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## Indian Law - Tribal Authority to Levy a Mineral Severance Tax on Non-Indian Lessees - *Merrion v. Jicarilla Apache Tribe*

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## CASE NOTES

### INDIAN LAW— Tribal Authority to Levy a Mineral Severance Tax on Non-Indian Lessees. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

Indian lands have become a focal point for the exploration and development of previously ignored deposits of energy resources. The United States Supreme Court, in *Merrion v. Jicarilla Apache Tribe*,<sup>1</sup> has recognized the right of the Indian tribes to benefit from the wealth generated by mineral development on tribal land. *Merrion* is a reaffirmation of existing law governing tribal sovereignty. This note will consider the historical background of tribal authority to tax non-Indians engaged in economic activity on reservation land, and examine the approach taken by the Supreme Court to analyze the extent of inherent tribal sovereignty.

The Jicarilla Tribe inhabits an executive order reservation<sup>2</sup> situated in northwest New Mexico. Petitioners, J. Gregory Merrion and Robert L. Bayless, entered into mineral leases for the recovery of oil and gas with the Jicarilla Tribe. In 1968, the Jicarilla Tribal Council adopted a revised constitution which granted the Tribal Council the authority to pass ordinances to govern the development of tribal resources.<sup>3</sup> The revised constitution was adopted pursuant to the Indian Reorganization Act of 1934<sup>4</sup> and was approved by the Secretary of the Interior.

On July 9, 1976, the Tribal Council adopted the Jicarilla Oil and Natural Gas Severance Tax, designed to apply to "any oil and natural gas severed, saved and removed from tribal lands."<sup>5</sup> The tax was due at the date of severance and was payable monthly by the non-Indian lessees.<sup>6</sup> The tax was at the wellhead per million BTU of natural gas and per barrel of

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1. 455 U.S. 130 (1982).

2. Executive order reservations do not involve treaties or acts of Congress, but are designated by the President for particular tribes. "Generally, property rights in executive order reservations are similar to those in reservations created pursuant to treaty or statute. . . ." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 493 (1982).

3. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 134-35 (1982) (citing REVISED CONSTITUTION OF THE JICARILLA APACHE TRIBE art. XI, § 1).

4. Indian Reorganization Act of 1934, 25 U.S.C. §§ 476-477 (1976) (permits tribes to organize and adopt a constitution under section 16).

5. 455 U.S. at 136 (1982). JICARILLA APACHE TRIBE, TRIBAL COUNCIL ORDINANCE NO. 77-0-02 amended by NO. 77-0-195 and Res. 77-327.

6. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 539 (10th Cir. 1980).

crude oil "sold or transported off the Reservation."<sup>7</sup> The trial court found that the tax would generate over two million dollars annually for the Jicarilla Tribe.<sup>8</sup> In addition to the tribal severance tax, at the time the Supreme Court granted certiorari the state of New Mexico imposed six different taxes on oil and gas equipment and production.<sup>9</sup>

In two separate actions consolidated by the United States District Court for the District of New Mexico, the non-Indian lessees filed suit to enjoin enforcement and collection of the tax by either the Secretary of the Interior or the Jicarilla Tribal Council.<sup>10</sup> The District Court found the severance tax illegal and void.<sup>11</sup> The court held that the tribe lacked the power to levy the tax under the Indian Reorganization Act of 1934. The 1934 Act was interpreted to give tribes adopting a constitution thereunder only those powers specifically named, along with powers that were vested in a tribe by existing law.<sup>12</sup> The court found that the power to tax non-Indians was not among the specifically defined powers and was not vested in the Jicarilla Tribe by any existing law.<sup>13</sup>

The district court also agreed with the non-Indian lessees that the power to impose the mineral severance tax was vested exclusively with local and state authorities.<sup>14</sup> This conclusion was based on a 1927 Act of Congress which permits state taxation of mineral lessees in executive order reservations.<sup>15</sup> The non-Indian lessees argued that Congress had struck a compromise between the interests of the state and the Indian tribe by granting the states the right to tax production, while granting the Indian tribes the royalties, rentals and bonus income

7. *Id.*

8. *Id.* at 539-40.

9. The Oil and Gas Severance Tax, N.M. STAT. ANN. §§ 7-29-1 to-22 (Supp. 1980); The Oil and Gas Conservation Tax, N.M. STAT. ANN. §§ 7-30-1 to-26 (Supp. 1980); The Oil and Gas Emergency School Tax, N.M. STAT. ANN. §§ 7-31-1 to-25 (Supp. 1980); The Oil and Gas Ad Valorem Production Tax, N.M. STAT. ANN. §§ 7-32-1 to-27 (Supp. 1980); The Natural Gas Processors Tax, N.M. STAT. ANN. §§ 7-33-1 to-22 (Supp. 1980); The Oil and Gas Production Equipment Ad Valorem Tax, N.M. STAT. ANN. §§ 7-34-1 to-20 (Supp. 1980).

10. *Merrion v. Jicarilla Apache Tribe*, 5 INDIAN L. REP. (AM. INDIAN LAW TRAINING PROGRAM) (D.C.N.M. Dec. 29, 1977).

11. *Id.* at F-27, 28.

12. COHEN, *supra* note 2, at 149.

13. 5 INDIAN L. REP. at F-27.

14. *Id.* at F-26.

15. 25 U.S.C. § 398(c) (1976). This act permits state taxation of mineral production on reservation lands.

from oil and gas leases on their reservations.<sup>16</sup> Finally, the petitioners argued, and the court agreed, that because the tax was levied only against oil and gas sold or removed from the reservation, the tax imposed an unconstitutional burden on interstate commerce in violation of the commerce clause.<sup>17</sup>

On appeal, the United States Court of Appeals for the Tenth Circuit, sitting en banc, reversed the district court.<sup>18</sup> The Tenth Circuit agreed with the Jicarilla Tribe that their power to tax was an inherent attribute of tribal sovereignty which had not been surrendered by the tribe in any treaty.<sup>19</sup> No act of the federal government limited or destroyed the tribe's ability to tax non-Indians conducting business on reservation land.<sup>20</sup> Finally, the court found no violation of the commerce clause.<sup>21</sup> The United States Supreme Court granted certiorari and upheld the decision of the Court of Appeals.<sup>22</sup>

### LEGAL BACKGROUND

A review of the applicable case law will demonstrate that *Merrion* is consistent with past judicial decisions upholding tribal sovereignty. Indian tribes have a singular relationship with the federal government. An early Supreme Court decision characterized Indian tribes as "domestic dependent nations."<sup>23</sup> Chief Justice Marshall stated:

"[The tribes] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."<sup>24</sup>

This stance has been interpreted in later cases to mean that the relationship of Indian tribes to the federal government resembles that of a ward to a guardian. The only specific con-

16. Brief for the Petitioners at 19, *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, (1982).

17. 5 INDIAN L. REP. at F-28. U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes. . . ."

18. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980).

19. *Id.* at 540-44.

20. *Id.* at 546-49.

21. *Id.* at 544-46.

22. 617 F.2d 537, cert. granted, 449 U.S. 820 (1980), *aff'd*, 455 U.S. 130 (1982).

23. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

24. *Id.*

stitutional mention of congressional power over Indian affairs is contained in the commerce clause, which authorizes Congress to regulate commerce with the Indian tribes.<sup>25</sup> However, the federal government exercises broad plenary powers of control over Indian tribes,<sup>26</sup> based on the dependent status of the tribes.

As early as 1832, the Supreme Court, in *Worcester v. Georgia*,<sup>27</sup> recognized that Indian tribes were unique independent communities possessing powers of self-government that derived from aboriginal tribal sovereignty. Aboriginal sovereignty arises from the fact that Indians existed as independent entities prior to colonization.<sup>28</sup> The Court held that Indian nations did not relinquish their rights to self government and independence simply by associating with the United States.<sup>29</sup> This case has stood for the proposition that Indian tribes possess attributes of inherent sovereignty over both their territory and their members.<sup>30</sup>

Subsequently, the Supreme Court affirmed tribal authority to tax non-Indians in *Morris v. Hitchcock*.<sup>31</sup> At issue in *Morris* was a privilege or permit tax regulating the importation of livestock by non-members into the Chickasaw Reservation. The Court upheld the tax recognizing that the taxing power was designed both to prevent unwanted intrusion and to serve as an instrument for raising revenue.<sup>32</sup> The right to tax was found to be an acceptable method of raising revenue to pay for the cost of government. In addition, the Court reasoned that because no non-Indian can lawfully be within reservation land without authorization from the tribe, the Indians have the ability to dictate the grounds upon which such authorization will be issued.<sup>33</sup>

*Buster v. Wright*,<sup>34</sup> an Eighth Circuit Court of Appeals decision, was a significant reaffirmation of the inherent ability

25. U.S. CONST. art. 1, § 8.

26. *See, e.g., United States v. Ramsey*, 271 U.S. 467 (1926). The *Ramsey* Court stated: "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States. . . ." *Id.* at 471.

27. 31 U.S. (6 Pet.) 515, 559 (1832).

28. MAXFIELD, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 3 (1977).

29. 31 U.S. (6 Pet.) at 560.

30. *Id.* at 518, 559. *See* COHEN, *supra* note 2, at 220, 233-35.

31. 194 U.S. 384 (1904).

32. *Id.* at 389.

33. *Id.* at 391 (quoting 23 Op. Att'y Gen. 216-27 (1900)).

34. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

of Indian tribes to impose a tax on non-Indians for the privilege of conducting business on Indian land. Non-Indians, owners of property within the Creek Reservation, brought suit to enjoin the Interior Department and the Creek Tribe from evicting them for the non-payment of the required Indian tax. In this case the Indians were prohibited from removing the non-Indians by an Act of Congress.<sup>35</sup> The court concluded that the tribe nevertheless retained its authority to tax. The power to tax was held to be firmly rooted in the sovereign authority of the tribe:

The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty.<sup>36</sup>

Payment of the tax was considered by the court to be a condition on engaging in trade on Indian land. *Buster* supports the conclusion that tribal authority to tax is based on an inherent element of the sovereignty the tribe enjoyed prior to colonization and not just on the tribe's ability to exclude non-Indians.<sup>37</sup>

More recent cases have continued to uphold the ability of tribes to impose taxes on non-Indians engaged in economic activity within reservation lands. In *Iron Crow v. Oglala Sioux Tribe*,<sup>38</sup> the Eighth Circuit Court of Appeals endorsed an Oglala Tribal tax on non-members for the privilege of grazing on tribal land. The court found that tribes exist as sovereign entities that possess inherent rights, including the power to levy taxes to maintain tribal government, except where limited by Congress.<sup>39</sup> Shortly thereafter, the same court, in *Barta v. Oglala Sioux Tribe*,<sup>40</sup> reaffirmed the grazing tax in the face of a constitutional challenge. The non-Indian lessee claimed the tax was a deprivation of property and was limited by due pro-

35. Act of May 27, 1902, ch. 888, 32 Stat. 259. The Act reads: "[I]t shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a townsite under existing laws and treaties."

36. 135 F. at 950.

37. *Id.* at 951, 952.

38. 231 F.2d 89 (8th Cir. 1956).

39. *Id.* at 99.

40. 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959).

cess considerations.<sup>41</sup> *Barta* is significant because it involved the taxation of non-Indians with pre-existing leases who could not legally be removed from tribal lands.

In the latest series of cases to test a tribe's inherent sovereignty, the United States Supreme Court has declined to depart from the reasoning of past decisions. The Court, in *United States v. Mazurie*,<sup>42</sup> acknowledged that "[I]ndian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations'. . . ."<sup>43</sup> The Court also noted that previous Supreme Court decisions had uniformly protected the authority of Indian governments over their territory.<sup>44</sup>

In *Washington v. Confederated Tribes of the Colville Reservation*,<sup>45</sup> the Supreme Court reiterated that taxation is a fundamental attribute of tribal sovereignty: "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."<sup>46</sup> The Court expressly rejected the theory that the tribe's power to tax was limited to its power as a landowner to exclude non-Indians. The *Colville* decision emphasized that Indian tribes exercise congressionally sanctioned powers of self-government.<sup>47</sup>

The Supreme Court has limited tribal authority over non-Indians on non-Indian land within the reservation. In *Montana v. United States* the Court held that the Crow Tribe had no power to regulate non-Indian hunting and fishing within the reservation on land owned in fee by non-members of the tribe.<sup>48</sup> The Crow Tribe claimed the power to prohibit hunting and fishing on lands within the reservation owned in fee by non-members was an incident of the inherent sovereignty of the tribe over the entire Crow Reservation.<sup>49</sup> The State of

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41. *Id.* at 556. See Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (Supp. III 1979).

42. 419 U.S. 544 (1975).

43. *Id.* at 557.

44. *Id.* at 558 (citing *Williams v. Lee*, 388 U.S. 217, 223 (1959)).

45. 447 U.S. 134 (1980).

46. *Id.* at 152.

47. *Id.* at 153.

48. 450 U.S. 544 (1981). See Note, *Ownership of Lands Underlying Navigable Waters and Limits to Tribal Sovereignty*, 17 LAND & WATER L. REV. 189 (1982).

49. 450 U.S. at 547.

Montana asserted its authority to regulate hunting and fishing by non-Indians on land owned by non-Indians within the reservation.<sup>50</sup>

The Court found any exercise of tribal power in excess of what is required to protect Indian self-government or to regulate internal conduct inconsistent with the tribe's dependent status.<sup>51</sup> No clear relation was established between the regulation of hunting and fishing by non-Indians on non-Indian fee land and tribal self-government or internal relations. However, in dictum the Court limited its holding and found that the Crow Tribe had the power to tax, license or similarly regulate the activities of non-members who enter into consensual relationships with the tribe by means of leases, contracts or other commercial dealings.<sup>52</sup> The language in the opinion indicated that the tribe also has the inherent power to regulate non-Indians on fee land within the reservation when the non-Indian activity poses a threat to or has a direct effect on a significant tribal interest.<sup>53</sup>

### THE *Merrion* DECISION

The United States Supreme Court affirmed the decision of the Court of Appeals and upheld the Jicarilla Tribe's mineral severance tax. After examining both positions, the Court found little authority to support a theory denying tribes the power to tax non-Indians. At the outset, Justice Marshall reviewed the *Colville* analysis, which was that Indian tribes have the power to tax affairs which significantly involve a tribe or its members until divested of it by federal law or necessary implication.<sup>54</sup> The taxing power is an inherent attribute of Indian sovereignty for the reason that the power to raise revenue to provide for governmental services is a vital element of self-government.<sup>55</sup> The Court found that the tax at issue in this case is of a type often employed by other governmental bodies to provide for services similar to those assured by the

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50. *Id.* at 549.

51. *Id.* at 564.

52. *Id.* at 565.

53. *Id.* at 566. See *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), for an example of the further erosion of *Montana* (followed *Montana dicta* to uphold tribal zoning laws).

54. 455 U.S. at 137.

55. *Id.*

Jicarilla Tribal Council.<sup>56</sup> The lessees availed themselves of the benefits of organized society within the Indian reservation, and the Court found nothing unusual in requiring the non-Indian lessees to contribute to the cost of tribal government.<sup>57</sup>

The tribe's interest in taxing non-Indians to provide revenue for essential services is most clear when the taxed transactions involve the tribe and take place on reservation land, where the taxpayer receives the benefit of tribal services.<sup>58</sup> The Court found no significance in the fact that the Jicarilla Tribe was simultaneously the government imposing the taxes and also the commercial partner receiving rents and royalties from the mineral leases taxed. Justice Marshall noted that state governments regularly receive both royalty payments and severance taxes from lessees within state borders.<sup>59</sup>

According to the majority opinion, all three branches of the federal government assumed that the tribe's taxing power is an essential element of self-determination.<sup>60</sup> The Court, citing *Colville*, found that executive orders have reiterated the position that an Indian tribe's civil jurisdiction over non-Indians engaged in activities in which the tribe has a significant stake encompasses the ability to tax.<sup>61</sup> Similarly, Congress has recognized the tribal power to tax as inherent to self-government and territorial control.<sup>62</sup> Consistent with this point of view, Supreme Court decisions have repeatedly guaranteed the Indians' inherent sovereign right to self-government, which includes the power to levy taxes.<sup>63</sup> The fact that the federal government can divest the tribe of its power to tax and that the tribe must obtain Interior Department approval before taxing non-members, gave the Court adequate reassurances that the recognized power to tax would not be misused.<sup>64</sup>

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56. *Id.* at 138.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 139.

61. *Id.* (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-53).

62. 455 U.S. at 139.

63. *Id.* at 140.

64. *Id.* at 141.

Next, the Court went beyond what was necessary to uphold the severance tax and rejected the claim that tribal authority to tax non-Indians was based solely on the tribe's power to exclude non-Indians from reservation land. That assertion, the Court found, was inconsistent with the idea of the tribe's retained sovereignty as well as with the recognition that the taxing power is a necessary tool for raising revenue.<sup>65</sup> The majority also rejected the dissent's reading of *Morris, Buster, and Maxey v. Wright*, that the taxing power was based in the tribe's power to exclude non-Indians.<sup>66</sup> While the Court acknowledged that the power to exclude was a benchmark of Indian sovereignty, it held none of the cases cited stood for the proposition that the power to tax was grounded solely in the power to exclude.<sup>67</sup> The simple fact that tribal authority to tax does not arise until the non-member enters tribal jurisdiction does not require that the power to tax be based on the tribe's power to exclude all non-members.<sup>68</sup>

Even assuming that the authority to tax results from the right to exclude non-members from tribal land, the majority said the Indian tribe still has the power to impose the contested tax.<sup>69</sup> The Court held that the ability to exclude must by definition include the power to maintain conditions upon residence.<sup>70</sup> A tribe does not lose the authority to tax merely because that power was not exercised at the outset of the relationship with the non-Indian.<sup>71</sup> The theory that a tribe's ability to tax is dependent on its ability to exclude confuses the role of the tribe as an economic participant with the role of the tribe as sovereign. The tribe's receipt of royalties as the lessor of mineral leases does not amount to an abandonment of its powers to tax as a sovereign.<sup>72</sup> Additionally, the Court found that a policy which required the consent of the non-Indian to be taxed deprived the Indians of their sovereign power.<sup>73</sup> The

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65. *Id.*

66. *Id.* See *supra* notes 31, 34; *Maxey v. Wright*, Indian Terr. 243, 54 S.W. 807 (1900), *aff'd*, 105 F. 1003 (8th Cir. 1900).

67. 455 U.S. at 141.

68. *Id.* at 142.

69. *Id.* at 144.

70. *Id.*

71. *Id.* at 145.

72. *Id.* at 146.

73. *Id.* at 147.

Court ruled that a sovereign power does not waive the right to tax by silence.<sup>74</sup>

The non-Indian lessees also sought to prove that Congress had implicitly preempted the tribe's authority to tax mineral transactions on reservation lands. Petitioners first pointed to a 1938 act of Congress which outlined the procedures to be followed for leasing oil and gas interests on tribal land.<sup>75</sup> Although petitioners argued that any tribal taxation was inconsistent with the provisions of the Act, the Court found that this provision should not be interpreted to limit tribal action under the Indian Reorganization Act.<sup>76</sup> The lessees also asserted that Congress withdrew tribal taxing power by authorizing states to tax production from leases within reservation boundaries.<sup>77</sup> The Court stated that the lessee's contention was in conflict with the settled principle that different sovereigns have the power to tax the same transaction.<sup>78</sup>

In the final segment of its opinion, the Court ruled that the Jicarilla mineral severance tax did not violate the negative implications of the commerce clause.<sup>79</sup> At the outset, the Court noted the difficulties in examining tribal conduct under the interstate commerce clause or the Indian commerce clause.<sup>80</sup> However, after assuming that the interstate commerce clause did apply, the Court found that the negative implications analysis is only appropriate when Congress has not acted to regulate.<sup>81</sup> In this case, Congress has acted by providing for procedures to be followed before a tribal tax could be put into effect.<sup>82</sup> Even if judicial scrutiny had been found to be appropriate, the challenged mineral severance tax would survive.<sup>83</sup> Citing the four part test in *Complete Auto Transit*,

74. *Id.* at 148.

75. *Id.* at 150 (citing Act of 1938, 25 U.S.C. §§ 396a-396g (1976)).

76. 455 U.S. at 150 (citing Act of 1938, 25 U.S.C. § 396b (1976)).

77. 455 U.S. at 150 (citing Act of 1927, 25 U.S.C. § 398c (1976)).

78. 455 U.S. at 151.

79. *Id.* at 154.

80. *Id.* at 153. "Commerce with Indian tribes need not be 'interstate' in character or impact as the Indian Commerce Clause is a separate provision from the portion of the Commerce Clause dealing with interstate commerce." COHEN, *supra* note 2, at 208.

81. 455 U.S. at 154.

82. *Id.* at 155.

83. *Id.* at 156.

Inc. v. Brady,<sup>84</sup> the Court found no unconstitutional burden on interstate commerce.<sup>85</sup>

### *Merrion* EXAMINED

*Merrion v. Jicarilla Apache Tribe* is a logical extension of earlier decisions which reaffirmed Indian tribes' rights to sovereignty over their territory. Federal court decisions have consistently upheld the Indians' inherent right to self government, which includes the power to levy taxes.<sup>86</sup> These rights are retained by the Indian tribes until limited by federal law or by implication of the tribe's dependent status,<sup>87</sup> and not all tribal powers are implicitly forfeited by virtue of the tribe's dependent status.<sup>88</sup> Past decisions recognize such a divestiture only when the attempted exercise of tribal sovereignty is at odds with an overriding national interest, such as if a tribe were to engage in foreign relations, alienate tribal land to non-Indians without first obtaining federal consent, or prosecute non-members in tribal court.<sup>89</sup> In the present case, the national interests in developing new oil reserves, and the interests of the lessees in resisting an increase in costs of production do not appear consistent. Furthermore, the *Merrion* decision is consistent with *Montana v. United States*, a case which places limits on tribal civil jurisdiction over non-Indians.<sup>90</sup> Regardless of the problems inherent in determining whether a tribal action is inconsistent with a tribe's dependent status, dictum in *Montana* contemplates tribal taxation where a consensual relationship exists between a tribe and a non-member, as in *Merrion*, even if the non-Indian activity takes place on fee land.<sup>91</sup>

### *No Trend to Limit Tribal Sovereignty*

The non-Indian lessees attempted unsuccessfully to convince the Supreme Court to place limits on tribal civil jurisdic-

84. 430 U.S. 274, 279 (1977). The *Complete Auto Transit* Court held that a state tax is valid if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* See Note, *Commerce Clause Standards for State Taxation of Mineral Severance*, 17 LAND & WATER L. REV. 169 (1982).

85. 455 U.S. at 156, 157.

86. See, e.g., *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

87. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 153 (1980).

88. *Id.*

89. *Id.* at 153-54.

90. See *supra* text accompanying note 48.

91. 450 U.S. at 565.

tion. This attempt was based on the recent Supreme Court decisions in *Oliphant v. Suquamish Indian Tribe*<sup>92</sup> and *United States v. Wheeler*,<sup>93</sup> which suggest that Indians lack inherent power over non-members. These decisions do suggest such a conclusion. Despite the decisive majority opinion by Justice Marshall, the fact that the Supreme Court heard oral arguments twice suggests that *Merrion* was a more difficult case than it seems on first impression.

In *Wheeler*, the United States attempted to prosecute a Navajo Indian for rape when the Indian had already pleaded guilty to a charge of contributing to the delinquency of a minor stemming from the same incident.<sup>94</sup> The Supreme Court allowed the federal prosecution. Language in the case suggested that implicit divestiture of sovereignty had occurred in areas involving the tribe and non-members.<sup>95</sup> *Oliphant* concerned the exercise of tribal criminal jurisdiction over non-Indians. This decision implied that although Indian tribes were independent nations at one time, they no longer possess the full attributes of sovereignty.<sup>96</sup>

The non-Indian lessees in *Merrion* contended that the dependent status of Indian tribes precludes any exercise of taxing powers over non-Indians under *Wheeler* and *Oliphant*.<sup>97</sup> However, those cases do not support that proposition. *Wheeler* did, nevertheless, outline the correct framework in which to view tribal sovereignty.<sup>98</sup> The Court in *Oliphant* expressly limited its decision to tribal criminal jurisdiction.<sup>99</sup> The decision in *Merrion* went to great lengths to dispel any notion of expanded limitations on tribal civil jurisdiction.

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92. 435 U.S. 191 (1978).

93. 435 U.S. 313 (1978).

94. *Id.* at 315.

95. *Id.* at 326. The *Wheeler* Court stated: "The areas in which such implicit divestiture has been held to have occurred are those involving relations between an Indian tribe and nonmembers of the tribe." *Id.*

96. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d at 541 (10th Cir. 1980) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

97. Brief for the Petitioner, *supra* note 16, at 13-15.

98. "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." 435 U.S. at 328.

99. 435 U.S. at 196 n.7.

*Contractual Limits on Severance Taxes*

One result of the decision in *Merrion* is that an oil and gas lease between a tribe and a non-Indian lessee may not signify the total economic cost of the venture for the duration of the project. The Court held that a non-Indian lessee remains subject to a later exercise of sovereign tribal power.<sup>100</sup> This raised the question of whether an Indian tribe can agree to a contractual limit on its taxing power in a mineral development lease. It is questionable whether a tribe's power to contract may be used to restrict any future tribal government in its exercise of sovereign taxing powers. Considering that the exercise of sovereign power is at issue, perhaps an analogy can be drawn between the case at hand and that of a state in a similar situation. In *United States Trust Co. of New York v. New Jersey* the Court stated that the contracts clause does not demand that a State "adhere to a contract that surrenders an essential attribute of its sovereignty."<sup>101</sup> Taking into consideration the principle of tribal sovereignty discussed in *Merrion* and the congressional commitment to Indian self-determination,<sup>102</sup> one tribal government should not be allowed to place a contractual limit on future mineral severance taxes.

Even assuming a tribe were to agree to a contractual limit, there remains the question of whether the Secretary of the Interior could approve such a limitation. The Court in *Merrion* explicitly found that the Secretary must approve any tax on non-members before the tax will be effective.<sup>103</sup> However, the Secretary owes a fiduciary duty to act in the tribe's best interest. This concept first appeared in *Cherokee Nation v. Georgia*, where the Court held that the Indian's relationship to the United States was similar to that of a ward to a guardian.<sup>104</sup> That relationship is also conditioned on special trust obligations which impose strict fiduciary standards.<sup>105</sup> This implies that the Interior Department has a duty to safeguard the property of Indian tribes in their relations with third parties. If these standards are applied to the Secretary of

100. 455 U.S. at 145.

101. 435 U.S. 1, 23 (1977). See also *Fletcher v. Peck*, 2 U.S. (6 Cranch) 328, 336 (1809) ("One legislature cannot abridge the powers of a succeeding legislature").

102. See *supra* note 4.

103. 455 U.S. at 141.

104. See *supra* notes 23, 24.

105. COHEN, *supra* note 2, at 207.

the Interior, he might not be acting in the best interests of the Indian tribe by approving contractual limitations on mineral severance taxes.

Assuming increased costs prohibit further mineral development, the responsibility for settling this issue rests with Congress. Congress ultimately controls Indian authority to tax non-Indians on tribal land.<sup>106</sup> All tribal sovereign rights remain subject to divestiture.<sup>107</sup> However, as an alternative to divestiture Congress can use its authority to work a compromise between the competing interests. An example of one such Congressional attempt is a bill which would make tribal severance taxes deductible from the windfall profits tax, in order to eliminate any double taxation.

#### CONCLUSION

The mineral severance tax imposed by the Jicarilla Tribal Council is a constitutional exercise of tribal self-government. The tribe's right of self-government is an inherent attribute of the sovereignty tribes enjoyed prior to colonization. This power continues uninterrupted until limited or withdrawn by Congress.

The *Merrion* decision is consistent with past decisions which reaffirm the tribal right to sovereignty over tribal territory. The adjudicial recognition of the inherent right to regulate non-Indians doing business on tribal lands, beginning with *Worcester*, and continuing in *Buster* and *Colville*, is firmly established in *Merrion*. The right of Indian self-government would mean considerably less if tribes were prohibited from taxing economic activities within their borders.

As a final consideration, it should be emphasized that the power to regulate Indian affairs, including the interactions between a tribe and non-Indian lessees, is firmly in the grip of the federal government. However, Congress should pay proper respect to the principles of tribal sovereignty when acting to balance the competing interests of Indian tribes and non-Indian lessees.

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106. See *supra* notes 25, 26.

107. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137 (1982).

108. 127 CONG. REC. S 700 (daily ed. March 12, 1981).