No. 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

BRIEF OF POWER COUNTY DEVELOPMENT AUTHORITY AND BANNOCK DEVELOPMENT CORPORATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* certify that they are non-profit organizations that do not have parent corporations, issue stock, nor does there exist a publicly held corporation that owns 10% or more of the stock of any *amicus*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Power County Development Authority ("PCDA") and Bannock Development Corporation ("BDC") (collectively, the "*Amici*") are local non-profit economic development entities located in the close vicinity of the Shoshone-Bannock Fort Hall Reservation. These entities have substantial interests in non-Indian fee lands near or within the boundaries of the Fort Hall Reservation.

Prior to its closure in 2000, FMC Corporation's phosphate processing plant and mining operation carried a payroll in excess of $40 million annually and paid millions of dollars in state and local taxes annually. The closure of the FMC plant was a significant economic loss for the region. *Amici* are highly interested in the successful redevelopment of the 2,000-acre former FMC site (along with development of other nearby industrial sites). Located at the intersection of two major interstate highways and accessible to rail and air transport as well as gas and electric power lines, the FMC site is well situated to capitalize on economic opportunities. And though the site is located within the Eastern Michaud Superfund Site, hundreds of acres of this Superfund site have already been certified by the Environmental Protection Agency (EPA) for redevelopment. An economic impact analysis completed in 2011 found that "a remediated FMC site likely represents the

[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

area's best possibility for attracting major industrial development and associated high paying jobs."[2]

The FMC site and other areas of importance to the economic prosperity of this region are located adjacent to or within the boundaries of the Shoshone-Bannock Fort Hall Reservation. As a result, *Amici* have a strong interest in ensuring that the courts faithfully apply the Supreme Court's framework in *Montana v. United States*, 450 U.S. 544 (1981), concerning tribal jurisdiction over non-members on non-Indian fee lands located near or within tribal boundaries, as well as this Court's decision in *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013), which involved the same Tribes and reservation at issue here.

The *Amici* have great respect for the Shoshone-Bannock Tribes (the "Tribes") and their desire for a safe, healthy, and prosperous community for their members. The *Amici* share these desires. But the *Amici* are deeply concerned by the panel's approach to tribal jurisdiction. Moreover, *Amici* have a strong interest in the proper characterization of environmental risks posed by the FMC site.

[2] Neil Tocher, *Economic Impact Analysis For a Remediated and Redeveloped FMC Site* at 3 (2011), available at http://www.co.power.id.us welcome-to-power-county-idaho/business-and-industry/power-county-develpment-authority/.

Because the panel's decision presents questions of exceptional importance, *see* Fed. R. App. P. 35(b)(1), *Amici* have a direct and substantial interest in en banc review of the panel's decision.

SUMMARY OF ARGUMENT

Across the United States, communities and businesses exist on non-Indian fee lands near or within tribal boundaries. This is especially true in this Circuit. Like *Amici* here, such entities rely on the carefully-crafted general principle of U.S. law that non-members on non-Indian fee lands are not subject to tribal regulations. Though Congress has enacted statutes to alter this principle in particular contexts, the U.S. Supreme Court has otherwise provided only two very narrow and rarely-invoked exceptions: one for a limited kind of "consensual" dealings, and a second for certain activities that constitute a sufficient "threat" to a core attribute of tribal sovereignty—a tribe's political integrity, economic security, or health or welfare. Seldom is either exception applicable; even more rare would be a case where *both* exceptions applied simultaneously. As the Supreme Court has made plain, these exceptions should only apply where necessary to protect the essence of tribal self-government. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("Tribal assertion of regulatory authority over non-members must be connected to that right of the Indians to make their own laws and be governed by them."). No such threat to tribal self-governance arises here.

In this case, the panel's opinion improperly concluded that tribal regulatory requirements of the kind imposed on FMC constituted "consensual" dealings sufficient for the first *Montana* exception. And the panel improperly found that the FMC site—though overseen by EPA in keeping with federal requirements—constituted a "threat" sufficient to apply the second exception. By invoking the *Montana* exceptions, the panel allowed the Tribes to assert regulatory jurisdiction over the site and impose millions of dollars in fees (essentially in perpetuity). In so doing, the panel broke from the framework established in *Montana* and followed in *Evans*. The panel's decision incorrectly disrupts the jurisdictional equities vis-à-vis tribes and non-tribes on non-Indian fee lands and poses an especially acute risk of harm to *Amici* given their interests in and proximity to the particular non-Indian fee lands at issue in this case.

ARGUMENT

I. The panel's expansive view of tribal jurisdiction impedes on local governmental jurisdiction and threatens economic harm to communities with fee lands near or within tribal boundaries.

Southeastern Idaho is home to the Shoshone-Bannock Tribes and the Fort Hall Reservation. It is also home to others who are not members of the Tribes yet hold interests in fee simple lands near or within the reservation. This situation—non-Indian fee lands held by non-members near or within a tribe's boundaries—is common across the United States, especially in the West. And, for this common

arrangement to promote the general welfare of tribal members and non-members alike, reliable delineation between tribal and non-tribal jurisdictions is essential.

Today, tribal lands are governed by tribal governments without the uninvited involvement of other non-tribal jurisdictions, except as permitted by Congress. Likewise, non-Indian lands held in fee simple by non-members are expressly beyond tribal jurisdiction, even where those fee simple lands are near or within tribal boundaries. As such, fee simple lands like these are generally subject to the jurisdiction of the relevant federal government and the local and/or state governments, not tribal governments. This arrangement, which has been relied upon by tribes and non-tribes alike, ensures a clear delineation of jurisdictions, reduces the potential for inter-governmental disputes, promotes a stable tax base, and facilitates economic development.

However, as explained below (see Part II), the panel's opinion incorrectly expands tribal jurisdiction over non-Indian fee lands held by non-members and undermines the jurisdictional paradigm that usually governs these circumstances. This result adversely impacts *Amici*'s interests in several ways.

First, the panel's decision will adversely impact the *Amici*'s interest in economic activity on non-Indian fee lands near or within the boundaries of the Fort Hall Reservation. For example, the Pocatello Regional Airport and Business Park, which is crucial to the local and regional economy, is located on non-Indian fee lands

within the boundaries of the Fort Hall Reservation. This airport serves the cities of Pocatello and Chubbuck and the southeast Idaho region with flight service to Salt Lake City (connecting to other destinations worldwide) and offers general aviation services as well. The airport also provides business sites for job creation and expansion of the region's economy. The panel's broad interpretation of tribal jurisdiction risks placing a variety of activities occurring on land owned or controlled by local governments in the vicinity of the Fort Hall Reservation under the regulatory jurisdiction of the Tribes.

Second, *Amici* are keenly interested in the successful redevelopment of the FMC site and other nearby existing and potential industrial sites. The panel's broad interpretation of tribal jurisdiction jeopardizes *Amici*'s ability to attract new businesses to the FMC site and surrounding areas.

Third, the panel's decision may adversely impact the *Amici*'s ability to recruit and retain businesses, including ongoing efforts to promote the economic revitalization and redevelopment of the FMC site. Commercial interests could be dissuaded from locating at the FMC site due to concerns about overlapping and duplicative tribal and non-tribal jurisdictions. This includes the risk that the Tribes may seek to levy high fees, as they have done here, on other industries that may locate at the FMC site or other nearby industrial areas.

Fourth, the panel's description of the environmental risk posed by the FMC site poses a serious concern to the *Amici*'s ability to reassure current and prospective residents and businesses about the quality of life offered in these communities. Businesses are often risk averse and the panel's decision introduces another factor to the business siting process. The FMC site is subject to long-term remediation and redevelopment plans under the close purview of federal regulators with the involvement of the Tribes and other stakeholders, in accordance with the federal Superfund program. The FMC site is now a contained disposal site following many years of remedial action under EPA's intense scrutiny and direction, which will continue. As such, it does not constitute a current threat sufficient to apply the *Montana* exceptions.

II. The panel incorrectly interpreted and applied the *Montana* framework.

In *Montana*, the Supreme Court reiterated that Indian tribes generally lack the authority to regulate non-member activity on non-Indian fee land within a reservation, absent express authorization by federal statute or treaty. *See Montana*, 450 U.S. at 564-566. The Court in *Montana* set forth two[3] exceptions to this general rule, neither of which applies here.

[3] Courts usually refer to the "two" *Montana* exceptions while also recognizing Congress's plenary power to regulate tribal interactions with non-Indians. The panel identified "three" *Montana* exceptions because it seemed to treat congressional action as one of the exceptions. *Amici* submit that it is more appropriate to treat the

A. The *Montana* exceptions are limited in scope and rarely invoked.

To ensure proper respect for the interests of both tribes and non-tribal entities, the two *Montana* exceptions have been limited in scope and application. Otherwise, the rarely invoked *Montana* exceptions would defeat the general rule that non-Indians on non-Indian fee lands are not subject to tribal jurisdiction.[4] For the *Montana* exceptions to apply, a tribe's regulation of the activity must be "necessary to protect tribal self-government." *Id*. at 564 (citations omitted).

In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, two non-member individuals sought permission from the County of Yakima to make improvements to non-Indian fee land located within the Yakima Reservation. 492 U.S. 408, 417-419 (1989). The land at issue encompassed both an "open area," which was generally accessible to the public, and a "closed area," which was restricted to the public. *See id*. at 416. As proposed, both developments would have been impermissible under the Yakima Nation ordinance. *See id*. The Yakima Nation

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two limited *Montana* exceptions as distinct and separate from the power held by Congress over tribal matters, as this Court did in *Evans*.

[4] A report published by the Congressional Research Service explained that the Supreme Court has interpreted the first *Montana* exception "narrowly" and that "federal courts have rarely found tribal jurisdiction based on a non-member's consensual relationship." *See* Jane M. Smith, Congressional Research Service, *Tribal Jurisdiction over Nonmembers: A Legal Overview* at 6 (2013) (Tribal Jurisdiction Report). The Tribal Jurisdiction Report noted that cases have limited the second *Montana* exception "significantly," and also observed that the second exception "appears to be very limited and will be applied only in cases in which the tribe's survival is threatened by nonmember conduct." *Id*. at 8, 10.

unsuccessfully challenged the developments with the Yakima County Board of Commissioners, and later brought suit in federal district court, which agreed with the Yakima Nation. *See id*. at 420-421.

On appeal, this Court concluded that the Yakima Nation had zoning authority over *both* proposed developments because "denying the Yakima Nation the right to zone fee land would destroy its capacity to engage in comprehensive planning, so fundamental to a zoning scheme." *Id*. at 421 (internal quotation marks and alterations omitted).

The Supreme Court reversed this Court's decision.[5] Justice Stevens focused on the distinction between the "open area" and "closed area" nature of the land. On the one hand, tribal jurisdiction over the closed area was necessary to "preserve the character of this unique resource by developing their isolated parcels without regard to an otherwise common scheme." *Id*. at 441. Justice Stevens noted that allowing tribal regulation of the fee lands inside the pristine, mostly forested "closed area" did "not interfere with any significant state or county interest." *Id*. at 444. On the other hand, Justice Stevens reasoned that the open area, which was already commercially developed, was not subject to tribal regulation. *See id*. at 445-447.

[5] No single opinion in *Brendale* garnered a majority, and this Circuit has stated that Justice Stevens' opinion, joined by Justice O'Connor, is "controlling." *Evans*, 736 F.3d at 1303 (applying the approach set forth in *Marks v. United States*, 430 U.S. 188, 193-195 (1977) to plurality opinions).

Justice Stevens found that the open area "no longer maintains the character of a unique tribal asset." *Id*. at 446. Consequently, the Tribe lacked the authority to regulate the open area. *See id*.

For purposes of evaluating the *Montana* exceptions, the FMC site is certainly more analogous to the developed open area in *Brendale* than the pristine closed area that Justice Stevens noted did not involve "any significant state or county interest." The FMC site and surrounding areas certainly carry significant local governmental interest. And Supreme Court case law after *Brendale* confirms that tribal authority to regulate non-members on non-Indian fee lands is severely constrained. *See Hicks*, 533 U.S. at 361 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.") (citation omitted); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333-334 (explaining that *Brendale* only allowed tribal zoning on "nonmember fee land isolated in the heart of a closed portion of the reservation") (alteration omitted).

B. Neither *Montana* exception is applicable.

1. The panel misapplied the "consensual" dealings exception.

In *Montana*, the Supreme Court recognized that, although Indian tribes generally lack the authority to regulate non-member activity on non-Indian fee land, a tribe may regulate "the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through *commercial* dealings, contracts,

leases, or other arrangements." 450 U.S. at 565 (concluding that non-members who entered non-Indian fee land on the tribe's reservation to hunt and fish did not enter into a consensual relationship with the tribe) (citations omitted) (emphasis added). The Supreme Court has made clear that the first *Montana* exception is cabined to consensual commercial arrangements. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *Plains Commerce*, 554 U.S. at 334-335 (referencing a "business enterprise employing tribal members" and "commercial development"—without referencing any non-commercial examples—as activities on non-Indian fee lands that might trigger the *Montana* exceptions). However, this Circuit does not currently read the first Montana exception in this way. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 n. 4 (9th Cir. 2006) (rejecting "commercial" as a required aspect for this exception).

Regardless of whether the first *Montana* exception applies exclusively in commercial contexts,[6] the nonmember must have entered the relationship with the

[6] The view that the first *Montana* exception is limited to "commercial" contexts is reinforced by a reasonable construction of the Supreme Court's chosen phraseology in *Montana*: "through commercial dealings, contracts, leases, or other arrangements." *See Lockhart v. United States*, 136 S. Ct. 958, 965 (2016) (discussing the series-qualifier canon, which "requires a modifier to apply to all items in a series when such an application would represent a natural construction"). The first three nouns in this series—dealings, contracts, leases—are obviously commercial in nature, and it is more logical to construe the final noun in the series—"other arrangements"—as referring to "commercial arrangements" as opposed to "any arrangements." This view is also reinforced by the cases, all of which involve commercial dealings of one kind or another, cited by the Supreme Court in *Montana* immediately following the

tribe at issue in the case on a "consensual" basis, and the tribe's *assertion of jurisdiction* cannot be the basis for that consent. In *Strate*, the Supreme Court affirmed the Eighth Circuit's en banc decision, which held that a Tribal Court lacked subject matter jurisdiction over a personal injury dispute between two non-members. *See Strate*, 520 U.S. at 443-445. The Court noted that the first *Montana* exception was inapplicable because the conduct at issue—personal injury—was tortious in nature and thus did not rise to the level of a "consensual relationship" between a non-member and a tribe. *See id*. at 457. The *Strate* decision has been followed by this Court. *See Cty. of Lewis v. Allen*, 163 F.3d 509, 514 (9th Cir. 1998).

Montana, *Strate*, and *County of Lewis* highlight the Supreme Court's insistence that the first *Montana* exception only applies when a consensual relationship exists between a non-member and the tribe. Obtaining a permit or even paying a fee, at the threat of regulatory action by a tribal government, is not the type of consensual dealings required by *Montana*, its progeny, or any decision of this Court.

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use of this phraseology. *See Williams v. Lee*, 358 U.S. 217 (1959) (sale of goods); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (livestock grazing on tribal lands pursuant to contracts with tribe members); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (trading goods within reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarette sales).

2. The FMC site does not pose a "threat" sufficient for the second *Montana* exception to apply.

The second *Montana* exception only applies when a tribe demonstrates that "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." 450 U.S. at 566 (citations omitted). The Supreme Court has clarified that the conduct by the non-member "must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains Commerce*, 554 U.S. at 341 (2008) (citation and internal quotation marks omitted). Indeed, the second exception is only satisfied when the exertion of tribal power is "necessary to avert catastrophic consequences." *Id*. (citation omitted).

In *Evans*, a non-member who owned non-Indian fee land within the Fort Hall Reservation, sought and received a building permit from Power County to construct a single-family residence on his property. 736 F.3d at 1300-1301. The Tribes' Policy Commission requested that Evans submit an application and pay certain permitting fees to the Tribes. *See id*. Evans declined, and the Tribes brought an action in Tribal Court against Evans. *See id*. Evans (along with the builder) later filed suit in district court seeking a declaration that the Tribal Court lacked jurisdiction as well as an injunction. *See id*. Evans lost in district court and appealed to this Court. *See id*.

This Court noted that "[b]ecause Evans is an owner of non-Indian fee land, the Tribes' efforts to regulate him are presumptively invalid." *Id*. at 1303 (citation and internal quotation marks omitted). After both parties agreed that the first *Montana* exception was inapplicable (given that Evans did not engage in a consensual commercial relationship with the Tribes), this Court analyzed whether the second exception applied. *See id*. It acknowledged that Evans' property was located in a residential neighborhood within the reservation, but rejected the Tribes' claim that "Evans' construction of a single-family house poses catastrophic risks." *Id*. at 1304-1306. Noting that the reservation "has long experienced groundwater contamination," this Court concluded that the Tribes failed to demonstrate how "Evans' construction would meaningfully exacerbate" that "problem." *Id*. at 1306. As a result, the second *Montana* exception was inapplicable. *See id*.

A few key points from *Evans* are worth reiterating. This Court correctly explained that the general rule against finding tribal jurisdiction "is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id*. at 1302-1303. In *Evans*, this Court also carefully articulated the circumstances under which tribes may carry the "formidable burden" for relying on the *Montana* exceptions, explaining that tribal environmental regulatory authority to arises in rare circumstances where the conduct "imperil[s] the subsistence of the tribal community," and the "challenged conduct [is] so severe as to fairly be called

catastrophic for tribal self-government." *Id.* at 1306 (internal quotation marks omitted). In *Evans*, this Court found generalized, speculative concerns to be insufficient for the *Montana* exceptions. And the scenario in *Evans* was not a close call, as this Court concluded that tribal jurisdiction there was not even "plausible." *Id*. at 1305.

Unlike Evans' property, which was located in a residential neighborhood, the FMC site is sequestered and set away from the general population. Moreover, the FMC site has long been overseen by the EPA. As the panel itself acknowledged, EPA's current requirements in the IRODA "will be protective of human health and the environment . . ." *See* Slip Op. at 22 (quoting IRODA at v).[7]

Though the panel opinion states that certain of the RCRA ponds on the site have not been capped, *see id*. at 7, *Amici*'s understanding of the situation at the site is that, in fact, those ponds have been capped. *See* IRODA at p. 46-47 ("The RCRA ponds were closed and capped in accordance with the requirements of the 1999 RCRA Consent Decree and are subject to RCRA Post Closure requirements."). This is consistent with the district court's acknowledgement that the FMC site currently poses no risk to humans. *See FMC Corp. v. Tribes*, No. 4:14-CV-489-BLW, 2017

[7] IRODA refers to the "Interim Amendment to the Record of Decision," which was issued by EPA in 2012 and discussed at length in the panel's decision. A copy of the IRODA is available at http://fmcidaho.com/wp-content/uploads/Final_IRODA 9-27-2012.pdf.

WL 4322393, at *8 (D. Idaho Sept. 28, 2017) ("FMC's evidence established without rebuttal that despite the toxicity of the waste, no measurable harm had yet occurred to humans or water quality, and the EPA's containment program would prevent any future harm."). Further, the contamination at the FMC site has been prevalent for years, and the Tribes, just as they did in *Evans*, have failed to demonstrate how there has been a meaningful "exacerbation" of the problem such that tribal jurisdiction is essential. *See Evans*, 736 F.3d at 1306. Via EPA, the federal government has taken action to protect human health and the environment with regard to the site. Accordingly, the Tribes' perceived threat is far from catastrophic and does not support the second *Montana* exception.

III. The Tribes had an active role in the FMC Site remediation process.

Though the Tribes should be found to lack regulatory jurisdiction over the FMC site, the Tribes have been provided and continue to have substantial opportunities for engagement in the FMC site remediation process. The Tribes and nearby communities have been deeply involved in the EPA-led site remediation process, and in no way has the FMC site threatened to undermine self-government by the Tribes.

As stated in EPA's Unilateral Administrative Order (UAO) for the FMC Site, "EPA has consulted with the Shoshone Bannock Tribes of the Fort Hall Indian Reservation," UAO at 3, and EPA has entered a cooperative agreement with the

Tribes concerning the FMC site and extensively engaged with the Tribes on development of the Record of Decision (ROD) along with the Remedial Design and Remedial Action plans. UAO at 6-8, 12-13, 19-20. And with regard to the FMC site remediation, the Tribes have been afforded by EPA a "reasonable opportunity to review and comment on all plans, reports or other deliverables or other written submissions to EPA prior to any EPA decision thereon." UAO at 30-31. Likewise, the IRODA discusses the Tribes' role in the CERCLA process at the FMC site. *See, e.g.*, IRODA at 132-163 (responding to Tribes' comments on the proposed plan for remediating the FMC site).

CONCLUSION

For the foregoing reasons, *Amici* respectfully supports Appellant's petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above document was served on this the 9th day of December, 2019, via the Court's CM/ECF system on all counsel of record.

/s/ Jeffrey H. Wood
Jeffrey H. Wood
Counsel for Amici Curiae

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1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and because this brief contains 3,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Jeffrey H. Wood
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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