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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 RECOGNITION OF JURISDICTION UNDER THE SECOND EXCEPTION TO *MONTANA*

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The case law forecloses the Tribes' attempt to establish jurisdiction over FMC in this matter. While the Tribes' courts may have been anxious to overrule Supreme Court and Ninth Circuit law, this Court does not have that luxury. Moreover, even if they could prove the legal elements required in the cases, the Tribes' raw demand for cash does nothing to change any environmental condition at the FMC Site, and cannot be said to be necessary to avert any environmental harm. Finally, the Tribes continue to offer little but descriptions of some of the substances at the FMC Site and statements out of context, without proving the full story of a pathway for substances to leave the Site, be transported to other locations, and cause exposures at levels sufficient to cause harm. That is clearly not sufficient to prove jurisdiction under the second *Montana* exception.

I. *BRENDALE* AND *PLAINS COMMERCE BANK* DO NOT SUPPORT THE TRIBES' DE MINIMIS THREAT STANDARD.

To establish jurisdiction over FMC's conduct on its fee owned land under the second *Montana* exception, the Tribes have the burden to prove that FMC's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," and thus "imperil[s] the subsistence or welfare" of the tribe. *Montana v. United States*, 450 U.S. 544, 566 (1980). The *Montana* standard requires evidence that the "subsistence or welfare" of "the tribe" as a whole has been "imperil[ed]." *Id.*

The Tribes attempt to rewrite U.S. Supreme Court precedent established in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008), by removing the "catastrophic" standard and lowering the bar to a *de minimis* threat, or even to lower the standard to the mere perception that a hazardous substance may someday be released. The Tribes'

proposed re-write is wrong. Under *Plains Commerce Bank*, the second *Montana* exception must "do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341.

The Tribes also contend that this Court can accept evidence that is neither statistical nor scientific. But they do not have any evidence that rises to the level of *Plains Commerce Bank* and *Brendale*. As discussed in FMC's Response Brief on this issue (Dkt. 73 at 2-4), the Tribes' non-zero risk legal standard is error. *Brendale* does not allow a tribe to obtain jurisdiction based on unsubstantiated speculation. Even an "adverse effect" is insufficient. Under *Brendale*, a tribe's protectable interest can only be triggered by impacts that are "demonstrably serious":

> But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be *demonstrably serious* and must imperil the political integrity, the economic security, or the health and welfare of the tribe. This standard will sufficiently protect Indian tribes while at the same time *avoiding undue interference* with state sovereignty and *providing the certainty* needed by property owners.

Brendale, 492 U.S. at 431 (emphasis added).

The clearest demonstration of the chasm between the Tribes' legal arguments and the actual case law is found in *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013). *Evans* is particularly relevant here because it deals with the same tribe, the same geographical area, and the same "character" of the area as this case. The Ninth Circuit's decision in *Evans* consists primarily of two parts:

First, the Ninth Circuit says that if a tribe is going to rely on *Brendale*, the questions are (a) if there is an "arguable similarity" between the area at issue and the closed area in *Brendale*, and (b) whether the intended use of the fee land would place the character of the area at issue "in jeopardy." *Evans*, 736 F.3d at 1304. The Tribes' assertion of jurisdiction in *Evans* failed

because (a) the area around the Evans house is "dramatically different" and does "not in any way resemble" the closed area in *Brendale*, and (b) the proposed use would not put the character of the area in jeopardy because the area had already seen "comparable development." *Id.* at 1305. The Ninth Circuit also rejected the concept of tribal zoning power over fee land in an open area, saying: "The Supreme Court's rejection of tribal zoning power over fee land in the open area reflects the rule that tribes generally lack authority to regulate nonmember activity on non-Indian fee land." 736 F.3d at 1305 n.7.

The Ninth Circuit's analysis provides no hope for the Tribes here. The Tribal Appellate Court purported to rely on *Brendale*, based on its discussion of a "closed area," and yet ignored the Ninth Circuit's simple two-question approach to follow *Brendale*. Instead, the Appellate Court twisted *Brendale* to a result completely different than the Ninth Circuit's, allowing jurisdiction based on any non-zero risk. Because this arises under the Tribes' zoning ordinance, this analysis should end the assertion that the Tribes have zoning power over this open area.[1]

[1] Moreover, although the Tribes persist in these arguments, the Ninth Circuit has previously told these Tribes that the observation "that the percentage of non-Indian fee land in the Fort Hall Reservation is relatively low does not change this analysis." *Evans*, 736 F.3d at 1305. The closed area in *Brendale* had no permanent residents and access to the area was restricted to Tribal members and permit holders. *Brendale*, 492 U.S. at 438-39; *Evans*, 736 F.3d at 1304. The inquiry focuses on the "character" of the area, not land ownership. 736 F.3d at 1305. Based on that analysis, the Ninth Circuit found this area to be an "open area" that "bears no resemblance" to the closed area in *Brendale*.

The Tribes criticize the census-based testimony of FMC's expert (Dkt. 77 at 6 n.8), but they fail to provide any explanation for why the Census Bureau data that he relied upon was not complete and accurate. 008056. Using this census data, Warren Glimpse analyzed the census blocks immediately adjacent to the FMC property and concluded that the area is sparsely populated and of that limited population, the vast majority is non-Native American. 008055; 343083 (map showing census block-level data). These highly specific, factual statements and expert opinions were not challenged or rebutted by the Tribes before the LUPC in April 2006 or at the 2014 evidentiary hearing. FMC further supported its demographic evidence with the testimony of Doug Glascock, the Power County Assessor, who testified that the lands

Second, if the analysis extends beyond this zoning authority to more general reliance on the second *Montana* standard of "threatens or has some direct effect," the Ninth Circuit also addressed this. *Evans*, 736 F.3d at 1305. The Ninth Circuit relied on three points to analyze that question, which required: (1) that there be a connection from the concern to harm, and not merely "speculation" or "generalized concern" that a condition might cause harm; (2) that the non-member conduct has "meaningfully exacerbated" an existing condition; and (3) that the proposed Tribal regulation "is necessary to avert catastrophe." 736 F.3d at 1306 & n.8.

But the Appellate Court again ignored the Ninth Circuit's inconvenient *Evans* decision. Instead of following these three standards, the Appellate Court found that if there were *any* hazardous substances present on the FMC Property, and that if the risk of escape is *anything above zero*, the second *Montana* exception is met. The Appellate Court did not draw any non-speculative or probable connection between the source and any actual or probable harm. The Appellate Court did not make findings that the FMC Site had "meaningfully exacerbated" any existing condition. The Appellate Court did not find that the proposed tribal fee was "necessary to avert catastrophe." *Evans*, 736 F.3d at 1306 & n.8. This is not the law as established by *Montana* and applied in *Evans*. The Supreme Court's decisions in *Plains Commerce* and *Brendale*, and the Ninth Circuit's decision in *Evans* are contrary to the Appellate Court's non-zero risk standard, with the result that this Court cannot enforce the Judgment entered by the Tribal Appellate Court.

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surrounding the FMC property are predominantly owned by non-Tribal members. 007838-39. South of the FMC property is undeveloped Tribal land. 343052. Significant acreage north of the FMC property is owned by the City of Pocatello, including lands occupied by the Pocatello Municipal Airport. *Id.*

II. PAYMENT OF A FEE DOES NOT PROTECT THE TRIBES.

The Tribes argue that enforcing Tribal laws is necessary for protection of the Tribes' lands, waters, and natural resources. But they ignore the fact that the permit at issue, the Special Use Permit issued on April 25, 2006, contains *zero* environmental requirements. It contains one requirement only – the payment of a cash fee. Likewise, the Judgment that the Tribes ask this Court to recognize has only one requirement – the payment of a cash fee. If environmental protection were truly a concern, the permit would have imposed some kind of environmental-related requirements. But the Tribes provided none. They acknowledge this in their response to Dkt. 67-2, FMC's Motion to Deny Enforcement due to Lack of Due Process. In that brief, they state: "Nor would FMC's compliance with the Judgment conflict with its obligations under these administrative actions because *all the Judgment requires FMC to do is pay a permit fee*." Dkt. 75 at 28 (emphasis added). There is no "regulation" of FMC's waste managing activities. Dkt. 77 at 9. Requiring payment of cash is not the same as regulating hazardous waste.

As *Evans* confirmed, once tribal lands are converted to fee status, the tribe loses plenary jurisdiction over them. *Evans*, 736 F.3d at 1306. If the purpose of the second *Montana* exception is to provide a tribe with the ability to protect itself from noxious uses of that fee land that are so severe that they threaten tribal welfare or security, then it must be incumbent on the tribe to demonstrate the intended benefits of its proposed regulation. Nowhere have the Tribes shown the manner by which it seeks to "vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land, within the limits set forth in our cases." *Plains Commerce Bank*, 554 U.S. at 336-37. Second *Montana* requires that the proposed tribal regulation do something to improve the alleged health impact. The Ninth Circuit requires that the proposed regulation must be "necessary to avert

catastrophe." *Evans*, 736 F.3d at 1306 n.8. The Tribes' perpetual fee payment fails to do anything to address environmental conditions or requirements.[2]

Given EPA's extensive role in overseeing the environmental conditions at the FMC site, there is no plausible scenario for such a catastrophe to occur.[3] Moreover, given EPA's extensive requirements to protect the environment at the Site, the Tribes would have to prove some set of facts under which the Tribes' differing requirements were "necessary to avert [a] catastrophe" that would occur under EPA's requirements. The Tribes have not even attempted this level of

[2] In their due process response brief, the Tribes point to the RCRA Consent Decree and contend that they are protecting Tribal members' health and Reservation resources by ensuring that FMC obtain Tribal permits required by that Consent Decree. Dkt. 75 at 28. But they continue to misread the RCRA Consent Decree. Section 8 of the RCRA Consent Decree states: "***Where*** any portion of the Work requires a federal, state, or tribal permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." 004655 (emphasis added). Section 8 is clearly written in the conditional. It imposes an obligation to obtain permits only "***[w]here*** any portion of the Work" requires one. 004655 (emphasis added). The RCRA Consent Decree does not make a determination as to whether a Tribal permit is required. Like other parts of the Tribes' argument, this argument prejudges the outcome of this case because there would have to be a jurisdictional finding before a Tribal permit would be "required." Also, the permit provision of the RCRA Consent Decree applies only to RCRA Consent Decree "Work" which has been completed and does not in any way related to the Tribes' claimed $1.5 million permit fee. Moreover, the Ninth Circuit has ruled that FMC's obligation is limited to the interpretation of the United States as the other party to the Consent Decree. *United States v. FMC Corp.*, 531 F.3d 813 824 n.6 (9th Cir. 2008). As before "the United States has remained unwilling to support the Tribes' cause" in relation to the Tribes' demand for this permit. *Id; See* 001934. If the United States has not required such permits, the Tribes have no right to do so. It remains the Tribes' burden to demonstrate that it has jurisdiction to enforce Tribal laws against FMC. *Plains Commerce Bank*, 554 U.S. at 329.

[3] The oft-repeated assertion in the Tribes' briefs that EPA's remedy has not been constructed underscores the Tribes' intentions. For this reason, it is both relevant and necessary to fix any misstatement about remedy construction by admitting the declaration of Maureen L Mitchell, Dkt. 67-5.

proof. The bottom line is that there is no connection between the cash required for a permit fee the Tribes seek and the reduction of any risk that a catastrophic event would occur.[4]

III. REGULATION OF NON-MEMBERS IS INCONSISTENT WITH THE CONCEPT OF SELF-GOVERNMENT.

The Tribes argue that regulation of FMC is necessary to protect their right to self-government, but self-government does not include the right to regulate non-members who are outsiders to that government. In contrast to regulation of tribal members, a tribe's efforts to regulate a non-member on fee land are "presumptively invalid." *Evans*, 736 F.3d at 1303. Self-government is not implicated here, because FMC is not a Tribal member. Tribal self-government centers on lands held by the tribe and on tribal members within its reservation. *Plains Commerce Bank*, 554 U.S. at 327. FMC's conduct poses no threat to Tribal self-government. In this case, from 1949 through 2001 FMC conducted industrial activities on its fee land located largely within but also outside the Fort Hall Reservation. For over a half-century, Tribal self-government continued without interference from FMC's activities. Accordingly, there is no basis for the claim that FMC's conduct can be called so severe as to "fairly be called catastrophic for tribal self-government." *Evans*, 736 F.3d at 1306.

[4] The Tribes argue that the fee would pay the costs of a Hazardous Waste Management Program. Dkt. 75 at 28. Apparently, the Tribes hope that the Court will speculate that a well-funded Hazardous Waste Management Program would mandate changes to EPA's environmental remedies, and that those changes would somehow avert a "catastrophe." *Evans*, 736 F.3d at 1306. But this approach fails. First, it would be complete "speculation" to make such assumptions. *Id.* at 1306 n.8. Second, such an approach would allow requirements that contradict EPA authority. Dkt. 67-2, at 24-25; Dkt. 74 at 26-27.

IV. THERE IS NO THREAT TO THE TRIBES FROM THE WASTES LOCATED AT THE FMC SITE.

The Tribes' arguments about alleged "threats" posed by the wastes at the FMC site invite the Court to rely upon the same "generalized concerns" and "speculation" that the Ninth Circuit rejected in *Evans.* 736 F.3d 1306 n.8. The Tribes' arguments that the waste located on the FMC Site "threatens the Tribes and their members" fail to address the critical elements of the risk assessment process – pathway and exposure. Dkt. 77 at 10. These risk assessment components are explored more extensively in FMC's Memorandum in Response to the Tribes' Motion for Recognition of Jurisdiction under the Second Exception of *Montana*, Dkt. 73 at 17-35, which is incorporated by reference. Another fatal flaw is their failure to address and accurately present the actual sources and levels of contamination released from the FMC site and from other sources contributing to the Portneuf River and other off-site areas. While the Tribal Appellate Court found the Tribes' evidence to be sufficient under its *de minimis* or "non-zero" risk standard, it does not meet the Ninth Circuit's standards in *Evans*, which required: (1) that there be a connection from the concern to harm, and not merely "speculation" or "generalized concern" that a condition might cause harm; (2) that the non-member conduct has "meaningfully exacerbated" an existing problem; and (3) that the proposed Tribal regulation "is necessary to avert catastrophe." 736 F.3d at 1306 & n.8.

The Tribes' errors appear in their discussion of the following media and constituents: (1) elemental phosphorus on the soil; (2) groundwater contamination (phosphorus, orthophosphates, arsenic, nickel and vanadium; (3) phosphine gas; (4) gamma emissions from slag; and (5) fluoride in off-site plants. These are identified in the sections below.

A. Elemental Phosphorus in Soil Poses No Threat to the Tribes.

The Tribes' assertions regarding elemental phosphorus in soil are incorrect.

First, as in their initial Memorandum on the second *Montana* exception, the Tribes misstate the qualities of elemental phosphorus in soil. Dkt. 65-1 at 19. It is ***not*** mobile. The Tribes cite the IRODA for the proposition that phosphorus migrates horizontally, but in fact that page of the IRODA states that "elemental phosphorus has ***not*** been detected downgradient of monitoring wells" of the former elemental phosphorus production area. 329034 (emphasis added). To put this in laymen's terms, the elemental phosphorus at depth in the soils in the FMC Operable Unit is only located in discrete areas directly underneath the former furnace that, when historically operated at high temperatures, caused the liquid state elemental phosphorus to move downwards to cooler zones where it solidified and remains in place.

Second, while elemental phosphorus poses risks to human health, orthophosphates do not, except at extremely high concentrations not present at the FMC site. 329040. Accordingly, in the Portneuf River, orthophosphates, 95% of which originate from Simplot, are a risk to ecological receptors – but not to humans. 329063.

Lastly, contrary to the Tribes' claims, phosphine generation from elemental phosphorus in soils and the RCRA ponds does not create a human health risk on or off the FMC Property. The IRODA states, "Studies from the FMC OU indicate that phosphine is not present in ambient air above levels that cause a health concern. In 2010, EPA directed FMC to investigate the RCRA-regulated ponds and CERCLA areas containing elemental phosphorus processing waste to evaluate the concentrations of phosphine and other gases in ambient air and in the soil column." 329114. These investigations of soil gas samples in areas near the former furnace building, where the highest elemental phosphorus concentrations are present, showed readings

all under 1 ppm. *Id.* "All phosphine gas measurements within soil gas were below the permissible exposure limit." *Id.* The IRODA concludes: "The overall conclusion of the Gas Assessment Report (MWH, 2011) is that phosphine generation does not pose a risk to human health or the environment in the FMC OU. Regardless of those findings, to ensure human health and environmental protection, long-term phosphine monitoring is part of the CERCLA selected remedy." *Id.* In sum, elemental phosphorus on the FMC Property, whether in soils or in the RCRA or CERCLA ponds, poses no human health risk on or off-site.

B. Groundwater Contamination at the FMC Site Poses No Risks to the Health and Welfare of the Tribes or its Members.

The Tribes' allegations regarding groundwater "threats" to Tribal health and welfare are replete with misstatements and mischaracterizations.

First, a key fact confirmed in the EPA-approved *Groundwater Current Conditions Report* (290964) and restated by FMC expert witness Nicholas Gudka is that no FMC on-site related constituents are impacting groundwater off-site (007979). The Report states, "There is no migration of FMC site-related constituents in groundwater beyond FMC- (and Simplot-) owned properties." 290964. Furthermore, there is no pathway or exposure route to humans since "no domestic or public water supply wells are downgradient of site- impacted groundwater." 290964. The Tribes' characterizations of the 1995 Ecological Risk Assessment ("EMF-ERA") and the Lower Portneuf River Preliminary Assessment Site Inspection ("Lower Portneuf RA"), which they attempt to tie to groundwater discharges from the Eastern Michaud Flats Site ("EMF Site") are also seriously flawed.

Some, but not all, of the obvious errors the Tribes make in attempting to characterize off-site groundwater impacts are the following:

- Barbara Ritchie did not testify that "groundwater that flows from the FMC Property into the Portneuf River" contains arsenic concentrations of 37 mg/l. Dkt. 77 at 13. She testified that arsenic levels discharging to the Portneuf River has been as high as 37 mg/l in 2007. Not all of that is from the FMC Property. In fact, according to Simplot's calculations, only approximately 5 percent of the arsenic mass loading to the Portneuf is attributable to FMC, representing approximately 2 parts per billion of the 37 mg/l. 007889; 007982-8.
- Tribal expert witness Dr. Leikin did not testify that "contamination in the water from the FMC Property poses dangers from drinking and bathing, aerosolizing, bioaccumulation in animals and biological life." Dkt. 77 at 13. His testimony describing water as a "particularly hazardous medium" was isolated, and not made in reference to any source of water on the FMC Property. 007665.
- Likewise, Tribal expert witness Dr. Orris made no specific reference to the Portneuf River when speaking about human exposure pathways for contaminated groundwater. Dkt. 77 at 13. His testimony responded to questions asking generally about pathways ("Q: Okay. And we also talked earlier, I guess, we talked about the groundwater and drinking the groundwater? A. Yes. Q. What other exposure -- exposure pathways are there for the groundwater to get to people?" 007733.)
- The Tribes criticize the 2009 Supplemental Human Health Risk Assessment based on their claim that the non-implementation of the 1998 Record of Decision resulted in the presence of a potential groundwater ingestion pathway. Dkt. 77 at 13-14. This is incorrect. No pathway for ingestion of contaminated groundwater

exists for the FMC OU, regardless of whether the 1998 ROD took effect, and therefore no such scenario was included, because, as Ms. Barbara Ritchie testified, "the plume is wholly located under FMC, and/or Simplot owned properties. There is no chance of somebody putting a well into that aquifer, and extracting groundwater." 008022. The U.S. Agency for Toxic Substances and Disease Registry ("ATSDR") agreed in its 2005 public health assessment report, stating that since the early 1990's "no one is drinking site-contaminated groundwater." 285232 at 285241.

- When the 2009 Groundwater Report updated the prior human health risk assessment for the FMC OU, it did conclude that risk estimates "still exceeded levels of health concern," but this was for a hypothetical on-site worker groundwater ingestion scenario that does not and will not ever exist. Dkt. 77 at 14; 290968-69. Overall, groundwater concentrations have *decreased* since the 1998 ROD. *Id.* The existence of contamination in groundwater under the FMC Site is not a health risk to Tribal members where no pathway or exposure exists.
- The Groundwater Report undermines the Tribes' contention that "contaminants on the FMC Property are plainly reaching the groundwater and discharging into the Portneuf River." Mr. Hartman testified, "EPA approved the groundwater current conditions report, which represents the nature and extent, fate and transport of groundwater from the FMC OU." 007887.
- FMC has not asserted that Simplot is "primarily responsible for the groundwater contamination under the FMC site" and the Tribes' attempt to disprove this incorrect assertion misses the mark. Dkt. 77 at 14-15. Discharges of groundwater

from the EMF Site to the Portneuf River are indisputably the primary responsibility of Simplot. But comparing groundwater contamination under the FMC Site and contamination in the Portneuf River are two different things. The Tribes cannot show a threat to the Tribes based solely on the existence of contaminated groundwater underneath the FMC Site that is not, and has no reasonable chance of, being ingested by a Tribal member.

- A finding of an "elevated" or above background concentration does not equate to a risk to plants or animals. 007996. Although the EMF-ERA found that cadmium was elevated 2.5 times above background, further chemical analysis found that the cadmium is strongly bound to sediments and is not in a bioavailable form. 263913. "[N]o other contaminants were found in Portneuf River delta sediment at levels significantly above background or levels of concern. Therefore potential risks of adverse effects of sediment contamination on benthic life are expected to be minimal." *Id.*
- In the Lower Portneuf PA, nickel and vanadium were detected at "elevated concentrations," but those sample locations downstream of the EMF sources were similar to concentrations found upstream from the EMF sources, strongly suggesting that the Portneuf sediments were likely from upstream sources other than FMC. 285686.
- The Lower Portneuf PA came about due to Tribal requests that EPA perform an assessment of risks to the area but the conclusions were essentially that no real risks existed to warrant listing on the National Priorities List. 007992-93. Further, the report noted that non-EMF sources, such as gravel pits that had petroleum

contamination, the City of Pocatello publicly-owned sewage treatment plant, and a former Union Pacific Railroad Superfund site also were potential sources of contamination to the Lower Portneuf River. 285630.

C. Phosphine Is Not a Threat to Persons On or Off the FMC Property.

The Tribes' discussion of phosphine releases reflects another failed effort to demonstrate direct impacts to Tribal members by the mere presence of hazardous substances on the FMC Property. Again, the Tribes have no evidence connecting source to pathway, or pathway to exposure, or exposure to harm.

First, FMC's position is not that the RCRA Consent Decree bars the Tribes from objecting to phosphine releases. FMC's position is that the Tribes are barred from relitigating issues already decided in the RCRA Consent Decree case, including this Court's determination that placing evapotranspirative (ET) caps over the RCRA ponds and disposing the phosphorus-containing wastes in place is protective of human health and the environment. Dkt. 67-4 at 27.

Second, there is no threat. The presence of phosphine gas under the RCRA pond caps, even at high concentrations, is not a threat to human health unless there is evidence of a pathway from source to exposure and harm. But the Tribes point only to a source, and ignore all of the other elements of risk assessment. They ignore testimony in the record that EPA maintains a catalog of thresholds for chemicals, which provides a trigger for reporting to EPA a certain quantities of spills or releases, which Tribal expert David Reisman himself worked on developing. 007582-83. The EPA threshold for reporting a release of phosphine is 100 pounds per day. 007951. FMC calculated that during the 2010-2011 timeframe, its worst case scenario for phosphine releases to the atmosphere was three pounds per day, an amount well under the EPA reporting threshold. *Id.* By comparison, during FMC plant operations, the upper boundary

of phosphine releases on a daily basis was 163 pounds per day, which was reported to EPA in accordance with reporting requirements. *Id.* There is a vast difference between conditions that existed during plant operations, when the ponds were uncapped and phosphine gas was readily released to the atmosphere, and current conditions, which have existed since capping was completed in 2005, which contain phosphine under the caps and away from potential receptors.

The Tribes point to four detections of phosphine gas in the last four years involving workers. Dkt. 77 at 19. These incidents consisted of very low level alarm triggers that were thoroughly documented for EPA in a report prepared on December 17, 2013. 345905-07. That report shows that over a 41 month time period, when FMC contractors logged 92,586 work hours, there were four alarm triggers, two of which were at the 0.3 ppm level and two of which were at the 1.0 ppm level. *Id.* These alarms do not necessarily demonstrate an exposure at a certain level, but if they did, the exposures were below the Occupational Health and Safety Administration ("OSHA") Permissible Exposure Limits for 15 minutes and 8 hours respectively. 007851. Given their proximity to the RCRA ponds that are sources of phosphine, it would be expected that site workers would be the most immediate and frequent receptors of phosphine releases. But the sparcity of worker alarm triggers, as well as the 41,000 fenceline nondetects, point to the single conclusion that there is no threat to the public, outside the FMC fenceline, associated with phosphine gas. These data undermine the Tribes' argument that the phosphine monitoring at the FMC Property was inadequate. The presence of phosphine at the FMC site poses no on-site or off-site risk to human health or the environment. "There is virtually no credible scenario that phosphine would be detected at the fence line." 007950.

D. Slag Poses No Radiological Risks to Site Workers On or Off the Site.

Without identifying any actual measurements of exposure to radiologicals, the Tribes challenge EPA's conclusions that slag presents no unacceptable risks to off-site receptors. Dkt. 77 at 21. They cite Dr. Leikin, who testified in the most general terms that his opinion from the documents he reviewed is that, "the FMC products and contaminants and waste products constitute a severe threat to the population." 007672. Such generalized conclusions provide no evidence of the existence of a pathway and exposure to any Tribal member.

The evidence before the Appellate Court demonstrated conclusively that off-site dispersal of radiologicals from the FMC Property presented no unacceptable health risks. Mr. Gudka testified about the results of the EPA-approved risk assessments, stating the conclusion of the April 25, 2011 *Comprehensive Letter Report Documenting Potential Human Health Risks for Site COCs in the Off-Plant OU* as follows: "We, essentially, collected data on properties that weren't owned by FMC or Simplot to evaluate risks to potential future assessments. And we found that those risks were below EPA's range of concern." 007977. This conclusion is identical to the ATSDR's public health assessment dated March 21, 2005, which stated that slag in the community poses no human health risk. 285242. "On the basis of available data from the slag study, the highest estimated annual radiation dose from slag used in the community was not high enough to cause apparent adverse health effects." *Id.* Even though any member of the community could request an evaluation under the community slag program, no evidence was presented of any Tribal households that have requested such an evaluation. 008065.

E. There is no Evidence of Ecological Threats from the FMC Property.

The Tribes attempt to argue that fluoride contamination within the FMC Off-Site OU, which consists of non-FMC and non-Simplot properties that may have been impacted by EMF

Site emissions, poses a threat to ecological receptors, namely red-tailed hawk and horned lark. Dkt. 77 at 24. Their efforts neglect to mention the conservative assumptions incorporated into the risk assessment. 343861. They also ignore that if the home ranges of the raptors and the sage grouse are taken into account, the no observable adverse effects levels ("NOAEL") would fall precipitously. 343861. FMC Property now generates no fluoride emissions; all fluoride since the FMC plant shut down have come exclusively from Simplot. *Id.* Even if the FMC plant posed ecological threats to the Off-Site OU in the past, those threats ceased over a decade ago.

V. THE BURDEN OF PROVING HARM BELONGS TO THE TRIBES.

Neither Dr. Orris nor Dr. Leikin presented anything more than speculation that an exposure to a hazardous substance may occur at some time in the future at the FMC Property and cause harm to a member of the public. The RCRA Consent Decree's "SEP 14" project does not excuse the Tribes' failure to present meaningful analysis of health risks to Tribal members. SEP 14 is a project that FMC agreed to conduct, in coordination and full cooperation with the Tribes to assess whether FMC-related releases had impacted Tribal member health. 008067. The 2006 *Health Profile for Shoshone and Bannock Tribes at Fort Hall Idaho* was the product of the initial SEP 14 effort to complete its mission. *Id.* The results did not identify any FMC site-related impacts but instead identified other factors contributing to Tribal mortality and clinic visits. 008068. The methods and data evaluated were accurate and reliable, however the joint FMC-Tribal study management team agreed to pursue additional investigations to better understand health issues on the Fort Hall Reservation. *Id.* The existence of that ongoing study, which FMC has funded and continues to fund, does not relieve the Tribes of their burden of demonstrating that the FMC site poses a real and actual threat to Tribal health and welfare under the second *Montana* exception.

VI. CONCLUSION.

The Tribes cannot establish second *Montana* jurisdiction under the case law provided in *Montana*, *Plains Commerce*, *Brendale*, and *Evans*. Those cases foreclose the Tribes' attempt to establish jurisdiction over FMC in this matter. Moreover, the demand for cash does nothing to change any environmental condition at the FMC Site, and cannot be said to be "necessary to avert catastrophe." *Evans*, 736 F.3d at 1306 n.8. Finally, the Tribes have no proof of any pathway from source to transport to exposure to harm. Instead, all they have is descriptions of the contaminants that are contained at the FMC Site according to EPA oversight and direction. That is clearly not sufficient to prove that anything at the FMC Site "imperil[s]" the subsistence or welfare of the Tribes. *Montana*, 450 U.S. at 567.

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 RECOGNITION OF JURISDICTION UNDER THE SECOND EXCEPTION TO *MONTANA*** 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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