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 RESPONSE AND REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Tribes ask this Court to disregard the precedent of this Court and the Supreme Court on the scope of tribal court jurisdiction, disregard the judgment of the world's foremost expert agency on remediating environmental threats, and disregard the fact that after 70 years they cannot cite to any actual harm from a threat they claim is existential. There is no basis for this Court to ignore any of that. And accounting for both existing precedent, and the absence of any evidence of any actual, existential threat to the Tribes, requires reversal of the decision below.

Notably absent in the Tribes' brief is any meaningful attempt to account for the binding precedent refuting the district court's unprecedented extension of tribal jurisdiction to the circumstances here. The Supreme Court and this Court have repeatedly stressed that tribal jurisdiction over nonmembers is extremely limited and that tribal jurisdiction over nonmembers on non-Indian fee land is almost nonexistent. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 331-32 (2008). There are only two narrow exceptions to the general rule that tribes lack jurisdiction over the activities of nonmembers, and the Supreme Court has repeatedly emphasized that those exceptions are narrow and should not be extended. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001); *Plains Commerce*, 554 U.S. at 330. Neither exception remotely applies here.

The first *Montana* exception allows a tribe to regulate the activities of a nonmember who has voluntarily entered into a relationship with a tribe or its members "through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. But this case does not involve anything like such a consensual, commercial relationship. Instead, the Tribes claim that the exception was triggered by FMC's response to the Tribes' increasingly aggressive assertion of regulatory authority over FMC. The Tribes do not identify a single case recognizing jurisdiction under the first *Montana* exception in such circumstances. And even if a tribe could effectively coerce jurisdiction through regulatory demands, there is no reason to find that FMC agreed to the perpetual payment of a $1.5 million annual permit fee—for as long as waste remains on FMC's land, which, under the EPA-approved remediation plan, will be for the indefinite future.

The Tribes fare no better under the second *Montana* exception. For starters, they simply ignore that this Court has already held that this exception does not extend to the very area at issue in this case. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 n.8 (9th Cir. 2013). That alone defeats their argument. But the Tribes also do not come close to establishing that they face the kind of actual, existential threat necessary to trigger *Montana*'s second exception. They have much to say about the hazardous nature of phosphorus and phosphine *in general*. But they ignore the fact that the waste at issue was generated and disposed

of at FMC's facility for over 50 years without incident, proving there is no actual threat. When it comes down to it, the Tribes' claim rests on nothing but speculation piled on generalization, which does not trigger jurisdiction. *See id.* at 1306.

Remarkably, the Tribes also ask this Court to excuse the patent bias evidenced by the comments of two of the tribal court judges who heard this case. But no amount of *post hoc* rationalization can undo those comments or change what they are—a stunning admission by two sitting tribal court judges that they viewed their duty not as a neutral decsionmaker but rather to "step in . . . to protect the tribes." ER791:15-18. Even the tribal court itself seemed to recognize how bad these comments were because they replaced the judges who made them. Yet that did not cure the bias because, despite FMC's request, the new panel did not reconsider the biased panel's jurisdictional ruling under the first *Montana* exception; instead, the new panel just rubber-stamped the "previous[]" ruling. ER115. This clear bias, and other procedural irregularities, denied FMC its right to due process.

The district court's decision should be reversed.

ARGUMENT

As the Tribes admit, to enforce the tribal court judgment at issue in this case, the Tribes must show both that (1) the Tribes had jurisdiction over FMC as to the activity at issue, and (2) the judgment was entered consistent with the requirements of due process. Red Br. 1; *see* Blue Br. 28. The Tribes have failed to do either.

I. THE TRIBES HAVE FAILED TO ESTABLISH JURISDICTION UNDER THE FIRST *MONTANA* EXCEPTION

The Tribes' attempt to justify their regulation of FMC under the first *Montana* exception fails on both the law and the facts.[1]

A. A Consensual Relationship Under *Montana* Does Not Exist Where The Relationship Results From A Tribe's Assertion Of Jurisdiction Over A Nonmember's Activities On Non-Tribal Land

In its opening brief, FMC explained in detail how the precedent of this Court and the Supreme Court severely limits the exercise of tribal jurisdiction over nonmembers, especially when it comes to activity on non-Indian fee land. Blue Br. 29-33. In response, the Tribes largely just ignore that binding case law.

The Tribes never dispute, for example, that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders" and thus that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land & Cattle*

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[1] Throughout their brief, the Tribes misleadingly quote statements from the district court's opinion as if they are quoting materials in the record or actual findings of fact. For example, in their brief, the Tribes state: "By its terms, 'FMC agreed to pay the annual permit fee for as long as it stored the waste on the site.'" Red Br. 6 (quoting ER32). One might think that this is a quote from an actual agreement. In fact, however, it is a quote from the district court's decision (erroneously) *characterizing* its view of the parties' dealings. The district court's statements about the documents or events at issue are entitled to no deference from this Court; they are simply statements in a summary judgment decision. FMC urges the Court to carefully review the materials on which the Tribes rely in making or quoting statements about the events at issue in this case.

Co., 554 U.S. 316, 328, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). Nor do they dispute that the exceptions to this general rule are "limited" and that the rule is "particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* at 328, 330; *id.* at 338 (noting "the critical importance of land status"). And the Tribes do not dispute that they bear the burden "to establish one of the exceptions to *Montana*'s general rule" applies. *Id.* at 330. All that must be taken as given in deciding this appeal.[2]

Instead, the Tribes try to rewrite the law on what the first exception requires. According to the Tribes, a consensual relationship for purposes of the first *Montana* exception exists whenever "a nonmember's interaction with the tribe should reasonably be expected to trigger tribal authority." Red Br. 15-16 (capitalization altered) (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 818 (9th Cir. 2011)). But that formulation ignores the critical requirement for such jurisdiction—that the relationship be consummated "through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450

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[2] Although the Tribes do not dispute that the property at issue in this case is non-Indian fee land, they misleadingly refer to the activities at issue taking place "on the Reservation." Red Br. 12, 15, 30. Under *Montana* and its progeny, what matters is that FMC owns its land in fee; the fact that most of FMC's fee land is physically located within the boundaries of the reservation does not change that. Indeed, as the Supreme Court stated in *Plains Commerce,* "non-Indian fee parcels . . . cease[] to be tribal land." 554 U.S. at 336; *see id.* at 328 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.").

U.S. 544, 565 (1981). As the Supreme Court has held time and again, "a tribe 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) (emphasis added); *see also Atkinson Trading Co.*, 532 U.S. at 653. That is why the Tribes are unable to cite any case where jurisdiction under the first *Montana* exception was upheld absent a business relationship with a tribe or its members.

Neither *Water Wheel* nor *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.,* 715 F.3d 1196 (9th Cir. 2013), the cases relied on by the Tribes for their foreseeability test (Red Br. 16), qualifies as such. In *Water Wheel,* the nonmember had entered into a "business lease" with the tribe for the development of "tribal property." 642 F.3d at 817. And in *Grand Canyon*, the nonmember had entered into "a revenue-sharing 'Development and Management Agreement'" with the tribe for activities on "Hualapai trust land." 715 F.3d at 1199, 1205. In other words, unlike this case, both *Water Wheel* and *Grand Canyon* involved situations in which nonmembers voluntarily engaged in commercial dealings with tribes on tribal lands, as consummated through contracts, leases, or other arrangements.

The Tribes also argue that *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Merrion*, support their view that tribes can regulate and tax nonmembers on non-Indian fee land, and that a non-member need not enter tribal land or conduct business with a tribe or its members. But once again,

they ask this Court to ignore existing precedent. As the Supreme Court itself has explained, all of the cases *Montana* cited as illustrative of the first exception, including *Morris* and *Buster*, "involved private *commercial* actors." *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (emphasis added). There is no basis for this Court to revisit the Supreme Court's own explanation of its decisions.

In *Morris*, for example, the Court upheld a tribal tax based on a business arrangement the nonmembers had with tribal members to graze their cattle on tribal land. 194 U.S. at 393. And in *Buster*, the Eighth Circuit upheld the tribe's "power to levy a permit tax on nonmembers for the privilege of doing business within the reservation." *Plains Commerce*, 554 U.S. at 332-33 (citing *Buster*, 135 F. at 950). The Tribes read *Buster* as showing that tribes can regulate nonmembers on fee land. But in *Atkinson Trading Co.*, the Supreme Court squarely rejected that reading, explaining that it has "never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.' Accordingly, beyond any guidance it might provide as to the type of consensual relationship contemplated by the first exception of *Montana v. United States*, . . . *Buster* is not authoritative precedent." 532 U.S. at 653 n.4 (citations omitted); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (cases in *Montana* "indicate[] the type of activities the Court had in mind").

The Tribes' reliance on *Merrion* is even further afield. The Tribes state that *Merrion* confirms that a tribe's "'authority to tax derives'" from its "inherent powers of self-government" and thus that a tribe's power to tax "does not require that the nonmember voluntarily enter tribal lands." Red Br. 17-18 (quoting *Merrion*, 455 U.S. at 144). But this case involves a permit fee, not a tax. In any event, the Supreme Court has expressly rejected the Tribes' theory of taxing authority, stating that "*Merrion* . . . was careful to note that an Indian tribe's inherent power to tax only extends to 'transactions occurring on *trust lands* and significantly involving its members.'" *Atkinson Trading Co.*, 532 U.S. at 653 (quoting *Merrion*, 455 U.S. at 137). And in *Atkinson Trading Co.*, the Supreme Court further held that a tribe has "no taxing authority over nonmembers' activities on land held by nonmembers in fee." *Nevada*, 533 U.S. at 360 (citing *Atkinson Trading Co.*, 532 U.S. at 659). There is thus no basis to uphold the permit fee at issue under the Tribes' expansive conception of its taxing authority under *Merrion.*

Rather than grapple with the requirement repeatedly reiterated by the Supreme Court in applying *Montana*'s first exception to consensual, commercial dealing, the Tribes invent a new theory for jurisdiction under *Montana*—one in which a non-member's response "following the assertion of tribal regulatory authority can establish a consensual relationship." Red Br. 18. According to the Tribes, that was the holding of this Court's decision in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d

1311 (9th Cir. 1990). But once again, the Tribes have it backwards. Indeed, that case simply magnifies what is *absent* here under the *Montana* analysis.

In *FMC*, this Court reiterated the requirement that "*Montana* requires 'consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangement.'" *Id.* at 1314 (citation omitted). The Court then went on to state that FMC had "entered into consensual relationships with the Tribes in several instances," most notably in the "wide ranging mining leases and contracts FMC ha[d] for the supply of phosphate shale" from tribal land "to its plant." *Id.* Those commercial dealings—embodied in mineral leases and contracts for raw material from tribal land—were critical to the Court's finding of jurisdiction under the first *Montana* exception. *Id.*; *see also id.* at 1312-13 (discussing FMC's activity "on lands owned by the Tribes or by individual Indians"); *id.* at 1315 ("FMC actively engaged in commerce with the Tribes . . . ."); *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (describing *FMC* as finding that "tribal jurisdiction existed over non-Indian business that entered mining leases and contracts with a tribe"). By contrast, the activities at issue here concerned the disposal of waste solely on FMC's own land. The mineral leases and raw material contracts that this Court cited in *FMC* involving activities on tribal land cannot possibly justify the exercise of jurisdiction here because they lapsed before the assertion of jurisdiction at issue here.

See FMC Idaho, *The Gay Mine*, http://fmcidaho.com/the-gay-mine/ (mining operations ceased in 1993) (last visited Nov. 1, 2018).

The Tribes also misapprehend why the Tribes' coercion of FMC into the alleged arrangements at issue here is important. The point is not that these arrangements are invalid, and unenforceable, under the law of contracts because of duress, as the Tribes seem to think. *See* Red Br. 19 (citing *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976) (discussing whether a contract term was void due to duress)). Rather, the point is that FMC did not voluntarily choose to engage in commerce with the Tribes as *Montana* requires but instead responded to the Tribes' threats and "assertion of regulatory authority here." *Id.* And the absence of a voluntary decision by FMC to engage in a commercial relationship with the Tribes is fatal to the Tribes' claim of jurisdiction here. *See Plains Commerce*, 554 U.S. at 337 (Tribal laws and regulations "may be fairly imposed on nonmembers only if the nonmember has consented.").[3]

[3] The Tribes suggest that FMC should "have simply litigated the jurisdictional issue" back then. Red Br. 19. But the Tribes ignore the predicament that FMC faced. It had an immediate need to construct additional ponds to remain operational and comply with EPA's requirements for the disposal of waste, yet the Tribes had threatened to obtain a tribal court injunction prohibiting FMC from building the ponds if FMC did not submit to their regulatory demands. ER1247 ¶4. In those circumstances, FMC had no practical option but to try to obtain the least harmful settlement it could from the Tribes to remain operational. *See* ER1246-48 ¶¶3-8.

Ultimately, the Tribes' claim of jurisdiction under the first *Montana* exception boils down to their view that such jurisdiction can exist even if (1) a non-member's relationship with a tribe is *non*consensual, *non*commercial, and results solely from the tribe's assertion of *regulatory* authority, *see* Red Br. 18-19, and (2) the tribe is regulating a nonmember's activity on *non-Indian* fee land, *id.* at 18-20. Neither the Supreme Court nor this Court has ever endorsed such an expansive view of tribal jurisdiction, and the Tribes identify no basis for this Court to do so now.

The Court need go no further to find that jurisdiction is lacking for the judgment at issue under the first *Montana* exception.

B. Even If A Regulated Entity's Response To A Tribe's Assertion Of Jurisdiction Could Result In A Consensual Relationship For Purposes Of *Montana*, No Such Relationship Exists Here

Even if a tribe's assertion of regulatory authority over a nonmember for activity on fee land could ever establish a "consensual relationship" for purposes of the first *Montana* exception, the Tribes have failed to show that FMC consented to the indefinite payment of the $1.5 million annual permit fee at issue here.

1. FMC's application for a building and use permit in 1997 did not establish a consensual relationship

The Tribes first attempt to paint a picture wherein FMC "voluntarily applied for Tribal permits" in 1997 and was the driving force behind any arrangement between FMC and the Tribes. As the Tribes tell it, it was FMC that "approached the Tribes and sought their regulatory approval" and FMC then "confirmed" that, "[i]n

the RCRA negotiations, FMC agreed to obtain Tribal permits for the clean-up work." Red Br. 21 (citing ER1246-47, SER295). But the very materials the Tribes cite—a declaration from former FMC employee David Buttelman and a letter from former FMC General Counsel Paul McGrath—belie this account.

It is clear from both Mr. Buttelman's declaration and Mr. McGrath's letter that FMC had no intention of seeking a permit from the Tribes—until the Tribes attempted to regulate FMC and threatened to seek an injunction if FMC did not comply with their demands. And even then, EPA required FMC to proceed with its construction and waste-disposal plans regardless of whether the Tribes issued FMC any permits. Mr. Buttelman and Mr. McGrath advised the Tribes of the work EPA had required FMC to do involving the construction of new ponds, and asked the Tribes to support or concur in the plan (to avoid any conflict over the ponds), but they also made clear that FMC was required "to construct the ponds *even without Tribal approval*." SER295 (emphasis added); *see* ER1246-47; ER1251.

FMC did not voluntarily go to the Tribes and seek "regulatory approval," as the Tribes claim. *See* ER1251-52. Rather, it was the Tribes that introduced, and then insisted on, the need for such approval. In response to Mr. Buttelman's letter, the Tribes "demanded that FMC submit a building permit to the Commission for construction of the new ponds" and "threatened to initiate suit against FMC to enjoin construction unless such an application were submitted." ER1247 ¶4.

Left with no practical choice, FMC did apply to the Tribes for a building permit and a use permit in 1997, but when it did so, it made clear that it refused to consent to tribal jurisdiction at all. ER1250. Thereafter, facing the outstanding threat of an injunction from the Tribes and its "critical" need for additional ponds to comply with EPA's requirements, ER1247 ¶4, ER1248 ¶7; ER1251, FMC sent a letter stating that it was willing to consent to the Tribes' jurisdiction only "with regard to the zoning and permitting requirements as specified in the *current* Fort Hall Land Use Operative Policy Guidelines." ER1125 (emphasis added). Those Guidelines called for a *$10 permit fee*, not the many millions of dollars in fees that the Tribes sought to impose under later Guidelines. ER1026-28, ER1033-35; FER6 ("The permit application was accompanied by the $20 permit fee required under the Land Use Policy Commission Ordinance provisions . . . .").

Despite that explicit limitation, the Tribes claim that FMC's consent to "jurisdiction over both applications" with respect to the policies then in place was actually "consent[] to Tribal jurisdiction over land use permits" writ large. Red Br. 22. And the Tribes further contend that Mr. McGrath "confirmed that FMC consented to Tribal jurisdiction 'as it related to the zoning issue associated with the requisite construction permits,' without qualification." *See id.* (quoting SER295). But here, too, the Tribes read far too much into Mr. McGrath's letter.

The letter makes clear that Mr. McGrath did not seek to *broaden* the scope of FMC's limited consent but rather was simply describing the limited consent FMC had offered when it submitted its application—where FMC had offered to consent the Tribes' limited jurisdiction "with regard to the zoning and permitting requirements" under the *then-current* Guidelines. ER1125; *see* SER295 ("As part of FMC's permit application submitted to the Land Use Commission, we appended a cover letter indicating that our submission did not seek to avoid the Tribe's jurisdiction as it related to the zoning issue associated with the requisite construction permits."). Indeed, Tony Galloway, Sr., a member of the Tribes' Land Use Policy Commission, himself later stated in a declaration that, when FMC submitted its 1997 application, it "conceded jurisdiction of the Commissions in the *limited* area of land use permitting over the ponds under the Commission's guidelines *in place before* August 11, 1997." FER6 ¶7 (emphasis added). Mr. Galloway was right then and the Tribes are wrong now. There is no basis in any of the correspondence between FMC and the Tribes in 1997 upon which to find the "consensual relationship" asserted by the Tribes here.[4]

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[4] Notably, the Tribes "did not respond to Mr. Buttelman's August 11, 1997 letter." ER1111. Instead, they "sent out a notice dramatically altering the regulatory scheme," which FMC understood to mean "that the Tribes had rejected FMC's offer to abide by the zoning and permitting requirements which were 'current' as of the date of Mr. Buttelman's letter." *Id*. And, critically, the Tribes do not dispute that the permit fee under the Guidelines referenced in Mr. Buttelman's letter was $10 per

2. FMC's settlement of the permitting dispute with the Tribes in 1998 did not establish a consensual relationship

The Tribes ask this Court to ignore the exchanges that took place in 1997 by arguing that FMC entered a consensual relationship with the Tribes in 1998 when the parties settled the permitting dispute, no matter what transpired between the parties in 1997. To support that claim, the Tribes point to an exchange of letters in 1998, ER23-25, 31-35, asserting that FMC consented to tribal jurisdiction and agreed to pay the Tribes an annual permit fee "for as long as it stored . . . waste on the site." Red Br. 24 (quoting ER32). That is incorrect.

The 1998 letters must be read in light of what led up to them. Before the Tribes and FMC settled their dispute in 1998, the Tribes rejected FMC's 1997 use permit application and instead asserted that, pursuant to its new regulations, FMC needed to pay *$182 million annually*—an amount that would have required FMC to shut down its plant. ER1093; *see also* ER1248. It was in the shadow of both that staggering demand for nearly $200 million in annual fees and the Tribes' threat of an injunction that FMC said it would pay the Tribes $1.5 million annually for the disposal of waste. It cannot seriously be disputed that FMC's attempt to strike the least disfavorable resolution in these circumstances so that the Tribes would cease

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permit application whereas the Tribes' later amendment to the Guidelines raised the fees to many millions of dollars. Red Br. 22. As a result, any offer FMC made to the Tribes in Mr. Buttelman's letter was rejected by the Tribes.

their increasingly unreasonable and exorbitant demands was far from the sort of voluntary, commercial agreement contemplated by *Montana*.

The Tribes argue that FMC agreed to pay for "storage" of the waste and that, because FMC's waste is permanently "stored" on FMC's property, FMC agreed to pay the Tribes a storage fee indefinitely—as long as the waste remains on the site. But to understand what FMC agreed to, one must look at the regulations the Tribes were attempting to enforce. *See* ER1015-16 (April 13, 1998 letter from the Tribes to FMC asserting that FMC must "adhere to Chapter V Section V-9-2 Hazardous and Non-Hazardous waste disposal fee"). And those regulations draw a specific distinction between the "storage" of waste and the "disposal" of waste—making those terms critical to understanding any agreement by FMC to pay permit fees.

Both "storage" and "disposal" were defined by the Tribes' 1998 Guidelines. "Storage" was defined as "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*." 1998 LUPO Guidelines, ER1017 (emphasis added). "Disposal," in turn, was defined as "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." *Id.* And because FMC was disposing of waste into its land such that it would enter the environment and

remain there (and therefore not "storing" it), FMC negotiated a "one and one-half (1.5) million dollar fee" with the Tribes "for *disposal* of waste"—a fact the Tribes themselves have recognized. *See* ER1080 (emphasis added); *see, e.g.*, FER15 ¶30 (showing that the Tribes understood that the ponds were used for "*disposal* of wastes" (emphasis added)); *see also* FER12-14 ¶¶20, 24.

The Tribes do not dispute that the 1998 Guidelines distinguish between the storage and disposal of waste and that a party disposing of waste is *not* also storing that waste. *See* Red. Br. 25. Instead, they contend that the provisions of the 1998 Guidelines regarding storage and disposal are irrelevant because FMC's obligation arises from the purported "1998 Agreement." *Id.* That agreement, according to the Tribes, is represented by three letters: (1) a May 19, 1998 letter from the Tribes to FMC stating that the parties agreed that FMC would pay an annual "fixed permit fee amount $1.5 million for the period June 1, 1998 to May 30, 1999," ER1045-46; (2) a May 26, 1998 letter from FMC to the Tribes stating that FMC understood that the fees would "apply during the time the[] ponds are in operation," ER1047; and (3) a June 2, 1998 letter from FMC to the Tribes, stating that "the permit covers the plant," ER1049, and sent in response to the Tribes' objection that FMC's May 16, 1998 letter "could be read as attempting to limit the Use Permit to ponds 17, 18, 19," ER1053, which FMC intended to phase out of use when it began disposing of waste via its LDR Treatment System, ER1152-58; ER1113 ¶18.

There is no evidence in those letters or elsewhere that either FMC or the Tribes thought that FMC was agreeing to pay the Tribes the $1.5 million annual fee to "store" waste indefinitely regardless of whether FMC's plant operations shut down and it ceased disposing of waste entirely. One need look no further than the Tribes' response to FMC's initial letter to see that, until recently, even the Tribes thought that FMC was obligated to pay the annual fee only for the *disposal* of waste, as defined by the 1998 Guidelines. The reason the Tribes were concerned about the statement in FMC's letter that the fee applied "during the time the[] ponds are in operation" (ER1047) was because the Tribes knew that, pursuant to the consent decree, FMC was going to stop using the ponds for disposal and therefore the $1.5 million fee would not apply going forward. If the Tribes had thought then that the fee applied to the indefinite storage of the waste, as they now posit, there would have been no basis for the Tribes' concern since FMC purportedly would have agreed to pay even "when those ponds were closed under the Consent Decree." ER1053.

The Tribes confirmed this understanding in 2005 when they moved in federal district court for clarification of the consent decree and for a preliminary injunction to enforce the decree. In those motions, the Tribes argued that, if the district court did not issue an order "requiring FMC to comply with the terms of the Consent Decree regarding Tribal permits . . . FMC's activities" would "continue unchecked." ER1138; FER9. The Tribes also urged the court to act quickly because, once FMC's

work activities were complete, the Tribes would not have the "opportunity to enforce its laws and regulations." FER9-10. But none of that would have been true if, as the Tribes now claim, the parties had agreed in 1998 that FMC would pay annual permit fees for waste "storage" in perpetuity. It was only after the Tribes failed in their efforts to force FMC to obtain permits pursuant to the consent decree that the Tribes came up with the theories they now press.

In all events, absent the clearest of terms, there is no basis to read into the letters an agreement to pay a $1.5 million annual permit fee—for as long as the waste remains on the site, which is likely to be for centuries.

3. FMC did not confirm anything about its relationship with the Tribes in the consent decree

Because FMC did not enter into a consensual relationship with the Tribes in 1997 or 1998 let alone agree to pay the Tribes a "storage" fee in perpetuity, the Tribes pivot and argue that the *consent decree* evidences such an agreement. Red Br. 26-27. That argument fails as well. To begin with, as this Court has already held, the Tribes are not a party to the consent decree and therefore cannot seek to enforce it. *See United States v. FMC Corp.*, 531 F.3d 813, 823-24 (9th Cir. 2008). That alone should eliminate any argument by the Tribes based on the consent decree.

In any event, nothing in the consent decree refers to any agreement by FMC to pay $1.5 million in annual fees, for any period of time. Instead, the Tribes point to a provision of the consent decree stating that FMC would apply for permits "the

Work requires." ER1150. But as the United States has explained, this provision does not "expand the ability of a permitting authority such as a Tribe or state to exercise additional authority—beyond what it *already* possesses." U.S. Amicus Br. § C, *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008), 2007 WL 1899170 (May 4, 2007) (emphasis added); *see* Blue Br. 38-39. So, even if the Tribes had standing to enforce the consent decree (which they do not), the provision hardly establishes any agreement to pay the fees at issue.

The Tribes' only answer to this is to say that FMC had already recognized that the Tribes possessed the authority to require FMC to obtain permits. The record, however, shows the opposite—that FMC did not believe the Tribes had authority to require FMC to apply for any permits, but rather simply concluded that, given the Tribes' threat of an injunction and attempt to impose a $182 million annual permit fee, and given FMC's need to construct new waste ponds imminently, FMC saw no practical option but to settle its dispute with the Tribes by agreeing to the $1.5 million annual disposal fee. ER1247-48; ER1093. The decision to apply for permits under threat of an injunction and exorbitant fees from a claimed regulator is a far cry from a consensual agreement to plenary tribal jurisdiction over land use in perpetuity. A contrary finding would establish just the kind of "in for a penny, in for a Pound" conception of jurisdiction under the first *Montana* exception that the Supreme Court has emphatically rejected. *See Atkinson Trading Co.*, 532 U.S. at 656.

The Tribes also claim that FMC "relied on its Tribal permits to secure this Court's affirmance of the District Court's approval of the Consent Decree." Red Br. 26. But that argument is based on "selective quotes" and is, once again, an attempt to rewrite the past. FMC never rested its defense of the consent decree on the ground that it had agreed to the Tribes' permitting scheme. Rather, FMC simply pointed out that "[i]t [wa]s difficult to understand how the Tribes" could object to the consent decree given "the fact that the Decree permits the operation of ponds that the Tribes have permitted." FMC Br. 17-18, *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000), 2000 WL 33996531 (Jan. 27, 2000). FMC, of course, ultimately obtained permits from the Tribes to construct and operate the ponds while it was disposing of waste. But nothing in the consent decree, or in FMC's prior briefing to this Court, suggested that FMC agreed to tribal jurisdiction writ large and in perpetuity, let alone that this Court should affirm the district court's decision in light of such an agreement. The Tribes' claim otherwise is meritless.

4. Any conceivable agreement to pay permitting fees was terminable at will because it lacked a duration term

In the end, there is another way to cut through all of this: whatever the parties agreed to, there is no enforceable obligation to the perpetual payment of a $1.5 million annual permit fee. The Tribes do not deny the "general rule" that indefinite contracts are terminable at will. Red Br. 25; *see* Blue Br. 42 & n.4 (discussing rule). Nor do they deny that the alleged agreement has "no expiration date," as the district

court itself recognized. ER32. That should be the end of the matter: any agreement to pay fees was terminable at will, and ended when FMC stopped paying the $1.5 million annual fee after the plant closed and it ceased operations.

The Tribes' only response is that this rule does not apply because the parties clearly "intended" that the fees *would* be indefinite—*i.e.,* that FMC would "pay the annual fee for as long as it stored the waste on the site" (which, as the Tribes themselves recognize, will be for an indefinite period under the consent decree). Red Br. 25 (citation omitted). That is unfathomable. There is no express term providing for the indefinite payment of a $1.5 million annual fee. Nor would any reasonable actor ever agree to such an extraordinary obligation. In fact, the agreement provides that FMC would pay the fees only for as long as it *disposed of* waste, which FMC did. *See supra* at 15-19. But if this Court disagrees with FMC's interpretation, then the agreement has no durational limit and, accordingly, is terminable at will under the "general rule" the Tribes themselves recognize. And it is indisputable that FMC terminated any agreement with the Tribes to pay the $1.5 million fee when its plant shut down and FMC stopped disposing of waste and paying the fees.[5]

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[5] The consequences of the Tribes' view that the $1.5 million annual permit fee applies indefinitely are confirmed by a new lawsuit filed by the Tribes, while this appeal has been pending, seeking the recovery of an additional $4.5 million in permit fees during 2015-2017. *Shoshone-Bannock Tribes v. FMC*, No. 2018-CV-CM-0079 (Shoshone-Bannock Tribal Ct. Mar. 12, 2018). This new suit underscores that the Tribes will seek to collect the $1.5 annual permit fee for as long as the waste remains

II. THE TRIBES HAVE NOT ESTABLISHED JURISDICTION UNDER THE SECOND *MONTANA* EXCEPTION

The Tribes' attempt to establish jurisdiction under the second *Montana* exception, much less a nexus between the alleged threat and the exorbitant $1.5 million annual permit fee that they are seeking to collect, also fails.

A. As A Matter Of Law, The Second *Montana* Exception Cannot Apply To The Regulation Of The Land At Issue Here

Perhaps recognizing the challenge they face, the Tribes devote a mere paragraph in their 66-page brief to the law governing the second *Montana* exception, and that paragraph merely recites a few platitudes. *See* Red Br. 28-29. The Tribes do not even attempt to grapple with the numerous Supreme Court and Ninth Circuit cases that, as FMC explained (Blue Br. 43-51), make clear that there is no jurisdiction under the second *Montana* exception in the circumstances here.

Indeed, the Supreme Court has repeatedly made clear that, for jurisdiction to exist under the second *Montana* exception, the nonmember's conduct must "menace[] the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). The conduct therefore "must do more than injure the tribe; it must 'imperil the subsistence' of the tribal community." *Id.* (quoting *Montana*, 450 U.S. at 566). And

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on FMC's property, as it is expected to for decades if not centuries under the EPA-approved remediation plan.

a tribe's jurisdiction, in turn, "must be necessary to avert catastrophic consequences." *Id.* (quoting F. Cohen, *Handbook of Federal Indian Law* § 4.02[3][c], at 232 n.220 (2005 ed.)); *see also Evans v. Shoshone-Bannock Land Use Policy Commn.*, 736 F.3d 1298, 1306 n.8 (9th Cir. 2013).

Given those demanding requirements, a tribe attempting to establish jurisdiction over a nonmember under the second *Montana* exception faces a "formidable burden." *Evans*, 736 F.3d at 1303. In fact, the Supreme Court has upheld the assertion of tribal jurisdiction over nonmembers on fee land only *once*, in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *See Plains Commerce*, 554 U.S. at 333; *see also Evans*, 736 F.3d at 1303. And even then, the Supreme Court's controlling opinion recognized that the tribe only had authority to regulate non-Indian land that was "in the heart" of a closed area of the reservation—an area "almost entirely . . . reserved for the exclusive benefit of the Tribe." *Brendale*, 492 U.S. at 440, 442. As to non-Indian land that was in an open area of the reservation, the Court found that the tribe had no jurisdiction because, "[i]n 'sharp contrast to the pristine, wilderness-like character of the "Closed Area,"' the open area [was] marked by 'residential and commercial developmen[t].'" *Id.* at 445 (alteration in original) (citation omitted).

This Court has already recognized *Brendale*'s limits, explaining in *Evans* that "[t]he Supreme Court's rejection of tribal zoning power over fee land in the open

area [in *Brendale*] reflects the rule that tribes generally lack authority to regulate nonmember activity on non-Indian fee land." 736 F.3d at 1305 n.7 (citing *Plains Commerce*, 554 U.S. at 328). "By contrast," this Court continued, the Supreme Court's "authorization of tribal zoning of non-Indian fee land in the closed area represents a 'minor exception' to that rule." *Id.* (quoting *Plains Commerce*, 554 U.S. at 333). As a result, "courts must analogize to the closed area described in *Brendale* to determine whether tribal zoning authority over fee land is plausible." *Id.*

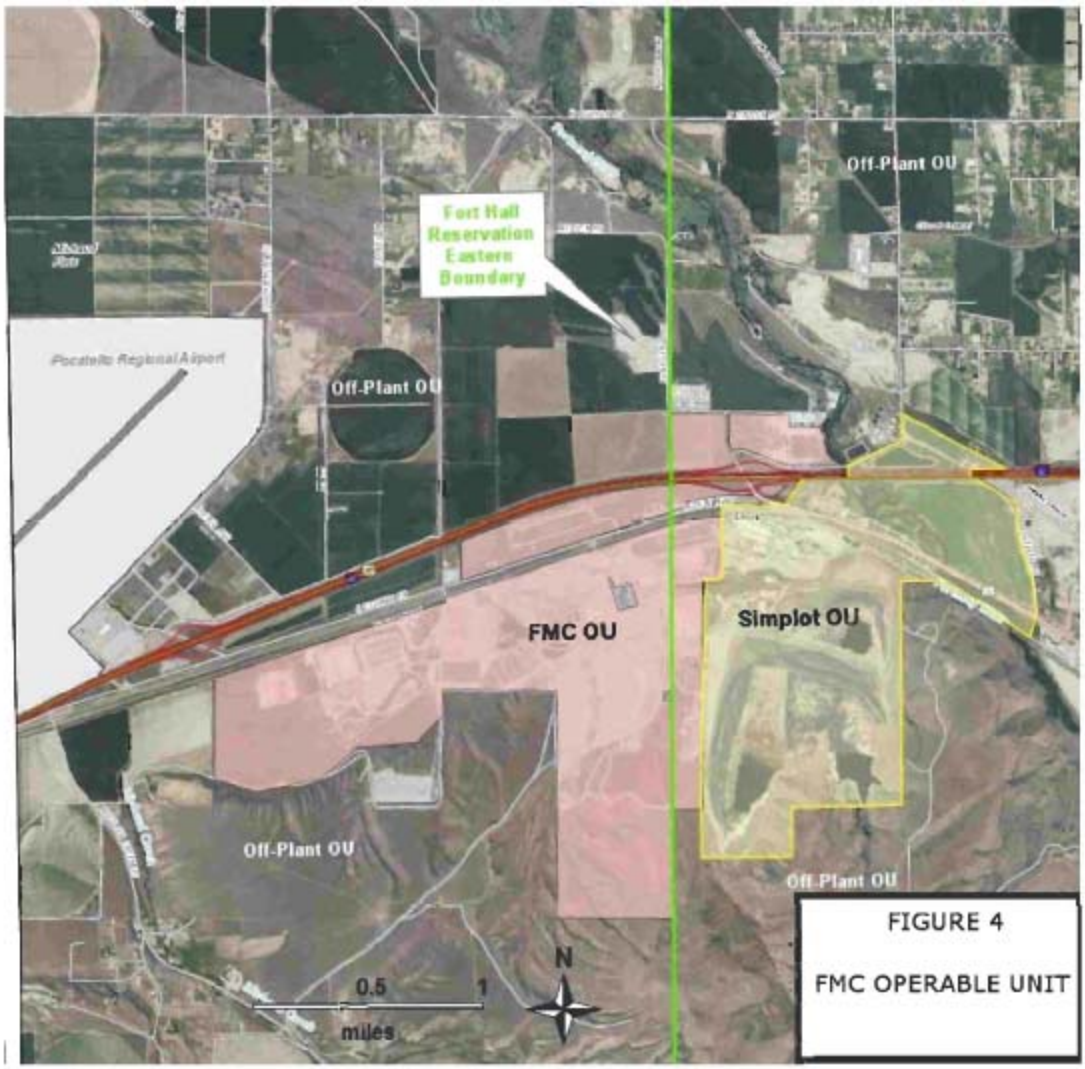
Following that approach, this Court recognized that under the second *Montana* exception: "[t]ribal zoning authority over non-Indian fee land is plausible only if (1) there is an arguable similarity between the area surrounding the fee land and the closed portion of the reservation described in *Brendale*; and (2) the intended use of the fee land would place the character of the surrounding area of the reservation 'in jeopardy.'" *Id.* at 1304 (quoting *Atkinson Trading Co.*, 532 U.S. at 658). And even then, the Court explained, a tribe's jurisdiction must be "necessary to avert catastrophe." *Id.* at 1306 n.8; *see also Plains Commerce*, 554 U.S. at 341.

To make matters worse for the Tribes, this Court has already addressed whether the area surrounding FMC's property can be regulated under the second *Montana* exception, and held that it could not. In *Evans*, this Court held that the Tribes could not regulate the activities of a nonmember on fee land located in the *same* area of the *same* reservation at issue in this case because the "area surrounding

[the] property b[ore] no resemblance to the closed portion of the reservation in *Brendale*" and because "the Tribes fail[ed] to provide specific evidence showing that tribal regulation" was "necessary to avert catastrophe." 736 F.3d at 1304, 1306 n.8. That holding compels the same outcome here. *See* Blue Br. 43-46.

Remarkably, the Tribes dispute the relevance of *Evans*, arguing that it did not consider the precise facts that are before the Court here. *See* Red Br. 30. But this is just splitting hairs. *Evans* could hardly be closer in terms of the nature of the property at issue—the key to the application of *Brendale*. Indeed, both the property at issue in *Evans* and the property at issue here are located in the same area of the Fort Hall Reservation and have the same essential character. There, as here, "[t]he area surrounding [the] property on the [reservation] is dramatically different" from the closed area in *Brendale*. *Evans*, 736 F.3d at 1304; ER1216-17, ER1220. There, as here, "the City of Pocatello operates the Pocatello Regional Airport on non-Indian fee land a short distance from" the property at issue. 736 F.3d at 1304; Blue Br. 5 (showing FMC's property located across Interstate Highway 86 from the airport). There, as here, "[t]he area is traversed by a public road"—there, "Government Road"; here, Interstate Highway 86 and U.S. Highway 30. 736 F.3d at 1304; Blue Br. 6. And there, as here, "the area of the [reservation] near the . . . property [at issue] does not in any way resemble the 'undeveloped refuge' in which the *Brendale* Court permitted tribal zoning of non-Indian fee land." 736 F.3d at 1304.

To the extent there is any difference in the properties, the property here is even *less* amenable to regulation under the second *Montana* exception than the property in *Evans*. Most of the area immediately surrounding FMC's property is not, in fact, tribal land or owned by tribal members. One side of FMC's property lies on top of the reservation's boundary and next to off-reservation land owned by J.R. Simplot Co., which operates a major fertilizer plant on the site. *See* Blue Br. 6-7. And the rest of the property around FMC's land is predominantly non-tribal agricultural and commercial land comprised of state and federal highways, petroleum storage tanks, and a municipal airport. *See* Blue Br. 7; *see also* ER1209 ¶33 (referring to the petroleum fuel pipeline running to "Chevron's tank farm" just north of FMC's property); ER1220 (showing FMC's property (S14 and S13)); *see* ER1216-17 (all of S10, S12, S15, most of S11 and S22, and half of S21 are non-tribal lands not owned by tribal members). In short, the area surrounding FMC's property bears no resemblance whatsoever to the closed area around the non-tribal land in *Brendale*.



ER971.

No doubt that explains why the Tribes do not even *try* to analogize the area around FMC's property to the closed area for which tribal jurisdiction existed in *Brendale*. That fact, alone, is fatal to their assertion of jurisdiction under the second *Montana* exception. *See Evans*, 736 F.3d at 1305 n.7.

B. The Tribes Also Have Failed To Establish The Requisite Threat To Trigger The Second *Montana* Exception

The Tribes also have failed to establish the requisite, existential threat required under the second *Montana* exception. The Tribes opine at great length on the dangers of phosphorus and phosphine. But as FMC has explained (at 46), the question is not whether those substances are dangerous in the abstract but rather whether those substances imperil the existence of the Tribes here, even when they are contained under many tons of engineered soil caps and are subject to extensive, federally approved remediation measures including constant monitoring. *See Evans*, 736 F.3d at 1306 & n.8. As to that question, the Tribes offer nothing more than speculation and generalizations. And as *Evans* holds, that is not enough. *See id.*

1. History alone refutes the Tribes' apocalyptic claims of threats

History refutes the Tribes' claim that they face a "catastrophic threat." *See* Red Br. 28. The waste at issue—elemental phosphorus and phosphine—has been located on (and contained within) FMC's property "for at least 50 years, during which time the project of tribal self-government has proceeded without interruption." *Plains Commerce*, 554 U.S. at 341 (citation omitted). Indeed, the district court itself recognized 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; *see* Blue Br. 47-48 (discussing studies failing to find that the Tribes have suffered

any harm). The notion that, after over 70 years, there is suddenly an existential threat to the Tribes is absurd.

2. The Tribes' claimed threats are speculative and unsupported by the record

Given this history, the Tribes are forced to rely on speculation and generalizations about the potential threats posed by the waste in the abstract. But as *Evans* holds, that is not enough to trigger jurisdiction under the second *Montana* exception. 736 F.3d at 1306. The Tribes claim, for example, that phosphorus creates "a constant threat on and off the FMC property." Red Br. 31-32. But they fail to acknowledge that the phosphorus on FMC's property is in the ground in a solid state and so "does not pose a risk to human health if left undisturbed." ER962, 964. The real danger, as EPA recognized, would be created by trying to excavate the phosphorous and remove it from the property. That is why EPA's remediation plan calls for leaving the waste on FMC's property. *See* Blue Br. 49.

The Tribes likewise contend that "[p]hosphine is deadly and cannot be contained." Red Br. 32. Here, too, the Tribes are exaggerating. For example, the Tribes rely on the triggering of phosphine alarms worn by FMC workers to say that "releases are unavoidable." *Id.* at 36 n.28. But all the triggering of these alarms shows is that the types of releases that have (and thus could) occur pose no threat to the Tribes at all let alone the "deadly threat" the Tribes claim because, even when those alarms were triggered, the areas beyond the immediate location of the alarm

contained no measurable level of phosphine. *See* SER146 ("The operators did monitor for PH3 in the area downwind and measured 0.00 ppm."); *see also* SER147 (measurement of 0.00 ppm of phosphine at the fence line following an alarm). The Tribes identify no instances where phosphine has ever been measured at the fence line of FMC's property, let alone miles beyond FMC's property in Fort Hall, where the Tribes' population center lies. *See* Blue Br. 5 (map).

Much of what the Tribes rely on to claim a catastrophic threat to the Tribes is the testimony of tribal members regarding their "feelings" and "beliefs." In an attempt to bolster that testimony, the Tribes now say that those "feelings were later confirmed by proof of contamination to the Portneuf River and Fort Hall Bottoms." Red Br. 38. The purported "proof" the Tribes cite is not actual proof of contamination, however, but rather the testimony of another tribal member—Chairman Nathan Small—about what he *believes*. *See, e.g.*, SER33 (907:1-5) (referring to ducks that died and saying that "there was a *feeling* that why did all these ducks" die—"I *believe* it was because of the discharge of the phosphate" (emphasis added)); ER834 (903:9-24) ("But the people just had that feeling, and that knowing" about contaminants; "to live near a toxic waste dump . . . it's not conducive to our health and welfare of our people, because of the contaminants, and the possibility of what may occur."). And as the district court itself recognized, when it comes to actual proof, the evidence in fact shows the opposite—that

"contamination at the FMC site has not affected water quality off-site"; "no measurable harm" has "occurred to humans or water quality"; and "the EPA's containment program [will] prevent any future harm." ER20; *see also* ER19 (citing ER872, ER873, ER869, ER879, ER884).

The Tribes' statements about "the possibility of what may occur" in the river or elsewhere is precisely the sort of speculation that this Court held in *Evans* is insufficient to overcome the Tribes' "formidable burden" to establish jurisdiction under the second *Montana* exception. *See Evans,* 736 F.3d at 1306 & n.8. In fact, Chairman Small himself acknowledged that he does not know of "anybody directly, or anybody's health studies or anything else that might have been done to say where" tribal members' health problems "are coming from." ER834 (904:12-14). Far from providing the "proof" the Tribes claim, Chairman Small's testimony shows that even the Tribes did not have such evidence, though they were "hoping that health study that is done will confirm our suspicions." *Id.* (904:15-16).

Chairman Small recognized what the Tribes do not—that there is no evidence, in health studies or otherwise, to confirm the Tribes' claims that FMC's activities cause any threat to the Tribes or its members let alone that FMC's activities have had any adverse effect on the Tribes or its members. Even the health study that the Tribes now rely on (at 40) to say that "non-white FMC Plant workers have had elevated cancer rates since 1949" says that the "cancer deaths do not distribute in a

fashion that would indicate any relationship to the work environment." ER894; ER895 ("deaths from cancer . . . appear to be unrelated to work environment").

The Tribes try to bolster their claims of a threat by alleging that FMC's "containment plans are unlikely to be fully effective." Red Br. 42. But those plans have been developed and approved by the world's foremost expert agency for remediating environmental threats, not to mention approved by this Court. In fact, this Court considered, and rejected, the same overblown claims of catastrophic harm when the Tribes appealed the district court's approval of the consent decree, finding that "the Tribes . . . presented 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). There is still no evidence.

Pointing to *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998), the Tribes argue that the risk that EPA's own containment system "may fail" is sufficient to establish jurisdiction. Red Br. 43 (citation omitted). For starters, this speculation is just as unfounded as the Tribes' other speculation, and therefore must be rejected under *Evans*. *EPA* does not change that conclusion at all. Indeed, in *EPA* the tribes were regulating *consistent with* a grant of EPA authority; here, the Tribes are essentially claiming that EPA's efforts should be rejected as inadequate. *See* 137

F.3d at 1139. Moreover, the Court nowhere held in *EPA* that the hypothetical risk that EPA regulation may "fail" establishes jurisdiction under *Montana.*[6]

In short, the Tribes have not come close to showing the sort of real, existential threat that would trigger jurisdiction under the second *Montana* exception.

3. The Tribes' generalized interest in self-government is not sufficient to establish jurisdiction

According to the Tribes, the $1.5 million annual fee is also necessary because, "[i]f the Tribes were powerless to protect their Treaty rights to the lands, waters, and natural resources of their homeland through the enforcement of [tribal] laws, it would divest the Tribes of their right to self-government and their right to control internal relations." Red Br. 44-45. In other words, the Tribes claim that denying jurisdiction under the second *Montana* exception would prevent them from enforcing their environmental laws, which, in turn, divests them of their right to self-government and to control internal relations. That argument fails too.[7]

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[6] The Tribes claim that EPA has failed to oversee FMC's site throughout FMC's 50-plus year history. Red Br. 42-43. But the Tribes neglect to mention that the production of elemental phosphorus was exempt from RCRA until 1990. *See* ER965. Once that exemption was eliminated in 1990, EPA addressed FMC's site and has worked exhaustively towards identifying and implementing remediation plans for the site pursuant to RCRA, as it is required by law to do. ER946-947.

[7] The Tribes also refer to the need "to control internal relations." Red Br. 44. But that interest applies to the rules governing membership, domestic relations among members, or the like. *See Plains Commerce*, 554 U.S. at 327-28. It is not remotely implicated by the activities at issue here.

Indeed, based on the Tribes' logic, a tribe would always have jurisdiction under the second *Montana* exception over non-members on fee land within a reservation because, otherwise, the tribe would be unable "to protect their Treaty rights to the lands, waters, and natural resources of their homeland through the enforcement of [tribal] laws." *Id.* at 44. That is far from the "limited" exception to the general rule that the second exception is supposed to effect. *Plains Commerce*, 554 U.S. at 329-30. This theory swallows the rule that jurisdiction is generally lacking over nonmembers on non-Indian fee land, which, of course, is not allowed. *See County of Lewis*, 163 F.3d at 515 ("Under the tribe's analysis, the exception would swallow the rule . . . . The exception was not meant to be read so broadly.").

Not surprisingly, the Supreme Court has already explained that the second *Montana* exception "does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." *Atkinson Trading Co.*, 532 U.S. at 657 n.12. "Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." *Id.* (alteration in original) (citation omitted). The Tribes' ability to maintain their political integrity during the almost 70 years since the Pocatello plant first opened its doors conclusively establishes that there is no such threat here.

C. The District Court Correctly Concluded That The Perpetual $1.5 Million Annual Permit Fee Has No Nexus To The Alleged Harm

The Tribes devote just three and a half pages of their brief to the argument that the district court erred in finding that they had not shown a "nexus" between the alleged threat and $1.5 million annual fee—the supposed basis of their cross-appeal. Red Br. 44-47. This argument should be rejected as well.

Tellingly, the Tribes largely rely on procedural objections in seeking to challenge the district court's decision on this point. First, they argue (at 45-46) that FMC waived any objection to an indefinite $1.5 million annual fee by paying $1.5 million from 1998 to 2001, when the plant was in operation and FMC was disposing of waste in ponds. The Tribes did not make that argument below, however, and so it is waived. *See FMC Corp. v. Shoshone-Bannock Tribes*, No. 14-CV-489-BLW, ECF Nos. 64-1, 64-2, 65-1, 75, 76, 77, 80, 81, 82. But in any event, the Tribes ignore that FMC agreed to pay $1.5 million annually while it was using the ponds to dispose of waste, not to pay the fee annually for as long as the waste remained on the site—indefinitely. *See supra* at 15-19. FMC paid the fees while it generated and disposed of waste, and stopped when it no longer generated or disposed of waste. Its payment of those fees (which it does not challenge) in no way waived FMC's right to challenge the Tribes' claims that they were entitled to a $1.5 million fee indefinitely, now that the plant has been dismantled and FMC is no longer disposing of waste.

Next, the Tribes contend (at 46) that FMC "earlier acknowledged that a much larger fee was not unreasonable." But here, too, the Tribes are relying on an argument that they did not raise below and thus have waived. *See FMC Corp. v. Shoshone-Bannock Tribes*, No. 14-CV-489-BLW, ECF Nos. 64-1, 64-2, 65-1, 75, 76, 77, 80, 81, 82. In any event, the argument fails on its own terms too, because the Tribes are conflating the issues. Any position FMC took with respect to fees the Tribes wanted to assess previously addressed fees for the disposal of waste and says nothing about what fees, if any, are appropriate once disposal has ceased, as it has here. Moreover, as discussed, FMC never agreed to pay any fee indefinitely, even after the plant was closed, which would clearly be unreasonable. *See supra* at 15-19.

When the Tribes finally get around to the exorbitant amount of the fees—the real issue—they simply claim (at 46), in broad and generalized terms, that the $1.5 million annual fee is needed to support its oversight programs. Yet the Tribes fail to provide any evidence as to why they supposedly need $1.5 million annually, as opposed to, say, $500,000, or $50,000, or even $5,000. In fact, the Tribes do not cite *a single figure or actual cost* that purportedly justifies the $1.5 million annual permit fee at issue. As the district court pointed out, the Tribes never addressed what "monitoring or containment costs . . . the Tribes expect[ed] to incur." ER31. The Tribes still have identified no such costs (though it is too late to do so now).

The Tribes do not argue that the district court was wrong to demand such a showing. Instead, they rely on testimony that simply indicates, in general terms, that they have been involved in oversight work related to FMC's RCRA and CERCLA sites. Red Br. 46 (citing SER8 (32:8-16); SER15 (144:15-18)). But that testimony does not address who pays for the Tribes' oversight efforts. In fact, FMC has paid for the Tribes' efforts related to the remediation processes. *See* FER4 (1557:2-1558:10). And although the Tribes say that they "lack adequate funding to engage in effective oversight," they never try to show what funding is necessary, what funding is lacking (and why), what "effective oversight" would look like, or how much it would cost. The testimony they cite says nothing of the sort either. *See* Red. Br. 47 (citing SER13 (110:1-17)). What it does say, however, is that EPA pays the Tribes $50,000 to $75,000 annually for such activities. SER13 (110:1-5).

Accordingly, even if jurisdiction somehow existed under the second *Montana* exception, the district court correctly concluded that the Tribes have not come close to justifying a $1.5 million annual permit fee.[8]

[8] Even if the Tribes could justify a $1.5 million fee in a given year, they could not possibly justify a *perpetual* $1.5 million fee. The Tribes do not dispute that the fee is "perpetual," Red Br. 24-25 & n.15, but, remarkably, still argue that it is justified, Red Br. 45-47. Yet they do not even attempt to explain how a perpetual $1.5 million fee could possibly be warranted. And of course, it is not.

III. ENFORCING THE JUDGMENT WOULD DEPRIVE FMC OF DUE PROCESS

The Tribes agree, as they must, that a tribal court's judgment cannot be enforced if the tribal court's proceedings did not "conform to 'the basic tenets of due process.'" Red Br. 47 (quoting *Wilson v. Marchington*, 127 F.3d 805, 810-11 (9th Cir. 1997)). Due process requires "that 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." *Marchington*, 127 F.3d at 811. "[E]vidence 'that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or 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.* (citation omitted).

Despite clear and irrefutable evidence that FMC was subjected to a partial tribunal, prejudice in the tribal court, dominance of the judiciary by the Tribes' political bodies, and the absence of appellate review leading up to the entry of the tribal court judgment at issue, the Tribes continue to insist that the tribal court's judgment can be enforced. The Tribes offer three reasons why they believe this is so: (1) the bias reflected by the tribal court judges was cured when the biased judges were replaced; (2) the original Shoshone-Bannock Tribal Court of Appeals ("TCA")

panel was not, in fact, biased; and (3) FMC's other due process claims are waived and have no merit. None holds up.

A. The Patent Bias That Infected The First Tribal Court Appeal Was Never Cured By The Tribal Courts

Notably, the Tribes' lead argument is not that there was no bias (which there obviously was, *see* Blue Br. 53-56), but rather that the bias demonstrated by two of the three original TCA judges was cured when the new panel "reconsider[ed] the rulings of the prior panel." Red Br. 48. But that never happened. The new panel did not consider any arguments regarding jurisdiction under the first *Montana* exception. It did not consider the reasons why the original panel found jurisdiction under the first *Montana* exception. And it did not to take additional evidence regarding the first *Montana* exception. Why? Because, as the new panel explained in its decision, the prior panel had "previously ruled that [the tribal] court does have jurisdiction over respondent FMC Corporation under the first Montana exception." ER115. In other words, the new panel expressly relied on the prior panel's ruling on the first *Montana* exception. And since the new panel did not reconsider the original panel's decision, there was nothing further for it to say or do on this issue.

Like the district court, the Tribes identify no language in the new panel's opinion that remotely suggests that the panel "independently came to the same conclusion" as the original panel. Red Br. 51 (quoting ER29-30). That is because no such language exists. Indeed, as noted, the only thing the new panel said about

jurisdiction under the first *Montana* exception was that the issue had been "previously" decided—that is, decided by the prior panel. Far from establishing that it engaged in an independent analysis of the issue, that statement, and the panel's subsequent statement that it would therefore not take additional evidence, confirms that the new panel failed to reconsider this already-decided issue.

Attempting to bolster their claim that the new panel somehow cured the original panel's bias, the Tribes cite *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995). In *Keating*, the Court considered the appellant's claim that, during appellant's proceedings before the Office of Thrift Supervision, the Office's director should have recused himself. Contrary to the Tribes' characterization, however, the Court did not conclude that the director's resignation is what cured the final decisions of bias. Rather, the Court held that the appellant's recusal claim failed because, as relevant here, the director's "actual role was not significant." *Keating*, 45 F.3d at 327-28. Here, in contrast, the two biased decision makers—Judge Gabourie and Judge Pearson—were necessary and thus central to the decision that the Tribes had jurisdiction under the first *Montana* exception.

The Tribes' reliance on *Bender v. Dudas*, No. Civ. A. 04-1301 RBW, 2006 WL 89831 (D.D.C. Jan. 13, 2006), a district court decision, is equally unavailing. There, the court held that a decision by the United States Patent and Trademark Office ("PTO") could stand because the individuals who made questionable

comments did not make "the initial and final decisions" and had left the PTO prior to the agency's decision, and because "the actual decision makers . . . did not personally make any statements that would indicate bias." *Dudas*, 2006 WL 89831, at *16. Here, in contrast, two of the three judges who held that the first *Montana* exception applies *did* personally make statements that would indicate bias and, as discussed, that decision was left undisturbed by the later panel.

Finally, perhaps recognizing the weakness of their argument, the Tribes assert—in a footnote (at 49 n.35)—that FMC waived its judicial bias argument by failing to raise it earlier in the tribal court proceedings. As an initial matter, the Tribes have waived their wavier argument by raising it only in a footnote. *Estate of Saunders v. Commissioner*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes . . . are generally deemed waived."). In any event, FMC did raise the issue of judicial bias before the TCA and that court made no finding of waiver. ER742-51, ER113-17. The Tribes' claim of waiver is thus meritless, too.

B. The Bias Reflected In Judge Gabourie's And Judge Pearson's Statements Is Clear And Irrefutable

The Tribes next backtrack and, amazingly, claim (at 54) that the comments by Judges Gabourie and Pearson are unobjectionable. First, they point to the fact that they were made at an educational conference rather than in a courtroom, as if that excuses them. But the problem is not *where* a judge makes inflammatory comments, the problem is what those comments reveal—a bias. Here, it may be that the setting

and audience—a gathering of "tribal court practitioners," Red Br. 54—caused the judges to let down their guard and speak more frankly. But that in no way excuses what they said at the conference. And, more to the point, it in no way undoes the bias that those comments reflect against non-members like FMC that find themselves in tribal court relying on Supreme Court precedent.

Next, the Tribes suggest that the Judges' comments "are not objectionable"—when "read in context." Red Br. 54. Here again, the Tribes are grasping. No matter how they are read, the comments are shocking and cannot be condoned. *See* ER761-801. The Tribes' attempts to sugarcoat and qualify the Judges' comments (at 55-60) cannot save them from what they are—a clear indication that these Judges replaced any semblance of neutral decisionmaking with an agenda to "protect the tribes" any way they could. *See, e.g.*, ER775:1-3 ("*Montana*, boy, you better have a good appellate decision to get around that.") (italics added); ER778:18-19 ("[W]e're sitting on one now that we know is going to go up, so we're saying our prayers . . . ."); ER769:9-10 ("The appellate court has to take the case and mold it.").[9]

[9] The Tribes' attempt to paper over Judge Gabourie's remark that an "appellate court has to take the case and mold it" is especially absurd. According to the Tribes, this remark simply meant that an appellate judge should "writ[e] a decision that is impartial." Red. Br. 55. But the transcript lays bare that Judge Gabourie in fact had something entirely different in mind. Blue Br. 53; *see also* ER768:20-769:10.

That partiality not only was plain as day, it plainly violated FMC's right to due process. *See Marchington*, 127 F.3d at 811 (no opportunity for full and fair trial where tribunal is partial and there is a showing of prejudice). And this Court should condemn such obvious bias, not excuse or condone it.

C. The Additional Evidence Of The Absence Of Due Process In The Tribal Courts Is Properly Before This Court

No doubt recognizing the problem with their argument on the merits, the Tribes eventually argue that FMC waived any due process claims not based on judicial bias. But that attempt to dodge this issue altogether fares no better.

When due process is lacking because of the fundamental attributes of a tribunal, due process claims are not required to be presented to that tribunal first. Thus, in *Bank Melli Iran v. Pahlavi*, this Court held that a foreign default judgment could not be enforced in American courts even though the party against whom the judgment was obtained never appeared in the foreign court and so never raised a due process challenge there. 58 F.3d 1406, 1411-13 (9th Cir. 1995); *see also, e.g.*, *Bagues-Valles v. Immigration & Naturalization Serv.*, 779 F.2d 483, 484 (9th Cir. 1985) (refusing to require exhaustion of due process claims in reviewing decision by Board of Immigration Appeals when the "due process claims . . . do not concern 'procedural errors correctable by the administrative tribunal'" (citation omitted)).

As FMC explained to the district court, the determination of whether a constitutional violation has occurred, including a due process violation, must be

made by a federal court "upon its own record." *See* ECF No. 67-2 at 23 & n.11 (citation omitted). And contrary to the Tribes' assertion, it is irrelevant that a due process claim based on the Indian Civil Rights Act ("ICRA") would have been cognizable in tribal court. A claim under the Constitution and a claim under ICRA are two separate claims that require separate considerations. *See Randall v. Yakima Nation Tribal Ct.*, 841 F.2d 897, 900 (9th Cir. 1988). And the Tribes identify no support for their contention that FMC's ability to raise an ICRA claim in tribal court precludes it from raising a separate and independent due process claim under the United States Constitution when in federal court.

Finally, the Tribes attempt to trivialize the various procedural irregularities and fundamental problems that plagued the tribal court proceedings. But the point is not that any individual procedural irregularity itself amounts to a due process violation, but rather that the collection of questionable decisions and procedures reinforce that the deck was stacked against FMC from the outset. *See* Blue Br. 56.

Notably, the Tribes leave until last perhaps the most fundamental problem with the tribal court proceedings—the lack of tribal court independence from the Tribes' political branches. The Tribes defend the independence of the Tribal Courts by citing *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976). But that case did not address the structural flaws of tribal courts. It involved a discrimination claim by a tribal judge against the Business Council based on her *removal* by the Council.

And in that respect, *Brunette* just underscores that tribal court judges are not, in fact, independent of the Business Council. *See* Blue Br. 57.

This Court's precedent is unequivocal. "If the tribal court violated due process," then there is "no discretion to recognize the tribal court judgment." *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001). The due process violations here began when FMC was forced to adjudicate its claims before its opponent—the Land Use Policy Commission and then the Business Council—and continued when FMC was forced to continue adjudicating its claims before an openly biased appellate court. As a result of those irregularities, the judgment that resulted from those proceedings cannot be enforced in federal court.

* * * * *

The tribal court judgment in this case is for more than $20 million in permit fees that the Tribes claim are due for years after the Pocatello plant closed. And that is not the end, in the Tribes' view, it is just the beginning. While this appeal has been pending, the Tribes filed a new lawsuit in tribal court to collect some $4.5 million in *additional* permit fees for later years not claimed here. *See supra* at 23 n.5. These demands and lawsuits no doubt will continue unless stopped by this Court. Because the Tribes lack jurisdiction to demand, and collect, the fees at issue, and because the tribal court proceedings that resulted in the judgment that the Tribes now seek to enforce failed to afford FMC due process, the Court should reverse the district court's judgment and order judgment for FMC.[10]

CONCLUSION

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

[10] The Tribes do not dispute that, if the tribal court judgment cannot be enforced, then the award of attorney's fees to the Tribes must fall too. Blue Br. 59 n.7.

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Respectfully submitted,

s/ *Gregory G. Garre*

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 28.1(e)(2) and 32(a)(5) and (6), and Ninth Circuit Rule 28.1-1, Appellant's Response and Reply Brief is proportionately spaced, has a typeface of 14 point and contains 12,052 word limit words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Gregory G. Garre*
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CERTIFICATE OF SERVICE

I, Gregory G. Garre, hereby certify that I electronically filed the foregoing Appellant's Response and Reply 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 November 5, 2018, which will send notice of such filing to all registered CM/ECF users.

s/ *Gregory G. Garre*
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