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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. 67-3, MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY THE TRIBES JURISDICTION OVER FMC UNDER THE FIRST EXCEPTION TO *MONTANA*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Briefs and Court Filings

The Shoshone-Bannock Tribes ("Tribes") respond below to the Memorandum of FMC Corporation in Support of Motion to Deny the Tribes Jurisdiction over FMC Under the First Exception to *Montana*, Dkt. No. 67-3 ("FMC-FMBr."), by showing that FMC's Motion to Deny the Tribes Jurisdiction over FMC under the First Exception to *Montana*, *see* Dkt. No. 67 ¶1, should be denied.[1]

I. THE STANDARD OF REVIEW FOR THE TRIBAL APPELLATE COURT'S DECISION IN THIS CASE IS DE NOVO ON QUESTIONS OF LAW AND CLEAR ERROR ON QUESTIONS OF FACT.

FMC asserts that this Court should not defer to the tribal courts on whether there is jurisdiction over FMC under the first *Montana* exception in this case because the questions presented in this case are purely legal and the tribal courts did not consider or decide any facts in this case, but instead relied exclusively on this Court's Memorandum Decision and Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho Mar. 6, 2006), ECF No. 94 ("Mar. 6, 2006 Order"). FMC-FMBr. at 3-8. These assertions are either legally incorrect, factually unsupported, or fail for both reasons.

A. The Applicable Standards For Review Of The Tribal Appellate Court's Decision Are Well-Settled.

Settled precedent establishes the applicable standards of review in this case. The Tribal Appellate Court's legal rulings on tribal jurisdiction are reviewed *de novo*, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002), but review is limited to questions of federal law

[1] FMC's legal arguments do not support its position, and the facts on which it relies are incorrect for the reasons shown below, and as shown by 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.

relevant to the tribal court's jurisdictional ruling as "federal courts may not readjudicate 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." *Id.* In addition, "the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978))). The Tribal Appellate Court's findings of fact are reviewed under a "deferential, clearly erroneous standard of review." *FMC*, 905 F.2d at 1313. *Accord Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1206 n.1 (9th Cir. 2001) (en banc). "A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (quoting *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011)). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *In re Rifino*, 245 F.3d 1083, 1086 (9th Cir. 2001) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

B. FMC's Argument Furnishes No Legal Reason To Depart From The "Clear Error" Standard For Review For Findings Of Fact In This Case.

FMC's assertion that the tribal courts relied exclusively on the Mar. 6, 2006 Order to support its decision instead of deciding any facts is simply wrong. The Tribal Appellate Court decided the questions of fact necessary to determine whether FMC entered into consensual relationships with the Tribes that satisfy the first *Montana* exception. These facts are set forth in Section II of its Opinion and Order on the first *Montana* exception, Ex. 1, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012, *FMC Corp. v. Shoshone-*

Bannock Tribes Land Use Dep't, Nos. C-06-0069, C-07-0017, C-07-0035, at 3-10 (Shoshone-Bannock Tribal Ct. App. May 14, 2014) ("2012 TCA Op.").

In brief, the Tribal Appellate Court determined that on August 11, 1997, FMC consented to tribal jurisdiction over both its use permit and building permit applications under the Land Use Policy Commission, Fort Hall Land Use Operative Policy Guidelines (Nov. 22, 1979) ("LUPO Guidelines") (Ex. 14). 2012 TCA Op. at 4 (quoting Ex. 11, Letter from J. David Buttelman, Health, Safety, & Envlt. Manager, FMC, to Tony Galloway, Chairman, LUPC (Aug. 11, 1997) ("FMC's Aug. 11, 1997 Letter")). The Land Use Policy Commission ("LUPC") then approved FMC's building and use permit applications subject to specific conditions, including the payment of an annual fee to store waste on the Reservation, which was to be calculated on a per-ton basis. 2012 TCA Op. at 4, 12; Ex. 12, Letter from LUPC to Paul Yochum, FMC (Apr. 13, 1998) ("Apr. 13, 1998 Letter"), Ex. 13, Apr. 1998 Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, § V-9-2(A). [SOF ¶32]. Seeking better terms, FMC negotiated an agreement with the Tribes in May of 1998 under which it agreed to pay a fixed fee of $1.5 million each year that it stores waste on the Reservation, as set forth in a series of letters dated May 19, 1998, May 26, 1998, and June 2, 1998. 2012 TCA Op. at 5 (citing Ex. 17, Letter from LUPC to J. Paul McGrath, Senior Vice President & Robert J. Fields, Vice President, FMC (May 19, 1998); Ex. 18, Letter from J. Paul McGrath, Senior Vice President, FMC, to LUPC (May 26, 1998); Ex. 19, Letter from J. Paul McGrath, Senior Vice President, FMC, to Jeanette Wolfley, LUPC (June 2, 1998) (collectively "1998 Agreement")).

The Tribal Appellate Court found that in the 1998 Agreement, FMC stated

> in clear terms that [it] would obtain Tribal land use permits for its waste activities on the Reservation and pay the Tribes an initial payment of $2.5 million and thereafter pay an annual special use permit fee of $1.5 million each year, "even if use of ponds 17-19 was terminated," i.e. stopped being used for disposal in the next

> several years, and FMC would thereby obtain, and continue to have an exemption from the otherwise-applicable Tribal land use permitting regulations.

Id. (footnote omitted). The court further found that FMC had entered into a Consent Decree with the United States in *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho entered July 13, 1999), ECF No. 28 ("RCRA Consent Decree" or "Consent Decree"), that this Court's Mar. 6, 2006 Order held that the Consent Decree was one of three consensual relationships that support tribal jurisdiction under the first *Montana* exception, and that in *United States v. FMC Corp.* (*FMC II*), 531 F.3d 813 (9th Cir. 2008), the Ninth Circuit had held that the Tribes could not enforce the RCRA Consent Decree because they were not parties to it, but that the Ninth Circuit "did not relieve FMC of its responsibility to apply for the necessary Tribal permits." 2012 TCA Op. at 7-8. Accordingly, FMC's assertion that the Tribal Appellate Court "did not consider or decide any facts regarding [the first *Montana* exception]," FMC-FMBr. at 3, is flatly wrong.

The Tribal Appellate Court relied on those findings in its legal analysis, 2012 TCA Op. at 14-15, 26-27, 40-42, holding that the record "supports the Trial Court's ruling on the issue of jurisdiction . . . based upon a consensual relationship after taking guidance from Judge Windmill's [sic] decision." *Id.* at 15. The court summarized its legal findings in the "Conclusion" section of its order, *id.* at 61-62, including its finding that: "The Tribes have jurisdiction over FMC under the consensual relationship exception based on the 1998 contractual agreement, the 1998 Consent Decree, and FMC's specific consent to Tribal jurisdiction in the 1997 Buttleman letter." *Id.* at 61 (quoted in FMC-FMBr. at 8).

In short, Tribal Appellate Court's decision relied on its own findings of fact and legal analysis, *see id.* at 14-15, 26-27, 40-42, which were not simply a recitation of this Court's legal

conclusions from the Mar. 6, 2006 Order.[2] And as we show next, the guidance the court took from the Mar. 6, 2006 Order was entirely proper.

C. FMC's Attacks On This Court's Mar. 6, 2006 Order Are Factually And Legally Incorrect, And That Order Was Properly Relied On By The Tribal Appellate Court For Guidance.

FMC asserts that this Court's Mar. 6, 2006 Order was in error, but it relies on a highly selective reading of a different order in the same proceedings to make that claim, which is untenable. *See* FMC-FMBr. at 4-5. FMC also asserts that because the Mar. 6, 2006 Order was vacated by the Ninth Circuit in *FMC II*, it "function[s] as if there had been no legal decision in the first place." *Id.* at 7. Neither contention is correct.

FMC asserts that the Mar. 6, 2006 Order was in error because this Court's Memorandum Decision and Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW, 2006 WL 3487257 (D. Idaho Dec. 1, 2006), ECF No. 119 ("Dec. 1, 2006 Order"), which denied FMC's motion for reconsideration or clarification of the Mar. 6, 2006 Order, "directed that FMC's arguments regarding tribal jurisdiction could not be raised in the Tribal forums . . . ." FMC-FMBr. at 5. That assertion is specious. In the Mar. 6, 2006 Order, this Court held that FMC was required to apply for tribal permits under the RCRA Consent Decree, and exhaust tribal remedies, or "identify a

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[2] The Mar. 6, 2006 Order's ruling that FMC entered a consensual relationship with the Tribes through FMC's Aug. 11, 1997 Letter, the 1998 Agreement, and Consent Decree was correct, for the reasons set forth in the 2012 TCA Op., the supporting Memorandum to Tribes' Motion for Affirmance of the Tribal Court of Appeals' Finding of Jurisdiction Under the First *Montana* Exception, Dkt. No. 64-1, and this memorandum. The Ninth Circuit's ruling on appeal was only concerned with whether the Tribes had the right to enforce the Consent Decree in federal court, not whether they had a consensual relationship with FMC. *See FMC II*, 531 F.3d at 823-24 ("In response to questioning from the panel, FMC's lawyer represented to the court that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion. We accept that statement from counsel as binding on FMC.").

legal exception to exhaustion doctrine, before seeking relief in this Court." Mar. 6, 2006 Order at 17. In so holding, the Court rejected FMC's assertion that the Tribes lacked jurisdiction over FMC, holding that the Tribes had jurisdiction under the "consensual relationship" exception of *Montana v. United States*, 450 U.S. 544 (1981). Mar. 6, 2006 Order at 13-15. In the Dec. 1, 2006 Order, this Court denied FMC's motion for reconsideration or clarification of that order, and restated FMC's obligation to exhaust tribal remedies. Dec. 1, 2006 Order at 5, 6.

FMC asserts that this Court "directed that FMC's arguments regarding tribal jurisdiction could not be raised in the Tribal forums" by selectively quoting the Dec. 1, 2006 Order, FMC-FMBr. at 5, which cannot be so read. In that order, the Court explained that FMC had asked the Court whether it should have exhausted tribal remedies before it sought the ruling on jurisdiction set forth in the Mar. 6, 2006 Order. The Court said "[t]he short answer is no," and then explained that in the proceedings resolved by the Mar. 6, 2006 Order, FMC had challenged tribal court jurisdiction "on the record as it stood," that "[t]he Court rejected FMC's challenge on the present record," and that "FMC cannot ask the Court for a ruling on the present record and then, when the ruling goes against them, seek reconsideration of the ruling on the ground that the record is not complete." Dec. 1, 2006 Order at 6. Nothing in the Dec. 1, 2006 Order relieved FMC of its obligation to exhaust tribal remedies under the Mar. 6, 2006 Order at 17; to the contrary, the Dec. 1, 2006 Order at 5, 6, restated that requirement.[3]

FMC's second assertion, that the Mar. 6, 2006 Order can no longer be relied on because it was vacated by the Ninth Circuit in *FMC II*, also fails. *See* FMC-FMBr. at 7 (citing *Durning v.*

[3] FMC appealed the Dec. 1, 2006 Order to the Ninth Circuit, which dismissed that appeal as duplicative of FMC's appeal of the Mar. 6, 2006 Order. *FMC II*, 531 F.3d at 818 n.5. Thus, it is now too late for FMC to challenge that order in any event.

Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 50 (1950)). While a vacated decision is not precedent, holdings of the vacated opinion that were not called into question by the reviewing court retain their persuasive force. *United States v. Clark*, 617 F.2d 180, 184 n.4 (9th Cir. 1980). *See also Durning*, 950 F.2d at 1424 n.2.[4] The Mar. 6, 2006 Order retains its persuasive force on the question of tribal jurisdiction, Mar. 6, 2006 Order at 14-15, because the Ninth Circuit expressed no disagreement with that holding, and itself found that FMC had entered into an agreement with the Tribes to pay the annual waste storage permit fee, *FMC II*, 531 F.3d at 815. Thus, the Tribal Appellate Court properly relied on the Mar. 6, 2006 Order for guidance.

D. The Decisions Issued By LUPC, FHBC, And The Tribal Court Do Not Change The Applicable Standards Of Review.

The Tribal Appellate Court's decision is under review here, not the decisions of the LUPC, the FHBC, and the Tribal Trial Court. FMC suggests otherwise, and even attacks the Trial Court's reliance on the Mar. 6, 2006 Order. FMC-FMBr. at 5-6. That argument has no merit and the facts on which it relies are irrelevant because the appellate court reviewed and considered the issues in this case *de novo*, 2012 TCA Op. at 11 (quoting Ex. 23, Law & 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.")), and as the court of last resort under tribal law, *see* Law & Order Code ch. IV § 1, the Tribal Appellate Court's rulings superseded the rulings from which FMC appealed. Furthermore, FMC's assertion that the lower administrative and judicial tribunals "failed to make factual and legal determinations on FMC's challenge to tribal jurisdiction," FMC-FMBr. at 5, is simply wrong –

[4] *Munsingwear*, which FMC also cites, concerns vacatur upon a finding of mootness, 340 U.S. at 40-41, and thus has no relevance here.

these tribunals all made their own findings.[5] FMC's related assertion that the Trial Court's reliance on the Mar. 6, 2006 Order was improper is also meritless because the Tribal Appellate Court reached its own legal conclusions based on its own reasoning. 2012 TCA Op. at 14-15, 26-27, 40-42.[6]

II. THE FIRST *MONTANA* EXCEPTION APPLIES TO FMC'S USE OF RESERVATION FEE LANDS TO STORE WASTE.

A. The Tribal Appellate Court's Correctly Interpreted The First *Montana* Exception, and FMC's Assertion That The Exception Applies Only On Tribal Land Has No Merit.

The Tribal Appellate Court properly interpreted the first *Montana* exception. The court acknowledged the general rule that tribal jurisdiction over nonmember activity is limited, and that to establish jurisdiction over nonmember activity on fee land either of the two *Montana* exceptions must be satisfied. 2012 TCA Op. 13-14 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 326 (2008); *Montana*, 450 U.S. at 565-66). The court further held that the Tribes had the burden of establishing the applicability of the *Montana* exceptions, *id.* at 14,

[5] Although their reasoning is not at issue here, the lower tribunals acted properly when they found that this Court's legal conclusions in its Mar. 6, 2006 Order were supported by the record, including the 1998 Agreement, FMC's Aug. 11, 1997 Letter, and the Consent Decree. *See* Ex. 24, 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 2-10 (Shoshone-Bannock Tribal Ct. May 21, 2008); Ex. 25, 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 2-9 (Shoshone-Bannock Tribal Ct. May 21, 2008) ("Nov. 13, 2007 Op."); Ex. 26, *In re FMC's Appeals from Land Use Permit Decisions* ¶7 (FHBC July 1, 2006); Ex. 27, *In re FMC Application for Bldg. Permit*, at 2 (LUPC Apr. 25, 2006); Ex. 28, *In re FMC Application for Special Use Permit*, at 3 (LUPC Apr. 25, 2006).

[6] Furthermore, the Mar. 6, 2006 Order was not vacated by the Ninth Circuit until June 2008, after the tribal administrative and lower court proceedings concluded. Because tribal jurisdiction is a federal law question, the tribal courts did exactly what they were supposed to do: Review existing federal decisions relating to the matter before them and apply them, if relevant, to the facts in the record.

and acknowledged the "presumption that if a tribe has regulatory authority under *Montana* to regulate the activities of non-members, jurisdiction over disputes arising out of those activities exists in the tribal courts," *id.* at 15 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). FMC recites its own version of these principles, but does not assert that the Tribal Appellate Court's ruling was to the contrary. FMC-FMBr. at 8-12. Instead, it seeks to establish a legal basis for its next argument, which asserts that the first *Montana* exception applies only on trust land. *See id.* at 12-22. That effort fails.

Montana itself establishes the applicability of the first *Montana* exception to activity on non-Indian owned fee land. The Court held at the outset that it "readily agree[d]" with the court of appeals that the Tribe could prohibit hunting and fishing on tribal lands. 450 U.S. at 557. By contrast, the Court held that "on non-Indian fee lands" tribal inherent sovereign power was more limited, and that its existence was to be determined by applying the *Montana* exceptions. *Id.* at 565-66. The Court's later decisions confirm the same point. *Strate*, 520 U.S. at 453, 454, 456 (describing *Montana*'s "main rule and exceptions" as "[r]egarding activity on non-Indian fee land," and applying those exceptions to an accident on a state highway because it was the equivalent of non-Indian owned fee land); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) (describing "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land"). FMC's attempt to limit the *Montana* exceptions to trust land is also rejected by the law of the Ninth Circuit, which holds just the opposite. "[T]ribes have the power to manage the use of [their] territory and resources by both members and nonmembers," *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813-14 (9th Cir. 2011) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983)) (alterations in original), and those broad powers are subject to the limitations imposed by the *Montana* decision *only* on

non-Indian land *id.* at 813.[7] Applying *Montana* more broadly "would impermissibly broaden *Montana*'s scope beyond what precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Id.* Furthermore, as between the Tribes and FMC, the applicability of the first *Montana* exception to non-Indian activity on fee land is a matter of settled law. In *FMC v. Shoshone-Bannock Tribes*, the Ninth Circuit squarely held that the first *Montana* exception applies to determine whether "to allow tribal jurisdiction over non-Indians on fee land." 905 F.2d at 1314.

FMC also seeks to constrict the scope of the first *Montana* exception by describing it as permitting the exercise of tribal power only when "the regulation . . . stem[s] from the Tribes' inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." FMC-FMBr. at 12 (quoting *Plains Commerce*, 554 U.S. at 337 (citing *Montana*, 450 U.S. at 564)) (emphasis omitted) and when its exercise is "connected to that right of the Indians to make their own laws and be governed by them," *id.* (quoting *Hicks*, 533 U.S. at

[7] As the Ninth Circuit explained in *Water Wheel*, while the Supreme Court stated in *Montana* "that the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,' *id.* at 809 (quoting *Montana*, 450 U.S. at 564), "[t]he narrow question the Court considered in light of this test concerned the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian* land within the reservation." *Id.* (footnote omitted). And the Court's later decisions apply the *Montana* exceptions to questions of tribal jurisdiction arising on non-Indian land or its equivalent only, with the exception of "the explicitly narrow nature of the question considered in [*Nevada v.*] *Hicks*[, 533 U.S. 353 (2001)]." *Water Wheel*, 642 F.3d at 809-10. In *Hicks*, the Court held that "where a state has a competing interest in executing a warrant for an off-reservation crime, the tribe's power of exclusion is not enough on its own to assert regulatory jurisdiction over state officers and *Montana* thus applies," and "expressly limited its holding to 'the question of tribal-court jurisdiction over state officers enforcing state law' . . . ." *Water Wheel*, 642 F.3d at 813 (quoting *Hicks*, 533 U.S. at 358 n.2). And even that holding is applicable only where "the specific concerns at issue in [*Hicks*] exist." *Id.*; *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013) (*Hicks* rule applicable only where "obvious state interest[] at play").

361) (emphasis omitted). But the Supreme Court has repeatedly held that the imposition of a tribal permit fee is an authorized form of regulation under the first *Montana* exception, as shown by the decisions in *Hicks*, *Strate*, and *Montana* itself. The *Hicks* Court relied on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), to illustrate the proper application of the first *Montana* exception, noting that there the court upheld the application of a tribal permit tax to nonmembers "for 'the privilege of . . . trading within the borders.'" *Hicks*, 533 U.S. at 372 (quoting *Buster*, 135 F. at 950). *Buster* was also relied on to illustrate the proper application of the first *Montana* exception in *Strate*, 520 U.S. at 457, and *Montana* itself, 450 U.S. at 565-66. Notably, the permit tax in *Buster* was applied to nonmembers on non-Indian fee land. 135 F. at 958. The Tribes' waste storage permit fee in this case falls squarely within this precedent. Furthermore, FMC's agreement to pay the fee is "necessary 'to protect tribal self-government [and] to control internal relations,'" *Plains Commerce*, 554 U.S. at 337 (quoting *Montana*, 450 U.S. at 565), because it obligates FMC to comply with tribal law by paying a permit fee that enables the Tribes to protect the lands, waters, and natural resources of the Reservation from the waste stored on the FMC Property. [SOF ¶¶23-28]. And the agreement is "connected to that right of the Indians to make their own laws and be governed by them," *Hicks*, 533 U.S. at 361, because it secures FMC's compliance with tribal law.

In sum, because FMC's activities took place on fee land on the Reservation, the Tribal Appellate Court properly found tribal jurisdiction over FMC in this case by applying the first *Montana* exception in accordance with settled federal law. *See* 2012 TCA Op. at 13-15.[8]

[8] FMC later implies that the Tribal Appellate Court applied state law for that purpose, *see* FMC-FMBr. at 29 n.37, which is flatly wrong. The Tribal Appellate Court's Am. Findings of Fact, Conclusions of Law, Op. & Order re Att'ys Fees & Costs, Nunc Pro Tunc of Feb. 5, 2013 (Ex. 29), on which FMC relies for that purpose, considered whether the Tribes could recover attorney's fees from FMC, not whether the first *Montana* exception had been satisfied, which was decided in the 2012 TCA Op. To decide whether the Tribes could recover attorney's fees from FMC under

B. FMC's Three-Category Theory Of The First *Montana* Exception Is Wrong.

Ignoring the settled law set out above, FMC argues that the first *Montana* exception applies only to consensual relationships related to activities on trust lands. FMC-FMBr. at 12-22. It does so by asserting that there are three categories of first *Montana* exception cases, that only cases that fall within one of those categories satisfy the exception, and that those categories apply the first *Montana* exception on trust lands only. *Id.* As shown above, FMC has it exactly backwards. The rule is instead that the limitations imposed by the *Montana* decision apply only on non-Indian land. *Water Wheel*, 642 F.3d at 813. Even if that question had not been settled, a review of the cases FMC cites shows that its proposed framework is incoherent, as it is based on FMC's interpretations of the facts in those cases, rather than the courts' application of the relevant law to the facts.

1. FMC's first category supports tribal jurisdiction over nonmembers on Reservation fee lands.

FMC first theorizes that there is a category of *Montana* cases which demonstrate that the first *Montana* exception applies only when a nonmember enters a relationship with the tribe to engage in commercial activities on trust lands. FMC-FMBr. at 13-17. Two of these cases, *Water Wheel* and *FMC v. Shoshone-Bannock Tribes* reject this argument by expressly holding that the *Montana* exceptions apply to non-Indian owned fee land. *See supra* at 9-10. And while *Water Wheel* and *Grand Canyon*, 715 F.3d 1196, rely on *Montana* to provide an alternative basis for tribal jurisdiction over non-Indian activity on trust land, that does not mean the *Montana*

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the statutory exception to the American Rule on attorney's fees, the court applied diversity principles, and then considered Idaho law, *id*. at 8, but ultimately expressly declined to decide even that narrow issue at that time, *id.* at 9. Accordingly, the Feb. 5, 2013 Order does not bear on the jurisdictional principles that determine whether a consensual relationship exists under the first *Montana* exception.

exceptions are applicable *only* on trust land. Instead it shows that tribal jurisdiction is proper in these cases even if *Montana* applies to trust lands.

In *Water Wheel*, the Ninth Circuit first held that the case did not implicate *Montana* since the non-Indians were lessors on tribal land, while *Montana* addressed a tribe's regulatory power over non-Indians on *non-Indian* land, 642 F.3d at 810-11, and upheld tribal jurisdiction because the non-Indian activity "interfered directly with the tribe's inherent powers to exclude and manage its own lands," *id.* at 814. The court then held in the alternative that even if *Montana* applied, "the corporation's long-term business lease with the [tribe] for the use of prime tribal riverfront property established a consensual relationship and that the tribe's eviction action bears a close nexus to that relationship." *Id.* at 817. So too in *Grand Canyon*, in which the court held that "the district court correctly relied upon *Water Wheel*, which provides for tribal jurisdiction without even reaching the application of *Montana*." 715 F.3d at 1204. Continuing, the court held that "[e]ven if the tribal court were to apply *Montana*'s main rule, [the non-Indian plaintiff's] consensual relationship with [the tribal entity] or the financial implications of the agreement likely place it squarely within one of *Montana*'s exceptions and allow for tribal jurisdiction." *Id.* Similarly, in *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), concerning a dispute over tribal land leased to a non-Indian, the Ninth Circuit acknowledged that "[t]he tribal court had subject matter jurisdiction over the claims because they arose out of commercial relationships with the Tribe on its reservation." *Id.* at 1035 n.3 (citing *Strate*, 520 U.S. at 446).

To the extent that tribal jurisdiction in these cases relied on the trust land status of the underlying land, that only establishes that tribes have jurisdiction over nonmember activities on trust land, not that jurisdiction under the first *Montana* exception *only* exists on trust land. Indeed, another case cited by FMC specifically found the *Montana* test applicable *because* the contracted-

for activities took place on the equivalent of fee land. *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) ("[t]his court's post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land, the precise situation presented by this case.").[9] Finally, two other cases FMC cites were not decided under the first *Montana* exception. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1415-16 (9th Cir. 1986); *Stock W., Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989). The only legal principle that unite these cases into a coherent category is that tribes have jurisdiction over their reservations and can regulate nonmembers on fee lands if the first *Montana* exception is satisfied.

2. FMC's purported second category also supports tribal jurisdiction over nonmembers on Reservation fee land.

FMC then says there is a second category of *Montana* cases, made up of cases in which a nonmember voluntarily enters the reservation to conduct a commercial activity on trust land. FMC-FMBr. at 17-20. There is really no basis to distinguish this category from the first. *See Montana*, 450 U.S. at 665 ("consensual relationships" include "commercial dealing, contracts, leases, or other arrangements"). Nor do these cases help FMC's argument. Two of these cases simply recognize tribal jurisdiction over nonmember activity on trust land, *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-54 (1980); *McDonald v. Means*,

[9] FMC's assertion that trust lands were affected by the nonmember Cooperative's activities in *Big Horn* may be true, but that did not inform the court's legal analysis, which concerned whether the tribe could regulate the supply of power through rights-of-way that were the equivalent of fee lands. *Id.* And this point does not help FMC in any event, as here too, the non-Indian activities – FMC's storage of waste – have affected trust lands, as we have shown by separate memorandum. *See* Memo. Supp. Shoshone-Bannock Tribes' Mot. Recognition Aff. Tribal App. Ct. Decision Upholding Tribal Juris. Second *Montana* Exception at 22-23, Dkt. No. 65-1.

309 F.3d 530, 537-40 (9th Cir. 2002), and as with *Water Wheel*, *Grand Canyon*, and *Johnson*, the courts' recognition of the existence of tribal jurisdiction over nonmembers on trust land does not undermine tribal jurisdiction over non-Indian activity on fee land under the first *Montana* exception. In another case, *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999), the Ninth Circuit acknowledged that the *Montana* rule generally "governs only disputes arising on non-Indian fee land, not disputes on tribal land . . . ." *Id.* at 1074.

The other cases cited here all show that the *Montana* exceptions apply to fee lands. In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the court held that the second *Montana* exception did not establish tribal jurisdiction over a tort action arising from a traffic accident on a state highway because, as in *Strate*, the highway was the equivalent of non-Indian fee land, and the tribe's traffic safety concerns were insufficient to satisfy the exception. *Id.* at 813-15. In the other cases where the tribe did not have jurisdiction, the court found that there was no qualifying consensual relationship between the tribe and the nonmember litigant, either because there was no purported relationship, *Montana*, 450 U.S. at 566, or because the nature of the only purported relationship was insufficient to support jurisdiction, *Boxx v. Long Warrior*, 265 F.3d 771, 773, 776 (9th Cir. 2001) ("social acquaintances"); *Strate*, 520 U.S. at 457 (one driver in a highway accident was the employee of a subcontractor of a tribal enterprise but the tribe was a "stranger" to the accident); *Burlington N. RR v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999) (alienation of right-of-way from tribal control did not support relationship between the right holder and the tribe); *Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1113-14 (9th Cir. 1999) (same); *Yellowstone Cnty. v. Pease*, 96 F.3d 1169, 1176 (9th Cir. 1996) (allotment of tribal land did not establish relationship between tribe and current allotment owner). None held that the fee status of the land was a bar to first *Montana* exception jurisdiction.

In addition, FMC cites to another, pre-*Montana* group of cases, which affirmed the right of tribes to regulate the activities of nonmembers within their jurisdictional boundaries. FMC-FMBr. at 17 (citing *Williams v. Lee*, 358 U.S. 217 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster*, 135 F. 947). The *Montana* Court cited these three cases as illustrative examples of permissible exercises of tribal regulatory authority under the first *Montana* exception, *Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 457, not to show that the regulated activities must be on tribally-owned land, *see Buster*, 135 F. at 948, 958 (upholding tribal permit tax on non-Indian business on fee land). Because these cases all support the application of permit or licensing requirements to nonmembers, they support the application of a permit fee to FMC here.

These first two categories, FMC argues, also show that the first *Montana* exception applies only to "commercial" relationships. FMC-FMBr. at 19-20. This too is wrong. The Ninth Circuit has repudiated its earlier statement that *Montana* is limited to commercial dealings. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 n.4 (9th Cir. 2006) (disapproving the earlier statement in *Boxx*, 265 F.3d at 776, that "other arrangements" must be "of a commercial nature"). The Supreme Court has never held that all relationships under first *Montana* must be "commercial" – it has only described the "other arrangements" cited in *Montana* as "private consensual relationship[s]," distinguishing them from official discretionary actions like a state police officer obtaining a search warrant from a tribal court. *Hicks*, 533 U.S. at 359 n.3. But under either the case law, or FMC's invented rule, FMC is subject to tribal jurisdiction. It is a private party that, through consensual relationships, agreed to obtain tribal permits, and operated a commercial business on the Reservation that entered an agreement with the Tribes related to the storage of waste produced as a result of its on-reservation commercial activities, under which it paid a fee to store its wastes. Its agreement was thus both "private [and] consensual" and commercial.

3. FMC's third category supports jurisdiction for nonmembers who submit to tribal permitting processes.

FMC cites one case in its third purported category, cases of nonmembers knowingly taking part in tribal judicial processes related to activities on tribal land. FMC-FMBr. at 20-22 (citing *Smith*). But in *Smith*, tribal jurisdiction was established when a nonmember plaintiff sought relief from tribal court, as "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, *by the act of filing his claims*, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*." 434 F.3d at 1140 (emphasis added). The status of the underlying lands was "not dispositive," as *Montana* applies to fee land on the reservation. *Id.* at 1135. *Smith*, too, supports tribal jurisdiction over FMC.

In sum, none of FMC's three categories limit the application of *Montana* to trust land. And to do so would make no sense. Since the *Montana* exceptions are triggered when a tribe seeks to regulate nonmembers on fee lands, an interpretation of *Montana* that only applies it to activities on trust lands would be an absurd result.

III. FMC ENTERED INTO CONSENSUAL RELATIONSHIPS WITH THE TRIBES THAT ESTABLISH TRIBAL JURISDICTION TO IMPOSE THE TRIBAL WASTE STORAGE PERMIT FEE ON FMC.

The Tribal Appellate Court correctly found that FMC entered into numerous consensual relationships with the Tribes that establish its consent to tribal jurisdiction, as shown by the course of dealings that lead to FMC's entry into the 1998 Agreement with the Tribes, and FMC's confirmation and performance of that agreement. FMC attempts, unsuccessfully, to rewrite the history of that course of dealings. This case is instead a follow-up to *Shoshone-Bannock Tribes v. FMC*, in which the court found that the consensual relationships FMC had entered into included "leases with the Tribes or tribal members for a substantial percentage of its raw materials at [the FMC plant] . . . ." 905 F.2d at 1315. In this case, FMC entered into consensual relationships to

secure a permit to store the waste generated by turning those raw materials into marketable phosphorus. *See* [SOF ¶¶40-41].

A. FMC Entered Into Consensual Relationships With The Tribes By Applying For A Use Permit From The LUPC, And Expressly Consenting To Tribal Jurisdiction In FMC's Aug. 11, 1997 Letter To The Tribes.

FMC established a consensual relationship with the Tribes and consented to tribal jurisdiction by filing its special use permit application with the LUPC. *See Smith*, 434 F.3d at 1140 (knowingly entering tribal court to seek relief establishes a consensual relationship). That conclusion is also sustained by the Ninth Circuit rule that the existence of a consensual relationship is determined by "consider[ing] the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 338). That is plainly so here. Nevertheless, FMC asserts that it reserved its jurisdictional objections in the letter that transmitted its use permit application by stating that it was "consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines." FMC's Aug. 11, 1997 Letter. Indeed, FMC goes even further, claiming that "[a]ny consent provided by [that letter] is limited to submission of building and special use permit applications and payment of the $10 permit fee." FMC-FMBr. at 33. This argument fails.

FMC asserts that it was compelled to consent tribal jurisdiction because the Tribes had earlier declined to recognize FMC's reservation of objections to tribal jurisdiction over its building permit application. *Id.* at 23. That is not so – FMC could have sought an agreement with the Tribes at that time (indeed, the Tribes showed in their answer that the LUPC had earlier objected to FMC's reservation of jurisdictional objections over its building permit application because it

understood that FMC had agreed to recognize tribal jurisdiction. "[T]he LUPC informed FMC on August 6, 1997 that FMC's application for a building permit for Ponds 17, 18 and 19 could not be accepted with the August 1 Bush Letter attached to it because, as the letter explained, LUPC 'understood' that as a result of the 'FMC Initiative' and a 'July 10, 1997 [meeting] with FMC, EPA, and Tribal officials,' 'FMC would recognize tribal jurisdiction within the exterior boundaries of the Fort Hall Indian Reservation.' Letter from Tony Galloway, Chairman, LUPC to Dave Buttelman, Health, Safety and Environmental Manager, FMC (Aug. 6, 1997)." Answer to First Am. Compl. for Decl'y J. & Injunctive Relief & Countercl. ¶29, Dkt. No. 12.) If FMC wished to negotiate an agreement that would recognize its jurisdictional objections, it should have sought one. Instead, FMC's Aug. 11, 1997 Letter consented to tribal jurisdiction.

FMC also asserts that less than two weeks later the Tribes informed FMC that they had adopted amended LUPO guidelines that would impose a $180 million annual permit fee on FMC, and refused to grant FMC's use permit application, which allegedly "rejected FMC's offer to consent to the 'current' August 11 Operative Policy Guidelines." *Id.* at 24. In the first place, FMC submitted its applications for consideration by the LUPC in the exercise of its jurisdiction and the LUPC then considered and approved FMC's applications subject to specific conditions. In so doing, the LUPC exercised the jurisdiction to which FMC had consented; it did not reject an "offer." *See infra* at 21. Second, the amended LUPO guidelines that FMC asserts rejected its "offer" were simply proposed – FMC commented on that proposal, and it was not adopted. The facts are as follows. At a public hearing held on August 22, 1997, the LUPC informed FMC that proposed amendments to the LUPO guidelines would be considered that provided for a fee of one hundred dollars ($100.00) a ton for hazardous waste and fifty dollars ($50.00) a ton for non-hazardous waste. Ex. 30, Pub. Hr'g Mins., LUPC, Pub. Hr'g, Special Use Permit, F.M.C. Corp.,

Ponds 17-19 & Shoshone-Bannock Tribes, Fort Hall Land Use Operative Guidelines Proposed Amendments at 6-8 (Aug. 22, 1997). A sixty-day comment period was also announced. *Id.* at 7. And FMC filed comments on the proposed amendments. *See* Ex. 31, Letter From David Buttelman, Health, Safety & Envtl. Manager, FMC, to Tony Galloway, Chairman, LUPC (Nov. 3, 1997); Ex. 32, FMC Corp.'s Comments on the LUPC's Proposed Amendments to the Shoshone-Bannock Tribe [sic] Fort Hall Reservation Land Use Operative Guidelines ("FMC Nov. 3 Comments").

In its comments, FMC noted that it had filed a $10 application fee with each permit, as well as "a $5,000 voluntary contribution to help the Land Use Policy Commission cover the costs of reviewing the permit applications," *id.* at 3, which "was returned to us awaiting the outcome of the proposed amendments to the Land Use Operative Guidelines," *id.* at 4. FMC also acknowledged that "the disposal fee proposed by the Land Use Policy Commission is not out of line with tipping fees charged by commercial or municipal owner/operators of waste disposal facilities – although they are high compared to prices in the State of Idaho or elsewhere in the region." *Id.* at 8. FMC stated that "commercial hazardous waste disposal facilities charged between $50 and $250 per ton for bulk disposal," which is "the type of materials typically disposed of at FMC's Pocatello facility," but that the State of Idaho imposed only a $30 per ton fee on hazardous waste disposal. *Id.* at 7-8 & n.8. FMC further alleges that shortly after the Tribes adopted those new regulations (which the Tribes did not do),

> FMC explained to the Tribes that (1) "FMC filed its applications expressly subject to the Land Use Policy Guidelines in effect on August 11, 1997;" (2) "FMC had no notice of the proposed fees at the time it submitted these applications;" and (3) "Therefore, application of the proposed permit fees to Ponds 17, 18, and 19 would constitute retroactive application in violation of Due Process protections."

FMC-FMBr. at 24. But these assertions were actually made in FMC's comments on the amendments proposed in August of 1997. FMC Nov. 3 Comments at 11. And those proposed amendments were never adopted.[10]

Nor did the Tribes refuse to grant FMC's use permit application, as FMC contends. FMC-FMBr. at 24. Instead, the LUPC approved building and special use permits for FMC, subject to specific conditions requiring, *inter alia*, that FMC adhere to temporary Amendments to Chapter V of the LUPO Guidelines (that were attached to the LUPO's permit decision) that imposed an annual waste permit fee of three dollars ($3.00) per ton on hazardous waste and one dollar ($1.00) per ton on non-hazardous waste. 2012 TCA Op. at 4, 12; Apr. 13, 1998 Letter; Apr. 1998 Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, § V-9-2(A). [SOF ¶32]. Had FMC wished to challenge the LUPC's April 13, 1998 decision on the ground that the decision exceeded the jurisdiction to which FMC had consented, it would have had to appeal that decision, as it had a right to do. *See* Ex. 6, Shoshone-Bannock Tribes, Land Use Policy Ordinance, art. V, § 6 (Feb. 28, 1977) ("LUPO"). FMC failed to do so, and as a result it forfeited any such claim.

In any event, regardless of whether FMC's Aug. 11, 1997 Letter limited its consent to jurisdiction, that letter, as well as FMC's use permit application, and the LUPC's April 13, 1998 permit decision undeniably established consensual relationships with the Tribes. And after the

[10] Instead, the LUPC adopted a different set of amendments to Chapter V of the Guidelines in May of 1998 ("May 1998 Guideline Amendments") (Ex. 16), 2012 TCA Op. at 12; Nov. 13, 2007 Op. at 2. The May 1998 Guideline Amendments impose a hazardous waste storage fee of five dollars ($5.00) per ton, which is to be paid annually and be accompanied by a permit application, which if granted is valid for one year. *Id.* § V-9-2(A) to (B). The permit fees are to be "deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund," and used "to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." *Id.* § V-9-2(B).

LUPC issued its April 13, 1998 decision, FMC elected to negotiate and enter into the 1998 Agreement, in which FMC expressly agreed to pay the annual permit fee at issue in this case, without reserving any objection to tribal jurisdiction, as we show next.[11]

B. By Entering Into The 1998 Agreement, FMC Established A Consensual Relationship With the Tribes and Consented To Tribal Jurisdiction.

1. The 1998 Agreement was spelled out in the letters exchanged between FMC and the Tribes in May and June 1998.

Instead of appealing the April 13, 1998 decision of the LUPC, FMC engaged in new negotiations over the permit fee, which resulted in an agreement instantiated in an exchange of letters in 1998 by which FMC agreed to pay $1,500,000 each year to store waste on the Reservation. [SOF ¶33]. This agreement is explained in the Tribes' May 19, 1998 Letter, and confirmed by FMC's May 26, 1998 Letter, 2012 TCA Op. at 14-15. Subsequently, FMC clarified that the waste permit for which FMC had agreed to pay $1.5 million each year was not limited to ponds 17-19 only "during the time these ponds are in operation," May 26, 1998 Letter, but instead "covers the plant and that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years." June 2, 1998 Letter. Under the first *Montana* exception, a non-Indian owner of reservation fee land who enters into "consensual relationships with the tribe or its members," 450 U.S. at 565, has consented to the

[11] Furthermore, as the Tribal Appellate Court correctly held, the LUPO Guidelines in effect at the time of FMC's Aug. 11, 1997 Letter gave the LUPC the authority to impose reasonable conditions on any permit it granted, including the payment of a fee. 2012 TCA Op. at 29 (finding the Chapter V amendments "authoriz[ed] the assessment of the FMC permit fee"), 33 (finding the LUPC had inherent authority under the LUPO to impose permitting fees). These holdings are correct. And because tribal courts are the primary adjudicators of tribal law, the Court should defer to the Tribal Appellate Court's interpretation of tribal law and its rejection of FMC's contrary interpretation. *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983) (remanding to tribal court to interpret jurisdictional provision of tribal law because "[i]nterpretation of a tribal ordinance is one of the duties of a tribal court").

exercise of tribal jurisdiction that has "a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656. And here, the nexus could not be clearer: in the 1998 Agreement FMC agreed to pay the annual permit fee that is at issue in this case.

FMC again asserts that it had no choice but to agree, asserting that the Tribes informed FMC in April 1998 that they had adopted an amendment to Chapter V of the Land Use Policy Commission Guidelines that included a fee schedule that would require FMC to pay a $100 million annual permit fee. FMC-FMBr. at 26 & n.28.[12] But the 1998 Agreement was highly favorable to FMC, as the $1.5 million fee it agreed to pay enables FMC to store twenty-two million tons of waste on the Reservation at an annual cost of a little less seven cents per ton. FMC can hardly complain that it was forced to agree to pay pennies per ton to store hazardous waste – but it does.

FMC next asserts that the annual permit fee was not due after the FMC Plant ceased production. *Id.* at 28. But FMC's June 2, 1998 Letter obviously included the ponds as part of the FMC Plant, as FMC committed to pay the $1.5 million permit fee "even if the use of ponds 17-19 was terminated in the next several years." *Id.* This understanding was shared by the parties during the negotiation, as shown by the affidavit of Robert J. Fields (Ex. 22), the Division Manager of FMC's Phosphorus Equity, who was with FMC Vice President Paul McGrath when the terms of the June 2, 1998 Letter were agreed upon. [SOF ¶39]. In sum, as the Tribal Appellate Court held,

[12] To support that statement FMC relies on a brief it submitted to the Fort Hall Business Council on June 9, 2006 in which it estimated that the fee due under the Chapter V Amendments would be approximately $110,000,000. Ex. 33, FMC Corp. Br. in Supp. of Appeal from LUPC's Apr. 25, 2006 Decisions & Mot. to Stay at 13 n.6. But in the same brief, FMC asserted that it "had no notice prior to receiving the Declaration of Blaine Edmo on January 26, 2006 that the Amendments to Chapter V of the Guidelines purportedly had been adopted." *Id.* at 3 n.4. If that were so, the Chapter V Amendments, which were adopted in May of 1998, *see supra* at 21 n.10, could not have informed FMC's decision to enter into the 1998 Agreement.

> [b]ecause the original agreement contemplated the payment of the permit fee at the agreed upon rate continuing for several years, even if the use of certain ponds was terminated, the annual permit fee of $1.5 million was properly set by the LUPC and is upheld as valid by this Court as a proper exercise of the LUPC's authority consistent with FMC's voluntary agreement.

2012 TCA Op. at 27.

FMC also asserts that, as part of the agreement, the Tribes promised to "amend the Tribes' Hazardous Waste Act to expressly include FMC's fixed fee," FMC-FMBr. at 26-27, but this is not correct. The terms of the agreement were set forth in two numbered paragraphs in the May 19, 1998 Letter, which provides as follows:

> 1. It is agreed between the Land Use Policy Commission and the FMC Corporation that in lieu of the hazardous and nonhazardous waste permit fees established in the Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, Chapter V, Section V-9-1 and V-9-2, that the FMC Corporation will pay to the Hazardous Waste Program of the Land Use Department of the Shoshone-Bannock Tribes the hazardous and nonhazardous fixed permit fee amount $1.5 million for the period June 1, 1998 to May 30, 1999. In addition, the FMC Corporation will provide a one time start up a grant to the Hazardous Waste Program in the amount of $1 million. The permit fee and grant will be paid to the Hazardous Waste Program on June 1, 1998.
>
> 2. It is agreed between the Land Use Policy Commission and the FMC Corporation that beginning on June 1, 1999, and for every year thereafter, the FMC Corporation will pay an annual hazardous and nonhazardous fixed permit established in Chapter V of the Fort Hall Operative Guidelines.

Id. at 1-2. After setting out those terms, the letter states that:

> As we explained during our meeting, the Chapter V Amendment to the Operative Guidelines is only temporary for this year. Accordingly, within the year, the Hazardous Waste Program will be drafting a Hazardous Waste Act that will include either specific classes or exemptions to insure that FMC's fixed fee of $1.5 million remains the same in the Future.

Id. at 2. That explanation is not a term of the agreement, i.e., it did not commit the Tribes to enact the Hazardous Waste Act within a year so that it could exempt FMC from the application of that Act. It instead explains that the Tribes will not impose an additional annual permit fee under the

Hazardous Waste Act for FMC's storage of waste on the Reservation. Nor did the Tribes ever seek to do so. Furthermore, FMC subsequently recognized that codification of the 1998 Agreement was not necessary to its effectiveness. As the Tribal Appellate Court held, "FMC voluntarily paid the $1.5 million annual permit fee for four (4) years without asserting the permit fee under the 1998 Agreement required . . . the Tribes to pass regulations specifically exempting FMC from such regulations." 2012 TCA Op. at 22. And "the Tribes never tried to enforce a statutory per/ton fee against FMC and . . . upheld their end of the bargain in the 1998 Agreement." *Id.* And finally, codification was not required because the 1998 Agreement was a binding contract, and codification of the exemption was not a material term of that contract. *Id.* at 41-42.

2. FMC's other challenges to the 1998 Agreement are factually incorrect and have no merit.

FMC challenges the continuing validity of the 1998 Agreement, arguing that it is not binding under state law because it is a "perpetual" agreement, which is invalid unless the intent to agree to such a contract is "clearly and expressly made." FMC-FMBr. at 29 n.37 (citing *Barton v. State*, 659 P.2d 92, 94 (Idaho 1983); *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1474 (9th Cir. 1983)); that the 1998 Agreement is too "attenuated or stale" to constitute a valid agreement, *id.* at 34, and should not be considered "consensual" under *Montana* because FMC was coerced into the 1998 Agreement. *Id.* at 30-32. None of these assertions is accurate, as a review of the facts shows, and none have merit.

The 1998 Agreement is a consensual relationship whose interpretation is governed by federal law, not Idaho law. *See supra* at 9-10. And it is not "perpetual." The "$1.5 million [fee is] to be paid annually as long as FMC stores waste on the Reservation, even if the use of waste ponds 17-19 was terminated in the next several years." 2012 TCA Op. at 41. The duration of the agreement depends on the length of time FMC intends to store waste on the Reservation, and the

agreement clearly continued in effect after phosphorus production at the FMC plant had ceased, i.e., when the ponds were no longer in use. *See supra* at 22; [SOF ¶¶30-33, 39].[13]

Even assuming *arguendo* that Idaho law were applicable to construe the 1998 Agreement, it does not make every contract without an explicit term a "perpetual" contract revocable at will. Idaho law actually imposes a presumption *against* perpetual contracts, such that "[a]bsent clear manifestation" that the parties intend their contract to be perpetual, "[courts] will not infer such intent." *Barton*, 659 P.2d at 94. And, rather than making such contracts revocable at will, "where a contract is silent [as to term] and *the parties' intent cannot be ascertained* the parties are bound for a reasonable time." *Id.* at 95 (quoting *Schultz v. Atkins*, 554 P.2d 948, 953 (Idaho 1976)) (emphasis added). So even if the 1998 Agreement did not clearly reflect the parties' intent that they be bound for as long as FMC stores waste on the Reservation, and Idaho law applied to its interpretation, state law would simply limit the contract to a "reasonable time." And as FMC paid the annual permit fee for only four years, that "reasonable time" would plainly cover the period for which the Tribal Court Judgment was entered. A "reasonable time" cannot be construed to be only that period for which the agreement is honored by the party that entered into it, and FMC's contention that the agreement expired when the FMC Plant closed, FMC-FMBr. at 28, is rejected by its express commitment that "the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years," June 2, 1998 Letter.

[13] FMC also relies on *Zidell*, but in that case the court applied the Uniform Commercial Code as set forth in Oregon law, 719 F.2d at 1473, neither of which have any application here. Furthermore, while in that context *Zidell* states that the general rule is that a contract with no minimum duration is terminable at will by either party, the 1998 Agreement has a minimum duration, as shown in text above.

Nor is the consensual relationship between FMC and the Tribes "so attenuated or stale that the *Montana* consensual relationship requirement would not be met." FMC-FMBr. at 33-34 (quoting *FMC*, 905 F.2d at 1315). FMC and the Tribes entered into the 1998 Agreement to allow FMC to use its Reservation fee land to store waste, and FMC continues to do just that – store waste on the property. And FMC and its contractors manage those wastes pursuant to the 1998 Consent Decree and the IRODA.[14] Some of the circumstances of the Property have changed, but the basis of the consensual relationship, FMC use of Reservation lands to store millions of tons of hazardous waste, has not changed and FMC has no present intention of changing it.

FMC also claims the 1998 Agreement is not "consensual" because it was coerced into agreeing to pay the tribal permit fee. FMC was not coerced. Coercion requires threat of a wrongful act, and it is not wrongful for a government to assert its rightful authority. *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976) (per curiam); *Trans-Sterling Inc. v. Bible*, 804 F.2d 525, 529 (9th Cir. 1986); *United States v. Contents of Bank of Am.*, 452 F. App'x 881, 882-83 (11th Cir. 2011) (per curiam); *Hisel v. Upchurch*, 797 F. Supp. 1509, 1527 (D. Ariz. 1992). FMC also had recourse from the threatened application of a tribal permit fee that it deemed to be a threat to its operation of the plant, or otherwise illegal. To wit: it could have sought judicial relief, as it did in 2006, and is now doing. Although litigation may be inconvenient, it hardly constitutes duress. *See Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger*, 861 P.2d 71, 77 (Idaho

[14] As the Tribes show, Memo. Supp. Mot. Affirmance Tribal Juris. Second *Montana* Exception, Dkt. No. 65-1, these efforts are not sufficient to eliminate the threat and ongoing impacts to the Tribes under the second *Montana* exception. Yet FMC does remain actively involved in the management of its property and communicates with the Tribes about that management.

Ct. App. 1992); *Primary Health Network, Inc. v. State*, 52 P.3d 307, 312 (Idaho 2002); *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp.*, 337 B.R. 475, 477 (S.D.N.Y. 2006).

Nevertheless, FMC argues that in 1998 it agreed to pay the $1.5 million fee rather than risk being subject to a much higher fee, and that this was coercion. In the first place, paying seven cents a ton per year to store twenty-two million tons of hazardous waste on the Reservation is not coercion. *See supra* at 23. In essence, FMC's claim is that it had bargained well. Nevertheless, FMC asserts the choice it faced in 1998 was the same one that it later faced in 2006, either pay the $1.5 million or risk being responsible for a much higher fee, and that this is coercion. FMC advances this argument by relying on this Court's May 2006 Memorandum Decision & Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho May 17, 2006), ECF No. 114 ("May 17, 2006 Order"), which imposed a temporary stay to enjoin the Tribes from enforcing a deadline by which FMC would have to make an election between paying $1.5 million or a much higher amount. *Id.* at 3. But FMC fails to note that the stay imposed by that order was lifted by this Court in the Dec. 1, 2006 Order.

In the Dec. 1, 2006 Order, this Court rejected FMC's coercion argument, ruling that "because FMC may seek a stay of any fee payment in the Tribal system, and may appeal any denial to this Court, FMC's central argument is no longer persuasive." *Id.* at 5. In short, the availability of a legal remedy defeated FMC's coercion argument then, and it does now too. If FMC wanted to resist making any payment, it could have advanced its jurisdictional argument at that time, and could have done so in federal court by arguing that an exception to the exhaustion doctrine applied. Indeed, that is precisely what FMC did in 2006, which resulted in the Mar. 6, 2006 Order rejecting its jurisdiction argument. And finally, FMC's assertion that it was bullied is undercut,

considerably, by the fact that it stopped paying the annual permit fee in 2001, at the same time it stated its objection to the fee – and it has paid nothing since then.

Indeed, FMC's allegation that it agreed to the permit fee because the Tribes could have wrongfully forced shutdown of the plant, FMC-FMBr. at 26 & n.29,[15] is simply too far-fetched to merit serious consideration. The Tribes could not force the plant to stop operations. The Tribes lack criminal jurisdiction over FMC, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978), and had they sought to close the plant through the exercise of civil jurisdiction, FMC could have sought relief in federal court, as it is doing now. Nor is there reason to think that the Tribes would have attempted to do so, as at the time the plant was in operation, many tribal members and Reservation residents relied on FMC for employment, and the Tribes relied on the plant's operations for revenue. *See FMC*, 905 F.2d at 1312 ("FMC is the largest employer on the Reservation"); Ex. 21, Letter from John T. Bartholomew, FMC, to Blaine J. Edmo, Chairman, Fort Hall Business Council (May 23, 2002) (describing economic hardship and loss of tribal revenue caused by closure of FMC Plant).

[15] FMC provides no evidentiary support for its claim that tribal officials could have blocked access to the FMC Property and forced a plant shutdown, aside from a citation to a document in the record that does not support this claim. *See* Ex. 34, Decl. of John Bartholomew In Support of FMC Corp.'s Memo. in Opposition to Tribes' Mot. for Clarification of Consent Decree at 5, *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho filed Oct. 13, 2005) ("Bartholomew Declaration"). Indeed, the Bartholomew Declaration shows that the Tribes and FMC repeatedly negotiated to resolve disputes over FMC's use of the FMC Property, in order to avoid prolonged litigation over the question of tribal jurisdiction over FMC. *Id.* at 4-9, 11-12. This includes the negotiations in 1998 that lead to FMC's agreement to pay the permit fee. *Id.* at 6-9.

C. The 1998 Consent Decree Is Also A Consensual Relationship Under The First *Montana* Exception, in Which FMC Reaffirmed the 1998 Agreement and Consented to Tribal Jurisdiction.

In the RCRA Consent Decree, FMC expressly agreed that if "any portion of the Work requires a federal, state, or *tribal* permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." Consent Decree ¶8 (emphasis added). This reaffirms the validity of the 1998 Agreement, to which FMC agreed before it entered into the Consent Decree.[16] *See* 2012 TCA Op. at 15. The Consent Decree also constitutes a separate consensual relationship. Indeed, this Court confirmed that in the Consent Decree FMC agreed to submit to the tribal permitting process and go through the Tribes' land use planning system in its January 18, 2001 Order, which was issued in response to FMC's motion asserting that it had complied with ¶8 by simply applying for tribal permits. *See* Mem. Decision & Order at 3, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho Jan. 18, 2001), ECF No. 56. FMC is still bound by that decision. Furthermore, the consensual relationship

[16] FMC is judicially estopped from denying the validity of the 1998 Agreement, as recognized by the Consent Decree. FMC argued to the Ninth Circuit, in its successful argument against the Tribes' challenge to the Consent Decree, that it had to obtain tribal permits and pay the tribal permit fee pursuant to the Consent Decree. It now argues the opposite. FMC also argued that the Tribes could not challenge the Consent Decree's compliance with RCRA because the Tribes had permitted the same waste storage allowed in the Decree in exchange for a $1.5 million permit, Br. of Appellee FMC Corp., *United States v. Shoshone-Bannock Tribes* (*FMC I*), 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition) (No. 99-35821), 2000 WL 33996531, at *17-18, which permitting FMC now claims is impermissible. FMC then obtained judicial approval of the RCRA Consent Decree, *FMC I*, 229 F.3d 1161 (9th Cir. 2000), 2000 WL 915398, at *2, thereby inducing the court to accept the material claims made in support of the settlement, and to lend its coercive power to the enforcement of FMC's agreement with EPA. *See Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012). FMC is attempting to gain an unfair advantage by relying on contradictory arguments on the same legal issue to prevail in different proceedings, which is barred by judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Fort Hall Landowners Alliance, Inc. v. BIA*, 407 F. Supp. 2d 1220, 1224-25 (D. Idaho 2006) (quoting *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)).

created by the Consent Decree with the United States creates an expectation of tribal authority, and supports the exercise of tribal jurisdiction relating to the substance of the relationship. *Water Wheel*, 642 F.3d at 818. The fact the consensual relationship was with the federal government does not prevent the exercise of tribal authority. *See Plains Commerce*, 554 U.S. at 332 (relationship with tribal members authorizes tribal government jurisdiction); *see also Atkinson*, 532 U.S. at 656 (consensual relationship with federal government did not establish first *Montana* jurisdiction because there was no nexus between federal license and tribal regulation). This conclusion is also supported by this Court's Mar. 6, 2006 Order. The later vacation of that order on other grounds by the Ninth Circuit, after FMC appealed it, did not preclude the Tribal Appellate Court from relying on this Court's reasoning to come to the same conclusion.[17]

D. The Tribal Waste Permitting Laws Have A Nexus With The Consensual Relationship Between FMC And The Tribes.

The Tribes' permit fee also has "a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656. Indeed, the nexus could not be closer: in the consensual relationships that FMC entered into with the Tribes, FMC agreed to pay the annual permit fee. Furthermore, the Tribes' regulation of FMC's waste storage through a permit fee is precisely the type of regulation that is permitted by the first *Montana* exception. Permit or licensing fees are a type of regulation that the

[17] Indeed, a court can adopt the reasoning in a vacated opinion if it was not overruled by a higher court, and that reaffirmation in the new opinion is independently precedential. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129-30 (9th Cir. 2013) (reaffirming part of a vacated holding and affirming the lower court's reliance on the reasoning of the vacated holding); *Doody v. Ryan*, 649 F.3d 986, 990 (9th Cir. 2011); *Cen. Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001); *Hester v. Int'l Union of Operating Eng'rs*, 878 F.2d 1309, 1309-10 (11th Cir. 1989). Because the Ninth Circuit did not overrule or even address the district court's Mar. 6, 2006 consensual relationship ruling in its vacatur ruling, the Tribal Appellate Court could adopt the District Court's legal reasoning, not because it was binding precedent, but because its reasoning was independently convincing.

Montana Court specifically cited as permissible under the first *Montana* exception. *Montana*, 450 U.S. at 565 (citing *Williams*, 358 U.S. at 223; *Morris*, 194 U.S. 384; *Buster*, 135 F. at 950). And unlike the impermissible tax in *Big Horn*, *see* FMC-FMBr. at 30, the permit fee is not an ad valorem tax. Ad valorem taxes are imposed directly on real property and are owed by the owner of the property. *See Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 266 (1992) (describing ad valorem tax); *Big Horn*, 219 F.3d at 951; *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 772 (9th Cir. 2003) (invalidating under *Montana* an ad valorem tax imposed directly on a nonmember right-of-way that was based on a "fair assessment value" of the property). In contrast, the permit fee is a flat fee that FMC agreed to pay for a permit to use its land to store waste on the Reservation and is neither assessed against the wastes as property, nor based on the value of the wastes. 2012 TCA Op. at 5, 26 (the permit fee is imposed on "waste activities" on the FMC Property); LUPO Guidelines § V-5 ("a Special Use Permit is required for the following *uses of land*") (emphasis added); FMC's Aug. 11, 1997 Letter (submitting applications for LUPO building and special use permits); May 26, 1998 Letter (agreeing to "fixed fee" for "permitting at the FMC facility").

E. The Tribal Appellate Court Has Adjudicative Authority Over FMC.

As the Supreme Court has made clear, "*Montana* [also] govern[s] assertions of adjudicatory authority over non-Indian fee land within a reservation," *Atkinson*, 532 U.S. at 652 (citing *Strate*, 520 U.S. at 453), and "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising from such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (brackets omitted). And as the Court recently reaffirmed, when a nonmember has entered into a contract with an Indian on the reservation, tribal adjudicatory jurisdiction exists under the

first *Montana* exception to resolve a dispute arising under that contract. *Plains Commerce*, 554 U.S. at 332-33 (citing *Williams*, 358 U.S. 217); *Strate*, 520 U.S. at 457 (same). The law of the Ninth Circuit accords with these principles. As the Tribes have regulatory authority over FMC, recognition of tribal adjudicative jurisdiction would not conflict with "the Supreme Court's instruction that a tribe's adjudicative authority may not exceed its regulatory authority," *Water Wheel*, 642 F.3d at 809 (citing *Strate*, 520 U.S. at 453), and turns instead on "earlier precedent," *id.* at 815, which recognizes tribal civil adjudicative jurisdiction over non-Indians on the reservation, *id.* (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 18; *Santa Clara Pueblo*, 436 U.S. at 65; *Williams*, 358 U.S. at 220). Tribal adjudicative jurisdiction exists over "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into." *Smith*, 434 F.3d at 1136 (quoting *Hicks*, 533 U.S. at 372 (citing *Williams*, 358 U.S. at 217)) (ellipsis in original); *Water Wheel*, 642 F.3d at 805-06, 817 (expired business lease with tribe established a consensual relationship that authorized the exercise of tribal adjudicative jurisdiction); *Grand Canyon*, 715 F.3d at 1206 (commercial agreement, though not with the tribe directly, would have established a consensual relationship under the first *Montana* exception that authorized the exercise of tribal adjudicative jurisdiction). So too here.

IV. FMC'S MOTION ON THE FIRST *MONTANA* EXCEPTION SHOULD BE DENIED.

For the above reasons, the Tribal Appellate Court correctly held that there is a consensual relationship between the Tribes and FMC that establishes tribal jurisdiction over FMC to impose the permit fee. This Court should deny FMC's Motion to Deny the Tribes Jurisdiction over FMC Under the First Exception to *Montana*, Dkt. No. 67 ¶1, and grant the Tribes' Motion for Recognition & Affirmance of the Tribal Appellate Court Decision Upholding Tribal Jurisdiction under the First *Montana* Exception & for Summary Judgment on Judicial Estoppel, Dkt. No. 64.

DATED this 27th day of February, 2017.

SHOSHONE-BANNOCK TRIBES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th 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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