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Drumming Out the Intent of the Indian Mineral Leasing Act of 1938

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NOTES

DRUMMING OUT THE INTENT OF THE INDIAN MINERAL LEASING ACT OF 1938

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I. INTRODUCTION

Historically, states could not tax Indian interests on Indian lands without express congressional authorization.[1] Not until 1924 did Congress enact specific legislation that allowed states to tax Indian mineral leases.[2] The applicability of that act was limited to Indian lands which were bought and paid for until Congress enacted the Act of March 3, 1927 [3] Together the acts allowed the states to tax mineral leases on most Indian lands.

The 1924 and 1927 Acts were only two of several that formed the Indian mineral leasing program.[4] In 1938, Congress enacted legislation that was designed, in part, to bring uniformity to that program.[5] The Indian Mineral Leasing Act of 1938, however, did not contain any provisions expressly allowing states to tax Indian mineral leases. Nevertheless, states continued to levy taxes against the production of minerals on Indian lands.[6] In 1977, an Interior Department decision suggested that states did not have authority to tax Indian mineral leases executed under the 1938 Act.[7] The Interior decision was the impetus for *Montana v. Blackfeet Tribe*,[8] a case which analyzed the state's authority to tax Indian mineral leases on the Blackfeet Reservation in Montana. This casenote

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1. *See, e.g.*, The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); The New York Indians, 72 U.S. (5 Wall.) 761 (1866); Choate v. Trapp, 224 U.S. 665 (1912); and Bryan v. Itasca County, 426 U.S. 373 (1976).

2. Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)).

3. Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. §§ 398a-398e (1982)). This act allowed taxation of Indian mineral leases on reservations created by Executive Order. Its provisions were similar to the 1924 Act which specifically applied to reservations that were bought and paid for by the Tribes.

4. The mineral leasing of Indian lands was first authorized in statute by the General Allotment Act of 1891.

5. Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396f (1982)).

6. In Montana, the appropriate taxes were collected from the non-Indian lessees who in turn deducted the amount of taxes from the royalty payments to the tribes. Blackfeet v. Montana, 507 F Supp. 446 (D. Mont. 1981).

7. 84 Interior Dec. 905 (1977).

8. 105 S. Ct. 2399 (1985).

discusses the *Montana v. Blackfeet* litigation, the Supreme Court's determination of the case and its impact on the Indian mineral leasing program.

II. LEGISLATIVE HISTORY

The General Allotment Act of 1887[9] established a policy of dividing and allocating tribal lands among individual tribal members. The 1887 Act initiated an era in which national policy sought to assimilate the Indian into a Western European lifestyle.[10] In 1891, the 1887 Act was amended to allow, for the first time, mineral leasing of Indian lands.[11] The 1891 Act provided that the Secretary of the Interior (Secretary) could issue mineral leases on unallotted Indian lands "not needed for farming or agricultural purposes, and are not desired for individual allotments. . . ."[12] Although the 1891 Act applied only to Indian lands that were bought and paid for,[13] it did allow the Secretary to lease unimproved and unused allotments under certain conditions.[14]

The 1891 Act established the Indian mineral leasing program which was added to or amended several times in the next thirty years.[15] In 1924 Congress made significant changes to that program.[16] The Act of May 29, 1924 provided that oil and gas leases, limited to ten-year terms in the 1891 Act, were to remain in effect as long as the leases were productive.[17] The 1924 Act also authorized the states to tax Indian royalties received from the production of all minerals on Indian lands.[18] The scope of the 1924 Act was limited, however, in that the Act specifically applied only to Indian

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9. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331, 332, 333, 334, 339, 341, 342, 348, 349, 354, 381 (1982)).

10. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 128-36 (1982).

11. Act of February 28, 1891, ch. 383, 26 Stat. 794 (codified at 25 U.S.C. §§ 331, 336, 371, 397 (1982)).

12. 25 U.S.C. § 397 (1982).

13. *Id.* The distinction between Indian lands that were bought and paid for and those that were received through an Executive Order, lost its significance with the enactment of the 1938 Act. That Act applied equally to all Indian lands. *See*, 84 Interior Dec. 905, 914 (1977).

14. 25 U.S.C. § 397.

15. Only those acts concerning state taxation of oil and gas leases on Indian lands are discussed in this casenote. The several acts affecting the Indian mineral leasing program in the interim are as follows: Act of March 3, 1909, ch. 263, 35 Stat. 781 (an act that allowed the individual Indian allottee to lease lands for minerals under guidance of the Secretary); Act of June 25, 1910, ch. 431, § 4, 36 Stat. 855, 856-57 (an act which gave the Secretary control of the proceeds from allottee leases and limited the term of these leases to five years); Appropriation Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34 (an act which governed the mining of metalliferous minerals on Indian reservations in several designated western states.)

16. Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)).

17. *Id.*

18. *Id.* While the Act extended the lease term for oil and gas leases only, the tax authority applied to the production of all minerals.

lands subject to lease under the 1891 Act.[19] The Act of March 3, 1927 extended the states' tax authority to reach Indian mineral leases on Indian reservations created by Executive Order.[20] Following the enactment of the 1927 Act, and unless Congress had provided otherwise, the Secretary could authorize oil and gas leases for an indefinite term on all Indian lands.

In 1934, Congress enacted the Indian Reorganization Act (IRA).[21] The IRA abruptly reversed more than forty years of federal policy toward Indians, ending programs of assimilation and fully encouraging the autonomous development of Indian tribes. The IRA established the framework for Indian tribe reorganization,[22] extended indefinitely all existing periods of trust and restrictions against the alienation of Indian lands,[23] restored all unused land within reservation boundaries to tribal ownership[24] and, generally, provided a foundation for the protections afforded tribes today. Most importantly, the IRA allowed tribes that reorganized under the Act tremendous autonomy in governing the use of their own lands.[25]

The various laws affecting the Indian mineral leasing program, when combined with the tribal autonomy provided by the IRA, left the mineral leasing program in a confused state. The Secretary, recognizing several problems in the Indian mineral leasing program, suggested to Congress in 1937 that comprehensive legislation be enacted to correct those problems.[26] The Secretary's suggestions were incorporated into the Indian mineral leasing program by the Indian Mineral Leasing Act of 1938.[27]

With the 1938 Act, Congress sought to bring uniformity to the Indian mineral leasing program, to bring the program into harmony with the IRA, and to ensure the Indians received the greatest return on their leases.[28] The 1938 Act established that a tribal council could lease mineral leases with the Secretary's approval,[29] provided that Indian mineral leases be issued on a competitive basis,[30] and allowed the mineral leasing of restricted lands

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19. *Id.*

20. Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. §§ 398a-398e (1982)).

21. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1982)).

22. *Id.* §§ 476-479.

23. *Id.* § 462.

24. *Id.* § 463.

25. *Id.* § 476.

26. *See* H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938).

27. 25 U.S.C. §§ 396a and 396f (1982).

28. These are the main intentions of Congress as found in the legislative history of the Act. The Ninth Circuit Court of Appeals identified these intentions and the Supreme Court adopted those findings. *See* Montana v. Blackfeet Tribe, 105 S. Ct. at 2404 n.5.

29. 25 U.S.C. § 396a (1982).

30. *Id.* § 396b.

under specific guidelines.[31] The 1938 Act was silent on the question of taxation. The Act did contain a general repealer clause, "[a]ll Act [sic] or parts of Acts inconsistent herewith are hereby repealed".[32] The critical difference between the 1938 Act and the 1924 and 1927 Acts is that the 1938 Act did not expressly allow states to tax Indian mineral leases.

III. Case History

In 1977 the Department's Assistant Secretary for Indian Affairs requested an opinion from the Solicitor's Office on the applicability of Montana's mineral production taxes to Indian mineral leases on the Fort Peck Indian reservation.[33] The Solicitor, in turn, sought to determine which Indian mineral leases, if any, were taxable by the state. The Solicitor noted the comprehensive nature of the 1938 Act and the chief differences between it and earlier Indian mineral leasing acts. He determined that the state did not have authority to tax Indian mineral leases on the reservation since they were all executed under the 1938 Act.[34]That opinion reversed more than thirty years of policy that permitted states to tax Indian mineral leases issued under the 1938 Act. The opinion also provided the impetus for the Blackfeet Tribe of Indians to litigate the same question.

The Blackfeet Tribe brought suit in federal district court to challenge the State of Montana's right to levy mineral taxes against Indian mineral leases on tribal lands.[35] Those taxes were assessed against Indian royalty interests in oil and gas leases issued to non-Indian lessees.[36] Citing the Department's 1977 decision,[37] the Tribe argued that the 1938 Act repealed the tax authorization granted to states in earlier acts. The state urged the court to find that the previous tax authorizations apply equally to Indian mineral leases granted under the 1938 Act. On a motion for summary judgment the district court found for the state declaring:

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31. *Id.* § 396(c) and (d).

32. Indian Mineral Leasing Act of 1938, ch. 198, § 7, 52 Stat. 347, 348. The general repealing clause should legally be a nullity, but has sometimes been found to repeal previous acts where the latter act conflicts. *See*, 1A C. Sands, Sutherland Statutory Construction § 23.08 (4th ed. 1985).

33. 84 Interior Dec. 905 (1977).

34. *Id.* at 914.

35. Blackfeet Tribe v. Montana, 507 F. Supp. 446 (D. Mont. 1981).

36. The following Montana tax statutes were challenged:

(1) The Oil and Gas Conservation Tax, Mont. Code Ann. § 82-11-131 (1985);

(2) The Resource Indemnity Trust Act, Mont. Code Ann. § 15-38-104 (1985);

(3) The Oil and Gas Severance Tax, Mont. Code Ann. § 15-36-101 (1985) and its predecessor;

(4) The Oil and Gas Net Proceeds Tax, Mont. Code Ann. § 15-23-601 (1985).

507 F. Supp. at 448 n.1.

37. While this issue was awaiting trial, the Department issued yet another opinion that re-stated its 1977 position regarding the taxation of 1938 Act Indian mineral leases. *See* 86 Interior Dec. 181 (1979).

> The taxing power of the state in the 1924 Act is specific and clear. The fact that a later act was passed with the general leasing scheme of tribal lands does not, without more, repeal or otherwise create an ambiguity which must be resolved in favor of the Tribe's position.[38]

The Blackfeet Tribe appealed to the Ninth Circuit Court of Appeals for review.[39] The court of appeals recognized that any taxation of Indian interests required congressional consent.[40] The court noted that although the 1938 Act did not authorize taxation, the 1924 Act expressly allowed the states to tax Indian mineral leases. The court of appeals stated that both Acts must be given effect "absent a clearly expressed congressional intention to the contrary."[41] Since the law disfavors repeal by implication,[42] and the 1938 Act did not expressly repeal the 1924 Act, the court found that the 1924 tax provision remained in effect.[43] Despite the 1977 Interior Department decision, the court of appeals found further support for the state's position in the long-standing administrative acquiescence to the taxes.[44] The court of appeals held that the 1924 Act tax authorization applied "with equal force to leases made pursuant to the 1938 Act."[45]

The Blackfeet Tribe remained adamant in its position and petitioned the court of appeals for a rehearing en banc.[46] The petition was granted to resolve a conflict with an earlier decision from the same court.[47] In the earlier decision, the court of appeals recognized that the 1938 Act may have abandoned the tax authority previously allowed states in other acts.[48]

Before the court of appeals, sitting en banc, the Tribe presented a two-pronged argument that developed during the original appellate hearing on the question. The first prong argued that the 1938 Act repealed the 1924 Act; therefore, the 1924 tax provision could not apply to 1938 Act leases. A significant feature of the 1924 Act, however, is that oil and gas leases under

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38. *Blackfeet Tribe*, 507 F. Supp. at 452.

39. Blackfeet Tribe v. Groff, 729 F.2d 1185 (9th Cir. 1982) [hereinafter cited as *Blackfeet I*].

40. *Id.* at 1186. *See also supra* note 1.

41. *Blackfeet I*, 729 F.2d at 1191 (quoting Morton v. Mancari, 417 U.S. 535, 552 (1974)).

42. *Blackfeet I*, 729 F.2d at 1189.

43. *Id.* at 1191.

44. The court noted that unless the original interpretation of the statute by the Department was clearly wrong it will not be disturbed. *Id.* at 1191 (citing United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956)).

45. *Blackfeet I*, 729 F. 2d at 1191.

46. A rehearing en banc by a federal court of appeals is an exceptional safety device usually reserved for cases involving issues of great moment. *See* Louisell and Ronan, *Rehearing in American Appellate Courts*, 25 F.R.D. 143 (1932). *See also* FED. R. APP. P. 35.

47. Blackfeet Tribe v. Montana, 729 F.2d 1192 (9th Cir. 1984) [hereinafter cited as *Blackfeet II*].

48. Crow Tribe v. Montana, 650 F.2d 1104(9th Cir 1981), *amended*, 665 F.2d 1390 (9th Cir.), *cert. denied*, 459 U.S. 916 (1982).

the Act had terms of indefinite duration. The court of appeals noted this fact stating that the "legal status of indefinite term leases" would be seriously affected if the 1938 Act had retroactive effect.[49] Additionally, the court of appeals cited specific language from the 1938 Act which expressly limited its application to leases executed after its enactment.[50] The court adopted these indicators, rejected the Tribe's first argument, and stated that "the 1938 Act superceded but did not repeal prior leasing statutes . . . . "[51] Since the 1924 Act remained in effect, the court ruled that the state's production taxes did apply to Indian mineral leases executed under the 1924 Act.[52] That ruling, in effect, narrowed the issue to whether the 1924 Act's tax authorization applied to leases executed under the 1938 Act.

The second prong of the Tribe's argument asserted that, even without repeal, the 1924 tax authorization did not apply to leases issued under the 1938 Act. The state countered this assertion by stating that the rules of statutory construction supported the incorporation of the 1924 tax provision into the 1938 Act.[53] The state also argued that the court of appeals should defer to earlier administrative decisions that supported its tax authority. The court rejected the state's first argument noting that rules of statutory construction were "merely guideposts in determining congressional intent."[54] The court of appeals noted that there must be express congressional consent before a state may tax tribal income.[55] The court also stated that it would not defer to an administrative practice merely because of its earlier vintage.[56] Accordingly, the court held that the State could continue to tax Indian mineral leases issued pursuant to the 1924 Act but not those leases executed under the 1938 Act.[57]

The State of Montana petitioned the Supreme Court for review.[58] The Court granted certiorari[59] and the case was initially argued before the Court in January, 1985.[60] The Court was evenly divided following the

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49. *Blackfeet II*, 729 F.2d at 1200.
50. *Id.*
51. *Id.*
52. *Id.*
53. The canons that the state relied upon are as follows: "that where two statutes on the same subject are not absolutely irreconcilable, both should be given effect. . . . [and] that a long held agency interpretation in which Congress has silently acquiesed is entitled to great deference." *Id.* at 1201.
54. *Id.*
55. *Id.* at 1202.
56. *Id.* at 1203.
57. *Id.*
58. 53 U.S.L.W. 3137 (U.S. August 1984).
59. 105 S. Ct. 80 (1984).
60. 53 U.S.L.W. 3235 (U.S. Jan. 15, 1985).

initial argument. After a re-argument in April,[61] the Court affirmed the decision below.[62]

The Court's opinion in *Blackfeet II*,[63] reviewed the case history, reflected upon the applicable legislative history of the Indian mineral leasing program, reiterated the requirements necessary for a state to tax Indian interests, and compared the 1924 and 1938 Acts. The majority opinion rested squarely on two canons of statutory construction that apply to Indian law. The Court, noting that the 1938 Act did not contain express provisions allowing states to tax Indian mineral leases, held that the State of Montana could not tax "Indian royalty income from leases issued pursuant to the 1938 Act."[64]

IV. DISCUSSION

The long-recognized trust relationship between the federal government and the Indian tribes was critical to the outcome of this case. This trust relationship gives the federal government exclusive power to deal with Indian tribes,[65] and prevents the states from infringing upon Indian sovereignty over their lands.[66] Because of the trust relationship, courts have presumed that congressional intent toward Indian tribes is benevolent.[67] Some canons of statutory construction, which have specific application to Indian law statutes, also reflect that benevolence.[68] The practical effect of those canons is to broadly construe statutes which reserve or establish Indian rights and to narrowly construe statutes limiting Indian rights.[69]

The two canons of Indian law statutory construction that supported the Tribe's opinion are as follows. First, a state may not tax Indians or their property interests on reservations without express congressional authorization.[70] "[S]econd, statutes are to be construed liberally in favor of the

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61. 105 S. Ct. 1838 (1985). Re-arguments before the Supreme Court are rare, especially as in this instance, when the Court was evenly divided. *See* R. STERN AND E. GESSMAN, SUPREME COURT PRACTICE, 791-93 (5th ed. 1978).

62. Montana v. Blackfeet Tribe, 105 S. Ct. 2399 (1985).

63. *Id.*

64. *Id.* at 2405.

65. This authority is found in Art. I, § 8 of the U.S. Constitution. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).

66. States have no power "to infringe upon tribal sovereignty" without congressional authority. *See* Williams v. Lee, 358 U.S. 217, 220 (1959).

67. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982).

68. *Id.* at 225.

69. *Id.*

70. Montana v. Blackfeet, 105 S. Ct. at 2403 (citing Bryan v. Itasca County, 426 U.S. 373, 393 (1976)).

Indians, with ambiguous provisions interpreted to their benefit . . . ."[71] Aided by the Ninth Circuit decision and the force of these canons of construction, the Tribe asserted that Montana could not tax leases executed under the 1938 Act.

The state based its argument for taxation on principles of statutory construction arising from previous Court decisions. Those decisions supported the notions that a general repealing clause "implies very strongly that there may be acts on the same subject which are not thereby repealed,"[72] and, that there is a strong presumption against repeal by implication.[73] Underlying the state's argument was the idea that when two acts on the same subject were not inconsistent, they could be construed together.[74] Since the 1938 Act did not expressly repeal the 1924 Act, and since there is a strong presumption against repeal by implication, the State claimed that the 1924 Act should remain in effect.[75] It would follow then, that since "nothing in the 1938 Act is inconsistent with the 1924 taxing provision,"[76] the tax authorization should apply to 1938 Act leases.

When two acts concern the same subject, and the acts are either consistent, or reasonably so, both acts will be given effect.[77] Where such acts are in irreconcilable conflict, however, one act will be cited as controlling. In such an instance, the courts will assume that the legislature considered previous acts on the subject before it enacted the latter act; the latter act, therefore, will control.[78] Here, in suggesting that the two statutes were not inconsistent, the state implied that the acts did not irreconcilably conflict.

If the Court found either that the statutes were irreconcilable, or that canons of Indian law construction would not permit taxation of 1938 Act leases, the decision below must be upheld. The Court has previously stated that two statutes will not be read as being in irreconcilable conflict without seeking to ascertain congressional intent.[79] Further, canons of statutory construction are not a license to disregard clear expressions of congressional intent.[80] The Court's resolution of the congressional intent behind the 1938 Act, therefore, becomes the determining factor.

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71. 105 S. Ct. at 2403-04, (citing McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973)).

72. 105 S. Ct. at 2403 (quoting Hess v. Reynolds, 113 U.S. 73, 79 (1885)).

73. 105 S. Ct at 2403.

74. *See* Posodas v. National City Bank, 296 U.S. 497, 503 (1935).

75. 105 S. Ct. at 2403.

76. *Id.*

77. C. SANDS, *supra* note 32, at § 26.06

78. *Id.* at 454.

79. *See* Watt v. Alaska, 451 U.S. 259, 267 (1981).

80. *See* Rice v. Rehner, 463 U.S. 713, 733 (1983).

The Court recognized three major goals in enacting the 1938 Act;[81] all of these goals would be prejudiced if the 1924 tax authorization were to apply to 1938 Act leases. First, the 1924 Act was limited in its application.[82] The 1938 Act on the other hand was intended to bring uniformity to the Indian mineral leasing program and applied to all Indian lands.[83] If the 1924 tax authorization were found to apply to 1938 Act leases, certain 1938 Act leases would remain untaxable.[84] The intended uniformity in the Indian mineral leasing program would suffer.

Second, the Court recognized that the 1938 Act sought to bring the greatest return possible on Indian mineral leases back to the Indians.[85] If the 1924 tax authorization were to apply generally to Indian mineral leases executed under the 1938 Act, Indian mineral leases previously not taxable would become taxable.[86] Such a result would not comport with providing the Indians with the greatest return for their property.

Third, the Court noted that Congress intended to bring the Indian mineral leasing program into harmony with the IRA.[87] While the 1924 Act authorized the taxation of Indian mineral leases during an era of assimilation, the IRA sought to reverse the policies of that era.[88] The IRA specifically provided the Indian tribes that reorganized under that Act greater authority over their lands.[89] To allow the 1924 tax provision to apply to leases issued under the 1938 Act would conflict with this legislative intent.

Despite the apparent tension between the legislative intent behind the 1938 Act and the taxation of those mineral leases, the Court avoided this matter. The Court did state that nothing in the legislative history to the 1938 Act indicated that Congress intended state taxation of Indian mineral leases under the 1938 Act.[90] Applying the canon of construction

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81. 105 S. Ct. at 2404 n.5.

82. *See supra* note 19 and accompanying text.

83. "Hereafter unalloted lands within *any* Indian reservation or lands owned by any Tribe . . . ." (emphasis added). 25 U.S.C. § 396a.

84. The 1924 Act applies only to Indian mineral leases on reservations that were bought and paid for, on lands that were unallotted, and that are not needed for agricultural or farming purposes. *See supra* note 13 and accompanying text.

85. 105 S. Ct. 2404 n.5.

86. Not all Indian mineral leases were taxable, even following the 1927 Act. Specifically, Indian mineral leases other than oil and gas leases on executive order reservations could not be taxed. *See* 84 Interior Dec. 905, 909 n.6.

87. 105 S. Ct. 2404 n.5.

88. The state's brief exposed some cases where the policies of the IRA were apparently argued before the Court but not relied upon in the Court's decisions. In this case, however, there is express indication of the intent to conform to the policies of the IRA. *See* Petitioner's Brief for Certiorari at 63-65.

89. 25 U.S.C. §§ 476-477.

90. 105 S. Ct. at 2404.

that the authority to tax Indian interests must be express, and recognizing that such express authorization was lacking, the Court held that the state could not tax Indian mineral leases executed under the 1938 Act.[91]

V. CONCLUSION

Montana v. Blackfeet identifies and reinforces the congressional intent behind the Indian Mineral Leasing Act of 1938. As the Court indicated, Congress intended that the Act bring uniformity to the Indian mineral leasing program, bring the mineral leasing program into harmony with the IRA, provide the Indians the best return for the use of their property, and govern Indian mineral leases executed only after its enactment. More importantly, the Court found that the Act did not permit states to tax Indian mineral leases issued under that Act.

The Court does not determine whether the 1938 Act repealed the 1924 Act; that question was not before it. The Court's opinion allows the states to continue taxing Indian mineral leases issued pursuant to the 1924 Act. This result leaves the indefinite term leases issued under the 1924 Act unfettered. Thus, the Court has, for the time being, preserved the integrity of indefinite term leases while settling the question of the 1938 Act's intent.

The present case settled an issue arising between the effect of the 1924 and 1938 Acts—two statutes affecting the same area. Because of strong similarities between the 1924 and 1927 Acts, it is unlikely the question will be relitigated for the 1927 Act. The Court's determination leaves the leases executed under those Acts intact, but assures us that taxation under those Acts does not apply to 1938 Act leases.

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91. *Id.* at 2405.