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

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SUMMARY OF ARGUMENT

The district court erred in denying comity to the Tribal Appellate Court ("TCA") judgment under the second *Montana* exception on the ground that the Tribes had not shown a nexus between "the Tribe's obligation to protect the health and safety of Tribal members" and the $1.5 million annual permit fee. ER31. A nexus exists here for the same reasons that the exercise of Tribal jurisdiction is necessary to protect tribal self-government and control internal relations, namely that enforcement of FMC's obligation to pay the fee is necessary to protect Tribal resources and Tribal members from the threat of FMC's wastes. In addition, by agreeing to pay the fee to store waste on the Reservation, FMC waived any right to argue that the amount of the fee—which is less than seven cents per ton—is unreasonable. Furthermore, FMC earlier conceded that the fee is reasonable. Finally, if more were required, the monitoring and oversight of the FMC site that the Tribes engage in to protect Tribal resources and Tribal members from the impacts of the waste, the Tribal law requirement that waste storage fees be used to address the impacts of waste storage, and the inadequacy of the funding now available for that purpose amply demonstrate that the $1.5 million annual permit fee has a nexus to the threat posed by FMC's wastes.

ARGUMENT

A. Tribal Jurisdiction Is Necessary To Protect Tribal Self-Government And Control Internal Relations And The Annual Permit Fee Therefore Has A Nexus To Tribal Health And Welfare.

1. Tribal jurisdiction is necessary to protect Tribal health and welfare from the catastrophic threat posed by FMC's waste.

"Key to [the second *Montana* exception's] proper application" is that the exercise of Tribal jurisdiction be "necessary to protect tribal self-government or to control internal relations," *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)), which requires that the "Tribal assertion of regulatory authority over nonmembers must be connected to th[e] right of the Indians to make their own laws and be governed by them." *Nevada v. Hicks*, 533 U.S. 353, 360-61 (2001). While the district court referred to this as a nexus requirement, it meant only that "the permit fee must have some relationship to the Tribe's obligation to protect the health and safety of Tribal members." ER31. As Tribal jurisdiction to enforce FMC's obligation to pay the annual permit fee is necessary to protect Tribal natural resources and Tribal members from the threat of the waste FMC stores on the Reservation, the fee has a nexus to the protection of Tribal members' health and safety.

FMC maintains that the Tribes argue that jurisdiction is necessary only because Tribal law otherwise could not be enforced. FMC-RRBr. at 34-35. Not so. Tribal jurisdiction is necessary to protect sovereign interests, *see Plains Commerce*

Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 332 (2008), held by the Tribes under the Treaty of Fort Bridger, art. 4, July 3, 1868, 15 Stat. 673, namely the lands, waters, and natural resources of the Fort Hall Reservation–especially those of the Portneuf River and the Fort Hall Bottoms, which Tribal members depend on for subsistence, cultural, and religious purposes. Tribes' Br. at 29, 37-38, 44. The Reservation is the Tribes' permanent homeland, *id.* at 44, over ninety-six percent of which is Tribal and Indian land, *id.* at 2, and the protection of its resources and cultural sites is a responsibility of self-government that "affects 'the internal and social relations of tribal life,'" *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1222-23 (9th Cir. 2001) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975) and citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 441 (1989) (Stevens, J.); *Montana*, 450 U.S. at 566); *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1103 (S.D. Cal. 2008) (destruction of tribal cultural sites threatens tribal "political integrity and welfare" and authorizes tribal jurisdiction under second exception); ER983 (Tribal constitutional authority to preserve tribal culture). FMC's contrary assertion is wrong. FMC-RRBr. at 34 n.7.

Furthermore, the Tribes "retain power to legislate …, including certain activities by nonmembers," *Plains Commerce*, 554 U.S. at 327, and under *Montana* "may quite legitimately seek to protect its members from noxious uses [on non-Indian fee land] that threaten tribal welfare [and] security," *id.* at 336. The Tribes

do so pursuant to the Land Use Policy Ordinance ("LUPO"), SER169-180, the LUPO Guidelines, as amended, ER1026-1043, and the Hazardous Waste Management Act ("HWMA"), SER216-294, which require that waste storage permit fees be used to address the impacts of waste storage on the Reservation, for which funding is presently inadequate. Tribes' Br. at 4-5, 44-47.

The necessity of exercising Tribal jurisdiction in this case arises from the threat posed by FMC's waste, *see* Tribe's Br. at 44, not a general interest in tribal self-government, *cf.* FMC-RRBr. at 34. "FMC's waste is radioactive, carcinogenic, poisonous, and massive in size," ER28, and "[u]nder the standard discussed in *Evans* [*v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013)]," poses a threat that is "catastrophic for the health and welfare of the Tribes,"[1] ER29. FMC challenges the Tribes' characterization of the catastrophic threat posed by FMC's toxic wastes, FMC-RRBr. 29-34, but it never contests the TCA's findings of fact, or the district court's reliance on those facts, which are reviewed under "a

[1] As *Evans* makes clear, where tribal jurisdiction is asserted to prevent environmental harm, the threatened effect of the non-Indian land use on Reservation lands, waters, and natural resources is determinative, not land ownership in the surrounding area. Tribes' Br. at 30-31 (citing *Evans*, 736 F.3d at 1305-06; *Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998)). In *Evans*, this Court held the construction of a single-family home did not satisfy the second exception because it did not "'imperil the subsistence' of the tribal community." 736 F.3d at 1306. That holding has no application here as the Tribes did not claim jurisdiction over the FMC Property in *Evans*, nor was FMC's use of its fee land to store toxic waste at issue, much less the impacts of that land use on the Portneuf River, the Fort Hall Bottoms, and the American Falls Reservoir. Tribes' Br. at 30.

deferential, clearly erroneous standard of review." Tribes' Br. at 15 (quoting *FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990)). Nor does it allege that the TCA's findings of fact are clearly erroneous because they are "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record." *Evans*, 736 F.3d at 1306 (quoting *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011)). FMC puts forward only another view of the evidence—and "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). Furthermore, the view FMC puts forth is riddled with errors.

FMC asserts that its waste is contained on its property, FMC-RRBr. at 29, and that there is no evidence that its activities "cause any threat to the Tribes or its members," *id.* at 32. Not so. FMC began depositing contaminants on its fee land "[v]irtually the day the plant started operating," TFER34:1190:16-17, and now stores twenty-two million tons of waste, ER6, on land that is 600 feet above the Portneuf River and the Fort Hall Bottoms, Tribes' Br. at 30 n.21 (citing ER969), from which the groundwater flows to the Portneuf River, SER143. Phosphorus saturates the FMC Property, contaminating waste storage ponds, subsurface soils, abandoned rail cars, and the groundwater. ER15. Phosphorus is toxic to humans when inhaled, ingested, or absorbed through the skin. ER16; ER68 (citing SER124).

FMC asserts that phosphorus is not a threat because it "is in the ground in a solid state and so 'does not pose a risk to human health if left undisturbed.'" FMC-RRBr. at 30 (quoting ER962; ER964). But elemental phosphorus oxidizes to phosphorus/orthophosphate, SER109, which contaminates nearly all of the groundwater on the FMC Property, TFER53. The contaminated groundwater then flows to the Portneuf River, degrading water quality and aquatic habitats all the way to American Falls Reservoir. Tribes' Br. at 36-37. As the district court found, "[a]rsenic and phosphorus from the site are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and Fort Hall Bottoms," which affects "the ecosystem and subsistence fishing, hunting and gathering by tribal members at the River, as well as the Tribes' ability to use this important resource as it has been historically used for cultural practices, including the Sundance." ER17; ER70; ER74-75; TFER43 ("phosphorus levels in the Portneuf River" pose a "substantial risk to ecological receptors").

FMC objects to Tribal members' testimony about the impacts of FMC's contamination on Tribal cultural and religious practices, FMC-RRBr. at 31, but "FMC chose not to cross-examine these two tribal members about the veracity of their statements concerning how contamination in the [Portneuf] river has impeded their efforts to participate in a cultural tradition" and the TCA "[t]herefore, … accept[ed] that as an uncontroverted fact," ER109. FMC also disputes that the Tribal

members' testimony "'w[as] later confirmed by proof of contamination to the Portneuf River and the Fort Hall Bottoms.'" FMC-RRBr. at 31 (quoting Tribes' Br. at 38). But the Tribal Chairman, Nathan Small, testified that "the contaminants that are being released … threat[en] our health and welfare," and "[b]ecause of all of the science and technology now, … we now truly can see what is really happening out there, …" ER834:903:12-18. And when Chairman Small testified that because of the contamination of the Portneuf River "[w]e are not out there drinking the water any more, because of the feelings," he added, "[a]nd finally, the proof was that these places are now contaminated." SER33:907:14-18. That is correct. *See* Tribes' Br. at 36-38.

FMC points to the district court's statement that no measurable harm to water quality had been reported. FMC-RRBr. at 29 (quoting ER20). But that statement refers to FMC's reliance on "evidence from the EPA that contamination at the FMC site has not affected water quality off-site," ER19, and that "no off-site drinking water wells are contaminated from any substances emanating from the FMC Property," *id.* (citing ER872). That evidence has no predictive value because the groundwater on the FMC Property is contaminated with arsenic, fluoride, nitrate, radium-226, selenium, thallium, elemental phosphorus, gross alpha, and gross beta, all at levels "that exceed the groundwater MCLs (drinking water standards)." TFER44; TFER49 (mapping arsenic contamination); TFER50 (potassium); TFER51

(sulfate); TFER52 (nitrate); TFER53 (total phosphorus/orthophosphate); TFER54 (selenium). And the groundwater in the Area North of Highway 30 and Interstate 86 is already contaminated with arsenic that presents incremental cancer risks to hypothetical future residents that exceed EPA's remedial action objective. TFER38; TFER37. Furthermore, FMC cannot control the flow of groundwater off its property, or where drinking water wells are drilled off its property. Protecting water quality on the Reservation is instead a Tribal responsibility. *See* TFER32:915:16-33:917:23.

FMC argues that "the Tribes are exaggerating" in asserting that "phosphine is deadly and cannot be contained." FMC-RRBr. at 30. Not so. Phosphine is deadly at fifty parts per million ("ppm"), SER163, and "essentially can destroy the lungs from the inside and almost the entire respiratory tree …" TFER30:485:7-10. Phosphine cannot be contained because it is generated by the exposure of phosphorus to water or moisture, *id.* (citing ER16; ER68 (citing SER128); SER108), is mobile in soil and air, *id.* at 32-33 (citing SER46:1669:9-10; SER98), and moves downhill by force of gravity, *id.* at 33 (citing SER100; SER28:757:5-12). And contrary to FMC's claim, FMC-RRBr. at 31, phosphine has been detected at the FMC fence line on several occasions, Tribes' Br. at 33 (citing SER40:1321:6-1322:2). Phosphine also burns or explodes when exposed to air at concentrations at or near 20,000 ppm, *id.* at 32 (citing SER163), and EPA has warned that the

reactivity of phosphorus produces "[c]louds of combustion [that] obscure visibility (a problem for adjacent highways and the Pocatello Airport)." ER955. Nor did capping the ponds under the RCRA Consent Decree stop the generation and release of phosphine. ER26-27. In 2006, EPA determined that releases of phosphine gas, hydrogen sulfide gas, and hydrogen cyanide at Pond 16S "may present an imminent and substantial endangerment to human health and the environment." SER140. And in 2010, EPA determined that phosphine releases at the RCRA ponds presented risks to Tribal members "at or near facility boundaries" and were an "imminent and substantial endangerment to public health or welfare." SER167. And while FMC has installed gas extraction and treatment systems at the RCRA ponds, TFER39, those systems pose risks of releases, ignition and burning, and "emit[] low concentrations of phosphine," TFER40. And phosphine generation at the RCRA ponds continues. Indeed, at the time of trial, FMC was extracting gas at Pond 18A. TFER35:1316:13-15.

FMC argues these impacts do not satisfy the second exception because they have not affected Tribal members' health. FMC-RRBr. at 32-33. But "noxious uses [of non-Indian fee land] that *threaten* tribal welfare or security" satisfy the second exception. *Plains Commerce*, 554 U.S. at 336 (emphasis added). And the "lethal gases that accumulate under pressure beneath the pond covers … pose a constant and deadly threat to the Tribes, a real risk of catastrophic consequences should

containment fail. And despite the best efforts of the EPA, there have been releases of these lethal gases." ER27. In addition, "[i]n even broader terms, the EPA concluded in 2013 that the waste sites 'may constitute an imminent and substantial endangerment to public health or welfare or the environment.'" *Id.* (quoting TFER47-48); ER73 (FMC's waste storage activities "are a threat of a catastrophic nature in health and reactions, including death."). Furthermore, threats to Tribal natural resources relied on by Tribal members for subsistence, cultural, and religious purposes satisfy the second *Montana* exception, Tribes' Br. at 28-29, and such threatened and direct effects are clearly present here, *id.* at 28-41.

Finally, there are indications that FMC's contamination of the Reservation has affected the health of Tribal members. FMC agreed to conduct a study to address that very issue, but it was not completed by the time of trial. *Id.* at 40. FMC asserts that a 1977 study stated that the elevated cancer rates of non-white male FMC Plant workers were not related to the work environment. FMC-RRBr. at 32-33. But a University of Minnesota study concluded in 2000 that "employees from the FMC Pocatello plant have increased risks for death due to cancer of the respiratory system, non-malignant respiratory disease, and malignant melanoma among men." SER101. And a 2006 study showed that sixteen percent of patients who had at least two visits to the Tribal health clinic between 1992 and 2003 had one or more cardiorespiratory

and cancer diagnoses of interest, TFER41, and that asthma diagnoses had increased over time, TFER42.[2]

All of these facts reject FMC's assertion that recognizing Tribal jurisdiction here "swallows the rule that jurisdiction is generally lacking over nonmembers on non-Indian fee land." FMC-RRBr. at 35. And the cases FMC relies on for that purpose are wholly inapposite. FMC-RRBr. at 35 (citing *Cty. of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)). In *Allen*, an individual Indian and his wife sued the county and county sheriffs in tribal court, asserting claims arising from the individual Indian's arrest by a deputy sheriff who was authorized to make arrests on the reservation under an agreement with the tribe. 163 F.3d at 511-12. This Court held that the tribe's general interest in the safety of its members did not establish jurisdiction. *Id.* at 515. But FMC's use of fee land to store twenty-two million tons of toxic waste in defiance of Tribal law cannot rationally be compared to the arrest of an individual Indian by a person authorized to do so under tribal law. And in *Atkinson*, the Court simply held that Tribe's provision of generally available public services to a hotel on non-Indian fee

[2] FMC misrepresents Chairman Small's testimony concerning the health effects of the contamination from the FMC Property. FMC-RRBr. at 32. Chairman Small acknowledged that respiratory problems and cancer among Tribal members had increased, ER834:903:25-904:2, and "hop[ed]" the health study that FMC was to conduct would confirm his suspicion that the FMC and Simplot sites were responsible, ER834:904:7-TFER31:905:1.

land did not establish jurisdiction under the second exception because the burden of providing those services did not "'imperil' the political integrity of the Indian tribe." 532 U.S. at 657 n.12 (quoting *Montana*, 450 U.S. at 566) (alteration omitted). By contrast, FMC's storage of twenty-two million tons of toxic waste poses a catastrophic threat to Tribal members, ER29; Tribes' Br. at 28-41, and if the Tribes failed to address that threat, they would be defaulting political control over their own reservation, "endanger[ing] the [Tribes'] political integrity," *Atkinson*, 532 U.S. at 659. That threat satisfies the second exception. *Id.* at 657 n.12.

2. The annual permit fee has a nexus to the Tribes' responsibility to protect its members from the threat posed by FMC's waste.

The Tribes monitor and regulate waste storage on the Reservation pursuant to the LUPO, the amended LUPO Guidelines, and the HWMA, which require that waste storage permit fees be used to address the impacts of waste storage on the Reservation, for which funding is presently inadequate. Tribes' Br. at 4-5, 44-47. FMC does not dispute this. Instead, it argues that the Tribes must provide a budget for the fee to show what they would have done with the money if FMC had paid it, and what they will do with it if FMC is required to pay it in the future. *See* FMC-RRBr. at 37-38. In the first place, when FMC negotiated the RCRA Consent Decree, it was required to obtain Tribal permits, ER9; ER24, and in the Consent Decree, FMC recognized the breadth of the Tribes' authorized regulatory activities, which include monitoring, verifying data, conducting investigations, obtaining samples,

inspecting and copying records, and assessing FMC's compliance with the Consent Decree, TFER58-59. FMC plainly did not view the $1.5 million annual permit fee—which it negotiated and agreed to before entering into the Consent Decree, ER8; ER24—as unreasonable at that time. Instead, it touted its agreement to pay the fee as a reason for this Court to approve the Consent Decree. Tribes' Br. at 26 (quoting ER24).[3]

Nor is the budget for which FMC now argues required, as *Montana* and *Strate* confirm. In *Montana*, the Court relied on the fact the parties "had accommodated themselves" to state regulation of hunting and fishing on fee lands within the reservation to justify its finding that tribal regulation of nonmember hunting and fishing bore "no clear relationship to tribal self-government or internal relations." 450 U.S. at 564 & n.13. And in *Strate*, the Court held that tribal court jurisdiction over a claim arising from a "commonplace state highway accident" was "not necessary to protect tribal self-government" because the plaintiff could pursue her claim in state court. 520 U.S. at 459. By contrast, protecting Tribal resources relied on by Tribal members for subsistence, cultural, and religious purposes is a core responsibility of self-government. *See supra* at 2-3.

[3] In that case, the United States "agree[d] with the Tribes that, under the consent decree, FMC must take actions necessary to obtain any permits that are required for consent decree work under applicable law, including applicable Tribal law … ." Br. of U.S. § C, *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008) (No. 06-35429), 2007 WL 1899170.

Only the Tribes can fulfill that responsibility. The State has no jurisdiction over hazardous waste storage on the Reservation. Tribes' Br. at 45 n.32. EPA required FMC to obtain Tribal permits in the RCRA Consent Decree, ER24, and under the Clean Water Act, EPA already recognizes the Tribes' jurisdiction over the Reservation's water resources–including those on fee lands–under the second exception, Tribes' Br. at 38-39 (citing SER50-65). Moreover, the Tribes' responsibilities to protect Reservation resources and Tribal members do not interfere with EPA's responsibilities. Indeed, EPA did not evaluate the impact of FMC's activities on Tribal members' reliance on the Reservation's natural resources for cultural and religious purposes, SER12:71:9-22, because of Tribal concerns about the risks—particularly commercialization—of disclosing private and sacred information that EPA could not keep confidential, TFER45; TFER46. And although the district court indicated that the permit fee should have "some nexus to the costs of supplementing the EPA's program to fully protect the health and safety of Tribal members," ER31, the exercise of jurisdiction over the FMC Property by EPA does not deprive the Tribes of jurisdiction under the second *Montana* exception to protect Treaty rights to natural resources on which Tribal health and welfare depends. Tribes' Br. at 41 (citing *U.S. EPA*, 137 F.3d at 1140-41). And finally, the record shows that the Tribes could not rely on EPA to protect their Treaty rights to natural resources in any case. *See* Tribes' Br. at 41-43. Although FMC points to EPA's

determination that capping the ponds under the RCRA Consent Decree was protective of human health and the environment, FMC-RRBr. at 33, as the district court held, capping the ponds did not stop the release of phosphine, ER24-25.

In sum, the annual permit fee has a nexus to the Tribes' responsibility to protect its members from the catastrophic threat posed by the FMC's wastes.

B. FMC Waived Any Right To Challenge The Reasonableness Of The $1.5 Million Annual Permit Fee.

1. By agreeing to pay that annual permit fee in the 1998 Agreement, FMC waived any right to challenge its reasonableness.

FMC cannot now argue that the $1.5 million annual permit fee is unreasonably high for the same reason that the Tribes cannot argue that it is unreasonably low—namely, that amount was negotiated and agreed upon by the parties in the 1998 Agreement.[4] In the Order of May 28, 2013, the second panel of the TCA held that FMC was subject to Tribal jurisdiction under the first *Montana* exception ruling, ER115, reaffirming the prior panel's decision, *see* ER169-172, and that "FMC voluntarily entered into a contract in 1998 with the Shoshone Bannock Tribes for payment of 1.5 million per year," ER113, also reaffirming the earlier ruling, *see*

[4] Indeed, after FMC failed to pay the $1.5 million annual permit fee in accordance with the 1998 Agreement, the Land Use Policy Commission ("LUPC") set the fee at that same amount, ER166; ER338-339, even after receiving information on the volume of FMC's waste that FMC estimated would establish an annual permit fee of more than $110 million, Decl. of Rob Hartman, *United States v. FMC Corp.*, No. 4:98-cv-00406-BLW (D. Idaho filed May 5, 2006), ECF No. 104-3, at 2.

ER197-199. FMC did not argue that the prior panel's rulings on either issue was wrong, or that the annual permit fee was unreasonable. *See* Tribes' Br. at 53; TFER60. A contract is a consensual relationship, *Montana*, 544 U.S. at 565, and FMC has conceded that the 1998 Agreement is a valid contract, FMC-RRBr. at 10. Accordingly, it was entirely proper for the second panel to carry over the $1.5 million annual permit fee when it considered whether Tribal jurisdiction existed under the second *Montana* exception.

Nor did FMC argue the fee was unreasonable in the court below. The district court—not FMC—raised the reasonableness of the annual permit fee at oral argument. TFER1:10. In response, the Tribes argued that "the [$]1.5 million [annual permit fee] was negotiated in the 1998 agreement," TFER2:4-5, that "surely a tribe is entitled to impose a fee that has been negotiated and agreed upon," TFER4:16-18, and that when FMC failed to pay the $1.5 million annual permit fee in conformance with the LUPC's April 26, 2006 decision on FMC's application for a Special Use permit, the LUPC had properly set the fee at $1.5 million based on the parties' prior agreement, as set forth in the LUPC Decision of February 8, 2007. TFER4:18-22. The Tribes had also made these arguments in briefing to the district court. TFER20-26; TFER12-19; TFER5-10. The Tribes therefore did not waive these arguments.

In this Circuit, "[t]he standard 'is that the argument must be raised sufficiently for the trial court to rule on it.'" *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) (quoting *Whittaker Corp. v. Execuair Corp.*, 953 F2d 510, 515 (9th Cir. 1992)). "Accordingly, when a party takes a position and the district court rules on it, there is no waiver." *Id.* (citing *W. Watersheds Project v. U.S. Dep't of Interior*, 677 F.3d 922, 925 (9th Cir. 2012)). This standard also applies to the determination of whether an issue first raised at oral argument can be considered on appeal, *see Yamada*, 825 F.3d at 543-44; *EIJ, Inc. v. UPS, Inc.*, 233 F. App'x 600, 602 (9th Cir. 2007); *Boracchia v. Biomet, Inc.*, 348 F. App'x 269, 270-71 (9th Cir. 2009); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 n.2 (9th Cir. 2002); *Moreno Roofing Co. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996), and it is satisfied here as the district court raised the reasonableness of the fee at oral argument, the Tribes addressed it, and the district court ruled on it, ER5; ER31. FMC therefore cannot argue now that the fee is unreasonable.

Finally, FMC cannot challenge the reasonableness of the $1.5 million annual permit fee because it earlier conceded that a much larger fee was reasonable. Tribes' Br. at 23 (citing ER1091-1092); TFER11; TFER3:17-22. Thus, this argument was not waived either. *See* FMC-RRBr. at 37. FMC conceded that proposed fees of one hundred dollars ($100.00) a ton for hazardous waste and fifty dollars ($50.00) a ton for non-hazardous waste were "not out of line with tipping fees charged by

commercial or municipal owner/operators of waste disposal facilities—although they are high compared to prices in the State of Idaho or elsewhere in the region." ER1092.[5] FMC also admitted that "[t]he State of Idaho imposes a $30/ton fee on the disposal of hazardous wastes at the one commercial hazardous waste treatment, storage and disposal facility in Idaho." *Id.* n.2. FMC then negotiated a $1.5 million annual fee to store twenty-two million tons of waste on the Reservation, which works out to just under seven cents per ton. That fee would have to be paid for 440 years before it would equal the State of Idaho's one-time $30.00 per ton fee.

For these reasons, the district court erred in ruling that the TCA had improperly carried over the $1.5 million annual permit fee in its second *Montana* exception ruling.

2. FMC's other attacks on the nexus between the 1998 Agreement and the threat posed by FMC's wastes have no merit.

FMC urges that in the 1998 Agreement it agreed to pay the fee only when it "was using the ponds to dispose of waste," not for as long as it stored waste on the site. FMC-RRBr. at 36 (citing and incorporating by reference *id.* at 15-19). The facts show otherwise.

[5] FMC states that the Tribes "do not dispute" that the only permit fee in place was a $10 application fee. FMC-RRBr. at 14 n.4. But FMC earlier acknowledged that the $10 was only an application fee, FMC Op.Br. at 36, and the LUPO Guidelines in effect at that time authorized the LUPC to impose reasonable conditions on a permit, including the payment of a fee, ER190; *see* Tribes' Br. at 22-23.

First, the 1998 Agreement makes clear that FMC agreed to pay the annual permit fee for as long as FMC stores waste on the Reservation. As the TCA correctly held, the letters comprising the 1998 Agreement

> provide in clear terms that FMC would obtain Tribal land use permits for its waste activities on the Reservation and pay the Tribes an initial payment of $2.5 million and thereafter pay an annual special use permit fee of $1.5 million each year, "even if use of ponds 17-19 was terminated," i.e., stopped being used for disposal in the next several years[ ], and FMC would thereby obtain, and continue to have an exemption from the otherwise-applicable Tribal land use permitting regulations.

ER162 (footnote omitted).

FMC contends that there is "no evidence" that FMC agreed to pay the fee "to 'store' waste indefinitely regardless of whether FMC's plant operations shut down and it ceased disposing of waste entirely." FMC-RRBr. at 18. But as the district court correctly held, "there is nothing in the negotiations or series of letters that conditions the annual fee on the FMC plant being operational. This absence was certainly noticed (or should have been noticed) by FMC's attorneys, but FMC never attempted to negotiate any modifications to add such a condition." ER32. Instead, FMC's June 2 Letter expressly confirmed "[FMC's] understanding that the permit covers the plant and that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years." ER1049. FMC argues that if the Tribes thought "the fee applied to the indefinite storage of the waste," they would not have been concerned that FMC's consent was

too limited. FMC-RRBr. at 18. But FMC sent the June 2 Letter to reaffirm the agreement as both parties understood it. And the affidavit of Robert J. Fields, the Division Manager of FMC's Phosphorus Equity Division, again confirmed FMC's understanding that "the Tribes' Use Permit for the Pocatello plant … applied broadly to the entire facility" regardless of whether certain ponds were closed under the Consent Decree. ER1053. Finally, FMC reaffirmed in a letter sent with the annual payment for June 1, 2000 through May 31, 2001 that, "[a]s you know, in May *and June 1998*, FMC and the [LUPC] agreed to an annual fee of One Million Five Hundred Thousand Dollars ($1,500,000) per year for all hazardous and non-hazardous waste activities within the boundaries of the Fort Hall Reservation." ER180 (quoting ER1051) (emphasis added). As FMC continues to store and treat waste at its facility, e.g., by extracting phosphine at the RCRA ponds, *see supra* at 9, and thus continues to engage in "hazardous and nonhazardous waste activities" on the Reservation, its obligation to pay the annual permit fee continues.

FMC also argues it is "unfathomable" that it would have agreed to pay the permit fee as long as it stores waste on the site. FMC-RRBr. at 22. But the threat posed by its wastes will continue for that same period, as phosphorus is reactive for thousands of years, ER16; Tribes' Br. at 32, and groundwater remediation will take more than a century, SER118. Furthermore, while FMC asserts that the Tribes cannot justify the annual permit fee because it is "perpetual," FMC-RRBr. at 38 n.8,

the fee is due only as long as FMC stores waste on the Reservation, ER32. Finally, FMC knew its right to store the waste was not a gratuity, as it agreed to pay the fee "in lieu of the hazardous and nonhazardous waste permit fees established [under Tribal law]." ER1045.[6] The parties' intent could not be clearer.

FMC also argues that it agreed to "pay the Tribes $1.5 million annually for the disposal of waste" because in August 1997 the Tribes had proposed "unreasonable and exorbitant" fees in proposed amendments to the LUPO Guidelines, and that therefore the 1998 Agreement was not a "voluntary, commercial agreement contemplated by *Montana*." FMC-RRBr. at 15-16. First, positions exchanged in negotiations do not invalidate terms subsequently agreed upon. The negotiations leading up to the 1998 Agreement plainly established consensual relationships between FMC and the Tribes, which resulted in FMC's agreement to pay the annual permit fee. FMC's attack on those negotiations, FMC-RRBr. at 11-14, therefore fails. Second, FMC actually viewed the larger fees earlier proposed as

[6] The 2005 litigation to which FMC refers says nothing about the Tribes' authority under the 1998 Agreement. *See* FMC-RRBr. at 18-19. The Tribes there sought to enforce FMC's obligations under the Decree "regarding Tribal permits, access, and providing the Tribes with information and documents." ER1138. And when the Tribes argued that, without an order from the federal court requiring FMC to obtain Tribal permits, "FMC's activities and their potentially irreparable effect on the environment will continue unchecked," FER9, EPA was allowing FMC to release harmful chemicals into groundwater as part of its work at the FMC site, and FMC was refusing to obtain Tribal permits regulating its work activities, FER8-9. So, the Tribes were simply stating a truism, not describing the scope of their jurisdiction under the 1998 Agreement.

reasonable. *See supra* at 17-18. Third, FMC then negotiated an annual permit fee of less than seven cents per ton, which it agreed to pay in order to obtain EPA's agreement to the terms of the RCRA Consent Decree, which "was a sweetheart deal and FMC was desperate to grab it." ER32. That agreement was not involuntary. It was a business transaction FMC entered into for the privilege of storing waste on the Reservation. As the district court found, "[t]his was a simple business deal, not the product of illegal duress or coercion." ER24. Fourth, and in any event, this Court has rejected the assertion, *see* FMC-RRBr. at 16, that the first exception applies only to agreements "of a commercial nature," *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 n.4 (9th Cir. 2006). And finally, FMC's "subjective beliefs regarding [its] relationship with the [Tribes]" are not determinative; the controlling question is instead whether "under th[e] circumstances, [FMC] should have reasonably anticipated that [its actions] might 'trigger' tribal authority," *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011) (quoting *Plains Commerce*, 554 U.S. at 338). The 1998 Agreement plainly satisfies that standard. *See Morris v. Hitchcock*, 194 U.S. 384 (1904) (non-Indian's contracts to graze cattle on individual Indians lands subjected non-Indian to tribal jurisdiction); *Buster v. Wright*, 135 F. 947, 958 (8th Cir. 1905) (non-Indian doing business with Indians on reservation fee lands was subject to tribal permit tax) (both cited in *Montana*, 450 U.S. at 565; *Strate*, 520 U.S. at 457); *Merrion v. Jicarilla Apache*

Tribe, 455 U.S. 130, 143 (1982) (recognizing *Buster* upheld tribal tax authority over a nonmember on non-Indian fee land); *Atkinson*, 532 U.S. at 654 (recognizing tribal tax authority over non-Indian activity on fee land may be established under *Montana* exceptions); *id.* at 653 n.4 (*Buster* illustrates proper application of first *Montana* exception).

The propriety of Tribal jurisdiction under the first exception here is also illustrated by *FMC Corp.*, to which this case is a follow-up. In that case, this Court held that a Tribal employment rights agreement, negotiated following the assertion of tribal regulatory authority, established a consensual relationship under the first exception. 905 F.2d at 1314-15. In this case, FMC agreed to pay an annual permit fee to store waste to satisfy its obligation to obtain Tribal permits, on which EPA had insisted. ER24. In *FMC Corp.*, this Court cited FMC's mining leases as one basis for Tribal jurisdiction. *Id.* at 1312. In this case, much of the waste FMC stores is a byproduct of ore mined under those leases. ER846:1185:13-20; TFER55-57 (FMC's Gay Mine leases were not terminated until July of 1996). This Court also reasoned in *FMC Corp.* that FMC had established a "substantial" presence on the Reservation because it had "certainly entered into consensual relationships with the Tribes in several instances" and that the "underlying fact that [FMC's] plant is within reservation boundaries" also supported tribal jurisdiction. 905 F.2d at 1314. So too here. Tribes' Br. at 21 (listing agreements); ER1096 (FMC enters Tribal lands to

obtain permit). Indeed, when FMC applied for permits, it submitted to tribal regulatory authority over the subject of those permits. *See Smith*, 434 F.3d at 1140.

FMC also argues that it agreed to pay the $1.5 million fee only for the disposal of waste, not its storage, asserting that under the proposed LUPO Guidelines attached to the LUPC's April 13, 1998 Letter to FMC, the annual permit fee was due only while FMC was disposing of waste. FMC-RRBr. at 16-17. That argument fails because FMC's obligation to pay the fee arises from the 1998 Agreement, not the proposed April 1998 Guidelines. In fact, the 1998 Agreement explicitly states that the fee would be paid "in lieu of the hazardous and nonhazardous waste permit fees established in the [proposed April 1998 Guidelines]." ER1045. FMC's argument is also specious. FMC says that the proposed April 1998 Guidelines distinguish between "disposal" and "storage" and that it was only "disposing" of its wastes since it was doing so "such that [its wastes] would enter the environment and remain there." FMC-RRBr. at 16-17. But under those definitions, waste that "remain[s]" on site is being stored. ER1017. And the proposed April 1998 Guidelines would have applied to any person "who generates treats, stores or disposes of hazardous waste" on the Reservation, ER1019, and thus would have applied whether the waste was "store[d]" or "dispose[d]" of on the Reservation. Indeed, FMC concedes this is so. ER1248 (quoting ER1019).

C. The Exercise Of Jurisdiction Is Necessary To Enable The Tribes To Protect Their Members From The Threat Posed By FMC's Wastes.

FMC argues that the Tribes' explanation of the fee is too broad and general to justify the fee. That argument fails too. First, under Tribal law, waste storage permit fees may be used only to fund the Tribes' Hazardous Waste Management Program. The amended LUPO Guidelines provide that "[s]uch fees shall be deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund" and used "to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." ER1043. And the HWMA requires that waste storage fees must "be deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected." SER249.

Second, the Tribes currently engage in a broad range of activities to protect against the direct and threatened effects of FMC's waste, as shown by the evidence presented at the second *Montana* exception hearing. *See* Tribes' Br. at 46-47. At that fifteen-day hearing, both parties appeared by counsel, presented evidence, and submitted briefs. ER63; ER66. Accordingly, FMC had the "opportunity to address," ER31, whether the Tribes' annual permit fee has a nexus to the threats arising from FMC's waste storage. Indeed, FMC does not contest that the district court erred when it assumed that FMC did not have an opportunity to address this issue before the TCA. *See* Tribes' Br. 45, 47-48.

Third, the Tribes' work at the FMC site is ongoing. *See* SER8:32:8-16. The Tribes sample soil, water, and sediments impacted by the EMF site, SER9:34:22-25, for organic and inorganic compounds, including metals, SER9:35:1-4. Water sampling includes groundwater and surface water sampling. SER9:35:9-15; SER14:128:9-22. That sampling is important because the number of constituents FMC analyzes are limited, TFER28:251:15-252:7, and do not include certain radiological constituents, TFER29:254:2-19. And after the interim remedy is implemented, EPA, FMC, and the Tribes will engage in a five-year review of whether it is working, including testing the groundwater and gamma exposure from the slag pile. TFER27:218:19-219:11. There is also an enormous amount of additional work that the Tribes still need to do. There is a critical need to monitor for phosphine, as the existing monitoring procedures are not adequate, ER27, and phosphorus remains reactive for thousands of years, Tribes' Br. at 32 (citing ER15-16; ER68-69 (citing ER955); SER134). Further analysis of the threat posed by the phosphorus in the buried railcars is also needed. TFER29:255:24-257:4. And the Tribes must ultimately decide how to address the contamination of the Portneuf River, the Fort Hall Bottoms, and the American Falls Reservoir, ER17; ER969, as well as the twenty percent of Reservation roads that are contaminated with radioactive slag, Tribes' Br. at 31 n.25.

Fourth, the Tribes presently lack adequate funding to engage in oversight at the FMC site, and the little funding they receive is unreliable. *Id.* at 47 (citing SER13:110:1-17). The Tribes' Environmental Waste Management Program is responsible for the Tribes' RCRCA and CERCLA related work. SER16:173:5-10. As FMC admits, the Tribes receive only $50,000 to $75,000 a year from EPA for activity at the FMC site. FMC-RRBr. at 38 (citing SER13:110:1-5). And while FMC also asserts that it "has paid for the Tribes' efforts related to the remediation processes," *id.* (citing FER4:1557:2-1558:10), that contention double counts the same funds. As FMC's witness testified in April of 2014, "EPA sends bills kind of like when they get around to it. The last one I've gotten through fiscal year November 1, '10 through October 31, '11, … I think the Tribes had over $60,000 for that fiscal year period." TFER36:1557:20-1558:4. Finally, as the Tribes' witness testified at trial, that amount is "very inadequate. It's [also] hit and miss. We go—the Tribes, at times, go months without funding. So they have no means to provide oversight, whatsoever." SER13:110:6-9. In sum, the funding the Tribes receive is both inadequate and unreliable.

CONCLUSION

The TCA's Final Judgment should be enforced under the second *Montana* exception, and the district court's Judgment denying comity to the TCA's second

Montana exception ruling should be reversed.

Dated: January 17, 2019

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I hereby certify that I electronically filed the foregoing 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 January 17, 2019, which will send notice of such filing to all registered CM/ECF users.

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