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Crow Tribe v. Montana: New Limits on State Intrusion into Reservation Rights, New Lessons for State and Tribal Cooperation

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NOTE

CROW TRIBE V. MONTANA: NEW LIMITS ON STATE INTRUSION INTO RESERVATION RIGHTS, NEW LESSONS FOR STATE AND TRIBAL COOPERATION

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I. INTRODUCTION

In January, 1988, the United States Supreme Court affirmed the Ninth Circuit appellate court's decision in *Crow Tribe of Indians v. Montana*.[1] The Supreme Court's decision in *Crow* capped

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1. Crow Tribe of Indians v. Montana, 469 F. Supp. 154 (D. Mont. 1979), *rev'd and remanded*, 650 F.2d 1104 (9th Cir. 1981), *opinion amended* 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982) [hereinafter *Crow I*], 657 F. Supp. 573 (D. Mont. 1985),

almost a decade of intense litigation between Montana and the Crow Tribe. At stake was the right to tax Crow mineral resources, a right worth millions of dollars annually to the prevailing party.[2] In holding that Montana could not tax Crow mineral resources, the Ninth Circuit Court of Appeals significantly extended recent Supreme Court rulings on state taxation of Indian tribes. The *Crow* case is therefore an important development in federal Indian law. The case is also an important development in Montana's historical struggle to defend its coal severance taxes. In exercising a fundamental power of self-government, the power to tax, both the Tribe and Montana remain subject to Congress' plenary power. By impinging on the Crow's sovereign right to benefit from their own tribal resources, Montana may have weakened its own asserted right to tax resource extraction statewide. This comment explores the *Crow* case as it evolved over ten years, explaining the significance of the case to both Indian and Montana law.

II. ORIGINS OF THE CASE

A. *History*[3]

In 1851 the United States and the Crow Tribe entered into a treaty[4] delineating reserved land of thirty-eight million acres and other reserved rights which the federal government would hold in trust for the Crow Tribe's beneficial use.[5] A second treaty in 1868[6] reduced tribal reserved lands to eight million acres lying entirely

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rev'd, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988) [hereinafter *Crow II*].

2. In the seven years between 1975 and 1982, almost 62 million dollars from coal severance and gross proceeds taxes accumulated on coal mined from the area in dispute. *Crow II*, 819 F.2d at 897. As of September 19, 1988, the United States District Court for the District of Montana held over 29 million dollars in Crow tribal coal severance tax funds in its registry. *See* Crow Tribe of Indians v. Montana, No. CV 78-110-BLG slip op. at 1 (D. Mont. Sept. 19, 1988).

3. This comment will, by and large, present only those "facts" which the district court and the Ninth Circuit Court of Appeals considered germane to the disposition of this case. Note, however, that history and the courts often differ.

4. Treaty of Fort Laramie, 11 Stat. 749 (1851).

5. *Crow II*, 657 F. Supp. at 575.

6. Treaty of Fort Laramie, 15 Stat. 649 (1868). In *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), the court detailed the reservation's origins:

> The Crow Indian Reservation is the remnant of a much larger tract of land recognized as Crow lands by the United States in the Treaty of Fort Laramie of 1851. . . . In 1868, this original reservation was diminished from one of 38,531,174 acres to one of approximately 8,000,000 acres by the Second Treaty of Fort Laramie. . . . Subsequent Congressional Acts have reduced the size of the reservation even further to its present acreage of approximately 2,282,764 acres.

Id. at 1164 (citations omitted). The court further explained the reservation property division as follows:

within what, twenty-one years later, would become the state of Montana.[7] In 1904, responding to homesteading pressure, Congress passed an act compelling the Crow Tribe to cede over a million acres of its reserved lands to the United States.[8] The federal government later opened up this million-plus acre "ceded strip" to homesteading.[9] However, the United States retained most of the mineral rights underlying the surface of the ceded strip.[10] Homesteading progressed, and non-Indian homesteaders purchased[11] surface patents to most of the area in the ceded strip.[12] The ceded strip spans Treasure, Big Horn, and Yellowstone counties. Now populated mainly by non-Indians, the strip's economy continues to revolve around agriculture.[13]

The 1904 cession of the Crow lands constituted only a small part of a national policy designed to lead to the eventual abolition

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Type of Ownership	Acreage	Percentage of Ownership to Total Acreage
Allotted	1,187,592.34	52.02%
Tribal (Surveyed)	379,740.64	16.64%
Tribal (Unsurveyed)	15,850.85	.69%
Government Owned	1,400.50	.07%
Yellowtail Dam	6,695.64	29%[sic,.29%]
State Lands	44,804.82	1.96%
Fee Lands	646,679.12	28.33%
TOTAL:	2,282,764.00	100.00%

Id. at 1164 n.3.

7. *Crow II*, 657 F. Supp. at 575.

8. *Id.* (citing Crow Cession Act of April 27, 1904, Pub. L. No. 183, 33 Stat. 352 (1904)). Though the terms of the cession supposedly resulted from field negotiations between the federal government and the Crow Tribe, the Crow had little bargaining power, and the result of the "negotiations" was one-sided at best. *See* F. PRUCHA, THE GREAT FATHER 295-96 (1986). In remarks made to the House Committee on Indian Affairs just three days prior to the Crow Cession Act, Indian Commissioner Jones said about obtaining cessions on the Rosebud Reservation:

> If you depend upon the consent of the Indians as to the disposition of the land where they have fee to the land, you will have difficulty in getting it, and I think the decision in the Lone Wolf case, that Congress can do as it sees fit with the property of the Indians will enable you to dispose of that land without the consent of the Indians.

Id. at 296.

9. *Crow II*, 657 F. Supp. at 576.

10. *Id. See* text accompanying notes 22 and 72, *infra*.

11. The lands were made available to homesteaders at $4.00 per acre. Crow Cession Act of April 27, 1904, Pub. L. No. 183, § 5, 33 Stat. 352, 360 (1904).

12. *Crow II*, 657 F. Supp. at 575.

13. *Id.*

of all Indian reservations.[14] Congress furthered this assimilationist policy through diminishment of reserved lands and through allotment in fee of reserved lands to individual Indians.[15] In 1934, Congress recognized the devastating effect that allotment and sale of ceded reservation lands had had on Indian tribes.[16] Expressing renewed commitment to tribal self-government and the reservation trust system, Congress passed the Indian Reorganization Act (IRA).[17] The IRA's major purpose was to halt the erosion of tribal

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14. The General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887), commonly known as the Dawes Act, provided that the executive branch could allot 160 acres of reservation land to each Indian head of family residing on the reservation, and make allotments of 80 acres to individuals if the allotments were in the best interest of the tribe. These allotment acreages were to be doubled if the land was suitable for grazing. After 25 years of holding each allotment in trust, the federal government would convey fee simple title to the individual Indian or the Indian head of family.

The Act further provided that reservation lands not allotted to Indian families be designated as "surplus." With the consent of the tribe, any such "surplus" could then be sold, and most buyers were non-Indian homesteaders. The result of the Dawes Act was a reduction of Indian reserved lands held in trust from 138 million acres in 1887 to 48 million in 1934.

Proponents of the allotment scheme included federal legislators convinced that eventual abolition of reservations and assimilation of all Indians were in the best interest of Indians. Also backing the Dawes Act were legislators representing homesteaders and land speculators eager to wrest reserved land holdings from the tribes. For an authoritative discussion of the policy behind the allotment era, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 20-24,78-82,206-33 (1942); W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 19-23 (1988).

Continued pressure from homesteaders and land speculators during this period resulted in additional Congressional acts, such as the 1904 act diminishing the Crow Reservation, wherein tribes "ceded" vast portions of then-reserved land holdings for sale by the federal government to non-Indians. COHEN, *supra*.

15. The comments of Indian Commissioner Leupp, made in his first report to Congress in 1905, illustrate the guiding philosophy behind allotment:

> [I]t is our duty to set [the Indian] upon his feet and sever forever the ties which bind him either to his tribe, in the communal sense, or to the Government. This principle must become operative in respect to both land and money. . . . Thanks to the late Senator Henry L. Dawes of Massachusetts, we have for eighteen years been individualizing the Indian as an owner of real estate by breaking up, one at a time, the reservations set apart for whole tribes and establishing each Indian as a separate landholder on his own account.

COHEN, *supra* note 14 at 24, quoting the remarks of Commissioner Leupp, ANN. REP. COMM'R. INDIAN AFF. at 3-4 (1905).

16. In 1928, Congress received the report, *The Problem of Indian Administration*, INSTITUTE FOR GOVERNMENT RESEARCH (1928), commonly known as the "Meriam Report." The report spurred wholesale rethinking of federal Indian policy by tracing the actual effects of allotment and assimilationist policies. Most Indian allottees, unable to pay taxes or make a go of farming on the small allotments, had sold their allotments or leased them long-term to non-Indians. Allotment policy had therefore not only abolished reserved tribal holdings, but had also resulted in cutting off individual Indians from a sustaining land base. *See* PRUCHA, *supra* note 8 at 278-79, 304, 312-16; CANBY, *supra* note 14 at 23-25; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 128-32 (1982 ed.).

17. 25 U.S.C. § 461 (1934). Congress responded to the Meriam Report in 1934 with the

lands caused by allotment policies. The IRA also provided tribes with several means for reorganization by establishing procedures tribes could use to participate more directly in the determination of their economic and governmental futures.[18] To help achieve these purposes, the IRA restored to various tribes many of the mineral rights and lands which those tribes had previously ceded to the federal government.[19] The IRA allowed tribes to accept or decline restoration of land and mineral rights made available under its provisions.[20] The Crow Tribe did not accept the IRA, and therefore rejected restoration of its rights in the ceded strip.[21]

As a result of the IRA, however, the federal government suspended sale of surface rights on the ceded strip and continued to hold the subsurface mineral rights in trust for the use and benefit of the Crow Tribe.[22] To this end, under the terms of the IRA, the federal government leased subsurface mineral rights in the ceded strip for the benefit of the Crow Tribe.[23] In 1938, Congress passed the Indian Mineral Leasing Act (IMLA),[24] reaffirming the intent behind the IRA of 1934 in respect to mineral leasing. The IMLA restored to the tribes the possibility of controlling mineral leases, subjecting that control only to the approval of the Secretary of the

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Indian Reorganization Act, halting allotment and sale of "surplus" Indian lands and extending the trust period indefinitely. The IRA reorganized "surplus" but unsold, unhomesteaded tribal lands and returned them to reservation status. The IRA provided that the government would thereafter hold those lands in trust for the benefit of the tribes. The IRA also authorized the Secretary of the Interior to purchase additional lands to augment the vastly diminished reservations.

Some of the tribes, such as the Crow, rejected restoration of ceded lands under the IRA because of their fear of federal government domination. *See* note 20 *infra*; CANBY, *supra* note 14 at 24. Meanwhile, the federal government continued to hold these ceded lands (to which ceding tribes were entitled under the IRA) in trust for the benefit of those tribes.

Despite successes of the IRA, the era of allotment and cession in federal Indian policy resulted in the jurisdictional nightmare of "checkerboarded" reservations wherein non-Indians hold fee simple title to sections throughout the reservations. CANBY, *supra* note 14 at 99-102. The policy of allotment and assimilation also resulted in the complex jurisdiction of the ceded strip in the *Crow* cases.

18. *Crow I*, 650 F.2d at 1112. The United States Supreme Court has noted that Congress' purpose in passing the IRA was in part to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 152 (1972) (quoting H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934)).

19. *Crow II*, 657 F. Supp. at 576.

20. *Id.*

21. *Id.* For a discussion of the many reasons why particular tribes elected not to come under the terms of the IRA, *see* 2 F. PRUCHA, THE GREAT FATHER 959-65 (1984).

22. *Crow I*, 469 F. Supp. at 156.

23. For a more complete discussion of the various Indian mineral leasing acts and their effect on the tribes, *see Blackfeet Tribe v. Montana*, 729 F.2d 1192 (9th Cir. 1984).

24. The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976) (*cited in Crow I*, 650 F.2d at 1107).

Interior.[25] Among the IMLA's stated purposes was to assure that tribes receive "the greatest return from their property."[26]

In 1958, Congress enacted legislation requiring tribes that had refused to accept the terms of the IRA to retake lands and rights which, under the terms of the IRA, the federal government had held in trust since 1934.[27] Under the provisions of the Indian Restoration Act of 1958, full beneficial title to the mineral rights underlying the ceded strip passed from the United States back to the Crow Tribe.[28] In 1958, then, the Tribe secured the same kind of title to the ceded strip mineral rights that the Tribe held for its other reserved lands. Since 1958, the federal government has held the mineral rights for the ceded strip in trust specifically for the Crow Tribe's use and benefit, as it holds all other Crow tribal lands. Because of the changes wrought by the 1958 Indian Restoration Act, Crow mineral rights on the ceded strip became subject to regulation under the 1938 IMLA.[29] In effect, the Crow Tribe's reserved rights to the subsurface minerals of the ceded strip, while temporarily interrupted, date back to the treaty establishing all of the Crow's reserved land rights.[30]

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25. *Id.* at 1112.

26. *Crow II*, 819 F.2d at 898 (quoting S. REP. No. 2, H.R. REP. No. 1872, 75th Cong., 3d Sess. 2 (1938)).

27. The Indian Restoration Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121 (*cited in Crow II*, 819 F.2d at 897).

28. *Crow II*, 819 F.2d at 897.

29. *Id.* at 898.

30. *Crow I*, 650 F.2d at 1107. In its initial opinion dismissing the Tribe's claim, the district court founded its reasoning in part on the concept that the incidence of the tax fell not on the Tribe, but on "the production and income of non-Indian coal mine operators." *Crow I*, 469 F.Supp. at 165. The district court relied on Montana statutes and turn-of-the-century case law directed at the taxation of non-Indian grazing leaseholders to reach this conclusion. *Id.* (citing Truscott v. Hurlbut Land and Cattle Co., 73 F. 60 (9th Cir. 1896)). The court found that because it was Westmoreland Resources that actually severed the coal and paid taxes to Montana, it was "inconceivable" that Montana's taxes infringed on Indian rights. *Id.* Had the Crow elected to come under the provisions of the 1934 IRA, the *Crow* district court might have had more certainty about the status of the mineral rights underlying the ceded strip. The IRA provides that:

> [A]ny lands or rights acquired pursuant to any provision of the Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands *or rights* shall be exempt from state and local taxation.

25 U.S.C. § 465 (emphasis added). Of course, the question of whether Montana's severance tax is a levy on the coal alone or on the right to the coal as well is more complex. In *Mescalero*, for example, the United States Supreme Court held that the tax New Mexico wished to levy on the Tribe's off-reservation ski resort lay not on the leased land or right, but on the economic activity that the land generated. "[A]bsent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, *or its other source*, is itself exempt from taxes." *Mescalero*, 411 U.S. at 156 (emphasis added). However, where reservation re-

The southeastern region of Montana contains vast reserves of bituminous coal, now commercially prized because of its clean-burning characteristics.[31] The Crow Reservation and the ceded strip overlie a portion of these coal reserves.[32] In 1972, the Crow Tribe leased the rights to mine coal under thirty-one thousand acres of the ceded strip to Westmoreland Resources Corporation.[33]

In 1975, the Montana legislature imposed two separate taxes on all coal production within the state. The first enactment, the Montana Coal Severance Tax, imposed a tax on mined coal on a per-ton basis, with the rate of taxation varying from three to thirty percent of the coal's market value.[34] In addition to the Coal Severance Tax, the legislature imposed a gross proceeds tax on "each person engaged in coal mining."[35] Montana bases the gross proceeds tax on coal producers' gross yields from coal sales and links the tax to individual Montana counties' property taxes. Therefore, the gross proceeds tax that each producer pays varies depending on the mine's location.[36]

In 1975, Montana imposed both the Coal Severance and the gross proceeds tax on Westmoreland Corporation's Crow-lease mining operations in the ceded strip.[37] From the first imposition of the taxes in 1975 until 1981, Westmoreland paid to the state 53.8 million dollars in severance taxes and 8.1 million dollars in gross proceeds taxes as a result of its Crow-lease operations in the ceded strip.[38]

In 1976, the Crow Tribe enacted its own coal severance tax for

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sources generate an economic activity on the reservation, the Court is more chary of such distinctions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 220 (1987).

31. T. Gill, Coal Development Potential in Eastern Montana 1-14 (1972) (report to the Montana Environmental Council, available in the University of Montana Mansfield Library, Missoula, Montana).

32. *Crow I*, 650 F.2d at 1107. In 1974, it was estimated that over eight *billion* tons of strippable coal underlie the Crow and Northern Cheyenne Reservations. Over 60% of the lands on the Crow Reservation are estimated to contain coal deposits in commercially favorable formations. Native American Natural Resources Development Federation of the Northern Great Plains, Declaration of Indian Rights to the Natural Resources in the Northern Great Plains States 13-15 (Report to the Northern Great Plains Resources Program, June, 1974) (available at the University of Montana Mansfield Library, Missoula, Montana).

33. *Crow I*, 650 F.2d at 1107. *See also* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, I FINAL ENVIRONMENTAL STATEMENT CROW CEDED AREA COAL LEASE TRACTS II AND III WESTMORELAND RESOURCES 1-11 (Dec. 1976).

34. *Crow I*, 650 F.2d at 1107 (citing MONT. CODE ANN. §§ 15-35-101 to -111 (1979), *amended by* MONT. CODE ANN. § 15-35-103 (1987); MONT. CODE ANN. §§ 15-23-701 to -704 (1979), *amended by* MONT. CODE ANN. § 15-23-701 (1987)).

35. MONT. CODE ANN. § 15-23-701 (1987).

36. MONT. CODE ANN. §§ 15-23-701 to -704 (1987).

37. *Crow II*, 819 F.2d at 897.

38. *Id.*

coal mined from the subsurface within Crow Reservation boundaries.[39] The Crow impose a twenty-five percent severance tax on Crow coal, a rate which in effect exactly equals Montana's coal taxes.[40] The Department of the Interior approved the Crow's severance tax as it applies to coal mined within reservation boundaries.[41] Because the Tribe has not yet allowed the development of any major coal sites within the boundaries of the post-1904 reservation, however, the tribal severance tax has yet to produce tribal revenues.[42] In 1982, the Crow Tribe enacted a severance tax to ap-

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39. *Crow II*, 657 F. Supp. at 586.

40. *Id.* at 587. The issue of whether a tribe may impose its own tax on non-Indian activity on the reservation has been long settled. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court said:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status . . . [F]ederal law to date has not worked a divestiture of Indian taxing power.

Id. at 152.

41. *Crow II*, 819 F.2d at 897. In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), the Supreme Court held that the Navajo Tribe which, like the Crow, elected not to come under the provisions of the IRA, did not, under the terms of the 1938 IMLA, have to submit tax laws to be imposed on mineral lessees to the Secretary of the Interior for approval. *Id.* at 201. Unlike the Crow, however, the Navajo had no provision in the tribal constitution that mandated the Secretary's approval. Discussing the method by which many tribes arrived at a tribal constitution following the passage of the IRA, the Court said:

> Many tribal constitutions written under the IRA in the 1930's called for Secretarial approval of tax laws affecting non-Indians. . . . But there were exceptions to this practice. . . . Thus the most that can be said about this period of constitution writing is that the Bureau of Indian Affairs, in assisting the drafting of tribal constitutions, had a policy of including provisions for Secretarial approval; but that policy was not mandated by Congress.

Id. at 198. The Secretary of the Interior rejected the Crow's initial attempt to levy a severance tax on coal mined on the ceded strip in 1982. However, the basis for the rejection arose not from any dispute over the Tribe's power to tax, but rather because the Secretary had not yet recognized the on-reservation status of the coal on the ceded strip. *Crow II*, 819 F.2d at 897.

42. As of 1972, the Tribe had leased 61,123.93 acres of unallotted reservation lands to Westmoreland and to Shell Oil. In addition, the Tribe had issued prospecting permits for another 178,978.39 acres to Gulf Oil, Peabody Coal Co., and AMAX, Inc. *See* Decision of the Secretary of the Interior Relating to *Crow Tribe v. Kleppe*, 4 I.L.R. I-2 (Jan. 20. 1977). *See also* K.R. TOOLE, THE RAPE OF THE GREAT PLAINS 44 (1976).

The Tribe became concerned about the possible major impact of coal mining on the Tribe's cultural and environmental resources, and cancelled most of the leases. *Id.* at 44-45. *See also* Cady v. Morton, 527 F.2d 786 (9th Cir.1975) (suit was brought against the Secretary of the Interior by environmentalists concerned about environmental impacts of strip mining on the reservation, and about Bureau of Indian Affairs failure to follow statutory lease requirements. The Ninth Circuit held that the coal leases constituted "major federal action" and required the preparation of environmental impact statements). *See also*, Crow Tribe Community Action Program, A Sample Survey of Attitudes About Coal Development - Crow Tribe (1973) (available at the University of Montana Mansfield Library, Missoula, Montana). The survey reported that 94.3% of those tribal members surveyed thought the

ply to coal mined through leases of Crow subsurface mineral rights in the ceded strip.[43] The Department of the Interior refused to approve this tax, however, because it believed the Constitution of the Crow Tribe precluded its imposition.[44] The Crow promptly amended their constitution to allow the imposition of severance taxes on coal mined through leased mineral rights in the ceded strip.[45] In the meantime, the Crow negotiated a new lease contract with Westmoreland for the company to pay this "tax" contractually, instead of under tribal law, in addition to its royalty fees.[46] Since 1982, Westmoreland has paid over $20 million into a federal district court escrow fund in lieu of payment of either Montana or Crow coal taxes.[47]

Tribe should institute a moratorium on coal development until more was known about it. *Id.* at 2.

In 1974, the Tribe petitioned the Secretary of the Interior to cancel the 1972 Westmoreland leases, then amounting to approximately 31,000 acres. The Tribe alleged severe mismanagement and failure of the Bureau of Indian Affairs to properly uphold its trust responsibility to the Tribe. As a result of this petition, the Tribe was able to renegotiate the terms of its Westmoreland leases (raising royalty payments from 17.5 cents per ton to approximately 40 cents per ton) and also to ensure closer scrutiny from the Secretary. *See* UNITED STATES BUREAU OF INDIAN AFFAIRS, DRAFT ENVIRONMENTAL IMPACT STATEMENT, CROW CEDED AREA COAL LEASE TRACTS II AND III WESTMORELAND RESOURCES 5-7 (1976).

43. CROW TRIB. COAL TAXATION CODE tit. I §§ 1 to 13 (1982).

44. *Crow II*, 819 F.2d at 897. For discussion of obtaining Department of the Interior approval, *see* note 41 *supra*. It is notable that neither the district court nor the court of appeals appropriately cited to either the constitution of the Crow Tribe, or the Crow Tribal ordinances which provided for taxation of Crow coal. Attorneys, as a matter of good practice, and the courts, as a matter of comity, should cite tribal codes and constitutions properly, as they would the laws of any other sovereign.

45. *Crow II*, 657 F. Supp. at 586. The Crow Tribal Council amended the Crow Tribal Constitution to take jurisdiction over the coal on the ceded strip on July 10, 1982. CROW TRIB. CONST. art. VI § X (1982).

46. *Crow II*, 657 F. Supp. at 587.

47. *Crow II*, 819 F.2d at 897. The fund continues to accumulate substantial interest while the district court deliberates its ultimate disposition. *See supra* note 2. Westmoreland Resources and the Crow Tribe continued to dispute the validity of this contractual tax after the final disposition in *Crow II*. In July, 1988, the district court dismissed Westmoreland's contention that the Tribe had failed to enact a valid tax and ordered the funds in escrow released. Crow Tribe of Indians v. Montana, No. CV 78-110-BLG slip op. at 2, 3, 8 (July 11, 1988).

The court has not yet released the funds, however, due first to a dispute between the United States and the Tribe as to the proper recipient of the funds, the United States arguing that the Tribal Coal Taxation Code calls for payment of the taxes into the United States Treasury in trust for the Tribe, and the Tribe arguing that the terms of its amended Westmoreland leases override the Tribal Coal Taxation Code and provide for direct payment to the Tribe. *See id.*, slip op. at 1 (Sept. 7, 1988).

The court subsequently ordered payment of the funds to the Treasury, and then withdrew the order for further consideration. *Id.*, slip op. at 2 (Sept. 19, 1988), slip op. at 1, 2 (Oct. 7, 1988). The issue is complicated by allegations of fraud and mismanagement that some tribal members have levied against the current Tribal Chairman. *See id.*, Amicus Curiae Brief (Sept. 12, 1988). One year after the Supreme Court's affirmance then, the funds

B. Procedural History of the Case

In 1978, the Crow Tribe brought suit against the state of Montana to challenge the imposition of state coal taxes on Crow leaseholders and Crow coal in the ceded strip. The Crow suit also sought a declaratory judgment as to the validity of state coal taxes imposed on coal produced within the boundaries of the Crow Reservation should Montana ever attempt to impose them.[48] The United States District Court for Montana dismissed the suit for failure to state a claim.[49] The Tribe appealed.

In 1981, the Ninth Circuit Court of Appeals reversed the district court and remanded the action for trial.[50] In 1985, after trial, the district court upheld Montana's tax on coal mined in the ceded strip and declined to decide whether the state could tax future coal mining within the Crow Reservation's boundaries.[51] The Tribe appealed again. In June of 1987, the Ninth Circuit Court of Appeals reviewed the case *de novo* and reversed the district court.[52] The state then appealed the Ninth Circuit's decision to the U.S. Supreme Court. On January 12, 1988, the Supreme Court affirmed the Ninth Circuit appellate court without opinion.[53]

III. Discussion

The final decision in the *Crow* taxation cases turns on the adjudication of five distinct but interrelated issues. First, the federal courts had to determine whether the Crow's mineral rights in the ceded strip were or were not part of the Crow Reservation. Second, and always an issue in state taxation of Indian activities, the courts analyzed whether federal law preempted[54] the imposition of Montana taxes on coal mined from the ceded strip. Next, the courts

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have yet to be distributed in full.

48. *Crow I*, 469 F. Supp. 154.

49. *Id.*

50. *Crow I*, 650 F.2d at 1107.

51. *Crow II*, 657 F. Supp. 573.

52. *Crow II*, 819 F.2d at 896.

53. *Crow II*, *aff'd mem.*, 108 S.Ct. 685 (1988).

54. Note that preemption analysis in federal Indian law veers substantially from the analysis used in other areas of federal law. As the Supreme Court stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980):

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.

Id. at 143.

examined whether Montana furthered a legitimate state interest in imposing coal taxes on Crow ceded strip coal. Even if legitimate, however, the state's interest yet had to overcome possible infringement of Crow tribal self-government and economic determination. Finally, the appellate court found justiciable the issue of whether Montana could tax coal mined within the boundaries of the Crow Reservation. The differing views of the district and appellate courts on each of these five issues compelled their radically different holdings.

A. The Reservation Status of Ceded Strip Mineral Rights

The district court based its decision to uphold the Montana tax to a large extent on the status of the ceded strip. While acknowledging that Congress' 1958 Act restored the mineral rights underlying the strip to the Tribe's full beneficial ownership, the district court concluded that "[t]he undisposed-of ceded minerals underlying entered land were not added to and made a part of the Crow Reservation by the 1958 Act."[55]

The district court reasoned that while the 1958 Act restored the mineral rights to the Crow, the Act could not have restored the rights to reservation status because the Crow Tribe exercises no sovereign powers over the surface of the ceded strip.[56] Instead, the state of Montana and the three Montana counties exercise all jurisdictional rights and powers over the populace and surface of the ceded strip area.[57]

Indeed, because the Tribe no longer holds title to the lands overlying the disputed coal, and because less than one percent of the strip's population is Indian, the Tribe has no traditional basis for jurisdiction over any of the *surface* of the ceded strip.[58] In finding that the Crow exercise no jurisdiction over the surface of the ceded strip, the district court relegated the Crow's interest in the ceded strip coal to simple "ownership," comparable to any other Montana coal lessor's royalty interest.[59]

This characterization of the Crow's interest in ceded strip coal

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55. *Crow II*, 657 F. Supp. at 590.

56. *Id.* The district court relied heavily on the reasoning in *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981), wherein the court of appeals lauded and published the district court's earlier opinion in *Hawkins v. Crist*, No. CV-76-99-BLG (D. Mont. 1978). In *Little Light*, quoting *Hawkins*, the court of appeals concluded that the Crow Cession Act of 1904 had effectively diminished the Crow Reservation and that the Crow Tribe had relinquished criminal jurisdiction over the ceded strip. *Little Light*, 649 F.2d at 690.

57. *Crow II*, 657 F. Supp. at 579, 592.

58. *Id.* at 579-82.

59. *Id.* at 594. *See also* note 30, *supra.*

informed the district court's selection from the myriad of precedents available in Indian taxation case-law in deciding the *Crow* case. The district court chose to invoke case law dealing with off-reservation Indian economic activity in reaching its conclusion that the state taxes were validly imposed on the Crow coal in the ceded strip.

In particular, the district court relied heavily on *Mescalero Apache Tribe v. Jones*.[60] In *Mescalero*, the U.S. Supreme Court held that the Mescalero Apache Tribe's operation of a ski resort off the reservation on national forest lands was subject to state taxation.[61] Unlike the circumstances of the *Crow* case, however, neither the IRA nor the Indian Restoration Act of 1958 restored the federal land at issue in *Mescalero* to the Mescalero Tribe. The *Crow* district court nonetheless found the *Mescalero* rationale compelling.[62]

The Supreme Court had distinguished *Mescalero* from a line of earlier state taxation cases wherein the Court rejected state taxation of on-reservation tribal economic activities.[63] Noting that the Mescalero conducted their activity off the reservation, the Supreme Court said, "[A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state."[64] The Supreme Court thus confirmed that state taxes, like other state laws, applied to off-reservation Indian activities.

The *Crow* district court's reasoning paralleled the rationale of *Mescalero*.[65] Montana's coal taxes are clearly non-discriminatory, applying equally to Indian and non-Indian coal holdings. The district court concluded that because the Crow held only a royalty interest in the ceded strip coal, Westmoreland Corporation's min-

60. 411 U.S. 145 (1973). The IRA of 1934 empowered the Mescalero Tribe to enter into leases and to act as a corporate entity. The Tribe operated a ski resort on leased federal land adjacent to the reservation. However, unlike the Crow mineral rights at issue in *Crow I* and *Crow II*, the Mescalero leasehold had been severed from the federal/tribal trust relationship, and so the resort's non-reservation status, while at the crux of *Mescalero*, was not itself an object of litigation. *Mescalero*, 411 U.S. at 146. It is notable, however, that while the Court rejected any sweeping immunity from state taxation in these circumstances, it still construed the provisions of the IRA to preclude state taxation of "land or rights" acquired by a tribe pursuant to the purposes of the IRA. *Id.* at 155. In keeping with this concept, then, the Court allowed the state's corporate income tax to stand, but rejected any state taxation of the personalty attached to the leased land (lifts, lodges etc.). *Id.* at 158.

61. 411 U.S. at 158.

62. *Crow II*, 657 F. Supp. at 591.

63. *Mescalero*, 411 U.S. at 148.

64. *Id.* at 148-49.

65. *Crow II*, 657 F. Supp. at 591 (quoting *Mescalero*, 411 U.S. at 148-49).

ing of Crow coal was, like the *Mescalero* ski resort, an off-reservation activity.[66] The district court reasoned, then, that absent federal law to the contrary, the Crow coal in the ceded strip was subject to Montana's taxes.[67]

In reversing the district court's conclusion about the reservation status of the ceded strip coal, the Ninth Circuit Court of Appeals referred to its earlier opinion remanding the case for trial.[68] In that case, *Crow I*, the court of appeals had unequivocally declared that "the underlying minerals are a 'component of the *reservation land itself.*' "[69] The court of appeals had based this conclusion on the 1958 Indian Restoration Act, which "restored to reservation status all lands returned to tribal ownership under the Act."[70] Apparently the *Crow I* court equated returned mineral rights with returned "lands" in the Indian Restoration Act. Thus, by extension, the *Crow I* court of appeals had decided that when the Indian Restoration Act returned ceded strip mineral rights to Crow tribal ownership, the Act also restored those rights to the reservation.

By tracing the history of the ceded strip mineral rights, the *Crow II* appeals court sought to correct the district court's misconception of the effect of *surface* jurisdiction on the status of the mineral interests which lie below the surface.[71] The court of appeals in *Crow II* did not fully address each of the district court's findings and conclusions regarding the status of the ceded strip mineral rights, but instead emphasized the critical distinction between above-surface state and county rights and below-surface tribal rights. The appellate decisions make clear that despite the Crow's compelled cession of the strip in 1904, the Crow Tribe never lost sovereign interest in the subsurface minerals.[72]

The terms of the 1904 Cession Act dictated that the federal

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66. *Crow II*, 657 F. Supp. at 591. Illustrating the crucial importance of the ceded strip's on or off reservation status, *Mescalero*, which the *Crow* district court found so compelling, states:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n* . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Mescalero, 411 U.S. at 148.

67. *Crow II*, 657 F. Supp. at 591.

68. *Crow II*, 819 F.2d at 898.

69. *Id.* (quoting *Crow I*, 650 F.2d at 1117) (emphasis added).

70. *Id.*

71. *Id.* at 898 n.1.

72. *Id.* at 898; *Crow I*, 650 F.2d at 1117.

government would hold all ceded lands and rights in trust for the Crow until such time as the federal government actually sold the lands or rights and paid the Tribe for the sale.[73] Transfers in fee made pursuant to the 1904 Cession Act not only transferred land title to non-Indians, but also replaced tribal jurisdiction with state jurisdiction over such lands.[74] As a result, and as the district court observed, Montana and three counties now exercise full jurisdiction over the *surface* of the ceded strip, and the Crow Tribe retains no jurisdictional rights to the surface.[75]

Between the enactment of the 1904 Cession Act and the 1934 IRA, however, the federal government did not sell the underlying mineral rights.[76] Because the Crow declined to come under the terms of the 1934 IRA, the federal government retained these unsold subsurface mineral rights in trust for the Crow for twenty-four years until the passage of the Indian Restoration Act.[77] When Congress passed the Indian Restoration Act of 1958, it required the Crow to accept the lands and mineral rights declined in 1934.[78] At no time, then, did the federal government ever transfer title to the mineral rights to non-Indians or transfer sovereign jurisdiction over the mineral rights from the Tribe to the state of Montana.[79]

Instead, the federal government continuously held the ceded strip mineral rights in beneficial trust for the Tribe. Similarly, the federal government holds most Crow reservation lands in beneficial trust for either individual Indians or the Tribe.[80] The only remaining issue concerning the status of the mineral rights in the ceded strip was how the federal government defined Crow subsurface mineral rights. Were the mineral rights part and parcel of the

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73. *Crow II*, 819 F.2d at 896-97. *See also* CANBY, *supra* note 14 at 19-22.

74. *Crow II*, 819 F.2d at 896, 900.

75. *Crow II*, 657 F. Supp. at 576; *see Little Light*, 649 F.2d 682.

76. *Crow II*, 819 F.2d at 897.

77. *Id.*

78. *Id.*

79. *Crow II*, 819 F.2d at 898 (citing the Indian Restoration Act of May 19, 1958, 7 Pub. L. No. 85-420, § 2, 72 Stat. 121 (1958)).

80. The Crow Tribe holds its reservation lands subject to the 1851 Treaty of Fort Laramie, 11 Stat. 749 (1851), modified by the 1868 Treaty of Fort Laramie, 15 Stat. 649 (1868). The treaties set the Crow Reservation apart for the use and occupation of the Tribe. *Id.*, 1868 Treaty at 650. When a treaty creates a reservation, the United States holds Indian title in fee subject to the tribe's sole right to occupy the land and enjoy its beneficial use. *See* D. GETCHES AND C. WILKINSON, FEDERAL INDIAN LAW 161-94 (2d ed. 1986). United States Supreme Court Chief Justice John Marshall first developed this distinction between fee title and a right of occupancy in three seminal opinions which remain central to an understanding of federal Indian law. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 580 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831).

Tribe's other reserved rights in their reservation lands, or were the mineral rights somehow separate from these other reserved rights? The Ninth Circuit Court of Appeals turned to the explicit language of the 1958 Indian Restoration Act to answer this issue. The Act states, "Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, *and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.*"[81] According to these explicit terms, Congress must have restored the Crow's rights to the minerals in the strip, the Court of Appeals concluded, as "a component of the reservation land itself."[82] Just as with the Crow's rights to reservation lands, federal law reserved mineral rights to the Crow and mandated that the federal government hold the mineral rights in beneficial trust for the Tribe. Just as the Tribe retained sovereign jurisdiction over the surface of its reserved lands, the Tribe retained sovereign jurisdiction to tax the subsurface of the ceded strip.[83] The ceded strip mineral rights are, therefore, part and parcel of the Crow reservation, and the law governing off-reservation tribal activity is irrelevant.

B. Preemption Analysis

Having found that the Crow mineral rights underlying the ceded strip are a component of the reservation, the *Crow* appellate court reviewed the district court's preemption analysis. The district court, in concluding that the Crow mineral rights underlying the strip were *not* a component of the reservation, placed its decision within the ambit of *Mescalero Apache Tribe v. Jones*,[84] and hence within the Supreme Court's off-reservation preemption analysis. *Mescalero* clearly stated that off-reservation tribal economic activity presents courts with "different considerations" than on-reservation economic activity.[85] State taxes will generally be appli-

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81. *Crow II*, 819 F.2d at 898 (quoting the Indian Restoration Act of 1958, 7 Pub. L. No. 85-420, § 2, 72 Stat. 121 (1958)(emphasis added)).

82. *Crow I*, 650 F.2d at 1117; *Crow II*, 819 F.2d at 898 (quoting *Crow I*, 650 F.2d at 1117).

83. *Crow II*, 819 F.2d at 902; *cf. Crow I*, 657 F. Supp. at 591-92 (Tribe has no jurisdiction to tax on the ceded strip).

84. *Crow II*, 657 F. Supp. at 591 (citing *Mescalero*, 411 U.S. at 148-49).

85. *Mescalero*, 411 U.S. at 148. The Court noted that in respect to the on or off reservation analysis:

> Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia* has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government.

cable to *off*-reservation tribal economic activity "[a]bsent express federal law to the contrary."[86] The Ninth Circuit Court of Appeals, however, concluded that *Mescalero* did not apply to the *Crow* facts, stating, "[t]he [district] court erred in these findings and in the conclusions of law."[87] First, *Mescalero* addressed taxation of off-reservation tribal activities. The appellate court had concluded, however, that Westmoreland had leased mineral rights which were part of the reservation. Second, the off-reservation land in *Mescalero* was federal forest land and was not held in trust for the use of the Apache Tribe.[88] In *Crow*, however, the federal government had at all times held Crow mineral rights in trust for the Tribe.

Whether Westmoreland's mining of Crow coal was an on or off-reservation activity became a critical distinction for the district and appellate courts' different preemption analyses. Both courts turned to *White Mountain Apache Tribe v. Bracker*[89] for the unique federal preemption standards the Supreme Court has developed for federal Indian law.[90] In *Bracker*, the Court invalidated a motor vehicle gross receipts tax Arizona had imposed on non-Indian contract loggers operating on reservation land.[91] In holding that federal law preempted state taxation in *Bracker*, the Supreme Court emphasized reservation boundaries as the basis of its decision.[92] By crossing reservation boundaries, imposition of the state tax in *Bracker* impermissibly conflicted with federal law.[93]

The *Crow* district court relied heavily on this geographical component of the *Bracker* analysis. Citing *Bracker*, the district court reasoned:

> [T]here is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-

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Id. (citations omitted).

86. *Id.*

87. *Crow II*, 819 F.2d at 898.

88. *Mescalero*, 411 U.S. at 146-47.

89. 448 U.S. 136.

90. *Id.* at 151-52.

91. *Id.* at 138. Had Arizona attempted to tax on-reservation activities involving only Indians, the case would probably have fallen under the rules stated in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959); wherein state intrusion onto the reservation is preempted by federal law (*Warren*), precluded by principles of self-government (*Williams*), and viewed against the "backdrop of tribal sovereignty" (*McClanahan*, 411 U.S. at 172). Because the activity subjected to taxation in *Bracker* was conducted on the reservation by *non*-Indians, the *Bracker* Court balanced the state's interest in imposing the tax against the Tribe's interest in self-government and the federal government's interest in the Tribe as expressed by Congress. *Bracker*, 448 U.S. at 151-53.

92. *Bracker*, 448 U.S. at 151.

93. *Id.* at 153.

emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.[94]

Because the district court had found that Crow ceded-strip mineral rights were off the reservation, the court concluded that the state tax was valid unless federal legislation "expressly" barred its imposition.[95]

The *Crow II* appeals court, on the other hand, rejected any requirement for express federal preemption because it had already declared Crow ceded-strip minerals a "component" of the reservation.[96] The appeals court therefore applied the preemption standard the Supreme Court had elucidated in *Bracker* for on-reservation activities, stating that: "No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the *purpose* or *operation* of a federal statute, regulation, or policy."[97] Thus, under the preemption standard developed by the Supreme Court, the appeals court investigated not express federal preemption, but a possible conflict between Montana's coal severance tax and federal policies and purposes.[98] This unique preemption analysis, applying only to federal Indian law,[99] required

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94. *Crow II*, 657 F. Supp. at 592 (quoting *Bracker*, 448 U.S. at 151).

95. *Id.* at 591.

96. *Crow II*, 819 F.2d at 898.

97. *Id.* (quoting *Crow I*, 650 F.2d at 1109). The Supreme Court in *Bracker*, holding that federal law preempted Arizona's tax, stated:

> In a variety of ways, the assessment of state taxes would obstruct federal policies. . . . At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . ." Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe. . . . That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs."

Bracker, 448 U.S. at 148-49 (quoting *Mescalaro*, 411 U.S. at 151) (citations omitted).

98. *Crow II*, 819 F.2d at 898.

99. *Bracker*, 448 U.S. at 145. While federal regulation in *Bracker* did "occupy the field," the Supreme Court nonetheless used standards unique to Indian law in holding that federal law preempted Arizona's taxes:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. 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, an inquiry designed to determine whether . . . the exercise of state authority would violate federal law.

Id. at 144-45; *see* note 90, *supra*, for the leading cases developing standards of federal preemption in Indian taxation. It is notable that Montana, which had defended its coal severance tax with such success in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981),

the court's "particularized inquiry"[100] into federal policy and intent.[101]

The *Crow* appeals court identified the Indian Mineral Leasing Act of 1938 as a possible source for federal policies or purposes conflicting with Montana's coal taxes.[102] The purpose of that Act, the *Crow* appeals court said, was to "revitalize tribal governments" and to "promote tribal economic development."[103] To help accomplish these goals, Congress intended the Act to maximize tribal revenue from mineral leases.[104] The appeals court thus concluded that if Montana's coal taxes interfered with the Tribe's ability to maximize its coal's economic benefit, federal policies would pre-

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again attempted to utilize concepts of federal preemption in *Crow I*. The Ninth Circuit Court of Appeals, however, declined to accept Montana's argument, explaining by implication the difference between federal/state preemption issues and principles of preemption as developed in Indian law:

> In that case, [*Commonwealth Edison*] in the context of a challenge to the Montana coal severance tax as a burden on interstate commerce, the Court upheld the tax against the challenge that it is not fairly related to the services provided by the state. The Court stated that wide latitude is afforded the states under the Due Process Clause in imposing taxes upon particular activities. . . . Completely different considerations are implicated in the case before us. Our task is to determine the limits of state power to tax Indian tribes, Indian-related activities and Indian trust property. Different congressional acts are at issue. . . . We do not find *Commonwealth Edison* to control this case as suggested by appellees.

Crow I, 665 F.2d at 1391. In essence then, the "wide latitude" that courts will afford states when only state/federal preemption issues are present narrows dramatically when "Indian-related activities" enter the field. The preemption interest of the federal government is then analyzed from the much broader perspective of congressional intent relative to the welfare of the affected Indians, and to the maintenance of a cohesive federal Indian policy. Thus, the states often find the tables reversed in issues of Indian taxation, Congress' intentions receiving "wide latitude," and the states' interests receiving a stricter scrutiny.

100. *Bracker*, 448 U.S. at 145.

101. In *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982), the Supreme Court rejected the Solicitor General's proposed *presumption* against state taxation where "on-reservation activities involving a resident tribe" were at stake. *Id.* at 845. The Court rejected this presumption because, though such a standard would simplify litigation, the current standards for Indian preemption analysis "allow for more flexible consideration of the federal, state, and tribal interests at issue." *Id.* at 846. Quoting *Bracker*, the Court said "federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence.' " *Id.* (quoting *Bracker*, 448 U.S. at 144). The Court expressed "disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area," and demanded compliance from lower courts in the future. *Id.*

102. *Crow II*, 819 F.2d at 898.

103. *Id.*

104. *Id. See Blackfeet Tribe*, 471 U.S. 759, where the Court noted that "the legislative history [of the Indian Mineral Leasing Act of 1938] suggests that Congress intended . . . to ensure that Indians receive 'the greatest return from their property.' " *Id.* at 767 n. 5 (quoting S. REP. No. 2; H.R. REP. No. 1872, 75th Cong., 3d Sess., 1 (1938)).

empt the taxes.[105]

Because of recent developments in the law, the effect of the state taxes on Crow coal revenues was not the only factor the court of appeals considered in its preemption analysis. Until the late 1970s, the Supreme Court maintained strong barriers to taxation of on-reservation activities.[106] Generally, in the absence of Congressional authorization to the contrary, federal law preempted state taxation on reservations.[107] However, a recent line of Supreme Court cases[108] has expanded Indian federal preemption analysis to include in certain instances a balancing of state interest in taxation against a tribal and federal interest in immunity from state taxation. Thus, where a state demonstrates a strong interest in asserting its taxing authority over the reservation, its tax may survive federal preemption.[109]

In *Washington v. Confederated Tribes of the Colville Reservation*,[110] for example, the Court held that the state's "legitimate interest" in taxing sales of cigarettes to non-tribal members on the reservation predominated over the Tribes' interest in economic development.[111] The Tribes had sought to bolster their economy through the imposition of their own tax on cigarette sales to members and non-members.[112] Because the Colville Tribes did not themselves produce the cigarettes they sold,[113] the Court said, the Tribes were merely marketing a state tax exemption to non-members.[114] Thus the Court permitted Washington to impose its tax on non-members of the Tribes.[115]

State regulations, however, have yet to survive the *Colville* balancing test when a tribe generates the economic activity from its own reservation resources.[116] Thus, in *California v. Cabazon Band of Mission Indians*,[117] federal policy preempted state regulation of bingo games because the Band itself operated the games on

105. *Crow I*, 650 F.2d at 1113; *Crow II*, 819 F.2d at 898.

106. *See supra* note 91 for the leading cases.

107. *Id.*

108. *Colville*, 447 U.S. 134; *Cabazon*, 480 U.S. 202; *see* Fredericks, *State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, a Judicial Sword Through the Heart of Tribal Self-Determination*, this issue.

109. *Crow II*, 819 F.2d at 896.

110. 447 U.S. 134 (1980).

111. *Id.* at 156-57.

112. *Colville*, 447 U.S. at 154.

113. *Id.* at 155.

114. *Colville*, 447 U.S. at 155.

115. *Id.* at 159.

116. *See Bracker*, 448 U.S. 136; *Ramah Navaho School Bd.*, 458 U.S. 832; *Cabazon*, 480 U.S. 202.

117. 480 U.S. 202 (1987).

the reservation.[118] The Supreme Court reasserted in *Cabazon* that where a tribe or band itself generates the economic activity, "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak."[119] In light of *Colville* and *Cabazon*, the *Crow* court of appeals could uphold Montana's taxation of Crow coal only if the state's interest in taxation was very strong and the Tribe's claim to tax immunity correspondingly weak. Relying on its investigation of the congressional intent behind the 1938 Mineral Leasing Act, the *Crow* appeals court characterized the Crow interest at stake as that of tribal economic development based on reservation resources.[120]

C. Tribal Interest in Economic Development

The district court in *Crow* found, after trial, that imposing Montana's taxes on Westmoreland's mining of Crow coal in the ceded strip did not interfere with Crow economic interests.[121] In its first opinion, the district court had noted that the state taxed only Westmoreland, which in turn passed the tax on to consumers.[122] Thus, the court reasoned, the state tax never reached the Crow Tribe.[123] In addition, the district court had held that because the state could not attach Crow lands or mineral rights in the event of a Westmoreland default in tax payments, the state tax simply could not affect the Crow Tribe.[124] Most importantly, after trial, the district court found that Montana's coal taxes neither depressed Crow coal royalties nor reduced the Crow share of the coal market.[125] While the coal taxes might be a "factor" in the negotiation of Crow coal leases, other factors "overshadowed" the effect of the taxes.[126] The district court pointed out that national and even worldwide trends in energy production and demand had depressed coal pricing and marketing.[127] Additionally, Montana's remoteness from coal markets and the high cost of transportation exacerbated those poor market trends.[128] Finally, the district court criticized

118. *Id.* at 215 n.17.
119. *Id.*
120. *Crow II*, 819 F.2d at 898.
121. *Crow II*, 657 F. Supp. at 595.
122. *Crow I*, 469 F. Supp. at 159.
123. *Id.* at 160.
124. *Id.* at 165.
125. *Crow II*, 657 F. Supp. at 592.
126. *Id.*
127. *Id.*
128. *Id.* at 588.

the Tribe's own coal marketing strategies.[129] If anything adversely affected the Crow's ability to maximize coal revenues, the district court concluded, it was these other factors, and not the state's coal taxes.[130]

In reviewing the lower court's decision *de novo*, the *Crow* appeals court rejected both the district court's findings of fact and its conclusions of law.[131] Not only could Montana's severance taxes adversely affect Crow coal revenue, the appeals court decided, but they had in fact done so.[132] As a first step in reaching this decision, the court of appeals noted that in enacting the coal taxes, the Montana legislature intended to appropriate a fixed percentage of coal resource benefits for the state.[133] Montana's tax statutes revealed the legislature's conclusion that coal "is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes."[134] Clearly the legislature had analyzed the amount of economic rents coal production could carry with the intent of appropriating a portion of those rents for the benefit of the state.[135] In levying a thirty percent tax on Westmoreland's mining of Crow coal, the state had appropriated the maximum possible economic rents from Crow coal production.[136] The appeals court concluded that such a calculated state appropriation of available economic rents must inevitably preclude the Crow Tribe from maximizing economic benefit from its mineral leases.[137] The appeals court therefore held that imposition of Montana's taxes on Crow coal frustrated the intent of the 1938 Mineral Leasing Act, namely to maximize tribal revenues from mineral leases.[138]

As long as the state appropriated thirty percent of the coal's economic rents,[139] the appellate court reasoned, the Crow Tribe had no economic room to negotiate higher royalties nor impose its

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129. *Id.*

130. *Id.* at 592.

131. *Crow II*, 819 F.2d at 898.

132. *Id.* at 899.

133. *Id.* at 901.

134. *Crow II*, 819 F.2d at 902 (quoting MONT. CODE ANN. § 15-35-101(1)(e) (1985)). The Ninth Circuit Court of Appeals in *Crow I* defined economic rents as "the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12.

135. *Crow II*, 819 F.2d at 902.

136. *Id.* (quoting *Crow I*, 650 F.2d at 1113); *see also* MONT. CODE ANN. § 15-35-101(e) (1985).

137. *Crow II*, 819 F.2d at 899, 902-03.

138. *Id.* at 898, 900, 903.

139. *Id.* at 902 (quoting *Crow I*, 650 F.2d at 1113).

own severance tax on its coal.[140] Were the Crow to raise the cost of coal by raising its price or by adding its own tax to production, the Tribe could no longer compete with either Montana or Wyoming coal mines.[141] Indeed, the appeals court found that the state taxes had already depressed and "interfered" with Crow coal marketability.[142] Relying on an economic study cited by the Tribe,[143] the appeals court found that Montana's coal taxes had caused a shift in coal market demand from Montana to Wyoming, resulting in a twenty-two percent decline in Montana coal production.[144] Since enactment of the taxes, Crow coal production had fallen from over seven percent of the state's total to less than three percent.[145] Subsequent to Montana taxation, Wyoming coal production had risen over twenty-five percent, and the Crow Tribe could not effectively compete.[146] Based on these findings, the appeals court concluded that Montana's coal taxes had impinged on the Crow Tribe's economic interests.[147]

As the Supreme Court asserted in *Colville*, a tribe's mere economic interest will not trigger federal preemption of a state tax.[148] The appeals court distinguished *Crow Tribe* from *Colville*, however, by deciding that the Crow Tribe's economic interest in its coal was strong.[149] First—unlike the *Colville* Tribes, but like the *Cabazon* Band—the Crow Tribe generated revenue from its own reservation resources.[150] Second, the federal policy as found in the Indian Mineral Leasing Act of maximizing Indian revenues from mineral leases bolstered the Crow's asserted economic interest.[151] These two factors combined to form the strong tribal interest which the appeals court then balanced against the state's interest

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140. *Crow II*, 819 F.2d at 902. "By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the [coal's] economic rent." *Id.* (quoting *Crow I*, 650 F.2d at 1113).

141. *Id.* at 899-900.

142. *Id.* at 900. The appeals court explained:

> As long as the taxes "interfere[] or [are] incompatible with federal and tribal interests reflected in federal law," they are deemed preempted "unless the state interests at stake are sufficient to justify the assertion of state authority." Any finding of interference, then, would be enough to subject the state taxes to preemption. This record shows interference.

Id. (citations omitted).

143. *Id.* (citing "the NERA Report").

144. *Id.* at 899.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Colville*, 447 U.S. at 154-55.

149. *Crow II*, 819 F.2d at 899.

150. *Id.*

151. *Id.* at 898-99.

in imposing its coal taxes.[152]

D. Montana's Legitimate Interests

The Ninth Circuit Court of Appeals recognized that Montana has some legitimate state interest in taxing Crow coal.[153] However, the court of appeals also made clear that the state's interest would not overcome the Tribe's own interest in economic revitalization without a more narrowly tailored tax scheme.[154]

In analyzing what constitutes a legitimate interest, the appeals court examined the impact of the Westmoreland mining operation on the ceded strip and identified two clear state interests.[155] First, the mining operation created an increased demand for state government services because of the influx of employees and service companies required by the mining activity.[156] Second, the court of appeals noted that the mining operation created increased costs to state government because of the pollution and solid waste disposal problems consequent to mining operations.[157] The appeals court rejected, however, the district court's finding that these increased state government costs necessitated imposition of the state coal taxes.[158] Citing the Crow-commissioned study as "hard evidence" of Westmoreland's mining impact on government and the ceded strip,[159] the appeals court found that though coal mining on the strip had increased government costs by $38 million from 1972 to 1982, state, local and excise taxes "*other than the coal taxes*, provided state and local government with $42 million."[160] The state did not require coal taxes, then, to meet the increased costs generated by the Crow coal leases.

The district court had justified imposition of the coal taxes not only on the present costs of coal mining to the state, but also on the future costs.[161] The district court explained that the legisla-

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152. *Id.* at 898, 900.

153. *Id.* at 901. The court noted, however, that, " 'It is unnecessary to rebalance [the state, federal, and tribal] . . . interests in every case.' The Supreme Court has increased the presumption against finding legitimate state interests. Hence, even if we agree . . . that Montana taxes support legitimate interests . . . [they] may no longer be sufficient." *Id.* (quoting *Cabazon*, 480 U.S. at 215 n.17).

154. *Id.* at 903.

155. *Id.* at 900.

156. *Id.*

157. *Id.*

158. *Id.* at 901.

159. *Id.* Because the court of appeals reviewed the case *de novo*, the court was able to consider substantial evidence not utilized by the court below.

160. *Id.*

161. *Crow II*, 657 F. Supp. at 581-83.

ture's purpose in enacting the tax was to anticipate and provide for future and unknown costs resulting from the resource extraction.[162] The appeals court, however, said that such future costs were too speculative a foundation on which to base a tax of Crow coal.[163] The appeals court also noted that the bonding and reclamation fees required by the Surface Mining Control and Reclamation Act of 1977[164] already provided for some of the state's concerns about pollution control and unknown future costs.[165]

Finally, while the district court had found that Montana had "narrowly tailored" its tax to its legitimate interests,[166] the appeals court vigorously disagreed.[167] The appeals court noted that the legislature earmarked fifty percent of the coal severance tax for the Coal Tax Trust Fund.[168] Montana has not dedicated that fund to either reclamation or coal-related services.[169] Indeed, of the total tax collected, only about nine percent went to coal-related expenses in 1981, as opposed to the thirty-one percent dedicated to those expenses when the legislature first enacted the tax.[170] The court of appeals found, then, that the state coal severance tax was at best distantly related to coal-related services, and was not "narrowly tailored" to a legitimate state interest.[171] Under this "narrowly tailored" standard, first indicated in *Colville*,[172] the state's

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162. *Id.* at 584.
163. *Crow II*, 819 F.2d at 901.
164. 30 U.S.C. §§ 1201-1328 (1982).
165. *Crow II*, 819 F.2d at 901.
166. *Crow II*, 657 F. Supp. at 592-93.
167. *Crow II*, 819 F.2d at 901.
168. *Id.* (citing MONT. CODE ANN. § 15-35-108(1) (1985)).
169. *Crow II*, 819 F.2d at 901.
170. *Id.*
171. *Id.* at 901-02.
172. *Colville*, 447 U.S. at 163. The development of this standard from the "tailored" language first enunciated in *Colville* to the "narrowly tailored to legitimate state interests" standard of *Crow II* is remarkable. *Colville* is often cited for its chilling effect on tribal revenue generation. *See* Fredericks, *supra* note 105. The "narrowly tailored" standard that has grown from *Colville*, however, suggests that at least where non-tribal activities overlap the geographic boundaries of a reservation and yet are generated from on-reservation tribal resources, the presumption against state taxation is almost total. Compare this standard with the much looser "fairly related" standards applied to the imposition of Montana's coal severance tax on coal producers announced in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614-17 (1981). *See supra* note 99.

The Supreme Court has recently heard oral argument in *Cotton Petroleum v. New Mexico*, 106 N.M. 511, 745 P.2d 1159 (N.M. 1987); 106 N.M. 517, 745 P.2d 1170 (N.M.App. 1987); *prob. juris. noted*, 108 S.Ct. 1466 (1988), a case that shares striking similarities to the *Crow* case. In *Cotton Petroleum*, the New Mexico Supreme Court upheld a state severance tax imposed on on-reservation non-Indian oil producers. The Jicarilla Apache Tribe leased *on-reservation* oil and gas rights under the 1938 IMLA to Cotton Petroleum. New Mexico levied its oil and gas severance tax on Cotton Petroleum, much as Montana levied its coal

interest in taxing Crow coal did not outweigh the Tribe's interest in economic development based on coal revenue.[173]

The court of appeals noted in conclusion that the Supreme Court's 1987 *Cabazon* ruling "increased the presumption against finding legitimate state interests."[174] The appellate court thus rejected the imposition of Montana's taxes on Crow-ceded strip coal because of the federal policy to maximize tribal revenues and because the state had failed to establish that it tailored its taxes narrowly to meet the state's legitimate interests.[175]

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severance tax on Westmoreland Resources.

Unlike *Crow*, however, the Jicarilla Apache Tribe did not bring suit to attack the validity of the taxes. Rather, Cotton Petroleum, which is also subject to a tribal severance tax, brought suit against the state on the basis that the state's tax was both a burden on interstate commerce, as in *Commonwealth Edison*, and that in the absence of an ability to apply the *Complete Auto Transit* test utilized in *Commonwealth Edison*, the court should properly consider the value of the services the state provides Cotton Petroleum on the reservation in contrast to the amount of taxes that Cotton Petroleum pays the state. Cotton Petroleum claimed that New Mexico's taxes were not "fairly related" to the services the state provided the taxpayer. This argument failed utterly in *Commonwealth Edison*, and the New Mexico court properly rejected it. However, the court did consider the state's argument, based on preemption principles elucidated in *Bracker* and *Ramah*, compelling. The court found, much as the *Crow* district court did, that New Mexico's tax incidence fell, not on the Tribe, but on Cotton Petroleum. The court also held that the tax did not significantly impact the Tribe.

The argument that Montana attempted to put forth in *Crow I* echoes, in part, Cotton Petroleum's "fairly related" argument, and, in part, New Mexico's argument that the Tribe was not burdened by the tax imposed. The Ninth Circuit Court of Appeals expressly refused to apply either the *Commonwealth Edison* tests or a pure economic impact analysis in *Crow*. *See supra* note 99.

Clearly, had the Tribe itself brought suit in *Cotton Petroleum*, the results in the lower court might have been much different. The only proper result of the case should be to follow the precedent developed in *Crow*, and to insist that New Mexico narrowly tailor its tax to meet its legitimate interests. The economic impact analysis of *Colville* is best left behind as an anomaly in the case law. Just as the Supreme Court noted in *Commonwealth Edison*, to base a state tax's constitutionality on its economic impact would be to invite challenge after challenge to the tax's validity as economic climates change. It should be just as obvious that the validity of a state tax imposed on on-reservation economic activity cannot be measured by its economic impact on a tribe, both because courts are ill-equipped to perform such an analysis, and because tribal economies are just as volatile, if not more so, than are the states'. The Crow Tribe made a convincing argument that *any* state taxation of on-reservation activities would not only impact the Tribe's ability to govern itself, it would also frustrate the firm federal policy of tribal economic self-determination.

The *Commonwealth Edison* criteria have no place in issues surrounding federal-tribal preemption. If the Supreme Court upholds New Mexico's tax on Cotton Petroleum's on-reservation leaseholds, it will mark a dangerous departure from traditional principles of Indian sovereignty and will mark a new era of state intrusion into the reservation.

173. *Crow II*, 819 F.2d at 902-03.

174. *Id.* at 901.

175. *Id.* at 903.

E. Tribal Self-Government as an Independent Barrier to Taxation

Principles of tribal sovereignty have informed U.S. Supreme Court decisions in Indian affairs since *Worcester v. Georgia* in 1832.[176] In the past decade, the Supreme Court has modified those principles, departing from the rigid geographic and sovereign political boundaries described by Justice Marshall in *Worcester*. In *Worcester* Justice Marshall had declared that "[t]he Cherokee Nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[177] In *Colville*, the Supreme Court imposed a balancing test to determine whether state taxation impermissibly infringed on tribal self-government.[178] This balancing test must be "assessed against . . . traditional notions of Indian sovereignty."[179]

The *Crow* district court had held that Montana's tax did not impinge on tribal self-government.[180] The court reached this holding because it had concluded that the ceded strip was not part of the reservation, and that, therefore, the Crow Tribe could not exercise any attributes of self-government over its "ceded" coal.[181] The court of appeals reversed, however, implying that "because the minerals underlying the ceded area are owned by the Tribe and are considered part of the Crow Reservation,"[182] the Tribe can exercise not only proprietary rights, but also sovereign powers of government over those minerals.[183] The most notable sovereign power the Crow Tribe sought to exercise was that of imposing its own tribal severance tax on the ceded strip coal.[184] The appeals court found

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176. 31 U.S. (6 Pet.) 515 (1832). *See also McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), *and Cherokee Nation*, 30 U.S. (5 Pet.) 1, 48 (1831), for the seminal cases on tribal sovereignty.

177. *Worcester*, 31 U.S. (6 Pet.) at 561.

178. *Colville*, 447 U.S. at 161.

179. *Crow II*, 819 F.2d at 902 (quoting *Mescalero*, 462 U.S. at 334).

180. *Crow II*, 657 F. Supp. at 593.

181. *Id.*

182. *Crow II*, 819 F.2d at 902 (citing *Crow I*, 650 F.2d at 1117, where the court of appeals had held that the minerals underlying the ceded strip are "a component of the reservation").

183. *Crow II*, 819 F.2d at 902.

184. *See* CROW TRIB. COAL TAXATION CODE tit. I § 4 (1982) which states:

Coal Mining Tax.

(a) A person engaged in or carrying on the business of coal mining, or engaged in the business of working or operating a coal mine or coal mining property from which marketable or merchantable coal of any kind is severed or produced by means of strip coal mining, or underground mining, whether the person carries on the operations as owner, lessee, trustee, possessor, receiver or in any other capacity, must for the year this code becomes effective and each year thereafter, pay to

that Montana's tax prevented the Crow Tribe from reaping the full economic benefit from its coal, including tribal tax revenues.[185] Not only did state taxes impermissibly contravene the federal policy of maximizing tribal economic benefit, but they also impinged impermissibly on the Crow Tribe's ability to self-govern.[186] The sovereign power to tax coal mining and the tribal government functions supported by such taxes are intrinsic to Crow self-government.[187] The imperative for tribal self-government operates as an "independent barrier to state regulation,"[188] the Ninth Circuit Court of Appeals noted. The appellate court therefore held that even were Montana's taxes narrowly tailored to legitimate state interests, the state taxes on Crow coal would be "invalid because [they] erode the Tribe's sovereign authority."[189]

As a necessary corollary of its holding that Montana could not tax ceded strip coal, the court of appeals also held that the state could not tax future coal mining within Crow Reservation boundaries.[190]

IV. ANALYSIS

Montana has defended its imposition of coal taxes on Crow tribal coal during an era of state economic decline.[191] Undoubtedly the state coveted the $20 million Westmoreland deposited in the district court escrow account as state revenues declined and the legislature steeled itself to slash state budgets. Unfortunately, while Montana fought a losing battle to secure the Crow Tribe's share of coal taxes, the state may have imperilled its continued ability to impose coal taxes on all other Montana coal resources. The *Crow* cases were not the first assault on the validity of Montana coal taxes, and they will not be the last.

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the Treasury for the use and benefit of the Crow Tribe of Indians, a tax for engaging in and carrying on the operations described above. Said tax shall be assessed in accordance with Section Six (6) below.

(b) Said tax will be imposed on each ton of marketable or merchantable coal beneficially owned by the Crow Tribe wherever located and all coal severed within the boundaries of the Crow Indian Reservation which is severed or produced by means of strip coal mining or underground mining by an operator.

Id.

185. *Crow II*, 819 F.2d at 900.

186. *Id.* at 902-03.

187. *Id.* at 902.

188. *Id.* (citing *Bracker*, 448 U.S. at 142-43).

189. *Crow II*, 819 F.2d at 903.

190. *Id.* at 903.

191. *Commonwealth Edison*, 189 Mont. 191, 615 P.2d 847 (1980), *aff'd*, 453 U.S. 609 (1981).

In 1981, coal companies challenged Montana's coal taxes in *Commonwealth Edison Co. v. Montana*.[192] In that case the Supreme Court upheld Montana's coal taxes as nondiscriminatory and fairly related to state interests.[193] The *Commonwealth Edison* Court observed, however, that Montana's coal taxes remained valid only in the absence of federal legislation preempting them.[194] After *Commonwealth Edison*, then, Montana was put on notice of at least one ground on which its coal taxes were vulnerable to attack. Responding to the state's failure to demonstrate sufficient state interest in its taxes, Congress, exercising its plenary commerce powers, could instantly invalidate the taxes.

In striking down Montana's taxes on Crow coal, the court of appeals found Montana's interest uncompelling. Other taxes and fees, the *Crow* court found, already protected Montana against present and future impacts of coal mining.[195] The court did not examine, however, a primary legislative intent in establishing the coal severance tax and the Coal Tax Trust Fund. The legislature intended the Trust Fund as a legacy to the future when Montana's coal resources are mined out and Montanans must find an alternative to resource extraction as an economic base.[196] The coal taxes, therefore, meet not only the direct effects of coal mining, but also provide a fund for the indirect effects Montanans will face when natural resource extraction can no longer sustain an important segment of Montana's economy.[197]

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192. 453 U.S. 609 (1981).

193. *Id.* at 614, 620, 629.

194. 453 U.S. at 608 (White, J., concurring). Justice White said, "The constitutional authority and the machinery to thwart efforts such as those of Montana, if thought unacceptable, are available to Congress, and surely Montana and other similarly situated states do not have the political power to impose their will on the rest of the country." *Id.* The Crow and the state of Montana are thus in a strikingly similar position, each subject to immediate Congressional action, and neither possessing the clout to defend against such action.

195. *Crow II*, 819 F.2d at 901.

196. *Crow II*, 657 F. Supp. at 585. *See* MONT. CONST. art. IX, § 5; *see also Commonwealth Edison v. Montana*, 189 Mont. 191, 196, 615 P.2d 847, 850 (1980).

197. Montana Supreme Court Justice John Sheehy, writing for the court in *Commonwealth Edison*, 189 Mont. 191, 615 P.2d 847 (1980), explained the history of Montana's Coal Severance Tax and Trust Fund in light of the state's experience:

> Montana's experience had shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent. For these and other reasons, when strip coal mining was beginning to burgeon, in 1975, the legislature moved to fix a tax that would provide both for the present and the future when the coal deposits were gone.

The Crow Tribe, of course, also shares this concern for the future when its mineral resources are wholly depleted.[198] By imposing its own severance taxes, the Tribe has created an opportunity to build a future economic base to replace its eventual loss of coal reserves.[199] In litigating against the Tribe, the state failed to see that supporting a tribal severance tax and tribal economic develop-

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Id. at 196, 615 P.2d at 850.

198. The Crow Tribe has shown a consistent concern, not only for the effects of coal mining on the reservation environment, but for the effect that coal mining might have on the Crow society as well. A 1973 report to the Crow Tribe detailed the effects of coal mining on the reservation and foreshadowed Justice Sheehy's remarks about Montana's future after coal depletion in *Commonwealth Edison*, *supra* note 197. The report said, referring to coal development and depletion on the Crow Reservation:

> These are only some of the social issues that will have to be dealt with if large scale coal development comes to the Crow Reservation. There are many others. For one thing, plant construction will cause a rapid growth in population, but one that will only last for the construction period. Yet the construction workers and their families will have to be accommodated. There will have to be adequate school facilities . . . housing will have to be provided, health care, retail stores and so on. However, once the construction is completed the population will drop somewhat leaving the community to deal with what is left. Most likely what will be left will include: new classrooms now empty, too many teachers and more school supplies than are needed; empty houses; new businesses with not enough business; more public services than can be supported; and, for many of those who worked on the construction and are unwilling or unable to relocate, there is unemployment.
>
> In the long run there is one other social impact associated with coal development. After the coal is expended, after the plants are worn out or have been shut down for whatever reason, there is an adjustment to living in a community noe [sic] dying, a community whose economic base has collasped [sic], a community now forced to look for some new reason to exist. If new business is found, the community goes on. If not, the community becomes, for all practical purposes, another product of exploitation, a boom and bust phenomenon, just one more Western ghost town.

J. Schwechten, Coal Mining and Coal Utilization on the Crow Indian Reservation and Adjacent Ceded Strip, A Preliminary Social Impact Report 4 (Oct. 1973) (unpublished report of the Crow Tribe Community Action Program presented to the Crow Tribe, Oct., 1973; available at the University of Montana Mansfield Library, Missoula, Montana).

199. Reflecting that concern, the Crow Tribal Coal Taxation Code states:

> Since the mining of Crow coal resources represents the perpetual loss of a nonrenewable and valuable tribal asset, the Tribe will be indemnified for the extraction of those resources. The receipt of revenue from this tax will allow the Tribe to upgrade and improve governmental services, especially the increase in those services needed to insure against damage to the total social, cultural, economic and environmental well-being of the Crow Tribe that may occur as a result of the extraction of coal.
>
> Finally, the imposition of a tax on coal resources will discourage resource waste and thus insure that adequate amounts of mineral resources will be available for future generations of the Crow Tribe. In addition, the revenue of said tax will enable the Tribe to establish, manage and control programs designed to offset the effect of mining of Crow coal.

CROW TRIB. COAL TAXATION CODE tit. I § 2 (1982).

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ment must benefit all Montanans.[200] The economic vitality of the Crow Tribe contributes significantly to the economic vitality of the whole state. It must not be forgotten that the Crow are Montana citizens.[201]

Furthermore, by litigating against the Tribe, the state secured a ruling, affirmed by the U.S. Supreme Court,[202] that its interest in providing an alternative economic base for the future is only distantly related to the taxes it imposes.[203] This ruling weakens both the state's and the Tribe's argument for funding a legacy trust from coal taxation. Had the state recognized the Tribe's sovereign interest in taxing coal, it would have strengthened its own sovereign justification for its coal taxes. Instead, the state argued the inherently inconsistent position that for its own sovereign interests the state could tax another sovereign's resources.

The *Crow* case, however, is just another example of the state's general inconsistency in coal taxation policy. In district court, the state argued the necessity of funding a trust fund for the future,[204] yet a few short years later countenanced legislative raids on the Coal Tax Trust Fund for current state budgetary needs.[205] The state argued on appeal that its coal taxes do not adversely affect coal marketability;[206] yet a few short years later the legislature reduced coal tax rates on the grounds that coal taxes *do* adversely affect coal marketability.[207] If Montana is to defend its coal taxes against the inevitable future assaults by coal companies, the state must elucidate a consistent and thus credible coal taxation policy.

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200. Note that former Montana State Senator Thomas E. Towe, a leading proponent of the Coal Severance Tax and Trust Fund, had the foresight to introduce in the 1977 Legislative Session S.B. 319, "An Act allowing a credit against the Coal Severance Tax for any similar tax levied by an Indian tribe on coal produced on a reservation." S.B. 319, 45th Leg. (1977). The bill failed to pass. *See* J. Bulger, Walking on the Edge of the Pit: A Look at the History of Montana's Coal Severance Tax (Spring 1988) (unpublished paper available at the University of Montana School of Law, Missoula, Montana).

201. Congress conferred citizenship on some Indians through the terms of the allotment acts, and several special acts, and on all Indians in 1924. Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C.A. § 1401 a(2) (1924). State citizenship attaches through the 14th amendment to the United States Constitution, U.S. CONST. Amend. XIV, § 1, which states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the . . . state wherein they reside." *Id.*

202. *Crow II*, 108 S. Ct. 202 (1988).

203. *Crow II*, 819 F.2d at 901.

204. *Crow II*, 657 F. Supp. at 584.

205. *See* Bulger, *supra* note 199.

206. *Crow II*, 819 F.2d at 899-900.

207. *See* New Coal Production Incentive Tax Credit Act, MONT. CODE ANN. §§ 15-35-201 to -205 (1987). *See also* Bulger, *supra* note 199, at 10-12.

V. CONCLUSION

Montana and the Crow Tribe not only have shared interests in justifying their coal taxes, they also have shared adversaries. Montana's coal taxes, as the *Commonwealth Edison* Court noted, are subject to congressional tolerance.[208] At any time it chooses under its constitutional commerce powers,[209] Congress may preempt Montana's coal taxes. So too, the Crow Tribe's taxing authority, its reserved lands, indeed its very status as a Tribe are subject to congressional tolerance. Montanans have noted and disclaimed that power over the tribes. Montanans chose, in drafting the 1972 Constitution, to reaffirm the "absolute jurisdiction and control" of the United States Congress over the Indian tribes of Montana.[210] At any time it chooses, under its constitutional power to regulate Indian affairs, Congress may preempt tribal taxing authority and, some would argue, even abolish the reservation and the special federal-tribal relationship.[211] Montana and the Crow Tribe therefore have in common the necessity of promoting the case for sovereign self-government. In drafting the 1972 Constitution, Montanans reaffirmed their commitment to self-government and self-determination, free of domination by outside interests more powerful than this state.[212] In its struggle to assert taxing authority over its coal, the Crow Tribe has demonstrated the same commitment to self-government and self-determination. If Montana is to defend itself successfully against further federal government domination of its natural resources, and if Montana genuinely wishes to guard the future for its children, the state should cultivate the Crow Tribe as a new yet natural ally in this struggle.

208. *Commonwealth Edison*, 453 U.S. at 608 (White, J., concurring).
209. U.S. CONST. art. I, § 8, cl. 3.
210. MONT. CONST. art. I (1972).
211. U.S. CONST. art. I, § 8, cl. 18.
212. *See* MONT. CONST. art. II, § 2, which states: "The people have the exclusive right of governing themselves as a free, sovereign, and independent state."