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The Taxation of Natural Resources by Indian Tribes: Merrion, a Comment

Federal Indian Law is in a period of transition, the contours of which are as yet unclear. The foundations of Federal Indian Law established in *Johnson v. McIntosh*,¹ *Cherokee Nation v. Georgia*,² and *Worcester v. Georgia*,³ remained largely unquestioned for 127 years. Between *Worcester* and *Williams v. Lee*,⁴ the Court examined the principle of Indian self-government only once.⁵ Recently, however, cases are being decided at a pace that may be beyond the capacity of the interested parties and institutions to absorb.⁶ The capacity to absorb the entire case, not simply the holdings, is vital in Indian Affairs because of the importance that Supreme Court decisions have in determining immediate policies and relationships between the tribes, the states, and the United States.

The status of Indian Tribes in the American political system is almost entirely the result of Supreme Court decisions.⁷ The judiciary has appeared to Indians, and history supports the appearance, to be the only branch of Government willing to protect tribal rights. This protection has been rendered even in the face of vitriolic opposition from the other two branches.⁸ Indians are cognizant of the judiciary's role, and this results in cases involving issues of significance to Indians being followed as avidly as professional football in Dallas.

When a significant case is decided, reprise of it travels to be assimilated

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1. 21 U.S. (8 Wheat.) 543 (1823).

2. 30 U.S. (5 Pet.) 1 (1831).

3. 31 U.S. (6 Pet.) 515 (1832).

4. 358 U.S. 217 (1959).

5. In *United States v. Quiver*, 214 U.S. 602 (1916), the Supreme Court held that a prosecution for adultery was not included (1885) in the Major Crimes Act (23 Stat. 362, 385, codified at 18 U.S.C. § 1153) and therefore was a matter of tribal domestic law.

6. Since *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court has decided approximately 45 Indian Cases. The approximation stems from an inability to define what constitutes an Indian law issue.

7. See Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN L. REV. 500 (1969).

8. The most striking example is President Jackson's reputed response to the Cherokee cases. While it is the subject of some debate as to whether *Worcester v. Georgia* was the case that caused Jackson to reportedly retort, "He has made the law, now let him enforce it," there is little doubt the Executive and Legislative branches did not take the law seriously. The Trail of Tears is ample evidence, and today the tradition is being carried on. See H.R. 5494, 97th Cong., 2d Sess. (1982).

into a common knowledge of Indian law. This common knowledge is the basis for discussion, strategy, and action by Indians and non-Indians. Congressmen, bureaucrats, Governors, tribal lawyers, and tribal leaders comment on the implications of a case too often on the barest understanding of the reasoning and holding. This results in a vulgate law. Too often it is the vulgate law that is the basis for policy decisions.⁹

*Merrion v. Jicarilla Apache Tribe*¹⁰ is the latest case to be absorbed into the stream of common knowledge. Immediately after the opinion came down, visions of wealth or ruin, depending on one's vantage point, danced like Tchaikovsky's sugarplum fairies. *Merrion* would be the salvation of American Indians or the ruination of commerce with Indians.¹¹

Before discussing some of the implications of *Merrion*, it may be of interest to explain why Indians are overjoyed by the holding. The recent cases of *Oliphant v. Suguamish Indian Tribe*¹² and *Montana v. United States*¹³ caused Indians to question the faith that they had placed in the Supreme Court as the principal protector of tribal powers. The Court in *Oliphant* held that the tribe lacked criminal jurisdiction over non-Indians because it was the common understanding of all three branches of government that the tribe lacked this power as an attribute of political status. In *Montana*, the Court held that the Crow Tribe could not regulate fishing by non-Indians on non-Indian fee land even though the land was within the exterior boundaries of the reservation.

Prior to *Oliphant* and *Montana*, there was a belief, or at least a fond hope, that deviations from the dictate of John Marshall's "the state law had no force" were aberrations.¹⁴ To many Indians, these two cases meant that the aberrations were to become the rule rather than the exception: the feeling was that the court would restrict tribal power to the narrowest possible focus—over Indians and tribal land. This fear was buttressed by other cases, cases supporting tribal powers only when those powers were being exercised on tribal land over member Indians.¹⁵

These cases engendered a fear of a Supreme Court backlash that the

9. The latest example of thoughtlessness is H.R. 5001, 97th Cong., 2d Sess. (1982), a bill to authorize Indian tribes and states to make compacts. It is conceded by almost everyone that the power to make compacts already exists. This bill would result in Congressional "approval," a concept diametrically opposed to the principle of retained sovereignty.

10. 102 S. Ct. 894 (1982). Together with No. 80-15, *Amoco Production Co. v. Jicarilla Apache Tribe*, also on *Certiorari* to the Supreme Court.

11. Leonard Atole, President of the Jicarilla Apache Tribe, called the *Merrion* decision "the brightest day in New Mexico." The CERT Report, Vol. 4, No. 2, Feb. 8, 1982, at 2, col. 2.

12. 435 U.S. 191 (1978).

13. 450 U.S. 544 (1981).

14. *Worcester v. Georgia*, 450 U.S. at 561.

15. See *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Court was abandoning tribal self-government. *Merrion* appeared to many to be the perfect case to destroy tribal power over non-Indians.¹⁶

The Jicarilla Apache Tribe of New Mexico had enacted a severance tax ordinance on oil and gas extracted from the reservation.¹⁷ Non-Indian lessees challenged the tax on a variety of grounds; millions of dollars were at stake. The fears were not allayed in 1981 when the Supreme Court upheld Montana's 30 percent severance tax on coal extracted from federal land by private leases¹⁸ and then ordered *Merrion* to be set over for reargument in the next term.¹⁹ Therefore, when the decision came down upholding the tribal position, the elation among Indians was understandable.

Merrion is the first case in which the Supreme Court has specifically upheld the authority of an Indian tribe to impose taxes on minerals extracted from tribal land under leases between the tribe and private lessees pursuant to federal law, although it is in line with other cases upholding tribal taxing authority.²⁰ In *Washington v. Confederated Tribes of the Colville Indian Reservation*,²¹ the most recent of these cases, the Court reaffirmed a broad principle:

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 implications of their dependent status.²²

Merrion upheld the tribal tax authority on the broad ground of inherent sovereignty.

Thus, the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their government services through taxation of non-Indians who benefit from those services. Indeed, the conception

16. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). While both cases allowed a degree of state taxation on Indian reservations, they also upheld the tribes' right to tax. See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) which prohibited the State of Arizona from imposing taxes on a variety of activities relating to timber, and *Central Machinery Co. v. Arizona Tax Comm'n.*, 448 U.S. 160 (1980), which prohibited the State of Arizona from imposing taxes on transactions occurring on an Indian reservation. Both *White Mountain* and *Central Machinery* were decided on the preemption doctrine.

17. Jicarilla Apache Tribe, Ordinance No. 77-0-02 (1976), as amended by Ordinance No. 77-0-195 (Apr. 23, 1977).

18. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

19. *Merrion* had been argued originally Mar. 30, 1981, then reargued Nov. 4, 1981, after Justice O'Connor had been seated.

20. *Supra* note 16.

21. 447 U.S. 134 (1980).

22. *Id.* at 152.

of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion.²³

The dissent in *Merrion*²⁴ would have found the Tribe without the power to tax on the theory that tribal power to tax nonmembers doing business on the reservation rests solely on the narrow ground of the tribe's long recognized power to exclude outsiders from the reservation. The dissent reasoned that since the leases gave the lessees the right to enter the reservation, a right the tribe was bound to honor, the Jicarilla Apache Tribe was without power to exclude the lessees from the reservation once the leases had been executed, and therefore, powerless to impose the severance taxes. The majority rejected that argument and upheld the tax not only on the grounds of inherent tribal sovereignty, but also on the separate grounds of the tribe's right to exclude outsiders from its reservation which was not surrendered by the tribe in negotiating its leases.

The Court also held that the tax did not violate the Interstate Commerce Clause²⁵ because the clause was not applicable to Indian Tribes. However, Justice Marshall then opined that even if the Interstate Commerce Clause was applicable, the tribal tax did not violate the negative implications of the clause.

But, even with this attempt to provide guidelines beyond the case in controversy, two serious issues remain for Indian mineral taxation: What is the power of the Secretary of the Interior in approving tribal tax ordinances, and what is the extent of state power to impose severance taxes on an Indian reservation? The second issue, beyond the scope of the opinion and this article, is now the most important issue remaining in Indian mineral taxation. By determining that the Interstate Commerce Clause and the dissent's theory of limited power to exclude were inaccurate or at least unnecessary statements of the law, Justice Marshall seems to have drawn broad guidelines for determining tribal taxation power over minerals.

The crucial issue in *Merrion* was not the Tribe's power to tax. As noted earlier, the Court has recognized this power in every case raising the issue. The crux was what effect the mineral leasing acts had on the power when exercised against non-Indian lessees.²⁶ Did these Acts extinguish the Tribe's inherent power to tax minerals? Petitioners argued that even if the Tribe retained the inherent power to impose taxes on non-Indians,

23. 102 S. Ct. at 903.

24. Justice Stevens filed the dissenting opinion in which the Chief Justice and Justice Rehnquist joined.

25. U.S. Const. art. I, § 8, cl. 3.

26. The Jicarilla Apache Tribe leases were entered into under the Act of May 11, 1938, Ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g (1976)) [hereinafter the Mineral Leasing Act of 1938 to distinguish from the plethora of other leasing statutes enacted beginning in 1891].

severance taxes on oil and gas leases entered into pursuant to statutes were preemptive of tribal taxes. It is a disingenuous argument. The preemption, if any, would be for the benefit of Indians, not for the benefit of the non-Indian lessees. The effect of preemption should not provide a windfall to the non-Indian corporation at the expense of the tribe.

The Court addressed the argument of preemption:

This Act [Mineral Leasing Act of 1938], and the regulations promulgated by the Department of the Interior for its enforcement, establish the procedures to be followed for leasing oil and gas interests on tribal lands. However, the proviso to § 396b of the Act states that "the foregoing provisions *shall in no manner restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464-475, 476-478, and 479 of this title.*" (emphasis added) Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.²⁷

This neatly disposes of the preemption argument that the Mineral Leasing Act of 1938 and other mineral leasing acts are not preemptive of tribal inherent taxation power.

However, because the Court was addressing only the validity of the Jicarilla ordinance, it was not necessary to elucidate fully the extent or limit of the power of the Secretary of the Interior to approve tribal ordinances. Opponents of tribal taxation or perhaps the tribes themselves may use the above quoted language to question the validity of tribal taxes enacted by a tribe whose organic documents do not require Secretarial approval.

In other words, opponents of tribal taxation may make the reasoning error of affirming the antecedent to conclude that the Mineral Leasing Act of 1938 does prohibit the severance tax when the ordinance is not approved by the Secretary. To reason from the stated premise that the Act would bar taxes levied under an ordinance not approved by the Secretary of the Interior is an excellent example of the logical fallacy Aristotle called "affirming the antecedent."²⁸ Affirming the antecedent will not result in a valid statement unless the antecedent is inclusive of a class that encompasses the subject. This must either be a given or known from empirical knowledge.

27. 102 S. Ct. at 908.

28. ARISTOTLE, PRIOR AND POSTERIOR ANALYTICS 107 (J. Warrington ed. and trans. 1964).

Example 1:

- A. That Indian is a Chemehuevi.
- B. That is not a Chemehuevi; that is not an Indian.

Statement A is a given premise that is demonstrably true. Statement B which results from affirming the antecedent of Statement A is demonstrably false because one could be any of more than 300 tribes.

Example 2:

- A. All Chemehuevis are Indians.
- B. That is not an Indian; that is not a Chemehuevi.

Statement A again is demonstrably true. But the affirmation of the negative in statement B is also true because Chemehuevi is a subclass of a class of Indians, and to be a Chemehuevi, one must also be an Indian.

Example 3:

- A. That Act does not bar tribal mineral tax ordinances that are approved by the Secretary.
- B. That Act does bar tribal mineral tax ordinances that are not approved by the Secretary.

Assuming that statement A is true, it does not follow that statement B is true. Statement B is true only if there exists a general Secretarial power to approve all tribal mineral tax ordinances. A specific requirement in the tribal constitution requiring Secretarial approval for tribal tax ordinances, or the Act itself, creates in the Secretary of the Interior, a power to approve all tribal mineral tax ordinances regardless of the general powers of the Secretary or the nonexistence of a specific requirement in the tribe's organic documents.

Justice Marshall's statement on the relationship between the Mineral Leasing Act of 1938, Secretarial approval of the Revised Constitution, and the severance tax ordinance must be placed in context to understand why Secretarial approval is an issue in *Merrion*. The Indian Reorganization Act of 1934 (IRA)²⁹ was intended to be voluntary; tribes could by affirmative vote be excluded from the statute. "During the two-year period during which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,365 Indians, including 45,000 Navajos) rejected it. The IRA also applied to 14 groups of Indians who did not hold elections to exclude themselves. Within 12 years, 161 constitutions and 131 corporate charters had been adopted pursuant to the IRA."³⁰

The Jicarilla Apache Tribe voted to be included in the IRA. In 1937,

29. 25 U.S.C. § 461 (1976).

30. 70 MICH. L. REV. 955, 972 (1972).

the Tribe adopted, and the Secretary of the Interior approved, a constitution. In 1968, the Tribe revised its constitution to allow *inter alia* development of resources and to impose taxes on nonmembers. These revisions were approved by the Secretary of the Interior. The severance tax ordinance at issue was also approved by the Secretary.

The Jicarilla, in their Constitution, bound themselves in a relationship with the Secretary of the Interior. In order for the tax ordinance to be valid, they had to take both steps: revise the original documents and submit the ordinance for approval. The approval of the Secretary was required not only as a matter of federal law, but of Jicarilla law. Therefore, Marshall's observation is correct.³¹ If the Jicarilla had omitted either step, revision or approval, the ordinance would have been invalid.

IRA constitutions are often boiler plates.³² Most tribes that accepted the IRA have adopted the Bureau of Indian Affairs' model Constitution and must go through the same process to assert power that had atrophied. This places in the hands of the Secretary the power to approve those necessary changes required by Constitutions.³³

For example, the Crow Tribe of Montana is not an IRA tribe, but the Constitution of the Tribe requires Secretarial approval for constitutional amendments.³⁴ In 1978, the Tribe submitted to the Bureau of Indian Affairs a proposed constitutional amendment that would allow the Tribe to exercise its inherent power of taxation over non-Indians.³⁵ The Secretary of the Interior has taken no action on the amendment although the reason for failing to act appears to be procedural errors rather than ideological opposition. However, for those tribes that do not have to submit ordinances for Secretarial approval, a different situation is presented.

As noted earlier, the tribes that elected to reject the IRA are not governed by the provisions of the Act. In most instances, these tribes do not require Secretarial approval for their internal laws.³⁶ The Navajo Nation, by far the largest tribe by almost every indicator, is governed without a written constitution. The Navajos rejected the IRA in 1934 and have spurned other federal offers to adopt an approved constitution.³⁷

The Navajo Nation has imposed a series of taxes that are similar in

31. 102 S. Ct. at 900.

32. K. PHILIP, J. COLLIERS, *CRUSADE FOR INDIAN REFORM* 164 (1977).

33. 25 U.S.C. § 476 (1976).

34. Constitution of the Crow Tribe (adopted 24 June 1948, approved 23 May 1949). The Crow Constitution has been changed by amendment several times since adoption, a difficult task since the Crow Tribal Council is the entire tribe.

35. The Crow Constitution limits tribal jurisdiction to the reservation; a great portion of the Tribe's coal resource is in the ceded strip. The Crow own the mineral rights but not the surface. There have been several attempts to redefine the reservation to include the ceded strip as part of the reservation.

36. See discussion at notes 47-51 *infra* and accompanying text.

37. 25 U.S.C. § 636 (1976).

scope to those passed by the Jicarilla Apache. Numerous lawsuits are pending that test the validity of these taxes.³⁸ Most of these suits were stayed with the fond hope that the Supreme Court in *Merrion* would provide definitive guidelines for resolution. However, the Court's reaffirmance of the inherent tax power of tribes changes the focus of the litigation from inherent tribal power to Secretarial control. Plaintiffs must show that there is either a general power of the Secretary of the Interior to approve tribal tax ordinances which exist regardless of the organic documents of the tribe or that the mineral leasing acts and federal regulation create a specific power to approve these types of ordinances.

A general power of the Secretary to approve the internal laws of tribes has always been denied by the United States. In *Phillips Petroleum Company v. Navajo Tribe of Indians*, the United States has requested that it be dismissed as a party to the suit:

It is the position of the federal defendants that the Secretary of the Interior and Commissioner of Indian Affairs have no authority to approve, or disapprove, the resolutions. Therefore we contend, and plaintiffs have not alleged otherwise, that action by the federal defendants in relation to these taxes has no effect on the validity *vel non* of these taxes.³⁹

While the capacity to have such a power is within the plenary legislative power of the United States, neither the legislative nor executive branches of the government has exercised the right. Tribes are free to structure their government and govern their internal affairs without federal approval.

To find a general power would cut against the historical development of federal Indian law. The movement since the passage of the IRA has been to increase the degree of tribal management of its own affairs.⁴⁰ This trend is reflected in all aspects of Indian affairs; for instance, there

38. See *Southland Royalty Co., v. Navajo Tribe of Indians*, No. C79-0140 (D.C. Utah 1980) (memorandum opinion on motion to dismiss of the Navajo defendants). The Motion to Dismiss was denied as to the claims alleging Secretarial approval. This is one of many cases controlled by the memorandum opinion and order: *Phillips Petroleum Co v. Navajo Tribe of Nations*, No. C79-0153, *Superior Oil Co. v. Navajo Tribe of Nations*, No. C79-0237 and *Texaco, Inc. et al. v. Navajo Tribe of Nations*, No. C79-0296.

39. Brief for Federal Defendants' Motion to Dismiss, *Phillips Petroleum Co. v. Navajo Tribe of Indians*, No. C79-0153, at 2 (1980).

40. See generally: The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451-1453, 1461-1469, 1481-1498, 1511-1512, 1521-1524, 1541-1543 (1976)) (established a revolving loan fund and authorized the Secretary of the Interior to insure loans to Indians); Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 94-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450-450n, 455-458 (1976)) (authorized Federal officials to contract with and make grants to Indian tribes and organizations to perform federal services); The Tribal Federal Jurisdiction Act of 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1976)) (authorized the tribes access to Federal district courts in cases where the U.S. Attorney declines to bring the action).

is legislation proposed to allow tribes greater freedom in controlling their mineral resources.⁴¹ To find a general power reversing that trend would be nonsense.

The broadest statement on the Secretary's power to manage Indian affairs is 25 U.S.C. § 2,⁴² but this has been construed to mean the management of the Federal/Indian relationship itself, not internal tribal government.⁴³ Felix Cohen has likened this power to the power of the Secretary of State to manage foreign affairs; the Secretarial mandate refers to the relationship, not to the internal affairs of foreign countries.⁴⁴

Part of the confusion over the role of the Secretary of the Interior in Indian affairs stems from confusing management and trust obligations that impose a specific standard of conduct in certain areas with the plenary legislative power of the United States.⁴⁵ While Congress may grant general approval power to the Secretary, until it does, Secretarial conduct is limited to that which has been specifically delegated by statute.⁴⁶

Although it is generally conceded that no general approval power exists, the *Merrion* case does raise the possibility that the Mineral Leasing Act of 1938 and regulations enacted pursuant to the Act may create a specific power to approve tax ordinances that would tax minerals extracted pursuant to a lease. The argument that the Act itself creates a specific power flows from the language quoted earlier where the Court explains the relationship between the Mineral Leasing Act of 1938 and the IRA.⁴⁷

The Mineral Leasing Act of 1938, while not formally part of the IRA, was a continuation of the same policies of economic independence and self-government. It was intended to bring order out of the chaos that had resulted from a hodgepodge of laws passed over an extended period of time to control Indian minerals. Further, the Act was to be another piece of comprehensive federal policy.⁴⁸ One of the rights guaranteed under the IRA was that they could, in certain circumstances, develop mineral development schemes that would not necessarily provide for public auction of minerals. It would make little sense if the Mineral Leasing Act of 1938 would nullify those schemes that had been established four years earlier

41. S. 1894, 97th Cong. 2d Sess. (1982) (a bill which would allow tribes more flexible mineral development).

42. "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (1976).

43. See: *Francis v. Francis*, 203 U.S. 233 (1906); *Jones v. Meehan*, 175 U.S. 1 (1899).

44. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 102 (1945).

45. Compare *United States v. Kagama*, 118 U.S. 375 (1886) with *United States v. Mitchell*, 445 U.S. 535 (1980).

46. See *Kake Village v. Egan*, 369 U.S. 60 (1962).

47. *Supra* note 27.

48. For a discussion of the Mineral Leasing Act of 1938 and the IRA, see *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981).

under the IRA. Therefore, Congress, in passing the Mineral Leasing Act of 1938, ensured that rights guaranteed under provision of the IRA would be saved. As the Tenth Circuit Court in *Merrion* noted, the tribes may "define for themselves the leasing process."⁴⁹ This is an accurate reading of the provision in 25 U.S.C. § 396b, cited within the quote.⁵⁰

The Court was clear; the Mineral Leasing Act of 1938 is not a bar to tribal taxation. To find that the savings provision in section 396b limits that bar to IRA tribes or imposes Secretarial power would be an absurd result.

One final issue in *Merrion* should be kept in mind. The recognition of the tribes' right to tax is not a source of money that will turn Indian reservations into American sheikdoms. Tribes may only get "x" number of dollars for resources; those dollars may be denominated royalties or taxes. While the denomination may have consequence to the non-Indian lessees, it will not increase the total revenue for the tribe in the future mineral agreements. Unless the state is ousted from the reservation, the effect will be to limit reservation resource development. Tribal taxes will now be computed into the equation as other costs. In those instances where minerals are already being extracted and a tax is imposed, the tribe's ability to levy a tax will still depend on the economic feasibility of the project. Tribes in exercising their taxing power of those existing projects should take note of both Aesop's admonitions and Justice Black's dissent in *Federal Power Comm'n v. Tuscarora Indian Nation*, "that great nations like great men should keep their word."⁵¹

49. 617 F.2d 537, 559 (10th Cir. 1980).

50. *Supra* note 27.

51. 362 U.S. 99, 140 (1960).