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. 72, FMC CORPORATION'S RESPONSE TO TRIBES' MEMORANDUM IN SUPPORT OF TRIBAL JURISDICTION OVER FMC UNDER THE FIRST EXCEPTION TO *MONTANA***

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The Shoshone-Bannock Tribes reply to the Memorandum of FMC Corp. in Response to the Memorandum in Support of Tribal Jurisdiction over FMC Under the First Exception to *Montana*, Dkt. No. 72 ("FMC FM-Rbr."), by showing that the Tribes' Motion, Dkt. No. 64, supported by their opening Memorandum, Dkt. No. 64-1 ("Tribes' FMBr."), should be granted.

I. JURISDICTION, BURDEN OF PROOF, AND STANDARD OF REVIEW.

FMC does not contest the Tribes' statements on jurisdiction, burden of proof, or standard of review. Tribes' FMBr. at 2-4. As the Tribes have explained, *id.*, this court reviews the tribal court's legal ruling de novo, and defers to its findings of fact under "a deferential, clearly erroneous standard of review," *id.* at 3 (quoting *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)).[1]

II. FMC ENTERED CONSENSUAL RELATIONSHIPS WITH THE TRIBES AND FMC'S CONTENTIONS TO THE CONTRARY HAVE NO MERIT.

FMC established consensual relationships with the Tribes through its voluntary course of dealings with the Tribes from August 1997 through June 1998, by submitting to tribal jurisdiction in the Aug. 11, 1997 Letter, negotiating and entering into the 1998 Agreement with the Tribes, entering into the RCRA Consent Decree with the United States, which confirmed the 1998 Agreement, and finally by performing that agreement. That course of dealings established

[1] FMC asserted in its opening memorandum on the first *Montana* exception, Dkt. No. 67-3 ("FMC FMBr."), that the Court should not apply the clearly erroneous standard because the Tribal Appellate Court used this Court's vacated Mem. Decision & Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho Mar. 6, 2006), ECF No. 94, ("Mar. 6, 2006 Order") for guidance on whether FMC entered into consensual relationships with the Tribes. FMC FMBr. at 3-8. These contentions, to the extent FMC may have incorporated them into the FMC FM-Rbr., must be rejected for the reasons already described in the Tribes' response memorandum, Dkt. No. 76 ("Tribes' FM-Rbr."), namely: FMC mischaracterized the Tribal Appellate Court's findings of fact, *id.* at 2-5; the Mar. 6, 2006 Order was correct, *id.* at 5 n.2.; FMC's attacks on the lower tribal courts are irrelevant and wrong, *id.* at 7-8 & nn.5-6; and FMC's reasons why the Tribal Appellate Court could not rely on the Mar. 6, 2006 Order are also wrong, *id.* at 5-7. FMC's argument also fails because it is not supported with proper legal authority. *See id.* at 3 n.4 (showing that the "Ninth Circuit Standards of Review," FMC FMBr. at 3, are not legal authorities).

consensual relationships because FMC should have, and did, expect that it would "trigger" tribal jurisdiction. And the requisite nexus could not be clearer: in the 1998 Agreement FMC agreed to pay the annual permit fee that is at issue in this case. For that reason, the Tribes have jurisdiction to impose the permit fee.[2]

A. The Tribal Appellate Court Stated The Correct Standard For Determining Jurisdiction Under The First *Montana* Exception.

As the Tribes have established, Tribes' FMBr. at 6, the Tribal Appellate Court correctly applied the rule that the Tribes have jurisdiction over nonmembers who enter into consensual relationships with the Tribes or their members, *Montana v. United States*, 450 U.S. 544, 565 (1981), which is satisfied when "under th[e] circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008)). *See* Ex. 1, Am., Nunc Pro Tunc Findings of Fact, Conclusions of Law, Op. & Order of June 26, 2012, *FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't*, Nos. C-06-0069, C-07-0017, C-07-0035 at 13-15 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("2012 TCA Op."). FMC does not contest this, except to claim that the first *Montana* exception only applies to tribal land. FMC FM-RBr. at 9-12.[3] The bare text of the Supreme Court and Ninth Circuit decisions applying

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[2] FMC does not contest that, if the Tribes had regulatory jurisdiction over FMC, their courts also had adjudicatory jurisdiction, Tribes' FMBr. at 11, 25-26; *see* Tribes' FM-Rbr. at 32-33. Nor did FMC dispute the Tribes' adjudicatory jurisdiction when it stopped performing the 1998 Agreement. Tribes' FMBr. at 14 n.11.

[3] The truncated history of Indian law presented in FMC's response, FMC's FM-Rbr. at 4-6, does not properly explain inherent tribal sovereignty or the manner in which it is exercised. And while it is not necessary to address this subject at length in this case, settled law shows FMC is wrong. Inherent sovereign authority provides the basis for tribal governance. As the Court explained in *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978),

Montana rebut this claim. *See* Tribes' FM-Rbr. at 9-10, Dkt. No. 76, (quoting *Montana*, 450 U.S. at 565-66 (formulating the exceptions for tribal jurisdiction on Reservation non-Indian fee land); *Strate*, 520 U.S. at 453 (*Montana* "[r]egard[s] activity on non-Indian fee land");[4] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) ("*Montana*'s general rule" applies "on non-Indian fee land");[5] *Water Wheel*, 642 F.3d at 813 (applying *Montana* to tribal trust land "would impermissibly broaden *Montana*'s scope" against precedent and federal interest in tribal self-government);[6] *see Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204 (9th Cir. 2013) (tribes have jurisdiction on trust land "without even reaching" *Montana*)).[7]

> [t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. at 323. That sovereignty includes the power to: regulate and tax Indians and non-Indians engaged in reservation activities, *see, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), even on non-Indian owned fee lands, *Montana*, 450 U.S. at 565-66, and to adjudicate disputes arising from those activities, *Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Finally, as the Supreme Court recently reaffirmed, "unless and until Congress acts, the tribes retain their historical sovereign authority," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted).

[4] *Montana* also applies to certain rights-of-way on trust land, *Strate v. A-1 Contractors*, 520 U.S. 438, 454-56 (1997), and in the special circumstances present in *Nevada v. Hicks*, 533 U.S. 353, 392 (2001), as we earlier discussed. Tribes' FM-Rbr. at 10 n.7. Those cases actually confirm that *Montana* properly applies to FMC's activities on fee lands.

[5] While the concurrence from *Atkinson* that FMC cites, FMC FM-Rbr. at 9-10 (quoting *Atkinson*, 532 U.S. at 659-60 (Souter, J., concurring)), proposes that *Montana* may apply on trust lands, the Court did not adopt this position, *Atkinson*, 532 U.S. at 651 (*Montana* set forth "two possible bases for tribal jurisdiction over non-Indian fee land."). Even if the concurrence's position had been adopted, it would in fact *require* FMC to submit to the *Montana* factors by applying *Montana* throughout the Reservation.

[6] FMC tries to distinguish *Water Wheel* on the facts of that case. FMC FM-Rbr. at 12. But the facts are analogous here, as FMC has operated on the Reservation for over fifty years, and has had extensive dealings with the Tribes. Furthermore, FMC failed to reserve jurisdictional objections in the 1998 Agreement, *see* Tribes' FMBr. at 8, 10-11, although it had done so in an earlier agreement,

FMC's misinterpretation of federal case law continues in an effort to limit *Montana* so that it does not apply here. It first contends that the first *Montana* exception only applies to activities on trust lands, by summarizing its invented three categories of first *Montana* cases. FMC FM-Rbr. at 2, 7-8; *see* FMC FMBr. at 12-22. The Tribes have shown that the supposed three-category test is conceptually incoherent, and that FMC's conclusions are contrary to the rule explicitly applied in those cases to decide the first *Montana* exception. Tribes' FM-Rbr. at 12-17. And, as with its initial brief, the cases FMC cites in its response brief to support these categories either expressly state that the first *Montana* exception applies on reservation fee lands, *id.* at 14-15, 17, or do not apply the first *Montana* exception at all, *id.* at 14. FMC additionally states that, post-*Hicks*, *Montana* only applies when "necessary to protect tribal self-government or to control internal relations . . . ." FMC FM-Rbr. at 10 (quoting *Hicks*, 533 U.S. at 359). The Tribes have already shown that FMC's agreement to pay the fee meets this standard, FMC FM-Rbr. at 11, and is additionally "connected to that right of the Indians to make their own laws and be governed by them," *id.* (quoting *Hicks*, 533 U.S. at 361).

B. FMC Consented To Tribal Jurisdiction By Submitting Its Special Use Permit Application With The Aug. 11, 1997 Letter.

The Tribes have shown that FMC consented to tribal jurisdiction when it submitted its Aug. 11, 1997 Letter, which dropped FMC's previous objections to tribal court jurisdiction, Tribes' FMBr. at 7-8 (quoting Ex. 10, Letter from Sheila Bush, Counsel, FMC, to Candy

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FMC FM-Rbr. at 16 n.9, and thus FMC should have anticipated that its actions would trigger tribal authority.

[7] FMC also wrongly suggests *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), forecloses tribal jurisdiction here, *see* FMC FM-Rbr. at 2-3 n.2. *Brendale* has no application in this context, as it concerned only the second *Montana* exception, as FMC recognizes. *Id.* Furthermore, FMC misinterprets *Brendale*, and has not shown that the area surrounding the FMC Property is an "open" area, as the Tribes demonstrated in their second *Montana* response brief, Tribes' SM-Rbr. at 6 n.8, Dkt. No. 77.

Jackson, Tribal Attorney, Shoshone-Bannock Tribes (Aug. 1, 1997); Ex. 11, Letter from J. David Buttelman, Health, Safety & Envtl. Manager, FMC, to Tony Galloway, Chairman, LUPC (Aug. 11, 1997); 2012 TCA Op. at 4, 14). [SOF ¶¶30-31]. By submitting the Aug. 11, 1997 Letter and the attached permit application to the LUPC, FMC voluntarily submitted to tribal jurisdiction,[8] it did not simply submit an "offer." *Cf.* Tribes' FMBr. at 8 *and* Tribes' FM-Rbr. at 19 *with* FMC FM-Rbr. at 16. The LUPC then exercised that jurisdiction by issuing a decision on the special use permit application on April 13, 1998, subject to the specific condition that FMC adhere to proposed temporary amendments to the LUPO Guidelines.[9] Tribes' FMBr. at 9; Ex. 12, Letter from LUPC to Paul Yochum, FMC (Apr. 13, 1998) ("Apr. 13, 1998 Letter"). FMC cites to its comments on the proposed amendments as evidence that the LUPC rejected FMC's permit applications on September 11, 1997, but these comments only show that FMC was engaged in the Tribes' public notice and comment procedures, *see* FMC FM-Rbr. at 17 & n.12 (citing Ex. 32, FMC Corp.'s Comments on the LUPC's Proposed Amendments to the Shoshone-Bannock

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[8] FMC repeats its claim that the submission of this letter was not voluntary because FMC "knew" that the Tribes would "attempt[] to force a shutdown of the Plant by blocking access to the Plant . . . ." FMC FM-Rbr. at 16 & n.9; *see* FMC FMBr. at 26 & n.29. FMC still provides no evidence that the Tribes had attempted to shut down the FMC Plant in the past, or that it thought the Tribes would try in the future. As before, FMC only cites to a declaration that says nothing about tribal coercion, and in fact demonstrates that FMC and the Tribes repeatedly negotiated jurisdictional disputes to avoid prolonged litigation. *See* Tribes' FM-Rbr. at 29 & n.15 (citing Ex. 34, Decl. John Bartholomew Supp. FMC Corp.'s Memo. Opp. Tribes' Mot. Clarification Consent Decree at 4-9, 11-12, *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho filed Oct. 13, 2005)). The Tribes could not force the plant to shut down, had no practical incentive to do so, and if the Tribes had tried, FMC could have sought judicial relief at any time. *Id.* at 29 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978); *FMC*, 905 F.2d at 1312; Ex. 21, Letter from John T. Bartholomew, FMC, to Blaine J. Edmo, Chairman, Fort Hall Business Council (May 23, 2002)).

[9] Contrary to FMC's claim, these temporary guidelines were never adopted. *Cf.* FMC FM-Rbr. at 16 *with* Tribes' FMBr. at 9 & n.5 *and* Tribes' FM-Rbr. at 21 & n.10. The permit fees imposed by the LUPC's decision were also substantially less than those found in the Aug. 1997 proposed guidelines. Tribes' FMBr. at 9 & n.5 (citing Ex. 15, August 1997 Proposed Amendments Chapter V, §§ V-9-1, V-9-2; Ex. 13, Apr. 1998 Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, § V-9-2(A)). [SOF ¶32].

Tribe [sic] Fort Hall Land Use Operative Guidelines ("FMC Nov. 3 Comments")), and do not characterize the permitting process as an ongoing negotiation, *see* FMC Nov. 3 Comments at 4-5. To the contrary, the LUPC's letter decision is, on its face, approval of FMC's permit application. Tribes' FMBr. at 9; Tribes' FM-Rbr. at 21.

Further, the Aug. 11, 1997 Letter has the requisite nexus to the permit fee, *see Atkinson*, 532 U.S. at 656, because that letter submitted to tribal regulations that authorized the Tribes to negotiate the fee and impose it on FMC. Tribes' FMBr. at 8-9 n.4 (quoting 2012 TCA Op. at 33); Tribes' FM-Rbr. at 22 n.11 (quoting 2012 TCA Op. at 29, 33). FMC asserts that the LUPO Guidelines (Ex. 14), only required the payment of a ten dollar ($10.00) fee, and thus there is no nexus between the Aug. 11, 1997 Letter's submission to the 1979 LUPO Guidelines and the permit fee enforced by the Judgment. FMC FM-Rbr. at 17. But as the LUPO Guidelines plainly show, the ten dollar fee is only the filing fee, not the permit fee. Tribes' FMBr. at 8-9 n.4 (quoting LUPO Guidelines § V-1-1(b), V-5-1(b)).

FMC had an opportunity to contest tribal authority to impose the permit fee under the LUPO Guidelines in a timely appeal of the Apr. 13, 1998 Letter.[10] Instead, it chose to negotiate the 1998 Agreement, under which it obtained terms far superior than it would have had under the Aug. 1997 proposed amendments. Tribes' FMBr. at 9. FMC admits that it made the strategic decision to engage in these negotiations, FMC FM-Rbr. at 18, but advances meritless explanations of why this decision renders the 1998 Agreement nugatory.

[10] FMC does not deny that it never appealed the LUPC 1997 decision, nor does it deny that it had a right to do so under the LUPO. Tribes' FMBr. at 9; Tribes' FM-Rbr. at 21 (citing Ex. 6, Shoshone-Bannock Tribes, Land Use Policy Ordinance, art. V, § 6 (Feb. 28, 1977) ("LUPO")).

C. The 1998 Agreement Is A Valid Consensual Relationship That Supports Tribal Jurisdiction.

1. The 1998 Agreement is a consensual relationship.

The 1998 Agreement is another consensual relationship with the Tribes. Tribes' FMBr. at 10 (citing 2012 TCA Op. at 4-5, 14-15, 26-27, 40-42). FMC voluntarily negotiated the 1998 Agreement rather than appealing the Apr. 13, 1998 Letter decision through the LUPO process. *Id.* (citing 2012 TCA Op. at 22); Tribes' FM-Rbr. at 22. By its express terms, the 1998 Agreement has a nexus with the Tribes' permit, because it requires the payment of an annual fee in exchange for the right to store waste on the Reservation. Tribes' FMBr. at 11. FMC makes several meritless arguments that the 1998 Agreement is not effective.

FMC argues that it was coerced into the 1998 Agreement because it was afraid the Tribes would shut down the Plant or jeopardize the ongoing RCRA Consent Decree negotiations with the United States. FMC FM-Rbr. at 18. FMC does not provide any support for either claim except for a citation to a blank exhibit cover sheet in the record.[11] *Id.* at 18 & n.15. As shown above, the Tribes were never in a position to shut down the plant and FMC had no legitimate reason to fear that they could or would. *See supra* at 7 n.8. And it is unclear how the Tribes' negotiation with FMC over a permit fee would jeopardize the RCRA Consent Decree, given that FMC entered into the Consent Decree *after* it had entered into the 1998 Agreement, and voluntarily agreed to submit to tribal permitting in ¶8 of the Consent Decree. Tribes' FMBr. at 19; Tribes' FM-Rbr. at 30. FMC does not contest that under federal and Idaho case law, settling

[11] The exhibit accompanying that sheet was submitted to this Court during briefing that preceded the Mar. 6, 2006 Order and contains copies of correspondence between FMC and the Tribes, including the 1998 Agreement, showing that FMC voluntarily paid the permit fee from 1998 until 2002 without making jurisdictional objections, and then raised objections in 2002 when it decided to stop paying the fee. *See* Ex. 35, Ex. F to Decl. Blaine Edmo Supp. Mot. Clarification & App. Prelim. Inj., *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho filed Jan. 26, 2006).

to avoid litigation does not amount to duress or coercion, *see* Tribes' FMBr. at 17, which is determinative here since the only potential threat that FMC has substantiated is the threat of litigation with the Tribes, *see* FMC FM-Rbr. at 18. It also does not contest that, following the negotiation of the 1998 Agreement and during implementation of the RCRA Consent Decree, it voluntarily paid the permit for years without challenging the validity of its agreement. Tribes' FMBr. at 10 (quoting 2012 TCA Op. at 23 (quoting Ex. 20, Letter from Paul Yochum, Plant Manager, Astaris LLC, to Curtis Farmer, Chairman, LUPC (June 1, 2000))).

Moreover, the Tribes' assertion of permitting authority was a governmental assertion of lawful authority that is not coercive. Tribes' FMBr. at 16-18. FMC attempts to distinguish the case law by saying that the Tribes did not establish the lawfulness of their exercise of authority before seeking to enforce their regulations. FMC FM-Rbr. at 26. But the imposition of a tribal permit tax on nonmembers on non-Indian fee land is a lawful exercise of tribal authority, *Buster v. Wright*, 135 F. 947, 958 (8th Cir. 1905). Furthermore, in the cases the Tribes cite, the lawfulness of the government's exercise of leverage was determined in the litigation in which the private party alleged coercion, and was not established before the agreements were made. *See, e.g.*, *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1039 (Ct. Cl. 1976) (per curiam); *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 527 (9th Cir. 1986); *Hisel v. Upchurch*, 797 F. Supp. 1509, 1511-12 (D. Ariz. 1992). This case law, and the evidence in the record, shows that FMC voluntarily submitted to tribal jurisdiction, was not coerced, and the Tribes have carried their burden to prove the first *Montana* exception applies. *See* FMC FM-Rbr. at 25.

FMC also argues that the 1998 Agreement was limited in ways that prevent its application here, but many of these claims were rejected by the Tribal Appellate Court, and none have merit.

FMC says that the 1998 Agreement required prompt passage of a Hazardous Waste Act to be effective. *Id.* at 18-19 & n.17. But, as the Tribal Appellate Court found, codification was not required because that was not a material term of the 1998 Agreement. Tribes' FMBr. at 14 (citing 2012 TCA Op. at 41-42). The plain text of the May 19, 1998 Letter confirms this. Tribes' FM-Rbr. at 24 (quoting Ex. 17, Letter from LUPC to J. Paul McGrath, Senior Vice President & Robert J. Fields, Vice President, FMC (May 19, 1998)).

FMC argues that the 1998 Agreement did not contain FMC's consent to jurisdiction. But in the letters that form that agreement, FMC agreed to pay permit fees to the Tribe, which constitutes a consensual relationship that establishes tribal jurisdiction. Tribes' FMBr. at 15-16 (citing 2012 TCA Op. at 14-15, 26-27, 40-42). When a nonmember enters into a consensual relationship, the nonmember's actions establish consent to the exercise of tribal jurisdiction, *Montana*, 450 U.S. at 565; *Plains Commerce*, 554 U.S. at 337 (consent may by express or by the nonmember's action), provided that the exercise of jurisdiction has "a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656. So too here. After paying the fee for four years, Tribes' FMBr. at 10, FMC objected in 2002, and later argued to this Court, that in prior dealings with the Tribes it had "expressly reserved its right to contest Tribal jurisdiction over FMC's activities at the FMC Property." FMC FM-Rbr. at 19-20. But there are no "express" reservations in the 1998 Agreement, nor are there any in the letters that accompanied FMC's permit fee payments for four years. or even in the letter in which FMC stated that it would no longer pay the fee. *See* Tribes' FMBr. at 10.

The 1998 Agreement also remains in effect for as long as FMC stores waste on the Reservation. *Id.* at 14-16. The Tribal Appellate Court ruled that FMC's contention that the 1998 Agreement only covered the plant while it was in operation, FMC FM-Rbr. at 22-23, is

foreclosed by the plain terms of the June 2, 1998 Letter, in which FMC stated that the permit covered the plant and would be paid even if use of the ponds were terminated. Tribes' FMBr. at 15 (quoting 2012 TCA Op. at 27). As shown by the Affidavit of Robert J. Fields (Ex. 22) who was Division Manager of FMC's Phosphorus Equity and was present when the terms of the June 2, 1998 Letter were agreed upon, both parties understood that the "annual fee applied broadly to the entire facility" and would not "go away when those ponds were closed under the Consent Decree" and the June 2, 1998 Letter was written to reflect that understanding. Tribes' FMBr. at 15. [SOF ¶39]. The Fields Affidavit, which FMC does not contest, forecloses FMC's argument that the 1998 Agreement only covered the plant operations.

2. FMC also submitted to tribal jurisdiction through its conduct.

The Tribal Appellate Court also correctly found that, even if the 1998 Agreement did not impose contractual obligations, FMC consented to tribal jurisdiction by its conduct surrounding the 1998 Agreement, and that "applicable Tribal laws provide separate and independent authority for the LUPC to set the FMC permit fee at $1.5 million per year." *Id.* at 11-12 (quoting 2012 TCA Op. at 27). FMC argues that there is no nexus between the permitting fees and the tribal laws authorizing collection of a fee, either because FMC did not expressly agree to comply with the Tribes' amended LUPO Guidelines, Hazardous Waste Management Act, Ordinance ENVR-01-S3 (Dec. 4, 2001) ("HWMA") (Ex. 7), and Waste Management Act, Ordinance ENVR-05-S4 (Oct. 7, 2005) ("WMA") (Ex. 8), in the 1998 Agreement, or because those laws were enacted after it entered the 1998 Agreement. FMC FM-Rbr. at 22-23.[12] This misunderstands the Tribal

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[12] FMC interprets these tribal laws not to apply to it. *Id.* But the Tribal Appellate Court already found that these laws apply to FMC's conduct on the Reservation, 2012 TCA Op. at 20, 27-35, and this Court should defer to that interpretation because tribal courts are the primary adjudicators of tribal law. *See R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983) (quoted in Tribes' FM-Rbr. at 22 n.11); *Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992)

Appellate Court's ruling. The court determined that, even if the 1998 Agreement lacked contractual force, FMC consented to tribal jurisdiction by its conduct – applying for a use permit, consenting to tribal jurisdiction over the application, securing a decision on the application and then negotiating the 1998 Agreement, *see* Tribes' FMBr. at 11 – and therefore submitted to tribal jurisdiction. *Id.* at 12.[13] The LUPC then exercised that jurisdiction, pursuant to the LUPO, amended LUPO Guidelines, HWMA, and WMA, *id.* at 12-13 (citing 2012 TCA Op. at 29-30, 30-35); [SOF ¶26]), to issue the annual special use permit fee in its February 8, 2007 Letter, *id.* at 13 (citing 2012 TCA Op. at 9; [SOF ¶8]). Under this alternative ruling, the nexus between

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(en banc) (tribal law "must be resolved in the first instance by the . . . Tribal Courts"). In its first *Montana* decision, the Tribal Appellate Court rejected FMC's arguments that its activities were not covered under tribal law because the April 1998 proposed amendments to the LUPO Guidelines do not apply to its storage of wastes, the HWMA was not validly enacted, and the WMA required the enactment of regulations to be effective. *Cf.* Ex. 36, FMC Corp.'s Resp. Br. & Br. Supp. Cross Appeal at 30 n.18, 35-36 (filed July 15, 2010) *with* FMC FM-Rbr. at 22-23. The Tribal Appellate Court correctly found the HWMA was properly approved, *see* Tribes' FMBr. at 12-13 n.8 (citing Ex. 2, Order of May 28, 2013 at 2-3; 2012 TCA Op. at 12), and that the WMA authorizes the imposition and modification of waste storage permits, *id.* at 13 n.9 (citing WMA §§ 101(D)(1), (3), 301(B); 2012 TCA Op. at 33). The proposed April 1998 Amendments were not adopted, *see id.* at 9 n.5, but their terms expressly apply to "[a] person who generates, treats, stores or disposes of hazardous waste," Apr. 1998 Amendments § V-9-2(1)(A), and "storage" is defined to include "the containment of hazardous waste . . . for a period of years," *id.* § V-9-1(A)(vii). In addition, the Tribal Appellate Court correctly found that the amendments actually adopted in May 1998 apply to the FMC Property, *see* Ex. 16, May 1998 Guideline Amendments § V-9-1(1)(A)(ii)-(iii), (B); 2012 TCA Op. at 29-30; Tribes' FMBr. at 12. FMC did not raise its argument interpreting the text of § 409 of the HWMA to the Tribal Appellate Court, and cannot do so here for the first time. *See Stock W.*, 964 F.2d at 920. In any event, FMC's interpretation of § 409 is clearly wrong because, as the Tribal Appellate Court found, the HWMA covers FMC's storage of waste on the Reservation, *see* HWMA §§ 105(H)-(I), 409(B); 2012 TCA Op. at 33 & n.20.

[13] FMC misconstrues this as an "argument that the[Tribes] have jurisdiction over FMC simply because FMC owns land within the Reservation and the Tribes have passed ordinances regulating waste management . . . ." FMC FM-Rbr. at 24-25. FMC's interpretation is well off the mark, as both the Tribes' FMBr. at 12-13, and the 2012 TCA Op. at 27, show these tribal laws were applied pursuant to a consensual relationship that FMC established with the Tribes. This is consistent with the Tribal Constitution, which secures to the Tribes "the power to exercise certain rights of self-government not inconsistent with Federal laws." Ex. 37, Tribal Constitution, prmbl. That provision vitiates FMC's argument that the Tribes assert jurisdiction over "any person within the Reservation boundaries." FMC FM-Rbr. at 24.

FMC's consensual relationship and these ordinances is determined by FMC's course of conduct, and is not gauged by the language of the 1998 Agreement.

D. The RCRA Consent Decree Is A Consensual Relationship And FMC Should Be Estopped From Arguing It Was Not Required To Obtain Tribal Permits Under The Decree.

1. By entering the Consent Decree, FMC entered into a consensual relationship with the Tribes.

FMC reaffirmed the 1998 Agreement in the RCRA Consent Decree, *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho entered July 13, 1999), ECF No. 28, which as this Court correctly found in the Mar. 6, 2006 Order, and as re-affirmed by the Tribal Appellate Court, 2012 TCA Op. at 15, also establishes a consensual relationship that supports tribal jurisdiction over FMC. Tribes' FMBr. at 18. In ¶8 of the Consent Decree, FMC agreed to obtain tribal permits necessary to implement the terms of the Decree, which it had already done by entering into the 1998 Agreement. *Id.* at 19. This Court ruled in the Mem. Decision & Order, *United States v. FMC Corp.*, No. 4:98-cv-00406-E-BLW (D. Idaho Jan. 18, 2001), ECF No. 56, ("Jan. 18, 2001 Order") that ¶8 required FMC to go through the Tribes' land use planning system, and FMC did not appeal that Order. Tribes' FMBr. at 20. Then, FMC represented to the Ninth Circuit in its brief in *United States v. Shoshone-Bannock Tribes* (*FMC I*), 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition), 2000 WL 915398, that the payment of the annual permit fee to the Tribes was made under the terms of the Consent Decree, and that the Tribes received "substantial benefits" from the Decree. Tribes' FMBr. at 22. FMC disputes neither that the Consent Decree reaffirmed the 1998 Agreement, nor that it agreed to obtain tribal permits under ¶8, nor the Tribes' description of what FMC is required to do under the Jan. 18, 2001 Order, nor that it told the Ninth Circuit that it would pay substantial permit fees to the Tribes under the Consent Decree. Nor, finally, does it contest that tribal jurisdiction can be established

by consensual relationships with third parties such as tribal members or the federal government. Tribes' FMBr. at 21.

Instead, FMC asserts that the Consent Decree is not a consensual relationship because the Mar. 6, 2006 Order was vacated by the Ninth Circuit, on the grounds that the Tribes could not enforce the Consent Decree because they were not an intended beneficiary of the Decree.[14] FMC FM-Rbr. at 20-21. The Ninth Circuit said nothing about whether the Consent Decree constituted a consensual relationship under *Montana*, but only ruled on whether the Tribes could enforce its terms as a third-party beneficiary. Tribes' FMBr. at 21; Tribes' FM-Rbr. at 31. Since this Court's reasoning on the first *Montana* exception was not overruled in the vacatur order, it can be subsequently adopted and re-affirmed by this or another court. *See* Tribes' FM-Rbr. at 31 n.17 (citing *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129-30 (9th Cir. 2013); *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001); *Hester v. Int'l Union of Operating Eng'rs*, 878 F.2d 1309, 1309-10 (11th Cir. 1989)). For that reason, the Tribal Appellate Court properly looked to the Mar. 6, 2006 Opinion's ruling for guidance.

2. FMC is judicially estopped from arguing that the Consent Decree did not require it to obtain tribal permits.

FMC is estopped from arguing the Consent Decree does not require it to obtain tribal permits under the three-factor test. *See* Tribes' FMBr. at 23 (citing *USW v. Ret. Income Plan*, 512 F.3d 555, 563 (9th Cir. 2008)). FMC does not contest the first and third factors: that its

[14] FMC also asserts that the Tribes are attempting to get "rights under the RCRA Consent Decree that the Ninth Circuit has ruled the Tribes do not have." FMC FM-Rbr. at 21. This is facially wrong. The Ninth Circuit ruled the Tribes could not enforce the Consent Decree, which implements numerous substantive requirements on FMC's operation of certain waste ponds at the FMC Property. *United States v. FMC Corp.* (*FMC II*), 531 F.3d 813, 815, 816, 821-22 (9th Cir. 2008). The Tribes are seeking enforcement of the Tribal Court Judgment, which requires FMC to pay an annual permit fee and which does not enforce the RCRA Consent Decree.

current position is clearly inconsistent with its prior position,[15] *id.* at 23-24, and that it is seeking an unfair advantage by changing its position, *id.* at 24. FMC does contest whether the Ninth Circuit adopted its position in rejecting the Tribes' challenge to the entry of the Consent Decree, claiming that the court did not make its decision based on "anything FMC did or said." FMC FM-Rbr. at 28. FMC's application of the second estoppel factor is wrong.

For estoppel to apply, the court "need not itself adopt the statement" made by a litigant supporting entry of a prior settlement. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012) (cited in Tribes' FMBr. at 24). In *FMC I*, the court did not need to expressly repeat FMC's arguments to accept its position, since the question at hand was whether the Tribes carried their burden of proof to overcome deference to the district court's entry. 229 F.3d 1161, 2000 WL 915398, at *1. As FMC's briefing shows, FMC convinced the Ninth Circuit to defer to the lower court's entry of the decree in part on the basis that the Tribes' arguments must be rejected since it would benefit from waste storage under its $1.5 million annual permits, Br. of Appellee FMC Corp., *United States v. Shoshone-Bannock Tribes* (*FMC I*), 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition) (No. 99-35821), 2000 WL 33996531, at *17-18, and that it had accepted the benefits of the Consent Decree, *id.* at *22. FMC successfully convinced the court to lend its coercive power to the enforcement of the Decree by showing that "the record contains ample grounds supporting the EPA's negotiated settlement and its approval by the district court," *FMC I*, 2000 WL 915398, at *2, and that is what estoppel requires, *see* Tribes' FMBr. at 24 (citing *Baughman*, 685 F.3d at 1133-34).

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[15] FMC argues that the position it took before the Ninth Circuit in *FMC I* is consistent with the Ninth Circuit's ruling. FMC FM-Rbr. at 28 (quoting *FMC I*, 229 F.3d 1161, 2000 WL 915398, at *2). But the question is whether FMC's prior position is inconsistent with its current position, and FMC's assertion is therefore irrelevant to the first factor. If anything, the Ninth Circuit's adoption of FMC's position that the RCRA Consent Decree should be entered establishes the second factor. *See* Tribes' FMBr. at 24 (citing *FMC I*, 229 F.3d 1161, 2000 WL 915398, at *2).

III. THE TRIBAL COURT JUDGMENT DOES NOT INTERFERE WITH THE RCRA CONSENT DECREE IMPLEMENTATION OF THE EPA'S CERCLA AND RCRA REMEDIES.

FMC claims that federal courts have ruled the Tribes do not have authority over FMC's activities at the FMC Property, and that the Tribal Court Judgment interferes with the implementation of the RCRA Consent Decree. FMC FM-Rbr. at 29-31. Wrong on all counts. The previous federal court decisions in this case that FMC cites do not prevent the enforcement of the Tribal Court Judgment. Those decisions dealt with whether the RCRA Consent Decree complied with federal law. *See id.* at 29-30 (quoting Order at 2, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho July 13, 1999), ECF No. 27; *FMC I*, 229 F.3d 1161, 2000 WL 915398, at *1). They did not deal with the Tribal Court Judgment, which does not implement federal law or place any obligations on EPA. *See* Tribes' DP-Rbr. at 28, Dkt. 75. In fact, the Ninth Circuit went on to acknowledge in *FMC II* that FMC had recognized its obligation to continue the permitting process, regardless of whether the Tribes could sue to enforce the RCRA Consent Decree. 531 F.3d at 823-24.

And FMC's obligation to the Tribes does not interfere with its obligation to comply with federal law. As FMC admits in its response brief on the second *Montana* exception at 7-8, the Tribal Court Judgment simply requires FMC to pay a permit fee. Payment of a fee, imposed by tribal laws, *see* 2012 TCA Op. at 27-35, does not interfere with EPA's enforcement of federal laws, *see* FMC FM-Rbr. at 31.[16] The reverse is true, as well: The exercise of EPA's delegated authority to apply federal environmental laws to FMC does nothing to interfere with the Tribes' authority to collect a permit fee to fund programs that monitor and detect threats to their resources and members on the Reservation. *See* Tribes' SM-Rbr. at 7. The fact that FMC is

[16] FMC's arguments that the Tribes do not have authority under second *Montana* exception are wrong for the reasons explained in the Tribes' briefing on that issue.

subject to one sovereign's environmental regulations does not foreclose the Tribes' inherent sovereignty over FMC's activities when the *Montana* exceptions are satisfied, as they are here. *See id.* at 8-9 n.10, 9 (citing *Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998)).

IV. CONCLUSION

For the reasons stated here and in the Tribes' FMBr., this Court should issue appropriate orders, recognizing and affirming the Tribal Appellate Court's Judgment on the first *Montana* exception, issuing summary judgment on the Tribes' motion for judicial estoppel, and enforcing the Judgment, as requested in the Tribes' Motion.

DATED this 20th day of March, 2017

SHOSHONE-BANNOCK TRIBES

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

ECHO HAWK LAW OFFICE

/s/ Paul C. Echo Hawk
Paul C. Echo Hawk

SONOSKY CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

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

Attorneys for Shoshone-Bannock Tribes

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