission of the Superintendent's 2008 letter to be untimely. *See* May 28, 2013 Order at 2. The Tribes had set forth the legal basis for the court's ruling on the validity of the HWMA in their Reply to FMC Corp.'s Response to Tribal Appellants' Motion to Correct Order at 5-9 (filed July 23, 2012) (Ex. 47), which was before the Tribal Appellate Court when it ruled on that question in the May 28, 2013 Order. FMC had received the Superintendent's letter in April 2012, even before the 2012 TCA Op. was issued. FMC's Second HWMA Br. at 3-4 n.1. Despite this, FMC waited over a month to request amendment of the order, FMC's First HWMA Br. at 3-4, even though such a motion is only timely if brought within ten days after an order is issued. Law & Order Code ch. III, § 3.59(e). Four days later, the Tribal Appellate Court issued the amended 2012 TCA Op., which did not include the requested changes from FMC's untimely motion. FMC never sought further amendment, nor a new trial after this amended order was issued. *See id.* § 3.59(a)(4), (b) (a new trial can be granted on "all or part of the issues in an action" for newly discovered evidence, on a motion that must be brought within ten days of an order). FMC finally submitted FMC's Second HWMA Br. nearly a year after the 2012 TCA Op. was issued. FMC did not identify the basis for the relief requested, but had had ample opportunity to seek amendment or a new trial within ten days of the 2012 TCA Op., which made FMC's request for relief untimely. *Id.* § 3.60(b)(2) (providing motions for relief from orders for newly discovered evidence only when the movant did not have "time to move for a new trial under Section 3.59(b)").

[20] As shown *supra* at 6-7, FMC's contention that members of the first panel prejudged whether FMC had polluted the groundwater and food, FMC DPBr. at 17, has no merit.

appeal or review,'" FMC DPBr. at 17, but it failed to timely advance that objection and in any case FMC has a right to federal court review of the jurisdictional determination under *Montana*, which it is exercising in this action.

FMC argues that the changes in judges support their bias allegation, but provides no specific facts to support the contention, and relies solely on inference.[21] Similarly, FMC also relies on a selective quotation from a Tribal Court judge's letter to the tribal newspaper, FMC DPBr. at 7, but as we previously explained, Shoshone-Bannock Tribes Reply Memo. Opp. Disc. § IV.C FMC's Compl. at 5 n.5, Dkt. No. 38, the letter has no relevance here. The judge who wrote the letter had no role in the Tribal Court proceedings in this case, and the letter post-dates those proceedings. The letter also acknowledges that tribal law prohibits a judge from running for a seat on the Fort Hall Business Council while serving as a judge. *See* Code of Judicial Conduct R. 5(A)(1)(a) (prohibiting judges from engaging in inappropriate political activity, including "hold[ing] an office in a political organization"); *id.* R. 5(A)(2) (requiring a judge to "resign from judicial office upon becoming a candidate for a nonjudicial office either in a primary or in a general election."). FMC also quotes a statement in the letter that tribal judges "can be removed at [the Business Council's] will," FMC DPBr. at 7, but that statement is incorrect. *See supra* at 21.

[21] FMC alleges that there was "no indication of the process by which [the judges of the second panel] were appointed." FMC DPBr. at 16. But the Law & Order Code, ch. I, § 1, does not require the Business Council to publicly discuss the basis of its judicial appointments. FMC also alleges that the Tribes' "fired," Judge Maguire as a result of his decision in this case, FMC DPBr. at 11-13, 19, but it provides no factual basis to support this contention. In fact, Judge Maguire's contract to hear the trial level proceedings in this case had ended, and was not renewed because trial level proceedings had ceased. Furthermore, the Tribes' retention of Mr. Maguire, by FMC's own admission, was "an attorney licensed by the State of Idaho with a legal practice in Pocatello, Idaho," [FMC SOF ¶80], supports an inference of fairness of the Tribes' process as much as FMC's suggestion to the contrary.

In sum, even if properly before this Court – and they are not – FMC's arguments regarding the Tribes' governmental structure and Business Council influence lack factual support and amount to conclusory speculation, which cannot overcome the presumption of impartiality, *Withrow*, 421 U.S. at 47, and does not provide a basis for questioning the impartiality of a decisionmaker, *see Schweiker*, 456 U.S. at 196 ("generalized assumptions of possible interest" on the part of administrative adjudicators insufficient); *Clemens v. U.S. Dist. Ct.*, 428 F.3d 1175, 1178 (9th Cir. 2005) ("[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" do not require recusal) (citation omitted). Nor do they meet the standard applicable here requiring a showing of "outrageous departures from our notions of 'civilized jurisprudence,'" *Bird*, 255 F.3d at 1142, and present no "serious question[s]" about the Tribes' "adherence to the rule of law and commitment to the norm of due process . . . ." *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

VI. THE DISCRETIONARY FACTORS IN *WILSON V. MARCHINGTON* ARE SATISFIED

FMC asks this Court to exercise its discretion to deny enforcement under two factors in *Wilson v. Marchington*, which permit courts to deny comity to tribal judgments that would conflict with "any final judgment that is entitled to recognition" or that would be contrary to the public policy of the United States. FMC DPBr. at 24. FMC has failed to meet its burden of showing these factors apply.

There is no "final judgment that is entitled to recognition" that would conflict with FMC's payment of the permit fee. *Wilson*, 127 F.3d at 810. FMC does not identify what EPA's supposed "judgments" in this care are, so it has failed to meet its burden of proof. And EPA has not issued any final judgments within the meaning of *Wilson* here. Because EPA was not exercising judicial power when it issued the Administrative Order on Consent, Unilateral Administrative Orders, and

Interim Amendment to the Record of Decision ("IRODA") dealing with FMC's use of the FMC Property, these federal administrative actions are not "final judgments." *See* Restatement (Second) of Conflict of Laws § 92 cmt. a (1971); *Stern*, 564 U.S. at 484 (judicial power of the United States rests with Article III courts).[22] Nor would FMC's compliance with the Judgment conflict with its obligations under these administrative actions because all the Judgment requires FMC to do is pay a permit fee. And the Judgment would do nothing to interfere with FMC's obligations under the RCRA Consent Decree, *United States v. FMC Corp.*, No. 4:98-cv-0406-BLW (D. Idaho entered July 13, 1999), ECF No. 28, for the same reason. Indeed, the Consent Decree actually requires FMC to obtain tribal permits. [SOF ¶35].

Nor would enforcement of the Judgment offend the public policy of the United States. Complying with the Judgment would not interfere with FMC's obligations under the RCRA Consent Decree or EPA's orders because it does not require FMC to take any actions contrary to EPA's remediation scheme. The fee will be used, in accordance with tribal law, to "pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." LUPO Guidelines § V-9-2(B). FMC suggests that the Tribes have a more nefarious purpose based on the Tribes' efforts to ensure that the Consent Decree complied with federal law and that FMC meets its obligations to obtain tribal permits under that Decree and its other agreements with the Tribes. FMC DPBr. at 24-25. But the Tribes took these actions to protect their members' health and the resources of the Reservation. This is entirely consistent with the federal policy of protecting tribal self-government and the health of tribal members and their resources.

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[22] The IRODA is also not final. *See* Ex. 29, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* at v, 18-19 (2012).

VII. THE PENAL JUDGEMENT RULE DOES NOT BAR ENFORCEMENT OF THE JUDGMENT

FMC contends that the Judgment may not be enforced as a penal rule, but as the Tribes have shown, Tribes' DPBr. at 33-34, it does not come within the scope of the penal rule, and even if it did, the rule would not provide a basis for denying enforcement under *Wilson.* An exception for a penal judgment for enforcement of tribal court judgments is contrary to Supreme Court precedent regarding the exercise of tribal civil jurisdiction, which is already incorporated into the comity analysis under *Wilson. Id.* at 31-32.

The penal judgment rule is not one of the factors that justify an exception from the "general principle [that] federal courts should recognize and enforce tribal judgments" under principles of comity.[23] *Wilson*, 127 F.3d at 810 (listing mandatory and discretionary factors). Nevertheless, FMC argues that the penal judgment rule "must" be applied here because it was incorporated into the comity analysis in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219 (9th Cir. 2006) (en banc) (per curiam), where the Ninth Circuit relied on § 483 of the Restatement (Third) of Foreign Relations Law (1987) to decide whether a foreign judgment might be enforced in United States. FMC DPBr. at 27. But *Yahoo!* did not deal with tribal court judgments, and no Ninth Circuit or district court decision since *Yahoo!* has applied the penal judgment rule or § 483 of the Third Restatement to decide whether to enforce a tribal judgment. Nor would it be proper to add such a factor, as the mandatory determination of tribal jurisdiction under *Wilson* already incorporates the Supreme Court's rulings on tribal jurisdiction, *see* 127 F.3d

[23] FMC argues in the alternative that the Judgment is a penal judgment that could not be recognized under the full faith and credit clause. FMC DPBr. at 30-31. Whether FMC is correct is irrelevant, as tribal court judgments are enforced under comity principles, not full faith and credit. *Wilson*, 127 F.3d at 809. Though even if full faith and credit were applicable, the Court could still recognize and enforce the Judgment, because it is not penal. *See infra* 30-32.

at 813-15, which establish the standards for distinguishing between tribal criminal and civil jurisdiction. Tribes generally lack criminal or penal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), but retain civil jurisdiction over non-Indians on the reservation, "even on non-Indian fee lands," under the two *Montana* exceptions, *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Thus, incorporating the penal judgment rule into *Wilson* is unnecessary, as *Wilson* already requires a court to determine whether *Montana* applies, and a *Montana* case is *ipso facto* civil, and therefore not penal.

FMC contends that the Judgment is penal because it is based on a law which "punishes an offense against the public or the Tribes as a whole," is "issued in favor of the Tribes' government rather than to any individual," and "is based on the Tribes' enforcement of planning, zoning and hazardous waste ordinances." FMC DPBr. at 28. But the Tribes have shown that the Judgment is not based on a criminal law and does not punish a criminal offense, nor is it a fine or other penalty. Tribes' DPBr. at 33-34.[24] Nor is it a tax.[25] Rather it requires FMC to compensate the Tribes for storing waste on the Reservation under an agreement between FMC and the Tribes and according to tribal law.[26] The penal judgment rule forbids one sovereign's courts from enforcing another sovereign's *criminal* judgments. *See Pasquantino v. United States*, 544 U.S. 349, 361 (2005) (the

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[24] Federal case law controls here, rather than the state standard FMC cites at FMC DPBr. at 29-30. But the Judgment also meets the state standard, because as described below it is not a "fine or other penalty," nor does it "punish[] an offense against public justice." *Id.* at 29-30 (quoting Idaho Code Ann. § 10-1403(2); Uniform Law § 7). *See infra* 30-32.

[25] FMC does not contend that the Judgment involves a tribal tax, but even if it did, it would not provide basis for denying enforcement based on the principles of the revenue rule, which is not made applicable to tribal court judgments under *Wilson* and is no longer applicable even as between the states, *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 279 (1935).

[26] FMC's contention that the Judgment "was issued by a tribal court in favor of the governing body that appointed it," FMC DPBr. at 29, is merely a restatement of its meritless due process attack which has no relation to whether the Judgment is penal and lacks merit. *See supra* at 15-27.

penal judgment rule "tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed"); *see also Huntington v. Attrill*, 146 U.S. 657, 674-75 (1892) ("the whole class of penal laws" is constituted by "'criminal laws,' that is to say, laws punishing crimes").[27]

A judgment is not criminal simply because it enforces a law, or accrues to the government:

> A foreign judgment may involve a revenue *or fiscal claim* even though it is neither a penal nor a tax judgment. Whether a judgment in favor of a foreign state . . . is a civil judgment entitled to recognition, or a judgment for a fine not entitled to recognition, *depends on the purpose of the claim and on the law on which it is based.*

Restatement (Third) § 483, cmt. d (emphasis added). The "real nature" of a judgment is criminal, and therefore penal, when "[i]n whatever form the state pursues her right to *punish the offense against her sovereignty*, every step of the proceeding tends to one end, – the compelling the offender to pay a pecuniary fine *by way of punishment for the offense*." *Pelican Ins.*, 127 U.S. at 299 (emphasis added).

The factors indicating that the purpose of a judgment is a criminal punishment include:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a

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[27] FMC's cases do not control because they dealt with criminal penalties, *Nelson v. George*, 399 U.S. 224, 229 (1970), penalty judgments, *City of Oakland v. Desert Outdoor Advert., Inc.*, 267 P.3d 48, 49-50 (Nev. 2011), and other issues not relevant here. *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 287 (1888), and *Oklahoma ex rel. West v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 291 (1911), are far afield as they involve the scope of the Court's original jurisdiction, and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-15 (1964), mentioned the doctrine but found it not dispositive. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825), involved whether federal courts could apply foreign laws criminalizing the slave trade to determine the disposition of slaves stolen off the African coast and brought to the waters of the United States. In *Pasquantino*, 544 U.S. 359-60, the Court held the revenue doctrine did not prevent application of the wire fraud statute to a scheme to evade foreign taxes. And in *United States v. Federative Republic of Brazil*, 748 F.3d 86, 94 (2d Cir. 2014), the court ruled that a Brazilian criminal forfeiture judgment – which also imposed prison sentences – could not be enforced, but remanded to allow application of a statutory exception to the penal judgment rule, *id.* at 88, 95-97.

> finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted); *see Yahoo! Inc.*, 433 F.3d at 1219-20 (criminal judgment imposed a penalty, was based on a criminal code provision, and deterred a "threat to internal public order"); *Gulf, Colo., & Santa Fe Ry.*, 220 U.S. at 294, 300 (criminal judgment enforced criminal laws "whose controlling objects is [sic] to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare"). These are not present here.

The Judgment is not penal. It does not punish a criminal offense. Rather, it is remedial, because it requires FMC to follow its agreement to pay a permit fee to the Tribes to store waste on the Reservation, in accordance with tribal regulatory law. FMC voluntarily agreed to pay the annual permit fee to bring its generation, disposal, and storage of waste on the Reservation into compliance with tribal laws. 2012 TCA Op. at 4-5. The tribal laws which authorize the permit are not penal. *See Kennedy*, 372 U.S. at 168-69. They are not part of the Tribes' Criminal Code, *cf.* Ex. 6, Law and Order Code, ch. XVI, and do not refer to the activities they regulate as crimes. They do not impose punishments on offenses or seek retribution for, or deterrence of, any offenses. They have no scienter requirements. Finally, the Tribes' regulation of FMC's activities has a clear "alternative purpose" to punishment: To protect tribal members and the Reservation's resources by restricting where certain land uses take place and collecting permit fees to fund the operation of the Tribes' Hazardous Waste Program, *see* LUPO Guidelines § V-9-2(B).

VIII. ARTICLE III OF THE U.S. CONSTITUTION IS NOT A BAR TO ENFORCEMENT OF THE JUDGMENT

FMC contends that enforcement of the Judgment is barred by Article III of the U.S. Constitution because tribal courts "were not 'ordained and established' by Congress, and they are outside the direct authority of the Supreme Court," FMC DPBr. at 32, and "Article III does not permit the federal courts to authorize non-Article III courts and vest them with power over citizens of the United States." *Id.* at 33.[28] This argument is misplaced. First, enforcement of a tribal court judgment under comity principles does not involve the conferral of federal judicial authority on the tribal court.[29] Rather, comity is "'the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Wilson*, 127 F.3d at 810 (quoting *Hilton*, 159 U.S. at 164). Such recognition does not involve delegation of the federal judicial power, but rather enforcement

[28] FMC contends, without citation to authority, that "Tribal courts are not established for purposes of impartial adjudication, but rather to further the interest of the Tribe." *Id.* at 34. But tribal courts have been repeatedly recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. *Santa Clara Pueblo*, 436 U.S. at 59-60 (citing *Fisher v. Dist. Ct.*, 424 U.S. 382, 387-88 (1976); *Williams v. Lee*, 358 U.S. 217, 272 (1959)); 25 U.S.C. § 3601(5) ("tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments"). Furthermore, the Tribes have determined that their interests are furthered by impartial adjudications, as tribal law confirms. *See supra* at 21. And the Tribes have demonstrated that FMC's contention that the Tribal Appellate Court was "not isolated from political and legislative pressure," has no merit. *See supra* at 19-21. FMC also argues that the Judgment "is not subject to review of either law or fact by the federal courts." FMC DPBr. at 34. But FMC's due process claim is reviewed *de novo* by this Court. *Bird*, 255 F.3d at 1140-41. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) (federal court *de novo* review of agency legal rulings does not present Article III problem).

[29] FMC's contention, FMC DPBr. at 33, that this Court's reliance on the Tribal Court's record to determine FMC's due process claims runs afoul of the prohibition on delegation of excessive authority to non-Article III courts fails for the same reason.

of a tribal court judgment issued pursuant to the tribe's sovereign authority, just as with enforcement of other foreign judgments.[30] And questions about tribal jurisdiction over non-Indians are addressed in the comity analysis, which requires the court to determination whether the tribal court had jurisdiction.[31] Second, the cases FMC cites do not support FMC's argument because they involve questions about congressional authority to delegate judicial power to non-Article III tribunals of the United States government.[32]

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[30] FMC suggests that tribal proceedings are unnecessary because tribal law may be enforced in state or federal court, "without any loss of the power of self-governance." FMC DPBr. at 35. But "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut.*, 480 U.S. at 18). And a state court adjudication would sacrifice the right of the Tribes "to make their own laws and be ruled by them" which is at the core of the right of self-government. *Williams*, 358 U.S. at 220. Indeed, "[s]tate courts may not exercise jurisdiction over disputes arising out of on-reservation conduct – even over matters involving non-Indians – if doing so would infringe on the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 452-53 (quoting *Fisher*, 424 U.S. at 386 (quoting *Williams*, 358 U.S. at 220)) (quotation marks and brackets omitted).

[31] FMC's suggestion, FMC DPBr. at 32-33, that the recognition by the federal courts of tribal adjudicatory authority over non-Indians is contrary to Article III has no basis in the Constitution or the law. The Supreme Court has repeatedly recognized that tribal courts may exercise authority over non-Indians, including on non-Indian fee land under the principles announced in *Montana*, 450 U.S. at 565-66. *Plains Commerce*, 554 U.S. at 330; *Strate*, 520 U.S. at 456-59; *Iowa Mut.*, 480 U.S. at 18. FMC's contention that "[t]here is no provision . . . in Congressional statutes giving tribal courts authority over non-Indians," FMC DPBr. at 34, fails because the source of tribal judicial power is inherent sovereign authority, *Williams*, 358 U.S. at 217-220, not a delegation from Congress, *United States v. Wheeler*, 435 U.S. 313, 322-24 (1978), and "unless and until Congress acts, the tribes retain their historical sovereign authority," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted).

[32] FMC's cases involve questions about congressional delegations of judicial authority to non-Article tribunals, including bankruptcy courts, *Stern*, 564 U.S. at 482; *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52 (1982), arbitrators, *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 571 (1983), and administrative officials, *Schor*, 478 U.S. at 835-36; *Crowell*, 285 U.S. at 36-37; *Murray's Lessee v. Hoboken Land & Im. Co.*, 59 U.S. (18 How.) 272, 274-75 (1856). Those cases establish that "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Schor*, 478 U.S. at 848; *see also Thomas*, 473 U.S. at 583; *Murray's Lessee*, 59 U.S. (18 How.) at 283. They do not involve questions about recognition or enforcement by federal courts of judgments by tribunals of other governments. Indeed, the cases cited by FMC make clear that the separation of powers concerns underlying Article III involve the three Branches of the United States, not foreign, state, or tribal governments. *See*

IX. CONCLUSION

For the above reasons, FMC received due process in the tribal proceedings that were concluded by entry of the Judgment, that judgment is not a penal judgment, and it does not violate Article III of the U.S. Constitution. Accordingly, this Court should deny FMC's motion for an order denying the Tribes jurisdiction over FMC and granting FMC a declaratory judgment and permanent injunctive relief, Dkt. No. 67 ¶3, and grant the Tribes' Motion for Summary Judgment on Due Process and Personal Jurisdiction, and Recognition and Enforcement of the Tribal Appellate Court's Judgment, Dkt. No. 66.

DATED this 27th day of February, 2017.

SHOSHONE-BANNOCK TRIBES

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Schor, 478 U.S. at 857 ("our prior precedents in this area have dealt only with separation of powers concerns, and have not intimated that principles of federalism impose limits on Congress' ability to delegate adjudicative functions to non-Article III tribunals"). Furthermore, the cases establish that any right to adjudication before an Article III court can be waived. *Id.* at 849 (right to Article III trial waived by party who chose to proceed before Administrative body).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of February 2017, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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