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9th Circuit Holds Shoshone-Bannock Tribes Can Impose \$1.5 Million Annual Waste Storage Permit Fee On FMC

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On November 15, 2019, a three-judge panel for the Ninth Circuit Court of Appeals held that the Shoshone-Bannock Tribes (Tribes) have regulatory and adjudicatory jurisdiction over FMC Corporation sufficient to impose an annual use permit fee for storage of hazardous waste on fee lands within the Shoshone-Bannock Fort Hall Reservation in Southeastern Idaho (Reservation). *FMC Corp. v. Shoshone-Bannock Tribes*, Nos. 17-3584017, 17-35865, 2019 WL 6042469, (9th Cir. Nov. 15, 2019). The decision is significant for operators within reservation boundaries, especially those who must seek tribal permits. The court found the Tribes had expansive regulatory and tribal court jurisdiction over activities on fee lands which traditionally have been subject to limited tribal jurisdiction. The court also sanctioned waste storage use permit fees that will exist in perpetuity.

In 1990, the Environmental Protection Agency (EPA) declared the FMC plant and storage area a Superfund Site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In 1997, the EPA charged FMC with violating the Resource Conservation and Recovery Act (RCRA). To settle the RCRA suit, FMC entered into a Consent Decree under which it agreed to construct a treatment facility and additional storage ponds on its fee lands within the Reservation and to obtain all relevant permits from the Tribes. FMC agreed to pay the Tribes a one-time fee of \$1 million and \$1.5 million annually for storage use permit fees. FMC paid the fees from 1998 through 2001 when plant operations ended, but the Tribes demanded that the annual payments continue. After unsuccessful negotiations and lengthy litigation in federal court and Shoshone-Bannock Tribal Court, the Tribes obtained a Tribal Court of Appeals' judgment requiring FMC to make the annual use fee payments from 2002 forward. FMC appealed to the federal district court in Idaho, arguing that the Tribes lacked subject matter jurisdiction and that it was denied due process in Tribal Court.

On appeal, the panel stated that precedent establishes that a tribal court judgment typically will not be recognized and enforced if the tribal court does not have personal and subject matter jurisdiction, where due process has been denied, or on equitable grounds. The question of subject matter jurisdiction required the panel to consider whether the Tribes have regulatory jurisdiction over FMC to impose the fees and adjudicatory jurisdiction to enforce its regulations against FMC. As a general rule, tribes lack jurisdiction over nonmembers' activities on fee lands located within a reservation unless a federal statute or treaty expressly authorizes such jurisdiction, or where jurisdiction is established under one of the exceptions set forth in *Montana v. U.S.*, 450 U.S. 544 (1981). The "*Montana* exceptions" permit tribes to exercise regulatory jurisdiction in two

instances: (1) where nonmembers have entered into consensual relationships with a tribe or its members through commercial dealings, contracts, leases, or other arrangements; and (2) where the conduct of nonmembers threatens or has some direct effect on the political integrity, economic security, or health or welfare of a tribe.

Here, the panel concluded that both *Montana* exceptions were met because FMC entered into a consensual relationship with the Tribes when it signed the permit agreements, and substantial evidence and expert testimony indicated that FMC's hazardous waste will remain stored on the Reservation indefinitely, posing a continuing threat to Tribal health and welfare. The panel also found that a sufficient nexus between the basis for jurisdiction and the exercise of jurisdiction (as required under *Montana*), as the Tribes demonstrated they use the fees to monitor and mitigate dangers posed by FMC's waste. Finally, the panel rejected FMC's due process claims, finding that despite public statements regarding the adverse impacts of mining on tribal lands made by two Tribal Appeals Court judges, the process was impartial and FMC could not demonstrate that nonmembers' due process rights are inherently at risk in tribal courts.

For more information about the decision or Holland & Hart's Indian Law practice, please contact:

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