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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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| FMC CORPORATION,<br>Plaintiff,<br>vs.<br>SHOSHONE-BANNOCK TRIBES,<br>Defendant. | Case No. 4:14-cv-489-BLW<br>**REPLY MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY THE TRIBES' JURISDICTION OVER FMC UNDER THE FIRST EXCEPTION TO *MONTANA*** |

**TABLE OF CONTENTS**

**Page**

**I. FEDERAL COURTS HAVE NEVER HELD THAT THE FIRST *MONTANA* EXCEPTION APPLIES TO A NON-MEMBER'S FEE LAND....................................1**

**II. THE STANDARD OF REVIEW IS DE NOVO ..........................................................2**

**III. FMC DID NOT CONSENT TO TRIBAL JURISDICTION........................................5**

- **A. The 1997 Buttelman Letter Consenting to the August 11, 1997, Land Use Operative Policy Guidelines Became a Nullity When the Tribes Materially Amended the Land Use Operative Guidelines After August 11.....6**
- **B. FMC Did Not Consent to Tribal Jurisdiction Under Any Tribal Ordinance Proposed or Amended After August 11, 1997.................................8**

**IV. THE RCRA CONSENT DECREE DOES NOT ESTABLISH A CONSENSUAL RELATIONSHIP.........................................................................................................18**



Client:4385076.1

## TABLE OF CASES AND AUTHORITIES

**Page**

**Cases**

*Atkinson Trading Co. v. Shirley*,
532 U.S. 645 (2001)........................................................................................................ 2, 7, 8

*Brendale v. Confederated Tribes & Bands of Yakima Nation*,
492 U.S. 408 (1989),........................................................................................................ 1

*Buster v. Wright*,
135 F. 947 (8th Cir. 1905) ................................................................................................ 1

*Merrion v. Jicarilla Apache Tribe*,
455 U.S. 130 (1982)........................................................................................................... 2

*Merrion v. Jicarilla Apache Tribe*,
617 F.2d 537, 543 (10th Cir. 1980) .................................................................................. 2

*Nevada v. Hicks*,
533 U.S. 353 (2001)........................................................................................................ 1, 2

*Plains Commerce Bank v. Long Family Land & Cattle Co.*,
554 U.S. 316 (2008)........................................................................................................ 7, 8

*Strate v. A-1 Contractors*,
520 U.S. 438 (1997)........................................................................................................... 8

*United States v. FMC Corp.*,
531 F.3d 813 (9th Cir. 2008) ........................................................................................... 18



Client:4385076.1

## I. FEDERAL COURTS HAVE NEVER HELD THAT THE FIRST MONTANA EXCEPTION APPLIES TO A NON-MEMBER'S FEE LAND

As explained in FMC's First *Montana* Opening Brief, federal courts have found a "consensual relationship" that meets the requirements of the first *Montana* exception in ***only*** three categories of cases: "commercial" cases, "trust land" cases, and "waiver" cases. Dkt. 67-3 at 9-23.[1] While the Tribes may quarrel with these, the holdings of the cases cited by FMC in each category stand. The Tribes assert that "*Montana* itself establishes the applicability of the first *Montana* exception to activity on non-Indian owned fee land." Dkt. 76 at 9. But the Tribes are contradicted by Justice Scalia, who wrote: "with one minor exception, we [the federal courts] have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land."[2] *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

The Tribes are also wrong that *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), supports their argument that the first *Montana* exception applies to non-member fee land. Title to the land in *Buster* was delivered to the Creek Nation by the United States in 1901. Non-members who occupied the land before 1901 were permitted to purchase their lots at one-half of appraised value. The court held that, under certain treaties prior to 1901, the United States guaranteed the Creeks' right to fix the terms upon which a non-member might conduct business within the territorial boundaries of the Creek Nation, and that by permitting non-members to purchase such lands, the United States did not withdraw rights granted the Creeks by prior treaties.[3]

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[1] *See* Memorandum of FMC Corporation in Support of Motion to Deny the Tribes' Jurisdiction over FMC under the First Exception to *Montana*. Dkt. 67-3.

[2] The "one minor exception" is *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989), which was decided under the second exception to *Montana's* general rule.

[3] Moreover, tribal jurisdiction in *Buster* is based on the tribe's, "power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business

The Tribes also argue that a $1.5 million permit fee "is necessary to protect tribal self-government" and that it is "connected to that right of the Indians to make their own laws and be governed by them" because "it secures FMC's compliance with tribal law," Dkt. 76 at 10- 11 (citing *Plains Commerce* and *Hicks*). But the Tribes' argument is a gross misreading of those two cases. The permit fee here is similar to the taxation at issue in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), about which the Supreme Court said:

> Although language in *Merrion* referred to taxation as 'necessary to tribal self-government and territorial management,' 455 U.S., at 141, 102 S. Ct. 894, it did not address assertions of tribal jurisdiction over non-Indian fee land. Just as with *Montana's* first exception, incorporating *Merrion's* reasoning here would be tantamount to rejecting Montana's general rule.

*Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656-57, n.12 (2001). The Tribes' argument that the fee is necessary to protect tribal self-government also suffers from the defect of many of the Tribes' arguments: pre-judging the result of the case by assuming that Tribal laws apply to FMC.

## II. THE STANDARD OF REVIEW IS *DE NOVO.*

For the reasons stated in Dkt. 67-3 at 3-8, no deference can be given to the factual findings of the Tribal Appellate Court regarding the first *Montana* exception. The standard of review is *de novo*—both on the application of federal law and the factual basis for the first *Montana* exception.[4]

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therein." *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 543 (10th Cir. 1980). Tribes do not have the "power to exclude" nonmembers on fee land. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

[4] Moreover, the Appellate Court's factual findings are that FMC and the Tribes corresponded in the May 19, May 26 and June 2, 1998 letters; FMC agreed to pay the annual fee even if the Ponds "*stopped being used for disposal*"; and FMC ceased payment when the Plant shutdown. The Appellate Court did not find that FMC agreed to pay a fee for *storage* of wastes on the

## III. THE TRIBES HAVE NOT MET THEIR BURDEN OF PROVING FIRST *MONTANA* JURISDICTION BECAUSE FMC HAS BEEN DENIED A PROCEEDING ON THE FACTS REGARDING CONSENT JURISDICTION.

The District Court's errors in the vacated decisions of March 2006 and December 2006 have resulted in the failure to have any proceeding that allowed for the litigation of the facts regarding first *Montana* jurisdiction. Rather than requiring exhaustion, the District Court's March 2006 and December 2006 orders found Tribal jurisdiction over FMC based *solely* on the Court's reading of Paul McGrath's May 26 and June 2, 1998 letters to the Tribes. When FMC asked whether the Court meant that FMC should exhaust is remedies in the Tribal courts before the Court made a finding on jurisdiction, the Court said no. Dec. 1, 2006 Mem. Dec., 004802, at 004807. The Land Use Policy Commission (LUPC), the Business Council and the Tribal Court all relied on this direction, and did not hold any factual proceeding on consent jurisdiction. SOF 88-90. Even after the District Court's March 2006 and December 2006 orders were vacated by the Ninth Circuit, the Tribal Appellate Court still deferred to the District Court's opinion, and found consent jurisdiction without the benefit of any factual proceeding on the issue of consent jurisdiction.

In December 2006, in response to the Court re-confirming its March 2006 finding of jurisdiction, FMC requested discovery on the jurisdiction issue because material facts regarding FMC's alleged consent to jurisdiction were in dispute. In response, the Court stated: "Once that exhaustion is complete, FMC can return to this Court and file a motion requesting further discovery on the jurisdictional issue." 004807.

The result of the Court's errors in the vacated March 2006 and December 2006 opinions

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Reservation, nor did the Appellate Court find that FMC agreed to pay the fee *in perpetuity.* 006165-230.

is that after 11 years of litigation, there still has not been a factual proceeding on consent. So how can this problem be fixed? FMC submits that the simple solution is to follow the case law, which has never allowed tribal jurisdiction under the first *Montana* exception over a non-member for conduct on fee owned land. It is also simple to rule as a matter of law that consent jurisdiction cannot be based on a tribe's assertion of compulsory governmental power. So the issue can be avoided by ruling as a matter of law that there cannot be consent jurisdiction under the simple agreed facts in this case.

But if the Court decides to not follow those clear legal requirements, then the Court must deal with the problem created by the vacated March 2006 and December 2006 orders, in that they resulted in an absence of any factual litigation of the 1997 and 1998 communications between the parties. The Court has two choices: (a) order discovery of these consent issues in the District Court (as was suggested in the December 2006 order); or (b) rule that the Judgment cannot be enforced because there was never a factual proceeding, and as a result, there is no basis for jurisdiction under the first *Montana* exception. The first choice is highly prejudicial to FMC because evidence that was available in 2006 is no longer available – the most striking example is that Paul McGrath, the author of the May 26 and June 2 letters upon which this Court and the Tribal courts found jurisdiction, has since passed away. FMC believes that the Court must follow the second course, finding that the Judgment cannot be enforced, both on legal grounds and because the Tribes never established these alleged facts related to consent. FMC argued repeatedly to the Tribal courts that they could not rely on the March 2006 order, but they proceeded to do so regardless of those arguments. FMC's Response Brief (July 15, 2010) 004873 at 004917-30; 003809 at 003858.

But if the Court decides to proceed forward again without a full examination of the

jurisdictional facts, the Court should consider the additional evidence FMC provides in this Reply.[5] With these facts, the Court cannot find tribal jurisdiction under the first *Montana* exception, even under the Tribes' expansive views of the law.

## IV. FMC DID NOT CONSENT TO TRIBAL JURISDICTION

In its Response, the Tribes assert that FMC entered into a consensual relationship with the Tribes in Dave Buttelman's August 11, 1997 and Paul McGrath's May 26 and June 2, 1998 Letters. Tr. Resp., Dkt. 76 at 18-29. Further, the Tribes contend that in McGrath's June 2, 1998 Letter, FMC agreed to pay the Tribes a $1.5 million annual permit fee in perpetuity. *Id.* The Tribes' assertions on all three counts are conclusively rebutted by the evidence.

The Tribes offer only a distorted and incomplete version of the correspondence between FMC and the Tribes in 1997 and 1998. When all the correspondence is considered, it is clear that: (1) that FMC's consent in 1997 was expressly limited to regulation under the Guidelines in existence on August 11, 1997, which the Tribes materially amended thereby making FMC's consent a nullity; (2) that there was no express consent in the 1998 correspondence because FMC and the Tribes had agreed to set aside the issue of jurisdiction in order to achieve a "winning solution" for both the Tribes and FMC; (3) that FMC's 1998 agreement to pay a $1.5 million permit fee was limited by the Chapter V Amendments which provided *only* for payment of a fee during the time FMC was generating hazardous wastes and either disposing of those wastes in ponds, or treating them in the LDR Treatment Plant; and (4) that FMC could not have consented

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[5] *See* Paul Yochum's September 12, 1997, letter to the LUPC Chairman (attached hereto as Ex. A); Paul McGrath's October 30, 1997, letter to the Tribal Chairman (attached hereto as Ex. B), which is expressly referenced in McGrath's May 26, 1998 letter (001482); Tony Galloway's August 6, 1997, letter to FMC (attached hereto as Ex. C); and Tony Galloway's September 11, 1997 letter to Yochum (attached hereto as Ex. D).

to the Tribes' regulation of FMC under the Tribes' 2003 Hazardous Waste Management Act or the 2005 Waste Management Act, neither of which existed when FMC made the agreement to pay the permit fee in 1998.

### A. The August 11, 1997 Buttelman Letter Became a Nullity When the Tribes Materially Amended the Land Use Operative Guidelines After August 11.

In 1997, FMC and EPA were negotiating settlement of RCRA violations alleged by EPA. In order to continue to operate the Pocatello Plant (the "Plant"), FMC had to construct new ponds in compliance with RCRA standards (the "RCRA Ponds").[6] As part of honoring its trust responsibility to the Tribes, the EPA requested that FMC consult with the Tribes "to ensure that we were addressing tribal concerns." *Id.* at 002168. Accordingly, FMC submitted a building permit application dated August 1, 1997 to the LUPC:

> Specifically, by submitting this application, FMC does not consent to the jurisdiction of the tribes over zoning or waste regulation matters, nor does it intend to create a "consensual relationship" (as contemplated by *Montana v. United States*, 450 U.S. 544 (1981)) with the Tribes.[7]

A few days later, the LUPC notified FMC that it would not accept the building permit application because FMC had reserved jurisdictional objections. SOF 34-35. Faced with having to shut down the Plant, on August 11, 1997, Dave Buttelman (FMC) submitted two permit applications to the Tribes: one for a building permit and one for a use permit (the "1997 Buttelman Letter"). 004595. The letter stated that FMC would consent to the Tribes' jurisdiction, but FMC's consent was expressly limited to "the zoning and permitting

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[6] *See* 001471-78; *see* FMC's Comments on the LUPC's Proposed Amendments to Land Use Operative Guidelines (Nov. 3, 1997) ("FMC's November 3 Comments"). 002167-78 at 002168.

[7] *See* 000023; SOF 34. All references to "SOF" are to paragraph numbers in FMC Corporation's Statement of Facts, Dkt. 67-1.

requirements ***as specified in the current Fort Hall Land Use Operative Policy Guidelines.***" *Id.* (emphasis added). The Guidelines in place on August 11, 1997 required only submission of permit applications and a $10 application fee for each permit. SOF 35.[8]

But the Tribes did not issue a building permit and a use permit to FMC under those Guidelines. SOF 35; 000021. Instead, on August 22, 1997, the LUPC proposed to amend the Land Use Operative Guidelines to impose a $182 million annual permit fee on FMC (the "August 22, 1997 Proposed Guidelines").[9] Then, in 1998, the LUPC purportedly adopted the April 1998 Chapter V Amendments (the "Chapter V Amendments") (005326-30), which, among other things, included a fee schedule that, if applied to FMC's Plant, would result in a $100+ million annual permit fee. 005326-330; SOF 38-40.

FMC's consent to jurisdiction regarding the permitting requirements of the Guidelines in effect on August 11, 1997 became a nullity when the Tribes proposed the August 22, 1997 Proposed Guidelines and later adopted the Chapter V Amendments. As the Supreme Court has held, "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656. Moreover, holding that a non-member's consent to a tribal ordinance requiring only submission of a permit application and payment of a one-time $10 fee establishes tribal jurisdiction to impose an annual, $1.5 million fee would violate the Supreme Court's admonition that the *Montana* exceptions are "limited ones" and cannot be construed in a manner that would "swallow the rule," or "severely shrink" it. *Plains Commerce Bank v. Long Family Land &*

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[8] *See* 001470; FMC's November 3 Comments. 002167-78 at 002168.

[9] August 22, 1997 Proposed Guidelines. 002179-86; SOF 36.

*Cattle Co*., 554 U.S. 316, 330 (2008); *Atkinson*, 532 U.S. at 65; *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997).

### B. FMC Did Not Consent to Tribal Jurisdiction Under Any Tribal Ordinance Proposed or Amended After August 11, 1997.

The events that occurred after the Tribes sent FMC the August 22, 1997 Proposed Guidelines establish that FMC did not consent to jurisdiction under those Proposed Guidelines, the Chapter V Amendments, the 2001 Hazardous Waste Management Act ("HWMA"),[10] the 2005 Waste Management Act or any other Tribal ordinance.

On September 11, 1997, the LUPC advised FMC that "it had voted to issue building permits for the ponds," but that the use Permit would not be issued "until further discussions can be held regarding the fee schedule and other outstanding issues."[11] FMC's Plant Manager, Paul Yochum, responded immediately to Tony Galloway, LUPC Chairman, stating that FMC could not consent to the Tribes' jurisdiction:

> Yesterday, I received notification from the Land Use Policy Commission that we have the permits necessary to build new ponds (subject to conditions) but not the permits to use them. That's similar to giving permission to build a home but not to occupy it. In addition, as we commented at the [August 22] permit public hearing, the proposed fee structure goes far beyond what Pocatello, or FMC Corporation, could survive. FMC cannot proceed with the enormous capital expenditures needed for construction without assurance that the new ponds can be used, both operationally and economically.

Paul Yochum Letter to Tony Galloway, dated September 12, 1997 (attached as Ex. A).

On November 3, 1997, FMC submitted comments on the August 22, 1997 Proposed

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[10] Comments submitted to the Tribes by FMC and other interested parties make it abundantly clear that FMC did not consent to the 2001 HWMA. 002188-219.

[11] *See* Ex. D. The LUPC also advised FMC that it had amended the Land Use Policy Guidelines to separate issuance of the building and use permits. Dkt. 67-3 at 24. *See* 002167-78, at 002171; 001608.

Guidelines ("FMC's November 3, 1997 Comments"), again clearly stating that the 1997 Buttelman Letter conceded *jurisdiction* ***"in the limited area of land use permitting over the ponds under the Commission's Guidelines in place before August 11, 1997."*** 002167; 002169. FMC stated unequivocally that it ***was not consenting to jurisdiction*** under the August 22, 1997 Proposed Guidelines, and why not.

> FMC has not commenced construction of the ponds because it cannot make the large financial commitment necessary to commence construction without some degree of certainty as to whether we can use the ponds. In addition, the Commission's September 11, 1997 letter makes clear reference to the fee schedule that we are commenting on today. ***If the fees are finalized as proposed, FMC could not afford to continue to operate the plant as required pursuant to EPA's interpretation of the standards established under the authority of RCRA.***[12]
>
> Consequently, the Commission's proposal attempts to take unfair advantage of the fact that we have limited options in this matter. ***In fact, imposition of the Disposal Fee proposed by the Land Use Policy Commission may leave FMC no alternative short of shutting down or moving the facility. Practical economics will make it impossible for FMC to comply with the Disposal Fee requirements as proposed by the Land Use Policy Commission. We estimate that the proposed Disposal Fee would cost FMC $182,000,000 per year. This is clearly more than we can afford to pay and continue to operate the facility.***[13]

FMC ended the Comments by stating its willingness to negotiate an arrangement that would benefit both FMC and the Tribes, and that would avoid FMC consenting to jurisdiction:

> FMC ***seeks to avoid legalistic jurisdictional disputes*** with the Commission and the Tribes and ***focus instead on creating relationships with the Tribes that provide winning solutions for both sides,*** ensuring the long future we hope to have together.[14]

Several months before submitting its November 3 Comments, on July 10, 1997, Paul McGrath, FMC's Senior Vice President and General Counsel, and Paul Yochum had met with

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[12] FMC's November 3, 1997 Comments at 002172 (emphasis added).

[13] *Id.* at 002176 (emphasis added).

[14] *Id.* at 002177 (emphasis added).

Galloway and Arnold Appenay, Tribal Business Council Chairman. Yochum summarized the July 10 meeting in his September 12, 1997, letter to Galloway:

> As discussed in our meeting of July 10th FMC would like to open regular discussions with the Tribes on issues of importance to both the Tribes and FMC. ***These issues could begin with jurisdiction. We will seek an understanding that addresses the Tribes' legitimate desire for oversight of FMC business activities but also preserves FMC's economic and legal positions***.[15]
>
> Tony, I remember that I promised you a letter from both myself and our Vice President, Paul McGrath, but he has been traveling. I am signing this letter with a pledge to have a follow-up letter from Mr. McGrath.[16]

Thus, at the July 10, 1997 meeting, Yochum and McGrath had explained that in seeking an agreement to resolve the Tribes' desire for oversight of FMC's activities, FMC was "**preserv[ing] its economic and legal positions**," and thus, any resolution reached with the Tribes would be without FMC's consent to the Tribes' jurisdiction. *Id*.

On September 30, 1997, McGrath wrote to the Tribes stating that their negotiations needed to be "without the contentious and unproductive barriers of jurisdictional concerns:"

> However, Chairman Galloway misinterpreted my verbal comments at the joint FMC/EPA/Tribal meeting on July 10 to be a concession to blanket Tribal jurisdiction. ***FMC is committed to forging a new cooperative relationship with the Shoshone Bannock Tribes. Through this new relationship FMC is seeking to develop a mutually satisfactory approach to settling issues and developing future plans without the contentious and unproductive barriers of jurisdictional concerns.*** Thus, the spirit of my comments was beyond jurisdictional issues discussed in Chairman Galloway's letter and intended to initiate a new dialogue.

000228 (emphasis added).

On October 30, 1997, McGrath sent another letter to Chairman Appenay, which he

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[15] *See* Ex. A (emphasis added).

[16] *Id*.

copied to the entire Business Council and the Land Use Policy Commissioners.[17] McGrath's letter recorded that, at the July 10 meeting, Chairman Appenay had indicated ways in which FMC could be helpful in areas of interest to the Tribes. *Id.* McGrath and Appenay discussed "the wisdom of a broader understanding on how FMC would interact with the Tribes." *Id.* Appenay expressed "a strong concern that FMC kept referring to the jurisdictional issue" and that FMC and the Tribes "would be better off to resolve [their] issues in a more affirmative and ***less legalistic manner***." Ex. B (emphasis added). McGrath agreed that would be a better approach. McGrath stated:

> Over the years, the relationship between FMC and the Tribes has been mostly undefined, uncertain and subject to all too frequent dispute and misinterpretation. ***My own feeling is that it makes sense to have the further kind of dialogue that you suggested in July on a broader understanding of relationships between the Tribes and FMC <u>and not to focus it on the legalistic discussion of jurisdiction</u>***. If we viewed this subject as one in which both parties have interests they would like to resolve, we could work toward an overall solution of our relationship that would be a winning solution for both.[18]

Thus, both McGrath and Yochum made it clear to the Tribes at their July 10, 1997, meeting with Chairmen Appenay and Galloway, and in their follow-up letters to Appenay and Galloway, that any future agreement to resolve disputes between the Tribes and FMC would preserve FMC's legal objections to the Tribes' jurisdictional claims. Exs. A-D.

Several months later, on April 13, 1998, the LUPC advised FMC that its building and use permits would be approved subject to a number of conditions, including payment of a waste disposal fee under the Chapter V Amendments (005326-30) that the LUPC had apparently

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[17] *See* Ex. B.

[18] Ex. B (emphasis added).

adopted on April 6, 1998.[19] In April 1998, FMC, the EPA and the Department of Justice ("DOJ") were engaged in settlement negotiations that culminated in the RCRA Consent Decree. The EPA and FMC had agreed on RCRA Consent Decree terms that required FMC to cease use of the RCRA Ponds by no later than May 16, 2002, and to design and construct a state-of-the art elemental phosphorus treatment facility (the "LDR Treatment System") to replace the RCRA Ponds.[20] SOF 40. The Tribes participated in RCRA Consent Decree negotiations and knew that FMC was required to replace the RCRA Ponds with the LDR Treatment System. *Id.*

The Chapter V Amendments purported to require FMC to pay an annual permit fee of $3.00 per ton on the volume of hazardous wastes that FMC "generated, treated, stored or disposed of within the boundaries of the Fort Hall Indian Reservation in a pond, surface impoundment, tank container . . . ." 005330. The Chapter V Amendments defined the terms "generates," "treatment," "storage," and "disposal" as follows:

> "Generates" means the act or process of producing hazardous waste … for disposal.
>
> "Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste non-hazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.

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[19] The Tribes' claim FMC consented to tribal jurisdiction under the May 1998 Chapter V Amendments, which require payment of a $5.00/ton hazardous waste fee for disposal or storage of hazardous waste. Dkt. 64-1 at 3. FMC did not see the May 1998 Amendments until January 2006, when a copy was submitted to the district court in support of the Tribes' preliminary injunction motion. Thus, there is no basis for the Tribes' assertion that FMC knowingly consented to the May 1998 Amendments in 1998. Moreover, there is no evidence in the record that the May 1998 Amendments were adopted by the Tribes' Business Council or approved by BIA, as required by the Tribes' Constitution. 004645; SOF 40, 42-43.

[20] The RCRA Consent Decree was entered by this Court on July 13, 1999, over the objections of the Tribes. SOF 12. The Tribes appealed entry of the RCRA Consent Decree to the Ninth Circuit, which affirmed this Court's entry of the RCRA Consent Decree. SOF 13.

> "Storage" means the containment of hazardous waste ***either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.***[21]
>
> "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any water, including ground waters. Chapter V, Section V-9-1 (i, iii, viii, ix).[22]

FMC's permanent placement of wastes in ponds is not "storage" "for a temporary period or a period of years." Instead, placing wastes is "disposal" because doing so may cause "a constituent thereof to enter the environment." 005326-30. If the Tribes could establish jurisdiction over FMC, FMC would be required to pay the $3.00 per ton permit fee during the time FMC disposed of hazardous wastes in the RCRA Ponds, and also during the time FMC treated hazardous wastes in the LDR Treatment System.[23] FMC calculated that the *annual* permit fee under the Chapter V Amendments would exceed $100 million.[24] In the event the Plant ever ceased operation, FMC ***would not owe a permit fee*** under the Chapter V Amendments because FMC would not be producing hazardous wastes and disposing or treating those wastes.

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[21] *Id.* at 005328 (emphasis added).

[22] *Id.*

[23] FMC notified the Tribes that it understood the disposal fee would be paid on the annual volume of wastes disposed: "[F]or purposes of calculating the cost to our facility we assumed that the Land Use Policy Commission would be . . . charging each ton of waste ***only at the time of disposal*** . . ." 002174. The Tribes accepted FMC's understanding without comment, thus McGrath's May 26 and June 2 letters were based on FMC's understanding that the permit fee would not apply in the event FMC closed the Plant and ceased generating and disposing of wastes in ponds or treating wastes in the LDR Treatment System. 001482; 002116.

[24] In its November 3 Comments, FMC stated: "The amount and form of the Disposal Fee appears to make it analogous to a 'tipping fee' charged by owners/operators of waste disposal facilities, rather than by regulators, to receive and store wastes generated by others." 002174. The Tribes accepted FMC's understanding without comment, thus McGrath's May 26 and June 2 letters were based on FMC's understanding that the fee applied to the one-time act of disposal, which ceased when the Plant was closed in 2001. 001482; 002116.

The Tribes' conditions for issuance of the building and use permits left FMC with only three alternatives: (a) shutting down the Plant, (b) contesting the Tribes' jurisdiction in the Tribal courts and later in the federal courts,[25] or (c) attempting to negotiate a lower annual permit fee.

Judge Winmill's Memorandum Decision and Order, dated May 17, 2006 ("May 17 Mem. Decision") accurately describes the type of choice that FMC faced in April 1998:

> ***The election mandated by the Tribes will prejudice the rights of FMC regardless of which option FMC elects.*** If FMC elects the lower fee, it must ratify the Agreement and hence abandon its argument – pursued here and at the Circuit – that it is not subject to the Agreement. If instead, FMC elects the higher fee, it will pay an astronomical sum that would stagger even the largest corporation with no assurance that it could recover the money if it eventually prevails on appeal . . . . ***By not allowing the large fee to be stayed or recovered, the Tribes' election "opportunity" actually steers FMC into electing the small fee and abandoning its legal challenge in this case.***[26]

Faced with no other choice, McGrath negotiated with Jeanette Wolfley, the Tribes' attorney, and reached an agreement whereby FMC would pay a fee of $1.5 million per year, plus a $1 million startup grant in lieu of the $100 million annual permit fee under the fee schedule in the Chapter V Amendments. 004644. The LUPC confirmed the agreement in a letter to McGrath and Bob Fields (FMC) dated May 19, 1998:

> It is agreed between the Land Use Policy Commission and the FMC Corporation that in lieu of the hazardous and nonhazardous waste permit fees established in the Amendments to Chapter V of the Fort Hall Operative Policy Guidelines, Chapter V, Section V-9-1 and V-9-2, that the FMC Corporation will pay to the Hazardous Waste Program of the Land Use Department of the Shoshone-Bannock Tribes the hazardous and nonhazardous fixed permit fee amount $1.5 million for the period June 1, 1998 to May 30, 1999. In addition, the FMC Corporation will

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[25] FMC believed if it continued to operate the Plant without reaching some accommodation with the Tribes, the Tribes might attempt to force a shutdown of the Plant. This threat was real because, in past years, Tribal authorities had blocked access to the Plant at the railroad line, public intersections, and interstate highways. *See* 001605; 002176.

[26] Dkt. 67-3 at 31-32 (emphasis added); 002806-07.

> provide a one time start up grant to the Hazardous Waste Program in the amount of $1 million.[27]

McGrath confirmed the arrangement in his May 26, 1998 response to the Tribes:

> We have received your letter of May 19, 1998, concerning the permitting at the FMC facility of ponds 17, 18 and 19. We appreciate your agreeing to the fixed fee proposal that we discussed, which we understand will apply during the time these ponds are in operation. ***On the basis as originally stated in my letter to you of October 30, 1997***, we accept the permit, and we therefore intend to make the payments of $2.5 million on June 1, 1998, and $1.5 million on June 1 in the following years.[28]

As McGrath recorded in his October 30, 1997 Letter to Chairman Appenay, Appenay requested that the Tribes and FMC "***resolve our issues in a more affirmative and less legalistic manner.***" Ex. B (emphasis added). McGrath stated "*that it makes sense to have the further kind of dialogue that you [Appenay] suggested* ***and not to focus it on the legalistic discussion of jurisdiction.***" *Id.* (emphasis added). By McGrath's statement in his May 26 Letter: "On the basis stated in my October 30, 1997 Letter to you of October 30, 1997," McGrath's acceptance of the Tribes' permit fees was expressly conditioned on ***FMC not consenting to the Tribes' jurisdiction***. Instead he was offering a resolution that did not include a **"*legalistic discussion of jurisdiction.***" 001482.

The fact that McGrath's May 26, 1998 letter has no reference to jurisdiction confirms that McGrath understood the jurisdictional issue was being put to the side. The fact that the Tribes did not insist on FMC's jurisdiction consent, as they had in 1997,[29] further confirms that the jurisdiction issue was being put aside.

After receiving McGrath's May 26, 1998 letter, Wolfley expressed concern to McGrath and Fields that McGrath's May 26 letter could be read as limiting the $1.5 million fee to the use of the RCRA Ponds, such that the annual $1.5 million permit fee would not apply when startup

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[27] *See* 004644.

[28] *See* 001482 (emphasis added).

[29] SOF 34-35.

of the LDR Treatment System eliminated FMC's use of the RCRA Ponds. 002116. That was not FMC's understanding or intention, since FMC knew that the Chapter V Amendments purported to require payment of a permit fee for treatment of hazardous waste as well as for disposal in the RCRA Ponds. Accordingly, in his June 2, 1998 letter to Wolfley, McGrath confirmed that a $1.5 million annual permit fee would be paid after the Ponds were closed and replaced by the LDR Treatment System:

> Dear Jeanette:
>
> In Seattle last week you raised a question about my letter to the Commission of May 26, 1998. The language in paragraph one of the letter seemed to limit the permit to ponds 17-19. As I indicated to you, that language was too narrow, and indeed it is our understanding that the permit ***covers the plant*** and that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years.[30]

Read in the context of the RCRA Consent Decree negotiations and the Chapter V Amendments, McGrath's letters agree only that FMC will pay the $1.5 million permit fee during the time the Plant is generating and disposing of hazardous wastes in the RCRA Ponds or treating those wastes in the LDR Treatment System. McGrath's letters cannot be read as an agreement to pay the $1.5 million permit fee in the event the Plant shuts down because the Chapter V Amendments under which the Tribes claimed the right to a permit fee ***do not*** require payment of a permit fee after the Plant ceases to generate, dispose, and treat wastes. 005328-30.

The Tribes knew how to demand consent to jurisdiction and FMC knew how to give it. FMC's August 1, 1997 letter submitting the first permit application to the Tribes states:

> Specifically, by submitting this application, FMC does not consent to the jurisdiction of the tribes over zoning or waste regulation matters, nor does it intend to create a "consensual relationship" (as contemplated by *Montana v.*

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[30] *See* 002116 (emphasis added); SOF 38-40.

*United States*, 450 U.S. 544 (1981)) with the Tribes.[31]

The Tribes' August 6, 1997, response to FMC states:

> The Land Use Policy Commission "Commission" is in receipt of the application you filed for a building permit for Ponds 17, 18 and 19. Attached to this permit application is a letter addressed to Ms. Candy Jackson, Tribal Attorney, asserting" . . . by submitting this application, FMC does not consent to the jurisdiction of the tribes over zoning or waste regulation matters, nor does it intend to create a "consensual relationship" . . . . *"The Commission cannot accept the application with this letter attached."*[32]

Buttelman's August 7, 1997, letter to the LUPC states:

> Enclosed is an application for a building permit for Ponds 17, 18 and 19. This submission replaces the one made on August 1, 1997.[33]

The 1997 Buttelman Letter, dated August 11, 1997, submitting the permit application states:

> Through the submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines.[34]

The LUPC's May 19, 1998, letter to McGrath and Fields confirming the agreement that FMC will pay the $1.5 million annual fee and a one-time $1 million startup fee does not demand that FMC consent to the Tribes' jurisdiction. 004644-46. McGrath's May 26 and June 2 letters regarding FMC's payment of the $1.5 million annual permit fee do not consent to the Tribes' jurisdiction over FMC. 001482; 002116. Once again, the exchange of these letters between FMC and the Tribes proves that FMC and the Tribes are proceeding as agreed upon by McGrath and Yochum for FMC and Chairmen Appenay and Galloway for the Tribes: **Both FMC and the Tribes have agreed on a *"winning solution for both sides"* without engaging in a *"legalistic discussion of jurisdiction" that requires FMC to consent.*** Exs. A-D.

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[31] *See* 004964.

[32] *See* Ex. C (emphasis added).

[33] *See* 005408.

[34] *See* 001470.

## V. THE RCRA CONSENT DECREE DOES NOT ESTABLISH A CONSENSUAL RELATIONSHIP

The RCRA Consent Decree does not establish a consensual relationship between FMC and the Tribes under the first *Montana* exception for the simple reason that the Tribes are neither a party nor a third-party beneficiary of the RCRA Consent Decree. *United States v. FMC Corp.*, 531 F.3d 813, 824 (9th Cir. 2008).

The Tribes also claim that the RCRA Consent Decree requires FMC to apply for Tribal permits. The RCRA Consent Decree permit provision states: "Where any portion of the Work *requires* a federal state or tribal permit or approval, Defendants shall submit . . . ." 004655 (emphasis added). The Tribes' argument flies in the face of the Ninth Circuit's decision vacating this Court's ruling in its entirety. Moreover, like other of the Tribes' arguments, it prejudges the outcome of this case because there would have to be jurisdictional finding before a Tribal permit can be "required." Finally, 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 relate to the Tribes' claimed $1.5 million permit fee. *Id.*

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 THE TRIBES JURISDICTION OVER FMC UNDER THE FIRST 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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