BUILDING RELATIONSHIPS WITH TRIBES AND OPERATING ON RESERVATION LANDS: LESSONS FROM FMC V. SHOSHONE

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On 11 January 2021, the United States Supreme Court declined a petition to review the Ninth Circuit's decision in *FMC Corporation v. Shoshone-Bannock Tribes*. In that case, the Ninth Circuit upheld a tribal court decision requiring FMC Corporation (FMC), a non-Indian business, to pay a tribally-assessed annual permit fee of US$1.5 million to store hazardous wastes from FMC's phosphorous plant operations on the Shoshone-Bannock Tribes (Tribes) Fort Hall Reservation (Reservation). Given that companies are increasingly engaging with Native American tribes on long-term relationships to develop and operate wind, solar, agriculture, retail, and other projects on tribal lands, the Ninth Circuit's decision provides a unique and timely opportunity to see how tribal jurisdiction can play out in the context of non-Indian companies conducting business on reservation lands.

These business endeavors can offer distinct economic advantages, including federal incentives such as federal financing subsidies and Opportunity Zone tax credits, as well as exemptions from state and local sales and property taxes. Investors are also looking to environmental, social, and corporate governance principles to guide investment decisions, and business collaborations with tribes that promote responsible growth and development for economically distressed tribal communities comport with these principles.

These projects also require leases, permits, and other agreements with tribes, tribal entities, and/or tribal members and may subject non-Indian businesses to tribal laws and courts. The Ninth Circuit's decision in *FMC* is an important reminder that, at the outset, and during any such relationship, companies should have a comprehensive understanding of the legal ramifications of doing business with tribes and on reservation lands, particularly when that relationship involves land development and impacts to natural resources on a tribe's reservation. It is also critical to have agreements that cover tribal jurisdiction and an understanding about the extent of that jurisdiction.

FMC'S HISTORY WITH THE TRIBES AND ON-RESERVATION ACTIVITIES

The Tribes are a federally recognized Indian entity with sovereign authority over the Reservation.[1] The Reservation consists of both tribal and non-tribal lands.[2] For over 70 years, FMC has had considerable operations on the Reservation and “an extensive relationship with the Tribes,” including “mining leases, contracts for the supply of phosphate shale, agreements recognizing the Tribes' taxing power, royalty payments, and employment

and permit agreements."[3] In a prior case, the Ninth Circuit described "FMC's presence on the reservation [as] substantial, both physically and in terms of the money involved," and held that the Tribes had authority to require FMC to comply with the Tribes' on-reservation tribal employment laws.[4]

At issue in the present case was FMC's operation of an elemental phosphorous plant on the Reservation from 1949–2001.[5] The plant was almost entirely located on non-Indian fee lands.[6] FMC's operations produced approximately 22 million tons of hazardous waste that are contained in waste storage ponds on the Reservation.[7] Other hazardous materials from FMC's operations remain on the Reservation in loose soil and groundwater or are buried on the Reservation in some 20–30 railroad tanker cars.[8]

In 1990, the Environmental Protection Agency (EPA) designated the plant, along with an adjoining off-reservation facility owned by a third-party, as a Superfund Site under the Comprehensive Environmental Response, Compensation, and Liability Act.[9] In 1997, EPA sued FMC for violations of the Resource Conservation and Recovery Act (RCRA), a federal statute that regulates the disposal of solid and hazardous wastes.[10]

FMC settled the RCRA suit via a consent decree that required the company to obtain permits from the Tribes to store hazardous wastes on the Reservation.[11] FMC and the Tribes entered into "an agreement under which FMC agreed to pay $1.5 million per year for a tribal use permit allowing storage of hazardous waste" on the Reservation.[12] During the negotiation process, FMC also consented to tribal jurisdiction in verbal and written statements.[13] FMC stopped paying the permit fee in 2002 after it ended active plant operations, even though the waste remains stored on the Reservation, and the Tribes require an annual permit for that storage.[14]

TRIBES HAVE AUTHORITY OVER NON-INDIANS IN LIMITED CIRCUMSTANCES

The Supreme Court established the ground rules for determining a tribe's civil authority over non-Indians in *Montana v. United States*.[15] That case established a general presumption that tribes do not have jurisdiction over nonmembers, subject to two exceptions.[16] A tribe may exercise jurisdiction over nonmembers (1) who enter "consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements,"[17] or (2) whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[18] If either exception applies, a tribe may exercise civil authority over a nonmember, including regulating the nonmember's conduct "through taxation, licensing, or other means."[19] There must, however, be a nexus between the basis for tribal jurisdiction and a tribe's exercise of that jurisdiction.[20]

Consent, under the first exception, "may be established expressly or by the nonmember's actions."[21] As the Ninth Circuit explained, "The test is not subjective. Rather, it is whether under the circumstances the non-Indian defendant should have reasonably anticipated that its interactions might trigger tribal authority."[22]

Under the second exception, a tribe must show that the nonmember's conduct will "do more than injure" the tribe.[23] It must "imperil the subsistence or welfare of the tribal community."[24] In the case of environmental contamination, a tribe may "seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."[25] "Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health, and welfare."[26]

FMC'S CONDUCT SUBJECTED IT TO THE TRIBES' JURISDICTION

The Ninth Circuit held "that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions to impose and enforce permit fees" on FMC.[27]

With regard to the first exception, the Ninth Circuit found that "FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into a permit agreement with the Tribes, requiring annual use permits and an annual $1.5 million permit fee to store 22 million tons of hazardous waste on the Reservation."[28] FMC "affirmed its consensual relationship with the Tribes by signing the Consent Decree, which required FMC to obtain Tribal permits" and by seeking court approval of the decree based in part on that consensual relationship.[29]

As to the second exception, the Ninth Circuit concluded that the hazardous substances FMC left in the ground, and that persist in the air, "will remain on the Reservation indefinitely and continue to present a threat to Tribal health and welfare," especially if containment fails.[30]

Finally, the court found that the conduct the Tribes regulate—FMC's storage of hazardous waste on the Reservation—is directly related to the parties' consensual relationship.[31] In addition, the Tribes' "annual fee of $1.5 million is an extraordinary bargain" compared to fees charged on the open market for storage of hazardous wastes.[32] The court concluded that there was "a more-than-sufficient nexus between the storage of FMC's [hazardous] waste and the $1.5 million annual use permit fee to warrant the assessment of that fee under Montana's second exception."[33]

LESSONS FROM FMC'S ACTIVITIES ON THE RESERVATION

Economic opportunities with Native American tribes on their reservations, comprising over 50 million acres with a spectrum of resources across the United States, are continuing to grow. The Ninth Circuit's decision requiring FMC to comply with a tribal permit under these circumstances is a valuable lesson for other parties doing business with tribes and on reservation lands. It is critical at the early stages of a relationship with a tribe or tribal entity to analyze the impacts a company's operation may have on tribal lands and the tribal community. The company should also develop a clear understanding of and delineate the framework for tribal jurisdiction and authority. Negotiating and including provisions in agreements with tribes and tribal entities that address the applicability of tribal laws and courts can prevent unforeseen situations and unwelcome surprises. They can also help establish and maintain strong working relationships for both non-tribal and tribal entities. As the relationship grows and develops, there will likely be other points at which tribal jurisdiction will again need to be addressed and agreed upon in new contracts. Agreeing to and abiding by those commitments at each opportunity will serve tribal and non-tribal parties alike.

FOOTNOTES

[1]FMC Corporation v. Shoshone-Bannock Tribes, 942 F.3d 916, 920 (9th Cir. 2019), *cert. denied*, 2021 WL 78077 (Jan. 11, 2021).

[2]*Id*. at 920–21.

[3]*Id*. at 933–34 (citations omitted).

[4]*Id*. at 934 (citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)).

[5]*Id*. at 921.

[6]*Id*.

[7]*Id*.

[8]*Id*.

[9]*Id*.

[10]*Id*.

[11]*Id*. at 921–22.

[12]*Id*. at 921.

[13]*Id*. at 921–22.

[14]*Id*. at 919, 922

[15]450 U.S. 544 (1981).

[16]*Id*. at 565–66.

[17]*FMC*, 942 F.3d at 920 (citing *Montana*, 450 U.S. at 565).

[18]*Id*. (citing *Montana*, 450 U.S. at 566). A tribe may also "regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty." *Id*. at 932.

[19]*Id*. 942 F.3d at 932 (citing *Montana*, 450 U.S. at 565–66).

[20]*Id*. at 933, 940.

[21]*Id*. at 932 (citing Water Wheel Camp Recreational Area, Inc. v LaRance, 642 F.3d 802, 818 (9th Cir. 2011) (quoting Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, 338 (2008))).

[22]*Id*. (citing *Water Wheel*, 642 F.3d at 817–18 (quoting *Plains Commerce Bank*, 554 U.S. at 337).

[23]*Id*. at 935 (quoting *Plains Commerce Bank*, 554 U.S. at 341).

[24]*Id*. (quoting *Montana*, 450 U.S. at 341).

[25]*Id*. (quoting *Plains Commerce Bank*, 554 U.S. at 336).

[26]*Id*. (citing *Plains Commerce Bank*, 554 U.S. at 333).

[27]*Id*. at 931, 944.

[28]*Id*. at 933.

[29]*Id*.

[30]*Id*. at 935–36, 939.

[31]*Id*. at 933.

[32]*Id*. at 940–41.

[33] *Id.* at 941.

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