



January 1999

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Recommended Citation

Pennington, Heather G. (1999) "Marking the Path Post-*Cotton*: The Supreme Court Reaffirms Dual Taxation in *Montana v. Crow Tribe of Indians*," *Journal of Natural Resources & Environmental Law*: Vol. 14 : Iss. 2 , Article 7.

Available at: <https://uknowledge.uky.edu/jnrel/vol14/iss2/7>

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MARKING THE PATH POST-COTTON: THE SUPREME COURT REAFFIRMS DUAL TAXATION IN *MONTANA V. CROW TRIBE OF INDIANS*

Heather G. Pennington

In *Montana v. Crow Tribe of Indians*,¹ the Supreme Court held that the Crow Tribe of Indians ("Tribe") was not entitled to receive disgorgement of improperly levied severance and gross proceed taxes. The taxes at issue had been paid by the Tribe's non-Indian mineral lessee to the State of Montana and Big Horn County prior to 1982. Although the Supreme Court had already upheld the Tribe's right to receive the post-1982 tax payments,² the Court refused to force the state to return the pre-1982 tax payments on equitable grounds. Ultimately, the Supreme Court's decision reaffirmed and strengthened its holding in *Cotton Petroleum Corp. v. New Mexico*.³ In that case, the Court held that states have the ability to tax the on-reservation activities of non-Indian mineral lessees concurrently with tribal governments. The decision in *Montana v. Crow Tribe* adds a new chapter to the "dual taxation" history and emphasizes the legitimacy of states' authority to tax non-Indian activity on reservations. By allowing Montana to keep taxes that the Supreme Court had already deemed excessive, the Court gave other states better leverage to impose new taxes on non-Indian mineral activity within Indian reservations.

I. BACKGROUND

A. Facts

In 1904, the Crow Tribe of Indians ceded approximately 1,137,500 acres of reservation property ("ceded strip") to the United

¹B.A. Dartmouth College, 1997, J.D. expected University of Kentucky, May 2000.

²523 U.S. 696, 118 S.Ct. 1650 (1998)[hereinafter *Crow Tribe*].

³*Montana v Crow Tribe of Indians*, 484 U.S. 997 (1988), *aff'g* 819 F.2d 895 (9th Cir. 1987).

⁴490 U.S. 163 (1989).

States for settlement by non-Indians.⁴ While the surface rights to the ceded strip eventually were conveyed to non-Indians, the United States held the mineral rights underlying the tract in trust for the Tribe.⁵

In 1972, the Tribe first entered into a coal mining lease covering 31,000 acres of the ceded strip with Westmoreland Resources ("Westmoreland"), a non-Indian company.⁶ Pursuant to the requirements of the Indian Mineral Leasing Act of 1938 ("IMLA"),⁷ the Department of the Interior approved the lease. In 1974, the Tribe and Westmoreland re-negotiated the lease. The Tribe's new royalties were some of the highest received by any coal lessor in the United States.⁸

In July of 1975, the State of Montana imposed a severance and gross proceeds tax on all coal within the state, including coal from Indian reservation property.⁹ Combined, the gross proceeds and severance tax rates constituted thirty-five percent of the contract sales price of the coal.¹⁰ Accordingly, Westmoreland paid roughly \$46.8 million in severance taxes to the state and \$11.4 million in gross proceeds taxes to Big Horn County.¹¹

Only six months later the Tribe attempted to impose its own twenty-five percent severance tax on all coal mining within the boundaries of the reservation.¹² In accordance with the IMLA, any tax levied by the Tribe first had to receive approval from the Department of the Interior before the tax could become effective.¹³ In 1977, however, the Department of the Interior approved the tax only with respect to coal that lay within the reservation proper. The Department refused to extend the reach of the Tribe's tax to the ceded strip.¹⁴ Thus, the Tribe could not tax any of the coal produced by its lessee,

⁴ *Crow Tribe*, 118 S.Ct. at 1653.

⁵ *Id.*

⁶ *Id.* at 1654.

⁷ The Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a to 396(f) [hereinafter IMLA].

⁸ *Crow Tribe*, 118 S.Ct. at 1654.

⁹ *Id.* See also MONT. CODE ANN. 15-23-701 to 15-23-704, 15-35-101 to 15-35-111 (1997).

¹⁰ *Crow Tribe*, 118 S.Ct. at 1654.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1655.

Westmoreland. In 1982, the Tribe once more sought to impose its severance tax on mining activity within the ceded strip.¹⁵ Again, the Department of Interior refused to allow the tax because the Tribe's constitution limited its jurisdiction to the reservation boundaries.¹⁶

In 1982, the Tribe and Westmoreland entered into an amended lease agreement that again required Department of Interior approval. This agreement provided that Westmoreland would pay the Tribe a tax equal to that the state received, *less* any amount that Westmoreland was required to pay the state and Big Horn County.¹⁷ Reversing its earlier position regarding the Tribe's authority to tax mineral production within the ceded strip, the Department of the Interior approved this amended lease agreement.¹⁸ The agreement served two purposes. First, it enabled Westmoreland to avoid double taxation. And second, the agreement allowed the Tribe to put into place a Department-approved tax that would enable the Tribe to receive tax revenues from mining on the ceded strip *if* the Tribe could have the state's tax invalidated via judicial proceedings.

B. Procedural History

The Tribe initiated judicial proceedings to invalidate Montana's tax in 1978 when it filed a suit in federal court seeking declaratory and injunctive relief from the state taxes.¹⁹ The district court, however, held the severance test was valid and dismissed the case.²⁰ On appeal, the Ninth Circuit reversed and remanded the case.²¹ The Ninth Circuit concluded that the minerals underlying the ceded strip formed a "component of the Reservation land itself."²² Thus, according to the Ninth Circuit's analysis, the Department of Interior's approval of tribal

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979).

²⁰*Montana v. Crow Tribe of Indians*, 118 S. Ct. 1650, 1655 (1998).

²¹*Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir. 1982)[hereinafter *Crow I*].

²²*Id.* at 1117.

taxation was actually in place as early as 1977 when the Department had first approved the Tribe's authority to tax mineral production within the reservation proper. The Ninth Circuit also found that if the Tribe's allegations proved true, the IMLA would preempt state taxation.²³ In addition, the court noted that Montana's taxes might also be invalidated because they impermissibly interfered with the Tribe's sovereignty.²⁴ Furthermore, the Ninth Circuit observed, "[A]s to the taxes already paid by Westmoreland . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid."²⁵

It was after this Ninth Circuit decision that the Tribe entered into the 1982 amended lease agreement with Westmoreland described above.²⁶ The Tribe and Westmoreland soon thereafter moved to deposit the severance tax payments into the Federal District Court for Montana until the litigation concluded. This motion was granted.²⁷ The district court later ordered the same temporary relief for the gross proceeds tax in 1987.²⁸

In 1983, the United States intervened as the Tribe's trustee for its mineral rights.²⁹ The district court held a trial in January of 1984 to determine whether the IMLA preempted the imposition of Montana's coal taxes.³⁰ The district court concluded that the IMLA did not preempt state taxation.³¹ However, the Ninth Circuit again reversed the decision of the lower court with its decision in *Crow Tribe v Montana*.³² The Ninth Circuit held that Montana's taxes *were* preempted by the IMLA.³³ In addition, the court found that Montana's taxes

²³*Id.* at 1113-1115.

²⁴*Id.* at 1115-1117.

²⁵*Id.* at 1113, n. 13.

²⁶*Montana v Crow Tribe of Indians*, 118 S.Ct. 1650, 1655 (1998).

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 1656.

³⁰*Crow Tribe v. United States*, 657 F.Supp. 573 (D.Mont. 1985).

³¹*Id.*

³²819 F.2d 895 (9th Cir. 1987), *rev'g* 657 F.Supp. 573 (D.Mont. 1985)[hereinafter *Crow II*].

³³*Montana v Crow Tribe of Indians*, 118 S.Ct. 1650, 1656 (1998) (citing *Crow II*, 819 F. 2d at 903).

impermissibly interfered with tribal sovereignty.³⁴ In 1988, the Supreme Court summarily affirmed the holding of *Crow II*.³⁵

After the Supreme Court decision, the district court ordered the distribution of the severance and gross proceed taxes that it had received as a deposit.³⁶ Thus, the Tribe received over twenty-three million dollars in tax payments that Westmoreland had made from 1982 to 1988.³⁷

At this point, the Tribe and the United States filed an amended complaint against the state and Big Horn County that eventually culminated in this Supreme Court decision. The amended complaint sought the recovery of the pre-1982 tax payments totaling \$58.2 million.³⁸ The Tribe and the United States posited theories of assumpsit and constructive trust in support of their amended complaint.³⁹ The plaintiffs argued that because the Supreme Court had declared illegal the taxes collected by the state and Big Horn County, the Tribe equitably deserved the pre-1982 payments.⁴⁰ Montana countered with the argument that Westmoreland was the only party possibly entitled to a refund, as it was the payer of the taxes in question.⁴¹ Westmoreland, however, had already entered into an agreement to dismiss any claim it had for a refund from the state or Big Horn County.⁴² Thus, the state moved for summary judgment. The district court denied the motion, but agreed to submit it to the Court of Appeals for interlocutory appeal.⁴³

Initially, the Ninth Circuit agreed to hear the appeal; however, one year later, the court dismissed the appeal as "improvidently granted."⁴⁴ In its dismissal (*Crow III*), the Court observed that the "sole issue" remaining was whether the Tribe and United States had a right

³⁴*Id.*

³⁵*Montana v. Crow Tribe*, 484 U.S. 997 (1988).

³⁶*Crow Tribe*, 118 S.Ct. at 1656.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 1654.

⁴³*Id.* at 1657.

⁴⁴*Montana v. United States*, 969 F.2d 848 (9th Cir. 1992)[hereinafter *Crow III*].

to "state a claim for relief in assumpsit and constructive trust." Because the Ninth Circuit concluded that that particular issue had been addressed in *Crow II*, the court refused to hear the appeal.⁴⁵

The district court then conducted a trial on the merits to determine whether the Tribe had any right to the tax payments that Westmoreland had made prior to 1982. The district court concluded that the "factors justifying preemption did not impel the disgorgement relief demanded by the Tribe."⁴⁶ The district court considered a number of factors. In examining this decision, the Supreme Court noted that "the respective taxing authority of State and Tribe" was "key" to the district court's reasoning.⁴⁷ First, the district court relied heavily on the Supreme Court's holding in *Cotton Petroleum Corp. v. New Mexico*,⁴⁸ where the Supreme Court expressly allowed both the State of New Mexico and the Jicarillo Apache Tribe to tax the mining activity of a non-Indian mineral lessee on reservation land.⁴⁹ Second, the district court observed that the Tribe could not enforce its severance tax on Westmoreland prior to the 1982 amended lease agreement, because the Tribe had been unable to get the Department of Interior's approval for taxes levied on mining activity within the ceded strip.⁵⁰ Third, the district court noted that the 1982 amended lease agreement between the Tribe and Westmoreland "stipulated that Westmoreland would have no tax liability to the Tribe for the 1976 to 1982 period."⁵¹ The district court also considered the services that the state and Big Horn County provided in the ceded strip area as evidence of the state's authority to levy taxes.⁵²

Once again, the Ninth Circuit disagreed with the district court's conclusions. In a per curiam opinion, the Ninth Circuit concluded that the district court's "denial of equitable relief was an abuse of discretion. Nearly all of the equitable considerations advanced in support of the

⁴⁵ *Montana v. Crow Tribe of Indians*, 118 S. Ct. 1650, 1657 (1998).

⁴⁶ *Id.* at 1658.

⁴⁷ *Id.* at 1657.

⁴⁸ 490 U.S. 163 (1989).

⁴⁹ *Id.*

⁵⁰ *Crow Tribe*, 118 S. Ct. at 1658.

⁵¹ *Id.*

⁵² *Id.* at 1657.

retention of the unlawful taxes by the state were rejected explicitly or rendered irrelevant by this court's previous decisions."⁵³

The Ninth Circuit took issue with the district court decisions because it felt the district court's holding contradicted "the law of the case" established in *Crow I*, *Crow II* and *Crow III*.⁵⁴ First, the Ninth Circuit noted that it had held in *Crow III* that the Tribe was still entitled to equitable relief, "despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust."⁵⁵ The Ninth Circuit also observed that it had decided the state's provision of general services to the ceded strip was not a dispositive issue for two reasons. First, the tax should have been levied only to cover coal related services, whereas the revenues generated by this tax served a variety of interests. Second, the court noted that the state would have provided these same general services even if the coal had never been mined. Furthermore, the Ninth Circuit declared that the ability of the Tribe to tax mining in the ceded strip was irrelevant because it had held in *Crow II* that the "Tribe was harmed . . . because the taxes imposed by Montana had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge."⁵⁶ Thus, when the Ninth Circuit weighed the equities, it concluded that the Tribe's interest was stronger than the state's.⁵⁷ Accordingly, the Ninth Circuit reversed the district court decision and remanded the case. Montana appealed and this decision by the Supreme Court ensued.

II. LEGAL BACKGROUND

The Supreme Court's decision in *Crow Tribe* added to the already extensive body of case law regarding taxation of Native

⁵³*Crow Tribe v. Montana*, 92 F.3d 826 (9th Cir. 1996), *amended* 98 F.3d 1194 (9th Cir. 1996)[hereinafter *Crow IV*].

⁵⁴*Id.* at 828.

⁵⁵*Id.*

⁵⁶*Id.* at 830.

⁵⁷*Id.*

Americans.⁵⁸ A study of this jurisprudence invariably begins with the United States Constitution, which granted Congress the authority to regulate commerce with Native Americans.⁵⁹ In fact, Congressional authority in this area is so extensive that federal law preempts state regulation in the absence of express federal consent to state regulation. Thus, federal field preemption in Native American affairs differs from the more general federal field preemption doctrine because the courts reverse their presumptions. Whereas in a general preemption case courts may presume a state has the authority to act absent some indication of Congress's intent to preempt, in a case involving Native Americans courts assume a state is preempted from acting unless the court has some indication of Congress's intent to allow a state to act.⁶⁰ For example, the Ninth Circuit observed in *Crow II* that "[t]he preemption analysis in Indian tribal cases differs from that used in other circumstances" because the courts do not require an express statement of congressional intent to preempt. Instead, courts regard a conflict with the "purpose or operation" of a federal statute, regulation or policy as sufficient grounds for preemption.⁶¹

The extent to which this Indian preemption analysis precludes state taxation of tribal mineral interests has been obscured by Congressional legislation. For example, in 1924 Congress explicitly allowed state taxation of tribal mineral interests in the Act of May 29, 1924.⁶² In 1938, however, the Indian Mineral Leasing Act⁶³ called into question the ability of a state to tax tribal mineral interests because the more recent act was silent on the issue of states' authority to tax. Furthermore, the IMLA also contained a general repealing clause that was added to repeal all previous Congressional legislation regarding mineral production on Indian reservations.⁶⁴ It was hoped that the general repealing clause would give Congress a clean slate on which to

⁵⁸ See Charley Carpenter, Note, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 CATH. U. L. REV. 639, 641 (1990).

⁵⁹ See U.S. CONST. art. I, §8, cl. 3.

⁶⁰ *Id.*

⁶¹ *Crow Tribe v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987).

⁶² Pub. L. No. 68-158, 43 Stat. 224 (codified at 25 U.S.C. 398 (1983)).

⁶³ Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. 396a-396g (1982)).

⁶⁴ Carpenter, *supra* note 59, at 658.

legislate. This clause has led many scholars to argue that the 1924 Act was repealed via the general repealing clause and thus states have no authority to tax Indian mineral interests.⁶⁵ Despite these questions regarding express authority to tax, states continued to tax tribal mineral leases for the next forty years.⁶⁶

It was not until 1985 that the Supreme Court addressed state taxation of tribal leases.⁶⁷ In *Montana v. Blackfeet Tribe of Indians*,⁶⁸ the Blackfeet Tribe ("Blackfeet") contested the application of Montana's oil and gas taxes on a lease entered into pursuant to the IMLA. The Supreme Court held that the state could not impose a tax that allowed the non-Indian mineral lessee unilaterally to deduct the amount of the state's tax from the royalty due to the Blackfeet.⁶⁹ The Court invalidated this "pass through" scheme because it considered the state's tax as a direct tax on the Indian's royalty interest rather than a permissible tax on the non-Indian lessee. The Court viewed the "pass through" of the tax's cost to the Blackfeet as a direct and therefore impermissible state tax on Native Americans.⁷⁰

Furthermore, the Court clarified the effect of the IMLA on the 1924 Act. The Court observed that two canons of construction indicated that the "taxing authority" of the 1924 Act was not implicitly incorporated into the 1938 IMLA.⁷¹ First, the Court noted that the unique Indian preemption doctrine allowed states to "tax Indians only when Congress has manifested clearly its consent to such taxation."⁷² Second, the Court relied on the principle that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit."⁷³ Applying these two canons, the Court found that the state lacked authority to impose this particular tax.

⁶⁵ Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L. J. 541, 572 (1993).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

⁶⁹ *Id.* at 765.

⁷⁰ Royster, *supra* note 65, at 572.

⁷¹ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766.

⁷² *Id.*

⁷³ *Id.*

Nevertheless, the Supreme Court limited the scope of its decision to instances where state taxes fell directly on the tribes rather than state taxation of the tribes' non-Indian mineral lessees.⁷⁴ The ruling did not prohibit state taxation of Indian mineral interests *if* the non-Indian lessee paid the tax without passing the tax's cost along to the tribe. This ruling increased the cost of mining activity on reservation land because the non-Indian mineral lessees could no longer pass along the costs of state taxes to their Indian lessors.⁷⁵ Furthermore, the costs of reservation mining increased in many instances because the non-Indian lessees were subject to double taxation if the tribes imposed their own taxes on top of state taxes.⁷⁶

The Supreme Court directly addressed the permissibility of this dual taxation system in its 1989 decision *Cotton Petroleum Corporation v. New Mexico*.⁷⁷ In this case, the Supreme Court held that the IMLA did not bar state taxation of non-Indian lessees.⁷⁸ The Court concluded that the significant role New Mexico played in providing services to both the Jicarillo Apache Tribe and the Cotton Petroleum Corporation justified the state's authority to tax.⁷⁹ Furthermore, the Court distinguished this decision from its summary affirmance of *Crow II*⁸⁰ by noting that in this instance New Mexico's tax was not "unusually large."⁸¹ Nor did the Court perceive any violation of federal Indian policy because of the "marginal effect" that a higher cost might have on the demand for on-reservation leases.⁸² Thus, because Congress had not prohibited either New Mexico or the Jicarillo Apache Tribe from levying taxes, the Court concluded that "concurrent taxing jurisdiction over all of Cotton's on-reservation leases exist[ed]."⁸³

The Court did, however, limit the state's concurrent taxing authority to the extent that the state may not impose a "discriminatory

⁷⁴Royster, *supra* note 65, at 572.

⁷⁵*Id.*

⁷⁶*Id.* at 574.

⁷⁷490 U.S. 163 (1989).

⁷⁸*Id.* at 182.

⁷⁹*Id.* at 185.

⁸⁰*Montana v. Crow Tribe*, 484 U.S. 997 (1988), *summarily aff'g* 819 F.2d 895 (1987).

⁸¹*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 186.

⁸²*Id.*

⁸³*Id.* at 189.

tax."⁸⁴ The Court indicated it would approve state taxes only if they are "administered in an evenhanded manner and are imposed at a uniform rate throughout the state--both on and off the reservation."⁸⁵ The distinction the Court drew between its affirmance of *Crow II* and its holding in *Cotton Petroleum* indicated that the concurrent taxing authority was limited to cases where the taxes were not so "unusually large" as to impose a "substantial burden."⁸⁶ However, the Court failed to explain how at some "undetermined point . . . a state tax becomes impermissibly burdensome."⁸⁷ The Court's only explanation of the alleged distinction mentioned that Montana's severance taxes were struck down because they had a "negative effect on the marketability of coal produced in Montana." The Court observed that the Ninth Circuit had found that Montana's taxes were "extraordinarily high" because they were more than "twice that of any other state's coal taxes."⁸⁸ The Court's observations did little to aid in determining at what point a state's tax becomes impermissibly burdensome. Thus, the Supreme Court's holding in *Cotton Petroleum* obscures the boundaries of the Indian preemption doctrine as it relates to states' authority to tax non-Indian mineral lessees. For although there was no express Congressional consent to the tax imposed by New Mexico, the Court was willing to allow the state to impose a reasonable tax.

III. THE SUPREME COURT'S ANALYSIS

A. Majority Decision

In *Crow Tribe*, the Supreme Court, per Justice Ginsburg, held that the Tribe was not entitled to recover the state and county taxes imposed on and paid by Westmoreland prior to 1982. In reaching this

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶Royster, *supra* note 65, at 578.

⁸⁷Charles Breer, Note, *Indian Law-Mineral Taxation- Are State Severance Taxes Preempted When Imposed on Non-Indian Lessees Extracting Oil and Gas from Indian Reservations [sic] Land?*, 25 LAND & WATER L. REV. 435, 443 (1990).

⁸⁸*Cotton Petroleum Corp. v New Mexico*, 490 U.S. 163, 187 n. 17 (1989)(quoting Motion to Affirm for United States, O.T. 1987, No. 87-313, p.12; 819 F.2d at 899 n. 2).

conclusion, the Court rejected each of the two bases for the Tribe's argument that it was entitled to receive the pre-1982 tax payments Westmoreland had made to the state and Big Horn County. The Court also undertook to "place in clear view" the "pathmarking decision" of *Cotton Petroleum*.⁸⁹

At the outset of its analysis, the Supreme Court reiterated the general rule that "a nontaxpayer may not sue for a refund of taxes paid by another."⁹⁰ The Court then noted that this must have been the "rule in mind" when the Ninth Circuit in *Crow I* observed that the Tribe was not entitled to a refund of taxes that Westmoreland had already paid to the state. This initial approach indicated that the Court's emphasis in this situation was on the law rather than the equities of the case before it.

Before the Court addressed the Tribe's first argument in support of its claim, however, the necessity of explaining the holding in *Cotton Petroleum* was noted. The Court emphasized that the IMLA did not preempt a state from enacting a non-discriminatory tax for the on-reservation production of oil and gas by a non-Indian mineral lessee.⁹¹ In so holding, the Court acknowledged that without some new indication by Congress, "neither the IMLA, nor any other federal law, categorically preempts state mineral severance taxes imposed, without discrimination."⁹² The Court went on to again distinguish its holding in *Cotton Petroleum* from its affirmation of the Ninth Circuit decision in *Crow II*. The Court concluded that the difference between the two decisions was based on the *rate* of taxation, not the ability of the states to impose a tax. The Court observed that it had stated in *Cotton Petroleum* that Montana "had the power to tax Crow coal, but not at an exorbitant rate."⁹³ Again, however, the Court failed to clarify at what point a tax becomes exorbitant.

The Supreme Court then addressed the Tribe's first argument in support of its claim. The Tribe maintained that it should have

⁸⁹Montana v Crow Tribe of Indians, 118 S. Ct.1650, 1660(1998).

⁹⁰*Id.* at 1659. See, e.g., Furman Univ. v. Livingston, 136 S.E.2d 254, 256 (S.C. 1964).

⁹¹*Crow Tribe*, 118 S. Ct. at 1660.

⁹²*Id.*

⁹³*Id.*

received Westmoreland's 1975-1982 tax payments because the mineral lessee had simply paid the wrong sovereign.⁹⁴ To support this proposition, the Tribe relied on *Valley County v. Thomas*.⁹⁵ *Valley County* involved a Montana law requiring that motor vehicles be licensed by the county in which the vehicle is owned and taxed. The suit arose out of Valley County's claim that neighboring McCone County had illegally issued licenses and collected fees for vehicles that should be licensed only by Valley County. Valley County sued for both monetary and injunctive relief. The Montana Supreme Court held that if Valley County was truly the county entitled to license the cars, then the county could "recover from McCone the fees McCone improperly collected" rather than forcing vehicle owners to pay the license fee a second time.⁹⁶ Thus, the Tribe argued that Montana had levied taxes on coal produced within the reservation that only the Tribe was entitled to tax and that the Tribe should therefore be able to recover the improperly collected fees from the state.

The Supreme Court distinguished *Valley County* from *Crow Tribe* by noting that the *Valley County* case did not fit the facts of the case before the Court.⁹⁷ In *Valley County* only one county had the authority to license a particular motor vehicle. The Court made clear that was not the case in *Crow Tribe*, "as *Cotton Petroleum* makes plain neither the state nor the Tribe enjoys the authority to tax to the total exclusion of the other."⁹⁸ Instead, *Crow Tribe* involved a situation where two governments had concurrent authority to tax.

Moreover, the Court stressed that prior to September of 1982, the Tribe was unable to impose a tax on mining activity within the ceded strip because it had yet to receive Department of Interior approval.⁹⁹ The Court then noted that the "Tribe never sought judicial review of the Department's pre-1982 disapprovals, . . . that Westmoreland would pay no tax to the Tribe absent Department approval, . . . that Montana's taxes did not impede the Tribe from

⁹⁴ *Id.*

⁹⁵ 109 Mont. 345, 97 P.2d 345 (Mont. 1939) (cited in *Crow Tribe*, 118 S.Ct. at 1660).

⁹⁶ *Crow Tribe*, 118 S.Ct. at 1661.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

gaining the Department's clearance, . . . and that Montana received no share of the post 1982 tax payments released from the district court's registry."¹⁰⁰ The Court regarded these factors as significant "in holding disgorgement an exorbitant, and therefore inequitable, remedy."¹⁰¹

The Court then analyzed the Tribe's second argument in support of its claim. This second prong of the Tribe's challenge posited the theory that the Tribe was entitled to disgorgement because the state's taxes had harmed the marketability of Crow coal by depriving the Tribe of its "fair share of the economic rent."¹⁰² The Court again disputed this line of reasoning by noting that the Tribe had been unable to exact a tax of any sort from Westmoreland prior to the 1982 amended lease agreement because the Tribe had lacked the requisite Department of Interior approval.¹⁰³ Furthermore, it was noted that the Tribe never presented any evidence to prove that *but for* Montana's severance tax, Westmoreland would have paid the Tribe a higher royalty.¹⁰⁴ Thus, the Court did not believe that the Tribe had proved that the state's tax had harmed the marketability of Crow coal. The Court concluded by noting that the Tribe had not sought compensatory damages based on actual losses suffered. Further, the Court did not believe the Tribe had shown any entitlement to such an award.¹⁰⁵ Thus, the Court denied compensatory damages based on lost coal sales as an alternative remedy allowed by Federal Rule of Civil Procedure 54(c).¹⁰⁶

Ultimately, the Supreme Court concluded that the district court's assessment of the matter had been correct because the Tribe had failed to prove its entitlement to total disgorgement of the pre-1982 tax payments. The Court also observed that the Tribe failed to "develop a case for relief of a different kind or size."¹⁰⁷ Accordingly, the Court

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1662.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

reversed the decision of the Ninth Circuit and remanded the case for "further proceedings consistent with this opinion."¹⁰⁸

B. Justice Souter's Partial Concurrence

Justice Souter wrote a separate opinion joined by Justice O'Connor. In this opinion Justice Souter agreed with the majority opinion to the extent it held that *Cotton Petroleum* made clear that Montana's taxes were not invalidated because the state lacked authority to tax Westmoreland's mining activity; rather, the Court invalidated the taxes because they were "extraordinarily high" and affected the marketability of Crow coal.¹⁰⁹ Nevertheless, Justice Souter disagreed with the majority opinion to the extent that it appeared to foreclose the district court from considering a partial disgorgement remedy.¹¹⁰ Justice Souter observed that the holding in *Cotton Petroleum* indicated that the Tribe's original request for complete disgorgement was too expansive; however, the "Tribe's prayer naturally encompass[ed] the lesser claim to disgorgement of any taxes in excess of the state's limit."¹¹¹

This partial concurrence departed from the majority opinion's analysis in two ways. First, Justice Souter held that the majority's "proffered distinctions came up short" regarding *Valley County*.¹¹² Instead, Justice Souter observed that the *Valley County* decision was relevant in this instance because that case addressed the "disgorgement issue."¹¹³ Justice Souter noted that *Valley County* "turned on the relative merits of the competing jurisdictions' claims of entitlement to impose a tax."¹¹⁴ Justice Souter explained that *Valley County* stood for the proposition that a government that unlawfully collects a tax must surrender those tax payments to the government lawfully entitled to

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1663.

¹¹¹ *Id.*

¹¹² *Id.* at 1664.

¹¹³ *Id.* at 1665.

¹¹⁴ *Id.*

collect the tax.¹¹⁵ In this case, Justice Souter noted that the Tribe's claim of authority to tax was "merely a way to recover or retain some of the value of the Tribe's own property."¹¹⁶ Whereas, the state's claim "was an appropriation of the Tribe's own property, just as it was an invalid counterpart of the tax collection that would have been rightful by the Tribe."¹¹⁷ Justice Souter argued that to deny partial disgorgement violated a fundamental principle of restitution - unjust enrichment.¹¹⁸ He contended that when one government unlawfully taxes to the prejudice of another government, "accepted principles of restitution entitle the latter government to claim disgorgement of what the former had no business receiving."¹¹⁹ Justice Souter viewed the excessive portion of Montana's tax as being unlawfully collected. He also believed that this excessive portion was a tax that the Tribe could have legally collected. Thus, Justice Souter concluded that the Tribe had sought "at least a facially valid claim when it seeks disgorgement of the excess taxes collected by the state in the period before 1983."¹²⁰

Justice Souter's second departure from the majority opinion involved the ability of the Crow Tribe to tax Westmoreland prior to 1982. Justice Souter noted that in light of *Crow II's* holding regarding the scope of the Tribe's taxing authority over the ceded strip, one must retroactively regard the mineral rights that underlay the ceded strip as part of the reservation proper. Thus, the Tribe did indeed have a valid tax in place as early as 1976 because the Department of the Interior had approved the Tribe's tax for territory within the reservation.¹²¹ This analysis enabled Justice Souter to dismiss one of the obstacles that had kept the majority from considering partial disgorgement as an appropriate remedy.

Based on these two departures, Justice Souter regarded partial disgorgement as an appropriate remedy. He noted that the majority

¹¹⁵*Id.* at 1663.

¹¹⁶*Id.*

¹¹⁷*Id.*

¹¹⁸*Id.* at 1663.

¹¹⁹*Id.*

¹²⁰*Id.* at 1664.

¹²¹*Id.*

opinion "says it imposes no bar to the possibility of further remedial action in the trial court."¹²² Thus, Justice Souter concluded that "nothing in this record disentitles the Tribe at least to press for disgorgement of some or all of Montana's pre-1983 excess tax revenues."¹²³

IV. CONCLUSION

In the *Crow Tribe* decision, the Supreme Court attempted to clarify the effect of *Cotton Petroleum* on the Indian preemption doctrine; nevertheless, this area of the law remains unclear. While the *Crow Tribe* holding did indicate that dual taxation will be allowed if the state's tax is not "extraordinarily high," the decision failed to indicate where the boundary between reasonable and impermissibly high state taxation lies. The decision also raises the question to what extent partial disgorgement may be a remedy.

The *Crow Tribe* decision did, however, clearly establish *Cotton Petroleum* as the preeminent test for the Indian preemption doctrine. The Court's continued application of the *Cotton Petroleum* analysis for preemption greatly enhances states' ability to tax the on-reservation mining activities of non-Indian lessees. Indeed, states may now impose any tax on reservation mineral production by non-Indians so long as the tax is reasonable. Thus, the *Crow Tribe* decision shows that dual taxation has become a firmly entrenched doctrine in Native American mineral law.

¹²²*Id.* at 1665.

¹²³*Id.*

