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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. 67-4, MEMORANDUM OF FMC CORP. IN SUPPORT OF MOTION TO DENY JURISDICTION TO THE TRIBES UNDER THE SECOND EXCEPTION TO *MONTANA*

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I. THE TRIBAL APPELLATE COURT CORRECTLY INTERPRETED THE SECOND *MONTANA* EXCEPTION IN ACCORDANCE WITH SETTLED LAW.

FMC asserts a tribe must show actual harm to the tribal community to satisfy the second *Montana* exception, *see Montana v. United States*, 450 U.S. 544, 566 (1981), but that the exception would still not be satisfied if "FMC's negligent waste disposal practices killed one or more tribal members," Mem. FMC Corp. Supp. Mot. Deny Juris. Tribes Sec. *Montana* Excpt. at 13-14 ("FMC SMBr."), or if "Tribal self-government has proceeded without interruption," *id.* at 20. That extreme position is not the law.[1]

A. The Second *Montana* Exception Authorizes Tribal Jurisdiction To Protect Tribal Natural Resources Threatened By Non-Indian Conduct.

1. Settled law establishes that the second exception authorizes tribal jurisdiction to protect reservation natural resources from threatened harm.

Under the second *Montana* exception, the Tribes may exercise jurisdiction to protect tribal members from noxious uses of land that threaten tribal welfare, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008), including uses of land that threaten natural resources relied by the tribe for subsistence, cultural, and religious purposes. *See Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998).[2] The Ninth Circuit there held that non-Indian conduct on fee lands within the Reservation was subject to tribal jurisdiction under the second *Montana* exception

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[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.

[2] The standards established by the *Plains Commerce* and *Montana v. U.S. EPA* decisions reject FMC's argument that the toxic tort liability standard should be applied under the second *Montana* exception. FMC SMBr. at 14-15.

because it had "the potential to impair water quality and beneficial uses of tribal waters," *id.* at 1139, and "posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential," *id.* at 1141.[3] The Circuit Court further held that the second exception does not require the tribe to show that no other government could take action. *Id.* FMC argues that "[u]nder the *Strate* line of cases,"[4] if "FMC's negligent waste disposal practices killed one or more tribal members, that still would not be enough to establish tribal jurisdiction," FMC SMBr. at 13-14. But that argument was rejected by the Ninth Circuit in *Montana v. U.S. EPA*, in which the court held that "the conduct of users of a small stretch of highway [in *Strate*] has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water resource." 137 F.3d at 1141. The Ninth Circuit decision is controlling here.

FMC also contends that the Tribal Appellate Court erred because under its analysis "a future threat that the wastes *might someday* cause harm to *an individual* is sufficient," FMC SMBr. at 14, as is "a mere possibility" the wastes would affect tribal cultural and religious traditions, *id.* at 10. That is not so. The Tribal Appellate Court held that FMC's conduct "continues to present a real, catastrophic threat to the Tribes. And this threat extends not only to the immediate

[3] The Circuit Court upheld EPA's determination that the tribe had authority over the activities of nonmembers on fee lands under the treatment as a state ("TAS") provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1377(e), by applying the second *Montana* exception, which it found was used by EPA as well. 137 F.3d at 1140-41. EPA has since issued a final Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183 (May 16, 2016), under which EPA announced that it construes Section 1377(e) as a delegation of federal authority.

[4] In all of these cases tribal jurisdiction over personal injury or tort claims of tribal members was denied based on *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997). *Wilson v. Marchington*, 127 F.3d 805, 814-15 (9th Cir. 1997); *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1064-65 (9th Cir. 1999); *Cnty. of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998).

environment and persons in the immediate vicinity, but also to members of the Shoshone-Bannock Tribes throughout the Reservation." Ex. 1, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014, *FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't*, Nos. C-06-0069, C-07-0017, C-07-0035, at 13 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2014 TCA Op."). Furthermore, the court held, the impact in this case "outweighs the speculative chances of future interference bought out and approvingly recognized by the Supreme Court in *Brendale* [*v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989)]. Indeed, if a catastrophic impact were required, *Brendale* shows that interfering with sacred tribal customs and traditions has such a impact." *Id.* at 14.[5]

FMC asserts that the Tribal Appellate Court misapplied *Brendale*. FMC SMBr. at 9-10. It did not. In *Brendale*, the Supreme Court upheld tribal authority to zone non-Indian fee land because of the impact that the planned development of that land would have had on tribal members' use of the surrounding lands for cultural and religious purposes. 2014 TCA Op. at 12-14 (citing *Brendale*, 492 U.S. at 440 (Stevens, J.)). Accordingly, the Tribal Appellate Court properly relied on *Brendale* to hold that the threatened effect of non-Indian conduct can establish jurisdiction under the second *Montana* exception, and that neither actual harm nor a catastrophe is required.

[5] FMC's assertion that the Tribal Law & Order Code rejects the federal law standards for tribal jurisdiction, FMC SMBr. at 4-5, is rejected by the Tribal Appellate Court decision, which correctly applies the federal law standards, 2014 TCA Op. at 4-5, 11-14. The Tribes' Constitution (Ex. 38) also explicitly recognizes that the Tribes' exercise of their sovereign authority is limited by federal law, *id.* pmbl. (purposes include "to exercise certain rights of self-government not inconsistent with Federal laws"), and the tribal judges' oath incorporates those limitations, Ex. 39, Law & Order Code, ch. I, § 3.3 (providing that judges will "protect the best interests of the Shoshone Bannock Tribes *in accordance with the Constitution and Bylaws*") (emphasis added). FMC's attack on the independence of the tribal judiciary, FMC SMBr. at 5-6, is meritless, *see* Tribes' Resp. to Dkt. No. 67-2, § V.B-D.

2014 TCA Op. at 13-14; Ex. 2, Statement of Decision of Apr. 15, 2014 at 6 ("2014 TCA Dec."). The Tribal Appellate Court also properly relied on *Brendale* to show that the threatened effect of non-Indian conduct on tribal cultural and religious activities may be established without statistical analysis and scientific measurement. 2014 TCA Op. at 13-14; 2014 TCA Dec. at 16, 29-30. In *Brendale*, the Court decided "whether the owners of [a] small amount of fee land may bring a pig into the parlor," by considering the character of the area, the subsistence, cultural, and religious uses of the area the tribe sought to protect, and the threatened effect of the non-Indian conduct on the character and uses of the land, *Brendale*, 492 U.S. at 438-42. That evidence was neither statistical nor scientific.[6] And *Brendale* was reaffirmed in *Plains Commerce*, 554 U.S. at 333.[7]

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[6] And here the evidence is even stronger: "[w]e have testimony that the activity of FMC has in fact interfered with the customs and traditions of the Shoshone Bannock Tribal Members." 2014 TCA Dec. at 2. That interference has a direct effect on the Tribes' political integrity, economic security, or their health or welfare. *See id.*

[7] As *Plains Commerce* reaffirms *Brendale*, it also rejects FMC's claim that the second *Montana* exception requires a catastrophic impact, or at least a catastrophic threat. FMC SMBr. at 4, 6. In *Plains Commerce*, the Court noted a commentator had said that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences," *id.* at 341 (quoting *Cohen's Handbook of Federal Indian Law*, § 4.02[3][c] at 232 n. 220 (Nell Jessup Newton ed.) (2005 ed.)) (alteration in original), and relied on that remark to provide analogical support for its holding, *id.* But the Court's holding was not based on the commentator's observation. Instead, the Court held that the second exception was inapplicable because the sale of non-Indian fee land "hardly 'imperil[s] the subsistence or welfare of the Tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 566) (alteration in original). Similarly, in *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), the Ninth Circuit held that to satisfy the second *Montana* exception the non-Indian conduct "must 'imperil the subsistence' of the tribal community," and that the construction of "a single-family house in an area that has already seen comparable development" did not do so. *Id.* at 1305-06. The *Evans* court also quoted *Plains Commerce*, stating that the challenged conduct "must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Id.* at 1306 (quoting *Plains Commerce*, 554 U.S. at 341). In short, neither court gave talismatic effect to the word "catastrophic." Furthermore, non-Indian conduct that imperils the subsistence or welfare of the tribe does pose a catastrophic threat to tribal self-government. As tribal witness Claudeo Broncho testified, "the United States is not going to find us another home if they destroy this one." Ex. 19, Trial Tr., Vol. IV, Test. of Claudeo Broncho ("CB Test.") at 962:23-24.

2. FMC's assertion that, under *Evans*, the Tribal Appellate Court should have determined whether the FMC Property is an open area has no merit.

FMC also contends that *Evans* required the Tribal Appellate Court to determine whether the FMC site is "an 'open area' of the Reservation." FMC SMBr. at 8-9. But *Evans* actually shows that whether an area is open or closed is not relevant to determining whether a tribe has jurisdiction to prevent environmental harm to tribal lands and natural resources. 736 F.3d at 1305-06 (evaluating tribal authority to prevent environmental harm based on the risks of harm to the Reservation environment and natural resources, without consideration of land ownership in that area). *Montana v. U.S. EPA* confirms that conclusion, as "the land within [the Reservation] boundaries reflects a pattern of mixed ownership and control between tribal and non-tribal entities," 137 F.3d at 1139, but the Ninth Circuit held the second *Montana* exception was applicable based on the threatened effect of the non-Indian conduct to tribal waters, without considering of the ownership of the land in the area, *id.* at 1141. Moreover, the *Evans* court itself expressly declined to compare the land surrounding the Evans property to the open area of the reservation described in *Brendale.* 736 F.3d at 1305 n.7. Instead, the court stated "courts must analogize to the closed area in *Brendale* to determine whether tribal zoning authority over fee land is plausible." *Id.* Assuming, *arguendo*, that such an analysis applied to environmental regulation, it would show that the Reservation is properly analogized to the closed area in *Brendale*, which contained at least 25,000 acres of fee land in an area of 807,000 acres, 492 U.S. at 415, which is slightly over three percent. The Fort Hall Reservation consists of approximately 544,000 acres, of which ninety-six percent is owned by the United States and is held in trust for the Tribes or for tribal members, or is held by the Tribes in fee. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1991); Ex. 40, EPA Region 10, *Decision Document: Approval of the Shoshone-Bannock Tribess* [sic] *Application for Treatment in the Same Manner as a State for Sections 303(c)*

and 401 of the Clean Water Act, App. I at 1-2 (2008) ("TAS Decision"). Thus, if *Brendale* were used as a metric in this case, the entire Reservation would be considered a closed area.[8]

B. FMC's Assertion That The Tribes' Waste Permitting Laws Are Not Directly Related to FMC's Conduct Is Rejected By The Evidence.

FMC claims that the second *Montana* exception is inapplicable in this case because the Tribes' permitting laws do not have a connection to FMC's conduct, FMC SMBr. at 4-5. That argument fails for the following reasons.

First, tribal law protects the Reservation's lands, waters, and natural resources from waste-related activities on the Reservation.[9] The LUPO provides that

> the control of the use of the lands and natural resources within the outer confines of the Fort Hall Reservation has a direct effect on the ability of the Shoshone-Bannock Tribes to safeguard and promote the peace, safety, morals and general welfare of all who may choose to reside within the outer confines of the Reservation . . . .

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[8] FMC vaguely asserts that "[t]he FMC Site and the surrounding lands are predominantly owned in fee and populated by non-Tribal members." FMC SMBr. at 9 & n.5. But FMC's witness did not get any information from the Tribes, Ex. 41, Trial Tr., Vol. VII, Test. of Warren Glimpse, 1702:1-5, although he admitted that some tribal members have no mailing address, *id.* 1705:16-20, and he did not do any analysis of the population of the Fort Hall Reservation. *Id.* at 1700:19-25. Furthermore, the surrounding area includes tribal and Indian lands that are relied on for subsistence, cultural, and religious purposes by tribal members, such as the Portneuf River and the Fort Hall Bottoms. [SOF ¶¶21-22, 43]. The surrounding area also includes the Reservation land traversed by the twenty percent of the Reservation roads that contain slag, the homes of over 100 Reservation residents who have been exposed to doses of gamma radiation in amounts that exceed background levels, and the tribal lands contaminated with radioactive particles blown by wind from the FMC Property. [SOF ¶72]. As these are all tribal and tribal member lands, they would constitute a closed area, assuming *arguendo*, that label applied outside the zoning context.

[9] These enactments include the Land Use Policy Ordinance (Feb. 28, 1977) ("LUPO") (Ex. 8), Fort Hall Land Use Operative Policy Guidelines (Nov. 22, 1979) ("LUPO Guidelines") (Ex. 9), the 1998 amendments to Chapter V of the LUPO Guidelines ("May 1998 Guideline Amendments") (Ex. 10), the Hazardous Waste Management Act, Ordinance ENVR-01-S3 (Dec. 4, 2001) ("HWMA") (Ex. 11), and the Waste Management Act, Ordinance ENVR-05-S4 (Sept. 8, 2005) ("WMA") (Ex. 12). [SOF ¶¶24-28].

Id. pmbl. And the purpose of the May 1998 Guideline Amendments is to "prevent further degradation of the environment and to protect the public health, safety, and welfare of Fort Hall Reservation residents" by establishing waste storage fees and requiring the LUPC to "utilize the hazardous waste fees for administration, management and oversight of the existing hazardous waste disposal sites and storage on the Fort Hall Reservation . . . ." *Id.* The HWMA also imposes a waste storage fee, *id*. § 409(B), and requires that such fees "be deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected." HWMA § 409(D).

Second, these laws are administered by tribal agencies that monitor and regulate the storage of hazardous and non-hazardous waste on the Reservation. Ex. 18, Trial Tr., Vols. I-II, Test. of Kelly Clyde Wright ("KW Test.") at 172:23-173:10, 176:8-25. Their work includes oversight of CERCLA and RCRA sites, document review, quality assurance analysis, and the collection and analysis of environmental samples. Ex. 20, Trial Tr., Vol. I, Test. of Susan Hanson ("SH Test."), 32:8-16; KW Test. at 144:15-18. For the EMF site, the Tribes have provided oversight, including sampling, investigations, inspections, and review of risk assessments and ecological risk assessments. SH Test. at 34:12-21, 72:3-13, 72:21-73:9; KW Test. at 127:15-128:22, 191:22-193:1; Ex. 21, Trial Tr., Vols. V-VI, Test. of Rob Hartman ("RH Test.") at 1276:13-17 (Tribes reviewed and submitted comments on FMC's proposed site-wide gas assessment report work plan). Tribal oversight of the FMC Property is necessary in part because EPA does not engage in independent oversight or direct sampling and testing at the FMC site. KW Test. at 270:19-22; Ex. 26, Trial Tr., Vol. VII, Test. of Barbara Ritchie ("BR Test.") at 1581:15-1582:8. For example, the Tribes – not FMC – first identified the phosphine releases at Pond 16S, and reported it to EPA.

KW Test. at 271:1-8. FMC did not even report those events to EPA until several months later. RH Test. at 1297:24-1298:10.

Third, the monitoring of the contamination on the FMC Property by tribal agencies under tribal law is also necessary because the warning of a release of contaminants from the FMC Property and the release itself are one and the same, and the Tribes are responsible for protecting their members from such releases. The RCRA Facility-Wide Contingency Plan, EPA ID No. IDD070929518 (rev'd 2010) (Ex. 42) is intended only to "minimize hazards to human health or the environment at the FMC Idaho LLC Pocatello site," at 1, 2 (identifying hazardous waste management units on the FMC Property). The plan for addressing releases of contaminants off the FMC Property is to "[n]otify[] the appropriate authorities . . . ." *Id.* at 8. That means the Tribes must be prepared to act. EPA has no staff on-site full time; FMC, not EPA, monitors the FMC site, RH Test. 1355:25-1356:8, and FMC's position is that it is up to EPA to notify the Tribes, BR Test. 1654:11-15.

In sum, if tribal law were inapplicable in this case, the Tribes would be powerless to protect the lands, waters, and natural resources of their Treaty homeland and their members' health and welfare from the threat posed by the waste stored on the FMC Property. Such a result would make a mockery of the Tribes' right "to make their own laws and be ruled by them," which is the "[k]ey to [the] proper application" of the second *Montana* exception. *Strate*, 520 U.S. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). And it would be catastrophic for tribal self-government.[10]

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[10] FMC claims that non-Indian companies and municipalities provide a number of services on the Reservation, FMC SMBr. at 9 n.5, repeating many allegations that the Tribes contested in their Answer, *see id.* ¶¶237-246. According to FMC, the provision of services shows the relevant part of the Reservation is an "open area" under *Brendale*. FMC SMBR. at 9. Even if FMC's

C. The Tribal Court Judgment Only Regulates FMC's Storage Of Waste On The Reservation, Not The EPA.

FMC asserts that the Tribes have no jurisdiction over FMC's waste storage because all of FMC's activities on the FMC Property "are directed toward remediation" ordered by EPA, and the Tribal Court Judgment therefore impermissibly "alter[s]" the implementation of EPA remedies and "require[s] EPA or the federal courts to impose regulations or requirements on FMC . . . ." FMC SMBr. at 31.[11] That argument fails because the only activity the Tribal Court Judgment regulates is FMC's storage of hazardous waste on the reservation, through the imposition of a waste storage permit and permit fee. *See* 2014 TCA Op. at 2-3, 11, 14-15. Payment of the fee does not touch on, supplant, or overrule EPA's regulatory authority, nor does it prevent FMC from complying with EPA's remedial scheme. *See id.* at 5.[12] And because the Tribes are only exerting

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characterization of all these services is correct, they do not deprive the Tribes of their inherent jurisdiction under the second *Montana* exception. "[T]here is no suggestion [in the *Brendale* opinions] that inherent authority exists only when no other governments can act." *Montana v. U.S. EPA*, 137 F.3d at 1141. Here, the Tribes are exercising their inherent authority to protect their reservation resources, including water and air, which authority has been recognized and affirmed by the EPA. TAS Decision at 7-12; Ex. 43, EPA, *Eligibility Determination for the Shoshone-Bannock Tribes for Treatment in the Same Manner as a State under the Clean Air Act* at 4 (2000). Municipal services on the Reservation do not affect that authority.

[11] FMC asserts that "[e]arly in the trial, the Tribal Appellate Court ruled that FMC would not be allowed to introduce evidence of EPA's regulation and oversight to ensure the effectiveness of the cleanup and provide actions and remedies for future contingencies." *Id.* at 19. Just the opposite is true. FMC asserted that EPA actions on the FMC Property were relevant to whether tribal health and welfare was being impacted by FMC's conduct, and thus to whether the Tribes had jurisdiction over FMC under the second *Montana* exception. Trial Tr. at 200:17-202:10. The court did not agree, but told "you've got a right to put your case on. Go ahead. Go ahead." *Id.* at. 202:11-20, 203:2:10 (allowing FMC to present evidence of the full extent of EPA's involvement on the FMC Property), 355:25-363:25 (allowing FMC to present evidence of its theory that EPA's actions at the FMC Property are protective of human health and the environment, including tribal health under the second *Montana* exception).

[12] Although the Tribal Court of Appeals considered EPA's involvement at the site, its proposed remedies, and how FMC is carrying them out, it did so only to determine whether FMC's waste

authority over FMC, and are doing so under the *Montana* exceptions, *Nevada v. Hicks*, 533 U.S. 353 (2001), has no application here.[13]

II. THE WASTE FMC STORES ON THE RESERVATION HAS A THREATENED AND DIRECT EFFECT ON TRIBAL HEALTH AND WELFARE.

FMC denies that its use of Reservation lands to store hazardous waste threatens the Tribes and their members. FMC SMBr. at 15. But the Tribes rely on the Reservation's lands, waters, and natural resources to sustain their subsistence and culture on their Treaty homeland, [SOF ¶20]. The Portneuf River, the Fort Hall Bottoms, the American Falls Reservoir, and the plants, animals and fish that populate that area are critical tribal resources. [SOF ¶¶21-22, 43].[14] And the evidence

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storage justifies tribal jurisdiction over FMC under the second *Montana* exception, *see id.* at 5, 8-10, not to assert authority over EPA.

[13] 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 Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011) (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 Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013) (*Hicks* rule applicable only where "obvious state interest[] at play"). That is not the case here. First, unlike the State officers in *Hicks*, *see* 533 U.S. at 359 n.3, FMC entered a consensual relationship with the Tribes to pay the permit fee, Ex. 3, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. Br. Order of June 26, 2012 at 4-5, 14-15, 26-27, 40-42. Second, unlike the state search warrant in *Hicks*, FMC's waste storage directly affects and threatens the health and welfare of the Tribes. 2014 TCA Op. at 14-15. Equally inapplicable is the statement in *Hicks*, that the lack of tribal adjudicatory jurisdiction can be compensated for by "invok[ing] the authority of the Federal Government and the federal courts . . . to vindicate constitutional or other federal or state-law rights." FMC SMBr. at 32 (quoting *Hicks*, 533 U.S. at 373). In this case, the Tribes seek to enforce tribal regulatory laws through the administrative and judicial appeals process set by tribal law. The state or federal courts are not alternative venues for such actions.

[14] Chairman Small testified that the Tribes believe that "water is life," NS Test. at 902:8, and that he and other Tribal members drank, swam, and fished in the Portneuf River and the streams of the Fort Hall Bottoms, and also hunted there, *id.* at 898:17-899:20. The animals, fish, water fowl, and plants of that area are important to tribal health and welfare because tribal members rely on these resources for subsistence purposes. *Id.* at 906:11-19. Claudeo Broncho testified that the area

at trial shows that the volume, toxicity, and mobility of the waste FMC stores on the Reservation create an uncontrollable threat to tribal health and welfare that satisfies the second *Montana* exception.

A. The Threatened And Direct Effect Of FMC's Wastes On The Reservation's Lands, Waters, And Natural Resources Is Shown By The Evidence At Trial.

1. The phosphorus that saturates the FMC Property threatens tribal health and welfare because it is reactive and cannot be contained.

Phosphorus leaching into the groundwater on the FMC Property has already contaminated the Portneuf River, the Fort Hall Bottoms, the American Falls Reservoir, and natural resources that are critical to the Tribes for subsistence, cultural, and religious purposes. [SOF ¶¶52-61]. FMC argues that the IRODA soils remedy of "specifically designed covers" will protect future workers on the FMC Property and that there is no risk to tribal members from the soil contamination on the property. FMC SMBr. at 28. This argument fails for the following reasons.

First, the soils remedy is not in place, [SOF ¶77], and will not reduce the toxicity, mobility, or volume of the phosphorus on the FMC Property even when it is in place, [*see* SOF ¶48]. Second, the capping of the soils will not affect the horizontal migration of phosphorus, which is driven by groundwater, converts to orthophosphate, Ex. 6, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* at 25 (2012) ("IRODA"), and has migrated off the FMC Property to the Portneuf River and the Fort Hall Bottoms, [SOF ¶¶52-61]. Third, the capping that was done under RCRA did not prevent the phosphorus from reacting to form phosphine, [SOF ¶¶66-67], which is also a threat off and on the

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where the Portneuf River comes down to the Fort Hall Bottoms is culturally significant, CB Test. at 954:14-18, and is used extensively for the Sun Dance ceremony and related cultural activities, *id.* at 956:1-20; 959:14-960:20. Both also testified to impacts to these core tribal interests. SOF ¶¶47, 61; NS Test. 923:22-924:12.

FMC Property, [SOF ¶¶63-65, 69-70]. Finally, while FMC's asserts that the risks of managing the phosphorus in place are less than the risks of excavating, leaving it in place also leaves all of the risks in place, which threaten tribal health and welfare. Tribes' SMBr. at 15-19.

2. Groundwater contamination from the FMC Property flows directly into the Portneuf River.

The groundwater contamination from the FMC Property both directly affects and threatens the health and welfare of the Tribes. Tribes' SMBr. at 19-23; [SOF ¶¶52-62]. FMC argues that there no risks to the Tribes from groundwater or surface water, that there are no excess levels of arsenic or heavy metals in groundwater wells outside the FMC Property, that 95% of the groundwater contamination is from Simplot, and that FMC's 5% contribution to that contamination is not a threat to the Tribes or the Portneuf River. FMC SMBr. At 29. FMC adds the IRODA groundwater remedy "will ensure the FMC OU groundwater contamination does not contribute to an exceedance of Clean Water Act standards in the Portneuf River." *Id.* These arguments fail for the following reasons.

First, whether or not the contaminated groundwater impacts groundwater off the FMC Property,[15] it is clear that the contaminated groundwater flows downhill from the FMC Property to the Portneuf River and contaminates surface waters, as well as the Fort Hall Bottoms, and the

[15] FMC witness Nicholas Gudka did testify that the contamination from the FMC Property had not migrated to groundwater off either the FMC Property or the Simplot property, Ex. 44, Trial Tr., Vol. VI, Nicholas Gudka, Test. ("NG Test.") at 1414:18-24, but none of the monitoring wells he relied on in making that determination were located off the FMC property, *cf. id.* at 1412:11-25 *with* Ex. 25, MWH, *Groundwater Current Conditions Report for the FMC Plant Operable Unit* at fig.1-2 (2009) ("Groundwater Report") (showing that the wells evaluated in the updated human health risk assessment were all on the FMC Property).

natural resources of those areas. [SOF ¶¶54-56].[16] FMC witness Barbara Ritchie testified that the IRODA reports arsenic concentrations in groundwater that flows from the FMC Property into the Portneuf River at 37 mg/l. BR. Test. at 1621:10-23. And Mr. Hartman testified there are also radiological constituents in the groundwater originating from the FMC Property, as shown by groundwater monitoring. RH Test. at 1246:4-16; Groundwater Report at 4-3 (reporting that gross alpha and gross beta activities were elevated in some of the monitoring wells). Dr. Leikin testified that water can be a particularly hazardous medium, and that contamination in the water from the FMC Property poses dangers from drinking and bathing, aerosolizing, bioaccumulation in animals and biological life. Ex. 24, Trial Tr., Vol. III, Test. of Dr. Jerrold Leikin ("JL Test.") at 496:4-11. Dr. Orris testified that human exposure pathways for contaminated groundwater include eating plants, animals, or fish sustained by the water, as well as swimming and washing in the Portneuf River. PO Test. at 769:12-24. Indeed, Mr. Hartman admitted that arsenic exposures exceeding drinking water standards earlier forced closure of a drinking water well at the Pilot House Café in 1976. RH Test. at 1247:10-14. That land is no longer off the FMC Property because FMC purchased it in 1990. Ex. 46, MWH, *Supplemental Remedial Investigation Addendum Report for the FMC Plant Operable Unit* at 3-11 (rev'd Nov. 2009).

Yet the *Supplemental Human Health Risk Assessment for the FMC OU* (rev'd Mar. 2009) (Ex. 47), did not even consider the risk from groundwater ingestion, as FMC witness Nicholas

[16] Dr. Orris testified that the contaminants of medical concern here are listed on page 8 of EPA Region 10's *Proposed Plan for an Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* (2011) ("PP-IRODA") (Ex. 45) and include metals, radionuclides, elemental phosphorus, and total phosphorus or orthophosphorus, all of which are in the groundwater discharged into the Portneuf River. Ex. 22, Trial Tr., Vols. III-IV, Test. of Dr. Peter Orris ("PO Test.") at 759:15-761:13.

Gudka admitted, explaining that "institutional controls" had been established in EPA's 1998 *Record of Decision* (Ex. 14) to deal with that issue. NG Test. at 1465:11-1466:5. But the 1998 ROD never went into effect on the FMC Property. [SOF ¶75]. Mr. Gudka also stated that an assessment of the groundwater was done in § 7 of the Groundwater Report, NG Test. at 1465:13-17, but that examination concluded "that there were constituent levels in groundwater underlying the FMC plant site that were above levels of concern." *Id.* at 1414:8-11. Furthermore, the conclusion of that assessment was that "the current cancer and non-cancer risk estimates still exceed levels of health concern" for groundwater ingestion. Groundwater Report § 8.1 at 8-5 to 8-6. And the Groundwater Report also shows that contaminated groundwater from the FMC Property discharges into the Portneuf River. [SOF ¶55].[17]

Second, FMC's assertion that Simplot is primarily responsible for the groundwater contamination under the FMC site is irrelevant (except to confirm that the ownership of land does not affect the transport of contamination by ground and surface water) since contaminated groundwater discharges from the FMC Property into the Portneuf River. RH Test. at 1348:6-13; BR. Test. at 1620:1-1621:4. If FMC wants to hold Simplot responsible for contamination that flows from FMC's land into the Portneuf River, it must take that up with Simplot. Furthermore, "EPA has not approved the Simplot mass loading calculation" on which FMC's position is based. IRODA at 54.

[17] The groundwater contamination directly affects the Tribes because their members "are connected to the river. . . . they hunt. They fish. They gather. They bathe in the river after sun dances. They drink in the river. It's a part of who they are." SH Test. at 47:15-48:15. *Accord* KW Test. at 131:10-133:4

And the assertion FMC attributes to Simplot is inconsistent with the facts in the record. The entire FMC Property is covered with contaminants. *Id.* at 223-228 tbl.1 (reporting contaminants on all of the Remedial Areas on the FMC Property), 209 fig.5 (showing Remedial Areas); Groundwater Report at 8-4 (listing "the primary FMC-related source areas and source–distinguishable constituents contributing to groundwater impacts at the FMC Plant Site."). Groundwater flows under the entire FMC property, including the areas most heavily contaminated, and then discharges at Batiste Springs and the Portneuf River, IRODA at 4, 209 fig.5, 212 fig.8. And the groundwater below the FMC Property is heavily contaminated. *Id.* at 213 fig.9 (arsenic), 214 fig.10 (potassium), 215 fig.11 (sulfate), 216 fig.12 (nitrate), 217 fig.13 (total phosphorus/orthophosphate), 218 fig.14 (selenium). Those contaminants include a phosphorus plume that leaked from the FMC Plant during its operations eighty-five feet below to groundwater. *Id.* at 24-25; 219 fig.15 (showing phosphorus subsurface migration and footprint to groundwater in the former furnace building and associated facilities). Furthermore, EPA found that "[t]he phosphorus/orthophosphate concentrations in groundwater resulting from oxidation of elemental phosphorus in the Former Elemental Phosphorus Production Area are indistinguishable from total phosphorus concentrations measured elsewhere at the EMF Site (see Figure 13)." *Id.* at 25. Accordingly, the contaminants on the FMC Property are plainly reaching the groundwater and discharging into the Portneuf River.

FMC's witnesses also admitted that wastes have contaminated the Portneuf River delta and natural resources that rely on that area. Dr. Linda Hanna testified that she worked on the 1995 *Ecological Risk Assessment for the Eastern Michaud Flats Site* ("ERA-EMF") (Ex. 48), and that the ERA-EMF found no impacts to the Portneuf River, river delta, or risks to species from toxicity. Ex. 49, Trial Tr., Vol. VI, Test. of Linda Hanna ("LH Test.") at 1483:3-12. But the study actually

found that cadmium was elevated 2.5 times above background in Portneuf River delta sediments, that cadmium, fluoride and zinc were elevated in plant tissue samples, and that cadmium and fluoride were elevated in small mammal tissue samples, ERA-EMF at 2, as Dr. Hanna later conceded, LH Test. at 1497:14-1499:7. Dr. Hanna also testified that the 2005 *Lower Portneuf River Preliminary Assessment Site Inspection* ("Lower Portneuf PA") (Ex. 50), found nothing different than the ERA-EMF had found. LH Test. at 1485:10-11. But the Lower Portneuf PA actually found: (a) nickel and vanadium were "consistently detected at elevated concentrations in sediment samples collected from the river;" (b) cadmium was detected at elevated concentrations in the Portneuf River and the delta, and was known to be associated with the EMF facilities; (c) radioactive contamination, specifically radium-228 and cesium-137, was detected in the downstream sediments; (d) at a location downstream of the intersection between a groundwater plume associated with the EMF facilities, "depressed pH [a measure of how acidic/basic water is], high conductivity . . . high salinity readings; high calcium and sodium concentrations, and an obvious sulphur-like odor" were detected. In addition, the "[r]adionuclide results indicate[d] possible elevated concentrations of Pb-210, Ra-226, and iodine-131 in river samples" which would require an expanded sampling effort to fully evaluate. *Id.* at 7-2. The Lower Portneuf PA concluded that "it appears possible that [the Lower Portneuf River sport fishery, the American Falls sport fishery, bald eagle habitat, and wetlands in these areas] are being impacted by [Target Analyte List] metals contamination, primarily from nickel and vanadium. Further, nutrient loading, although not a focus of this investigation, appears to be negatively impacting the river based on field observations of algae growth." *Id.* at 7-2 to 7-3. Finally, the Lower Portneuf PA did not analyze nutrients such as ammonia, chloride, orthophosphate, and sulfate because "this investigation was intended to focus on toxic/radioactive contaminants." *Id.* at 7-1. Nevertheless,

Dr. Hanna described the Lower Portneuf PA findings as "[e]ssentially, no real risks." LH Test. at 1485:10-14. That is not so.

Finally, FMC asserts that the IRODA groundwater remedy "will ensure the FMC OU ground contamination does not contribute to an exceedance of Clean Water Act standards in the Portneuf River." FMC SMBr. at 29. But the groundwater remedy in the IRODA is not now in place, and even when it is, it could take over a century to remediate the groundwater. [SOF ¶77].

3. Phosphine threatens persons on and off the FMC Property and phosphine monitoring is inadequate.

As we have previously shown, the phosphine that is generated on the FMC Property threatens the health and welfare of the Tribes. [SOF ¶¶63-67]; Tribes' SMBr. at 23-27. FMC asserts that the RCRA litigation rejected the Tribes' argument that the RCRA ponds pose a phosphine generation threat, that the Tribes cannot produce any evidence that the ponds pose an imminent health risk, and that thousands of fence line monitoring readings show "no detections of phosphine." FMC SMBr. at 27. Furthermore, when phosphine was detected at the RCRA ponds, FMC says that it and EPA acted promptly to implement protective measures. *Id.* As for CERCLA ponds, FMC assert that there are no phosphine risks associated with those ponds. *Id.* This argument is entirely without merit.

First, nothing in the RCRA litigation or the Consent Decree purports to bar anyone – not even the United States, which was a party to the decree – from objecting to subsequent phosphine releases from the FMC Property. Such releases did occur, which were the subject of action taken by EPA in the 2006 and 2010 UAOs, [SOF ¶¶66-67]. Furthermore, the Tribes are not parties to the RCRA Consent Decree and cannot enforce its terms. *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008).

Second, the 2006 and 2010 UAOs show that phosphine releases are a threat to the Tribes, [SOF ¶¶66-67], as Dr. Orris and Dr. Leikin testified, [SOF ¶¶69-70]. Mr. Hartman's testimony confirmed the extreme threat posed by phosphine emissions on the FMC Property. In 2006, FMC determined phosphine was being generated under the cap at Pond 16S and concentrating at levels in the range of 200,000 ppm. RH Test. at 1300:22-1301:3. Phosphine auto-ignited there, which led EPA to issue the 2006 UAO. *Id.* at 1287:14-22. FMC later determined that phosphine concentrations at the temperature monitoring points at the ponds was exceeding 20,000 ppm, which is the auto-ignition level, and would ignite when it reached ambient air, producing phosphorus pentoxide, a dense grey smoke. *Id.* at 1302:15-24. The 2006 UAO was not finally satisfied until 2011, after FMC showed EPA that it had reduced phosphine emissions at the temperature monitoring points to below 1000 ppm for a one year period. *Id.* at 1308:22-1309:12. That amount is twenty times the amount at which phosphine is immediately dangerous to life and health. [SOF ¶64]. Yet it apparently satisfied EPA. Furthermore, by that time, EPA had issued the 2010 UAO, which covered all eleven of the RCRA Ponds. RH Test. at 1313:5-12. Mr. Hartman did testify that there were twelve stations located around the perimeter of the FMC Property and that phosphine readings were taken at those twelve stations every four hours, "at the breathing zone at the ground level," and that between June 2010 and December 2010, 41,000 individual readings were taken that were all 0.00 ppm for phosphine. *Id.* at 1314:18-1315:7. But that protocol, if followed for that period, would actually produce only 15,400 readings. And the fence line monitoring was discontinued in March of 2011. *Id.* at 1315:13-14.

FMC relied on the testimony of Mr. Gudka to assert that the FMC site does not pose any health risk. But he is not a medical doctor and cannot opine on medical risks.[18] And his testimony did not address any risks from the waste stored in the RCRA Ponds; indeed, he testified that "[n]one of the risk assessments address the RCRA Ponds . . . ." NG Test. at 1460:13-18. That is significant because the RCRA Ponds are the primary source of phosphine emissions. *See* [SOF ¶¶66-67]. Nor did Mr. Gudka address the risk of gas generation at the CERCLA Ponds. NG Test. at 1465:1-5. But as phosphorus waste is in the CERCLA ponds, [SOF ¶46], those ponds will generate phosphine when the phosphorus comes in contact with water. [*See* SOF ¶63].

The mobility of the phosphine on the FMC Property was also confirmed by Mr. Hartman's testimony. He testified that during plant operations, phosphine was detected at the fence line on multiple occasions, including several that made it necessary to monitor phosphine levels on Highway 30, and another at which the phosphine levels along Highway 30 were so high that occupants north of Highway 30 were told to evacuate; and that in the last four years, phosphine alarms worn by workers on the property had gone off four times, which necessitated relocation of the workers. RH Test. at 1320:22-1321:5; 1322:7-11. At the time he testified, phosphine was being extracted and treated at Pond 18A. *Id.* at 1316:13-16. Phosphine was also being released from the ponds when a mild pressure gradient was created as a result of the barometric pressure changes; FMC determined that three pounds of phosphine a day was being released just from Pond 15S in this manner. *Id.* at 1317:5-20. Indeed, phosphine releases continue at the RCRA ponds as a regular matter, where the gas extraction systems installed by FMC "normally emit low

[18] Mr. Gudka has a bachelor of science degree in geology, and a master's of science degree in environmental science and engineering. NG Test. at 1392:15-1393:15

concentrations of phosphine (less than 0.3 ppm)." RCRA Facility-Wide Contingency Plan tbl.1. Mr. Hartman did estimate that there was a small probability, if any, of that phosphine being detected at the fence line. RH Test. at 1317:9-12. That would appear to be so, given his testimony that fenceline monitoring for phosphine on the FMC Property was discontinued in March 2011. *Id.* at 1315:13-14.

Finally, the monitoring for phosphine that was done by FMC was inadequate. 2014 TCA Dec. at 20-21. [SOF ¶68]. Tribal witness David Reisman testified that the fence line monitoring for phosphine that was done by FMC was inadequate because the equipment used was intended for monitoring occupational exposure, not environmental measurements, and the zone of influence within which that equipment monitored for phosphine was not defined, and that as a result, the monitor may have missed a cloud of gas escaping from the site. Ex. 33, Trial Tr., Vol. II, Test. of David Reisman ("DR Test.") at 331:18-332:23. In his opinion, the monitoring for phosphine emissions, including its frequency, at the FMC Property was not properly done, *id.* at 333:8-12, and the threat of the phosphine extends off the FMC Property, *id.* at 336:9-337:15. He also testified that a warning system for phosphine gas is needed for the FMC Property. *Id.* at 405:19-406:1. Yet the IRODA contains no monitoring plan for phosphine. IRODA at 70-71.

4. The radioactive elements in slag presents risks on and off the FMC Property.

Twenty-two million pounds of slag sits on the FMC Property, RH Test. at 1362:20-22, which is radioactive, and contains arsenic, *id.* at 1195:3-19. "[T]he surface of the slag emits gamma radiation at levels that are above EPA's acceptable levels." *Id.* at 1197:3-5. Radioactive contaminants have also been transported from the FMC Plant by air, impacting tribal lands, [SOF ¶72]. In the remedial investigation that was part of the CERCLA process "[t]he findings were that the contamination was concentrated within about the first mile around the facilities, and decreased

rapidly within the site." RH Test. at 1266:18-21. That contamination also reached lands north of I-86, the area known as RA-J in the IRODA, and that contamination is to be scraped off, brought back to the FMC Plant site, and capped. *Id.* at 1265:14-1266:2. Dr. Orris also testified that air deposition from plant emissions – metals and radionuclides – has dispersed throughout the region where the FMC Property is located and have impacted off-plant areas. PO Test. at 761:14-762:7 (citing 2011 PP-IRODA at 16), 759:15-761:13, and that the slag from the FMC Property will continue to emit radiation in the communities where it was used for other purposes and is a threat to human health, *id.* at 768:14-21. Dr. Leikin testified that slag is among the contaminants from the FMC Property that "constitutes a severe threat to the population." JL Test. at 521:5-522:16. The communities in which slag is a threat include the Fort Hall Reservation and tribal members. [SOF ¶72].

That the slag is a threat to human health was confirmed by the testimony of Mr. Gudka, who testified that in the Supplemental Human Health Risk Assessment for the FMC OU, radiation levels that exceeded EPA's level of concern were found at Remedial Units 1, 2, 4, 5, 7, 8 – and, indeed that almost all of the RUs had radiation exceedances, and that in addition, many reported a Hazard Quotient in excess of one. NG Test. at 1461:1-1463:10. A "Hazard Quotient" is "an expression of lung cancer risk," and warrants further analysis of anything above one. *Id.* at 1461:19-1462:1.[19]

[19] Relatedly, Mr. Gudka also testified that FMC conducted a study of the cadmium in vegetables grown at a garden off the FMC Property which was below level of concern. *Id.* at 1426:7-1427:4. But he admitted that FMC did not consider how the Tribes might be using plants for medicinal or health purposes, nor did it consider Tribal use of vegetation for religious and ceremonial purposes. *Id.* at 1463:11-1464:6. If there were such uses, Mr. Gudka testified that an assessment would have to be performed. NG Test. at 1472:17-1473:3.

FMC relies on the testimony of Professor Tom Gesell and Dr. Joseph Alvarez to assert that there is no radiological risk to the tribal community from the slag on the FMC Property. FMC SMBr. at 17. Professor Gesell has a Ph.D in physics, but he is not a medical doctor. Ex. 51, Trial Tr., Vol. VII, Test. of Thomas Gesell ("TG Test.") at 1712:19-1723:2. Dr. Alvarez also has a Ph.D in physics, but is not a medical doctor. Ex. 52, Trial Tr., Vol. VII, Test. of Joseph Alvarez ("JA Test.") at 1763:8-11. Professor Gesell opined that low doses of radiation do not have observable effects on humans, TG Test. at 1721:6-11, conceded that high doses could do so, *id.* at 1722:11-14, but could not say what level of gamma radiation would be acceptable to human health, *id.* at 1755:25-1756:21. He also acknowledged that EPA has adopted the linear no threshold hypothesis to assess risk from radiation, which "assumes that the risk for radiation starting at zero, radiation is zero. And then as the amount of radiation exposure goes up, the risks rise in a linear fashion with the dose." *Id.* at 1755:17-16. But he disagreed with that hypothesis, *id.* 1755:8-22, and did not use it in testimony, *id.* at 1758:10-23. Professor Gesell's opinions are contrary to the linear no threshold hypothesis, and to EPA's 1996 Administrative Order on Consent, *Monsanto Co.*, No. 10-96-0045-RCRA (EPA 1996) ("EPA 1996 AOC") (Ex. 35) to which FMC was a party, which found that the use of slag in road construction "may present an imminent and substantial endangerment to public health or the environment." *Id.* at ¶¶1.1, 8.1. Dr. Alvarez also disagreed with the linear no threshold hypothesis, JA Test. at 1777:1-9, though he asserted that his opinions would not change if he followed it. *Id.* at 1777:10-17. In his opinion, the radiation from the slag on the FMC Property can absorbed by the human body, on and off the FMC Property, without harm. *See, e.g.*, *id.* at 1769:22-1770:7 (no risk from use of slag use in roadways); 1771:2-16 (no risk to FMC workers). Indeed, Dr. Alvarez asserts that children could play on a ball field built on the FMC slag pile and would not be harmed. *Id.* at 1785:21-1786:2. These conclusions are

contrary to both the linear no threshold hypothesis and EPA's determination that the slag on the FMC Property poses a carcinogenic risk. [SOF ¶71]. And while Dr. Alvarez asserted that EPA had adopted the gradient exposure standard that he employed, he could not identify where this was done, and simply assumed it. *Id.* at 1778:3-9. Dr. Alvarez also asserted that there is no radiation risk to populations outside the FMC Property. *Id.* at 1773:16-1774:1. But he not know how many residences and residents on the Reservation tested above background for gamma radiation. *Id.* at 1775:9-1776:18. And contrary to Dr. Alvarez's opinion, the use of slag in road construction does present radiation risks. EPA 1996 AOC at ¶¶1.1, 8.1.

5. The testimony of Dr. Linda Hanna does not support FMC's assertion that FMC's wastes pose no ecological threat.

FMC relied on the testimony of Dr. Linda Hanna to assert that "a study of potential pathways to exposure and risk to the environment [shows that] the FMC Site poses no excess ecological risks." FMC SMBr. at 17. It does not. First, the ERA-EMF, which Dr. Hanna worked on, LH Test. at 1478:25-1479:5, did not even consider the ecological risks at the FMC OU or the Simplot OU, *id.* at 1480:4-16. Dr. Hanna testified that the ERA-EMF examined ecological risks in an area that extended three miles outside of the facility properties. *Id.* at 1480:19-1481:9. But it did not. ERA-EMF at 7-1 (ecological risk assessment sampled within one mile of the facilities; sampling at those locations *presumed* to be representative of area within three miles). Dr. Hanna also testified that EPA later requested that she evaluate the undeveloped areas of the FMC Plant site in the same manner as the EMF-ERA had done so, with some additional chemicals and receptors, and that she had done so in the Appendix B to the Supplemental Remedial Investigation Report (Ex. 53) ("App. B, SRIR"). LH Test. at 1485:14-1486:14. But she also admitted that the report did not rely on any data from the plant areas that it purported to address. *Id.* at 1485:14-1486:6. It was instead based on nearby off-site analyzes. App. B, SRIR at 5-2. And while she

described the results of the report as showing marginal risks for fluoride and vanadium, LH Test. at 1488:7-13, the conclusions of the report were more robust. Marginal risks for terrestrial plants, sage grouse, and horned lark as a result of fluoride contamination were identified, as were Hazard Quotients that exceeded one for coyote and pygmy rabbit. App. B, SRIR at 5-20. Dr. Hanna testified that the same areas, as well as FMC's northern properties, were later reexamined in Hanna Associates, Inc.'s *Supplemental Ecological Risk Assessment Addendum for the FMC Corp. Undeveloped Areas and Northern Properties Report* (2009) (Ex. 54) ("SERAA"), that data were actually collected this time, and that the report found only a marginal risk for fluoride. LH Test. at 1489:22-1491:9. But the SERAA only looked at nine contaminants, SERAA at 7, which did not include phosphorus, phosphine, or nutrient contamination. And its conclusions were broader than Dr. Hanna's testimony indicated. The risk estimates for fluoride exceeded the no observable adverse effects level (NOAEL) for red-tailed hawk and horned lark, and also exceeded the lowest observable adverse effects level (LOAEL) for red-tailed hawk. *Id.* at 39. In sum, Dr. Hanna's testimony actually establishes that the FMC Property does present excess ecological risks, and that those risks are not confined to the FMC Property.

B. Showing That FMC's Wastes Threaten Human Health Does Not Require A Showing That Harm to Human Health Had Already Occurred.

FMC asserts that the opinions that Drs. Orris and Leikin do not support the applicability of the second *Montana* exception because they did not testify to actual harm to the health of Tribal members from the contaminants on the FMC Property. FMC SMBr. at 15-16. That attack fails for three reasons. First, the second *Montana* exception is satisfied by the threatened or direct effect of non-Indian conduct on natural resources relied on by the Tribes for subsistence, cultural, and religious purposes, as shown above. *See supra* at 1-4; Tribes' SMBr. at 12-35. Second, threatened harm to human health also satisfies the exception, and Drs. Orris and Leikin testified to the

existence of such a threat. Third, while FMC faults Dr. Orris and Leikin for not addressing actual impacts to human health, FMC itself was responsible for completing that study. We address the second and third of these reasons below.

1. The expert opinions of Drs. Orris and Leikin establish that the contaminants on the FMC Property threaten tribal health and welfare.

The opinions of Drs. Leikin and Orris establish that FMC's use of Reservation lands to store waste poses a threat to tribal health and welfare that satisfies the second *Montana* exception. *See* JL Test. at 655:15-656:1; PO Test. at 767:11-771:1.[20] Both are both highly qualified medical doctors, [SOF ¶¶47 n.25 (Dr. Orris), 53 n.28 (Dr. Leikin)]. In their opinion, there is a reasonable medical certainty that the contaminants at the site threaten human health, up to and including death. PO Test. at 767:11-768:4; JL Test. at 655:15-656:1. Dr. Orris opined that the contaminants on the FMC Property[21] threaten the health of the public and individuals in the area, including the river

[20] As explained by Doctor Orris, a threat "occurs" when dangerous materials are at play, and is "inherent in the use" of dangerous materials. PO Test. at 775:23-25. Containment does not eliminate the threat. *Id.* at 786:22-787:3. "[A]s long as you have . . . either exposure or a logical possibility that there will be exposure" then a threat exists. *Id.* at 823:17-20. Once dangerous contaminants have been introduced into an area, then a current threat exists. *Id.* at 841:25-842:9, 765:10-21; *see* JL Test. at 654:21-655:21. Exposure to the contaminants on the FMC Property is concerning to a clinician because of their hazardous effects on the human body. JL Test. at 518:16-19; 558:3-21; 605:24-606:1; PO Test. at 765:10-21.

[21] Both Drs. Leikin and Orris identified the contaminants that pose these threats in their testimony. They include the radiation emitting slag, PO Test. at 768:18-21, contaminants of concern listed in the IRODA such as arsenic, cadmium, chromium, fluorides, lead, manganese, mercury, nickel, phosphorus, radium, selenium, tetrachlorethane, thallium, uranium, vanadium, zinc, potassium, and polonium, JL Test. at 491:11-494:24; PO Test. at 764:1-21, many of which can be transmitted through water, PO Test. at 769:3-24, as discussed in the Groundwater Report, JL Test. at 517:22-518:1; PO Test. at 750:1-751:6, as well as dangerous gases discussed in the Site-Wide Gas Assessment Report and 2006 and 2010 UAOs, JL Test. at 509:4-511:8; PO Test. at 745:12-19, 746:16-747:1, 752:23-753:14, 756:10-24, 758:11-16, 759:9-12, or dispersed particles of heavy metals and other contaminants listed in the PP-IRODA, all of which can be inhaled, JL Test. at 513:5-8, 514:7-11; PO Test. at 761:16-23.

area off the FMC Property, and have disrupted the Tribes' social welfare. PO Test. at 798:17-799:16. "[T]hese threats are not minimal annoyances. They are the threat of catastrophic health reactions . . . ." PO Test. at 767:18-768:4. Dr. Leiken's opinion is also that the FMC waste products constitute a severe threat to the population. JL Test. at 522:13-16.

FMC seeks to undercut the testimony of Dr. Orris by analogizing the threat presented by the contaminants on the FMC Property to the use of radioactive materials in hospitals. FMC SMBr. at 16. That analogy fails because, as Dr. Orris testified, the threat posed by the phosphorus and phosphine stored on the FMC Property can be reduced by engineering controls, but not removed. PO Test. at 786:19-787:8. And Dr. Leikin testified that if any of the engineering or institutional controls to be implemented on the FMC Property failed, the results could be catastrophic. JL Test. at 523:18-24. Furthermore, the history of containment failures at the site indicates that the threat exists despite engineering and regulatory controls – the contamination has been shown to escape the containment. PO Test. at 813:7-18. FMC's hypothetical hospital might be analogous to the FMC Property if the hospital had allowed radioactive waste to accumulate in piles for over fifty years and had permitted toxic materials to contaminate its water supply and blow across the landscape, without any administrative, engineering, and government controls in place. But no one would consider such a hospital safe. Nor is the FMC Property. In sum, the testimony of Drs. Orris and Leikin is itself sufficient to establish that the threatened effects of FMC's use of Reservation lands to store waste satisfy the second *Montana* exception.

1. FMC's challenge to Drs. Orris and Leikin's opinions fails because FMC is responsible for the study of the health impacts of its wastes.

FMC asserts that the opinions of Drs. Orris and Leikin do not support the applicability of the second *Montana* exception in this case because they did not testify to actual harm to the health of tribal members from the contaminants on the FMC Property. FMC SMBr. at 15-16. That attack

backfires, because under the RCRA Consent Decree it was FMC's responsibility to complete a study of the health effects of FMC's wastes. In the Consent Decree, FMC agreed to undertake the Fort Hall Environmental Health Assessment, the purpose of which was to "study . . . the potential human health effects on residents of the Fort Hall Reservation that may have resulted from releases of hazardous substances from RCRA waste management units and other sources at the FMC Pocatello Facility." Consent Decree, Att. B § II.14 *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (entered July 13, 1999), ECF No. 28. It was to "evaluate both direct human exposure pathways (air, water and soil) and indirect pathways (food, plants, fish, and animals)." *Id.* SEP 14 was to be completed and submitted to EPA for review and comment by December 31, 2002. *Id.* (under "Schedule"). But at the time of trial, more than a decade later, SEP 14 had not been completed, as the Tribes' witnesses testified, KW Test. at 146:25-147:21; JL Test. at 643:21-644:3; PO Test. at 654:1-655:10, and as FMC's witnesses at trial conceded, Ex. 55, Trial Tr., Vol. VIII, Test. of Dr. Jeffrey Mandel ("JM Test.") at 1857:22–1858:6; TG Test. at 1757:11-20.

Drs. Orris and Leikin cannot be faulted for not doing FMC's work. As they explained, they did not testify to the actual health impacts of the contaminants because: SEP 14 was supposed to evaluate the health effects of the FMC Property, but was not finished, PO Test. at 853:2-854:11; 855:22-856:12; *see* JL Test. at 654:16-656:1, and because the impacts of many of the contaminants from the FMC Property may be latent or without immediate effect, and would not reveal themselves for years after exposure, JL Test. at 498:16-499:3; PO Test. at 802:2-803:19. Thus, the full effects of the FMC Property cannot yet be known with clinical certainty. But, as the opinion of Drs. Leikin and Orris shows, the threat to human health can be identified.

C. Dr. Mandel's Testimony Does Not Show That FMC's Wastes Have Not Adversely Impacted Tribal Health.

FMC asserts that the testimony of Dr. Jeffrey Mandel shows that the waste on the FMC Property has not had any adverse health effects on FMC Plant workers or tribal members. FMC SMBr. at 17, 20-21. But Dr. Mandel actually testified that he had not formed an opinion on whether the activities on the FMC Property had adversely impacted the health and welfare of tribal members. JM Test. at 1854:7-19. And the opinions he did provide are not supported by his testimony.

1. Dr. Mandel's testimony that studies of FMC Plant workers do not show any adverse impacts related to the FMC Plant is entitled to no weight.

Dr. Mandel's opinion that studies of FMC Plant workers do not show any adverse impacts related to the FMC site was based on five studies, all of which report results that conflict with his testimony. The first study, Ex. 56, Shindell & Assocs., *Report of Epidemiological Study of the FMC Plant In Pocatello Idaho* at 4 (1977) ("1977 Study"), compared death rates of workers at the FMC Pocatello plant to the general U.S. population for the period from July 1, 1949 to December 31, 1976. Dr. Mandel testified that the death rate for white-male plant workers was lower than the death rate for the general population, JM Test. at 1808:10-17 (citing 1977 Study at 7). But the death rate for non-white males, and in particular the cancer rate, was elevated above those of non-white males in the U.S. as a whole. 1977 Study at 12. The second study, Ex. 57, Sidney Shindell, et al., *Report of Epidemiological Study of the Employees of FMC Corp. Plant, Pocatello Idaho, July 1949-December 1981* (1982) ("1982 Study"), which Dr. Mandel testified concluded that employment at the FMC Plant had no long-term latent effect on health, JM Test. at 1815:17-1816:4, showed that for non-white males cancer deaths were nearly double the U.S. non-white male population as a whole, 1982 Study at 17 tbl.IIIb. Dr. Mandel testified that the third study, Ex. 58, Sidney Shindell & Slack Ulrich, *Report of Epidemiological Study FMC Corp. Phosphorus*

Chemical Division, Pocatello Idaho, July 1949-March 1987 (1988) ("1988 Study"), showed that "[o]verall mortality was slightly, but not significantly lower than what was expected, based on the US population," JM Test. at 1821:14-18. But this study again showed that for non-white males, cancer deaths were considerably higher than the U.S. non-white male population as a whole. 1988 Study at 16 tbl.III. The fourth study, Ex. 59, Div. of Envtl. & Occupational Health, Sch. of Pub. Health, Univ. of Minn., *Nested Case-Control Studies of Respiratory Cancer and Non-Malignant Respiratory Disease of Employees at the FMC Plant in Pocatello Idaho* (1997) ("1997 Study"), sought to explain the conclusion of a 1995 study, which showed that "[c]ompared to males in the counties surrounding Pocatello, male employees of the plant experienced more deaths than expected due to respiratory cancer (33 observed, 17 expected) and non-malignant respiratory disease (41 observed, 26 expected)." *Id.* at 1. Dr. Mandel testified that the study showed that people who worked at FMC for five years or more did not show significant elevations for seven specific contaminants, and that elevated incidences of lung cancer or nonmalignant respiratory disease were not related to the duration of their employment, except for a dust finding in the nonmalignant respiratory disease category. JM Test. at 1833:23-1834:13. But the study actually concludes that "there are several possible interpretations of [its] findings," one of which was that there was no association between the contaminants assessed and cancer and nonmalignant respiratory disease. But three other explanations pointed in the opposite direction, one of which was that "the excesses in respiratory cancer and non-malignant respiratory disease deaths may be due to an unmeasured exposure at the plant." 1997 Study at 35. The last explanation is particularly significant as the study did not measure exposure to radioactive contaminants as a possible cause of cancer. *Id.* at 7 (listing the contaminants for which exposure was examined).

The fifth study, Ex. 60, Exponent & Univ. of Minn., *Mortality Study of Employees at FMC Plant in Pocatello Idaho* (2000) ("FMC Plant Mortality Study"), actually showed that "employees from the FMC Pocatello plant have increased risks for death due to cancer of the respiratory system, non-malignant respiratory disease, and malignant melanoma among men." *Id.* at 42. Dr. Mandel admitted "[w]hen you compare the rate of mortality in the plant workers to the U.S., the SMR is less than one, or 100, implying that there is less mortality overall than expected. But when you compare it to Idaho and surrounding counties, the all cause mortality is, actually, a little higher in the workers." JM Test. at 1836:20-25.[22] Dr. Mandel offered various explanations for this conclusion, including the religious preference he ascribed to many Idaho residents, who he said smoke and drink less alcohol than FMC plant workers, who he conjected were not from Idaho based on a conversation he had with a former FMC employee. *Id.* at 1837:4-11, 1837:20-1838:5. He also acknowledged that there was no smoking data in the report. *Id.* at 1842:25-1843:1. The conclusions of the FMC Plant Mortality Study may explain why Dr. Mandel offered these weak explanations. For nonwhite men the SMR for all cancers was 218.1, which is considerably higher than the all cancers SMR for white men, which was 120.7. FMC Plant Mortality Study at 18-19 tbl.10, 21-22 tbl.11. And for both groups, the SMR for cancer of the respiratory system was alarmingly high: 170.6 (white men) and 336 (nonwhite men). *Id.*

In sum, Dr. Mandel's testimony shows that non-white FMC Plant workers have had elevated cancer rates since 1949, and that the same has been true of all male workers since 1995.

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[22] SMR is an abbreviation for the term "standardized mortality rate," which compared the number of deaths observed during the follow-up period to the number of deaths expects, FMC Plant Mortality Study at 7. As used here, it establishes the ratio of the deaths in the cohort compared to deaths in the general population. If the ratio is less than 1.0, then the cohort has a lower death rate; if the ratio is greater than 1.0, the cohort has a higher death rate than the general population.

2. The 2006 Health Study relied on by FMC does not show that the waste on the FMC Property has not adversely impacted Tribal health.

Dr. Mandel opined that "[s]tudies of tribal members do not suggest harm related to potential exposures from the FMC site" based on the *Health Profile for Shoshone and Bannock Tribes at Fort Hall Idaho* by Oregon Health & Science University and the Northwest Portland Area Indian Health Board (rev'd Apr. 2006) (Ex. 61) ("2006 OHSU study"). JM Test. at 1846:16-1847:4. The 2006 OHSU study does not support even that limited opinion.

The purpose of the study was not to determine whether the FMC Site had adversely affected tribal members' health. Its purposes were instead to (a) characterize causes of tribal members' death using death certificates; (b) characterize types of cancer occurring among tribal members; and (c) characterize patient visits to the tribal clinic for respiratory and cardiac illnesses. 2006 OHSU at 5. In addressing causes of death, the report stated that "[m]ultiple factors contribute to mortality, including socioeconomic, cultural, lifestyle and environmental influences, *and causal inferences should not be made from these descriptive data.*" *Id.* at 6 (emphasis added). Second, in reporting on cancer cases involving tribal members, the report "does not attempt to correlate the occurrence of cancer with lifestyle or environmental factors, and is intended to provide a profile of cancer in the community. *Inferences as to the causes of specific cancers should not be made*." *Id.* at 19. And third, in reporting on clinic visit data, the report states that "[d]uring initial deliberations, multiple community members spoke of concerns about increased asthma, respiratory illnesses, and heart disease," which it said was "reasonably consistent with outcomes associated with exposure to ambient particulate matter in the epidemiological literature." *Id.* at 29. Data on patient visits showed that 16% of patients who had at least two visits to the clinic between 1992 and 2003 had one or more of the cardiorespiratory and cancer diagnoses of interest. *Id.* at 30. Asthma diagnoses had increased over time and peaked at approximately 5% of total visits in 2000-

01. *Id.* at 31. Congestive heart failure visits also increased during the period from 1992-2003. *Id.* Total visits for cancer diagnoses also "steadily increased from 1992 to 2003." *Id.* at 32. The report stated that "potential explanations for increases in clinic visits for cardiac and respiratory disease is worsening air quality" and also noted that observed decreases in chronic obstructive pulmonary disease, congestive heart failure and asthma coincided with the period when "FMC was reducing and ending production." *Id.* at 37. But it went on to say that "the analysis presented in this report is descriptive and causal inferences should not be made." *Id.* The report suggested that this issue be further examined in SEP 14. *Id.* In short, Dr. Mandel's reliance on this report is misplaced.

D. FMC's Assertion That The Testimony Of Two FMC Witnesses Shows Establishes The Adequacy Of The EPA Remedy Shows Just The Opposite.

As we have earlier shown the exercise of jurisdiction over the FMC Property by EPA does not deprive the Tribes of jurisdiction under the second *Montana* exception, and in any event, the remedial actions ordered by EPA are not adequate to protect tribal interests.[23] *See* Tribes' SMBr. at 31-34. Nevertheless, FMC asserts that the testimony of Barbara Ritchie shows that "FMC has

[23] This Court should not consider the new evidence that FMC presents in the Declaration of Maureen Mitchell of Jan 13. 2017, Dkt. No. 67-5, attached to its Due Process Motion, Dkt. No. 67, because that evidence was not before the Tribal Appellate Court. *Water Wheel*, 642 F.3d at 817 n.9 (district court reliance on declaration not presented to tribal court was reversible error). FMC did not, and could not have, put this information before the Tribal Appellate Court, as the events averred in the Declaration took place after the Tribal Court Judgment was entered. For that reason, too, they do not relate to the Tribes' jurisdiction in this case, which deals with FMC's obligation to pay the permit fee from 2002 to 2014. Ex. 62, J. & Order for Att'y Fees & Costs of May 16, 2014 at 1. The contents of the Declaration are therefore not only improperly before this Court, they are also immaterial to the jurisdictional issues here, and should not be considered. *See Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1087-88 (C.D. Cal. 2016). The Tribes therefore move to strike Dkt. No. 67-5 under Fed. R. Civ. P. 12(f). *See Shinde v. Nithyananda Found.*, No. EDCV 13-00363-JGB (SPx), 2014 WL 10988110, at *3-4 (C.D. Cal. Mar. 21, 2014) (striking declaration attached to opposition to motion to dismiss, for presenting evidence that the court could not properly consider at that stage).

worked closely with EPA for 20 years to effect continuous control of any risks at the [FMC] Site" and that the testimony of Marianne Horinko shows that "EPA has fulfilled its purpose of protecting human health and the environment in relation to the FMC Site." FMC SMBr. at 16-17. It does not.

Ms. Ritchie admitted that none of the remedies in the IRODA had been completed, that it would take two to three years for all of the remedies to be fully implemented, except for the groundwater remedy, which she estimated would take one to four years. BR. Test. at 1647:1-22. She also testified that the RCRA Consent Decree remains open. *Id.* at 1647:4-8. Thus, FMC and EPA have not "effect[ed] continuous control of any risks at the [FMC] site." FMC SMBr. at 16. Ms. Ritchie's testimony also shows that FMC disagrees with EPA on significant issues.[24] In FMC's opinion, groundwater extraction is not necessary, BR Test. at 1583:5-9, and while FMC was doing pilot work necessary to implement the remedy, *id.* at 1584:14-23, FMC might seek a "technical and practicability waiver" from the groundwater remedy after five years, *id.* at 1682:17-25. In her view, the groundwater contamination is Simplot's responsibility, not FMC's. *Id.* at 1683:1-5.

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[24] Ms. Ritchie's testified that she agreed with EPA on the trust responsibility, and read from "EPA's document summarizing that," as follows:

> While the U.S. government is a trust responsibility to Indian Tribes [sic], those responsibilities depend on the existence of underlying substantive law to create an enforceable right. An Indian tribe cannot force the government to take a specific action unless a specific treaty, statute, or regulation imposes that duty. EPA fulfills its trust responsibility by applying its environmental expertise consistent with relevant statute and regulations not specifically aimed at protecting Indian tribes. EPA is not required to do whatever a tribe asks or demands.

BR. Test. at 1570:21-1571:6 (quoting IRODA at 169). Ms. Ritchie was actually reading from FMC's comments to EPA on the IRODA. IRODA at 169. In any case, the Tribes do not agree that EPA has satisfied its trust responsibilities, for reasons earlier shown. Tribes SME Br. at 31-34; [SOF ¶¶75-80].

FMC also relies on the testimony of Marianne Horinko to contend that EPA has fulfilled its purpose of protecting human health and the environment at FMC Property. FMC SMBr. at 17. Ms. Horinko, a former EPA official, Ex. 63, Trial Tr., Vol. IX, Test. of Marianne Horinko ("MH Test.") at 1878:15-17; 1881:4-10, testified based only on her review of RCRA and CERCLA documents in the record, *id.* at 1889:5-1890:7. She admitted that exposures to contaminants from the FMC Property were ongoing at the time of her testimony, and that the interim remedy in the IRODA was necessary to cut off exposure routes and monitor, pump, and treat the shallow aquifer on the FMC Property. *Id.* 1940:5-17. She knew that the IRODA remedies were the process of being implemented, but did not know the status of their implementation. *Id.* at 1988:21-1989:14. And she agreed that it would easily be 100 years before the groundwater on the FMC site would be safe to drink. *Id.* at 1989:15-1990:2. Thus her testimony does not show that EPA is protecting human health on the FMC Property.

Ms. Horinko also disagreed with EPA on other significant issues. Indeed, she questioned whether EPA's 2006 and 2010 UAOs (concerning phosphine generation at the RCRA ponds) were actually necessary to protect human health, and stated that they may have been issued to get EPA's oversight costs paid by FMC. *Id.* at 1961:7-1962:12. And in her view, the detection of phosphine at the RCRA ponds showed that the pond capping remedy was working as designed. *Id.* at 1962:13-19. She also testified that FMC had achieved the remediation goals of the 2006 UAO by reducing phosphine emissions to a level ten percent below the explosive limit for phosphine for a one year period. *Id.* at 1967:1-20. But the explosive limit for phosphine is 20,000 ppm, Ex. 29, Unilateral Administrative Order for Remedial Action, *FMC Corp.*, CERCLA-10-2010-0170, at 9 ¶16, and reducing phosphine releases to only 18,000 ppm would leave extreme dangers in place. [SOF ¶¶64,69-70].

III. FMC'S MOTION ON THE SECOND *MONTANA* EXCEPTION SHOULD BE DENIED.

For the above reasons, the Tribal Appellate Court correctly held that the second *Montana* exception establishes tribal jurisdiction over FMC to impose the Tribes' annual permit fee for waste storage. Accordingly, this Court should deny FMC's Motion for Order to Deny the Tribes Jurisdiction over FMC Under the Second Exception to *Montana*, Dkt. No. 67 ¶2, and grant the Tribes' Motion for Recognition and Affirmance of Tribal Appellate Court Decision Upholding Tribal Jurisdiction under the Second *Montana* Exception, Dkt. No. 65.

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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