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DENYING DISGORGEMENT: THE SUPREME COURT'S REFUSAL TO GRANT THE CROW TRIBE RELIEF

ALEX GALLIANI*

Abstract: In *Montana v. Crow Tribe of Indians*, the United States Supreme Court declined to award the Crow Tribe of Indians disgorgement of coal taxes collected by Montana from a mining company with operations on the Tribe's reservation. The Supreme Court justified its decision by distinguishing the 1939 Montana Supreme Court case *Valley County v. Thomas*, referencing the precedent set by *Cotton Petroleum Corp. v. New Mexico*, and noting that the Tribe lacked the necessary approval to tax from the Department of the Interior. This Comment argues that the Supreme Court should have granted the Tribe full disgorgement, partial disgorgement, or compensatory damages.

INTRODUCTION

The Crow Tribe of Indians ("Tribe") has lived on the land that is now divided between southeastern Montana and northeastern Wyoming for at least 300 years.¹ Once as large as thirty-eight million acres, the Tribe's reservation land has shrunk through a series of cessions to the federal government, and today spans 2.3 million acres in Montana.² For decades, the Tribe has struggled with poverty; in 2000, the employment rate among Tribe adults was a mere fifty one percent.³ Although the Tribe's reservation sits on one of the largest coal reserves in the country, disproportionately high regulatory over-

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

¹ Brief for the United States at 1, *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998) (No. 96-1829), 1998 WL 28075; see INDIAN AFFAIRS: LAWS AND TREATIES 595 (Charles A. Kappler ed., 1904).

² *Crow Tribe of Indians v. United States*, 657 F. Supp. 573, 575 (D. Mont. 1985); JOSEPH P. KALT, THE MINING OF CROW NATION COAL: ECONOMIC IMPACT ON THE CROW RESERVATION, BIG HORN COUNTY, AND MONTANA 4 (2014); James R. Bellis, Comment, *Crow Tribe v. Montana: New Limits on State Intrusion into Reservation Rights, New Lessons for State and Tribal Cooperation*, 50 MONT. L.R. 133, 134–35, 136 n.14 (1989). Although purportedly the result of arms-length negotiations, the cessions were likely a result of pressure by the federal government as part of a now-defunct national policy to abolish Indian reservations. Bellis, *supra* note 2, at 135 n.8; see *infra* notes 14–15 and accompanying text.

³ KALT, *supra* note 2, at 4; U.S. CENSUS BUREAU, POPULATION GROUP: CROW ALONE (C83-C86), https://www.census.gov/aian/census_2000/census_2000_data_for_539_tribes.html [<https://perma.cc/ACL6-3UEC>] (to generate this information set table as "Selected Social Characteristics," select "Crow" for tribe, then click "Go").

sight and permitting requirements control mining of reservation coal, resulting in additional complexity at every stage of the mining process.⁴

In 1972, the Tribe entered into a lease with Westmoreland Resources, Inc. (“Westmoreland”), a non-Indian mining company.⁵ The lease enabled Westmoreland to mine coal beneath an area of the reservation held in trust for the Tribe by the federal government (“the Strip”), in return for royalties paid by Westmoreland to the Tribe.⁶ A dispute between the Tribe, Westmoreland, and Montana over taxation rights stemming from the lease led to nearly 20 years of litigation.⁷

In 1975, Montana imposed statewide taxes on coal mining, which applied to Westmoreland’s operations on the Strip.⁸ Shortly thereafter, the Tribe attempted to pass its own tax on Westmoreland’s activities, but the U.S. Department of the Interior (“DOI”) denied the Tribe’s tax.⁹ The United States Court of Appeals for the Ninth Circuit held that federal law preempted Montana’s taxes, and so the Tribe was due the taxes Westmoreland would have paid to Montana after 1983.¹⁰ The United States Supreme Court summarily affirmed that decision and awarded the Tribe the post-1982 taxes.¹¹ However in 1998, in *Montana v. Crow Tribe of Indians*, the Supreme Court denied the Tribe’s claim

⁴ KALT, *supra* note 2, at 2; William A. White, *The Industry Perspective: The Pros and Cons of Mineral Development in Indian Country*, 1988 NAT. RES. DEV. INDIAN COUNTRY 1, 2; Terry L. Anderson & Shawn Regan, *The War on Coal Is Punishing Indian Country: Washington Rules Prevent Tribes Across the West from Developing Resources That Could Lift Them Out of Poverty*, WALL ST. J. (Oct. 13, 2013, 7:44 PM), <http://www.wsj.com/articles/SB10001424052702304906704579111030189700024> [<https://perma.cc/JA4U-TW5Y>]. The Crow Tribe’s reservation coal reserves were valued at \$3.3 million per capita in 1995, but the Tribe earns just a 0.01% annual rate of return. Terry L. Anderson, *How the Government Keeps Indians in Poverty*, PROP. & ENV’T RES. CTR. (Nov. 22, 1995), <http://www.perc.org/articles/how-government-keeps-indians-poverty> [<https://perma.cc/P2LW-7BCT>].

⁵ *Montana v. Crow Tribe of Indians (Crow Tribe)*, 523 U.S. 696, 701 (1998).

⁶ *Id.*; see *infra* note 23 and accompanying text.

⁷ *Crow Tribe*, 523 U.S. at 719 (holding that the Tribe was not entitled to the taxes collected by Montana post-1982); *Montana v. Crow Tribe of Indians*, 484 U.S. 997, 997 (1988) (mem.) (summarily affirming the Ninth Circuit’s decision to award the Tribe the taxes collected by Montana pre-1983); *Crow Tribe of Indians v. Montana (Crow IV)*, 92 F.3d 826, 830 (9th Cir. 1996) (awarding the Tribe the taxes held by Montana post-1982); *Crow Tribe of Indians v. Montana (Crow III)*, 969 F.2d 848, 849 (9th Cir. 1992) (refusing to grant Montana’s motion to dismiss the Tribe’s claim to the post-1982 taxes); *Crow Tribe of Indians v. Montana (Crow II)*, 819 F.2d 895, 903 (9th Cir. 1987) (finding that Montana’s taxes were preempted by federal law, and that the Tribe was entitled to the taxes collected by Montana pre-1983); *Crow Tribe of Indians v. Montana (Crow I)*, 650 F.2d 1104, 1117 (9th Cir. 1981) (declining to grant Montana’s motion to dismiss the Tribe’s claim to the pre-1983 taxes). For consistency, this Comment describes this case’s complicated procedural history using the same short citation case names as appear in the final United States Supreme Court decision. See *Crow Tribe*, 523 U.S. at 704, 706, 708, 712.

⁸ *Crow Tribe*, 523 U.S. at 702; see *infra* note 24 and accompanying text.

⁹ *Crow Tribe*, 523 U.S. at 702–03; see *infra* notes 25–27 and accompanying text.

¹⁰ *Crow II*, 819 F.2d at 899 n.2; see *infra* notes 35–51 and accompanying text.

¹¹ *Montana v. Crow Tribe of Indians*, 484 U.S. at 997.

to full disgorgement of the pre-1983 taxes paid by Westmoreland to Montana.¹² This Comment argues that given the Court's previous award of the post-1982 taxes and the underlying federal policy favoring economic development, the Supreme Court should have granted the Tribe full disgorgement, partial disgorgement, or compensatory damages.¹³

I. FACTS AND PROCEDURAL HISTORY

During the late nineteenth and early twentieth centuries, the federal government controlled Indian property rights through an allotment program, which awarded parcels to individual Indians rather than to tribes collectively.¹⁴ By discouraging communal ownership of land by Indians, the allotment program was designed to assimilate Indians into mainstream culture and open land to white settlers.¹⁵ The Indian Reorganization Act of 1934 ("IRA") represented the federal government's repudiation of allotment.¹⁶ Congress effectuated the IRA as a general scheme, which was complemented in the specific context of mining through the Indian Mineral Leasing Act of 1938 ("IMLA").¹⁷ The IMLA expressly granted tribes the authority to execute mineral leases with non-Indian lessees, subject to approval by the DOI.¹⁸ By granting tribes control over mineral leases, Congress sought to revitalize tribal self-government.¹⁹ And by removing the technical requirements and complicated procedures that

¹² *Crow Tribe*, 523 U.S. at 719; see *infra* notes 96–102 and accompanying text.

¹³ See *infra* notes 103–129 and accompanying text.

¹⁴ See, e.g., Harjo v. Kleppe, 420 F. Supp. 1110, 1121–22 (D.D.C. 1976) (describing the federal allotment program); Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 811–12 (1996) (describing allotment programs, specifically the Dawes Act of 1887).

¹⁵ See, e.g., Gould, *supra* note 14, at 811–12 (noting that the federal government pursued allotment as a mechanism to assimilate "tribal Indians into mainstream culture"); Mark D. Poindexter, Note, *Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment*, 14 B.C. THIRD WORLD L.J. 53, 54 (1994) (noting that the federal government pursued allotment as a mechanism to "create more assimilation of the individual American Indian into the 'dominant' culture").

¹⁶ 25 U.S.C. § 5101 (2012). The IRA ended allotment by declaring that, "no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." *Id.* See generally Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 712 (1989) (discussing other aspects of the IRA, including model constitutions offered to Tribes by the Bureau of Indian Affairs).

¹⁷ *Crow I*, 650 F.2d at 1112–13.

¹⁸ 25 U.S.C. § 396a ("[U]n-allotted lands within any Indian reservation or lands owned by any tribe . . . may . . . be leased for mining purposes . . . for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.").

¹⁹ *Crow I*, 650 F.2d at 1112. During the allotment period, the federal government largely controlled mining leases without Indian consent. *Id.* at 1112 n.11.

previously deprived Indians of considerable revenue, Congress encouraged tribal economic development.²⁰

In 1904, the Tribe ceded the Strip, approximately 1,137,500 acres of reservation land, to the United States.²¹ Although the federal government conveyed the surface land on the Strip to non-Indian homesteaders, it retained the subsurface mineral rights in trust for the Tribe.²² In 1972, the Tribe entered into a coal-mining lease with Westmoreland for coal underneath the Strip.²³ In 1975, Montana imposed both a severance tax and a gross proceeds tax on all coal produced statewide, including Westmoreland's activities on the Strip.²⁴ Six months later, the Tribe set forth its own tax on any coal mined within the boundaries of the reservation, imposing an additional tax on Westmoreland.²⁵ Under the Tribe's own constitution, any proposed taxes required approval by the DOI.²⁶ Based on its interpretation of the Tribe's constitution, the DOI approved the Tribe's tax as applied to coal under the reservation, but "disapproved the tax to the extent that it applied to the Crow Tribe's coal in [the Strip]."²⁷

A. Crow I: *The Tribe Brings Suit for Disgorgement of the Post-1982 Taxes Collected by Montana*

In 1978, the Tribe brought a federal action against Montana, seeking declaratory and injunctive relief against the State's taxes.²⁸ The Tribe argued that the Montana state taxes were preempted by the IMLA.²⁹ Montana moved to dismiss for failure to state a claim upon which relief could be granted, and the United States District Court for the District of Montana granted the State's motion.³⁰ On appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court's decision and held that if proved, the Tribe's allega-

²⁰ *Id.* at 1112–13.

²¹ *Crow Tribe*, 523 U.S. at 700 (1998); *see supra* note 2 and accompanying text.

²² *Crow Tribe*, 523 U.S. at 700; *Crow I*, 650 F.2d at 1107.

²³ *Crow Tribe*, 523 U.S. at 701. At the time, the Tribe received royalties that were some of the highest in the nation. *Crow Tribe of Indians v. United States*, 657 F. Supp. 573, 587 (D. Mont. 1985). Through October 1983, the Tribe had received approximately \$17,877,126 in royalties. *Id.* at 588.

²⁴ *Crow Tribe*, 523 U.S. at 702; *Crow I*, 650 F.2d at 1107–08. Because Westmoreland was engaged in surface mining of high-quality coal, it was required to pay the highest severance tax rate. *Crow I*, 650 F.2d at 1107; White, *supra* note 4, at 8. The Crow Tribe submitted evidence that the effective rate of Montana's taxes was roughly thirty-three percent, whereas Montana stated that the effective rate was between twenty-one and twenty-two percent. *Crow II*, 819 F.2d at 899 n.2.

²⁵ *Crow Tribe*, 523 U.S. at 702–03. The Tribe's severance tax was equal to twenty-five percent of the value of coal mined by the Tribe's lessees. *Crow I*, 650 F.2d at 1107–08.

²⁶ *Crow Tribe*, 523 U.S. at 703.

²⁷ *Id.*

²⁸ *Id.* at 704.

²⁹ *Id.*

³⁰ *Id.*

tions could show that Montana's taxes were preempted for conflicting with the IMLA.³¹

Following the Ninth Circuit's reversal of the District Court, but before further proceedings to determine whether Montana's taxes were actually preempted, the Tribe and Westmoreland together filed a motion for Westmoreland to deposit severance tax payments into the District Court's registry.³² The motion requested that rather than Westmoreland pay the taxes to Montana, the court hold the severance tax payments until the dispute regarding Montana's ability to tax the Strip was resolved.³³ In 1983, the District Court granted the motion, and Westmoreland thereafter paid taxes into the court's registry.³⁴

B. Crow II: *The Ninth Circuit Awards the Tribe the Pre-1983 Taxes*

The trial to determine whether the Tribe was entitled to the post-1982 taxes began in 1984.³⁵ The District Court held that Montana's taxes were not preempted by the IMLA, but the Ninth Circuit again reversed.³⁶ The Ninth Circuit explained that the proper inquiry was whether the Tribe could demonstrate that Montana's taxes interfered with the policies underlying the IMLA, and if so, Montana's taxes would be preempted unless the State's interests nonetheless justified the assessment of the taxes.³⁷ The court reasoned that this preemption analysis should be colored by Congress's "firm federal policy of promoting tribal self-sufficiency and economic development."³⁸

The Ninth Circuit first determined that because the State's taxes had a negative impact on the coal's marketability, the taxes interfered with tribal and therefore federal interests.³⁹ The court then reviewed the legitimacy of Montana's interest in taxing Westmoreland, focusing on the relationship between

³¹ *Crow I*, 650 F.2d at 1115.

³² *Crow Tribe*, 523 U.S. at 705.

³³ *Id.*

³⁴ *Id.* In 1987, the District Court also allowed Westmoreland to pay the gross proceeds tax into the court's registry. *Id.*

³⁵ *Id.* at 706. Before court proceedings began, the United States intervened on the Tribe's behalf as trustee of the coal taxed by Montana. *Id.* at 705–06.

³⁶ *Crow II*, 819 F.2d at 898–903; *Crow Tribe of Indians v. Montana*, 657 F. Supp. at 591–94.

³⁷ *Crow II*, 819 F.2d at 898, 900.

³⁸ *Id.* at 898; *Crow I*, 650 F.2d at 1108–09.

³⁹ *Crow II*, 819 F.2d at 898–900. An economic research firm produced a report that showed Montana's coal tax drove buyers to Wyoming. *Id.* at 899. Before the taxes were imposed in 1975, Montana produced 40.6% of Northern Great Plains coal, while Wyoming produced 43.8%. *Id.* In each subsequent year, Montana lost as Wyoming gained, to the point that in 1982 Montana produced 18.2% while Wyoming produced 69.5%. *Id.* Although Montana argued that the change was the result of supply and demand theory, the court found that the taxes imposed was the component that differed the most between Montana and Wyoming. *Id.*

the taxes and the furtherance of those interests.⁴⁰ Montana argued that the additional government services required by the activity of mining itself, as well as the costs of rectifying pollution from the mining, justified assessment of the taxes.⁴¹ Assuming *arguendo* the legitimacy of Montana's interests, the Ninth Circuit explained that the coal taxes must still be narrowly tailored to support those interests.⁴² Because the court found that the state's taxes were excessively high and beyond a rate necessary to serve its proffered interests, the Ninth Circuit held that Montana's taxes were preempted.⁴³ Upon Montana's appeal, the United States Supreme Court summarily affirmed the Ninth Circuit's decision.⁴⁴

Following the Supreme Court's summary affirmation in 1988, the Tribe sought an order directing the release of the post-1982 taxes from the District Court's registry.⁴⁵ Montana did not object to the release of funds, but Westmoreland did.⁴⁶ Westmoreland argued that neither Montana nor the Tribe were entitled to the funds in the District Court's registry, and so the funds were due back to Westmoreland.⁴⁷ Under that theory, Montana could not receive the post-1982 taxes because the Ninth Circuit had ruled that the State's taxes were preempted.⁴⁸ And the Tribe was also ineligible to receive the funds because it lacked proper approval by the DOI to tax.⁴⁹ The District Court rejected Westmoreland's arguments and awarded the post-1982 taxes to the Tribe.⁵⁰ The District Court explained that Westmoreland's argument against the Tribe failed, because the Ninth Circuit's reasoning implied that the tax approved by the DOI for the "reservation proper" also covered the Strip, and the DOI erred in deciding otherwise.⁵¹

⁴⁰ *Id.* at 900.

⁴¹ *Id.* In *Crow I*, the court described this as the phenomenon of an "energy boomtown," wherein large mining projects in rural areas require infrastructure such as roads and utilities. *Crow I*, 650 F.2d at 1114.

⁴² *Crow II*, 819 F.2d at 901.

⁴³ *See id.* at 901–02. The court found that fifty percent of all revenues Montana collected from the severance tax statute were allocated to a state permanent trust fund. *Id.* at 901. Between nineteen percent and thirty percent of payments from the severance tax went to the state general fund. *Id.* Neither use was dedicated to either mining or environmental purposes. *Id.*

⁴⁴ *Montana v. Crow Tribe of Indians*, 484 U.S. at 997; *see Crow Tribe*, 523 U.S. at 714 n.14 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784–85 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 the judgment.").

⁴⁵ *Crow Tribe*, 523 U.S. at 706; *see supra* notes 32–34 and accompanying text.

⁴⁶ *Crow Tribe*, 523 U.S. at 706.

⁴⁷ *Id.*

⁴⁸ *Id.*; *see supra* notes 39–44 and accompanying text.

⁴⁹ *Crow Tribe*, 523 U.S. at 706; *see supra* notes 24–27 and accompanying text.

⁵⁰ *Crow Tribe*, 523 U.S. at 706–07.

⁵¹ *Id.*; *see supra* note 27 and accompanying text.

C. Crow III: *The Tribe Brings Suit for Disgorgement of the Pre-1983 Taxes Collected By Montana*

By this point in time, the Tribe had won the post-1982 taxes paid by Westmoreland.⁵² The Tribe then filed a complaint against Montana to separately obtain the taxes paid directly by Westmoreland to Montana between 1975, when the Montana's coal mining tax took effect, and 1982, when Westmoreland began paying into the District Court's registry.⁵³ The Tribe argued that because *Crow II* established that Montana had illegally collected taxes from Westmoreland between 1972 and 1982, it would be unjust to allow the State to retain the pre-1983 taxes.⁵⁴ Montana moved for a summary judgment based on a lack of privity between the Tribe and the State, but the District Court denied Montana's motion, and the Ninth Circuit ultimately dismissed the State's appeal.⁵⁵

D. Crow IV: *The Ninth Circuit Awards the Tribe the Post-1982 Taxes*

The full trial to determine whether the Tribe was entitled to disgorgement of the pre-1983 taxes paid by Westmoreland to Montana commenced in 1994.⁵⁶ The District Court found that because Westmoreland, not the Tribe, had paid the taxes to Montana, the Tribe lacked privity to recover the taxes from Montana.⁵⁷ The District Court further emphasized that Montana, not the Tribe, had provided infrastructure on the Strip.⁵⁸ Finally the District Court reasoned that because the Tribe lacked DOI approval to tax Westmoreland, the Tribe never would have collected taxes from Westmoreland, even if Montana had not taxed Westmoreland.⁵⁹ Therefore the District Court denied the Tribe's claim to full disgorgement.⁶⁰

On appeal, the Ninth Circuit again reversed the District Court, and fully disgorged the pre-1983 taxes to the Tribe.⁶¹ The Ninth Circuit reasoned that taken together, its holdings in *Crow II* and *Crow III* mandated full disgorge-

⁵² *Crow Tribe*, 523 U.S. at 707.

⁵³ *See id.* Between 1976 and 1982 Montana collected more than fifty-eight million dollars from Westmoreland. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 708–09; *Crow III*, 969 F.2d at 848–49. Montana argued that any right to a refund of the taxes collected belonged to Westmoreland, as the entity that paid the taxes, and not the Tribe. *Crow Tribe*, 523 U.S. at 708.

⁵⁶ *Crow Tribe*, 523 U.S. at 709.

⁵⁷ *Crow IV*, 92 F.3d at 828–29.

⁵⁸ *Id.* at 829–30; *see supra* note 41 and accompanying text.

⁵⁹ *Crow IV*, 92 F.3d at 830.

⁶⁰ *Crow Tribe*, 523 U.S. at 711.

⁶¹ *Crow IV*, 92 F.3d at 830.

ment.⁶² In contrast to the District Court's findings, *Crow III* dismissed the privity requirement, *Crow II* found that the services provided by Montana could not justify its tax, and *Crow II* awarded the post-1982 taxes to the Tribe despite the lack of DOI approval.⁶³ Montana appealed, and the United States Supreme Court granted certiorari.⁶⁴

II. LEGAL BACKGROUND

The Montana Supreme Court decided *Valley County v. Thomas* in 1939, holding that one county was entitled to the full disgorgement of fees unlawfully collected by another county.⁶⁵ The counties disputed the proper interpretation of a Montana statute that required owners of motor vehicles to obtain licenses and pay applicable fees in the county where the cars were "owned or taxable."⁶⁶ The vehicle owners in question applied for the licenses and paid fees in McCone County, where they worked and parked their cars for eight hours daily.⁶⁷ The vehicle owners lived in the Fort Peck townsite, the construction headquarters of a federal dam building project.⁶⁸ Both parties agreed that the Fort Peck townsite was not part of McCone County.⁶⁹ McCone County argued that because the federal government developed the dam building project, the townsite was not part of adjacent Valley County either, so that Valley County had no monopoly on the issuing of licenses to Fort Peck residents, and could not enjoin McCone County from doing so.⁷⁰ The Montana Supreme Court held that Montana never relinquished sovereignty over the Fort Peck townsite to the federal government, and therefore the townsite remained part of Valley County.⁷¹

Even though the Fort Peck townsite was part of Valley County, McCone County argued that Valley County could not recover the money because there was no privity between the counties.⁷² McCone County asserted that only the vehicle owners had privity and could sue McCone County for illegal exaction, and so the appropriate remedy for Valley County was to issue a new tax upon

⁶² See *id.* at 828–30. The Ninth Circuit said, "[i]n the process of weighing the equities in favor of and against restitution . . . [n]early every factor relied upon by the district court . . . is either contradicted or made irrelevant by our earlier holdings." *Id.*

⁶³ *Id.* at 828–831.

⁶⁴ *Crow Tribe*, 523 U.S. at 713.

⁶⁵ See *Valley Cty. v. Thomas*, 97 P.2d 345, 364, 367 (Mont. 1939).

⁶⁶ *Id.* at 349.

⁶⁷ See *id.*

⁶⁸ *Id.* at 349, 353.

⁶⁹ *Id.* at 351.

⁷⁰ *Id.*

⁷¹ *Id.* at 364.

⁷² *Id.* at 366.

vehicle owners.⁷³ The court rejected McCone County's solution as "clearly inequitable and burdensome."⁷⁴ Because McCone County had no right to collect the license fees, yet did so anyway, and because Valley County would have obtained the fees but for McCone County, the Montana Supreme Court ordered full disgorgement from McCone County to Valley County.⁷⁵

In 1989, in *Cotton Petroleum Corp. v. New Mexico*, the United States Supreme Court recognized the State's taxing power over a mining company's on-reservation activities.⁷⁶ The Apache Tribe leased part of its reservation land to Cotton Petroleum ("Cotton"), a non-Indian mining company.⁷⁷ Cotton paid severance taxes to both the State and the Apache for several years, but brought suit against New Mexico for injunctive relief in 1982.⁷⁸ Cotton argued that the Indian Mineral Leasing Act of 1938 ("IMLA") was intended to maximize return to tribes from mining leases, in order to further broaden federal policies that encouraged tribal self-government and economic development.⁷⁹ Both the New Mexico District Court and the New Mexico Court of Appeals upheld the State's taxes.⁸⁰ On appeal, the United States Supreme Court explained the standard for preemption in Indian law.⁸¹ The state may impose a tax on non-Indian private parties with whom the tribe does business, unless Congress has acted to provide the tribe immunity.⁸² But distinct from other areas of the law, that analysis of congressional intent should be "flexible" and "particularized" given the historical precept of tribal sovereignty.⁸³ Therefore, state law may be

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.* at 365–66.

⁷⁶ *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 186 (1989).

⁷⁷ *Id.* at 168.

⁷⁸ *Id.* at 168, 170. The DOI approved the tribe's severance tax in accordance with the tribe's constitution. *Id.* at 167–68.

⁷⁹ *Id.* at 177.

⁸⁰ *Id.* at 171. The New Mexico Supreme Court quashed a writ of certiorari, but the U.S. Supreme Court noted probable jurisdiction. *Id.* at 173. In addition to the Indian Mineral Leasing Act ("IMLA") preemption question, the United States Supreme Court invited the parties to argue whether under the Commerce Clause, Indian tribes should be treated as states to determine whether a state tax on non-Indian activity on a reservation needs to take account of the taxes already imposed on the same activity by an Indian tribe. *Id.*

⁸¹ *See id.* at 173–77.

⁸² *Id.* at 175. The Court noted that this standard represented a change in the Court's historical policy toward tribal preemption. *See id.* at 173–75. In the early twentieth century, the Court invalidated state taxes on tribal activities under the doctrine of intergovernmental immunity. *Id.* at 173–74. The idea there was that a state tax on a party in contract with the federal government was a tax on the contract, and so was a constitutionally prohibited tax on the federal government, because it inhibited the government's ability to enter into a contract. *Id.* at 174. *See generally* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 360–62 (1819) (declaring state taxes on the federal bank unconstitutional).

⁸³ *Cotton Petrol. Corp.*, 490 U.S. at 176; *see also* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) ("This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . .").

preempted based on Congress's implied will, with the history of tribal sovereignty acting as a "necessary backdrop to that process."⁸⁴

Because the text of the IMLA neither expressly permits nor precludes state taxes, the Supreme Court turned to the legislative history behind the IMLA in order to determine Congress's intent.⁸⁵ The Court found that the IMLA was designed to remove barriers in Indian mineral leasing not present in the non-Indian domain.⁸⁶ The Court noted that while the purpose of the IMLA was "to provide Indian tribes with badly needed revenue," Congress did not intend to "remove all barriers to profit maximization."⁸⁷ Therefore, the IMLA did not preempt New Mexico's taxation of on-reservation mining activity.⁸⁸ In a footnote, the Court explained that its decision was not inconsistent with its decision in *Crow II*.⁸⁹ The Court explained that it had summarily affirmed preemption in *Crow II* because Montana's "extraordinarily high" taxes negatively affected the marketability of the Tribe's coal, and so impaired the federal policy favoring the exploitation of Indian resources.⁹⁰ By contrast, the Supreme Court found that New Mexico's taxes would have only had a "marginal effect" on the Apache Tribe's demand for leases and ability to increase its own tax rate.⁹¹ Therefore the negative effects of Montana's taxes in *Crow II* were more substantial than New Mexico's taxes in *Cotton Petroleum*, and so New Mexico's taxes did not impair federal policy.⁹²

III. ANALYSIS

In 1998, in *Crow Tribe v. Montana*, the United States Supreme Court rejected the Tribe's claim to full disgorgement of the pre-1983 taxes paid by Westmoreland to Montana.⁹³ Instead, the majority should have awarded full disgorgement, or granted alternative relief through either partial disgorgement

⁸⁴ *Cotton Petrol. Corp.*, 490 U.S. at 176–77. In other words, congressional intent sufficient for preemption need not be express. *Id.*

⁸⁵ *See id.* at 177–80. The Court noted that the legislative history did not explicitly reflect on state taxation. *Id.* at 177–78.

⁸⁶ *Id.* at 180. One such example was the lack of extralateral mineral rights on Indian lands. *See id.* Whereas in the public domain a discoverer of minerals could mine the ore indefinitely beyond the public land, on Indian territory a discoverer was limited to mining within certain confines. *Id.* at 178.

⁸⁷ *Id.* at 178 To support the point that the IMLA guarantees Indian tribes the maximum profit available without regard to state interests, Cotton cited to the Secretary of the Interior's letter of transmittal to describe the IMLA. *Id.* at 178–79. The Secretary's letter contained the phrase, "[i]t is not believed that the present law is adequate to give the Indians the greatest return from their property." *Id.* at 178–79. The Court refused to give the Secretary's words "talismatic effect." *Id.* at 179.

⁸⁸ *See id.* at 180.

⁸⁹ *Id.* at 186 n.17.

⁹⁰ *Id.*

⁹¹ *Id.* at 186–87.

⁹² *Id.* at 186 n.17.

⁹³ *Montana v. Crow Tribe of Indians (Crow Tribe)*, 523 U.S. 696, 719 (1998).

or compensatory damages.⁹⁴ Alternative relief would have furthered the federal policy of promoting tribal self-government and economic development.⁹⁵

The Court relied on *Cotton Petroleum Corp. v. New Mexico* to distinguish the remedy in *Valley County v. Thomas*.⁹⁶ The Tribe likened its claim to that made by Valley County in *Thomas*, citing to the Court's invalidation of Montana's taxes in *Crow II*, and arguing that Westmoreland had simply paid the "wrong sovereign," and so all the pre-1983 taxes should be disgorged to the Tribe.⁹⁷ The Court distinguished *Thomas*, explaining that Montana law permitted one county to collect the fees at the exclusion of the other.⁹⁸ Disgorgement was therefore appropriate in that case because while Valley County had the right to tax, McCone County had actually obtained the money.⁹⁹ By contrast, *Cotton Petroleum* established that neither the State nor the Tribe could tax to the "total exclusion" of the other.¹⁰⁰ And unlike Valley County, the Tribe never had the right to tax in the first place.¹⁰¹ The Court thus held that the Tribe's request for full disgorgement based on *Thomas* did not follow as between the Tribe and Montana.¹⁰²

A. The Supreme Court Should Have Awarded Full Disgorgement

The Supreme Court's decision to deny full disgorgement of the pre-1983 taxes was inconsistent with its earlier decision to give the post-1982 taxes to the Tribe.¹⁰³ Because the Ninth Circuit granted declaratory and injunctive relief against Montana's taxes in *Crow II*, the Tribe was accordingly awarded the full amount of the post-1982 taxes held in the District Court's registry.¹⁰⁴ The Supreme Court summarily affirmed that judgment and the corresponding remedy.¹⁰⁵ Later in *Cotton Petroleum*, the Supreme Court confirmed its summary affirmance of *Crow II*.¹⁰⁶ Thus, in *Crow IV*, the Ninth Circuit found that Mon-

⁹⁴ See *id.* at 720–21, 725 (Souter, J., concurring).

⁹⁵ See *Crow Tribe of Indians v. Montana (Crow II)*, 819 F.2d 895, 898 (9th Cir. 1987).

⁹⁶ *Crow Tribe*, 523 U.S. at 716.

⁹⁷ See *id.* at 714.

⁹⁸ *Id.* at 716.

⁹⁹ See *id.* at 715–16.

¹⁰⁰ *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 186 (1989); see *Crow Tribe*, 523 U.S. at 716.

¹⁰¹ *Crow Tribe*, 523 U.S. at 716; see *supra* notes 26–27 and accompanying text.

¹⁰² See *Crow Tribe*, 523 U.S. at 714–16.

¹⁰³ Compare *id.* at 699 (holding that the Tribe was not entitled to the post-1982 taxes), with *Montana v. Crow Tribe of Indians*, 484 U.S. 997, 997 (1988) (mem.) (summarily affirming the Tribe's right to the pre-1983 taxes).

¹⁰⁴ *Crow Tribe*, 523 U.S. at 706–07; *Crow II*, 819 F.2d at 903.

¹⁰⁵ *Montana v. Crow Tribe of Indians*, 484 U.S. at 997.

¹⁰⁶ *Cotton Petrol. Corp.*, 490 U.S. at 186 n.17. In a footnote, the Court said, "We . . . have no occasion to reexamine our summary affirmance of the . . . conclusion that Montana's . . . taxes may not be imposed on coal mines on Crow tribal property." *Id.*; see *supra* notes 89–92 and accompanying text.

tana's arguments for denying the Tribe the pre-1983 taxes were essentially the same as its arguments in the litigation over the post-1982 taxes, and so had already been "rejected explicitly or rendered irrelevant by this court's previous decisions."¹⁰⁷

Rather than granting the Tribe the pre-1983 taxes, consistent with its summary affirmance of the Tribe's right to the post-1982 taxes, the Supreme Court implied that the Tribe had already been adequately compensated by the post-1982 taxes, and therefore did not deserve the pre-1983 taxes.¹⁰⁸ By denying the Tribe full disgorgement, the Court exercised contradictory discretion, and allowed Montana to retain taxes that the state legislature had always known were potentially illegal.¹⁰⁹ The Court should have instead fully disgorged the pre-1983 taxes to the Tribe, consistent with its prior decision.¹¹⁰

B. The Supreme Court Could Have Alternatively Awarded Partial Disgorgement

Even if the Supreme Court had denied the Tribe full disgorgement, the Court could have alternatively awarded partial disgorgement.¹¹¹ Because Montana had no right to tax at an "extraordinarily high" rate, and because the Department of the Interior ("DOI") erred in denying the Tribe the right to tax, the Court could have awarded partial disgorgement of the excess taxes.¹¹² To be sure, *Cotton Petroleum* allowed the State the right to tax on-reservation activities.¹¹³ But as Justice Souter explained in his concurrence, that principle only applied to a certain "economic point," which Montana exceeded by imposing excessively high taxes.¹¹⁴ The excess taxes collected by Montana were there-

¹⁰⁷ See *Crow Tribe of Indians v. Montana (Crow II)*, 92 F.3d 826, 830 (1996); see *supra* notes 61–64 and accompanying text.

¹⁰⁸ *Crow Tribe*, 523 U.S. at 725 (Souter, J., concurring) ("[T]he District Court's previous award to the Tribe of all taxes paid into the registry after 1982 amounted to a windfall big enough to provide at least rough restitution for the excessive share of taxes collected in the preceding six years."). The Court said, "Montana's retention of . . . taxes must be assessed in light of the court-ordered distribution of all funds in the registry to the United States, as trustee for the Tribe." *Id.* at 719 (majority opinion).

¹⁰⁹ *Crow IV*, 92 F.3d at 829 n.3 (noting that the Montana legislature expected litigation to settle the legality of the taxes it imposed, and yet did not place the taxes in escrow until the Tribe brought suit). In their brief, the Tribe further noted that allowing Montana to retain the taxes would disincentivize local governments from avoiding potentially illegal practices, and encourage additional burdens on Indian commerce. Brief for Respondent *Crow Tribe*, *supra* note 1, at 30.

¹¹⁰ See *Crow IV*, 92 F.3d at 830.

¹¹¹ See *Crow Tribe*, 523 U.S. at 720 (Souter, J., concurring).

¹¹² *Id.*

¹¹³ *Cotton Petrol. Corp.*, 490 U.S. at 163.

¹¹⁴ See *Crow Tribe*, 523 U.S. at 721 (Souter, J., concurring). Although the Ninth Circuit did not identify the exact maximum amount Montana could tax, it made clear that the state's taxes were excessive and not narrowly tailored to serve legitimate interests. See *Crow II*, 819 F.2d at 902.

fore as illegally exacted as the licensing fees ordered disgorged in *Thomas*.¹¹⁵ That prohibited portion of taxes collected by Montana could have been awarded to the Tribe as a partial disgorgement.¹¹⁶

The Court further could have found that the Tribe was entitled to collect taxes from Westmoreland, despite the DOI's ostensible disapproval.¹¹⁷ In both *Crow I* and *Crow II*, the Ninth Circuit found that the minerals underneath the Strip were a "component of the reservation land itself."¹¹⁸ Based on these findings, the District Court remarked that the DOI's rejection of the Tribe's proposed tax was mistaken.¹¹⁹ Although the DOI intended for the Tribe's tax to apply to on-reservation activities not including the Strip, the District Court found that the DOI's approval actually applied to the Strip given the Ninth Circuit's findings.¹²⁰ Although the Supreme Court treated this finding as immaterial, given that the Tribe did not receive explicit approval from the DOI, the Court could have allowed the Tribe to proceed as a rightful taxing authority similar to Valley County in *Thomas*.¹²¹ One of the primary purposes behind the IMLA was to remove technical requirements and complicated procedures that prevented tribes from leasing their land.¹²² By treating as dicta the lower courts' finding that the DOI should have granted the Tribe the right to tax, the Supreme Court betrayed Congress's intent.¹²³ If the Court had both recognized that Montana was not allowed to tax beyond a certain economic point, and that the Tribe should have had the right to tax, the Court could have awarded the Tribe partial disgorgement of the excess taxes in line with prior case precedent.¹²⁴

C. The Supreme Court Could Have Alternatively Remanded to Determine Compensatory Damages

Even if the Supreme Court did not find any disgorgement appropriate, it could have alternatively remanded the case for a factual determination of com-

¹¹⁵ *Crow Tribe*, 523 U.S. at 722 (Souter, J., concurring); see *Valley Cty. v. Thomas*, 97 P.2d 345, 367 (Mont. 1939).

¹¹⁶ See *Crow Tribe*, 523 U.S. at 722 (Souter, J., concurring).

¹¹⁷ See *id.* at 722–23.

¹¹⁸ *Crow II*, 819 F.2d at 898; *Crow Tribe of Indians v. Montana (Crow I)*, 650 F.2d 1104, 1117 (9th Cir. 1981).

¹¹⁹ *Crow Tribe*, 523 U.S. at 723 (Souter, J., concurring).

¹²⁰ *Id.*

¹²¹ See *id.* At oral argument, in response to the Tribe's claim that the DOI made a mistake by disapproving the tax, Justice Scalia remarked that "[i]t was the reality, whether it was a mistake or not." Transcript of Oral Argument at 38, *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998) (No. 96-1829).

¹²² *Crow I*, 650 F.2d at 1112.

¹²³ See *supra* notes 14–20 and accompanying text. But see *Crow I*, 650 F.2d at 1113 (reaching the opposite conclusion).

¹²⁴ See *Crow Tribe*, 523 U.S. at 720 (Souter, J., concurring); *Cotton Petrol. Corp.*, 490 U.S. at 193 (1989); *Valley Cty.*, 97 P.2d at 367.

pensatory damages due to the Tribe.¹²⁵ The Court's based its decision to deny compensatory damages entirely on the testimony of Westmoreland's president, who claimed that no contracts were lost during the relevant time period due to the State's taxes.¹²⁶ Yet the Ninth Circuit had repeatedly held that Montana's taxes increased the cost of coal production, and so forced the coal producers to pass higher costs onto purchasers, which resulted in fewer sales and so fewer royalties for the Tribe.¹²⁷ Therefore apart from the disgorgement claim, there was enough evidence to at least raise the question as to whether the Tribe had suffered injury due to Montana's taxes.¹²⁸ The Supreme Court should have remanded for a more comprehensive determination by the District Court.¹²⁹

CONCLUSION

Although the Tribe secured the post-1982 taxes paid by Westmoreland into the District Court's registry, the United States Supreme Court denied any relief to the Tribe for the taxes improperly collected by Montana between 1976 and 1982. During the course of litigation, the Tribe secured a judgment that federal law preempted Montana's taxes. Further, the District Court and Ninth Circuit recognized that the DOI erred in denying the Tribe's tax on the Strip, invoking the strength of federal policy favoring tribal self-government and economic development. After almost twenty years of contentious litigation, the United States Supreme Court improperly, and in conflict with their own precedent, denied the Tribe any relief whatsoever. The Court could have, and should have, found for the Tribe under *Thomas*, in spite of the precedent set by *Cotton Petroleum*. Relief for the Tribe would have served to ameliorate the on-reservation poverty, reduce bureaucratic impediments to tribal autonomy, and deny Montana the benefit of illegal taxation.

¹²⁵ See *Crow Tribe*, 523 U.S. at 725 (Souter, J., concurring).

¹²⁶ *Id.* at 711 (majority opinion).

¹²⁷ See *Crow IV*, 92 F.3d at 830; *Crow II*, 819 F.2d at 899; *Crow I*, 650 F.2d at 1113 n.13.

¹²⁸ See *Crow IV*, 92 F.3d at 830; *Crow II*, 819 F.2d at 899.

¹²⁹ See *Crow Tribe*, 523 U.S. at 720–21, 725 (Souter, J., concurring).