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FMC Corp. v. Shoshone-Bannock Tribes

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

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I. INTRODUCTION

In 1998, FMC Corporation ("FMC") agreed to submit to the Shoshone-Bannock Tribes' ("Tribes") permitting processes, including the payment of fees, for clean-up work required as part of consent decree negotiations with the Environmental Protection Agency ("EPA").[1] Then, in 2002, FMC refused to pay the Tribes under a permitting agreement entered into by both parties, even though the company continued to store hazardous waste on land within the Shoshone-Bannock Fort Hall Reservation in Idaho ("Reservation").[2] FMC challenged the Tribes' authority to enforce the $1.5 million permitting fees first in tribal court and later challenged the Tribes' authority to exercise civil regulatory and adjudicatory jurisdiction over the non-Indian corporation in federal court.[3] *FMC Corp. v. Shoshone-Bannock Tribes* demonstrates the complexities and fraught nature of tribal civil jurisdiction.

II. FACTUAL BACKGROUND

FMC opened an elemental phosphorus plant on fee land within the Reservation in 1949.[4] This plant produced twenty-two million tons of hazardous waste, including arsenic and "radioactive materials that emit gamma radiation," which FMC stored on the Reservation.[5] After declaring FMC's plant a Superfund site under the Comprehensive Environmental Response Compensation, and Liabilities Act ("CERCLA"),[6] the EPA charged FMC with violating the Resource Conservation and Recovery Act ("RCRA")[7].[8] To avoid litigation, FMC negotiated the terms of a consent decree with the EPA.[9] The consent decree included a provision requiring FMC to apply for all necessary clean-up permits from the Tribes.[10]

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1. FMC Corp. v. Shoshone-Bannock Tribes, 2017 U.S. Dist. LEXIS 161387, at *8 (D. Idaho 2017) [hereinafter *FMC Corp. I*].
2. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 919 (9th Cir. 2019) [hereinafter *FMC Corp II*].
3. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *3.
4. *Id.* at *5.
5. *Id.*
6. 42 U.S.C. §§ 9601–9675 (2018).
7. 42 U.S.C. §§ 6901–6992k.
8. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *5.
9. *Id.* at *5–6.
10. *Id.* at *6.

Faced with high permitting fees, FMC negotiated an agreement with the Tribes where the company agreed to tribal jurisdiction in exchange for reduced fees.[11] Under this accord, FMC agreed to pay the Tribes $2.5 million on June 1, 1998, and $1.5 million annually to continue storing the waste on the Reservation.[12] Within months of resolving the permitting issue, FMC and the EPA completed negotiations and established the consent decree.[13] Under the terms of the consent decree, the EPA required FMC to pay $11.9 million in fines, cap the plant's waste ponds, and comply with tribal permitting.[14] The consent decree further required FMC to pay a $1.5 million annual fee as part of its compliance with tribal permitting.[15]

FMC paid $2.5 million on June 1, 1998,[16] and paid "the annual use permit fee from 1998 to 2001, but refused to pay the fee in 2002 after ceasing active plant operations."[17] Despite closing its plant and refusing to pay the annual fee, FMC continued to store hazardous waste on the Reservation.[18]

III. PROCEDURAL HISTORY

FMC challenged the annual fee in tribal court, producing evidence showing the stored waste caused no harm and claiming "the EPA's containment program foreclosed any need to impose substantial fees."[19] Conversely, the Tribes produced evidence that the stored waste "was severely toxic, would remain so for generations, and could not be moved off-site."[20] The tribal court issued two opinions.[21] The first opinion established the Tribes had jurisdiction, while the second established the tribal permits FMC obtained under the 1998 agreement with the Tribes had not been codified in a tribal ordinance, and the Secretary of the Interior had not approved the $1.5 million annual fee.[22]

The Tribes appealed to the tribal appellate court, which ruled in favor of the Tribes, finding they had satisfied the first *Montana v. United States* exception and ordered FMC to pay the $1.5 million annual fee.[23]

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11. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *7.
12. *Id.* at *8.
13. *Id.* at *9.
14. *Id*.
15. *Id*. at *3.
16. *Id.*
17. *FMC Corp. II*, 942 F.3d at 919.
18. *Id.*
19. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *3.
20. *Id*.
21. *Id.* at *13.
22. *Id.*
23. *Id*. at *13, *16 (citing Montana v. United States, 450 U.S. 544, 565–66 (1981) (stating a tribe may establish civil jurisdiction over non-Indians if either the non-Indian consents to tribal jurisdiction or the non-Indian's conduct threatens the "political integrity, the economic security, or the health or welfare of the tribe")).

Three months prior to reaching the decision, but while still deliberating the issue, two of the judges from the three-judge tribal appellate panel attended a conference at the University of Idaho School of Law.[24] At the conference, the judges criticized many United States Supreme Court decisions in federal Indian law and discussed the need to protect tribal sovereignty.[25] The judges were particularly critical of the Court's decision in *Montana v. United States*.[26]

Nearly a year later, the two judges were removed and replaced for unrelated reasons, and FMC filed a motion for the tribal appellate court to reconsider its decision.[27] The court granted the request for reconsideration but affirmed the initial decision.[28] Subsequently, FMC challenged the tribal court's jurisdiction in federal district court and claimed the tribal appellate court's bias had violated FMC's due process rights.[29]

The United States District Court for the District of Idaho ("District Court") held that the Tribes had jurisdiction under both exceptions to the general presumption against tribal civil jurisdiction over non-Indians established in *Montana*.[30] The District Court found that FMC consented to the Tribes' jurisdiction,[31] and "the record show[ed] conclusively that a failure by the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the health and welfare of the Tribes."[32] Further, the District Court found "FMC received a full and fair trial before an impartial tribal appellate court, and c[ould] find no prejudice there or in the Tribes' laws."[33]

With respect to the Tribes' permitting requirement, the District Court held that the Tribes properly exercised jurisdiction over FMC under *Montana*'s first and second exceptions.[34] Although the District Court found that both *Montana* exceptions applied, it only extended comity to the tribal courts through the first exception,[35] finding the Tribes failed to establish a relationship between the annual fee and the existential threat established under the second *Montana* exception.[36] Notwithstanding the Tribes' improper exercise of jurisdiction under the second *Montana* exception as to $1.5 million annual fee, the District Court enforced the tribal appellate court's judgment under the first *Montana* exception, while also holding that the tribal judicial process and the appellate court's judgment

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24. *Id*. at *14.
25. *Id*.
26. *Id.* at *14–16 (referencing Montana v. United States, 450 U.S. 544 (1981)).
27. *Id*.
28. *Id*.
29. *Id.* at *27.
30. *Id*. at *27–31.
31. *Id*.
32. *Id*. at *37.
33. *Id*. at *40.
34. *Id.* at *43.
35. *Id.* at *40–42.
36. *Id*. (citing Montana v. United States, 450 U.S. 544, 565–66 (1981)).

did not violate FMC's due process rights.[37] Ultimately, the District Court rejected FMC's motion for declaratory judgment and injunction against the tribal court's judgment.[38]

IV. NINTH CIRCUIT DECISION

FMC appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), arguing the Tribes lacked jurisdiction under both *Montana* exceptions and that FMC was denied due process.[39] The Tribes filed a cross-appeal claiming "the [D]istrict [C]ourt erred in finding that the judgment was not enforceable under the second *Montana* exception."[40]

The Ninth Circuit acknowledged that "federal courts must recognize and enforce tribal court judgments under principles of comity," which in turn require the tribal court to have both personal and subject matter jurisdiction over the defendant and to ensure due process.[41] Thus, if the Tribes lacked regulatory jurisdiction, adjudicatory jurisdiction, or denied FMC due process "because two judges of the Tribal Court of Appeals were biased against it," the Ninth Circuit reasoned the Tribal Appellate Court's decision would not be entitled to recognition under comity.[42]

A. Regulatory Jurisdiction

FMC is a non-Indian entity whose conduct is on non-Indian fee land within the boundaries of the Reservation.[43] For this reason, the Ninth Circuit applied the framework established in *Montana*.[44] Under *Montana*, tribes retain civil regulatory jurisdiction where a non-Indian "enters into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or "the conduct of non-Indians on fee lands within its reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[45]

The Supreme Court has recognized that permit requirements and permit fees constitute a form of regulation.[46] Additionally, nonmembers may expressly or implicitly consent to regulation under the first *Montana* exception.[47] Based on these precedents, the Ninth Circuit concluded

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37. *Id.* at *42–43.
38. *Id*.
39. *FMC Corp. II*, 942 F.3d at 930.
40. *Id*.
41. *Id*. at 930 (citing AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903 (9th Cir. 2002)).
42. *Id*. at 931.
43. *Id*.
44. *Id*.
45. 450 U.S. 544, 565–66 (1981).
46. *FMC Corp. II*, 942 F.3d at 932.
47. Plains Commerce. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 338 (2008).

FMC's agreement with the Tribes demonstrated both express and implicit consent to the Tribes' jurisdiction.[48] While FMC argued the EPA coerced its consent to tribal jurisdiction, the court found FMC's decision constituted a "business decision" to avoid the costs and hardships of litigation.[49] The Tribes merely took advantage of the bargaining leverage created by the EPA and FMC's negotiations.[50] Further, because FMC had an extensive relationship with the Tribes dating back seventy years and a strong understanding of the Tribes' regulatory structure, the Ninth Circuit did not find FMC's objections to a non-Indian being subjected to strange and foreign laws compelling.[51]

Finally, in a previous dispute between FMC and the Tribes, the Ninth Circuit determined the Tribes had regulatory jurisdiction to compel FMC to comply with their Tribal Employment Rights Ordinance because the two parties had negotiated and entered an agreement based upon the Tribes' ordinances.[52] In that case, the Ninth Circuit held the agreement constituted a consensual relationship under *Montana*.[53] The court identified similarities between the facts of the 1990 case and the current case and reasoned they should have the same conclusion.[54] Therefore, the Ninth Circuit held that the Tribes satisfied the first *Montana* exception.[55]

As to the second *Montana* exception, FMC argued that the record did not support tribal jurisdiction and Ninth Circuit precedent barred the Tribes from asserting jurisdiction.[56] However, upon examining the record, the Ninth Circuit identified overwhelming evidence to the contrary. The presence of elemental phosphorous in the ground and phosphine gas in the air constituted an existential threat to the health, safety, and welfare of the Tribes.[57] FMC argued the EPA's CERCLA plan, and FMC's subsequent implementation of that plan, addressed and eliminated the threat of harm where elemental phosphorus had contaminated the ground.[58] The Ninth Circuit noted, however, many areas of the site had not been treated under the CERCLA plan, and the EPA admitted the actions taken under the plan did not eliminate the threat to the Tribes' health and welfare.[59] First, of FMC's eleven waste ponds—the source of the phosphine gas in the air—FMC only capped nine.[60] In 2006 and 2010, the EPA reported that the "[h]igh concentrations of phosphine accumulating within the [FMC]

48. *FMC Corp. II*, 942 F.3d at 932.
49. *Id*.
50. *Id*.
51. *Id*. at 933–34.
52. *Id.* at 934 (citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990)).
53. *Id*.
54. *Id.*
55. *Id.*
56. *Id*. at 939 (citing Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298 (9th Cir. 2013)).
57. *Id*. at 934–39.
58. *Id.* at 936.
59. *Id*.
60. *Id*.

RCRA ponds . . . being released constitute[d] an imminent and substantial endangerment to public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a)," and a former EPA official testified that FMC failed to adequately maintain the hazardous sites.[61] A former official for the EPA testified that FMC did not properly monitor the waste ponds and had not implemented a warning system.[62]

Additionally, the Ninth Circuit stated that *Evans* did not apply to this case.[63] In *Evans*, the Tribes failed to establish that the construction of a single-family home "threatened or had some direct effect on the political integrity, economic security, or the health or welfare of the Tribes."[64] The Ninth Circuit, however, differentiated *Evans* from the current case by noting "the threats from the FMC site . . . are not minimal annoyances. They are the threat of catastrophic health reactions, including death."[65]

Despite the remedial actions taken by FMC, the Ninth Circuit determined the toxic nature of the waste, the incomplete implementation of these actions, and the fact that the continued threat of harm persisted even where FMC had followed EPA instructions to completion, were all sufficient reasons to establish a threat satisfying the second *Montana* exception.[66] Thus, the Ninth Circuit held that FMC's site constituted an existential threat to the health, safety, and welfare of the Tribes.[67]

Having established that both *Montana* exceptions had been satisfied, the Ninth Circuit addressed whether a nexus existed between the second *Montana* exception and the Tribes' request for damages.[68] Reversing the District Court's decision, the Ninth Circuit found "[a] more-than-sufficient nexus may be shown by comparing fees charged on the open market for hazardous waste storage [against] the $1.5 million annual fee charged by the Tribes . . . ."[69] Based on the costs of commercial hazardous waste disposers, the Ninth Circuit reasoned that the $1.5 million annual fee was "an extraordinary bargain" and established "a more-than-sufficient nexus between the storage of FMC's dangerous—potentially catastrophic—waste and the $1.5 million annual use permit fee to warrant the assessment of that fee under *Montana*'s second exception."[70]

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61. *Id*. at 939 (internal citations omitted).
62. *Id*.
63. *Id*. at 940.
64. *Id*. (quoting Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1303–06 (9th Cir. 2013)).
65. *Id*. at 940 (internal citations omitted).
66. *Id*. at 934–39.
67. *Id*.
68. *Id*. at 940.
69. *Id*.
70. *Id*. at 941.

B. Adjudicatory Jurisdiction

While *Strate v. A1 Contractors* established tribes' adjudicatory jurisdiction must not exceed their regulatory jurisdiction, the Ninth Circuit noted "the Supreme Court has never decided whether a Tribe's adjudicatory jurisdiction is necessarily as extensive as its regulatory jurisdiction."[71] Citing two of its previous decisions, the Ninth Circuit stated adjudicatory and regulatory jurisdiction must be congruent because "[a]ny other conclusion would impermissibly interfere with the tribes[']inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government."[72] Thus, the Ninth Circuit held the Tribes had both regulatory and adjudicatory jurisdiction.

C. Due Process

FMC additionally claimed the two judges who served on the three-judge tribal appellate court panel unfairly favored the Tribes.[73] FMC cited remarks the judges made at a conference sponsored by the University of Idaho College of Law.[74] Upon reviewing the statements made by the

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71. *Id.*

72. *Id.* (citing Water Wheel Camp Rec. Area, Inc. v. LaRance, 642 F.3d 802, 816 (9th Cir. 2011); *accord* Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 899 (9th Cir. 2019)).

73. *Id.* at 942 (citing *FMC Corp. I.*, 2017 U.S. Dist. LEXIS, at *15–16.) FMC highlighted statements by Judges Gabourie and Pearson. Judge Gabourie offered his opinion relating to pollution by companies operating on reservations:

> You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and then the mining company or whatever, manufacturing company, disappears. They leave, you know. They've — they've either dug everything they could, and the then ground is disturbed, sometimes polluted beyond repair. And you sit as a — as an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself, you know, We know that the — there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it. And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses. You need chemists and whatever to get out of testifying. It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."

Judge Pearson added:

> If you're a law student and you're going to practice law, as well as if you're a judge and you're going to be hearing cases, you know where — companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they go out of business. And they leave you just sitting. And you need to know what you can do as you're sitting as a judge with those cases coming toward you.

74. *Id.*

judges, the Ninth Circuit determined that neither judge had made "any statements at the conference indicating bias against FMC."[75] To the contrary, a recording of the judges' speeches revealed that they emphasized the need for impartiality.[76] While the judges criticized Supreme Court decisions, the Ninth Circuit concluded that their opinions did not indicate or rise to a level of bias.[77] Most importantly, the Ninth Circuit remarked that the repaneling of the tribal appellate court and reconsideration of the previous panel's decision obviated this argument.[78]

Finally, FMC argued that tribal courts inherently risk nonmember due process.[79] However, the Supreme Court, Ninth Circuit, and other circuit courts have consistently rejected such arguments.[80] Based on these precedents and its own experience, the Ninth Circuit concluded that "contrary to the contention of FMC, tribal courts do not treat nonmembers unfairly."[81]

Because the Tribes had both regulatory and adjudicatory jurisdiction—and because FMC was not denied due process—the Ninth Circuit recognized and upheld the tribal appellate court's decision under the principle of comity.[82] Further, the Ninth Circuit held the tribal appellate court's judgment enforceable under both *Montana* exceptions.[83]

V. CASE ANALYSIS

This case represents the quintessential scenario of a tribe seeking to assert civil jurisdiction over a non-Indian's conduct on non-Indian fee land within the bounds of its reservation. The severity and extremity of the circumstances, however, highlight federal courts' reluctance to recognize tribal civil jurisdiction. To fully understand the potential impacts of this case, one must first understand the precedential history of the *Montana* line of cases.

A. Precedential History

As noted by the Ninth Circuit in this case, biases within tribal courts arising from the cultural divide between Indians and non-Indians

75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*. at 943.
80. *Id*. (internal citations omitted).
81. *Id.* at 944 (stating "[T]ribal courts often provide litigants with due process that 'exceed[s] the protections offered by state and federal courts" and empirical studies "demonstrate that tribal courts are even-handed in dispensing justice to nonmembers." (citing Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation, 862 F.3d 1236, 1250 (10th Cir. 2017); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1051 (2005)).
82. *Id*.
83. *Id.* at 931, 941.

remains a concern among many people and entities.[84] In the nineteenth century, the Supreme Court not only recognized tribal court decisions but also found that that tribes' cultural distinctions were "an additional reason not to construe a vague treaty provision to repeal a statute clearly prohibiting such jurisdiction."[85] However, in the twentieth century, the Supreme Court reduced the recognition of tribal jurisdiction within Indian Country. In 1978, the Supreme Court found "that these considerations spoke 'equally strongly against the . . . contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure.'"[86] *Suquamish v. Oliphant*[87] established that this cultural divide was "sufficient to remove all tribal criminal jurisdiction over non-Indians."[88] Despite finding that tribes lacked criminal jurisdiction over non-Indians, the Supreme Court held that tribes retain criminal jurisdiction over their members in *United States v. Wheeler*, and that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution did not apply to tribal government actions concerning tribal members in *Santa Clara Pueblo v. Martinez*.[89] Thus, *Wheeler* and *Santa Clara Pueblo* demonstrate a divergence between tribal authority over Indians and non-Indians.[90]

Oliphant addressed the extent of criminal, rather than civil, tribal jurisdiction.[91] In 1980, the Supreme Court first addressed tribal authority to assert civil regulatory jurisdiction authority over non-Indians when it found the Confederated Tribes of the Colville Reservation had the regulatory jurisdiction to impose a tax on cigarettes purchased by non-Indians.[92] *Oliphant*'s true impact on tribal civil jurisdiction was not revealed until 1981 in *Montana v. United States*, when the Court handed down one of its greatest curtailments of tribal civil jurisdiction.[93] Drawing on *Oliphant*, the Court held that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[94]

Despite this curtailment, the *Montana* Court emphasized that, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,

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84. *Id*. at 943.

85. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1057 (2005).

86. *Id*. (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978)).

87. 435 U.S. 191, 211 (1978).

88. Berger, *supra* note 85, at 1058.

89. *Id*. (referencing 435 U.S. 313 (1978) and 436 U.S. 49 (1978)).

90. *Id*.

91. *Oliphant*, 435 U.S. at 191.

92. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

93. 450 U.S. 544, 565–66 (1981).

94. *Id*. at 565.

even on non-Indian fee lands."[95] Thus, the Supreme Court held that tribes lack civil regulatory jurisdiction over non-Indians on non-Indian fee land unless: (1) the non-Indian "enter[ed into] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) "the conduct of non-Indians on fee lands within its reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[96] Additionally, the *Montana* court stated that if Congress wished to extend tribal jurisdiction to lands owned by non-Indians, it can do so "by incorporating . . . the definition of 'Indian country' in 18 U.S.C. § 1151."[97]

The cases immediately following *Montana* deviated from that decision in their support of tribal jurisdiction.[98] In *Merrion v. Jicarilla Apache*, the Supreme Court held that tribes have the authority to tax non-Indians for oil and gas revenues from severed land under their "general authority, as sovereign[s], to control economic activity within [their] jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[99] However, the sentiment reflected in *Montana* reemerged in *Brendale v. Confederated Tribes & Bands of the Yakima*.[100] In *Brendale*, the Yakima attempted to assert civil regulatory jurisdiction over two parcels of land, and the Court examined the land-status to determine whether the Yakima had jurisdiction.[101] The first parcel was in an "open area" on the fringe of the reservation surrounded by a significantly large non-Indian population, while the second parcel was in a "closed area" in an undeveloped location at the heart of the reservation.[102] By examining the characteristics of the parcels, a plurality of justices found that the Yakima had jurisdiction over the parcel within the "closed area" of the reservation but not over the parcel within the "open area" of the reservation.[103] Thus, *Brendale* established a tribe can exert civil regulatory jurisdiction over non-Indian activity on fee land if the parcel is in a "closed area" of the reservation.[104] Further, *Brendale* established a tribe's ability to zone land within its reservation was essential to prevent

95. *Id*.

96. *Id*. at 565–66 (internal citations omitted).

97. *Id*. at 562. "Indian Country" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. § 1151 (2018).

98. Berger, *supra* note 85, at 1060.

99. 455 U.S. 130, 137 (1982).

100. Berger, *supra* note 85, at 1060–61; *see* 492 U.S. 408 (1989).

101. Brendale v. Confederated Tribes & Bands of the Yakima, 492 U.S. 408, 417 (1989).

102. Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 752 (E.D. Wash. 1985) *aff'd in part, rev'd in part*, 492 U.S. 408 (1989); *Brendale*, 492 U.S. 408, 417 (1989).

103. Berger, *supra* note 85, at 1061.

104. *Brendale*, 492 U.S. at 432.

demonstrably serious harm and to prevent the imperilment of its political integrity, the economic security, or health and welfare.[105]

Despite this brief stint of decisions favorable to tribes, nearly a decade later the Supreme Court narrowed the *Montana* exceptions.[106] In *Strate v. A-1 Contractors*, the Court ruled if the second *Montana* exception only required non-Indian conduct to "jeopardize the safety of tribal members," then "the exception would severely shrink the rule."[107] Thus, the Court concluded that tribes must demonstrate that tribal civil jurisdiction "is necessary to protect tribal self-government or to control internal relations."[108]

Similarly, in *Atkinson Trading Co. v. Shirley*, the Court dismissed the assertion under *Jicarilla Apache* that tribes had the authority to tax economic activity on Indian lands.[109] Using similar language as *Strate*, the *Atkinson* Court asserted that the exception in *Jicarilla Apache* would "swallow the rule."[110] Instead, the *Atkinson* Court ruled that for the first *Montana* exception to apply, "the tax or regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself," reasoning consent in one circumstance did not constitute consent in all circumstances.[111]

In 2004, the Court once again diminished tribal civil regulatory jurisdiction, specifically on tribal trust land.[112] In *Nevada v. Hicks*, the Court held the Fallon Paiute-Shoshone Tribes lacked civil adjudicatory jurisdiction for a tribal member's claim against a state officer for conduct on tribal trust land.[113] Read broadly, *Hicks* could indicate that tribes generally lack civil jurisdiction over non-Indians within Indian Country regardless of land status.[114] However, Justice Scalia stated this holding "is limited to the question of tribal-court jurisdiction over state officers enforcing state law."[115] Thus, the Court "[left] open the question of tribal-court jurisdiction over nonmember defendants in general."[116]

The question of whether tribes may exercise adjudicatory jurisdiction over nonmember defendants remains undecided, despite being considered again by the Supreme Court in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, where the Court was evenly divided.[117] In that case, Dollar General entered a lease agreement with the Mississippi Band

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105. *Id*.
106. Strate v. A-1 Contractors, 520 U.S. 438 (1997).
107. *Id*. at 458.
108. *Id*. at 459.
109. 532 U.S. 645, 652–53 (2001).
110. *Id*. at 655.
111. *Id*. at 656.
112. Nevada v. Hicks, 533 U.S. 353 (2001).
113. *Id*. at 374.
114. *Id.*
115. *Id.* at 376.
116. *Id*. at 358, n.2.
117. 136 S. Ct. 2159 (2016) (per curiam), *aff'g* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

of Choctaw Indians to build a store on trust land.[118] While the Fifth Circuit declined to declare whether the first *Montana* exception required a consensual relationship to be commercial, the Fifth Circuit found that Dollar General's hiring of a minor as an intern under a tribal youth employment program constituted "unquestionably a relationship "of a commercial nature."[119] Additionally, the Fifth Circuit found a nexus between the youth employment program and Dollar General's tortious actions.[120] Thus, the Fifth Circuit held that tribes may exercise jurisdiction over non-Indians on tribal trust land.[121] The Supreme Court granted certiorari and affirmed the Fifth Circuit.[122] However, this decision offers no insight or guidance in determining to what extent tribes have civil jurisdiction over non-Indians in Indian Country because the Supreme Court could not reach a majority decision.[123] Rather, the Supreme Court's per curiam decision merely affirmed the Fifth Circuit's judgment.[124]

Finally, in 2008, under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Supreme Court collapsed the two *Montana* exceptions into one, noting that "*Montana* expressly limits its first exception to the 'activities of nonmembers,' . . . allowing these to be regulated to the extent necessary 'to protect tribal self-government [and] to control internal relations . . . .'"[125] Further, *Plains Commerce* required under the second *Montana* exception that the non-Indian conduct be "catastrophic" for tribal self-government.[126]

Thus, over the course of three decades, the Supreme Court has greatly reduced tribal jurisdiction. Tribal jurisdiction has eroded from recognizing jurisdiction to a general presumption against tribal jurisdiction over non-Indians on non-Indian fee land,[127] unless the tribe can establish that the activities of the non-Indians pose a "catastrophic" threat to tribal self-governance.[128] The Supreme Court's consistent whittling away at tribal civil jurisdiction demonstrates a troubling trend for tribes in federal Indian law. However, as Justice Scalia noted, "the question of tribal-court jurisdiction over nonmember defendants in general" remains.[129]

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118. *Dolgencorp, Inc.*, 746 F.3d at 169.
119. *Id*. at 173.
120. *Id*. at 173–74.
121. *Id*. at 177.
122. 136 S. Ct. at 2159.
123. *Id*.
124. *Id*.
125. 554 U.S. 316, 332 (2008) (quoting Montana v. United States, 450 U.S. 544, 564–65 (1981)).
126. *Id*. at 341.
127. *Cf*. Montana v. United States, 450 U.S. 544 (1981).
128. *Plains Commerce*, 554 U.S. at 341 (2008).
129. Nevada v. Hicks, 533 U.S. 353, 358, n.2 (2001).

B. The Ninth Circuit's Montana *Analysis*

Given the recent trend regarding tribal civil jurisdiction, not only did the Ninth Circuit reach the proper legal conclusion in *FMC Corp. v. Shoshone-Bannock Tribes*, but the decision also represents a welcome respite for tribes. Since 1978, the Supreme Court has consistently moved the goal posts, making the standard for establishing tribal jurisdiction over non-Indians increasingly stringent.[130] Given the precedential context of the case, and the facts and circumstances from which the case arises, the Ninth Circuit could have come to no other conclusion without seriously calling into question tribal civil jurisdiction under the *Montana* line of cases.

1. Consensual Relationship

As established in *Montana*, the Tribes overcame the presumption that they do not have civil regulatory or adjudicatory jurisdiction over FMC by establishing a consensual relationship.[131] Based on the record and the requirements set by *Montana*, *Atkinson*, and *Plains Commerce*, a finding other than a consensual relationship here would have been illogical.

Atkinson requires that consensual relationships have a nexus with the conduct that the Tribe seeks to regulate.[132] The Tribes and FMC negotiated an agreement where FMC acquiesced to submit to tribal jurisdiction and pay an annual fee of $1.5 million in exchange for tribal permitting.[133] The permitting directly addressed FMC's disposal of the plant's hazardous materials.[134] FMC entered this agreement specifically to satisfy its obligation to submit to tribal permitting under its agreement with the EPA, and the Tribes sought to regulate FMC's storage of hazardous waste.[135] Because the consensual relationship existed for the express purpose of FMC submitting to Tribal permitting, a nexus sufficient to satisfy *Atkinson* existed between the consensual relationship and FMC's conduct.

Plains Commerce states that where a non-Indian "should have reasonably anticipated that [its] interactions might 'trigger' tribal authority," the first *Montana* exception is met.[136] *Plains Commerce* further requires the Tribes to show that FMC's consensual relationship relates to conduct that is "catastrophic" for tribal self-government.[137] To complete the terms of the consent decree with the EPA regarding hazardous waste disposal, FMC consented to tribal civil jurisdiction.[138] The Ninth Circuit agreed with the District Court that the agreement constituted a "sweetheart deal"

130. *See supra* Section V(A).
131. 450 U.S. at 565.
132. 532 U.S. 645, 656 (2001).
133. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *7.
134. *Id.*
135. *Id.*
136. 554 U.S. 316, 337 (2008).
137. *Id.* at 341.
138. *Id.*

favoring FMC.[139] FMC "desperately grasped" at the agreement to avoid litigation with the EPA, reduce permitting fees from the Tribes, and continuing to store the hazardous waste on site.[140]

Thus, it is reasonable to anticipate that tribal authority would be triggered where a non-Indian entity has negotiated an agreement to pay a lower fee in exchange for submitting to a tribal permitting process. Such terms leave no room for argument without altering the parameters of *Montana*. FMC attempted to side-step this issue by claiming the EPA coerced it into submitting to tribal jurisdiction.[141] However, FMC had recourse other than to negotiate a permitting agreement with the Tribes.[142] While the negotiations produced a potentially more favorable outcome than litigating with the EPA, FMC had the power to negotiate its relationship with the Tribes.[143] Therefore, the Ninth Circuit correctly concluded that a consensual relationship existed under *Montana*, *Atkinson*, and *Plains Commerce*.

2. Harm Catastrophic for Tribal Self-Governance

To satisfy the *Montana* test under *Plains Commerce*, FMC's storage of elemental phosphorous in the ground and the waste pools must pose a catastrophic threat to the Tribes' self-governance.[144] The EPA concluded that the elemental phosphorus at the FMC site constitutes a "principal threat waste," meaning the waste is "highly toxic or highly mobile that generally cannot be reliably contained or would present a significant risk to human health or the environment should exposure occur."[145] Further, the EPA's CERCLA plan called for the capping of all contaminated areas.[146] Not only did FMC fail to cap all contaminated areas, the EPA conceded that even if FMC had done so, the measure would still "present a threat to [t]ribal health and welfare."[147]

Additionally, phosphine gas "is 'very flammable,' 'highly reactive,' and 'extremely toxic' to humans."[148] The gas is stored in waste ponds, all but two of which have been capped.[149] After two inspections, the EPA found that FMC failed to properly maintain the ponds, which

139. *FMC Corp. II*, 942 F.3d at 933.
140. *Id.*
141. *FMC Corp. II*, 942 F.3d at 934.
142. *Id.* at 921–23; *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *5–9.
143. *FMC Corp. II*, 942 F.3d at 921–23; *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *5.
144. 554 U.S. 316, 341 (2008).
145. *FMC Corp. II*, 942 F.3d at 936.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 936–37.

continued to leak gas, "constitut[ing] an imminent and substantial endangerment to public health or welfare or the environment."[150] Thus, the nature and state of the phosphorus and phosphine gas are such a threat that catastrophe would follow any failed containment of either, while the remedial measures taken by FMC do not guarantee the safety of the Tribes, and FMC's implementation of said measures leaves much to be desired.[151] Further, the nature of both the phosphorus and phosphine gas are such that a failed containment would have effects beyond the plant site itself and across the Reservation.[152]

Due to the catastrophic threat posed by the hazardous waste on FMC's site, the second *Montana* exception has clearly been satisfied. An opposite finding would be nonsensical in light of the toxicity and volatility of the substance and the uncertainty and poor execution surrounding FMC's remedial measures. Unlike *Plains Commerce*, *Montana*, and *Strate*, the harm threatened in this case has the potential to cause serious injury or death across the Reservation.[153] Both the EPA and a witness for the Tribes described the phosphine gas as a "close cousin to the phosgene gas used in World War I" to kill soldiers and, therefore, "acutely and chronically dangerous to people in the area or downstream . . . or downwind."[154] A 2010 EPA report highlights the severity of the threat with findings that the gas emitted from one of the waste ponds presented an urgent public health hazard.[155] Additionally, the waste is exceptionally volatile and combustible when exposed to air.[156] One witness explained the volatility of elemental phosphorus, testifying to seeing ducks spontaneously ignite as they attempted to fly off after having landed in waste pond.[157] The ducks and EPA report represent just two of several specific threats to the Tribes; however, they highlight the severity of the circumstances.[158]

By contrast, *Plains Commerce* concerned the sale of formerly Indian-owned fee land to a third party,[159] *Strate* concerned a car crash,[160] and *Montana* concerned hunting and fishing regulations.[161] The extreme circumstances in this case represent a threat of harm far greater than the harm threatened in those cases. This case, therefore, is more akin to *Brendale*. In *Brendale*, the Supreme Court held tribes retain inherent authority to regulate non-Indian conduct that is "demonstrably serious and must im-

150. *Id*. at 938–39.
151. *Id*. at 936, 939.
152. *Id*. at 936, 938.
153. *Id*. at 937–38.
154. *Id*. at 937.
155. *Id*.
156. *Id*. at 935–36.
157. *Id*. at 936.
158. *Id.* at 935–38.
159. 554 U.S. 316 (2008).
160. 520 U.S. 438 (1997).
161. 450 U.S. 544 (1981).

peril the political integrity, the economic security, or the health and welfare of the tribe."[162] The *Brendale* Court determined that refusing to comply with tribal zoning ordinances imperiled the political integrity of the tribe. Here, FMC sought to avoid compliance with tribal permitting for storage of hazardous waste. If anything, FMC's conduct presented a far greater threat to political integrity due to the severity of potential harm.

As the exception is defined under *Plains Commerce*, *Strate*, and *Brendale*, FMC's conduct satisfies the second *Montana* exception. Any other finding would obviate the exception. If a court found the storage of hazardous material with the potential to severely injure or kill anyone downwind or downstream of the facility in the event of a leak did not qualify as "catastrophic," how much greater would a threat of harm have to be to satisfy the second *Montana* exception? A ruling for FMC here would call into question the ability of a tribe to assert civil jurisdiction over non-Indian conduct within a reservation—ever.

3. En Banc Petition

On November 29, 2019, FMC filed a petition for rehearing en banc,[163] which the Ninth Circuit denied.[164] FMC argued that the Ninth Circuit misinterpreted *Montana* by disregarding its limitations and enlarging both the first and second exceptions.[165]

First, FMC argued that the Tribes failed to demonstrate the annual fee of $1.5 million was necessary to tribal government.[166] However, as noted in the Ninth Circuit opinion, the annual fee was necessary to conduct the governmental services required to oversee the permitting process.[167]

Second, FMC argued the Ninth Circuit enlarged the two *Montana* exceptions.[168] In its petition, FMC alleged the first exception only applies where tribes have entered into commercial relationships with non-Indian entities and that the second exception cannot be satisfied by a "highly speculative threat."[169] FMC argued that the establishment of a consensual relationship was an exercise of tribal authority and therefore did not qualify under the first exception.[170] Additionally, FMC claimed its relationship fell outside the first *Montana* exception because it could not terminate the

162. 492 U.S. 408, 431 (1989).

163. Appellant's Pet. for Reh'g En Banc, Nov. 29, 2019, Nos. 17-35840, 17-35865.

164. Order Den. Appellant's Pet. for Reh'g En Banc, Jan. 13, 2020, Nos. 17-35840, 17-35865.

165. Appellant's Pet. for Reh'g En Banc 11–16.

166. Appellant's Pet. for Reh'g En Banc 9–11.

167. *FMC Corp. II*, 942 F.3d at 941.

168. Appellant's Pet. for Reh'g En Banc 9, 10.

169. Appellant's Pet. for Reh'g En Banc 11, 12.

170. Appellant's Pet. for Reh'g En Banc 12.

consensual relationship.[171] However, FMC only entered into this relationship at the direction of the EPA.[172] Additionally, FMC took advantage of a "sweetheart deal" that it could have declined.[173]

Finally, FMC argued that the Ninth Circuit improperly substituted speculative harm for actual harm under the second *Montana* exception, stating that the Tribes were not under actual threat because of the preventative measures implemented under their EPA-approved plan.[174] Citing *Evans*, FMC alleged that the court's decision only allowed the Tribes to assert jurisdiction where necessary to "avert catastrophe."[175] However, the EPA testified that the protective measures under FMC's plan were not fully implemented, had flaws, and were not sufficient to eliminate the threat.[176] Additionally, the type of harm here is much greater than the "minimal annoyances" in *Evans*.[177]

Ultimately, FMC's arguments in its petition for rehearing were incorrect and unpersuasive. The court correctly applied *Montana* in this case and properly determined the Tribes had civil jurisdiction over FMC. Therefore, the Ninth Circuit properly denied FMC's petition.

VII. FURTHER PROCEEDINGS

Despite the Ninth Circuit's conclusions, this case may not be settled. On March 16, 2020, FMC filed a petition for writ of certiorari,[178] reasserting that the Tribes lacked civil jurisdiction.[179] Similar to its petition for rehearing en banc, FMC argues the Ninth Circuit has misinterpreted and incorrectly enlarged the *Montana* exceptions.[180] In the petition, FMC calls several Ninth Circuit decisions into question, including *Water Wheel* and *Window Rock Unified School District v. Reeves*.[181]

In the interim, the Ninth Circuit has agreed to stay the issuance of its mandate. FMC, although blaming the Ninth Circuit's interpretation, notes the uncertainty surrounding *Montana* and the question of tribal civil jurisdiction.[182] This assertion echoes Justice Scalia's questioning of whether Tribes may exercise jurisdiction over non-Indians is still an open

171. Appellant's Pet. for Reh'g En Banc 12.
172. *FMC Corp. I*, 2017 U.S. Dist. LEXIS at *6.
173. *FMC Corp. II*, 942 F.3d at 933.
174. Appellant's Pet. for Reh'g En Banc 13.
175. Appellant's Pet. for Reh'g En Banc 15 (citing Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1306, n.8 (9th Cir. 2013)).
176. *FMC Corp. II*, 942 F.3d at 936.
177. *FMC Corp. II*, 942 F.3d at 932; Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1303–06 (9th Cir. 2013).
178. Cert. Pet., Mar. 16, 2020, No. 19-1143.
179. Cert. Pet. 12.
180. Cert. Pet. 13–29.
181. Cert. Pet. 15 (referencing Water Wheel Camp Rec. Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011); Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894 (9th Cir. 2017)).
182. Cert. Pet. 4.

question.[183] This case may soon provide insight into that question and others left unanswered by both *Hicks* and *Dollar General*.

VIII. CONCLUSION

FMC v. Shoshone-Bannock Tribes provides a strong example of the perils of tribal civil jurisdiction and the reluctance to extend recognition of tribal court authority. While its precedential history is fraught with cases that have chipped away at what was once an inherent power of tribes as sovereign nations, the Ninth Circuit's decision is rightfully favorable to tribal civil jurisdiction, even though the Supreme Court has consistently restricted that authority over the last forty years. However, as is often the case in federal Indian law, circuit court decisions, no matter how properly reasoned or supported by precedent, are frequently overturned by the Supreme Court.

183. Nevada v. Hicks, 533 U.S. 353, 358, n.2 (2001).