Sovereign Immunity - Indian Tribes - Indian Mining Leasing Act of 1938 - Taxation - Restitution

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SOVEREIGN IMMUNITY—INDIAN TRIBES—INDIAN MINING LEASING ACT OF 1938—TAXATION—RESTITUTION—The United States Supreme Court held that an Indian tribe could not recover state taxes paid by its mineral lessee when the taxes were found to be in violation of federal law and the lessee had waived its right to a tax refund.


The Crow Tribe ("Tribe") ceded a portion of its non-reservation land to the United States in 1904. Although the United States conveyed the surface rights of the strip to various non-Indians, the United States continued to hold the mineral rights underlying the strip in trust for the Tribe. The Tribe entered into a coal mining lease agreement with Westmoreland Resources, Inc. ("Westmoreland"), in 1972 for a portion of the "ceded strip"; Westmoreland subsequently contracted with four of its utility company customers to pass on the cost of any taxes to these customers.

In July of 1975, the state of Montana imposed a tax scheme on all Montana-produced coal; the scheme consisted of both a severance and a gross proceeds tax. As applied to the "ceded strip," the state severance tax was thirty percent of the sales price of any coal contracts and the county gross proceeds tax was five percent of the sales price of the coal contracts. Westmoreland paid the taxes without pursuing available state law remedies for protests or refunds and later entered into a corresponding settlement.

1. Montana v. Crow Tribe of Indians, 118 S.Ct. 1650, 1653 (1998). The 1,137,500 acre tract was ceded for occupation by early settlers. Id.
2. Crow Tribe of Indians, 118 S.Ct. at 1653.
3. Id. at 1654. The lease was executed with approval of the Department of the Interior and pursuant to the Indian Mining Leasing Act of 1938, 25 U.S.C. § 396a (1938). Id.
4. Id. at 1653. The State and Big Horn, Treasure, and Yellowstone Counties have the authority to tax, and the responsibility for providing public services on, the "ceded strip." Id.
5. Id. at 1654. A severance tax is a form of property taxation in which a tax is levied on minerals at the time they are removed from the earth. BLACK'S LAW DICTIONARY 958 (6th ed. 1991). A gross proceeds tax is levied upon the total receipts of income without allowing a deduction for expenses. Id. at 485.
6. Crow Tribe of Indians, 118 S.Ct. at 1654. The severance tax was subsequently reduced to 15% of the sales price. Id. at 1654.
7. Crow Tribe of Indians, 118 S.Ct. at 1654. Westmoreland paid $46.8 million in state
agreement with the state of Montana.\textsuperscript{8}

In January 1976 and in January 1982, the Tribe attempted to impose a severance tax on coal mined on its reservations, including the "ceded strip," but both times the United States Department of the Interior disapproved the tax as applied to the Montana "ceded strip."\textsuperscript{9} The Tribe did not appeal the disapproval of the tax in either instance.\textsuperscript{10}

In 1978, the Tribe filed a federal action against Montana in which it sought declaratory and injunctive relief from the state's taxes on Tribe coal.\textsuperscript{11} The United States District Court for the District of Montana dismissed for failure to state a claim upon which relief could be granted.\textsuperscript{12} The Court of Appeals for the Ninth Circuit reversed, finding that the Tribe's petition did state a cause of action that, if proven, would show that the state tax was federally preempted by the Indian Mining Leasing Act of 1938 ("IMLA of 1938") and illegally interfered with the sovereignty of the Tribe (\textit{Crow I}).\textsuperscript{13}

Following the \textit{Crow I} decision, the Tribe and Westmoreland revised their lease agreement, with Department of Interior approval, to include a section providing that Westmoreland would pay the Tribe a tax equal to the state's taxes, less any taxes Westmoreland was required to pay the state.\textsuperscript{14} In December of 1983, the United States District Court for the District of Montana granted a joint motion by the Tribe and Westmoreland to pay the severance tax into the district court registry during the pendency of the proceedings challenging Montana's authority to tax the "ceded

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\item severance taxes from 1975 to 1982, and $11.4 million in county gross proceeds taxes from 1975 to 1987. \textit{Id.}
\item 8. \textit{Id.} at 1654. Westmoreland agreed to waive any right to a tax refund from the state of Montana. \textit{Id.}
\item 9. \textit{Id.} at 1654-55. The Tribe's Constitution required Department of Interior approval of taxes adopted by the Tribe; the Department approved the tax, as applied to the reservation, but not as to the non-reservation "ceded strip." \textit{Id.} at 1654-55.
\item 10. \textit{Id.} at 1655. The Tribe did attempt to amend its constitution to extend its tax to the "ceded strip," but the Department of Interior disapproved the proposed amendment on procedural grounds. \textit{Id.} at 1655.
\item 11. \textit{Id.}
\item 13. \textit{Id.}; \textit{Crow Tribe of Indians v. Montana}, 650 F. 2d 1104, 1113-17 (9th Cir. 1981), \textit{amended} 665 F. 2d 1390 (9th Cir. 1982) (\textit{Crow I}).
\item 14. \textit{Crow Tribe of Indians}, 118 S.Ct. at 1655. This agreement permitted the Tribe to have in place a tax under which it could claim future tax payments Westmoreland might make into the district court registry in the event that the Tribe prevailed in its litigation against Montana. \textit{Id.}
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strip." In November of 1987, the district court granted a similar motion for the gross proceeds tax, allowing that tax to be paid into the district court registry as well.

After a January 1984 trial, the district court held that the state's taxes on the "ceded strip" were not federally preempted. The Ninth Circuit reversed, holding that the state taxes were both federally preempted by the IMLA of 1938 and void as in contravention of tribal self-government (Crow II). The United States Supreme Court summarily affirmed, and, as a result, the district court ordered the funds in its registry released to the United States, as trustee for the Tribe.

The Tribe and the United States filed complaints against Montana and Big Horn County seeking to recover state and county taxes that were paid by Westmoreland before entry of the District Court orders of 1983 and 1987 providing payment of the taxes into the District Court registry. The petitioners based their complaint on theories of assumpsit and constructive trust and alleged that equity required the state and county to disburse to the Tribe, with

15. Id. at 1655. After January 1983, Westmoreland paid the state severance tax into the district court registry. Id.
16. Id. After November 1987, Westmoreland paid the county gross proceeds tax into the registry. Id.
17. Id at 1656. The United States intervened on the Tribe's behalf to represent its interest as trustee of the Tribe coal. Id.
19. Crow Tribe of Indians, 118 S.Ct. at 1656. The Ninth Circuit interpreted the IMLA of 1938 so as to have a "broad preemptive effect" upon state taxation upon Tribal resources. Crow Tribe v. Montana, 819 F. 2d 895, 903 (9th Cir. 1987) (Crow II). The Ninth Circuit also discussed the IMLA of 1938's purpose of revitalizing tribal governments and promoting tribal development and found that the Montana tax interfered with tribal economic interests. Id. at 898-99.
20. Crow Tribe of Indians, 118 S.Ct. at 1656; Crow Tribe v. Montana, 108 S.Ct. 685 (1988). The Court explained the effect of a judgment it summarily affirms in Anderson v. Celebrezze, 103 S.Ct. 1564, 1568 n.5 (1983). "A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." Crow Tribe of Indians, 118 S.Ct. at 1660; Anderson, 103 S.Ct. at 1568, n. 5.
21. Crow Tribe of Indians, 118 S.Ct. at 1656. Although the district court granted the Tribe's motion to release the registry funds for the benefit of the Tribe, Westmoreland had initially objected, claiming the funds as its own because the taxes had been preempted and the Tribe had no valid tax in place during the fund deposit years. Id. at 1656. The district court rejected Westmoreland's claim, finding that the Tribe-Westmoreland lease controlled, establishing the registry funds as properly payable to the Tribe. Id.
22. Id. at 1656.
interest, the taxes collected from Westmoreland in violation of federal law. Montana filed a motion for summary judgment, alleging that any right to a refund had accrued to Westmoreland, and not to either the Tribe or the United States. In December 1990, the district court denied the summary judgment motion, finding that a full hearing was necessary. The district court then certified for interlocutory appeal the issue of whether summary judgment was improperly denied. In 1991, the United States Court of Appeals for the Ninth Circuit granted permission to make the interlocutory appeal but, in 1992, dismissed the appeal as improperly allowed (Crow III).

Following a trial in April and May of 1994, the district court denied the disgorgement relief sought by the Tribe. The Ninth Circuit reversed, finding that the district court had abused its discretion in not granting the relief requested. The case was then remanded to the district court for entry of the disgorgement. Montana appealed and the United States Supreme Court granted

23. Id. The Tribe did not request, in the alternative, damages for its actual financial losses allegedly caused by the State's taxes. Id. at 1657. An action of assumpsit for money had and received is a cause of action that lies when one party has received money, which in equity ought to have been paid to another party. BLACK'S LAW DICTIONARY 82 (6th ed. 1991). A constructive trust is a trust created by operation of law against a party, who, by fraud, duress, commission of wrong, or by another form of unconscionable conduct, has obtained legal right to property that he should not, in equity, enjoy. Id. at 218.


25. Id. The District Court found that a decision as to the restitution issue raised by the Tribe and the United States could not be decided on a summary judgment motion, without the opportunity for all parties to clarify their positions. Id.

26. Id. The issue was certified, upon Montana's application, pursuant to 28 U.S.C. § 1292(b). Id.

27. Id.; Crow Tribe v. Montana, 969 F.2d 848 (9th Cir. 1992) (Crow III). The Court of Appeals for the Ninth Circuit held that the issue of whether the Tribe and United States had a right to a refund for the taxes paid by Westmoreland had previously been decided in Crow II. Id.

28. Id. at 1657. The district court found that the state was not unjustly enriched at the detriment of the Tribe based on the Westmoreland coal taxes paid to the state. Id.

29. Crow Tribe of Indians, 118 S.Ct. at 1659. The Court of Appeals did recognize the lack of presence of the traditional elements of assumpsit or constructive trust in the case. Crow Tribe of Indians v. Montana, 92 F. 3d 826, 828, (9th Cir. 1996), amended, 98 F. 3d 1194 (9th Cir. 1996) (per curiam). However, the Ninth Circuit stated that its prior holdings in Crow II and III established that the presence of these traditional elements were not necessary for the Tribe to prevail. Id. at 828. The Ninth Circuit found that equity required restitution of the wrongfully collected taxes to the Tribe, which was harmed as a result of the unjust enrichment of the state through the payment of such taxes. Id. at 830.

30. Crow Tribe of Indians, 118 S.Ct. at 1659. The district court was to also consider the Tribe's request for prejudgment interest and attorney's fees. Id., cited in, Crow Tribe of Indians, 92 F. 3d at 830-31.
certiorari (Crow IV). The question before the Supreme Court was whether the Tribe could recover taxes paid by its mineral lessee when those taxes had been subsequently found to be in violation of federal law and when the lessee, itself, had waived its claim to a tax refund.

Before analyzing the parties' arguments, Justice Ginsburg, writing for the Court, noted that Westmoreland had waived its claim for a tax refund from the state. The Court then stated the general rule that a nontaxpayer may not sue for a refund of taxes paid by another. Furthermore, the Court clarified the impact of Cotton Petroleum Corp. v. New Mexico on Crow II, noting that the case indicated that Montana had the power to tax Tribe coal, but not at an excessive or discriminatory rate.

Initially, the Court considered the Tribe's argument that the Tribe, and not Montana, was the proper recipient of Westmoreland's tax payments and that, accordingly, the disgorgement remedy was appropriate. The Tribe relied on Valley County v. Thomas, in which a refund to the proper taxing authority of license fees paid to the wrong political subdivision was justified. The Court distinguished Crow IV from Valley County on the basis that in Crow IV, under Cotton Petroleum, both entities had actual authority to tax the coal. In addition, the Court commented that the Tribe could not have collected taxes from Westmoreland during the relevant period because the Department of the Interior had not approved the Tribe's tax.

32. Crow Tribe of Indians, 118 S.Ct. at 1659.
33. Id. at 1654, 1659.
34. Id. at 1659; See generally, United States v. California, 113 S.Ct. 1784, 1788 (1993).
35. Crow Tribe of Indians, 118 S.Ct. at 1660. In Cotton Petroleum, 109 S.Ct. 1698 (1989), the Supreme Court held that the IMLA did not preempt a New Mexico oil production tax on Cotton Petroleum, a non-Indian oil lessee. Id. at 1712-13.
37. Id. In Valley County, 97 P.2d 435 (Mont. 1939), was at issue a Montana law establishing that motor vehicles be licensed by the county in which the vehicle was owned and taxable. Id. at 349. In that case, Valley County sued McCone County, claiming that it was unlawfully collecting fees and issuing licenses for vehicles taxable in Valley County. Id. The Montana Supreme Court held that Valley County could recover the unlawfully collected fees from McCone County. Id. at 366.
38. Crow Tribe of Indians, 118 S.Ct. at 1661. Under Cotton Petroleum, the state was merely prohibited from taxing Tribe coal at an excessive or discriminatory rate. Id.; Cotton Petroleum, 109 S.Ct. at 1714.
39. Id. Although the district court had determined in 1988 that the Department of Interior's refusal to approve the Tribe's proposed tax was in error, the district court also
The Court next considered the Tribe's alternative argument that tax disgorgement was appropriate because the state taxes had an adverse impact on the marketability of the Tribe's coal. The Tribe claimed that the state taxes on its coal wrongfully deprived the Tribe of the economic rental value of the coal. The Court noted that the Tribe did not ask for actual damages based on losses suffered but, instead, sought disgorgement of the state taxes paid by Westmoreland to compensate the Tribe for the alleged adverse impact of the tax.

After reviewing both Tribe arguments, the Supreme Court found that the district court had not abused its discretion in denying the disgorgement remedy sought and held that the Tribe was not entitled to disgorgement of taxes improperly assessed against its mineral lessee (Crow IV). The Court reversed the Ninth Circuit and remanded the case to the district court for a determination of the proper amount of the preregistry taxes to be kept by Montana in consideration of the receipt by the Tribe of all registry funds.

Justices Souter and O'Connor concurred in the decision of the Court in so far as it reversed the Ninth Circuit and remanded for further proceedings. Justices Souter and O'Connor dissented, however, from the limits they believe the Court expressly or impliedly placed on the district court in its determination of the proper amount of preregistry taxes to be retained by Montana. By instructing the district court to consider the many millions of dollars the Tribe had already received, the minority opined that the majority effectively prevented the district court from awarding the Tribe any appropriate restitution it may have been owed in recognition of excess taxes collected by Montana during the preregistry period. The minority also disagreed with the Court's found that the state taxes did not cause the error. Id. at 1658. The court stated that the Department of the Interior's erroneous conclusion that the Tribe lacked authority to tax the Westmoreland coal was not in reliance on or in consideration of the Montana taxes. Id.

40. Id. at 1661.
41. Id. The Tribe did not assert that any sales or coal contracts were lost by Westmoreland due to high prices resulting from the Montana tax. Id.
42. Id. at 1661-62. The district court properly did not consider an award of actual damages because the complaint did not request such relief. Id.
43. Crow Tribe of Indians, 118 S.Ct. at 1662.
44. Id. The Court, in its remand order, stated it did not "foreclose the District Court from any course the Federal Rules and that court's thorough grasp on this litigation lead it to take." Id.
45. Id. at 1663. (Souter, J., concurring in part, dissenting in part).
46. Id.
47. Id.
attempt to distinguish *Crow IV* from *Valley County* and would have instead applied *Valley County*. The minority believed that Valley County was controlling in this situation in which two rival taxing authorities sought to impose taxes on the Tribe's mineral lessee when the Tribe was clearly entitled to impose its own tax but received nothing, and the State, entitled to no excess taxes, received and kept the money. The minority would have remanded to the district court without restricting the amount of restitution, if any, the Tribe was owed for excess taxes paid in the preregistry period.

The United States Supreme Court has traditionally shown great deference to the sovereignty of the Indian tribes and, consequently, has shown reluctance to allow state taxation on Indian activities, absent express Congressional authorization to the contrary. In *White Mountain Apache Tribe v. Bracker*, the United States Supreme Court initially considered the limitation, if any, on a state's authority to tax commercial activity performed by non-Indians on an Indian reservation. The state of Arizona sought to impose its motor carrier license and use taxes on Pinetop Logging Co. ("Pinetop"), a non-Indian commercial entity that felled, cut, and transported trees for the White Mountain Apache Tribe ("Apache") pursuant to a contract with Fort Apache Timber Co. ("FATCO"). Pinetop paid the taxes under protest and brought suit with the Apache in state court, alleging that the taxes were preempted by federal law or, in the alternative, unlawfully interfered with tribal self-government.

The *Bracker* Court acknowledged the traditional deference given to tribal sovereignty in its statement that state taxation authority

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49. Id. The minority emphasized the fact that the Tribe could have rightfully imposed a coal tax at all relevant times because the Department of Interior wrongfully disapproved the tax. *Id.* (Souter, J., concurring in part, dissenting in part).
50. Id. at 1665.
52. *White Mountain Apache Tribe*, 100 S.Ct. at 2580. The Supreme Court has long recognized the sovereignty of Indian tribes over their members and territory. *Id.* at 2583.
53. *Id.* at 2581. FATCO was organized under the Apache Tribe's Constitution and with the approval of the Secretary of the Interior to manage the timber harvesting process for the Apache. *Id.* FATCO operates exclusively on the reservation and was created with federal funding. *Id.*
54. *Id.* at 2582. The Apache entered into an agreement to repay Pinetop any taxes associated with its reservation operations. *Id.* The motor carrier license tax was 2.5% of Pinetop's gross receipts. *Id.* at 2581. The use fuel tax was eight cents per gallon of fuel used by Pinetop on state highways throughout the reservation. *Id.* at 2581-82.
may be preempted by federal law even when Congress has not spoken on the subject.\(^{55}\) In such a case, the Court would make a particularized inquiry into the nature of the state, federal, and tribal interests at stake to determine whether the state tax would violate federal law.\(^{56}\) The Court found the federal regulations of Indian harvesting of timber to be so complete in this case as to preclude the taxes imposed by the state.\(^{57}\) The Court also found that the taxes would prevent the profits of the timber sales from benefiting the Apache, would undermine the Secretary of the Interior's authority to establish rates and prices associated with the timber sales, and would detrimentally impact the Apache's ability to meet the sustained-yield requirements of federal law.\(^{58}\) The Court further determined that the only state interest at stake was the general interest in raising revenue.\(^{59}\) As a result, the Court held that the state taxes were preempted by federal law.\(^{60}\)

Only five years later, the Supreme Court faced a similar issue regarding the permissibility of state taxation on the Indian tribes themselves.\(^{61}\) In *Montana v. Blackfeet Tribe of Indians*, the Court considered the question of whether the State of Montana could tax the Blackfeet Tribe's ("Blackfeet") royalty interests under oil and gas leases with non-Indian lessees under the IMLA of 1938.\(^{62}\) The non-Indian lessees paid the taxes to the state and then deducted the amount of the taxes paid from the royalties owed to the Blackfeet.\(^{63}\) The Blackfeet brought suit in federal court seeking

55. *Id.* at 2587. In addition, state taxation authority may interfere with the right of reservation tribes to enact and be governed by their own laws. *Id.* at 2583.

56. *Id.* at 2584. The Court also stated that it would review the language of the relevant statutes and treaties in reference to the tradition of tribal sovereignty. *Id.*

57. *Id.* at 2586. The Secretary of the Interior has promulgated an extensive set of regulations governing sales, advertising, bidding, contracts, permits, fire protection, and many other aspects of the timber harvesting business on tribal reservations. *Id.* at 2585.

58. *White Mountain Apache Tribe*, 100 S.Ct. at 2586-87. Because the Federal Government drafted and approved the Apache's coal contracts to produce revenues based on the Apache's business expenses, the imposition of the state taxes would skew the Apache's expenses, revenues, and contracts so as to no longer comply with the requirements of federal law. *Id.* The state taxes would also interfere with the Apache's ability to pay for the federally funded programs providing fire control, safety inspection, and wildlife preservation services. *Id.* at 2587.

59. *Id.* at 2587. The Court found no evidence of a compensatory purpose for the state taxes. *Id.*

60. *Id.* at 2588. Here the economic burden would fall solely on the Apache. *Id.*


62. *Blackfeet Tribe of Indians*, 105 S.Ct. at 2401. The IMLA of 1938 neither contained a section specifically allowing state taxation as had the Indian Mining Leasing Act of 1924 ("IMLA of 1924") nor expressly repealed the IMLA of 1924 tax. *Id.* at 2402.

63. *Id.* at 2401. The taxes included an oil and gas severance tax, oil and gas gross
declaratory and injunctive relief against enforcement of the state tax, alleging that the IMLA of 1938 did not give the state authority to tax Blackfeet's royalty interest and that the tax was unlawful.\textsuperscript{64}

The \textit{Blackfeet Tribe} Court noted that the general rule is that Indian tribes, themselves, are exempt from state taxation within their own territory, but Congress can authorize state taxes on Indian Tribes under the Indian Commerce Clause.\textsuperscript{65} The Court stated it would not lift the Indian exemption from taxation unless Congress, itself had, or through its legislation, manifested its intent to subject the Indians to state taxation.\textsuperscript{66} In addition, the Court held that statutes are to be construed liberally in favor of the tribes, with ambiguous provisions interpreted to their benefit.\textsuperscript{67} The Court then examined the text and legislative history of the IMLA of 1938 and found no explicit grant of state taxation authority.\textsuperscript{68} Moreover, the Court found that the IMLA of 1938 did not impliedly incorporate the provision of the Indian Mining Leasing Act of 1924 ("IMLA of 1924"), which had expressly authorized state taxation.\textsuperscript{69} Accordingly, the Court held that the state may not tax Indian royalty income from leases issued under the IMLA of 1938, absent a clear congressional consent to taxation, even when the tax in question was imposed on a non-Indian lessee.\textsuperscript{70}

Just four years after \textit{Blackfeet Tribe}, the Court encountered a case that was seemingly identical to \textit{White Mountain Apache Tribe}.\textsuperscript{71} In \textit{Cotton Petroleum Corp. v. New Mexico}, the Court

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proceeds tax, oil and gas conservation tax, and a resource indemnity trust tax. \textit{Id.} at 2401 n.1.
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64. \textit{Id.} at 2401. The IMLA of 1924 had explicitly authorized state taxes on Indian tribes and individuals. \textit{Id.} at 2403.
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65. \textit{Id.} at 2402-03 (citing U.S. CONST. art. I, § 8, cl. 3). The Indian Commerce Clause empowers Congress "[t]o regulate Commerce with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. However, the Court noted that Congress has rarely authorized state taxes on Indians. \textit{Blackfeet Tribe of Indians}, 105 S.Ct. at 2402.
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66. \textit{Blackfeet Tribe of Indians}, 105 S.Ct. at 2403. The IMLA of 1924 contained a specific authorization of state taxation, and the IMLA of 1938 was silent on the issue. \textit{Id.}
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67. \textit{Id.} at 2403. This canon of construction is considered deeply rooted in the "unique trust relationship" between the United States and the Indians. \textit{Id.}
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68. \textit{Id.} at 2403-04; See 25 U.S.C. §§ 396b-396g. The IMLA of 1938 was silent as to the permissibility of state taxation of the production of minerals on Indian lands. \textit{Id.}
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69. \textit{Id.} at 2404; See 25 U.S.C. § 398. The IMLA of 1924 had provided "[t]hat the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands . . . " \textit{Id.} The Court commented that the legislative history of the IMLA of 1938 implied that Congress intended to replace the IMLA of 1924, not incorporate it into the IMLA of 1938. \textit{Id.}
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70. \textit{Id.} The Court has previously held that, although tax immunity is generally narrowly construed, the opposite is true in the case of the Indians. \textit{Id.} at 2403.
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considered whether New Mexico’s severance taxes on non-Indian lessee’s oil and gas production from tribal reservation property were preempted by federal law.\textsuperscript{72} In 1976, the Jicarilla Apache Tribe ("Jicarilla"), under the IMLA of 1938, enacted a severance tax on any oil and gas removed from Jicarilla lands.\textsuperscript{73} The Jicarilla entered into five leases with Cotton Petroleum, a non-Indian company that extracts oil and gas, for a portion of the Jicarilla reservation.\textsuperscript{74} In addition to paying the Jicarilla taxes, between 1976 and 1982, Cotton Petroleum paid, without objection, five separate oil and gas taxes to the state.\textsuperscript{75} In 1982, Cotton Petroleum paid its taxes under protest and brought an action in federal court asserting that the state taxes violated the Indian Commerce, Interstate Commerce, Due Process, and Supremacy Clauses of the United States Constitution.\textsuperscript{76} Cotton Petroleum alleged that the state taxes were not related to state expenditures in providing services to oil and gas producers.\textsuperscript{77}

The \textit{Cotton Petroleum} Court noted that the tax immunity of the United States includes an Indian Tribe for whom the United States holds land in trust.\textsuperscript{78} However, the Court declined to apply the well-established rule that no state taxation of commercial activity on Indian reservations may occur absent a clear congressional intent to the contrary.\textsuperscript{79} The Court determined that a state could subject a non-Indian lessee of the Jicarilla to a nondiscriminatory

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\item[72.] Id. at 1701. In a previous action, the Court held that the Jicarilla had the authority to tax oil and gas produced by its non-Indian lessees on its reservation. Id. at 1702.
\item[73.] Id. at 1703. The Secretary of the Interior approved the tax as required by law. Id.
\item[74.] Id. The leases provide for payment by Cotton Petroleum to the Jicarilla of rental payments and royalties on its oil and gas production. Id.
\item[75.] Id. at 1703-04. Cotton Petroleum paid taxes amounting to eight percent of the production value to the state and six percent of the production value to the Jicarilla. Id.
\item[76.] \textit{Cotton Petroleum}, 109 S.Ct. at 1704; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1; U.S. CONST. art. VI, cl.2. Cotton Petroleum did not allege that the state taxes imposed a burden on the Jicarilla. Id. Cotton Petroleum relied on a footnote in a 1982 United States Supreme Court decision, Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 912, n.26 (1982), indicating that the dormant Commerce Clause might be implicated by a state tax on Indian activity imposed to an extent beyond which its contacts with the activity justified, and when the activity is already being taxed by the appropriate Indian Tribe. \textit{Merrion}, 102 S.Ct. at 912, n.26. (holding that a Tribe severance tax imposed upon non-Indian lessees’ mineral production on the Indian reservation did not violate the dormant Commerce Clause despite a New Mexico state tax assessed on the same production). \textit{Merrion}, at 912-13.
\item[77.] Id. Initially, the Jicarilla was not a party to the action. But later, the Jicarilla filed a brief amicus curiae in which it argued the state tax would interfere with its taxing plans. Id.
\item[78.] Id. at 1710.
\item[79.] Id. As a result of the Court’s non-application of the bright-line Indian exemption from state taxation, a non-Indian lessee’s oil production would not be "automatically exempt" from state taxation. Id.
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Montana v. Crow Tribe of Indians

tax despite the fact that the financial burden of the tax fell on the Jicarilla. After finding that tribe lessees were not automatically exempt from state taxation, the Court held that, under the circumstances of the case, federal law did not preempt the state's severance taxes on the oil and gas produced on the tribal reservation by the non-Indian lessees. In so holding, the Court distinguished its decision in Crow II on the basis that, in the case at issue, unlike in Crow II, the taxes were not so extraordinarily high as to impose a substantial burden on the tribe nor did they have a demonstrated negative effect on the marketability of production from tribe property.

Although the Supreme Court had lessened the deference given to Indian sovereignty from state taxation over the years, the Court had consistently adhered to the general principle that non-taxpayers may not sue for refunds of taxes paid by others. In United States v. California, the Supreme Court considered the question of whether the federal government may recover taxes that it claimed were unlawfully assessed against its private contractor by the state of California. The United States engaged private contractor Williams Brothers Engineering Co. ("WBEC") to manage its oil drilling operations at a reserve in California. California subsequently assessed sales and use taxes against WBEC, and WBEC unsuccessfully appealed to the board of equalization. WBEC then paid the taxes under protest with funds provided by the federal government. WBEC timely appealed to state court, seeking a fourteen million dollar refund and later entered into an agreement with the state for a three million dollar refund and dismissal of the actions without prejudice.

80. Id. The Court noted that the IMLA of 1938, unlike the IMLA of 1924, did not specifically authorize or prohibit state taxation. Id. at 1712.
82. Id. at 1713; See also White Mountain Apache Tribe, 100 S.Ct. at 2578 (holding that Montana's severance and gross proceeds taxes could not lawfully be imposed on non-Indian lessee's mining coal on Tribe property).
83. Crow Tribe of Indians, 118 S.Ct. at 1659.
84. United States v. California, 113 S.Ct. 1784, 1786 (1993). There was no claim that the state tax was itself unconstitutional. Id.
85. Id. Between 1975 and 1985, WBEC operated the oil drilling reserve for the federal government. Id.
86. Id. WBEC was assessed $14 million in taxes by the state of California. WBEC had claimed that the state was attempting to tax federal government property outside the scope of its authority, but the board of equalization interpreted the applicable state law to include the government operations managed by WBEC. Id.
87. Id. The federal government clearly bore the burden of the tax. Id. at 1788.
88. Id. WBEC received the $3 million refund for assessments on property bought by
subsequently filed suit in federal court seeking declaratory judgment relief, alleging that the taxed property was exempt and that WBEC had been wrongfully classified and taxed under state law. The United States also sought a refund of the outstanding eleven million dollars, plus interest, under the federal common law action of assumpsit for money had and received.

The California Court explained that tax immunity is appropriate only when the levy falls on the United States, itself, or on an agency so closely connected as to be virtually identical with the United States. The Court then found that the United States could not assert its immunity from state taxation against taxes owed by WBEC merely because the federal government absorbed the economic burden. Moreover, the Court determined that the federal common law action of assumpsit for money had and received is based on the existence of an implied contract and that there was no such contract between California and the United States. Furthermore, the Court concluded that the taxpayer, WBEC, had already accepted a settlement in regard to the taxes and, thus, was precluded from bringing an action for refund. Accordingly, the government, as subrogee of WBEC's rights, could not bring the action of assumpsit to assert a nonexistent right. As a result, the Court held that the federal government was not entitled to receive a refund for state taxes paid by its private contractor, despite its reimbursement for said taxes.

In Valley County v. Thomas, the Supreme Court of Montana considered a similar issue involving the appropriateness of a tax
refund to a non-taxpayer when it determined whether, under Montana law, a county that had unlawfully collected vehicle license fees from vehicle owners could be required to turn over such fees to the proper taxing authority.97 The Montana law at issue required each county to license motor vehicles and collect license fees from vehicle owners based on the county in which the vehicle owner resided.98 Valley County sued McCone County for injunctive and monetary relief, alleging that McCone taxable in Valley County.99 The Valley County Court considered the lack of privity between the two counties, as well as the lack of a statutory duty providing for a refund, but found inequitable the suggested remedy that the proper authority simply tax the vehicle owner a second time; this solution would, in effect, force the vehicle owner to sue the improper taxing authority for a refund.100 Instead, the Court held that the proper taxing authority could recover the unlawfully collected license fees directly from the improper taxing authority that had collected the fees and not from the vehicle owner who innocently paid the wrong party.101

Historically, the Supreme Court seemed reluctant to allow state taxation of non-Indian lessees for their production or use of tribal resources when Congress had remained silent on the issue of whether such taxes were permitted.102 Furthermore, the Supreme Court has continued to give considerable deference to tribal sovereignty by disallowing state taxation on Indian tribes, themselves, absent an unmistakable Congressional intent to do otherwise.103 However, following the Crow II and Cotton Petroleum decisions, it was less than clear whether a state could properly tax a non-Indian lessee on its production or use of tribal resources, and, if so, what limitation was placed on the state's ability to do so.

In Crow II, the United States Supreme Court summarily affirmed the Ninth Circuit's holding that Montana's taxation of a non-Indian

97. 97 P.2d 345 (Mont. 1939).
98. Valley County, 97 P.2d at 365. Under the Montana state system, only one county could properly tax the owner of each motor vehicle. Id. at 349.
99. Id. at 348.
100. Id. at 366. Montana law provides for suits between counties as well as monetary awards against counties. Id.
101. Id. The Court specifically ruled so as to minimize the burden imposed on citizens. Id.
102. White Mountain Apache Tribe, 100 S.Ct. at 2588. The Supreme Court had previously employed a long-standing tradition of deference to the sovereignty of tribal self-government. Id. at 2587.
103. Blackfeet Tribe of Indians, 105 S.Ct. at 2404. This case involved a state attempt to tax an Indian tribe directly, not through a lessee. Id. at 2401.
mineral lessee was both federally preempted and void as in contravention of tribal self-government. Because the Supreme Court did not write an opinion in Crow II, it appeared from the summary affirmance that states were federally preempted from taxing non-Indian lessees on their production of Tribal resources. Believing it was owed a refund for these improperly assessed taxes, the Tribe filed its action seeking restitution for the taxes paid by its mineral lessee (Crow IV).

Before the restitution issue was decided, the United States Supreme Court handed down its decision in Cotton Petroleum. On its face, Cotton Petroleum's holding that a non-Indian mineral lessee could be subject to state taxation for its production of tribal resources appeared to directly contradict the holding of Crow II. However, in Cotton Petroleum, the Court (in a footnote) distinguished Crow II on the basis that the Crow II taxes were so high as to be discriminatory and impermissible.

The Court's opinion in Crow IV explained in greater detail the basis for distinguishing Crow II from Cotton Petroleum. Specifically, the Supreme Court stated that each of the two sovereigns, the state and the Tribe, had taxing jurisdiction over all on-reservation production. Moreover, the Court stated that Montana had the power to tax Tribe coal but could not do so at the exorbitantly high and discriminatory rate it assessed. Accordingly, the Crow IV decision both continued the Supreme Court's trend of finding no automatic preemption of state taxes on the production of tribal resources by non-Indian lessees and clarified that any such state tax may not be so high as to be discriminatory. In addition, in Crow IV the Supreme Court followed the traditional principle that a non-taxpayer may not generally sue

104. Crow Tribe of Indians v. Montana, 92 F.3d 826 (9th Cir. 1996)(per curiam), aff'd, 108 S.Ct. 685 (1988). The Ninth Circuit had determined that the fact that the Tribe was not the taxpayer did not preclude the Tribe from recovering. Crow Tribe of Indians, 92 F.3d 826, 828 (9th Cir. 1996) (per curiam).

105. Crow Tribe of Indians, 118 S.Ct. at 1656. The Tribe claimed that the coal being taxed was a resource of the Tribe and that the taxed interfered with tribal sovereignty. Id. at 1657.

106. Cotton Petroleum, 109 S.Ct. at 1698. The Court held that federal law did not preempt state taxation of a non-Indian lessee's production of Tribal minerals. Id. at 1713.

107. Id. at 1723. The Court stated that the Montana taxes were invalid because they were so excessively high, and not because the state lacked authority to impose the taxes. Id.

108. Crow Tribe of Indians, 118 S.Ct. at 1660. Both the district court and the United State Supreme Court noted that the Montana did provide public services to the non-Indian lessees and the other occupants of the cede strip. Id. at 1657.

109. Id. The district court commented that the state could permissibly enact a "reasonably sized" tax upon the coal production. Id. at 1658.
for a refund of taxes paid by another.\textsuperscript{110} Despite having found the state taxes upon Crow production to be discriminatory and impermissible, the Supreme Court held that the Tribe was not entitled to disgorgement of taxes paid by its mineral lessee.\textsuperscript{111} Consistent with its ruling in \textit{California}, the Supreme Court found that when the taxpayer, itself, had settled or waived its claim for a refund, a non-taxpayer could not assert a right to restitution for the taxes paid, even if the economic burden of the tax fell on the non-taxpayer. In addition, the Supreme Court distinguished \textit{Crow IV} from the Montana Supreme Court’s decision in \textit{Valley County} on the basis that \textit{Valley County} involved two taxing jurisdictions of which only one had legal authority to tax.\textsuperscript{112} In such a case, the Montana Supreme Court held that restitution by the improperly taxing authority to the proper authority was appropriate.\textsuperscript{113} However, in \textit{Crow IV}, because both the Tribe and the state were proper taxing authorities, the United States Supreme Court found the tax disgorgement remedy sought to be inequitable.\textsuperscript{114}

The \textit{Crow IV} decision leaves open one important question, namely the extent, if any, to which the Tribe is owed restitution by the state. Although the Supreme Court held that total disgorgement of the state taxes paid by the mineral lessee was inappropriate, the Court remanded for a determination of the amount of restitution the Tribe may be owed as a result of the excessive nature of the taxes improperly assessed by the state and paid by the lessee.\textsuperscript{115} The Court ordered that this restitution question be considered in light of the distribution of approximately twenty million dollars the Crow Tribe has already received from the district court registry in this action.\textsuperscript{116} The dissent apparently fears that this consideration

\textsuperscript{110} Id. at 1659. In contrast, the Ninth Circuit had found relatively unimportant the fact that Westmoreland, and not the Tribe, had paid the taxes. Id.

\textsuperscript{111} Id. at 1662. Specifically, the Supreme Court held that the total disgorgement of state taxes requested by the Tribe was inappropriate. Id.

\textsuperscript{112} \textit{Crow Tribe of Indians}, 118 S.Ct. at 1661; \textit{See Valley County v. Thomas}, 97 P.2d 345 (Mont. 1939). In \textit{Valley County}, two competing counties were attempting to tax the same vehicles, which, under state statute, could only be taxed by the county in which the vehicle owner maintained a residence. Id.

\textsuperscript{113} \textit{Valley County}, 97 P.2d at 366. The Montana Supreme Court found that the improper taxing authority had been unjustly enriched at the expense of the proper taxing authority. Id.

\textsuperscript{114} \textit{Crow Tribe of Indians}, 118 S.Ct. at 1661. Unlike the holding in \textit{Valley County}, the United States Supreme Court held that the state of Montana had not been unjustly enriched at the expense of the Tribe. Id.

\textsuperscript{115} Id. at 1662. The Court noted that all severance and gross proceeds taxes belonged to the state as of January, 1983, and November, 1987, respectively. Id.

\textsuperscript{116} Id. The Court stated that the amount of taxes to be kept by Montana or returned to the Tribe should be "assessed in light of the court-ordered distribution of all funds in the
may lead to a hasty conclusion that the Tribe should not receive any restitution because it has already received many millions of dollars. Restitution is generally required to be made by one party to another when the first party has been unjustly enriched at the expense of the second party. Furthermore, equitable considerations render restitution as appropriate remedy in instances in which it is necessary to restore an injured party to his or her original pre-injury position. On the basis of these common law principles of restitution, it would, indeed, seem that the restitution should be awarded solely on the basis of the excessiveness of the state taxes as determined on remand and the resultant unjust enrichment, if any, rather than on an attempt to equalize benefits between the Tribe and state. However, until this restitution issue is decided on remand and upheld on appeal, if applicable, several questions remain unclear. First, the permissible extent to which a state may tax a non-Indian lessee's production of tribal resources remains to be determined. Second, the amount of restitution appropriately awarded to a non-taxpayer tribe in the case of an impermissibly high state tax has not yet been resolved. Third, and perhaps most important, it is unsettled whether a non-taxpayer tribe may be precluded from receiving any restitution from a state on the basis of unjust enrichment, even when the state tax is impermissible. Particularly because the Supreme Court in *Crow IV* injected the requirement that the district court consider past money received in its determination of the restitution award, it is impossible to predict how these questions will be answered by the district court and, ultimately, perhaps, by the United States Supreme Court. As a result, until these questions are answered, non-taxpayer tribes that shoulder the economic burden of taxes and wish to challenge the legitimacy of those taxes would be well-advised to direct their lessees to pay their taxes under protest and to refuse to waive any right to a refund. Otherwise, in the absence of a Supreme Court decision to the contrary, even when a tax is found to be excessive, discriminatory, and impermissible, the non-taxpayer tribe may be precluded from receiving a refund for taxes improperly paid by its lessee.

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