William F. Bacon, General Counsel, ISB No. 2766
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, Idaho 83203
Telephone: (208) 478-3822
Facsimile: (208) 237-9736
Email: bbacon@sbtribes.com

Paul C. Echo Hawk, ISB No. 5802
ECHO HAWK LAW OFFICE
P.O. Box 4166
Pocatello, Idaho 83205
Telephone: (208) 705-9503
Facsimile: (208) 904-3878
Email: paul@echohawklaw.com

Douglas B. L. Endreson, DCB No. 461999
Frank S. Holleman, DCB No. 1011376
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 682-0240
Facsimile: (202) 682-0249
Email: dendreson@sonosky.com
fholleman@sonosky.com

Attorneys for Shoshone-Bannock Tribes

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' REPLY TO DKT. NO. 74, MEMORANDUM OF FMC CORPORATION IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON DUE PROCESS AND ENFORCEMENT OF JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules and Constitutional Provisions

Secondary Sources

Online Sources

FMC's due process attack presumes that the Tribes' government cannot provide due process to nonmembers because to do so would be contrary to their members' interests. Memo. FMC Corp. Resp. Mot. Summ. J. Due Process & Enf't J. at 1, Dkt. No. 74 ("FMC DP-Rbr."). FMC's unsupported statement is not correct. The Tribes' Constitution (Ex. 32) protects the due process rights guaranteed to all persons under the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8), by "secur[ing] to ourselves and our posterity the power to exercise certain rights of self-government not inconsistent with Federal laws," Tribal Constitution pmbl., and by providing that the powers of the Business Council are "subject to any limitations imposed by the Statutes or the Constitution of the United States," *id.* art. VI, § 1. And tribal judges take an oath to "carry out faithfully and impartially the duties of my office to the best of my ability," and "protect the best interests of the Shoshone Bannock Tribes in accordance with the [Tribal] Constitution and Bylaws," Ex. 6, Law & Order Code, ch. I, § 3.3. The Tribal Constitution therefore commits the Tribes to provide due process to all persons. And the Tribes' courts provided due process to FMC.

I. FMC'S ARGUMENT THAT *DE NOVO* REVIEW MEANS THAT WHETHER DUE PROCESS WAS PROVIDED IS DETERMINED WITHOUT REFERENCE TO THE TRIBAL APPELLATE COURT'S OPINIONS IS MERITLESS.

FMC asserts that this Court must decide the due process question "without reference to the opinions of the court being reviewed" and without limitation to the tribal court record. FMC DP-Rbr. at 1-2. That assertion is defeated by this Court's ruling that FMC was required to assert its due process claims in tribal court, that FMC preserved only its claim that two Tribal Appellate Court were biased, and that FMC's due process challenge is limited to that contention, which it may advance based only on the "same material it presented to the Tribal Appellate Court, specifically the transcript of the [judges'] public comments." Mem. Decision & Order at 4-5,

Dkt. No. 43 ("Nov. 9, 2015 Order"). Tribes' Resp. Memo. FMC Corp. Supp. Mot. Deny Enf't Failure Due Process at 15-27, Dkt. No. 75, ("Tribes' DP-Rbr.") at 8-14, and *infra* at 15.[1]

This Court properly reviews FMC's due process claim de novo, Nov. 9, 2015 Order at 5, in accordance with the standards of review applicable to tribal court decisions under the tribal court exhaustion doctrine, *id.* at 2-4.[2] *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), provides that the circuit court reviews a district court's enforcement order de novo on questions of law, *id.* at 1140-41, based on the record developed in the tribal court, *see id.* at 1149-52 (using tribal court record to determine due process violation); *see also* Tribes' DP-Rbr. at 12-13 (collecting due process discovery cases).[3]

II. FMC'S ASSERTION THAT THE TRIBAL COURT SYSTEM IS INHERENTLY UNABLE TO PROVIDE DUE PROCESS TO NONMEMBERS HAS BEEN WAIVED, AND IS FIRMLY REJECTED BY FEDERAL LAW.

A. FMC's Structural Attack On The Tribal Courts Has Been Waived, And Is Contrary To Settled Federal Law.

FMC's claim that there are "inherent problems" in the nature of tribal court system that deny due process, FMC DP-Rbr. at 2-6, was not presented to the Tribal Appellate Court, and

---

[1] FMC again improperly relies on the Ninth Circuit Standards of Review, FMC DP-Rbr. at 1, which is not up-to-date and is not a legal authority, Tribes' DP-Rbr. at 3 n.4, and which expressly state that on appeal, questions of law are reviewed de novo, while questions of fact are reviewed for clear error, *Standards of Review – Definitions*, U.S. Cts. For the Ninth Cir., http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/I_Definitions.pdf at I-1 (May 2012). FMC cites irrelevant or incomplete passages of the standards to attempt to show otherwise. FMC DP-Rbr. at 2 (quoting Standards at III-11 (review of class action settlement notices), I-2).

[2] FMC does not contest that it has the burden of showing that the tribal proceedings violated due process, *Schweiker v. McClure*, 456 U.S. 188, 196 (1982); *Ohno v. Yasuma*, 723 F.3d 984, 991 (9th Cir. 2013), and that the Judgment should not receive comity under *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

[3] FMC asserts that there is no deference in de novo review, FMC DP-Rbr. at 2, but the Standards on which it relies refer to a circuit court's appellate review of a district court's findings of law, Standards at I-2 (citing *Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 970 (9th Cir. 2003)), not the standards applicable to review of tribal court decisions, *see Burrell v. Armijo*, 456 F.3d 1159, 1173 (10th Cir. 2006) ("federal courts are not the general appellate body for tribal courts").

FMC is therefore "precluded from raising . . . it in this Court." Nov. 9, 2015 Order at 4. Even if properly presented, this contention fails because the Supreme Court has squarely held that tribal courts "are available to vindicate rights created by the [Indian Civil Rights Act]," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), and for reasons already shown. Tribes' DP-Rbr. at 15-27. FMC points to differences between the tribal and federal systems that were acknowledged in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), in *Nevada v. Hicks*, 533 U.S. 353, 375-86 (2001) (Souter J., concurring), *United States v. Lara*, 541 U.S. 193, 211-14 (2004) (Kennedy, J. concurring), and *Duro v. Reina*, 495 U.S. 676 (1990), *see* FMC DP-Rbr. at 2-5. But those differences do not divest Indian tribes of civil jurisdiction under the *Montana* exceptions. *Plains Commerce*, 554 U.S. at 337 (citing, *inter alia*, *Hicks*, 533 U.S. at 383; *Lara*, 541 U.S. at 212). And *Lara* and *Duro* concern tribal criminal jurisdiction,[4] which is subject to limitations that do not apply to tribal civil jurisdiction.[5] Federal law thus rejects FMC's assertion that tribal courts are inherently unable to provide due process.[6]

FMC tries, but fails, to boost this argument with disprovable snippets about the Tribes. FMC DP-Rbr. at 5-6. The Tribal Constitution protects the rights of all persons in accordance with federal law, including the Indian Civil Rights Act. *See supra* at 1. FMC's objection that

---

[4] In *Lara*, the Court held that 25 U.S.C. § 1301(2) was a valid exercise of Congress's power to relax restrictions on tribal inherent sovereign authority and had lifted the restrictions on that authority that determined *Duro*, in which the Court had held that Indian tribes had been divested of the power to prosecute nonmember Indians by treaties and by Congress. 541 U.S. at 196.

[5] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985) (refusing to extend *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to tribal civil jurisdiction); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (reaffirming that the substantial limitations on tribal criminal jurisdiction do not apply to tribal civil jurisdiction); *Duro*, 495 U.S. at 687 ("our decisions recognize" the power to "resolve civil disputes involving nonmembers."); *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997) ("tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings.").

[6] FMC also relies on *Stern v. Marshall*, 564 U.S. 462 (2011), FMC DP-Rbr. at 4, concerning the judicial authority of the bankruptcy courts, *id.* at 482, which is not involved here.

the Tribal Constitution does not formally separate the branches of government, FMC DP-Rbr. at 5-6, does not deny due process, Tribes' DP-Rbr. at 15-16, 19-21. Furthermore, tribal proceedings must conform to "the basic tenets of due process" for a tribal court judgment to be recognized and enforced. *Wilson*, 127 F.3d at 811. FMC complains that tribal law rulings are not subject to federal court review, but that is a federal law limitation. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (review of tribal court decision is limited to questions of federal law relevant to the tribal court's jurisdictional ruling). FMC also complains of tribal sovereign immunity, FMC DP-Rbr. at 5, which is not at issue here, and again quotes from a tribal court judge's letter to the tribal newspaper, *id.*, which is irrelevant, Tribes' DP-Rbr. at 26-27. And FMC's argument that tribal law is unknowable has been waived and is wrong, *id.* at 15 n.12; *infra* at 6-7 & n.11.

B. *Bird* And *Burrell* Are Inapposite Here Because FMC Had Every Opportunity To Present Its Due Process Claims In Tribal Court.

FMC's recycled claim that "the Tribes ignore key cases" on when tribal courts satisfy due process requirements fails because these decisions are based on extreme facts not present here. In *Bird* the Ninth Court applied the plain error standard in an "extraordinary case" where an attorney made racially inflammatory statements in a closing argument to which no objection had been made. Tribes' DP-Rbr. at 12 (citing *Bird*, 255 F.3d at 1148; *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002)). No such extraordinary circumstances exist here. And in *Burrell*, the court rested its decision on the extremely limited tribal court proceedings, the summary nature of the tribal court's decision, which contained no legal reasoning or reference to the prior proceedings, and the apparent lack of any appellate court, all of which overcame the "great deference to tribal court systems, their practices, and procedures." 456 F.3d at 1173. By contrast, FMC participated in numerous hearings and rounds of briefing and had every

opportunity to assert challenges to the conduct of the tribal proceedings, the tribal courts issued rulings relying on a substantive record, and FMC appealed those rulings through the tribal administrative and judicial process. *See* Tribes' DP-RBr. at 11-12.

Relying on its incomplete analysis of these inapposite cases, FMC asserts that the Tribes' government is structurally deficient,[7] the tribal judges were biased against it, that the *Montana* exceptions should only apply on fee-owned lands, that FMC's consensual relationships with the Tribes do not trigger tribal jurisdiction, and that it should not have to pay the Tribes' annual waste storage permit fee.[8] FMC DP-Rbr. at 6-7. The Tribes have already rebutted these allegations by showing that: *Montana* applies to on-Reservation fee land, Tribes' FM-Rbr. at 8-17, Dkt. No. 76; the Business Council does not have an interest in the Judgment, Tribes' DP-Rbr. at 20; the Business Council does not control the tribal courts, *id.* at 20-23 & nn.16-18; Judges Gabourie and Pearson's statements at the legal education seminar were proper, *id.* at 4-7; Tribes' DPBr. at 18-30, Dkt. No. 66-1; FMC is a repeat negotiator with the Tribes who has done business there for years and willingly submitted to tribal jurisdiction, Tribes' FM-Rbr. at 22-25, 29 n.15; and the 1998 Agreement is not perpetual, *id.* at 25-26.

III. FMC'S CLAIMS THAT THE TRIBAL COURT DENIED IT DUE PROCESS ARE LEGALLY UNAVAILABLE AND FACTUALLY INCORRECT.

While FMC contends that it was denied due process in the tribal proceedings in specific instances, these claims were all waived by FMC's failure to present them to the Tribal Appellate Court, with the exception of its claim that two judges on the first panel of the Tribal Appellate Court were biased. Nov. 9, 2015 Order at 4-5. None of these claims has merit.

---

[7] FMC waived this allegation, raised in its first point on *Bird*, FMC DP-Rbr. at 6, by not raising it to the Tribal Appellate Court, *see* Nov. 9, 2015 Order; Tribes' DP-Rbr. at 8-14.

[8] The final three allegations, raised in FMC's second and fourth points on *Bird*, FMC DP-Rbr. at 6, and its points on *Burrell*, *id.* at 7, go to the merits of the first *Montana* exception and are not properly raised here.

A. FMC's Was Not Improperly Denied Discovery By This Court Or By The Tribal Appellate Court, Nor Was Tribal Law Unavailable To It.

FMC urges that the denial of discovery pursuant to the Nov. 9, 2015 Order, prevented it from knowing how tribal court judges were assigned to this case. FMC DP-Rbr. at 7.[9] But the Tribal Constitution and tribal law set forth the structure of the tribal courts, the process by which tribal judges are appointed and can be removed from office, Tribes' DP-Rbr. at 15-17, 20-21, and the rules of procedure, Law & Order Code, chs. I, III-IV.[10] If FMC had nonetheless wanted discovery on that issue, it had the opportunity to conduct it in the tribal court. Nov. 9, 2015 Order at 6; Ex. 22, Stipulation to Continue Trial Date, Enlarge Trial Time, & Extend Pretrial Deadlines at 1-2 (Oct. 17, 2013) (closing discovery on February 17, 2014); Ex. 23, Order of Oct. 28, 2013 (approving stipulation). It did not, and it is too late to do so now.

As earlier shown, FMC's claim that tribal laws are unknowable, FMC DP-Rbr. at 7-8, is both factually unsupported[11] and wrong. Tribes' DP-Rbr. at 15 n.12. Tribal law is not "hidden" from anyone, least of all FMC, which cited to tribal laws throughout this litigation. *See, e.g.*, Ex. 48, Mot. to Consol. at 1-2 (filed Apr. 2, 2007); Ex. 49, FMC Corp.'s Mot. to Dismiss Am. Countercl. & Supp'g Memo. at 1 (filed Oct. 16, 2006); Ex. 50, FMC Corp.'s Renewed Mot. for Stay & Supp'g Br. at 4 (filed Dec. 4, 2006); Ex. 51, FMC Corp.'s Opening Br. at 2-3 (filed Feb. 22, 2008). The Law & Order Code is also publicly available from the Tribes upon request, and on the National Indian Law Library's website. *See* Nat'l Indian Law Lib., *Law & Order Code of the Shoshone-Bannock Tribes*, Native Am. Rights Fund,

---

[9] This Court's Nov. 9, 2015 Order on discovery is correct, and FMC has waived its untimely argument to the contrary, as discussed *infra* at 15.

[10] Tribal law does not require the Tribes to explain the reasons its hires particular judges, Tribes' DP-Rbr. at 26 n.21, and FMC has not shown why that violates its due process rights.

[11] FMC fails to substantiate this claim, other than to cite to a misattributed concurrence that does not apply to the Tribes or their courts. *See Hicks*, 533 U.S. at 384-85 (Souter, J. concurring).

http://www.narf.org/nill/codes/shobancode/index.html (last accessed Mar. 14, 2017). Finally, FMC has also participated in the making of Tribal law. *See* Ex. 52, FMC Corp.'s Comments on the LUPC's Proposed Amendments to the Shoshone-Bannock Tribe [sic] Fort Hall Reservation Land Use Operative Guidelines.

B. FMC's Objection To The Tribal Appellate Court Conducting The Hearing On The Second *Montana* Exception Was Waived Long Ago.

FMC now objects to the Tribal Appellate Court's decision to revoke its remand to the Trial Court, and to hear the second *Montana* exception issue itself.[12] It is too late to do so. The Tribal Appellate Court expressly provided FMC an opportunity to object to that very ruling. Ex. 17, Corrected Minute Entry & Order, *Nunc Pro Tunc* of Feb. 1, 2013 at 2 (inviting pre-trial motions on the court's authority to revoke a remand to the trial court). FMC filed no such motion. Nor did FMC object when the new panel of the Tribal Appellate Court issued an order informing the parties that on May 10, 2013 it would hold a status conference on the issues the prior panel had determined would be the subject of further proceedings. Ex. 18, Order of Apr. 22, 2013 at 1. In response, FMC filed two briefs. Ex. 19, FMC Corp.'s Pre-Hr'g Br. Re: Case Management (filed May 6, 2013); Ex. 20, FMC's Corp.'s Pre-Hr'g Br. Regarding Lack of Approval of Hazardous Waste Management Act (filed May 6, 2013). But it did not object, in either brief, to the Tribal Appellate Court's revocation of its remand. Following the May 10,

[12] The Tribal Appellate Court initially remanded the second *Montana* exception issue, Ex. 4, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012 at 62-63, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp.*, Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2012 TCA Op."), but later decided that in the interest of time, it would conduct those proceedings, *see* Ex. 10, Findings of Fact, Conclusions of Law, Op. & Order re Att'y Fees & Costs of Jan. 14, 2013 at 1-2 ("Order of Jan. 14, 2013") (revoking remand); *id.* at 13 (holding that the Law & Order Code authorizes such action); Ex. 11, Am. Findings of Fact, Conclusions of Law, Op. & Order re Att'y Fees & Costs, *Nunc Pro Tunc* of Feb. 5, 2013 at 1-2 ("Order of Feb. 5, 2013") (revoking remand), 13 (holding that the Law & Order Code authorizes such action).

2013 hearing, the new panel of the Tribal Appellate Court "grant[ed] an evidentiary hearing" on the application of the second *Montana* exception to the case, and set forth a schedule for those proceedings. Ex. 3, Order of May 28, 2013 at 3. FMC never objected to that order, either. It is now too late to do so.[13]

Finally, there was nothing irregular about Judge Maguire's absence from further proceedings after the Trial Court issued the Order of May 21, 2008, as the case was then appealed to the Tribal Appellate Court, [SOF ¶¶9, 11], and Judge Maguire had no further role in the proceedings. If FMC had wanted to preserve the remand to Judge Maguire, it would have objected when it had the opportunity to do so.

C. FMC's Objections To Various Rulings Made During The Course Of The Tribal Proceedings Have No Merit.

FMC's objections to various rulings made during the course of the tribal proceedings have all been waived, and none have merit. FMC asserts that the only evidence submitted to the LUPC before it made its decision was the evidence FMC had submitted. FMC DP-Rbr. 9-10. Not so. The LUPC had before the record of the earlier proceedings involving FMC that resulted in the 1998 Agreement, [*see* SOF ¶¶29-33, 37-38]; the special use permit and building permit applications FMC filed in 2006, [*see* SOF ¶5]; the materials FMC submitted on the day of the hearing on its applications, *see* Ex. 53, Letter from Rob J. Hartman, Vice President, FMC to LUPC (Apr. 18, 2006); and "copies of pleadings and exhibits filed in [*United States v. FMC*

[13] FMC also could have filed for a new trial for violation of procedural due process after the Judgment was entered. *See* Law & Order Code, ch. III, § 3.59(a)(1). The availability of that option, by which FMC could have asked for a new trial in the lower court, constituted "access to appeal or review" under *Wilson*. 127 F.3d at 811; *see Mullally v. Gordon*, No. 13-55152, 2016 WL 7336618, at *2 (9th Cir. Dec. 19, 2016) (under *Wilson*, appellate review not required if litigant sought review of claims before multiple tribal bodies). In any case an appellate court can properly engage in fact-finding, *Gulf Power Co. v. United States*, 187 F.3d 1324, 1334-35 (11th Cir. 1999) (citing 28 U.S.C. § 1651); Fed. R. App. P. 48 (allowing appointment of special masters to engage in fact finding), and FMC has not shown that to do so violates due process.

Corp., No. 4:98-cv-00406-BLW (D. Idaho)]," and "a list of all documents that have been filed with the Court to date." Ex. 54, Letter from Susan Hanson to LUPC (Apr. 21, 2006) ("Hanson Submission") (referring to attached compact disc).[14]

FMC also objects to two evidentiary rulings. FMC DP-Rbr. at 10-12. In its appeal from the LUPC's decisions, two affidavits it submitted to the Business Council were rejected as untimely. Ex. 38, FHBC Decision, *In re FMC's Appeals of the Apr. 25th, 2006 Land Use Permit Decisions* ¶2 (FHBC July 24, 2006); Ex. 40, FHBC Decision, *In re LUPC Decision Dated Feb. 8, 2007* at 1 (FHBC June 14, 2007). That ruling was correct, and FMC cannot object to it now because FMC did not appeal that ruling to the Tribal Appellate Court. *See* Ex. 56, FMC Corp.'s Notice of Cross Appeal (filed June 10, 2008) (stating the issues that FMC appealed). FMC also objects to the Tribal Appellate Court's ruling rejecting submission of the 2008 Superintendent's Letter as untimely. FMC DP-Rbr. at 11-12. But the Tribal Appellate Court's 2012 TCA Op. and May 28, 2013 Opinion considered a 2004 letter from the Superintendent, expressing the same view as the 2008 Letter, *see* Tribes' DP-Rbr. at 24-25, and found it was not controlling under IBIA precedent, *see* 2012 TCA Op. at 31-32; May 28, 2013 Order at 2-3. FMC has not explained how the 2008 Letter could have changed this outcome, nor could it have. Furthermore, the May 28, 2013 Order correctly held that FMC's submission of the Superintendent's 2008 letter was untimely, as earlier shown. Tribes' DP-Rbr. at 25 n.19.[15]

---

[14] FMC suggests that the Hanson Submission was not timely, FMC DP-Rbr. at 10 n.3; [FMC-SOF ¶63], but FMC waived its challenge to the LUPC's consideration of the Hanson Submission at the first *Montana* exception hearing, where FMC's counsel said that the documents were part of the record on appeal and that FMC was waiving any objections, Ex. 55, Hearing on Oral Args. at 162:6-17, 164:3-13, 166:1-12 (Nov. 4, 2010). FMC's counsel also explained that LUPC considered these documents after extending the public comment period, which decision FMC did not challenge on appeal. *Id.* at 165:7-24. And in any event, these federal court filings were judicially noticeable.

[15] The Tribal Appellate Court also rejected the letter because FMC failed to include the attachments to the letter. May 28, 2013 Order at 2.

FMC also objects to the Tribal Appellate Court's consideration of whether the Tribes have jurisdiction over FMC under the second *Montana* exception. FMC DP-Rbr. at 12-14. But that issue was squarely presented in the Tribes' notice of appeal from the Trial Court's decision, the court's decision on the first *Montana* exception did not make it unnecessary to consider it, Tribes' DPBr. at 14 n.7; Tribes' DP-Rbr. at 25-26, and as FMC failed to object to the Tribal Appellate Court's conduct of that hearing, it is too late to do so now. *See supra* at 7-8.

D. FMC's Objections To The Seminar Presentations Of Judges Gabourie And Pearson Have No Merit.

FMC asserts that the reason the second *Montana* exception hearing was held "is answered . . . explicitly in the presentation made by" Judges Gabourie and Pearson at the University of Idaho Law School on March 23, 2012. FMC DP-Rbr. at 14. But the Judges' presentation on the role of tribal appellate courts and tribal court practitioners under the tribal court exhaustion doctrine, which did not mention FMC or this case, was entirely proper. Tribes' DPBr. at 15-30; Tribes' DP-Rbr. at 4-7. And in any event, the decision on whether to grant a hearing on the second *Montana* exception was correctly made and not objected to by FMC (as just shown), and was reconsidered and reaffirmed by a new panel of the Tribal Appellate Court on which neither Judge Gabourie nor Judge Pearson sat, Order of May 28, 2013 at 4, and the new panel decided the second *Montana* exception issue, which eliminated any basis for FMC's bias attack on Judges Gabourie and Pearson, Tribes' DPBr. at 10-15.

FMC's attack on the Judges' Gabourie and Pearson presentation is fully addressed in our earlier briefing. Tribes' DPBr. at 15-30. We address here only two points. First, contrary to FMC's assertion, FMC DP-Rbr. at 16, the Transcript shows that the Judges saw the potential repercussions of "bad law" stemming from their decisions as motivation to create good tribal court records and well-reasoned legal decisions, not pieces of judicial advocacy. The moderator

said the possibility that a bad decision might "lead to bad law for all tribes in the nation" was motivation to "explain[] tribal law . . . and at the appellate court level, mak[e] sure the record is very clear to actually have an educational part to it, so that when it goes up to the federal court judges . . . they understand the basis of those decisions," Ex. 21, Mitchell Decl., Ex. B, Verbatim Tr. from Video Recording at 29, which Judge Pearson described as a "heavy responsibility . . . ." *Id.* at 29-30.[16] Judge Pearson later explained a judge should come to the correct decision, even if it could be controversial among members of the tribe the judge serves, in part because of the possibility of federal review. *Id.* at 35-36.

Second, FMC asserts that in the Order of Jan. 14, 2013, the Tribal Appellate Court made statements that "mirror" Judge Gabourie's and Pearson's earlier legal education presentation, even though there was then no factual record before the court concerning the environmental impacts of FMC's storage of waste on the FMC Property. FMC DP-Rbr. 17-18.[17] That argument fails because the Judges' law school presentation referred to mining operations that go out of business without addressing the environmental impacts of their mining operations; by contrast, the statement from the Order of Jan. 14, 2013 to which FMC refers was made by the court in addressing the applicability of exceptions to the American Rule on attorneys fees, *id.* at 18, in a case in which FMC has not gone out of business and is seeking to continue to store waste

[16] As recent litigation over the *Montana* exceptions shows, tribal court cases of extremely narrow, local concern such as tort suits arising from the sexual assault of a minor can become Supreme Court cases with national implications when non-Indian litigants challenge tribal court jurisdiction in federal court. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014), *aff'd without opinion sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam). It is sensible for a tribal court to anticipate that possibility when compiling a record and writing an opinion, even on issues that seem mundane or legally unexceptional, and "protect" its ruling and the tribe from later adversarial attack.

[17] FMC's claim that Judges Gabourie and Pearson made comments in their presentation concerning mining companies that actually referred to FMC and this case has no merit for reasons earlier set forth, Tribes' DPBr. at 25-30.

on the Reservation. And contrary to FMC's assertion, the record before the Tribal Appellate Court at that time included facts concerning the environmental impacts of FMC's activities on the FMC Property, Hanson Submission (submitting the record in *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho), through April 13, 2006). And indeed, before the Order of Jan. 14, 2013 was issued, the court had made findings concerning the RCRA litigation and the RCRA Consent Decree. 2012 TCA Op. at 4, 7-8, 15.[18]

E. The Tribal Appellate Court Did Not Apply State Law Inconsistently.

FMC also asserts that the Tribal Appellate Court applied state law inconsistently, by failing to apply it to the consensual relationship analysis in the 2012 TCA Op., while relying on state law in the Feb, 5, 2013 Order. FMC DP-Rbr. 18-19. These rulings concerned different issues. In the 2012 TCA Op., the court correctly applied federal law to determine the existence of a consensual relationship; in the Feb. 5, 2013 Order, the court considered state law by applying diversity principles of federal law in discussing only whether the Tribes could recover attorney's fees under the statutory exception to the American Rule, which it ultimately did not decide, *id.* at 8-10. And finally, the court's statement in the Feb. 5, 2013 Order that "Tribal Law and Custom do not apply

[18] FMC falsely implies this case is about making a "fair determination" of potential remedies for the FMC Property, *see* FMC DP-Rbr. at 18 n.5, but it is really about whether FMC must pay a tribal permit fee to store waste on the Reservation. To make that determination, the Jan. 14, 2013 Order stated that the "Tribes still have to present evidence to this Court on the second *Montana* exception" at a future hearing, *id.* at 11, which was held in April 2014. The first panel recognized the tribal burden to prove jurisdiction under *Montana*, rather than assuming any remedy was "superior to FMC's position." *Cf.* FMC DP-Rbr. at 18 n.5. And the 2014 TCA Op. did not weigh a proposed tribal remedy against EPA's interim CERCLA remedy. *Id.* The court determined whether EPA's involvement proved that FMC's waste does not pose a threat to the Tribes, *see* Ex. 1, Op., Order, Findings of Fact & Conclusions of Law of May 16, 2014 at 9-11 ("2014 TCA Op."), and its decision was based on the actual threats from FMC's waste, *id.* at 14-15, not on the viability of alternate remedies. As this case is about whether FMC must pay a tribal permit fee, the Tribes correctly sought payment of that fee "from the beginning." *Cf.* FMC DP-Rbr. at 18 n.5.

in this case," *id.* at 13, clearly referred only to the attorneys fees issue, as the court had already applied tribal law to decide the first *Montana* exception issue, 2012 TCA Op. at 11-12.

F. FMC's Assertion That The New Panel Of The Tribal Appellate Court That Decided The Second *Montana* Exception Issue Was Biased Has No Merit.

The Tribal Appellate Court did not prejudge the second *Montana* exception, nor was the panel that decided that issue biased, nor did it ignore the applicable legal standards, as FMC asserts. FMC DP-Rbr. at 19-20. FMC waived any such claim by failing to advance it, and any such claim would be meritless in any event. The Statement of Decision of Apr. 15, 2014 (Ex. 2) ("2014 TCA Dec.") and 2014 TCA Op. show consideration of the relevant law and the trial presentations, 2014 TCA Dec. at 4-6, 16-17, 32; 2014 TCA Op. at 4-11, including the evidence and witness testimony, 2014 TCA Dec. at 7-15, 18-31; 2014 TCA Op. at 5-11, 14-15. The court's effort to "organize the issues and the evidence" throughout the trial, 2014 TCA Dec. at 1, in preparation for deliberations, *see id.* at 21-22, and to finalize the opinion as quickly as possible after deliberations, *id.* at 2, does not indicate prejudgment. The court's statements at the hearing that it would have "decided this case and completed it" after the Statement of Decision was read from the bench is a truism justifying the court's uncontested ruling that post-trial motions on a confidential evidentiary issue would be untimely. *See* Tr. Trans., Vol. IX at 2007:18-25.

FMC also asserts that the cases on bias from Article III courts are not applicable here because tribal court judges do not have Article III protections. FMC DP-Rbr. at 21. But that furnishes no basis for distinguishing these cases, which are entirely appropriate for this Court to consider under the standards of comity set forth in *Wilson* for the same reasons that a federal court may properly look to the Indian Civil Rights Act and the due process cases involving foreign tribunals for analogical support. *Bird*, 255 F.3d at 1142, 1143 n.12.

Furthermore, FMC's judicial bias cases (which are also from Article III courts) actually confirm that FMC has failed to show the second panel was biased against it or prejudged the issues. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court considered due process in "the context of judicial elections," *id.* at 881-82, and in that "extraordinary" case determined judicial recusal was required, where an executive whose company was appealing a state court judgment spent $3 million to elect a candidate to the state supreme court, *id.* at 884. *Caperton* involved "extreme circumstances," *Bradbury v. Eismann*, No. CV-09-352-S-BLW, 2009 WL 3443676, at *4 (D. Idaho Oct. 20, 2009) (citing *Caperton*, 566 U.S. at 887), where a judge may have felt indebted to a party for his "extraordinary efforts" to get the judge elected, *Caperton*, 556 U.S. at 882. The appointment of judges pursuant to tribal law[19] is not comparable to *Caperton* especially where the judges had no financial stake in the Judgment and were not subject to elections. *See Lujan v. City of Santa Fe*, 122 F. Supp. 3d 1215, 1247 (D.N.M. 2015).

FMC's prejudgment cases, FMC DP-Rbr. at 22-23, do not help it either, as these cases show the presumption of integrity in adjudicators is only overcome by extreme facts. In *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the adjudicator had engaged in a consistent pattern of prejudgment, *id.* at 591, said in a speech that newspapers violate business ethics by "carrying ads" offering "becoming an airline's hostess by attending a charm school," at the same time that a case before him alleged that a finishing school had deceptively advertised "courses of instruction which qualify students to become airline stewardesses," *id.* at 584 n.1, 589-90. That "directly track[ed] the allegations of the case." *Cf.* FMC DP-Rbr. at 22. And in *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995), the plaintiff overcame the "presumption of integrity" in a licensing board, *id.* at 742, with evidence that: the

[19] FMC's statement that the Business Council sets the length of judges' terms is facially wrong, as judicial terms are set by statute. Tribes' DP-Rbr. at 16-17.

plaintiff sought to compete with the board chairman's business, *id.* at 743; the chairman joked insultingly about a serious attempt on the plaintiff's life, *id.* at 744; and the board acted in "very unusual," "very negative," and "biased" ways towards the plaintiff, including "continually challeng[ing] his integrity," rejecting its counsel's recommendation for approval of the plaintiff's license, *id.* at 745, and making deceptive statements to his clients, *id.* at 746. FMC has raised no such unusual evidence here. The first panel's comments at the educational seminar indicated the importance of fairly adjudicating cases and compiling a court record, Tribes' DPBr. at 15-20, 23-25, and were otherwise well within the bounds of acceptable judicial commentary, *id.* at 20-23.[20]

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

FMC's argument that this Court's Nov. 9, 2015 Order was incorrectly decided, FMC DP-Rbr. at 7, 24-26, is barred because it is not made as part of a timely motion for reconsideration. Tribes' DP-Rbr. at 8 (citing *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1066 (D. Idaho 2005) (motions for reconsideration must be made within ten days of the challenged order)).[21] And the Tribes have already shown that FMC is wrong. Tribes' DP-Rbr. at 9-13.

[20] FMC misreads *Office of Thrift Supervision v. Keating*, 45 F.3d 322, 328 (9th Cir. 1995), *see* FMC DP-Rbr. at 23. *Keating* upheld the final order at issue. 45 F.3d at 328. As the Tribes have already shown, Tribes' DPBr. at 14-15, this was because the court reasoned that an adjudicator's potentially biased statements do not pose a due process problem when the adjudicator was replaced by another adjudicator who actually issued the final, binding opinion, 45 F.3d at 327.

[21] It would be rejected even if timely because FMC already unsuccessfully made this argument to the Court in its briefs on discovery, *see* FMC Corp.'s Br. Re. Disc. on Claims at 10-13, Dkt. No. 36; FMC Corp.'s Resp. Br. Re. Disc. on Claims at 2-4, Dkt. No. 37, and has not stated "facts or law of a strongly compelling or convincing nature" sufficient to meet one of the three bases for reconsideration, *see* Tribes' DP-Rbr. at 8-9.

V. THE DISCRETIONARY FACTORS IN *WILSON V. MARCHINGTON* ARE SATISFIED IN THIS CASE.

FMC's argument that two of the *Wilson* discretionary factors bar enforcement of the Judgment was comprehensively rebutted in the Tribes' DP-Rbr. at 27-28.[22] FMC claims that the Tribes' initial brief on the second *Montana* exception shows that "the Tribes seek to supersede the EPA regarding the safest remediation of the FMC site," contrary to public policy. FMC DP-Rbr. at 26 (quoting Tribes' SMBr. at 18, 31-34, Dkt. No. 65-1). It does not. The Tribes' statements show that EPA's exercise of jurisdiction does not affect the Tribes' authority under the *Montana* exceptions because Indian tribes and the EPA can simultaneously exercise sovereign authority, Tribes' SMBr. at 11-12, 31, and because EPA's remediation effort has not been implemented and leaves the threat to the Tribes in place, *id.* at 31-34. The Tribes have not asserted authority over EPA, or the implementation of federal laws.[23] Nor does the Judgment affect FMC's ability to implement EPA's remedy. *See* FMC SM-Rbr. at 7-8 (the Judgment "does nothing other than order the payment of money").

VI. THE PENAL JUDGMENT RULE DOES NOT APPLY.

The penal judgment rule does not bar the enforcement of the judgment for two reasons. First, the penal judgment rule is not part of the comity analysis under *Wilson*. Tribes' DPBr. at 31-32.[24] Under the "threshold inquiry" of tribal jurisdiction under *Montana*, which is part of the

---

[22] The Judgment does not conflict with any "final judgment" issued by EPA. *Id.* at 27-28 & n.22. The Judgment also does not conflict with EPA's decisions or the RCRA Consent Decree because, as FMC admits, FMC SM-Rbr. at 7-8, Dkt. No. 73, the Judgment requires only the payment of a fee. Enforcing the Judgment is consistent with public policy, because it would not interfere with federal laws and would fund programs to protect tribal members and resources. Tribes' DP-Rbr. at 28.

[23] Nor do the Tribes here challenge the Court's entry of the Consent Decree, *see* FMC DP-Rbr. at 26-27, because that issue has already been litigated through the federal courts.

[24] *Wilson*'s statement that § 482 of the Third Restatement of Foreign Relations Law (1987) could not be adopted wholesale in light of Indian law's "special considerations," 127 F.3d at 810, rejects

comity analysis, *Wilson* at 127 F.3d at 811 (citing *Strate*, 520 U.S. at 448-49; *Montana v. United States*, 450 U.S. 544, 565-66 (1981)), tribes only have civil jurisdiction over non-Indians; tribal criminal jurisdiction over non-Indians is controlled by *Oliphant*, 435 U.S. 191. Tribes' DPBr. at 31-32. That makes application of the penal judgment rule unnecessary, as that rule only deals with cases where criminal penalties are imposed, which *Montana* does not permit. *Id.* at 31-32; *infra* at 17-18. FMC states that the penal judgment rule "supports" *Montana*, essentially admitting that the penal judgment rule is unnecessary. FMC DP-Rbr. at 28-29 & n.8.[25]

Second, the penal judgment rule only bars the enforcement of criminal judgments. Tribes' DPBr. at 32; *Pasquantino v. United States*, 544 U.S. 349, 361 (2005).[26] A judgment is criminal, and thus penal, *see Pasquantino*, 544 U.S. at 361, when it has the traditional characteristics of a criminal judgment, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *see Oklahoma ex rel. West v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 294, 300 (1911),[27] and the Tribes have shown – and FMC does not contest – the Judgment had none of

---

FMC's contention that *Wilson* implicitly imposed other sections of the Restatement, *see* FMC DP-Rbr. at 27-28.

[25] The Tribes have already shown that FMC's arguments that the Supreme Court has applied the comity analysis, FMC DP-Rbr. at 28, and that the penal judgment rule is part of state law and the full faith and credit analysis, *id.* at 28, 30-31, are irrelevant, Tribes' DP-Rbr. at 29-30 nn.23-24, 31 n.27.

[26] A judgment is criminal when "[i]n whatever form the state pursues her right to *punish the offense against her sovereignty*, every step of the proceeding tends to one end, −the compelling the offender to pay a pecuniary fine *by way of punishment for the offense*." *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 299 (1888) (emphasis added). This contextualizes the Court's references to penalties and recovery by the State. *Id.* at 290, 299 (quoted in FMC DP-Rbr. at 32); *see United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954) ("'penalty,' strictly and primarily denotes punishment, imposed and enforced by the state, for an offence against its laws"). This rejects FMC's contentions that the Judgment is penal because just it accrues to the Tribes, is authorized by tribal laws, and did not award damages to an individual. FMC DP-Rbr. at 29, 31-33.

[27] FMC claims that any judgment to collect a "fine or penalty" is a penal judgment. FMC DP-Rbr. at 30-31. The cases it cites all involved punishments for a violation of law. *Pelican Ins.*, 127 U.S. at 299; *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219-20 (9th Cir. 2006) (en banc) (per curiam); *City of Oakland v. Desert Outdoor Advert., Inc.*, 267 P.3d 48, 49-50 (Nev. 2011) (en banc); *Schaefer v. H.B. Green Transp. Line Inc.*, 232 F.2d 415, 416-17, 418 (7th

those characteristics, Tribes' DPBr. at 32-34; Tribes' DP-Rbr. at 31-32. Accordingly, FMC's arguments that the Judgment is penal because it is a "flat amount paid for violating a law" and "is based on an offense against the public" are wrong. FMC DP-Rbr. at 33.

VII. ARTICLE III OF THE U.S. CONSTITUTION DOES NOT APPLY.

The Tribes have already shown that Article III does not bar enforcement of the tribal judgment. FMC DP-Rbr. at 33-35. FMC's new case on the philosophy and history of Article III does not show otherwise, as it addresses the separation of powers in the federal government, not comity. *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1276-77 (10th Cir. 2015).[28]

For the foregoing reasons, the Court should grant the Tribes' Motion, Dkt. No. 66.

DATED this 20th day of March, 2017

SHOSHONE-BANNOCK TRIBES

/s/ William F. Bacon
William F. Bacon, General Counsel

ECHO HAWK LAW OFFICE

Paul C. Echo Hawk
Paul C. Echo Hawk

SONOSKY CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

Douglas B. L. Endreson
Douglas B. L. Endreson
Frank S. Holleman

Attorneys for Shoshone-Bannock Tribes

Cir. 1956). The Judgment is not a punishment for a violation of law and so is not a penalty. *See Witherspoon*, 211 F.2d at 861.

[28] FMC uses this argument to again allege that the tribal judges were biased and the tribal court violated due process. FMC DP-Rbr. at 35. The Tribes have already rebutted those allegations, *see supra* at 10-12; and shown the allegations against the structure of the tribal government were waived, and are wrong, *supra* at 2-4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March 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:

David M. Heinick
davidh@summitlaw.com

Lee Radford
klr@moffatt.com

Ralph H. Palumbo
ralphp@summitlaw.com

Maureen Louise Mitchell
maureenm@summitlaw.com

DATED: March 20, 2017

/s/ Frank S. Holleman