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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

REPLY MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY ENFORCEMENT FOR FAILURE OF DUE PROCESS

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The Tribal Courts are controlled and supervised by the Business Council, which is the recipient of the money judgment against FMC Corporation ("FMC") issued by the same Tribal Courts the Business Council controls and supervises. Because of that supervision and control, the Court cannot find that there is no "prejudice in the tribal court" or in its "system of governing laws." *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997). There is no question that this "supervision" and "control" exists, because the Business Council describes its authority over the judicial system with those words. Because of that supervision and control, the Court cannot find these courts to be an "impartial tribunal," and the Court cannot enforce the Judgment. *Id.* at 810.

I. *DE NOVO* REVIEW TRULY MEANS *DE NOVO* REVIEW.

The Tribes agree that "FMC's due process claim is reviewed *de novo* by this Court." Dkt. 75, at 3. But the Tribes argue that this *de novo* review is not really *de novo*, but is somehow limited by the standards found in cases where tribal remedies have not been exhausted. *Id.* The Tribes have no authority for this position. The standards for deciding *prospectively* whether a dispute must be exhausted in tribal court are necessarily different from the standards for *retrospectively* deciding whether a dispute that has been through the tribal courts provided due process. While *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), provide the standards for determining whether a case must be exhausted, *Wilson* provides the standards for whether the tribal system furnished due process. 127 F.3d at 811. In setting its standards for reviewing a tribal court judgment, the Ninth Circuit did not in any way refer to exhaustion standards or to *Iowa Mutual* or *National Farmers*. *Wilson*, 127 F.3d at 811. Rather, the Ninth Circuit referred to the comity standards in *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995), and the Restatement (Third) of Foreign Relations Law § 482(1)(a) (1987). *Wilson*, 127 F.3d at 810-11. Those

standards require "an impartial tribunal" and "no showing of prejudice" and no showing that "the judiciary was dominated by" the opposing party.[1] 127 F.3d at 811.

II. THE TRIBAL COURT SYSTEM DOES NOT PROTECT THE DUE PROCESS RIGHTS OF NONMEMBERS.

A. This Tribal Court System Does Not Provide the Fundamental Foundations of Due Process for an Adjudication Against a Non-Member.

FMC is repeating the same concerns expressed by the United States Supreme Court regarding the fairness of a proceeding by a tribal court against a non-member. But the Tribes have provided nothing that would relieve the concerns of a non-member about being subjected to that system. At the same time, the Tribes cannot dispute the validity of these concerns, which include: (a) the Tribes and Tribal Courts are "outside the basic structure of the Constitution." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); (b) "[N]on-members have no part in tribal government – they have no say in the laws and regulations that govern tribal territory." *Id.* at 337; (c) the Tribal Constitution promotes only the welfare of the Tribes and its members, and affords no rights to non-members; (d) "[t]he Bill of Rights does not apply to Indian tribes." *Id.* at 337; (e) there is no federal cause of action against a tribe for violation of the Indian Civil Rights Act of 1968, *Duro v. Reina*, 495 U.S. 676, 693 (1990); (f) the Tribes' sovereign immunity prevents any liability for Tribal government misconduct; (g) the Tribes have a unitary government, with the Business Council holding all of the power of the Tribes; and (h) Tribal law can "be unusually difficult for an outsider to sort

[1] The Tribes say that "FMC bears the burden of demonstrating that the tribal proceedings did not afford due process." Dkt. 75, at 2. FMC had argued that the party seeking enforcement of a judgment must make a *prima facie* case of due process. Dkt. 67-2, at 3. But both sides are wrong on this point, because the Ninth Circuit expressly decided not to decide this question. *Pahlavi*, 58 F.3d at 1409.

out." *Nevada v. Hicks*, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring).

The Tribes' only attempt to relieve non-member's concerns is a 2010 ordinance that was supposed to deal with some of these concerns. Dkt. 75, at 16-17; Judicial Council Ordinance (#LWOR-2010-S-6), Dkt. 38-6, Ex. 14. But that ordinance does nothing to address these concerns because it does nothing to change the constitutional power held by the Business Council.[2] Five years after the Business Council passed this ordinance, it was still true that:

> ***[Tribal court judges] serve at the pleasure of the Fort Hall Business Council and can be removed at their will. That is the reality of the job.***

Dave Archuleta, *Archuleta Perspective on FHBC Candidate Withdrawal*, Sho-Ban News, March 19, 2015 at 4 (emphasis added); Apr. 22, 2015 Aff., Dkt. 38., Ex. 12; Dkt. 67-2, at 7. The Tribes argue that this statement is incorrect. Dkt. 75, at 26. But, in fact, it "is the reality of the job" that the Business Council controls and supervises the members of the judicial system. *First*, the term of a Tribal Court judge is only one (1) year, so the Business Council can remove a judge within a short time by simply doing nothing. LAW & ORDER CODE, Ch. 1, § 3.4. *Second*, the judges relevant to this case apparently held even shorter terms, being paid by the case or on a *pro tem* basis, serving only "once or only sporadically on a part-time basis." Dkt. 38-6, Ex. 13, at 2-3. From this, it appears that the Tribes can appoint a judge for a particular case or perhaps even a particular decision. *Third*, the Tribes admit that the Business Council got rid of Judge Maguire by failing to renew his short term contract in this way. Dkt. 75, at 26 n.21.

But the Business Council provides the best evidence of its constitutional control of the members of the judicial system. In the 2010 ordinance cited by the Tribes, the Business Council

[2] It is also significant that, even though the Tribes assert that there is a Judicial Council Ordinance governing judicial appointments and removals, the Tribes point to no record that any Judicial Council was involved in the appointment or removal of any of the judges in this case.

could not restrain itself from retaining and asserting its total power over the members of the judicial system, using the words "original," "supervisory," and "control" to describe that power:

> H. This section is an alternative to, and cumulative with, the removal of judges by ***the original supervisory control of members of the judicial system by the Business Council***.

Judicial Council Ordinance (# LWOR-2010-S-6), Dkt. 38-6, Ex. 14, at 4 (emphasis added). FMC could not have worded it better. The Business Council's authority over the members of the judicial system is "original" because the Tribal Constitution gives the Business Council the authority to establish and revise the courts at its will. TRIBAL CONST. art. VI, § 1(k); 262128. The Business Council has "supervisory" authority over the members of the judicial system because the Tribal Constitution gives the Business Council the "right to review any action taken by virtue" of the unitary powers it delegates to subordinates. TRIBAL CONST. art. VI, § 1(s), 262129. The Business Council has "control" over the members of the judicial system because it is the unitary branch of Tribal government, with all authority over legislating ordinances, appropriating compensation, and acting as the executive. TRIBAL CONST. arts. III, VI, 262126, 262127-29. This ordinance and the facts of this case show that the "reality of the job" is that tribal court judges "serve at the pleasure of the Fort Hall Business Council and can be removed at their will." Apr. 22, 2015 Aff., Dkt. 38., Ex. 12.

B. The Tribes Cannot Explain Away *Burrell* and *Bird*.

The Tribes have a problem. The Tribes cannot and do not cite to a case enforcing a judgment issued by a tribal court against a non-member when due process concerns have been addressed. The Tribes also cannot cite a case where a court has ever enforced a judgment by a tribal court awarding money from a non-member to the tribal government that organized and supervised the court. The only two reported circuit cases that have addressed these facts appear

to be *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006), and *Bird v. Glacier Elec. Co-op., Inc.*, 255 F.3d 1136 (9th Cir. 2001). Neither of these enforced the tribal court judgment.

In *Burrell*, the Tenth Circuit refused to enforce a tribal court's judgment, based on the close relationship between the tribe and the court. *Burrell*, 456 F.3d at 1173. The Tenth Circuit recognized the rule that "[a]llegations of local bias and tribal court incompetence" are not exceptions to the exhaustion requirement. 456 F.3d at 1168, citing *Iowa Mutual*, 480 U.S. at 19; Dkt. 75, at 11. But the Tenth Circuit then rejected the idea that the *Iowa Mutual* exhaustion rule applies to the comity question of due process:

> We disagree with the district court's conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations. ***The Supreme Court's decisions in Iowa Mutual and National Farmers do not address due process***; rather, they hold that principles of comity require a federal court to give a tribal court the first opportunity to determine its own jurisdiction subject to later review by a federal court . . . .

Burrell, 456 F.3d at 1171 (emphasis added). The Tenth Circuit then ruled that the "local bias" and control that existed in that case did not allow enforcement of the judgment because of the "close relationship between the tribal court, the Pueblo, and the individual tribal officials." 456 F.3d at 1173. *Burrell* demonstrates that *Iowa Mutual* and *National Farmers* do not address due process. "Local bias" remains a defense against enforcement of a judgment under comity,[3] and that "local bias" prevented enforcement of the judgment. And contrary to the Tribes' argument, the Tenth Circuit followed the Ninth Circuit. The Ninth Circuit rule is that comity issues are an

[3] The Tribes distinguish *Burrell* by arguing that the non-members in *Burrell* had no opportunity to present their concerns to the tribal courts. Dkt. 75, at 11. That is not true. In that case, one tribal court judge held two days of evidentiary hearings, and then delayed for four years in issuing a decision. Another judge later issued a one-page ruling. *Burrell*, 456 F.3d at 1173. As in this case, there was a proceeding, just not an impartial proceeding.

exception to the rules against reconsidering issues decided by the tribal court.[4]

Similarly, the Ninth Circuit denied enforcement of a tribal judgment against a non-member in *Bird*. *Bird* involves the question of whether to enforce a tribal court judgment in favor of tribal members against a non-member. For that reason, it does not involve *Burrell*'s heightened level of concern of a tribal government issuing a judgment to itself using its tribal courts. But nevertheless, the Ninth Circuit held that the verdict by a jury of all tribal members against the non-member, with an inappropriate closing argument[5] by the tribal member plaintiffs' attorney, violated due process. *Bird*, 255 F.3d at 1152. Because that due process error offended "fundamental fairness," the Ninth Circuit did not enforce the judgment, and did not need to address the other "alleged systemic deficiencies in the Blackfeet tribal court system." *Bird*, 255 F.3d at 1153, 1138 n.2. The violation of due process in this case is much more acute than in *Bird*, given the inherent prejudice of the Business Council being both a party and the organizer, supervisor and controller of the court system.

C. The Tribes Cannot Defend a Judicial System Under the Control of the Business Council.

The Tribes offer several arguments to try to defend the Tribes' court system. Dkt. 75, at

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[4] "***Unless* the district court finds the tribal court lacked *jurisdiction* *or* *withholds comity* for some other valid reason**, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903-04 (9th Cir. 2002) (emphasis added); *see* Dkt. 75, at 10-11.

[5] The Tribes cite an employment discrimination case, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002), for the proposition that the remedy afforded in *Bird* is available only in "extraordinary cases." Dkt. 75, at 12. But the "extraordinary" remedy referred to in *Bird* and *Hemmings* is the remedy of plain error review, or review absent a contemporaneous objection of counsel misconduct. *Bird*, 255 F.3d at 1148; *Hemmings*, 285 F.3d at 1193-94. There is no implication that the refusal to enforce a tribal court judgment for due process failures should occur only in "extraordinary cases."

19-21. But each of these arguments fails to redress the built-in structural deficiencies.

First, the Tribes argue that, under the Indian Civil Rights Act, 25 U.S.C. § 1301-26, the Tribes can structure their government as they wish. Dkt. 75, at 19. This is true. The Tribes are free to organize their tribal government as they wish. But when the Tribes ask the federal courts to enforce judgments by that governmental form against other citizens of the United States, *Wilson* rightly requires that the federal courts determine if the courts established by that government are from "a system of jurisprudence likely to secure an impartial administration of justice" between members and non-members. *Wilson*, 127 F.3d at 810 n.4.

Second, the Tribes argue that FMC has failed to show that these "institutional features" resulted in a violation of due process. Dkt. 75, at 19-20. But, as shown in Section III herein, FMC has detailed how the biased system led to a parade of failures of fundamental fairness.

Third, the Tribes argue that the Business Council does not have an interest in the Tribes' receipt of $20 million now and $1.5 million per year in perpetuity from FMC.[6] Dkt. 75, at 20. The Tribes argue that these funds would go to LUPC costs related to the Hazardous Waste Management Program. Dkt. 75, at 20. But the Business Council has all power over appropriations and budgets for these funds. TRIBAL CONST. art VI, § 1(g), 1(r), 262128-29. The LUPC has no independent power to tax, budget, or appropriate. TRIBAL CONST. art. VI, § 1(s),

[6] The potential to receive $20 million dollars, plus future annual payments of $1.5 million per year, is clearly enough for the Business Counsel to be considered "interested" in the outcome of this adjudication. *Compare Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 842 (9th Cir. 1997) (finding no interest where adjudicated amounts were more minor). The Business Council also has a substantial interest in establishing its broad view of jurisdiction, which would open up infinitely more ways of collecting money. These incentives would "offer a possible temptation to the average man." *Id.* at 847. Where the entity appointing the tribunal is biased by an interest in the outcome, the bias may be imputed to the appointee. *Schweiker v. McClure*, 456 U.S. 188, 196–97 (1982).

1(g), 1(r). The Business Council has "the right to review any action taken" by the LUPC as a "subordinate board" to the Business Council. TRIBAL CONST. art. VI, § 1(s), 262129. Moreover, through its legislative powers, the Business Council could end the LUPC or change the laws regarding these funds at any time.[7] TRIBAL CONST. art. VI, § 1(k), 262128.

Fourth, the Tribes argue that "the Business Council's budget and appointment authorities" are comparable to Congress's power. Dkt. 75, at 20-21. But that is not even remotely true. Congress, in its sphere, has nothing like the unitary power held by the Business Council. The Constitution divides Congress between the House and the Senate, and Congress is just one of three branches of government, as the Constitution carefully separates legislative, executive, and judicial powers. U.S. CONST. arts. I, II, and III. The Constitution requires that judges be appointed to lifetime terms, limited only by impeachment, a process so difficult that Congress has rarely even attempted it. U.S. CONST. art. II, § 4. The compensation of the judges cannot "be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. In contrast, the Tribal Constitution does not limit the Business Council with any other branch of government, and the Business Council retains "original supervisory control of members of the judicial system." Dkt. 38-6, Ex. 14 at 4. While the Business Council carefully retains ultimate control over the judicial system, the Constitution carefully limits and balances governmental power to ensure an independent judiciary.

III. THE TRIBAL COURT SYSTEM FAILED TO PROVIDE DUE PROCESS.

FMC has detailed how the failures of the system actually resulted in a violation of due

[7] The laws regarding these fees have changed this law no less than five (5) different times in relation to this proceeding. FMC SOF 26-27; 36-37; 40, 42-43, 84; Tribes' SOF 24-28. Some of those ordinances restricted these fees, and others did not.

process for FMC as a non-member. Dkt. 67-2 at 10-18; Dkt. 74, at 7-24; *see* Dkt. 75, at 19-20.

A. The Tribes Hide the Operation of the Judicial System.

The selection and removal of the judges in this case has not been transparent. Dkt. 74, at 7. The Tribes' response to this is that it is no one's business how these judges are selected or removed, writing that "the Law & Order Code, ch. I, § 1, does not require the Business Council to publicly discuss the basis of its judicial appointments." Dkt. 75, at 26 n.21. While the Tribes are free to cloak their judicial appointments in secrecy, that same secrecy deprives this Court of any basis for ruling that this secret system is likely to provide "fundamental fairness."

B. The Business Council Removed the Judge Who Dared to Rule Against Them.

The removal of Judge Maguire after he ruled against the Business Council provides further evidence of the institutional failure of the system. This removal excluded him from consideration of matters on remand. Dkt. 67-2, at 11-13; Dkt. 74, at 8-9. The Appellate Court's May 2012 remand to the Tribal Court for consideration of second *Montana* jurisdiction raised the problem that the Business Council had dismissed Judge Maguire. May 8, 2012 Op., 006165, 006227; June 26, 2012 Op., 006262, at 006323-24. Seven months later, the Appellate Court abruptly switched direction and revoked the remand, and decided to hear the issue of second *Montana* jurisdiction itself. Jan. 14, 2013 Op., 006464, 006481-82. The Tribes have no benign explanation for this, writing that "Judge Maguire's contract to hear the trial level proceedings in this case had ended, and was not renewed because trial level proceedings had ceased." Dkt. 75, at 26 n.21. But the trial level proceedings had not "ceased." The case was remanded in May 2012 to the trial level. The Business Council had simply ensured that Judge Maguire was not, by

previously removing him as Judge.[8] That is not due process.

C. The Tribal Courts Used a Double Standard on the Administrative Record.

The inconsistent treatment of the procedure for the two parties furnishes further proof of the bias of the courts. When making decisions about FMC's requests to add to the record, the Tribal bodies treated this case strictly as an administrative review, limited to the record before the LUPC. Because of this, FMC was prohibited from introducing 113 pages of evidence to the Business Council because this evidence was "untimely and not part of the record in this matter." June 14, 2007 Dec., 003021; *see* July 24, 2006 Dec., at 002787; SOF 74-75. Similarly, when FMC requested to introduce the two-page letter from the Bureau of Indian Affairs ("BIA"), the Appellate Court excluded this letter because its submission was not "timely," and limited the case to the existing record. May 28, 2013 Order, 006626, at 006627.

But the approach changed radically when the Appellate Court found that there was "insufficient evidence" in the record to support second *Montana* jurisdiction. June 26, 2012 Op., 006262, at 006276-77; SOF 60-62; 109. When the Tribes needed to provide evidence outside the record, the Appellate Court apparently forgot the concept of an administrative record, and allowed the Tribes to submit four days of testimony and 254,129 pages of documents to substitute for the missing evidence. Index, PTX0001-2024, 008575-262704; Trial Trans. 007474-7811. The judges' statements explain why FMC was prohibited from adding two pages, but the Tribes were allowed to add an additional 254,129 pages.[9] Dkt. 74, at 13-17. That is,

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[8] The Appellate Court then provided cover for the Business Council, by revoking the remand and hearing the matter itself, thus avoiding the awkward questions regarding what happened to Judge Maguire.

[9] The Tribes argue that "the Court's receipt of evidence was consistent with the Law and Order Code, ch. IV, § 2, which provides for trial de novo by the Court of Appeals." Dkt. 75, at 25. But this does not explain why the Court limited the evidence to the record when FMC

these Judges knew their role was to "be sure to protect the Tribe." 006599.

D. The Appellate Court's Response to the BIA Letter Shows That Court's Bias.

The Appellate Court's tolerance of the Tribes' withholding of the key BIA letter also shows the bias of the court system. FMC argued that the BIA did not approve the 2001 Hazardous Waste Management Act ("HWMA"), which the Tribes alleged as a statutory basis for the fees imposed on FMC. Nov. 27, 2007 FMC Mot., 004041, 004041-46; Dkt. 74, at 11. In 2008, the Tribes privately inquired to the BIA whether FMC was correct, and BIA told the Tribes that it had not approved the HWMA. Apr. 11, 2008 Letter, 006624-25; May 6, 2013 Br., 006610. The Tribes did not submit this evidence, but continued to argue to the Tribal Courts that the BIA had approved the HWMA. Apr. 15, 2008 Hrg. 004305, at 004326. FMC obtained the BIA letter four years later, by means of a FOIA request to the BIA. May 6, 2013 Pre-Hearing Br., 006610, at 006617. FMC immediately provided this letter to the Appellate Court.[10] June 22, 2012 FMC Resp., 006253, 006260-61; May 6, 2013 Br., 006610 at 006614. The Tribes do not defend withholding this key evidence for ***four years***. The Tribes do not explain why they continued to argue BIA's approval ***when the BIA had told the Tribes that it had not approved the HWMA***. The Tribes' only answer to this problem is a meritless procedural distraction.[11]

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requested an addition to the record, but treated the issue as a trial *de novo* when it was the Tribes who needed to add to the record.

[10] The Tribes argue that the Appellate Court was correct in finding that the HWMA was approved, even though the BIA stated it had not been approved. Dkt. 75, at 24; 006626. But the Appellate Court does not deal with the facts of the BIA letter, which explain that the law was not approved because it was still in draft form. 006260-61. BIA's reasoning in the letter itself shows why the Appellate Court was wrong. 006260-61.

[11] The Tribes make the procedural argument that FMC should have acted more quickly after obtaining this document. In other words, although the Tribes had withheld this key document for four years, they would fault FMC for failing to raise its arguments about the document for a matter of weeks after it was finally discovered. This argument is also factually

E. The Appellate Court Followed a Double Standard on Idaho Law.

The court's double standard on the applicable law also shows the bias in the system. The Appellate Court followed Idaho law when it favored the Tribes, and ignored Idaho law when it did not. Dkt. 67-2, at 16; Dkt. 74, at 18. The Tribes do not dispute that the Appellate Court applied Idaho law to award fees against FMC. Dkt. 75, at 23; Feb. 5, 2013 Findings, 006510, at 006525 & 006517-19. The Tribes only dispute whether the first panel's decision to rely on Idaho law was also followed by the second panel of the Appellate Court. But that argument fails, because the second panel also explicitly followed Idaho law on this point.[12]

Having followed Idaho law for one point, the Appellate Court ignored the key Idaho law on the point that undermined the Tribes' entire case. The Tribes do not dispute that Idaho law holds that a contract indefinite as to term is terminable at will by either party upon reasonable notice. July 15, 2010 FMC Br. 004873, at 004934. Nor do the Tribes dispute that Idaho contract law does not generally allow perpetual contracts that have no ending. 004873, at 004935, *Barton v. State*, 659 P.2d 92, 94 (1983). The Tribes also do not dispute that this law would bar the judgment against FMC, because the alleged contract had no duration term and FMC gave notice of termination. SOF 49. There is no genuine dispute that the Appellate Court applied Idaho law

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wrong, since FMC raised the entire issue to the Appellate Court on June 22, 2012, four days ***before*** the Appellate Court issued its Amended Opinion. June 22, 2012 FMC Br., 006253, at 006255-57; June 26, 2012 Am. Op., 006262.

[12] On April 15, 2014, the Tribes argued to the second panel that the Tribes had a right to attorney fees because they were "previously awarded attorneys' fees under the *Montana* first exception by this Court." Apr. 25, 2014 Mem. Fees, 008277 at 008278. The second panel relied on the first panel's finding that there was such a right. Apr. 15, 2014 Trans. 008210. The second panel also relied on Idaho law for its finding of attorney fees on the second *Montana* exception. 008211; *see* 008777. The Appellate Court then issued a judgment against FMC for these attorneys' fees based on this reliance on Idaho law. May 16, 2014 Judg. 008555.

when it favored the Tribes, and disregarded Idaho law when it favored FMC.

F. The First Panel Explained the Tribal Courts' Double Standards.

The statements of Judges Gabourie and Pearson at the "legal education seminar" provide express evidence of the bias of the system. Those statements show that they saw themselves as advocates for the Tribes, rather than impartial decision-makers. Dkt. 74, at 13-17. The Tribes respond to this problem with a procedural argument, asserting that FMC delayed and used a "hip pocket approach" in not challenging the inappropriate comments by these judges until after the Tribal Appellate Court had issued its May 2012 Op. Dkt. 75, at 7, 8 n.8. But this delay argument ignores the fact that FMC was prevented from obtaining the recording of this seminar.

Native American Law Professor Angelique EagleWoman of the University of Idaho College of Law organized the March 23, 2012, seminar as a public event. Dkt. 10, ¶¶ 287-88. But when FMC requested the videotape a few weeks after the seminar, on May 18, 2012, someone opposed this simple request for the recording of a public seminar. Dkt. 10, ¶¶ 299, 300. This opposition forced FMC to file a civil action under the Idaho Public Records Act against the University of Idaho to seek the release of the videotape. Dkt. 10, ¶ 302; Dkt. 12, ¶ 302. In January 2013, an Idaho District Court ordered the University of Idaho to release the videotape. Dkt. 10, ¶ 303; Dkt. 12, ¶ 303. The Tribes fail to provide any explanation for who else would have any interest in preventing the release of the recording of a public seminar. *See* Dkt. 66-1, at 15. The Tribes can hardly build a procedural delay argument based on the time FMC spent fighting through someone's diligent effort to keep this public seminar concealed.

G. The Tribal Court System Does Not Meet the *Wilson* Standards for Due Process.

The Tribes defend the Tribal Courts by citing *Bird* to hold that FMC must show

"outrageous departures from our notions of 'civilized jurisprudence.'" Dkt. 75, at 27, citing *Bird*, 255 F.3d at 1142. But that is not what *Bird* held. *Bird* held that where tribal court procedures parallel those found in Anglo-Saxon society, federal constitutional standards are followed to determine whether the challenged procedure violates due process. *Bird*, 255 F.3d at 1143, citing *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988). The Ninth Circuit ruled that in this situation, "our conception of due process for these tribal courts should be similar to that for federal and state courts," and there is no reason to depart from the standard of "traditional due process values requiring fundamental fairness." *Bird*, 255 F.3d at 1144. Rather than anything short of "outrageous" behavior, fundamental fairness is the standard.

The Tribes' system cannot meet this standard. If a state used this system, it would be struck down as violating due process. There is no way for this Court to call this Tribal system "a system of jurisprudence likely to secure an impartial administration of justice" between the government that appointed the system's decision-makers and the non-member that the government wants money from. *Wilson*, 127 F.3d at 810 n.4.

IV. IT WAS ERROR TO BAR DISCOVERY ON DUE PROCESS.

The Tenth Circuit has explicitly rejected the ruling of this Court barring litigation of the due process failures of the tribal courts. Dkt. 43; Dkt. 67-2, at 19-23; Dkt. 74, at 24-26. The Tribes now argue that FMC is barred from raising this issue, because FMC should have moved for reconsideration of this Court's order. Dkt. 75, at 1. But this argument fails, as "[n]either the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider." *Wilderness Soc'y v. U.S. Forest Serv.*, 2009 WL 1033711, at *1 (D. Idaho Apr. 16, 2009). The Tribes cannot establish that the rules require parties to file a motion to reconsider, when such a motion is not contemplated by those rules. *See* FED. R. EVID. 103(b) (evidentiary issues are

preserved once raised and ruled upon, and need not be raised again). And the Tribes offer no authority for such a requirement. On the other hand, this question of whether a non-member must argue with the tribal courts that their system is unfair is an integral part of these dispositive motions, which must be raised, or it could be waived.[13] But there is no avenue to procedurally sidestep the fact that the Ninth and Tenth Circuits disagree with this Court's application of the exhaustion rule to *Wilson's* comity analysis.

The Tribes' procedural argument also misses the substantive point. The Tribes argue that FMC should have somehow engaged in the futile process of arguing with the Tribal Court judges that they were part of a flawed system. But nothing requires a party to ask a court to take actions that the court plainly has no authority for. The Tribal Courts could do nothing about the fact that tribes and tribal courts are "outside the basic structure of the Constitution." *Plains Commerce*, 554 U.S. at 337. Nor could the Tribal Courts change the fact that "nonmembers have no part in tribal government." 554 U.S. at 337. The Tribal Courts could not revise the Tribal Constitution to require the Tribes to promote the welfare of non-members. The Tribal Courts could not change the unitary nature of the Business Council's power. The Tribal Courts could not have given themselves tenured appointments. The Tribal Courts could not do anything about these systemic failures. Asking them to do so would have been futile.

On the other hand, *Wilson* requires that the federal district court address these systemic failures. Under *Wilson*, the federal courts should deny enforcement of a judgment if it did not come from "a system of jurisprudence likely to secure an impartial administration of justice"

[13] "It is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) (internal quotation marks omitted)).

between insiders and outsiders. 127 F.3d at 810 n.4. If the Tribes want their judgments against non-members to be recognized, the system must be structured to be impartial for all.

V. *WILSON*'S DISCRETIONARY FACTORS SHOULD BAR ENFORCEMENT.

FMC has argued that a federal court may decline to enforce a tribal court judgment on equitable grounds, including (a) if "the judgment conflicts with another final judgment that is entitled to recognition," or (b) if recognition of the judgment "is against the public policy of the United States." *Wilson*, 127 F.3d at 810. In response to the factor regarding conflicts with the EPA's judgments, the Tribes argue that "all the Judgment requires FMC to do is pay a permit fee"[14] and that it does not "interfere with FMC's obligations under the Consent Decree." Dkt. 75, at 28. In response to the factor regarding public policy, the Tribes argue the fees "would not interfere with FMC's obligations" to the EPA "because it does not require FMC to take any actions contrary to EPA's remediation scheme." *Id.* In other words, the payment of a fee does nothing to change any environmental condition. But if it does nothing to improve the environmental condition, there is no purpose to the fee, and there can be no first or second *Montana* jurisdiction. Dkt. 67-3, at 12; Dkt. 67-4, at 33-35; Dkt. 73, at 7-9, 35. If, on the other hand, it does change environmental conditions, it violates the EPA's discretion and public policy, and contravenes the discretionary factors. Either way, this Court cannot enforce this Judgment.

[14] The Tribes argue that the permit fees would be used to pay costs of administering the HWMP. In itself, that does not change any environmental condition of the FMC site. But even assuming the HWMP used the funds to change the conditions at the site, that program would likely advocate for removal of the phosphorus wastes, as it has done in the past. This would violate the EPA's decisions that such a course would worsen, rather than improve, the environmental conditions at the site.

VI. THE PENAL JUDGMENT RULE BARS ENFORCEMENT OF THE JUDGMENT.

The permit fee required by the Judgment is a classic penal judgment, accruing to the Tribal government and enforcing the Tribes' planning and zoning and waste regulations. Apr. 30, 2015 Op., 008538, at 008538-39. Because the funds go to the public, rather than private individuals, the judgment is a penal judgment,[15] and cannot be enforced. *State of Wis. v Pelican Ins. Co.*, 127 U.S. 265, 290, 299 (1888); Dkt. 74, at 29-33. In response, the Tribes scramble to re-characterize these fees, but that does not change the facts. The $1.5 million annual fee is an arbitrary value. There is no evidence of any damage that the $1.5 million fee would reimburse.

To address this problem, the Tribes now assert that the fee is a rental fee that "requires FMC to compensate the Tribes for storing waste on the Reservation." Dkt. 75, at 30. But the Tribes have nothing for FMC to rent. FMC holds fee simple title to the site. The Tribes have no ownership of this land. And a tribe cannot justify regulation of non-member fee land "by reference to its power to superintend tribal land, . . . because non-Indian fee parcels have ceased to be tribal land." *Plains Commerce*, 554 U.S. at 336. FMC is not required to rent its own land.

VII. ARTICLE III BARS ENFORCEMENT OF THE JUDGMENT.

The Tribes argue that Article III does not bar enforcement of this Judgment because comity considers judgments from separate sovereigns. Dkt. 75, at 33. It is true that the comity standards of *Wilson* govern the enforcement of this Judgment. 127 F.3d at 810. But the Ninth Circuit in *Wilson* also expressed that Indian tribes are "dependent domestic nations." *Id.*

[15] The Tribes also meander from the analysis by arguing what a criminal punishment is, relying on a Vietnam-era draft evasion case. Dkt. 75, at 31-32, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). But penal judgments are defined by the cases dealing with the penal judgment rule, and not by cases defining what a crime is. Dkt. 74, at 29-33.

As such, they have implicitly been divested of sovereignty "involving the relations between an Indian tribe and nonmembers of the tribe." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). As a result of that dependent status, relations between an Indian tribe and nonmembers of the tribe must meet the standards of Article III, requiring an Article III court for all issues, and not just jurisdiction. Moreover, members of Indian tribes remain United States citizens, with the same rights and privileges and duties as every other United States citizen. As United States citizens, it is fundamentally inconsistent with the Constitution and Article III that they be possessed of their own judicial power outside of Article III protections that they can use as a club against other United States citizens. *Montana v. United States*, 450 U.S. 544, 564 (1980).

VIII. CONCLUSION

Based on the facts, this Court cannot find that this Tribal system is "a system of jurisprudence likely to secure an impartial administration of justice" between the government that appointed the decision-makers and the non-member that government wanted money from. *Wilson*, 127 F.3d at 810 n.4. The Court must deny enforcement of this Judgment.

DATED this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March, 2017, I filed the foregoing **REPLY MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY ENFORCEMENT FOR FAILURE OF DUE PROCESS** 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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