Nos. 17-35840, 17-35865

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FMC CORPORATION,

Plaintiff-Appellant-Cross Appellee,

v.

SHOSHONE-BANNOCK TRIBES,

Defendant-Appellee-Cross Appellant.

On Appeals from the United States District Court for the District of Idaho
Case No. 4:14-cv-00489-BLW

APPELLANT'S OPENING BRIEF

Ralph H. Palumbo
YARMUTH WILSDON PLLC
1420 Fifth Avenue
Suite 1400
Seattle, WA 98101
Telephone: (206) 516-3800
Facsimile: (206) 516-3888
rpalumbo@yarmuth.com

Lee Radford
PARSONS BEHLE & LATIMER
900 Pier View Drive
Suite 206
Idaho Falls, ID 83402
Telephone: (208) 522-6700
Facsimile: (208) 522-5111
lradford@parsonsbehle.com

Gregory G. Garre
Counsel of Record
Elana Nightingale Dawson
Genevieve P. Hoffman
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2207
Facsimile: (202) 637-2201
gregory.garre@lw.com

April 6, 2018

(additional counsel on inside cover)

Maureen L. Mitchell
FOX ROTHSCHILD LLP
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154
Telephone: (206) 389-1773
Facsimile: (206) 389-1708
mmitchell@foxrothschild.com

Counsel for Plaintiff-Appellant-Cross Appellee FMC Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant-Cross Appellee FMC Corporation hereby states that it is a publicly traded company, it is not owned by a parent company, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

On September 28, 2017, the district court granted summary judgment to the Shoshone-Bannock Tribes. ER3. On October 13, 2017, FMC Corporation timely appealed. ER357-61. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This case challenges the enforceability of a judgment entered by a tribal court against a nonmember, FMC Corporation ("FMC"), concerning activity by that nonmember on non-Indian fee land. That challenge, in turn, raises two issues:

1. Whether the Shoshone-Bannock Tribes (the "Tribes") had jurisdiction to regulate FMC's activity on its own fee land and enter a judgment against FMC for its alleged failure to abide by the Tribes' regulatory demands; and

2. Whether the Tribes afforded FMC due process of law.

INTRODUCTION

The district court's decision in this case upholds the enforceability of a judgment entered by the Shoshone-Bannock tribal courts against FMC for $19.5 million in permitting fees imposed by the Tribes against FMC based on FMC's containment of waste from a now-dismantled phosphorus production plant on land that FMC owns in fee simple and, what is more, the right to collect a $1.5 million annual permitting fee from FMC "*in perpetuity* with no ending date established." ER20 (emphasis added). Under the principles established in *Wilson v. Marchington,* 127 F.3d 805, 809-13 (9th Cir. 1997), that judgment is unenforceable.

Most fundamentally, the Tribes lacked jurisdiction to regulate the activity subject to the judgment—FMC's containment of waste on FMC's own fee land. The Supreme Court and this Court have repeatedly stressed that, while Indian tribes retain some residual sovereignty over their own members and their own land, tribes generally lack jurisdiction to regulate nonmembers, especially when it comes to nonmember activity on non-Indian fee land. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328-30 (2008); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303-04 (9th Cir. 2013).

The Supreme Court has recognized only two exceptions to that rule. First, a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce,* 554 U.S. at 329 (quoting *Montana v. United States,* 450 U.S. 544, 565 (1981)). And, second, a tribe may regulate "the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 329-30 (quoting *Montana,* 450 U.S. at 566). The Supreme Court has stressed that these exceptions are "limited" and that the burden rests on a tribe to show that an exception applies. *Id.* at 330 (citation omitted).

The district court fundamentally erred in holding that the *Montana* exceptions authorized the regulation at issue here. The court concluded that the first exception

applied because FMC ultimately relented to the Tribes' regulatory demands and agreed to make an annual $1.5 million payment "in lieu of" paying the Tribes "hazardous and nonhazardous waste permit fees," ER1045, so FMC could construct needed waste containment ponds. ER24. But the first *Montana* exception is limited to voluntary commercial relationships entered into by nonmembers, such as when a nonmember goes onto the reservation to do business with a tribe. It has never been invoked to reward a tribes' exertion of regulatory power over a nonmember in the first place. Holding that *Montana* extends to such a *coerced* regulatory relationship would fundamentally transform the nature and scope of this exception.

The district court reasoned that the second *Montana* exception applied on the ground that the presence of phosphorus-related wastes on FMC's land poses a "dangerous threat" to the Tribes. ER28. The court recognized that the nation's foremost environmental authority—the Environmental Protection Agency ("EPA")—has carefully regulated and monitored waste on the site for decades, and that an independent study in 2006 "failed to find adverse health impacts to Tribal members that could be attributed to contamination at the FMC Property." ER18-19. Nevertheless, the court concluded that the mere possibility that EPA's plan might fail was sufficient to establish jurisdiction. ER29. This Court has already held, however, that such speculation is patently insufficient to meet a tribe's "formidable burden" under the second *Montana* exception. *Evans*, 736 F.2d at 1306.

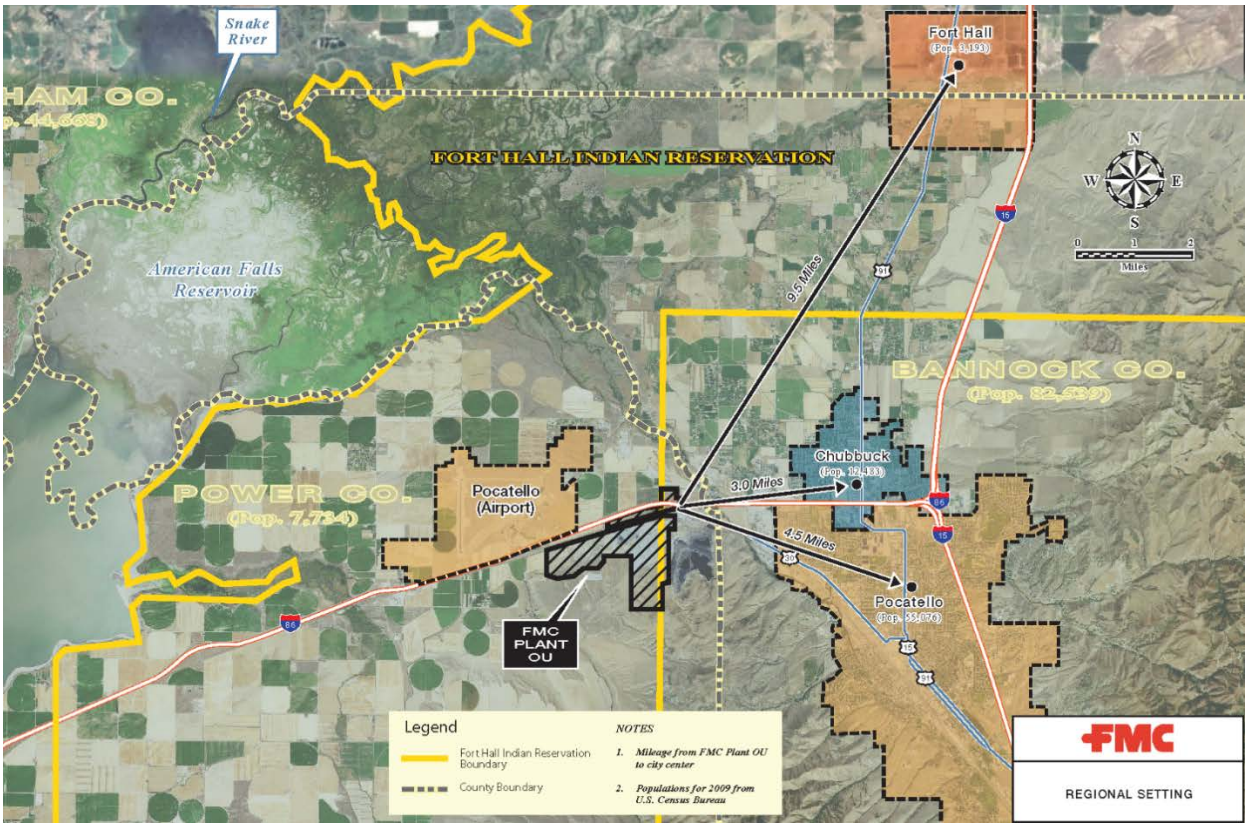
Even if the Tribes had jurisdiction over FMC, enforcement of the tribal court judgment is also precluded by the fact that FMC was denied due process in the tribal proceedings producing that judgment. Indeed, FMC was deprived of the most fundamental attribute of due process—an impartial decisionmaker. In a startling example of *biased* decisionmakers, while FMC's case was pending, two of the three judges that sat on the tribal appellate court that heard FMC's case spoke at a law school forum about how existing Supreme Court precedent was "murderous to Indian tribes" (ER772:9-15) and how tribal appellate courts must "step in . . . to protect the tribe" (ER791:15-18). And that is exactly what the Tribal Court of Appeals ultimately did in this case in rendering the judgment at issue.

Accordingly, the district court's decision should be reversed.

STATEMENT OF THE CASE

A. FMC's Land

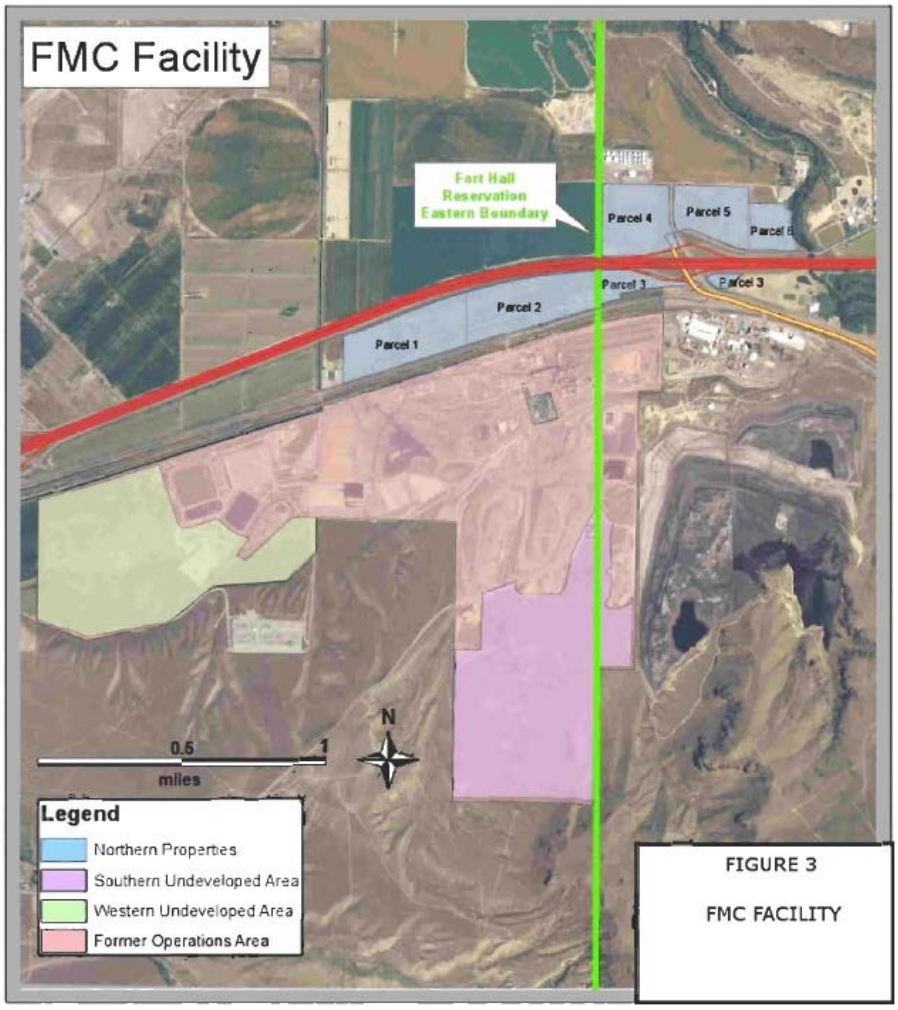
The property at the center of this case is a 1,450-acre site that lies about four miles northwest of Pocatello, Idaho and three miles west of Chubbock, Idaho—both Idaho municipalities—and about nine miles southwest of Fort Hall, the largest population center on the Indian reservation by the same name:



FMC Idaho, *Photos & Videos*, http://fmcidaho.com/redevelopment/site-photos-videos/ (last visited Apr. 5, 2018) ("FMC *Photos & Videos*").

Initially owned by the Tribes as part of the reservation, title to the land at issue passed from the Tribes to individual members of the Tribes in the early twentieth century pursuant to the General Allotment Act (or Dawes Act). ER835-36 (979:18-981:21). The land was later sold to non-Indians, and eventually acquired by FMC in fee simple. ER836 (981:15-982:3), ER837-38 (1000:12-1001:2). An aerial view of the property, which is part of Power County, Idaho, is printed below. The area to the left of the green line is within the Fort Hall Indian Reservation and the area to

the right is outside the reservation. The red line is Interstate Highway 86, which cuts through the reservation as it heads west, and the yellow line is U.S. Highway 30.



ER970.

The reservation land adjacent to FMC's property consists largely of parcels owned in fee by non-Indians (*see* ER877-78 (1695:7-1698:19)), just as this Court described the area in *Evans*, 736 F.3d at 1302-03. The Pocatello Municipal Airport, owned by the City of Pocatello, lies just north of FMC's property. ER969, ER971. Idaho Power, a state utility, owns land housing a substation within the borders of

FMC's property. ER1208 ¶27. Union Pacific Railroad owns railroad track that runs through the reservation alongside FMC's property. ER1211 ¶¶45-46. And the J.R. Simplot Company ("Simplot") owns a phosphate fertilizer plant just to the east of FMC's property, outside the reservation. ER918.

State and local authorities have long exercised jurisdiction over, and provided government services for, FMC's property and activities. Power County, Idaho, for example, requires FMC to obtain permits for activity undertaken on FMC's property. *See, e.g.*, ER1108 ¶12(A); ER1118; *see also* ER841-42 (1077:2-1081:17). The cities of Pocatello and Chubbuck provide all domestic water service in the area, while Idaho regulates water that is provided by privately owned groundwater wells. ER1205-06 ¶¶12-15, 19-20. The Idaho State Police and local sheriffs patrol the highways that run through the area. ER1212 ¶51. And emergency medical services and general police protection for FMC's property is provided by Pocatello, Chubbuck, and Power County. ER1212 ¶¶48-50.

B. FMC's Production Of Phosphorus

From 1949 to 2001, FMC used the site to produce elemental phosphorus (or "P4") from phosphate ore mined in the nearby mountains, which was processed and then sold to other companies that used it in products such as soda, cereal, cheese, flour, toothpaste, and detergent. *See* FMC Idaho, *Plant History*, http://fmcidaho.com/plant-history/ (last visited Apr. 5, 2018) ("FMC *Plant History*").

The production of elemental phosphorus generates a number of byproducts. A gravel-like material known as "slag" is left over once the phosphorus in shale ore has been extracted. ER849 (1195:3-1196:10). Slag, like the ore from which it is derived, contains naturally occurring radionuclides and heavy metals, including arsenic as well as uranium-238, which decays into radium-226. ER847 (1187:24-1189:7). FMC used slag around its facility to grade and fill its property, and slag has been used as road base and railroad ballast. ER948; ER851 (1204:20-24).

Another byproduct is "phossy water." Because elemental phosphorus ignites upon contact with air, it is generally contained under water. ER847 (1187:4-9). Water used for this purpose retains residual particles of elemental phosphorus known as phossy solids. ER937. FMC disposed of phossy water in large surface impoundments—or ponds—on its property. ER936. Phossy water can also produce phosphine gas, which, though toxic, degrades quickly in both air and soil, and does not accumulate in the food chain. ER955; ER976.

In addition, while FMC's plant was in operation, some of the elemental phosphorus it produced entered the soil beneath the plant. ER848 (1192:7-1193:12). Although the elemental phosphorus entered the soil in liquid form, it has since solidified and "does not pose a risk to human health if left undisturbed." ER962, ER964. FMC estimates that there is between 5,000 and 16,000 tons of solidified elemental phosphorus in the soil. ER959; *see* ER848 (1192:7-1193:12).

Although FMC produced elemental phosphorus and has contained phosphorus-related waste on its site for over half a century, there is no evidence of any long-term health impact on those who worked at the site or who live in the area. As the district court acknowledged, from 1977 to 2000, independent epidemiologists conducted multiple studies of FMC employees and found no "adverse health impacts to . . . workers whose exposures would be many times that of community members outside the Plant boundaries." ER18-19 (citing studies). Another independent study conducted in 2006 "failed to find adverse health impacts to Tribal members that could be attributed to contamination at the FMC Property." ER19.

C. EPA's Oversight Of FMC's Activities

The disposal and containment of waste at FMC's site also is heavily regulated under numerous federal environmental laws, including the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *id.* § 9601 *et seq.*, and regulations thereunder. Far from escaping the EPA's attention, EPA has zeroed in on the activity and waste at FMC's Pocatello site.

In 1990, EPA designated FMC's Pocatello property, along with the neighboring (but off-reservation) Simplot fertilizer plant, as a "Superfund Site" under CERCLA. ER967. EPA then spent years studying the site and, with input from the Tribes and the State of Idaho, determined the remedial measures necessary

to protect human health and the environment. *See* 42 U.S.C. § 9604; 40 C.F.R. § 300.430; *see also* ER944, ER946; ER874 (1585:2-15). In 1998, EPA codified its remediation plan in a Record of Decision ("ROD"), which, among other things, called for capping ponds and contaminated soils, monitoring contaminated groundwater, and implementing monitoring controls. ER915, ER917.

Meantime, EPA and FMC negotiated a consent decree detailing the measures necessary to comply with RCRA at the site. ER850 (1200:9-23); ER856 (1281:13-20). The United States then filed suit to secure court approval of the decree. *See United States v. FMC*, No. 98-406-BLW (D. Idaho) ("*RCRA case*"). The Tribes objected to the decree because it called for the containment of waste in ponds on the site, rather than the removal of waste altogether. But the district court (Winmill, J.) approved the decree in 1999, after finding that it adequately protected human health and the environment. *RCRA case*, ECF No. 27 at 2-5.

The Tribes appealed to this Court, arguing that the United States had violated its trust duty to the Tribes in entering into the consent decree. *United States v. Shoshone-Bannock Tribes,* 229 F.3d 1161, 2000 WL 915398 (9th Cir. 2000) (unpublished). This Court rejected that argument, finding that "the record discloses a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC." *Id.* at *1. The Court further concluded that

"the Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment." *Id.* at *2.

Pursuant to the consent decree, FMC continued to cap and close wastewater ponds and constructed a state-of-the art land-disposal-restriction ("LDR") facility or LDR Treatment System. *See, e.g.*, ER1152-58; ER1113 ¶18.

D. The Tribes' Permitting And Payment Demands

While FMC was collaborating with EPA on a remediation plan that would fully protect human health and the environment, the Tribes began imposing their own regulatory demands on FMC and, ultimately, insisted that FMC pay them millions of dollars to construct facilities required by federal law.

When FMC informed the Tribes in 1997 that it needed to construct new ponds on its land that had "been approved by EPA" and that "timing [was] critical" to keep the plant open and comply with the consent decree (ER1247 ¶5, ER1251), the Tribes demanded that FMC apply to their Land Use Policy Commission ("LUPC") for a building permit first. ER1246-47 ¶¶3-4. The Tribes then threatened to initiate suit in tribal court to enjoin the construction of the ponds if FMC did not comply with its demands (a threat the Tribes had carried through with respect to other ponds a couple years earlier). ER1247 ¶4; ER1200-01 ¶4.

Because it needed to proceed with construction of the ponds to continue its day-to-day operations and comply with RCRA, FMC saw no practical choice but to

accede to the Tribes' demands. ER1245-47 ¶¶2-5; ER1126-33. The Tribes, however, rejected FMC's permit application because FMC had made clear it was not consenting to jurisdiction by submitting the application. ER1247-48, ER1250 ¶¶5-6, 23; ER1110-11 ¶13. Moreover, the Tribes upped their demands by insisting that FMC not only secure a building permit, but also a *use* permit for the ponds.

Because construction on the new ponds was imperative for the plant, FMC proposed a compromise. It acceded to the Tribes' demand to subject itself to the Tribes' jurisdiction but did so only "with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines." ER1125. Those Guidelines, which were enacted in 1979, required only that FMC submit a written application and a $10 fee for each permit. *See* ER1026-28, ER1033-34. Accordingly, FMC applied for the building permit and special use permit and paid the requisite $20 in fees. ER1087.

Two weeks later, the Tribes upped their demands again. During a hearing on FMC's permit applications, the Tribes' LUPC announced proposed amendments to the Land Use Operative Policy Guidelines. ER1101-03; *see* ER998-99. Whereas the existing Guidelines imposed a $10 filing fee for permits—total—the proposed amendments included a disposal fee of $100 for every ton of hazardous waste. *Compare* ER1102, ER999, *with* ER1027, ER1033-34. Under the new regime, FMC

would be subject to a disposal fee of *$182 million* annually—an amount so large it would have required FMC to shut down the plant. ER1093.

On April 13, 1998, the Tribes informed FMC that they would approve the permits if FMC agreed to various conditions including adherence to a new version of the Guidelines, which the Tribes attached to their letter. ER1015-19. Under these new amendments, the Tribes imposed a $3-per-ton disposal fee for hazardous waste (as opposed to $100 per ton), and a $1-per-ton disposal fee for non-hazardous waste (as opposed to $50 per ton). ER1019. The new Guidelines explicitly defined "disposal" and "storage" to be mutually exclusive, so that the storage of waste did not constitute the disposal of waste. ER1017.

Shortly thereafter, FMC and the Tribes reached a settlement. ER1111-12 ¶14. As stated in a May 19, 1998 letter from the Tribes to FMC, "in lieu of the hazardous and nonhazardous waste permit fees" established in the proposed Guidelines, the Tribes would charge a "one time startup" fee of $1 million, and then collect "an annual hazardous and nonhazardous fixed permit" fee of $1.5 million. ER1045-46. The letter further stated that, although the present Guidelines were "temporary," "FMC's fixed fee of $1.5 million [would] remain[] the same in the future." ER1046.

That settlement avoided litigation and allowed the immediate construction of the needed containment ponds. In accordance with its terms, FMC paid the Tribes $2.5 million in 1998—the $1.5 million annual fee plus the $1 million start-up fee,

ER1045—and made the annual $1.5 million payment in the following years while the plant was operational. *See* ER1190 ¶1, ER1112 ¶15, ER1050-52.

E. The Closure And Demolition Of FMC's Plant

Then, an unexpected economic event intervened. In 2001, due to artificial power shortages triggered by Enron's manipulation of the energy markets, FMC's energy prices suddenly (and unexpectedly) skyrocketed to the point that the continued operation of the Pocatello plant was simply unsustainable. As a result, on December 10, 2001, after more than 50 years in operation, the plant was forced to close its doors. FMC *Plant History*, *supra*; *see also* ER844 (1175:18-1176:19).

FMC stopped disposing of waste on the site and began dismantling the facility altogether. ER844 (1175:22-1177:4). FMC also worked with EPA to refine the remediation plan to account for the fact that the plant was no longer operational. *See* ER939-40, ER960-61; ER845-46 (1181:12-1184:8). Under EPA's direction, FMC began removing water from and capping the wastewater ponds on the site, a task it completed in 2005. ER843 (1171:3-1173:10). Ponds that are capped are permanently closed with highly engineered soil covers. *See, e.g.*, ER857 (1282:17-1284:16). Today, what residuals remain of the phossy water contained on the site

lie beneath tons of earth in lined ponds that prevent seepage into the groundwater. *See* ER965-66; ER851 (1203:2-10); ER857 (1282:24-1284:18); ER866 (1344:8-9).[1]

FMC also installed monitoring and extraction systems for the capped ponds to detect any phosphine gas buildup beneath the caps. ER857 (1284:19-1285:24); ER862 (1303:23-1304:10). FMC routinely monitors the ponds for any gas. ER864-65 (1315:17-24, 1325:2-1327:7). And, when phosphine gas has been detected, FMC has notified EPA and begun to extract and treat the gas, in accordance with EPA's remediation plan. *See* ER860 (1297:17-1298:18), ER863-64 (1312:1-1313:16). FMC has also extensively monitored the air at FMC's property line and has never detected phosphine. ER864 (1314:16-1315:7).

In 2012, after holding four public meetings on a proposed plan, EPA also finalized amendments to the 1998 ROD in an Interim Record of Decision Amendment ("IRODA"). ER939-40, ER956. The IRODA—which remains in effect today, *see* ER949; *see also* ER973—requires an additional set of remedial actions that EPA has concluded are appropriate and fully "protective of human health and the environment." ER941-44.

---

[1] In 1964, FMC retired 21 railcars that had been used to store elemental phosphorus. Because it was impossible to remove all the remaining phosphorus residue from the cars, FMC buried the cars under about 80 feet of slag, where they remain today. ER931-32, ER934.

Today, FMC's Pocatello site is a series of grassy and shrub-covered rolling hills, underneath which the capped ponds remain with monitoring devices on top.

ER974; s*ee* FMC *Photos & Videos*, *supra* (video showing aerial view of site today).

FMC continues to actively monitor the gas and groundwater on its property and report the results to the EPA in accordance with the IRODA, and EPA closely oversees all remedial and monitoring activities on the site. *See* ER961; ER852-53 (1241:3-1242:3); ER856 (1280:11-1281:23); ER363 ¶3.

F. The Tribes' Demands For Perpetual Payments

Notwithstanding the shutdown of the plant (resulting in the end of any further waste disposal at the site), the Tribes informed FMC in May 2002 that they believed

that FMC was required to pay the $1.5 million annual disposal fee for as long as the waste *remained* on the site—which, under the EPA- and court-approved remediation plans, will be for decades if not centuries. ER1054-55. Then, in December 2002, the Tribes claimed that FMC had violated a *new* version of the Guidelines that FMC had never seen before and that differed from the April 1998 version in material respects. *Compare* ER1001-07, *with* ER1017-19.

Between 2002 and 2005, FMC and the Tribes continued to express their disagreement over the Tribes' efforts to regulate FMC's activities in a series of new letters. During that time, the Tribes also made a number of increasingly broad assertions of regulatory authority—claiming, for example, that FMC was subject to the Tribes' general jurisdiction and needed to obtain various building, use, and air quality permits for the demolition work that was taking place at the site after the plant closed. *See* ER1060-82. In response, FMC contested the Tribes' jurisdiction over FMC's activities and its right to impose these additional permits, and it continued to refuse to pay the $1.5 million annual fee. *See, e.g.*, ER1058, ER1074.

The situation worsened from there.

G. The Tribes' Failed Attempt To Enforce The Consent Decree

In 2005, the Tribes filed a motion in the *RCRA case* in an effort to force FMC to submit to the Tribes' permitting demands. ER1142-43; *see* ER1150. Arguing that they were a third-party beneficiary of the consent decree, the Tribes sought to

enforce a general provision of the decree that they claimed required FMC to apply for a host of tribal permits for the site. *See* ER1134-39; ER1022-24.

The district court (Winmill, J.) agreed with the Tribes that they were entitled to enforce the consent decree as a third-party beneficiary. *See United States v. FMC Corp.*, No. CV-98-0406-E-BLW, 2006 WL 544505, at *4-5 (D. Idaho Mar. 6, 2006) (*FMC (D. Idaho)*). The court further held that the Tribes had jurisdiction over FMC under the first exception in *Montana v. United States,* because FMC had purportedly consented to jurisdiction by agreeing to pay the Tribes $1.5 million annually "to settle their waste permit dispute." *FMC (D. Idaho)*, 2006 WL 544505, at *6. The court then ordered FMC "to apply to the Tribes for the permits," and "make its challenges to the applicability of the permits in the Tribal administrative process." *Id.* at *7.

FMC appealed. The United States filed an amicus brief arguing that the Tribes were not third-party beneficiaries to the consent decree and that the decree did not require FMC to apply for any tribal permits or recognize any tribal "jurisdiction over FMC." U.S. Amicus Br. § C, *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008), 2007 WL 1899170 (May 14, 2007) (2007 U.S. Amicus Br.).

This Court held that the Tribes lacked standing to enforce the consent decree, explaining that the decree did not grant "*any* rights" to non-parties, "third-party or otherwise." *United States v. FMC*, 531 F.3d 813, 823 (9th Cir. 2008) (*FMC (CA9)*).

Because the Court concluded that the Tribes lacked standing, it did not reach the district court's ruling that the Tribes had jurisdiction over FMC. Instead, the Court vacated the district court's decision in its entirety. *Id.* at 823-24.

H. FMC Exhausts Tribal Proceedings As Directed

While FMC's appeal before this Court was pending, FMC complied with the district court's order that it apply to the Tribes for the permits FMC claimed were not authorized to begin with, in order to exhaust FMC's objections to the permits before returning to federal court to challenge the permits. That process ended up taking twelve years and involved proceedings before four different tribal entities.

In March 2006, FMC filed applications with the LUPC for the building and special use permits the Tribes claimed were needed to implement the EPA-approved remediation plan, while preserving its objection to the Tribes' jurisdiction to require the permits at all. ER1275; ER1256. The LUPC rejected FMC's jurisdictional objection on the basis of the district court's 2006 decision (which had not yet been vacated by this Court), ER350, ER345, and issued permits subjecting FMC to a $1.5 million annual fee—starting back in 2002—for the special use permit and a $3,000 one-time fee for the building permit. ER347, ER349-50; ER338-39. The Fort Hall Business Council ("Business Council"), the Tribes' governing entity, then upheld the permits and related fees in their entirety. ER329-31.

At that point, FMC appealed to the tribal courts—which, under the Tribes' constitution, ultimately are politically subordinate to the Business Council itself. *See, e.g.*, ER980; ER982-83. As one tribal court judge observed in an open letter in the Tribes' newspaper, "We [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." ER366 (Sho-Ban News, Mar. 19, 2015). In response to FMC's appeal, the Tribes added counterclaims, including a breach-of-contract claim, contending that FMC had breached an alleged 1998 agreement between the parties to pay the Tribes a $1.5 million annual fee indefinitely. ER993-94.

On November 13, 2007, the Shoshone-Bannock Tribal Court dismissed the Tribes' breach-of-contract claim, finding that the alleged agreement based on the 1997-1998 correspondence never "took on the attributes of a contract." ER326; *see* ER312-27. The following year, on May 21, 2008, the Tribal Court held that, based on Judge Winmill's 2006 decision, the Tribes had jurisdiction over FMC, but that the Tribes' building and special use permits and fees could not be enforced against FMC because they contravened tribal law. ER310; *see* ER306-08; ER990:14-17.

The Tribes appealed the permitting ruling to the Shoshone-Bannock Tribal Court of Appeals ("TCA") and FMC cross-appealed on jurisdiction. ER827-31; ER823-26. After holding a hearing, but two months before the TCA issued its decision in this case, two of the three judges on the panel—Judges Fred Gabourie

and Mary L. Pearson—spoke publicly at the University of Idaho College of Law on the role of tribal appellate courts in shaping cases. ER753; ER761-62.

Judge Gabourie observed that the federal courts "don't know a darn thing about tribes" and thus the tribal appellate court "has to take the case and mold it." ER768:20-769:10. He criticized the Supreme Court's decisions on tribal jurisdiction, describing *Montana* as "murderous to Indian tribes" and emphasizing the need to "get around" it. ER772:13-15, ER774:24-775:3. And he explained that it was important for tribal appellate courts "to step in . . . to protect the tribe." ER791:15-18. Judge Pearson likewise emphasized the importance of "avoid[ing]" "bad [Supreme Court] decisions" on tribal jurisdiction. ER789:4-8. She told the audience that "we're sitting on [a case] now that we know is going to go up, so we're saying our prayers as well as reading the cases." ER778:17-20.

On May 8, 2012, the TCA—with Judges Gabourie and Pearson—reversed the Tribal Court's ruling for FMC on the permits and ruled that the Tribes had jurisdiction under the first *Montana* exception. ER227-92. The TCA then remanded the case to the Tribal Court for it to receive evidence on the second *Montana* exception (ER174, ER219)—exactly the sort of step that Judges Gabourie and Pearson had earlier urged in "tak[ing] a case and mold[ing] it." ER769:9-10. Several months later, the TCA *sua sponte* revoked its decision to remand the case

and simply ordered the parties to submit evidence on and address *Montana*'s second exception *directly to the TCA itself*. ER153; ER136.

FMC asked the TCA to reconsider its decision in light of Judge Gabourie's and Judge Pearson's public comments demonstrating clear bias in favor of the Tribes. ER739-51. FMC also attempted to offer into evidence a recently obtained letter, which had been sent to the Tribes from the U.S. Department of the Interior, showing that the Tribes' Hazardous Waste Management Act of 2001, which the Tribes were attempting to apply against FMC, had not been properly adopted because it was never approved by the Secretary of the Interior, as required under applicable law. ER113-14; *see* ER802-10; ER722-37.

The TCA, in a panel comprised of Judges Peter D. McDermott, Vern E. Herzog, and Cathy Silak, rejected FMC's requests. The panel refused to reconsider the ruling on the first *Montana* exception, explaining that the court had "previously ruled that this court does have jurisdiction over respondent FMC Corporation under the first Montana exception." ER115. And as to the newly discovered letter, the court declared that FMC's submission was "not . . . timely." ER114.

In April 2014, the TCA held an evidentiary hearing before the appellate court—Judge John Traylor, along with Judges McDermott and Herzog. The day after the close of evidence, the TCA orally ruled that the Tribes had jurisdiction over FMC under the second *Montana* exception as well. *See* ER80-112; ER886-87

(2043:12-2044:12). The court recognized the EPA-approved remediation plan, but observed that EPA's plan "might in fact fail" (ER98), and "[o]nce a threat has been created, you cannot remove it" (ER100 (quoting expert witness)). As for evidence of any existing harm, the TCA relied on the testimony of two tribal members who said they felt they "could no longer participate in Sundance ceremonies along the Portneuf River because of [alleged] contamination of those waters." ER109; *see, e.g.*, ER834 (901:16-17) ("It's just because there is . . . a feeling that this place just isn't what it used to be.").

The TCA issued a final judgment against FMC for $20,519,318.41, representing the $1.5 million annual fee "from and including 2002 up to and including 2014," and about $1 million in attorney's fees and costs. ER44-46.

I. This Litigation

FMC filed a complaint in federal district court seeking a declaration that the TCA's judgment was not enforceable because the Tribes lacked jurisdiction over FMC and denied FMC due process in imposing the judgment. *See FMC Corp. v. Shoshone-Bannock Tribes*, No. 14-CV-489-BLW, ECF Nos. 1, 10; *see also* AR637-721 (amended complaint). After the district court (Winmill, J.) denied FMC's request for discovery regarding its due process claim (*see* ER36-43), the parties cross-moved for summary judgment.

On September 28, 2017, the district court issued a decision upholding the enforceability of the tribal court's judgment in full. The court first held that the Tribes had jurisdiction over FMC under the first *Montana* exception. *See* ER24-25. According to the court, FMC's decision to accede to the Tribes' permitting demands so it could construct the necessary containment ponds was "a simple business deal" representing the "same type of consensual relationship" that the Supreme Court has approved under *Montana*. ER24.

As to the second *Montana* exception, the court recognized that FMC established that "no measurable harm had yet occurred to humans or water quality, and the EPA's containment program would prevent any future harm." ER20. Yet, the court held that the "threat" if EPA's remediation plan somehow failed was sufficient to trigger this exception. ER29. The court nonetheless declined to enforce the judgment on this basis because the Tribes had failed to explain "why an annual fee of $1.5 million is necessary to" supplement EPA's plan. ER31.

Finally, as to due process, the district court concluded that, by having a new panel issue the final TCA decision, FMC had received "a full and fair trial before an impartial Tribal Appellate Court." ER30. In the court's view, the mere fact that a newly comprised panel chose not to disturb the previous panel's decision was sufficient to cleanse the proceedings of any bias or impropriety due to the

inflammatory statements of the prior Judges. *Id.* The court did not address FMC's other objections to the fairness and partiality of the tribal proceedings.

This appeal followed.[2]

SUMMARY OF ARGUMENT

For two independent reasons, the district court erred in holding that the tribal court judgment at issue in this case may be enforced.

I. First, the Tribes lacked jurisdiction over FMC as to the activity that is the subject of the tribal court judgment. The general rule repeatedly emphasized by the Supreme Court and this Court is that Indian tribes lack jurisdiction over nonmembers, especially as to activity on non-Indian fee land. A tribe that nevertheless claims the authority to regulate a nonmember bears a heavy burden to establish that one of two, limited "*Montana* exceptions" applies, including that the regulation at issue is necessary to protect tribal self-governance, control internal relations, or enforce conditions on entry to the tribe's own land. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328-29 (2008); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303 (9th Cir. 2013).

---

[2] On March 12, 2018, the Tribes filed a new complaint against FMC in tribal court, claiming the right to a $1.5 million annual fee in 2015, 2016, and 2017. *Shoshone-Bannock Tribes v. FMC*, No. 2018-CV-CM-0079. The complaint alleges that FMC must pay the fee "for as long as it stores waste on the Reservation." *Id.*

The first *Montana* exception does not apply here because FMC did not enter any "consensual relationship" with the Tribes of the kind described in *Montana*. Instead of affirmatively consummating a business relationship with the Tribes, through a "commercial dealing," "contract," "lease," or like "arrangement," FMC simply sought to resolve the Tribes' regulatory demands in order to clear the way for the construction of the EPA-required containment facility on its property. Neither that settlement nor the consent decree that FMC entered into with the United States—to which, as this Court has held, the Tribes were not a party—establishes the requisite "consensual relationship" under the first *Montana* exception.

Nor have the Tribes shown that jurisdiction is necessary to avert an existential threat to the Tribes, as required by the second *Montana* exception. Indeed, as the district court itself acknowledged, independent studies have failed to show any actual harm to the Tribes or its members (including those who worked at the site for decades) from waste on FMC's property. In addition, not only is EPA directly regulating waste on FMC's property, but this Court itself has already held that EPA's containment plan is adequate to protect human health and the environment. The Tribes' claim that their permitting and payment demands are nevertheless necessary to prevent some lingering "catastrophic" threat is based on the same kind of speculation and unsubstantiated fears that this Court rejected in *Evans*.

II. Second, FMC was denied the minimum protections of due process in the tribal court proceedings resulting in the judgment at issue. That includes perhaps the most fundamental guarantee of all—the right to an impartial decisionmaker. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997). Two of the three members of the Tribal Court of Appeals panel that decided FMC's case made blatantly biased remarks in favor of tribes during a law school presentation while FMC's case was pending before the court, and then proceeded to issue a decision that demonstrated that bias. Although a new panel was convened, that panel simply adopted key aspects of the tainted panel's decision. In addition, the tribal court judgment is tainted by other procedural irregularities as well.

Accordingly, the district court's decision should be reversed.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000) (citing *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999)). "The standard of review for an Indian tribal court decision deciding jurisdictional issues is *de novo* on questions of federal law and clearly erroneous for factual questions. Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed *de novo*." *Id.* (citation omitted).

ARGUMENT

THE DISTRICT COURT ERRED IN ENFORCING THE TRIBAL COURT JUDGMENT

It is settled that "[f]ederal courts must neither recognize nor enforce tribal court judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) [a party] was not afforded due process of law." *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997); *see Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1141 (9th Cir. 2001). The tribal court judgment at issue here is infected by both of these fatal flaws, either one of which requires reversal.

I. THE TRIBES LACKED JURISDICTION OVER FMC

The general principles governing the jurisdictional question in this case are well established. While Indian tribes retain some inherent sovereignty over their own members and land, the Supreme Court has repeatedly held that they generally lack authority to regulate the activities of nonmembers, especially on non-Indian fee land. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327-28 (2008). Accordingly, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Id.* at 330 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). To overcome that presumption, a tribe must show that one of two, "limited" exceptions to this rule—known as the *Montana* exceptions—applies. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303 (9th Cir. 2013) (citation omitted).

Under the first *Montana* exception, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). Under the second, a tribe may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." *Id.* at 566. Even if an exception applies, however, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce*, 554 U.S. at 337.

As explained below, the Tribes cannot show that either of the *Montana* exceptions is met here. Accordingly, the Tribes lacked jurisdiction over FMC.

A. The Tribes Have Failed To Show That The First *Montana* Exception Justifies Its Regulation Of FMC

The first *Montana* exception covers "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Not just any "relationship" will do, however. Rather, the Supreme Court has explained that "*Montana*'s own list of cases fitting within the first exception indicates the type of activities the Court had in mind." *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (citation omitted). The Court therefore measures the relationship in question against these cases to

determine whether it is a "'consensual relationship' of the qualifying kind." *Id.*; *see Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (looking to *Montana* cases).

The cases cited in *Montana* (*see* 450 U.S. at 565-66) all involved nonmembers who voluntarily entered tribal land or who sought to avail themselves of benefits from tribes (or tribal members) on tribal land. In *Williams v. Lee*, 358 U.S. 217, 217-18, 223 (1959), for example, the Court found that there was tribal court jurisdiction over a lawsuit arising out of the sale of goods by a nonmember plaintiff to tribal-member defendants on the reservation. In *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904), the Court upheld a tribal permit tax on livestock owned by nonmembers that the nonmembers grazed on tribal lands pursuant to contracts they had with tribal members. In *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), the Eighth Circuit upheld the taxation of a nonmember by a tribe for the privilege of trading within the reservation. And in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980), the Supreme Court upheld a tribe's taxation of cigarette sales to nonmembers on the reservation.

These cases make clear that consensual relationships under *Montana* exist only when "private individuals . . . *voluntarily* submit[] themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Hicks*, 533 U.S. at 372 (emphasis added); *see Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1136 (9th Cir. 2006). A tribe thus has "no authority over a

nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

1. FMC did not voluntarily enter any consensual relationship with the Tribes of a "qualifying kind" under Montana

Regardless of what FMC and the Tribes actually agreed to in settling the Tribes' regulatory demands (*see infra* at 35-37, 40-42), FMC did not enter any "consensual relationship" with the Tribes within the first *Montana* exception.

To begin with, the Supreme Court has *never* countenanced tribal civil jurisdiction over nonmembers on non-Indian fee land—the situation here—based on a relationship with a tribe, consensual or otherwise. *See Plains Commerce*, 554 U.S. at 333; *see Evans*, 736 F.3d at 1303 & n.5. Rather, all the cases that the Supreme Court cited in *Montana* as illustrative of the first exception involved situations where nonmembers engaged in business with tribal members *on the reservation* (*Williams, Buster, Washington*) or engaged in activities on *Indian-owned* land (*Morris*). As this Court has recounted, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), is the only case in which the Supreme Court has upheld the exercise of tribal civil jurisdiction over nonmembers on non-Indian fee land. *Evans,* 736 F.3d at 1303-04. But that case falls under the second *Montana* exception and, as discussed below, is inapposite here. *See id.*; *infra* at 42-49.

This case also bears no resemblance to the cases where this Court has found that a nonmember had a consensual relationship with a tribe whereby it could

reasonably anticipate being subjected to tribal jurisdiction. In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, for example, this Court concluded that the nonmember should have anticipated being subjected to tribal jurisdiction because it entered into a contract with a tribal corporation to develop tribal lands. 715 F.3d 1196, 1206 (9th Cir. 2013). Similarly, in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, the nonmember entered into a contract to lease tribal lands along the Colorado River. 642 F.3d 802, 805, 818-19 (9th Cir. 2011) (per curiam). The common denominator in these cases is that the nonmembers voluntarily sought to do business with the tribes on tribal lands, thus entering the same kind of consensual relationship as existed in the cases identified in *Montana*.

This case is fundamentally different. FMC did not voluntarily go on to the reservation to do business with the Tribes, and it did not do anything at all on tribal land. Rather, the Tribes *came to FMC* and asserted jurisdiction to regulate FMC's activity on *FMC's own land*. The Tribes demanded that FMC apply for tribal permits to engage in activity on FMC's own land, and the Tribes threatened to impose exorbitant "use" fees on FMC (hundreds of millions of dollars, at one point). Only then did FMC do what any rational entity would have done—it sought to settle the dispute in order to avoid litigation and implement necessary containment measures. But that settlement—predicated on the assertion of the Tribes' regulatory power—can hardly be classified as a *voluntary* "consensual relationship."

In reaching the opposite conclusion, the district court reasoned that this case involves "the same type of consensual relationship" as in *Morris v. Hitchcock*. ER23-24. But *Morris* differs in fundamental respects. In *Morris*, the nonmembers (1) *voluntarily reached out* to individual tribal members and contracted with them (2) to secure permission to graze the nonmembers' cattle *on tribal land*. 194 U.S. at 384-85; *see Plains Commerce,* 554 U.S. at 333. It was thus the voluntary, contractual relationship that the nonmembers had with tribal members—involving nonmember activity on tribal land—that gave rise to jurisdiction, not the nonmembers' response to an assertion of jurisdiction by the tribe. Here, FMC did not seek to do business with the Tribes in any way, and did not do anything on tribal land. It simply acceded to the Tribes' increasingly aggressive regulatory demands.

The district court focused on whether any agreement FMC made with the Tribes was a product of "duress." ER24. That was error. The question is not whether FMC's agreement to pay the Tribes an annual fee was a product of "duress" in the ordinary contractual sense, but rather whether the agreement consummated a "'consensual relationship' of the qualifying kind" under *Montana*. *Strate*, 520 U.S. at 547. It plainly did not. Indeed, the district court itself recognized that FMC had "no realistic alternative" but to try to resolve its dispute with the Tribes over the assertion of regulatory authority, even though FMC "vigorously disagreed" with the Tribes' assertion of jurisdiction over it. ER7 (citation omitted).

Recognizing jurisdiction here is also contrary to the Supreme Court's command that the first *Montana* exception is a "limited" one that should not be "construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson*, 532 U.S. at 647, 655; *Strate*, 520 U.S. at 458). If all that is necessary for a "consensual relationship" under *Montana* is a nonmember's decision to compromise with a tribe asserting regulatory authority so as to avoid enormous permitting fees or potentially burdensome litigation, then there would be far more cases recognizing tribal jurisdiction under the first *Montana* exception. All tribes would need to do is threaten nonmembers with cost-prohibitive taxes or permitting fees in the hopes of finding at least a few nonmembers without the practical option to resist. Such a regime would effectively blow open the first *Montana* exception and create an incentive for tribes to aggressively assert regulatory jurisdiction over nonmembers on non-Indian fee land.

Indeed, if the law were as the district court imagined, the tribe in *Montana* could have simply imposed an onerous permitting requirement and fee on hunting on nontribal land in an attempt to force the nonmembers to agree to a less onerous fee thereby achieving almost the same result as seeking to regulate hunting and fishing on nontribal land—which *Montana* rejected. That can't be right. Holding that the first *Montana* exception is satisfied in such circumstances would contravene decades of Supreme Court precedent going back to *Montana* itself.

2. None of the specific bases identified by the district court qualify under the first Montana *exception*

To justify its ruling under the first *Montana* exception, the district court pointed to (1) the 1997-1998 correspondence between FMC and the Tribes and $1.5 million annual fee FMC paid to the Tribes "to settle their waste permit dispute," *United States v. FMC (D. Idaho)*, No. CV-98-0406-E-BLW, 2006 WL 544505, at *6 (D. Idaho Mar. 6, 2006); *see* ER7-9, ER24-25; and (2) the consent decree. Neither of those arrangements, however, establishes the requisite consensual relationship necessary for jurisdiction under the first *Montana* exception.

(a) The 1997-1998 letters and the $1.5 million annual fee

As explained, the 1997-1998 letters and 1998 agreement to pay a $1.5 million fee were the direct result of the Tribes' attempt to exert regulatory authority over FMC and, for that reason alone, do not qualify as a "consensual relationship" under *Montana*. After FMC told the Tribes that it would be constructing the ponds to fulfill its federal obligations, the Tribes demanded that FMC apply for a permit and threatened to initiate suit to enjoin construction if FMC failed to do so. ER1247 ¶4. Given FMC's need to construct the ponds, FMC applied for a permit while explicitly preserving its jurisdictional objection. ER1245-47 ¶¶2-5; ER1250; ER1127. The Tribes rejected FMC's application because of FMC's jurisdictional objection.

Needing to construct the ponds, and hoping to avoid time-consuming litigation that could interfere with the ponds' construction, FMC proposed a

resolution of the dispute. Rather than remove its jurisdictional objection entirely, it agreed to be subject to specific provisions of tribal law—the "zoning and permitting requirements as specified in the *current* Fort Hall Land Use Operative Policy Guidelines." ER1125 (emphasis added). At that time, the only fee required for a special use permit under those provisions was an "application filing fee of $10.00." ER1035. FMC thus submitted its applications for a building permit and a special use permit and paid the $20 filing fee to the LUPC. *See* ER1087.

The LUPC, having received FMC's applications and "the required fees," held a public hearing on FMC's applications. ER1036; ER1096. But rather than consider the applications under the then-current Guidelines, the LUPC announced a *new* set of amended Guidelines. ER1101-03. The amendments included drastic changes to the required permitting fees under which FMC would owe an annual disposal fee of *$182 million*. ER1093; ER1101-03; ER998-99. As one would expect, FMC objected to the application of the amendments to its conduct and also raised questions about the amendments' legality. ER1093, ER1095.

The district court skipped over this history, stating simply that, "[w]ith FMC having consented to Tribal jurisdiction" (purportedly in the 1997 letter), "the Tribes lowered their fee to $1.5 million a year." ER7-8. But at most, FMC agreed to comply only with specific provisions (the then-current Guidelines), as they related to specific conduct (the construction of new ponds and disposal therein). That

settlement is fundamentally different than the kind of "consensual relationship" covered by *Montana* and hardly supports the exercise of jurisdiction under all tribal laws—in perpetuity. Concluding otherwise, as the district court did, is directly contrary to the Supreme Court's repeated admonition that, when it comes to tribal jurisdiction, it is not "in for a penny, in for a Pound." *Atkinson*, 532 U.S. at 656.

The district court erred as a matter of law in concluding that FMC's attempt to resolve its dispute with the Tribes over their permitting demands and ultimate proposal to pay a $1.5 million annual fee "in lieu of" the Tribes' proposed fees established a "consensual relationship" triggering the first *Montana* exception.

(b) The consent decree

The district court's reliance on the consent decree fares no better. For starters, whatever the decree does, *the Tribes* cannot invoke it to secure any of its benefits. This Court has already held that the Tribes are neither a party nor a third-party beneficiary to the decree. *See United States v. FMC Corp.*, 531 F.3d 813, 823-24 (9th Cir. 2008). Saying that FMC nevertheless entered into a consensual relationship *with the Tribes* by entering into a consent decree *with the United States* simply disregards this Court's previous decision. FMC did not enter into any relationship with the Tribes at all by entering into the consent decree.

Moreover, the consent decree was not the product of any voluntary, consensual relationship with the Tribes or the United States; it was the product of

EPA's assertion of its own regulatory authority. Nor is a "consent decree" whereby a regulated entity agrees to certain legal obligations in order to avoid a violation of law akin to "commercial dealing," "contracts," "leases," or similar business "arrangements." *See Montana*, 450 U.S. at 565. In short, as explained above, a party that settles a dispute with a regulator has not entered into the type of "consensual relationship" contemplated by *Montana*. *See supra* at 31-34.

In any event, even if a consent decree to which a tribe is not a party could ever confer tribal jurisdiction over a nonmember, the terms of the consent decree here do not. Both the district court and the Tribal Court of Appeals relied on paragraph 8 of the consent decree to conclude that the decree "required FMC to obtain Tribal permits." ER24; *see* ER9; ER172. Paragraph 8 states:

> Permits: 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.

ER1150. The defendant, of course, is FMC. And the consent decree separately defines "Work" as "all activities Defendant is required to perform under this Consent Decree, together with its Attachments." ER1147.

Nothing in paragraph 8 requires FMC to obtain any tribal permit. It simply provides that FMC must apply only for those permits that "the Work requires." And for work on FMC's fee land to require a tribal permit there must be some *ex ante* basis to assert tribal jurisdiction over FMC's activities. In other words, as the United

States previously explained to this Court, paragraph 8 is "not designed to expand the ability of a permitting authority such as a Tribe or state to exercise additional authority—beyond what it *already* possesses." 2007 U.S. Amicus Br. § C, 2007 WL 1899170 (emphasis added). The district court's repeated reliance on this provision was therefore entirely misplaced. ER9, ER24.

Other provisions of the consent decree confirm that it does not provide a basis for tribal jurisdiction over FMC. Paragraph 77, for example, states that "[n]othing in this Consent Decree is intended either to create any rights in or grant any cause of action to any person not a party to this Consent Decree, or to release or waive any . . . defense in law or equity that any party to this Consent Decree may have against any person(s) or entity not a party to this Consent Decree." ER1151. That provision makes clear that the right to exert tribal jurisdiction over a nonmember—here, FMC—is *not* created by the consent decree. Moreover, the consent decree explicitly states that FMC is *not* waiving any defense against a non-party to the consent decree. And this Court has already held that the Tribes are not a party or even a third-party beneficiary to the decree. *See FMC Corp.*, 531 F.3d at 821-24.

The district court therefore erred in concluding that, by entering into a consent decree with EPA over its obligations under RCRA, FMC gave away its right to object to the Tribes' jurisdiction over FMC for activity on its own land.

3. FMC never consented to anything "in perpetuity"

One of the more remarkable things about the tribal court judgment, as described by the district court, is that it purports to impose a "$1.5 million fee in perpetuity with no ending date established." ER20; *see* ER44. Even if FMC could be deemed to have entered a "consensual relationship" with the Tribes within the meaning of *Montana* in seeking to resolve the Tribes' assertions of regulatory authority by eventually agreeing to a $1.5 million annual fee, there is no basis for concluding that FMC agreed to pay that fee *in perpetuity.*

FMC agreed to pay the $1.5 million fee in 1998 only while it was disposing of waste at its plant, but all disposal ceased when the plant unexpectedly closed a few years later. *See* ER1190 ¶1; *see also* ER1049. The $1.5 million fee resolved the Tribes' insistence that FMC was required to pay a per-ton disposal fee (which would have exceeded $180 million). *See* ER1019, ER1016. At the time this matter was resolved, the Tribes' Guidelines explicitly defined "disposal" to exclude "storage." "Storage" covered waste that was on the site for a period of time, but not waste that already had been "dispos[ed]." ER1017. When the plant was in operation, FMC was "generat[ing] and dispos[ing]" of waste, Tribes Br. 38, *United States v. Shoshone-Bannock Tribes*, 1999 WL 33622993 (Dec. 1, 1999), but it stopped doing

so when the plant shut down. And when FMC stopped generating and disposing of waste, it ceased making the annual payments. ER1056-58.[3]

In arguing that FMC was required to pay the $1.5 million annual fee after FMC stopped disposing of waste, the Tribes invoked a version of the Guidelines—purportedly effective April 6, 1998—that materially differed from the Guidelines attached to the Tribes' April 13, 1998 letter and that FMC had never seen before. *Compare* ER1017-19, *with* ER1001-07; *see* ER1047; ER1013-14. And subsequently, when the matter was before the tribal courts, the Tribes relied on a version of the Hazardous Waste Management Act that did not exist until 2001—years *after* the resolution reached in 1998. *See* ER308-10. Finding a "consensual relationship" in these circumstances to impose a $1.5 million annual fee would not only grant the Tribes the right to a "pound," it would grant them the right to retroactively define and enlarge exactly what that "pound" is.

---

[3] In 1998, the Tribes and FMC corresponded over whether the $1.5 million annual payment applied only to the disposal of waste in certain particular ponds (ponds 17-19) or whether it applied to any disposal of waste at FMC's facility. To address the Tribes' concerns that the payments only applied to particular ponds, FMC clarified that it was FMC's understanding that the payment "cover[ed] the plant" and "would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years," ER1049, as everyone expected to occur with the addition of the LDR Treatment System. But FMC never represented that its payments would continue indefinitely even if the plant ceased operations entirely.

But there is an even more fundamental problem with the Tribes' position that they are entitled to a $1.5 million annual payment in perpetuity. The whole premise of jurisdiction under the first *Montana* exception is that the nonmember entered into a voluntary, consensual relationship with a tribe and thereby implicitly consented to tribal jurisdiction. *See Plains Commerce*, 554 U.S. at 329, 337. But any relationship that is truly voluntary and consensual can be terminated as well. *See, e.g.*, *Morris*, 194 U.S. at 384-85; *Smith*, 434 F.3d at 1135-36; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990). Holding that the Tribes have jurisdiction to enforce a perpetual permitting fee over FMC's objection is the antithesis of a "consensual relationship" under *Montana*.[4]

B. The Tribes Have Failed To Show That The Second *Montana* Exception Justifies Its Regulation Of FMC

The district court also held that the Tribes had authority to regulate FMC under the second exception to *Montana* on the ground that the waste that remains on FMC's property poses a "catastrophic" threat to "the health and welfare of the Tribes." ER29. That conclusion flouts existing precedent.

---

[4] The general rule is that, where no minimum duration is stated, an agreement "is terminable at will by either party." *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1473 (9th Cir. 1983); *see* 5-24 *Corbin on Contracts* § 24.29 (Online ed., 2017); *cf. Shultz v. Atkins*, 554 P.2d 948, 953 (Idaho 1976). There is no basis for holding *Montana* imposes a more onerous rule for nonmembers.

1. The district court's decision directly contradicts this Court's decision in Evans *concerning the same area*

This Court's decision in *Evans* alone compels the conclusion that the Tribes lack jurisdiction under the second *Montana* exception. In *Evans*, this Court emphasized that "[t]ribes face a formidable burden" in seeking to invoke this exception. 736 F.3d at 1303. As the Court explained, the Supreme Court has invoked this exception only once—in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), which involved "tribal zoning 'on nonmember fee land isolated in the heart of a closed portion of the reservation.'" *Evans*, 736 F.3d at 1304 (internal quotation marks modified) (quoting *Plains Commerce*, 554 U.S. 333-34); *see Atkinson*, 532 U.S. at 658-59 (discussing *Brendale*).

In *Evans*, this Court rejected the Shoshone-Bannock Tribes' attempt to regulate the construction of a home on non-Indian fee land—in the same general area of the Fort Hall Reservation as FMC's property. ER1218 ¶¶15-19, ER1220, ER1222. In so holding, the Court found that the area at issue bore "no resemblance to the closed portion of the reservation in *Brendale*," which was "mostly forested," owned almost entirely by the tribes, and carefully "monitored" by the tribes in terms of nonmember access. *Evans*, 736 F.3d at 1304. By contrast, the Court explained, "[t]he area surrounding Evans' property on the Fort Hall Reservation"—which is the same area surrounding FMC's property here—"is dramatically different" and "does

not in any way resemble the 'undeveloped refuge' in which the *Brendale* Court permitted tribal zoning of non-Indian fee land." *Id.* at 1304-05.

The district court concluded that the Tribes have jurisdiction over FMC's activities here because, in its view, "a failure by the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the health and welfare of the Tribes." ER29. But this is the very type of "speculative" concern that this Court rejected in *Evans*. 736 F.3d at 1306 n.8. The Tribes did not, because they cannot, show that their regulation of FMC's activities "is *necessary* to avert catastrophe." *Id.* (emphasis added). In fact, they have made no showing that the regulation of FMC is designed to do anything but generate money.

Any finding by the district court that the Tribes' regulation of FMC—on top of EPA's direct and extensive regulation of FMC's site—was necessary to ensure the very existence of the Tribes is clearly erroneous. *See Evans,* 736 F.3d at 1306. Indeed, the district court itself acknowledged that "FMC's evidence established without rebuttal that despite the toxicity of the waste, no measurable harm had yet occurred to humans or water quality, and the EPA's containment program would prevent any future harm." ER20. Moreover, in approving the consent decree, this Court itself found that there is "no evidence that capping the ponds poses a threat to human health or the environment." *United States v. Shoshone-Bannock Tribes*, 229

F.3d 1161, 2000 WL 915398, at *2 (9th Cir. 2000) (unpublished). Eighteen years later and counting, there is still none.

In challenging the consent decree, the Tribes made essentially the same arguments that they make here about the alleged threat posed by the waste on FMC's land, claiming that the ponds "contain reactive and ignitable wastes and have not been deactivated; produce uncontrolled highly toxic mists, fumes and gases such as phosphine, hydrogen cyanide, and phosphorus pentoxide at elevated levels; and create fires." Tribes' Br. 35, 1999 WL 33622993 (citations omitted); *see also FMC Corp.v. Shoshone-Bannock Tribes*, No. 14-CV-489-BLW, ECF No. 65-1 at 16, 23-24, ECF No. 77 at 11-12, ECF No. 82 at 6-7. The only thing that has changed is that nearly two decades have passed and yet the Tribes still have presented no evidence of any actual harm to their members.

Ultimately, the Tribes' position—and the district court's decision—is predicated on the mere possibility that a containment program designed and monitored by the world's foremost environmental agency might fail, in the absence of any evidence that EPA has somehow slipped up to date. Under *Evans,* that kind of purely speculative, hypothetical threat is insufficient to invoke the second *Montana* exception. *See* 736 F.3d at 1306 & n.8. Were it otherwise, the second *Montana* exception would "severely shrink" the general rule that tribes do not have

jurisdiction over nonmember activities—a result the Supreme Court has repeatedly admonished against. *See Plains Commerce*, 554 U.S. at 330 (citing cases).

2. The record does not remotely support jurisdiction under the second Montana *exception*

Regardless of *Evans,* the Tribes have not come close to satisfying the second *Montana* exception. Of course phosphorus waste can be dangerous if left unmanaged. But that is not the relevant inquiry. The question is whether the waste that remains on FMC's property—even after being buried under tons of soil, subjected to extensive, federally approved remediation measures as well as the specific terms of the consent decree approved by this Court, and actively monitored by FMC and EPA—"'imperil[s] the subsistence' of the tribal community." *Plains Commerce*, 554 U.S. at 341 (citation omitted). To ask that question is to answer it.

The Tribes presented no evidence showing that tribal regulation is necessary to avert any impending disaster. The Tribes have focused on the possibility of phosphine gas being released from the ponds. But they presented no evidence showing that such gas would be likely to be released in any quantity that could be harmful or even showing how the Tribes could be affected by such gas at all. For example, the record does not reveal how the gas—or any other contaminants on FMC's property—could actually harm the Tribes or tribal members, nearly all of whom live many miles away from FMC's property. *See* ER855-56 (1256:7-13, 1278:10-1281:1), ER864 (1314:8-1316:23), ER877-78 (1695:7-1698:19). The

Tribes have also presented no evidence suggesting that there have been gaps in the EPA-required remediation and monitoring program that create an existential threat.

The same goes for any threat of groundwater contamination. Moreover, the Tribes simply disregard that over 95% of the identified groundwater contamination has been caused by FMC's off-reservation neighbor—Simplot. ER19. Amazingly, the Tribal Court of Appeals concluded that, even though FMC's portion of any groundwater contamination "was only 2%" (and below EPA levels of concern), jurisdiction under the second *Montana* exception still lies because "[a] 2% contribution is a contribution nonetheless." ER109. That is not, to say the least, a contribution that is "so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans*, 736 F.3d at 1306 (citation omitted).

FMC, in contrast, presented evidence that the waste at its property is contained and presents no meaningful risk of serious—let alone catastrophic harm—to the Tribes or its members. Even the district court recognized this fact. ER20. For example, FMC introduced:

- Studies conducted by "independent epidemiologists" that "establish[ed] that long-term exposure to the contaminants at the FMC Property did not cause any adverse health impacts to those workers whose exposures would be many times that of community members outside the Plant boundaries." ER18 (citing ER888; ER900; ER906).

- An independent study published in 2006 on the Tribal community that the Tribes themselves helped design and implement, which "failed to find adverse health impacts to Tribal members that could be attributed to contamination at the FMC Property." ER19 (citing ER927).
- Evidence "that contamination at the FMC site has not affected water quality off-site." *Id.* (citing ER872, ER873, ER869, ER879, ER884).
- And, with respect to air quality, evidence that the federal Agency for Toxic Substances and Disease Registry "found that the Superfund site currently presents no health hazard." *Id.* (citing ER921).

So on what basis did the tribal court conclude that the second *Montana* exception was triggered? The Tribal Court of Appeals—the only tribal court to consider the record on this issue—pointed to the testimony of two tribal members who said that their ceremonial practices in the Portneuf River were affected by their belief that the river is contaminated. ER109-11. This was not based on any actual harm caused by any real contamination, but rather a "feeling." As one of the members put it, "It's just because there is . . . a feeling that this place just isn't what it used to be." ER834 (901:16-17). Such subjective beliefs cannot possibly trigger the second *Montana* exception. *See Marchington*, 127 F.3d at 815 ("possibility of

injuring multiple tribal members does not satisfy the second *Montana* exception"); *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999).[5]

At bottom, what the Tribes want—as they argued before this Court almost two decades ago—is the removal of the waste altogether. So they are doing everything they can to make it as cost prohibitive and difficult as possible for FMC to do anything else. But that ignores the fact that containment of the waste *on site* is what EPA called for here after evaluating all the risks, including the dangers of *excavating* and *moving* waste offsite. ER959; *see* ER882 (1922:3-10), ER883 (1933:14-24); ER1161-62). And it ignores that this Court itself has already found that EPA's carefully considered remedial plan adequately protects health and human safety. *Supra* at 10-11, 44-45. Finding that the Tribes nevertheless have jurisdiction under the second *Montana* exception on this record would eviscerate the exception altogether.

C. The Tribes Lack Any Inherent Sovereign Authority Recognized By The Supreme Court To Engage In The Regulation At Issue

For the reasons explained above, the Tribes cannot meet their burden of establishing that either *Montana* exception applies. But the Tribes have an

---

[5] Not to mention, even if this kind of "feeling" testimony were ever sufficient to trigger the second *Montana* exception, it could not be adequate to impose tribal jurisdiction over FMC here given the fact that the arsenic levels in the river are below drinking water standards and, in any event, FMC is at most responsible for *2%* of any arsenic contamination in the Portneuf River. ER109; ER855 (1256:8-13).

additional and even more fundamental problem. Even where a nonmember has consented to tribal jurisdiction, there is an outer limit to which tribal sovereignty may ever extend. As the Supreme Court has observed, "[e]ven then,"—*i.e.*, even where there *is* consent—"the regulation [of a nonmember] must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce*, 554 U.S. at 337 (citing *Montana,* 450 U.S. at 564); *see id.* at 335 (explaining that "[t]he regulations we have approved under *Montana* all flow from these limited sovereign interests").

In the end, the Tribes' assertion of jurisdiction over FMC here must fail because it is not justified by any source of inherent sovereign authority recognized by the Supreme Court. Regulating FMC has nothing to do with the Tribes' "power to set conditions on entry" (since the Tribes have no right to control entry to *FMC's* own fee land), nothing to do with the Tribes' ability to govern themselves, and nothing to do with the Tribes' ability to control their internal relations.[6] Indeed, while FMC's plant was operating on all cylinders, the Tribes survived for decades

[6] The assertion of authority to generate revenue from permitting fees imposed on nonmembers for activity on non-Indian fee land is fundamentally different than the power to tax nonmembers who enter the reservation to do business with tribes. As the Supreme Court has explained, the latter taxing authority stems from the tribe's "power to exclude" and its power "'to control economic activity within its jurisdiction.'" *Atkinson*, 532 U.S. at 652 (citation omitted). Neither authority applies when it comes to the extraction of fees for activity on non-Indian fee land.

without regulating FMC or demanding any permitting fees. And the absence of any source of inherent authority justifying—and necessitating—the regulation at issue here alone compels the conclusion that the Tribes lacked jurisdiction.

In short, no matter how you slice it, "[t]he *Montana* rule, . . . and not its exceptions, applies to this case." *Strate,* 520 U.S. at 459.

II. FMC WAS DENIED DUE PROCESS

Even assuming the Tribes had jurisdiction to enter the judgment at issue, it is still unenforceable because FMC was denied the minimum requirements of due process in the proceedings before the Tribes, including, foremost, an impartial decisionmaker with "no showing of prejudice." *Marchington*, 127 F.3d at 811.

A. FMC Was Entitled To The Minimum Protections Of Due Process

"Due process, as that term is employed in comity," looks to whether "there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* In addition, "evidence 'that the judiciary was dominated by the political branches of the government or by an opposing litigant, or that a party was unable . . . to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to

recognition.'" *Id.* (quoting Restatement (Third) of Foreign Relations Law § 482 cmt. b (1987)).

The inherent risks that tribal courts present for denying nonmembers these crucial protections is well known. As the Supreme Court has observed, "[t]ribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the constitution.'" *Plains Commerce*, 554 U.S. at 337 (citation omitted). "[T]he Bill of Rights and the Fourteenth Amendment" thus "do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383. "Tribal courts also differ from other American courts (and often one another) in their structure, in the substantive law they apply, and in the independence of their judges." *Id.* at 384. Most notably, "'[t]ribal courts are often "subordinate to the political branches of tribal governments."'" *Id.* at 385 (alteration in original) (quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990)). This, of course, makes them the polar opposite of Article III courts.

Even assuming tribal courts ever have jurisdiction over nonmembers in civil cases (an issue on which the Supreme Court recently divided 4-4, *see Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159, 2160 (2016) (per curiam)), the tribal court judgment at issue here is unenforceable because it is the product of tribal proceedings that were infected by numerous fundamental errors that, both independently and collectively, denied FMC the minimum tenets of due process.

B. FMC Was Denied The Minimum Protections Of Due Process

This Court can begin and end its consideration of FMC's due process claim with the transcript of Judge Gabourie's and Judge Pearson's remarks at the University of Idaho College of Law. ER761-801. That transcript reveals two advocates evincing outright hostility to Supreme Court precedent on the limits of tribal jurisdiction, explaining how they protect their tribal clients (and employers), and describing how tribal court judges should "mold" cases in order to advance tribal interests. For example, Judge Gabourie described the Supreme Court's decisions on tribal jurisdiction, including *Montana,* as "murderous to Indian tribes," ER772:13-15; ER774:23-775:3; he observed that the tribal appellate court "has to take the case and mold it," ER768:20-769:10; and he explained that it was important for tribal appellate courts "to step in . . . to protect the tribe." ER791:15-18.

And Judge Gabourie provided an example:

> [T]here are tribes that have had mining and other operations going on . . . and then the ground is disturbed, sometimes polluted beyond repair.
>
> And you sit . . . as an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself . . . We know that . . . there's pollution . . . but nobody proved it. . . . But the tribal courts have got to realize that you need expert witnesses. . . . [S]o the appellate court is in a position of remanding that case back and say "do it."

ER790:3-22.

Judge Pearson likewise stressed the need for tribal appellate courts to create a record that would survive federal court review as a means of "avoid[ing]" purportedly "bad decisions" by the U.S. Supreme Court on tribal jurisdiction. ER778:10-20, ER789:4-8. She also observed that "[t]he tribe's got to be involved if it's going to be a really big case" and divulged that "we're sitting on one now that we know is going to go up, so we're saying our prayers as well as reading the cases." ER778:16-20. As a tribal judge, she explained, "you have to be thinking about, not only that tribe that you're sitting for, but how it's going to affect all of Indian country if it goes up in a federal case." ER795:23-ER796:1.

Just a month after making these startling comments, Judge Gabourie and Judge Pearson, along with Judge Silak, reversed every decision the Tribal Court made in FMC's favor, and handed the Tribes a big victory. Then the panel sought to bolster the Tribes' case in precisely the manner they described in their presentation. Although the panel recognized that there was not enough evidence in the record to support jurisdiction under the second *Montana* exception (an issue on which the Tribes bore the burden of proof), ER172-74, instead of simply holding that the Tribes had failed to show that the exception was met, it remanded to give the Tribes an opportunity to create a record on this issue, ER218-19. And then, the TCA reversed course and decided to take the evidence itself, sitting as an "appellate

court." ER134, ER136-37. In short, true to their word, Judges Gabourie and Pearson took the case and molded it "to protect the tribe." ER791:15-18.

It cannot seriously be doubted that Judges Gabourie and Pearson—and therefore the TCA panel on which they comprised a majority—evinced an improper prejudice in favor of the Tribes. And that makes the harm here even more egregious than the harm in *Bird*, 255 F.3d at 1149-51, where this Court refused to recognize a tribal court judgment because of biased remarks by a *lawyer* to the jury. Here, in contrast, the biased remarks were made by the *judges* themselves. But, without even acknowledging (much less condemning) this blatant bias, the district court held that any error was cured because "FMC asked the Tribal Appellate Court to reconsider the ruling by those Judges and that was done by a new panel that did not include either Judge Gabourie or Judge Pearson." ER29. In the district court's view, because the newly comprised panel "independently came to the same conclusion," the TCA "remov[ed] any due process concern." ER29-30.

But any fair reading of the opinion by the new TCA panel shows that it did *not*, in fact, "reconsider" the rulings by the biased judges and "independently" come to the same conclusion. Instead, the new panel simply indicated that the issues identified by FMC—namely, FMC's request to admit new evidence and challenge to the Tribes' jurisdiction under the first *Montana* exception—had already been ruled upon and so left those rulings undisturbed. ER114; *see* ER115 (the court had

"previously ruled that [it] does have jurisdiction over respondent FMC Corporation under the first *Montana* exception"). Yet, those rulings, as explained above and as the district court assumed, were the product of a panel with two judges who were clearly out to protect the Tribes' interests. Even assuming the new panel reached an "independent" decision on the second *Montana* exception, that would not eliminate the taint as to the panel's ruling on these important threshold issues.

That baked-in bias by the Tribes' highest court alone compels the conclusion that the Tribal Court of Appeals' judgment cannot be enforced. But that wasn't the only red flag. For example, because the TCA took the unusual step of receiving the evidence and making findings regarding the applicability of the second *Montana* exception in the first instance, FMC was effectively denied any appellate review of that ruling. That irregularity alone shows that FMC did not have a full and fair opportunity to litigate whether the second *Montana* exception applies. *See Burrell v. Armijo*, 456 F.3d 1159, 1171 (10th Cir. 2006) ("[W]e are troubled by the lack of a tribal appellate court to review the second tribal judge's decision."); *Bell v. Dillard Dep't Stores*, 85 F.3d 1451, 1456 (10th Cir. 1996) (citing, *inter alia*, *Luben Indus., Inc. v. United States*, 706 F.2d 1037, 1040 (9th Cir. 1983)).

Other procedural irregularities during the tribal proceedings underscore that the deck was stacked against FMC from the outset. For example, the Business Council claimed that the record was closed after the initial LUPC proceedings in

order to bar FMC from introducing additional evidence. *See* ER340, ER329. And the TCA refused to accept new evidence proffered by FMC showing that the Hazardous Waste Management Act was invalid, claiming the evidence was "not . . . timely" (ER114) even though FMC had only recently obtained a copy of the letter. *See* ER818-19; ER813-14; ER804-05, ER726. Yet, when it was clear that the Tribes had failed to meet their burden under the second *Montana* exception, the TCA opened the doors for the Tribes to introduce as much new evidence as they desired.

Beyond these procedural rulings lies a more fundamental problem—one that likely explains the way FMC was treated from the outset: the tribal courts are not independent of the Tribes' executive authority. The Business Council is the sole governing body of the Tribes. ER980. It has the power to both promulgate and enforce ordinances, ER982, and likewise has the power to review the action of any subordinate body of tribal government—meaning all other tribal bodies, including the courts. ER982-83. And for two of the four tribal proceedings, wherein the record on the first *Montana* exception was developed, FMC's opponent—the LUPC and FHBC—was also purportedly the neutral arbiter. Finally, tribal court judges—by their own admission—"serve at the pleasure of the Fort Hall Business Council. . . . That is the reality of the job." ER366 (Sho-Ban News, Mar. 19, 2015).

Remarkably, the district court simply disregarded all of the procedural irregularities, not even discussing them in its decision. And as to the lack of

independence of the tribal courts, the district court concluded that the argument could not be raised because FMC did not raise the issue in tribal court and "FMC had an obligation to exhaust its due process claims." ER39. That makes no sense. While the Supreme Court has indicated that tribal courts should be given "the first opportunity to determine its own jurisdiction subject to later review by a federal court," it has never held that exhaustion is required as to "due process" issues. *Burrell*, 456 F.3d at 1171. For good reason. It would make little sense to require a nonmember to complain to a tribal court about the structure of the tribe's system of government. Nor would it make sense to expect a tribal court to adjudicate a claim that its proceedings do not afford a nonmember due process when the Due Process Clause does not even apply. It is only when a federal court enforces a tribal court judgment that a cognizable due process claim arises. And that is why a federal court, under *Marchington*, has no discretion to enforce a tribal court judgment if the underlying proceedings violated the Due Process Clause.

Even without the discovery that FMC was improperly denied on the due process issue, the record demonstrates that the tribal proceedings did not afford FMC the minimum elements of due process, and were instead used to "protect the tribe," ER772:9-775:3, ER789:4-791:18, "mold" the case in order to advance the Tribes' interests, ER768:20-769:10, and ultimately favor the Tribes' perceived interests at the expense of FMC. Because the tribal court judgment was "obtained in a manner

that did not accord with the basics of due process," *Marchington,* 127 F.3d at 811 (citation omitted), the judgment cannot be enforced.

* * * * *

FMC attempted in good faith to resolve its disagreement with the Tribes over the Tribes' increasing regulatory demands over FMC's activity on its own fee land and FMC paid the Tribes a $1.5 million annual fee every year after 1998 that the plant was in operation. Whether or not the Tribes had jurisdiction to compel the payment of those fees, FMC has never sought a dime of that $7 million back. But under binding precedent of the Supreme Court and this Court, the district court erred in enforcing the tribal court judgment directing that FMC pay $19.5 million in permitting fees from 2002 to 2014—after the plant closed—and a $1.5 million annual fee "in perpetuity with no ending date established." ER20.[7]

[7] Because the tribal court judgment is unenforceable, the tribal court's award of some $1 million in attorney's fees and costs is likewise unenforceable. *See Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir. 2007) ("A court that lacks jurisdiction at the outset of a case lacks the authority to award attorneys' fees.").

CONCLUSION

The judgment of the district court should be reversed and the case should be remanded with instructions to enter judgment for FMC.

Dated: April 6, 2018

Respectfully submitted,

s/ *Gregory G. Garre*

Gregory G. Garre
Counsel of Record
Elana Nightingale Dawson
Genevieve P. Hoffman
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2207
Facsimile: (202) 637-2201
gregory.garre@lw.com

Ralph H. Palumbo
YARMUTH WILSDON PLLC
1420 Fifth Avenue
Suite 1400
Seattle, WA 98101
Telephone: (206) 516-3800
Facsimile: (206) 516-3888
rpalumbo@yarmuth.com

Lee Radford
PARSONS BEHLE & LATIMER
900 Pier View Drive
Suite 206
Idaho Falls, ID 83402
Telephone: (208) 522-6700
Facsimile: (208) 522-5111
lradford@parsonsbehle.com

Maureen L. Mitchell
FOX ROTHSCHILD LLP
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154
Telephone: (206) 389-1773
Facsimile: (206) 389-1708
mmitchell@foxrothschild.com

Counsel for Plaintiff-Appellant-Cross Appellee FMC Corporation

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant-Cross Appellee states that it is unaware of any cases pending in this Court that are related to this appeal, as defined by Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 28.1(e)(2) and 32(a)(5), and Ninth Circuit Rule 28.1-1, Appellant's Opening Brief is proportionately spaced, has a typeface of 14 point and contains 13,906 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Gregory G. Garre*
Gregory G. Garre

CERTIFICATE OF SERVICE

I, Gregory G. Garre, hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 6, 2018, which will send notice of such filing to all registered CM/ECF users.

s/ *Gregory G. Garre*
Gregory G. Garre