3. FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019)*

FMC Corporation operated an elemental phosphorous plant on fee land within the Shoshone-Bannock Fort Hall Reservation in Idaho (the Reservation) for decades, producing approximately 22 million tons of carcinogenic, radioactive, and toxic hazardous waste still stored onsite. Eventually, the Environmental Protection Agency (EPA) declared the facility a Superfund Site{{1}} under the Comprehensive Environmental Response, Compensation and Liability Act{{2}} ("CERCLA"). Soon thereafter the EPA brought an enforcement action against FMC for violating the Resource Conservation and Recovery Act{{3}} ("RCRA"), which culminated in a consent decree requiring FMC to obtain permits from the Shoshone-Bannock Tribes (Tribes) for using the facility and storing the associated waste onsite. FMC and the Tribes agreed to a $1.5 million per year fee for storing the hazardous waste, which FMC paid from 1998 (when the consent decree took effect) until 2001 (when FMC ceased using the plant), though it continued to store hazardous waste onsite. FMC then ceased paying the fee.

The Tribes sued FMC in tribal court seeking payment for the continued storage of the waste. After years of litigation regarding whether the tribal court had jurisdiction over FMC and a subsequent appeal, the Tribal Court of Appeals held that the Tribes had regulatory jurisdiction over FMC pursuant to *Montana v. United States*{{4}} and that FMC owed the Tribes $19.5 million in unpaid permit fees for hazardous waste storage from 2002 to 2014. For context, the so-called *Montana* Exceptions provide three routes for tribal regulatory jurisdiction: (1) tribes have jurisdiction to regulate the activities of nonmembers who enter consensual commercial relationships with them, (2) tribes have jurisdiction to exercise civil authority over the conduct of nonmembers on fee lands that threaten the "political integrity, the economic security, or the health or welfare of the Tribe," and (3) tribes may regulate the conduct of nonmembers on fee land where so authorized by federal law.

In response, FMC filed suit in federal district court alleging that the Tribes lacked jurisdiction under *Montana* and that the Tribal Court of Appeals violated its due process rights on account of the court's alleged bias towards the company. The United States District Court for the District of Idaho held that the Tribes had jurisdiction under *Montana v. United States* and that the Tribal Court of Appeals had not denied FMC due process.{{5}} However, the district court further held that the Tribal Court of Appeals' judgment was only entitled to comity, and was therefore enforceable, under the first but not the second *Montana* Exception. Both parties appealed. On Appeal, the Ninth Circuit held that the Tribes had jurisdiction under both *Montana* Exceptions and that the Tribal Court of Appeals did not violate FMC's due process rights.

Under the Fort Bridger Treaty of 1868, the Tribes have sovereign authority of the Fort Hall Reservation.{{6}} While 97% of the Reservation is held in trust for the Tribes and their members by the federal government, 3% is fee land owned by non-members. FMC's phosphorous facility was located on fee land. Over its decades of operation, FMC's operations thereon produced millions of tons of hazardous waste, including one million tons of contaminated soil and groundwater, a number of unlined waste ponds, and approximately 21 uncontained, buried railroad cars. In response to FMC's improper treatment and storage of the waste, the EPA brought an enforcement action, which FMC sought to settle. The resulting consent decree required FMC pay $11.9 million to install containment and clean up the area and to obtain tribal permits wherever required. Further, just before FMC and the EPA entered into the consent decree, FMC agreed with the Tribes to pay $1.5 million per year for a use permit to store its hazardous waste on tribal land, a rate significantly lower than the $5 per ton the Tribes' regulations stated. FMC then paid its annual $1.5 million annual permit fee until 2002,

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[[1]] ENVTL. PROT. AGENCY, SUPERFUND CLEANUP PROCESS, https://www.epa.gov/superfund/superfund-cleanup-process (last visited Feb. 25, 2019).[[1]]

[[2]] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).[[2]]

[[3]] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).[[3]]

[[4]] 137 F.3d 1135, 1140 (9th Cir. 1998).[[4]]

[[5]] FMC Corp. v. Shoshone-Bannock Tribes, (No. 4:14-CV-489-BLW), 2017 WL 4322393 (D. Idaho 2017).[[5]]

[[6]] Treaty with the Shoshonees and Bannacks, July 3, 1868, 15 Stat. 673.[[6]]

when it ceased operations. It then refused to pay. The Tribes, in response, filed a motion in the consent decree seeking a declaration that FMC was required to obtain tribal permits for the storage of its hazardous waste. The district court agreed, holding that FMC was required to obtain permits under the consent decree, that the Tribes had jurisdiction to regulate FMC, and that the Tribes were intended third-party beneficiaries of the consent decree.{[7]} On appeal, the Ninth Circuit addressed only the third point, ruling that the Tribes were incidental rather than intended beneficiaries and, therefore, did not have the power to enforce the consent decree.{[8]} The Ninth Circuit remanded with the understanding that FMC had sought the tribal permits at issue voluntarily.

The Tribes' Land Use Policy Commission granted FMC a building permit to demolish its facility and a use permit for the continued storage of hazardous waste. FMC appealed to the Fort Hall Business Council, which affirmed the Commission's decision. FMC then appealed to the Tribal Court, which held that the regulations upon which the permit fees were based were invalid because they had not been submitted to the Secretary of the Interior as was required by tribal law.{[9]} On appeal, the Tribal Court of Appeals reversed, holding that the regulations were properly vetted by the federal government and that the Tribes had jurisdiction to regulate FMC.{[10]} In the interim between the two judgments, however, FMC learned that some judges on the panel of the Tribal Court of Appeals had spoken publicly at a legal conference about their disdain for the business practices of companies like FMC, which pollute native lands and then leave. FMC, consequently, requested reconsideration with a reconstituted panel. In response, the Tribal Court of Appeals, with a new panel sitting, revised its prior ruling, holding that the Tribes had jurisdiction to regulate under the second *Montana* Exception as a result of the risks to human health and the environment resultant from FMC's contamination. Since the EPA's original remedial plan proved insufficient and had never been implemented, the Tribal Court found FMC's site to be an imminent health threat on the Reservation. It held FMC liable for its missed annual permit fees.

FMC then filed a complaint in federal court requesting the court deny enforcement of the Tribal Court of Appeals' judgment on the grounds that the Tribes lacked jurisdiction to regulate and that the tribal proceedings violated FMC's due process rights. The district court sided with the Tribes, holding that because the reconstituted panel independently reached the same conclusions as the previous panel, the alleged bias was harmless.{[11]} Further, it held that while the judgment was enforceable under the first *Montana* Exception, it was not under the second *Montana* Exception because there was an insufficient nexus between the $1.5 million annual storage fee and the threat the waste posed to the Tribes. The Tribes appealed.

The Ninth Circuit, on appeal, reviewed the Tribal Courts' legal rulings on jurisdiction de novo, and reviewed the Tribal Courts' factual findings underlying those jurisdictional decisions for clear error. Likewise, it reviewed de novo the Tribal Courts' grant of summary judgment on FMC's due process claim. In doing so, the Ninth Circuit was obliged to uphold the Tribal Courts' judgment so long as it found those courts had subject matter jurisdiction and had not violated FMC's due process. For the Tribes to have subject matter jurisdiction, they need regulatory jurisdiction to impose permit fees, and adjudicatory jurisdiction to enforce them in court. This inquiry is determined by *Montana*, which, again, provides three means for tribal regulatory jurisdiction.

The Ninth Circuit affirmed the district court's holding regarding the first *Montana* Exception, asserting that FMC's consensual business relationship with the Tribes satisfied the test. Given that the first *Montana* Exception only requires that the nonmember defendant should have reasonably anticipated its interaction would trigger tribal jurisdiction, the court found it clear that FMC should have expected tribal regulation considering the scale and associated danger of its operations and the consent decree with the EPA. FMC argued the EPA coerced it into entering relations with the Tribes, but the Ninth Circuit disagreed, pointing out the "sweet heart" deal EPA had offered FMC and holding

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[[7]] United States v. FMC, (No. CV-98-0406-E-BLW), 2006 WL 544505 (D. Idaho 2006).[[7]]

[[8]] United States v. FMC, 531 F.3d 813, 815 (9th Cir. 2008).[[8]]

[[9]] FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct., Civil Division, May 21, 2008).[[9]]

[[10]] FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. of Apps., June 26, 2012).[[10]]

[[11]] FMC Corp. v. Shoshone-Bannock Tribes, (No. 4:14-CV-489-BLW), 2017 WL 4322393 (D. Idaho 2017).[[11]]

that FMC, consequently, entered the consent decree, and subsequently pursued tribal permits, for its own good.

The Ninth Circuit also reversed the district court in holding that the Tribes had jurisdiction under the second *Montana* Exception and that there was a sufficient nexus between the annual use permits and the danger associated with FMC's facility. By storing millions of tons of hazardous waste on the Reservation, according to the Ninth Circuit, FMC imperiled the subsistence and welfare of tribal members, satisfying the second *Montana* Exception. Further, the Ninth Circuit distinguished the application of a permit scheme to control and compensate for the storage of hazardous waste, which it thought had a sufficient nexus, from a hypothetical requirement mandating FMC divest its holdings from Chinese corporations as a regulation on its storage of hazardous waste on the Reservation, which it did not think had a sufficient nexus. Nothing in *Montana*, according to the Ninth Circuit, counsels courts to read the second exception narrowly.

The Ninth Circuit also affirmed the district court's holding on FMC's due process claims. It first found that nothing the two allegedly biased judges said at the legal conference constituted legitimate bias towards FMC. The judges' statements in disagreement with the Supreme Court's logic in *Montana* and disdain for situations where nonmember companies take advantage of tribal hospitality did not, according to the Ninth Circuit, indicate that the judges would not faithfully apply the law to the case before them. Further, the reconstituted panel's reconsideration of the allegedly biased panel's prior rulings alleviated any potential bias. The Ninth Circuit noted that underlying FMC's argument was the notion that Tribal Courts present inherent risk for nonmembers' due process protections and rejected that contention flat out, pointing to empirical studies and previous cases demonstrating tribal courts' evenhandedness.