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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' REPLY  
TO DKT. NO. 73, MEMORANDUM OF  
FMC CORPORATION IN RESPONSE TO  
MEMORANDUM IN SUPPORT OF  
RECOGNITION OF JURISDICTION  
UNDER THE SECOND EXCEPTION TO  
MONTANA**

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**I. FMC’S EFFORT TO SIDESTEP THE STANDARD OF REVIEW THAT APPLIES TO TRIBAL COURT FINDINGS OF FACT HAS NO MERIT.**

The Tribal Appellate Court’s decision<sup>1</sup> is reviewed de novo on questions of federal law relevant to the jurisdictional ruling, and for clear error on findings of fact. Tribes’ SMBr. at 2, Dkt No. 65-1 (incorporating standard of review from Tribes’ FMBr. at 3-4, Dkt. No. 64-1). FMC asserts that the court’s findings of fact should not receive deference because the court incorrectly interpreted the second *Montana* exception. FMC SM-Rbr. at 3-4, Dkt. No. 73. Even if that were so,<sup>2</sup> it would not affect the standard of review for findings of fact. FMC also asserts that the court’s findings that a threat exists are conclusory legal determinations, subject to de novo review. *Id.* at 3 & n.3. But the court’s specific findings of fact reject that contention. 2014 TCA Op. § III; 2014 TCA Dec. at 7-28. Indeed, FMC does not attempt to show that any of those findings are clearly erroneous, and has therefore waived any such argument. For these reasons, this Court should defer to and accept the Tribal Appellate Court’s findings of fact.

**II. FMC’S ATTEMPT TO REWRITE THE SECOND MONTANA EXCEPTION IS REJECTED BY SETTLED FEDERAL LAW.**

As FMC’s attack on the Tribal Appellate Court interpretation of the second *Montana* exception largely recycles arguments earlier shown to have no merit, Tribes’ SMBr. at 5-12; Tribes’ SM-Rbr. at 1-6,<sup>3</sup> we respond here only to FMC’s efforts to shore up its argument.

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<sup>1</sup> See 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 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) (“2014 TCA Op.”); Ex. 2, Statement of Decision of Apr. 15, 2014 (“2014 TCA Dec.”).

<sup>2</sup> The Tribal Appellate Court correctly interpreted the second exception standard, see Tribes’ SMBr. at 5-12; Tribes’ SM-Rbr. at 1-6, Dkt. No. 77; *infra* at 1-6. The standard the court applied is that set forth in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008), 2014 TCA Op. at 4-5 (quoting *Plains Commerce*, 554 U.S. at 336), which is not a “non-zero risk” standard, as FMC contends. FMC SM-Rbr. at 3.

<sup>3</sup> To wit: FMC’s argument that the impacts here are allegedly general or speculative has no merit, Tribes’ SM-Rbr. at 2-3, 10-34; a threat to protected tribal interest can satisfy the second exception, *id.*

FMC again relies on *Plains Commerce* to narrow the second exception by seizing on the word “catastrophic.” FMC SM-Rbr. at 5-6. But that word is not talismanic, nor did *Plains Commerce* alter the second *Montana* exception. Tribes’ SM-Rbr. at 1, 4 n.7. Furthermore, the threatened and direct effects of FMC’s conduct satisfy each and every iteration of the second *Montana* exception to which FMC refers. *See, e.g.*, FMC SM-Rbr. at 14.<sup>4</sup> That is so because FMC’s contamination of the Reservation imperils the Tribes’ “permanent home,” set aside for them under the Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673, on which the Tribes depend for subsistence and to sustain their culture. And under the second exception, the Tribes have the power to protect their home through the exercise of their right of self-government, which includes the power “to make their own laws and be ruled by them,” *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).<sup>5</sup>

FMC again asserts that the Tribal Appellate Court misinterpreted *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), FMC SM-Rbr. at

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at 1-6; actual harm to tribal members is not a jurisdictional prerequisite, *id.* at 1-4; the second exception standard set forth in *Plains Commerce*, and *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998), rejects application of the toxic tort liability standard to this case, Tribes’ SM-Rbr. at 1 n.2; and the testimony in support of the second *Montana* exception is not based on tribal members’ perceptions, *id.* at 10-34.

<sup>4</sup> FMC asserts that a threat cannot satisfy the second *Montana* exception because such an interpretation would “swallow the rule.” *Id.* at 6 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001)). But *Atkinson* employed that metaphor to reject the fact-based argument that the non-Indian’s receipt of tribal services established a consensual relationship under the first *Montana* exception, 532 U.S. at 655, not to read the word “threat” out of the second *Montana* exception.

<sup>5</sup> 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. Tribes’ SMBr. at 11-12. The Tribes therefore do not have to prove that EPA will not protect human health and the environment on the FMC Property, as FMC contends, FMC SM-Rbr. at 1, nor do they have to show that EPA’s environmental remediation decisions have a threatened or direct effect under the second *Montana* exception, as FMC also urges, *id.* at 32-34. The Tribes here are seeking to exercise jurisdiction over FMC, not EPA. Furthermore, as the containment plan EPA set forth in the IRODA was not in place at the time of trial, it cannot be shown to protect tribal interests in any event. Tribes’ SMBr. at 32 & n.33. Nor is that plan adequate to do so. *Id.* at 32-33.

7, which is incorrect, Tribes' SM-Rbr. at 3-4.<sup>6</sup> FMC also urges again that *Brendale* and *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), require a determination of whether the FMC Property is in an "open" or "closed" area, FMC SM-Rbr. at 7. That distinction is inapplicable here because the Tribes are seeking to protect the Reservation environment from contamination that is mobile and does not distinguish fee from trust land. Tribes' SM-Rbr. at 5; *see infra* at 4 & n.7; [SOF ¶44]. Even if such an analysis were required, it would show that the Reservation is a closed area as 96% of its lands are tribal or Indian lands. Tribes' SM-Rbr. at 5-6. In any event, the Reservation cannot be analogized to the open area in *Brendale*, which was almost half fee land. 492 U.S. at 416, 446 (Stevens, J.). FMC next asserts that the FMC Property is part of an "open" area by arguing without any factual support that the same area was involved in *Evans*. FMC SM-Rbr. at 11. But the conduct is not the same, and the surrounding area must include the areas directly impacted or threatened by FMC's conduct. That area includes the Portneuf River and the Fort Hall Bottoms, which are tribal lands relied on by the Tribes and its members for subsistence, cultural, and religious purposes, [SOF ¶¶21-22, 43]. The surrounding area must also include the Reservation lands traversed by the twenty percent of Reservation roads containing slag, the homes of over 100 Reservation residents who have been exposed to gamma radiation in amounts exceeding background levels, [SOF ¶72], and the tribal lands contaminated with radioactive particles blown by wind from the FMC Property. [SOF ¶72.] Thus, even if the "closed area" label were applicable in the environmental regulation context, these areas would be part of a closed area, as they are all tribal and tribal member lands, situated on a reservation that is more than 96% tribal or tribal member lands.

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<sup>6</sup> FMC also says that the Tribal Appellate Court applied a "de minimis standard" improperly derived from *Brendale*. FMC SM-Rbr. at 11. The court really found that FMC's impacts on the Tribes "far outweigh[]" a "mere possibility" of future effects "upon the tribal members' cultural and religious traditions," 2014 TCA Op. at 14, including catastrophic impacts to tribal customs and traditions, *id.*

FMC also asserts that the Ninth Circuit's holding in *Montana v. U.S. EPA* was limited to an interpretation of the treatment as a state ("TAS") provision of the Clean Water Act ("CWA"). FMC SM-Rbr. at 6. Not so. The Ninth Circuit held that "the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference," that EPA had correctly ruled that "to support the exercise of inherent authority" under the second *Montana* exception "the potential impact of regulated activity must be serious and substantial," 137 F.3d at 1140-41 (citing Final Rule, 56 Fed. Reg. 64,878 (Dec. 12, 1991); *Brendale*, 492 U.S. at 431 (White, J.), 447 (Stevens, J.)), and that EPA had properly applied that standard to find that "the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential," *id.* at 1141.<sup>7</sup> In so holding, the Ninth Circuit reaffirmed that under the second *Montana* exception, a tribe may exercise jurisdiction over "conduct that involves the tribe's water rights," recognizing that

due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."

*Id.* (citation omitted). So too here.

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<sup>7</sup> FMC also contends that it is unclear how much of *Montana v. U.S. EPA* remains valid after *Plains Commerce, Evans*, and EPA's final Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183 (May 16, 2016) (announcing that EPA now construes TAS as a delegation of federal authority). FMC SM-Rbr. at 6 n.4. These contentions have no merit. First, *Plains Commerce* did not alter the second *Montana* exception. See Tribes' SM-Rbr. at 1, 4 n.7. Second, the Ninth Circuit has reaffirmed *Montana v. U.S. EPA* since *Plains Commerce* was decided. *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) ("contamination of a tribe's water quality [is a] threat[] sufficient to sustain tribal jurisdiction.") (citing *Montana v. U.S. EPA*, 137 F.3d at 1139-40). Third, *Evans* does not purport to question the vitality of *Montana v. U.S. EPA*, and turns on facts that are readily distinguishable. Tribes' SM-Rbr. at 4 n.7, 5-6; Tribes' SMBR. at 6-7 n.6. Fourth, EPA's reinterpretation of the CWA's TAS provision recognizes *Montana v. U.S. EPA* as one of several decisions upholding EPA determinations of tribal inherent authority, 81 Fed. Reg. at 30,186, and expressly provides that the new rule does not affect prior TAS approvals, *id.* at 30,194.

FMC also contends that the Tribes cannot show that the payment of the annual waste storage permit fee “will do anything to avert any harm to the Tribes.” FMC SM-Rbr. at 1, 7-9. But as shown earlier, the annual permit fee permits the Tribes to monitor the contamination on the FMC Property, which is essential to protect tribal health and welfare. Tribes’ SM-Rbr. at 6-8.<sup>8</sup> FMC suggests that there is no statutory authority that directs that the annual permit fee be used for environmental purposes. But the LUPO, the May 1998 Guideline Amendments, and the HWMA do just that. *Id.* at 6-7. And while FMC speculates that tribal law could change, the bare assertion that a sovereign can change its laws in the future affords no reason to disregard its laws today. FMC also argues that funding is not needed because it has provided funds for tribal oversight of the CERCLA site. FMC SM-Rbr. at 8. But the Tribes still lack adequate funding to engage in effective oversight at the EMF site. Ex. 20, Trial Tr., Vol. I, Test. of Susan Hanson (“SH Test.”) at 110:1-17.

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<sup>8</sup> The Tribes identified the phosphine releases that were occurring at Pond 16S in 2006, and documented those releases by photograph. Ex. 18, Trial Tr., Vols. I-II, Test. of Kelly Clyde Wright (“KW Test.”) at 149:17-154:3; 158:15-161:4; Ex. 64, Photograph (Sept. 25, 2006); Ex. 65, Photograph (July 26, 2006). The Tribes were the first to report data to EPA showing that phosphine releases at Pond 16S were a danger, which EPA subsequently addressed in the 2006 UAO. KW Test. at 270:19-271:10. And FMC’s first known disclosure that the FMC Property was formerly used as a military target range occurred in the Tribal Appellate Court, [*see* SOF ¶40] (citing Ex. 16, Trial Tr., Vol. IV, Test. of Jennifer Stevens at 996:9-21; Ex. 17, Map Showing Moving Target Range (showing target range and shell debris area)). That disclosure establishes the need to clean up the shell debris on the FMC Property, pursuant to the Defense Environmental Restoration Program’s (“DERP”) Formerly Used Defense Sites program (“DERP-FUDS”). DERP-FUDS regulates former military site cleanup, *see* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 211, 100 Stat. 1613, 1719 (codified at 10 U.S.C. ch. 160), specifically remediation of hazardous waste at former military sites, 10 U.S.C. § 2701(b)(1), including “detection and disposal of unexploded ordnance” posing “an imminent and substantial endangerment to the public health or welfare or to the environment,” *id.* § 2701(b)(2). The Army Corps of Engineers is responsible for responses at “[e]ach facility or site which was under the jurisdiction of the Secretary [of Defense] . . . at the time of actions leading to contamination by hazardous substances,” *id.* § 2701(c)(1)(B); *see Cannon v. Gates*, 538 F.3d 1328, 1333 n.4 (10th Cir. 2008). The FMC Property is part of a “facility or site” that was controlled by the military when it was contaminated with debris from its use as a gunnery range. The Corps should have remediated the FMC Property under DERP-FUDS. Yet EPA never sought to involve the Corps in the detection and disposal of unexploded ordnance.



Finally, FMC asserts that the Tribal Appellate Court should not have considered the second *Montana* exception. That contention has no merit for reasons earlier shown. Tribes' DPBr. at 14 n.7, Dkt. No. 66-1. Furthermore, consideration of that issue by the Tribal Appellate Court was entirely proper under the Law & Order Code (Ex. 39), which provides that, "[o]n appeal, each case shall be tried anew," *id.*, ch. IV § 2. The Tribal Appellate Court provided FMC an opportunity to object to that process, [SOF ¶14], but FMC failed to do so.

### **III. FMC'S ASSERTION THAT THE WASTE IT STORES ON THE RESERVATION DOES NOT HAVE A THREATENED AND DIRECT EFFECT ON TRIBAL HEALTH AND WELFARE IS REJECTED BY THE EVIDENCE IN THIS CASE**

FMC's toxic waste imperils the Tribes' subsistence and welfare because it contaminates and constantly threatens lands, waters, and natural resources the Tribes rely on for subsistence, cultural, and religious purposes. Tribes' SMBr. at 12-31; Tribes' SM-Rbr. at 10-27. While FMC asserts that the Tribes "do not prove that the potential sources [of harm] have or will cause any actual harm," FMC SM-Rbr. at 17, that argument fails for the reasons set forth below.

#### **A. The Phosphine Generated On The FMC Property Threatens Tribal Health And Welfare Because Of Its Toxicity And Mobility.**

Phosphine, a poison gas, [SOF ¶64], will be generated on the FMC Property indefinitely. That is so because: phosphine is generated by the reaction of phosphorus to water, [SOF ¶63]; an enormous quantity of phosphorus is buried on the FMC Property, [SOF ¶46]; and water flows on, over and under the FMC Property, [SOF ¶44]. Phosphine can also migrate in soil. Ex. 26, Trial Tr., Vol. VII, Test. of Barbara Ritchie ("BR Test.") at 1669:9-10.

While FMC asserts that the design of the RCRA Ponds "anticipated the accumulation of phosphine under the RCRA approved caps," FMC SM-Rbr. at 18-19,<sup>9</sup> that assertion actually

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<sup>9</sup> FMC even implies that the RCRA Consent Decree approved FMC to release phosphine. *Id.* at 18. That is not so for reasons we have earlier shown. Tribes' SM-Rbr. at 17.

acknowledges that phosphine generation in the RCRA Ponds cannot be stopped. Indeed, at the time Mr. Hartman testified, gas extraction was ongoing at Pond 18A. Ex. 21, Trial Tr., Vols. V-VI, Test. of Rob Hartman (“RH Test.”) at 1316:13-15. Nor can phosphine be contained. The RCRA Consent Decree, Att. A § I, ¶¶1-6, required the installation of a temperature and pressure monitoring and gas collection system at certain ponds, including 15S and 16S. But that system failed, as shown by the phosphine releases at Pond 16S, RH Test. at 1287:2-20, and later at Pond 15S, [SOF ¶¶66-67].<sup>10</sup> Phosphine releases also occur when the barometric pressure changes. RH Test. at 1317:5-7.<sup>11</sup> And the gas extraction systems “normally emit low concentrations of phosphine (less than 0.3 ppm),” Ex. 42, RCRA Facility-Wide Contingency Plan, EPA ID No. IDD070929518, tbl.1 (rev’d 2010). In short, phosphine releases on the FMC Property will continue indefinitely and threaten the Tribes and their members. [SOF ¶¶65-67, 69-70].

FMC contends that there was no risk to health from earlier failures of the gas treatment systems. FMC SM-Rbr. at 19. But as Mr. Hartman testified, that was so because when the workers’ personal phosphine alarms went off they removed to a safe location. RH Test. at 1288:24-1290:1. That does not eliminate the risk to persons without an alarm. Nor can it be shown that phosphine has not harmed a human, as harm from phosphine poisoning ranges from early symptoms such as nausea and vomiting, to bronchitis and death, Ex. 67, Agency for Toxic

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<sup>10</sup> The releases at Ponds 16S and 15S led to the 2006 UAO, [SOF ¶¶66], and the 2010 UAO, [SOF ¶¶67], respectively.

<sup>11</sup> FMC asserts that releases are not occurring at the CERCLA Ponds “due to the absence of water,” FMC SM-Rbr. at 19 (citing Ex. 66, MWH, *Site-Wide Gas Assessment Report* at ES-6 (2010) (“SWGA”); Ex. 6, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho* 15 (2012) (“IRODA”). But the CERCLA ponds are releasing gas, and there is water present at those ponds. SWGA at ES-4 to ES-5 (reporting CERCLA Remedial Area Assessment results showing phosphine in soil gas and flux chamber samples); 3-8 (reporting results for Remedial Area C, which includes nine CERCLA ponds), 3-7 (showing that flux chamber sampling at Pond 8S was repeated due to “significant rain event”), 3-8 (reporting phosphine releases from three CERCLA ponds that were “not entirely unexpected based on the historical knowledge that the potential for P4 [phosphorus] exists in these ponds”).

Substances & Disease Registry, *Phosphine*, CAS #7803-51-2 at 1 (2002). And “[t]here are no specific blood or urine tests for phosphine itself.” *Id.* at 2. And in any event, actual harm is not required to satisfy the second *Montana* exception. Tribes’ SM-Rbr. at 1-6.

FMC also asserts that phosphine dissipates quickly, FMC SM-Rbr. at 20, but the source on which it relies says only that about half of the phosphine degrades in air in one day, *Phosphine*, CAS #7803-51-2 at 1, which would not eliminate the danger from the extremely high concentrations of phosphine generated on the FMC Property, *see* [SOF ¶¶64, 69-70]. In addition, phosphine is denser than air, and thus sinks to the ground, and moves downhill by force of gravity. [SOF ¶65]. That poses dangers that earlier forced FMC to warn the owner of a nearby dragstrip to evacuate the facility, and that led EPA to warn that gases produced by the reactivity of phosphorus may obscure visibility on the highway and at the Pocatello airport. [SOF ¶65]. FMC questions the significance of the evacuation warning because it occurred in 1999, FMC SM-Rbr. at 20, but the characteristics of phosphine that pose the danger have not changed since then, and releases will continue because phosphine cannot be contained on the FMC Property.

FMC attempts to predict the future behavior of phosphine at the FMC Property using past results of phosphine monitoring. But that monitoring was inadequate, Tribes’ SM-Rbr. at 20, and covered only a short period of time, RH Test. at 1314:18-1315:7.<sup>12</sup> By contrast, phosphorus

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<sup>12</sup> FMC questions the Tribes’ reliance on Ex. 32, Letter from Kai Elgethun, Pub. Health Toxicologist/Health Assessor, Idaho Dep’t of Health & Welfare, to Greg Weigel, EPA Idaho Operations Office, at 2 (June 1, 2010) (“Elgethun Letter”), to show that the phosphine monitoring done by FMC was inadequate. FMC SM-Rbr. at 21 n.7. But the letter FMC sent in response to the Elgethun Letter, *see* Ex. 68, Letter from Robert Forbes, Dir., Env’t, FMC to Kai Elgethun, Pub. Health Toxicologist/Health Assessor, Idaho Dep’t of Health & Welfare (June 4, 2010), does not dispute the Elgethun Letter’s conclusion that phosphine monitoring on the FMC Property was inadequate, except to assert that a windsock had been placed on a pole at Pond 15S, *id.* at 2. Nor did Dr. Elgethun’s second letter, Ex. 69, Letter from Kai Elgethun, Pub. Health Toxicologist/Health

remains reactive for thousands of years, and has been generated on the FMC Property at levels in the range of 200,000 ppm. *Id.* at 1300:22–1301:1. FMC also asserts that “EPA has procedures in place to oversee and regulate how FMC maintains and monitors the gas treatment systems in order to ensure protection of human health and the environment.” FMC SM-Rbr. at 19. But the IRODA contains no monitoring plan for phosphine, IRODA at 70-71, and for the RCRA Ponds, EPA offers only that “EPA’s RCRA program is developing additional strategies to treat and manage phosphine gas production within the RCRA pond area,” *id.* at 15.

**B. The Phosphorus, Arsenic, And Orthophosphate On The FMC Property Contaminate Reservation Lands, Waters, And Natural Resources And Threaten Tribal Health and Welfare.**

FMC asserts that there is no harm to the Tribes from phosphorus on the FMC site because phosphorus “in soil is solid, largely insoluble, and immobile.” FMC SM-Rbr. at 23 (citing IRODA at 102).<sup>13</sup> Not so. While the solubility of phosphorus is less than three (3) mg/l, IRODA at 102, the quantity of phosphorus buried on the FMC Property is huge – 16,000 tons, [SOF ¶46], and the groundwater flow under the FMC Property is continuous. [SOF ¶¶54-55.] Phosphorus and arsenic contaminate the groundwater on the FMC Property, [SOF ¶¶53-54], and flow from FMC’s lands into the Portneuf River, as FMC’s witnesses conceded. RH Test. at 1348:6-13; BR Test. at 1620:1-1621:4. And the reason “elemental phosphorus has not been detected downgradient of FMC OU [is] because elemental phosphorus oxidizes in groundwater

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Assessor, Idaho Dep’t of Health & Welfare, to Greg Weigel, EPA Idaho Operations Office (Dec. 8, 2010), repudiate the first Elgethun Letter’s finding concerning the inadequacy of the monitoring for phosphine that was earlier done. *Id.* at 2. Nor did it find that phosphine gas was not escaping into the ambient air and moving beyond the fence line. Instead, it found that ambient air measurements in the breathing zone were low. *Id.*

<sup>13</sup> FMC questions the risks presented by the phosphorus in the buried railcars on the FMC Property based only on the assertion that they haven’t leaked yet, and that a cap will be placed over that area. *Id.* at 22 n.8. But the former assertion makes a leak in the future more likely, as the railcars corrode, and the cap is not in place. [SOF ¶50].

to phosphorus/orthophosphate very quickly.” IRODA at 24. Accordingly, FMC’s assertion that there is no evidence of how arsenic, phosphorus, and orthophosphates are transported downstream from Batiste Springs, FMC SM-Rbr. at 28, 30, is meritless.<sup>14</sup>

FMC blames Simplot for the arsenic, phosphorus, and orthophosphate contamination off the FMC Property. *Id.* at 27-30. But the FMC Property is saturated with contaminants, the groundwater that flows under the FMC Property is contaminated, and it flows directly from FMC’s lands into the Portneuf River. Tribes’ SM-Rbr. at 15. Numerous areas on the FMC Property have been specifically identified as sources of contamination, Ex. 25, MWH, *Groundwater Current Conditions Report for the FMC Plant Operable Unit* at 8-4 (2009) (“Groundwater Report”), and a significant portion of the contaminated groundwater on the FMC Property does not flow onto that property from Simplot lands, IRODA at 212 fig.8 (showing groundwater flow paths). Furthermore, a central purpose of the IRODA is to “reduce infiltration of surface water into elemental phosphorus and metals-contaminated soils and subsequent migration of contaminants beyond the FMC OU boundary and onto the Simplot OU, potentially affecting that remedy, and towards the adjoining springs or the Portneuf River.” *Id.* at ii. Blaming Simplot doesn’t change those facts.

Nevertheless, FMC asserts that it is only responsible for small portions of the arsenic and orthophosphate in the Portneuf River. FMC SM-Rbr. at 27-29. But FMC’s witness Rob Hartman testified that “essentially, all the containments at the site start out in the ore. So when we’re doing all of the Eastern Michaud Flats remedial investigation, we were essentially looking

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<sup>14</sup> FMC relies on the capping remedy to assert that arsenic and orthophosphates will not be transported off-site. *Id.* at 28, 30. But at the time of trial, the groundwater remedy in the IRODA was not operational, [SOF ¶¶77], and indeed, Barbara Ritchie testified that FMC might seek a waiver of that requirement. BR Test. at 1682:17-25. Furthermore, even if the groundwater remedy in the IRODA later becomes operational, it could take over a century to remediate the groundwater. [SOF ¶¶62, 77].

for the same containments [sic], particularly off-plant area, and there really is no practical way to separate who contributed what in that context.” RH Test. at 1173:23-1174:4. Mr. Hartman subsequently backtracked, and sought to allocate the contamination between FMC and Simplot. Relying on a table in Appendix E to Simplot’s 2012 Groundwater Annual Report, he testified that although he considered Simplot’s methodology to be inaccurate, in his view FMC’s contribution to orthophosphate in the Portneuf River is less than 1% for orthophosphates and less than 3% for arsenic. *Id.* at 1253:16-1254:25. He provided no basis for that assessment other than the table in the Simplot document; nor did he describe Simplot’s data or methodology (with which he disagreed). As a result, FMC’s reliance on Simplot’s assessment is entitled to no weight. Mr. Hartman was right the first time – “there really is no practical way to separate who contributed what.” *Id.* at 1174:2-4.

FMC relies again on Mr. Hartman’s testimony to assert that the groundwater entering the Portneuf River now meets drinking water standards, and that the arsenic in water there “is now below the 10 ppb MCL, which means FMC’s allocable concentration is now much less than 2 parts per billion.” FMC SM-Rbr. at 28 (citing RH Test. at 1254-57). But Mr. Hartman actually testified that “FMC’s samples from Batiste Springs in 2013 were all below the drinking water standard of ten parts per million.” RH Test. at 1256:7-10. By comparison, the maximum contamination level for arsenic set by EPA is 10 parts per *billion*. IRODA at 25 (identifying MCL for arsenic as 10 ug/l, which is ten (10) parts per billion in water); *see* Terrie K. Boguski, Ctr. for Hazardous Substance Research, *Understanding Units of Measurement 1*, available at [https://cfpub.epa.gov/ncer\\_abstracts/index.cfm/fuseaction/display.files/fileID/14285](https://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.files/fileID/14285) (1 ppb = 1 ug/L)); Ex. 44, Trial Tr., Vol. VI, Nicholas Gudka, Test. (“NG Test.”) at 1438:3-5 (confirming

that the MCL for arsenic is 10 ppb). Accordingly, his testimony on that issue is entitled to no weight.

FMC further contends that there is no evidence of how individuals would be exposed to and harmed by the arsenic and orthophosphates on the FMC Property. FMC SM-Rbr. at 28-30. There is an abundance of that evidence. The groundwater north of Highway 30 and Interstate 86 is heavily contaminated and dangerous to health. Groundwater Report at 8-6. FMC asserts that “[t]here are no drinking water wells downgradient from the FMC Site, and therefore no exposure pathway for individuals to be exposed to drinking that water.” FMC SM-Rbr. at 28. But FMC cannot control where drinking water wells are drilled on the Reservation other than on its own property. Nor does FMC protect water quality on the Reservation, which is a tribal responsibility. [SOF ¶23]; Ex. 7, Trial Tr., Vol. IV, Test. of Nathan Small (“NS Test.”) at 915:16-917:23 (describing tribal laws protecting Reservation waters and governing well construction).

FMC also asserts that there is no evidence of arsenic contamination downstream, FMC SM-Rbr. at 28, but elevated arsenic concentrations were detected in sampling of the Lower Portneuf at sample location LP10. Ex. 50, Superfund Tech’l Ass. & Resp. Team Reg. 10, *Lower Portneuf River Preliminary Assessment/Site Inspection* at 6-5, 7-2 (2005) (L10 sample point is “downstream of the intersection of a groundwater plume associated with the Superfund sites and the river”). And FMC witness Nicholas Gudka testified that arsenic levels at that point were thirty-five (35) ppb, and then decreased as the arsenic goes downstream from Batiste Springs to a level below the MCL for arsenic. NG Test. at 1440:5-1441:5. In short, the arsenic from the FMC Property not only contaminates the Portneuf River, it relies on the Portneuf River to dilute the contamination.

“Orthophosphate is identified as the COC [contaminant of concern] for ecological receptors in the aquatic environment of the Portneuf River.” IRODA at 93. FMC points to other sources of orthophosphates as the culprit, but IDEQ estimated that in 2001, 36 to 56 percent of the phosphorus load at transect T-2 comes from the EMF site, while at T-4 “as much as 80 percent of the phosphorus load” comes from the EMF site. Ex. 70, Tech’l Servs. Div., Idaho Dep’t of Env’tl. Quality, *Evaluation of Water Quality Impacts Associated with FMC and Simplot Phosphate Ore Processing*, at 16-17 (2004). Discharges of phosphorus from other sources on the River – a Pocatello waste water treatment and Simplot wastewater application discharge – are minimal compared to total amounts in the River. *Id.* at 15-16. In sum, decreases in phosphorus concentration are due to increased total stream flow, not decreases in total phosphorus content. *Id.* at 15.

FMC asserts that there is no evidence of ecological harm to the Fort Hall Bottoms attributable to orthophosphates from FMC’s Property, but that is not correct either. The phosphorus and orthophosphates released from the FMC Property have had a serious and substantial impact on water quality, aquatic animals, fish, and aquatic plants in the Portneuf River, the Fort Hall Bottoms, and the American Falls Reservoir by reducing oxygen levels in the river, which puts ecological receptors at risk, and by causing excessive algae growth that degrades water quality and aquatic habitat. [SOF ¶¶56, 58-60]. The phosphorus and orthophosphate that contaminate the Portneuf River and the Fort Hall Bottoms also directly affect tribal welfare by exposing persons who swim, bathe, or ingest the river waters to the contamination, by bioaccumulating in fish, animals, and plants that rely on those waters, Tribes’



SM-Rbr at 12-17; Tribes' SBr. at 19-22; [SOF ¶¶54-60]; and by having a destructive impact on subsistence, cultural, and religious uses of the Fort Hall Bottoms.<sup>15</sup>

**C. Radiological Contaminants On The FMC Property Threaten Tribal Health And Welfare.**

FMC asserts that there is “no evidence of how soil containing radiological constituents will be transported offsite,” and that only speculation connects the radioactive contaminants from soil on the FMC Property to harm to the Tribes and tribal members. FMC SM-Rbr. at 24. That is not correct.<sup>16</sup> Radiological contaminants are transported off the FMC Property by wind: “elevated levels of radionuclides detected in surface soil samples collected in the Off-Plant OU and Simplot OU [decision units] are the result of windblown dust, and to a lesser extent, stack emissions . . . .” Ex. 15, MWH, *Supplemental Surface Soil Radionuclide Investigation Report*

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<sup>15</sup> The Fort Hall Bottoms is an irreplaceable cultural resource. “No place illustrates the varied resources and subsistence strategies of the Shoshone-Bannock people than the Fort Hall Bottoms, located at the Snake and Blackfoot Rivers.” Ex. 71, Tribes' Application for Treatment In Same Manner As A State Under Sections 303(c) & 401 of The Clean Water Act, Att. 18, Letter from Alonzo A. Coby, Chairman, FHBC, to Elin Miller, Reg'l Admin., EPA (June 25, 2007) at 5. For centuries, the Shoshone-Bannock have fished, hunted, and lived in that area. *Id.* Archaeological excavations of the bluff overlooking the Fort Hall Bottoms revealed the Tribe's complex riparian adaptations during the Late Prehistoric (1350-1650), Protohistoric (1650-1805), and Early Historic (1805-1868) periods. *Id.* (citing *Shoshone-Bannock Culture History*, 39-40 (Richard Homer ed.) (1986) (“Homer Report”). Excavation of the site yielded: (1) 14,000 artifacts and 21,000 fragments of food waste spanning these three eras; (2) 21,700 bones, bone fragments, and shells from the site—the majority of which comprised large game such as deer, antelope, and bison remains; and (3) thousands of stone tools and pottery sherds indicating the intensive long term use of the site. *Id.* (citing Homer Report at 72, 161-71). These discoveries show that the Fort Hall Bottoms has long served as the center of Shoshone-Bannock Tribes' life. The harm to that area from FMC's contamination must be evaluated in terms of the singular historical and cultural significance of the area, and is based on facts, [SOF ¶61], not simply the perception of tribal members, as FMC contends, FMC SM-Rbr. at 15-16.

<sup>16</sup> While FMC relies on the capping of the radioactive wastes on the FMC Property to prevent their dispersion by wind, that capping was not in place at the time of trial in this case, [SOF ¶73], and is thus irrelevant here.

for the Off-Plant OU at ES-2 (2010) (“Surface Soil Report”).<sup>17</sup> Radiological contaminants have also dispersed to tribal land. Indeed, EPA earlier determined that cadmium found in homegrown produce in the Off-Plant OU, including on-Reservation lands, presented health risks, Ex. 34, Hanna Assocs., Inc. – Integrated Risk Mgmt., *Comprehensive Letter Report Documenting Potential Human Health Risks for Site COCs in the Off-Plant OU as Addendum to Off-Plant OU Supplemental Surface Soil Radionuclide Investigation Report* at 2 & fig.1 (Apr. 25, 2011) (“HHRA”) (showing area where the 1998 ROD showed that cadmium presented a health risk), and that tribal lands were contaminated with radionuclides that presented an increased cancer risk, *id.* at fig.1 (showing location of area in which the 1998 ROD found radionuclide activities to present an excess cancer risk, and showing location of DUs; Surface Soil Report at 3-10, 3-12 (reporting that DUs 6 and 7 include tribal lands). FMC later reexamined the former finding, and reported that testing at four off-Reservation gardens did not show potential adverse effects from cadmium contamination. Ex. 72, Letter from Barbara E. Ritchie, Assoc. Dir., Env’t, FMC to Kira Lynch, EPA, at 4 (Dec. 8, 2009). But it did not reexamine cadmium concentrations in homegrown produce on the Reservation. FMC also later reached a different result as to cancer risks from radionuclide activity on DU 7. HHRA at 12. But there is no question that radium contaminates both DU 6 and DU 7. *Id.* at tbl.7a (DU 6); tbl.8a (DU 7). DU 7 is also contaminated with cadmium at a level that exceeds the comparative value for residential surface soil, *id.* at 6, and presents an elevated cancer risks, though not above levels of concern to EPA,

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<sup>17</sup> In the DU 2 area north of highway 86 and just west of the eastern boundary of the Reservation, *id.* at fig.1-2 (showing location of decision units (“DUs”)), radium-226 and lead-210 both exceeded the residential comparative values, *id.* at 3-4. And to the north and east of the FMC Plant site and upwind from it, on parcel 3 of FMC’s northern properties, there is significant radiological contamination that presents cancer risks exceeding EPA’s acceptable risk range for hypothetical future residents and outdoor workers. Ex. 54, *Supp. HHRA Addendum for the FMC Undeveloped Areas and Northern Properties*, App. D, at 52 (2009). These risks are driven by radium-226 and arsenic. *Id.*

*id.* at tbl.25a, 7 of 8 (showing elevated cancer risks at DU-7 for residents due to inhalation of fugitive dust that contains cadmium). This radioactive contamination increases the risks of harm from radiation, as is confirmed by the linear no threshold hypothesis that EPA uses to evaluate risks from radiation, under which the risks posed by radiation rise in a linear fashion with the dose. Tribes' SM-Rbr at 22.

As we have shown previously, radioactive slag from the FMC Property has impacts off the FMC Property, where it was used in road construction. Tribes' SMBr. at 28-29. Over 100 residents of the Reservation have been exposed to gamma radiation in amounts that exceed background levels. [SOF ¶72]. More slag on the FMC Property will be dispersed by wind during the construction activities necessary to implement the IRODA. KW Test. at 257:9-18. The radioactive contaminants in the slag increase the risks of harm from radiation. Tribes' SM-Rbr at 22. FMC relies on the testimony of Professor Gesell to assert that there are no risks from the slag on the FMC Property, FMC SM-Rbr. at 26, but he disagreed with and did not use the linear no threshold hypothesis, Ex. 51, Trial Tr., Vol. VII, Test. of Thomas Gesell ("TG Test.") at 1755:8-22, 1758:10-23, as shown by his opinion that workers exposed to fugitive dust containing radioactive slag for 600 hours per year would not be exposed to significant risk. Ex. 73, Tom Gesell, Potential Radiation Exposure to Street Operations Staff at 3 (Dec. 8, 2013) (duration of exposure); 5 (risk). FMC also relies on the testimony of Dr. Joseph Alvarez, FMC SM-Rbr. at 26, but his testimony is also inconsistent with the linear no threshold hypothesis, as we have earlier shown, Tribes' SM-Rbr at 22-23. In sum, the slag from the FMC Property emits radiation that threatens human health on Reservation lands off the FMC Property. Tribes' SMBr. at 30-31.<sup>18</sup>

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<sup>18</sup> While FMC again relies on the capping of the radioactive wastes on the FMC Property to prevent harm, FMC SM-Rbr. at 24-25, that capping was not in place at the time of trial in this case, [SOF SHOSHONE-BANNOCK TRIBES' REPLY TO DKT. NO. 73, MEMO. OF FMC CORP. IN RESP. TO MEMO. IN SUPP. OF RECOGNITION OF JURISDICTION UNDER THE SECOND EXCEPTION TO *MONTANA* – 16<sub>151766-1</sub>

**D. The Contamination On The FMC Property Has Off-Site Impacts.**

FMC denies that contaminants on the FMC Property pose any risk to human health or the environment. FMC SM-Rbr. at 30-31. But as shown above, and in our earlier briefs, Tribes' SM-Rbr. at 10-34; Tribes' SMBr. at 12-31, that contention is wrong. In particular, FMC's reliance on Mr. Gudka's testimony to assert that there are no risks to human health from the contaminants on the FMC Property is rejected by the expert testimony of Drs. Orris and Leikin, *id.* at 25-26, who were the only medical doctors to give an opinion on that question, *see id.* at 28. And Mr. Gudka's testimony fails to show otherwise. *Id.* at 13-14 (failure to consider risk from groundwater ingestion); 19 (failure to address any health risks from RCRA Ponds or gas generation at the CERCLA ponds). And FMC's reliance on the testimony of Dr. Linda Hanna to assert that there are no off-site ecological risks from the contamination on the FMC Property fails as earlier shown. *Id.* at 15-17, 23-24.

Finally, FMC asserts that human health studies do not show any impact to human health from the FMC Site, FMC SM-Rbr. at 31-32, but as earlier shown that too is incorrect, Tribes' SM-Rbr. at 28-32.

In conclusion, the Tribes respectfully submit that this Court should recognize and affirm the ruling of the Tribal Appellate Court that the Tribes have civil jurisdiction over FMC under the second *Montana* exception, and recognize and enforce its Final Judgment of May 16, 2014 (Ex. 5) by an appropriate order.

DATED this 20th day of March 2017.

SHOSHONE-BANNOCK TRIBES

*/s/ William F. Bacon*

William F. Bacon, General Counsel

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¶73], and is thus irrelevant here. Finally, even when the cap is in place, it will not stop the waste from emitting radiation. [SOF ¶73].

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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:

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