

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MONTANA, ET AL., Petitioners v. CROW TRIBE OF
INDIANS, ET AL.

CASE NO: 96-1829

PLACE: Washington, D.C.

DATE: Tuesday, February 24, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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MONTANA, ET AL., :

Petitioners :

V. : No. 96-1829

CROW TRIBE OF INDIANS, ET AL. :

- - - - -X

Washington, D.C.

Tuesday, February 24, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

CLAY RIGGS SMITH, ESQ., Solicitor of Montana, Helena,
Montana; on behalf of the Petitioners.

ROBERT S. PELCYGER, ESQ., Louisville, Kentucky; on behalf
of the Private Respondents.

JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Federal Respondents.

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1 PROCEEDINGS

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1829, Montana v The Crow Tribe of
5 Indians.

6 Mr. Smith.

7 ORAL ARGUMENT OF CLAY RIGGS SMITH

8 ON BEHALF OF THE PETITIONERS

9 MR. SMITH: Mr. Chief Justice and may it please
10 the Court:

11 The issue today is whether a Federal court may
12 award to respondents, Crow Tribe and the United States,
13 \$58 million paid to the petitioners by a third party,
14 Westmoreland Resources.

15 Reduced to its essentials, the respondents'
16 theory is that a Federal court has this discretion and in
17 reality the obligation to make such an award merely
18 because the taxes have been held preempted and the actual
19 taxpayer has no entitlement to their recovery.

20 QUESTION: Mr. Smith, I'd like to pursue with
21 you what you assert is the underlying cause of action
22 here. Is it for some kind of breach of tribal
23 sovereignty, some Federal cause of action, or is it
24 limited to a cause of action for money had and received
25 based on an implied contract?

1 MR. SMITH: Justice O'Connor, we believe the
2 action in this matter is limited to a cause of action for
3 money had and received, a cause --

4 QUESTION: Well, that's interesting, because I
5 thought it had been determined in earlier litigation that
6 there was a Federal cause of action here based on a -- an
7 invasion of tribal sovereignty and a preemption by Federal
8 law of any State tax law.

9 MR. SMITH: Your Honor, that is --

10 QUESTION: And I thought we had basically
11 summarily affirmed that notion. Now, is that right or
12 wrong?

13 MR. SMITH: Your Honor, that is correct in the
14 Crow II decision, the 1987 Ninth Circuit decision.

15 QUESTION: Right.

16 MR. SMITH: The court of --

17 QUESTION: So are we dealing here in this suit
18 with what remedy is appropriate based on that theory?

19 MR. SMITH: Yes, Your Honor, we are, but I would
20 add, by way of further elaboration, that in determining
21 the appropriate remedy I think the Court is confronted
22 with the question of whether a Federal cause of action or
23 a Federal common law claim should be recognized under
24 these circumstances for --

25 QUESTION: Well, if it's been determined that

1 there is some breach of tribal sovereignty by the State of
2 Montana, and if what we at bottom are faced with here is
3 what's the remedy, then I think your argument might focus
4 on what should be the remedy, and it's entirely possible
5 to me that it shouldn't be just a disgorgement of all the
6 taxes but, rather, a requirement that the Court would have
7 to look at what injury was suffered by the tribe in
8 crafting the amount of the remedy. Is that an argument
9 you make, or not?

10 MR. SMITH: Your Honor, that is not precisely
11 the argument we make.

12 QUESTION: No, I didn't think so.

13 MR. SMITH: The argument we make, if I may go
14 on, is that in this case we essentially dealt -- played
15 the hand we were dealt in terms of the respondent's theory
16 and their theory of recovery, as set forth in their
17 amended complaints and, indeed, in subsequent pleadings
18 and in the pretrial order, was a theory which sought
19 recovery of taxes paid by Westmoreland Resources.

20 Had -- had the respondents attempted to recover
21 compensatory damages, that is to say, damages directed
22 specifically to the injury that the tribe suffered with
23 respect to the marketability of its coal, we would have an
24 entirely different case than we have before us today.

25 QUESTION: And the complaint was amended, as I

1 recall, after our affirmance in Crow II?

2 MR. SMITH: Yes, Your Honor, that is correct.
3 It was amended in 1989 by the tribe, it's fourth amended
4 complaint, and the United States filed essentially the
5 same complaint 6 months later in 1990.

6 QUESTION: Is money had and received the same as
7 restitution?

8 MR. SMITH: Your Honor, I would say not.
9 Restitution is a broader concept which covers a rather
10 extensive range of potential remedies.

11 QUESTION: Why can't they just get restitution?
12 Why couldn't -- I mean, here why can't the -- here's -- I
13 take it there's a person who paid some taxes to the State
14 and the Indian tribe says, well, the State doesn't --
15 isn't entitled to that money, and we're more entitled to
16 it than they are, because probably we would have gotten at
17 least some of it, so we would like it in restitution. Why
18 shouldn't they have it? The State isn't entitled to it.

19 MR. SMITH: Your Honor --

20 QUESTION: I'll add that my law clerk found a
21 bunch of cases that do seem, in restitution, to give one
22 of the two competing entities in taxes -- you pay it to
23 the wrong one, well, the right one has a right in
24 restitution to get it from the wrong one.

25 MR. SMITH: Justice Breyer, the claim that is

1 sought, again, or is alleged, deals with restitution of a
2 specific kind of payment, in this case taxes paid to the
3 respondents by Westmoreland. It seeks, in essence, a
4 traditional quasi-contract remedy, and it has been the
5 petitioners' position throughout that, given the nature of
6 the quite specific remedy sought, that the traditional
7 standards associated with quasi-contract govern the
8 respondents' entitlement to those moneys.

9 QUESTION: Mr. Smith, may I ask you to clarify
10 in response to Justice Breyer's inquiry? I understood
11 your brief to say it's not a question of one Government
12 receiving the tax versus the other, like one county
13 getting what belonged to another county.

14 I think your position was that even if there had
15 been no tax by the State of Montana there could not have
16 been a tax by the tribe instead, because it didn't have
17 the requisite Federal permission in the years in question,
18 is that correct?

19 MR. SMITH: That's correct, Your Honor and,
20 indeed, the district court so found following the 1994
21 trial, the second trial in this matter.

22 QUESTION: So it's not like getting benefits
23 that should have gone to you that went to somebody else,
24 but your position is that it would have been -- the tribe
25 could not have gotten the tax.

1 MR. SMITH: That's correct, Your Honor.

2 The vast bulk of the taxes at issue were paid
3 during the period between 1975 and 1982.

4 QUESTION: Another way of saying that would be
5 that there was no duty to pay the tribe.

6 MR. SMITH: Yes, Your Honor, there was no duty
7 on the part of Westmoreland to pay the tribe.

8 QUESTION: In the restitution cases there's
9 usually a duty to pay the person that seeks to recover
10 later on.

11 QUESTION: Mr. Smith, judging from the number of
12 times you cite it in your brief I gather you rely rather
13 heavily on our decision in United States v. California.

14 MR. SMITH: That's correct, Mr. Chief Justice.

15 QUESTION: And how do you fit that into your
16 case?

17 MR. SMITH: Your Honor, we believe that
18 California stands for the general proposition that quasi-
19 contract relief is available as a matter of Federal common
20 law only with respect to the entity or person who bears
21 the legal incidence of the tax.

22 Moreover, the facts in California are remarkably
23 similar to the facts here, in the sense that the United
24 States in that case, similar to the tribe in this case,
25 was attempting to enforce in essence an independent

1 obligation that may have existed between the Federal
2 contractor in that case and the United States, just as the
3 tribe in this case is, when you cut through the chaff, is
4 attempting to enforce real or imagined obligations that
5 the -- that Westmoreland may have had to the tribe under
6 the terms of the 1976 Tribal Tax Code.

7 QUESTION: Well, but the big difference, of
8 course, is that in U.S. v. California the suit was based
9 on money had and received, which this Court said required
10 finding an implied contract, and the tax was found to have
11 violated State law. State law.

12 Here, you've got in earlier litigation resolved
13 in Crow II a determination, affirmed by this Court, that
14 the Montana law violated tribal sovereignty and was,
15 indeed, preempted by Federal law. Now, that is a
16 different cause of action, and maybe will give rise to
17 some right for compensatory damages.

18 I think U.S. v. California on that basis is
19 distinguishable. How would you say it is not?

20 MR. SMITH: Justice O'Connor --

21 QUESTION: You've got a separate cause of action
22 here.

23 MR. SMITH: Justice O'Connor, as I said before
24 if the tribe and the United States had pursued an actual
25 or compensatory damages case, this matter would be quite

1 different.

2 QUESTION: Well, is it too late? Maybe what
3 needs to be done is to vacate and remand, so that the
4 Court can address what is the appropriate remedy. The
5 Court may well have found an improper remedy, just lumping
6 all the taxes together and saying, fine, you get it, but
7 they're probably entitled to something if they can
8 establish injury.

9 MR. SMITH: Your Honor, the respondents in this
10 case made a very conscious decision not to pursue a
11 damages claim with respect to Westmoreland. Indeed, they
12 did pursue a damages claim with respect to Shell, the
13 Shell transaction.

14 QUESTION: No. They're talking about some
15 remedy against the State of Montana, which -- and it is
16 the State of Montana by its law that is said to have
17 violated tribal sovereignty, not Westmoreland.

18 MR. SMITH: Your Honor, I may have misspoke.

19 The tribe attempted to amend its complaint in
20 1993 to allege, in essence, a damages claim against the
21 State and the county with respect to the nondevelopment of
22 a project on the reservation called Young's Creek, and we
23 loosely call that the Shell issue, and that issue was
24 resolved against it by the district court and by the court
25 of appeals.

1 With respect to Westmoreland, the tribe has
2 consistently declined to pursue a damages claim. Indeed,
3 the --

4 QUESTION: When you say with respect to
5 Westmoreland you mean with respect to that operation, not
6 suing -- the tribe suing Westmoreland, I take it.

7 MR. SMITH: That's correct, Your Honor.

8 The -- when I say Westmoreland, I'm speaking of
9 the production under the lease agreement between
10 Westmoreland and the tribe, but as -- and it's summarized
11 perhaps in most detail in our opposition, which is Clerk's
12 Record 600, to the United States and the tribe's motion to
13 amend their amended complaints in 1993.

14 We summarized in some detail the conscious
15 decision by the respondents not to pursue a damages claim,
16 and that description appears on pages 2 through 11 of
17 Clerk's Record 600.

18 There is simply no question, we respectfully
19 submit, in this case that if there in fact could have been
20 a damages claim the respondents made a conscious
21 litigation decision not to pursue it, and that was not an
22 unreasonable determination.

23 The district court, following the first trial in
24 this case, following the 1984 trial, concluded that there
25 was no evidence to establish that Westmoreland had lost

1 any prospective or existing coal contracts because of the
2 State taxes.

3 The district court in the second trial noted,
4 based on testimony adduced at that trial, that there was,
5 again, no further evidence that Westmoreland had lost any
6 contracts because of these State taxes.

7 QUESTION: Well, Mr. Smith, was Westmoreland a
8 plaintiff in some of these actions? I mean, did it sue
9 the State of Montana?

10 MR. SMITH: It did, Your Honor. It -- excuse
11 me. I'm sorry.

12 QUESTION: Yes, by --

13 MR. SMITH: The -- Westmoreland intervened as a
14 defendant in 1978, shortly after this matter was
15 initiated. It cross-claimed against the State, seeking a
16 determination in 1978 that the taxes were unlawful. It
17 amended its cross-claim in 1983 to seek recovery of the
18 taxes paid to the State between 1976 and 1982.

19 QUESTION: And how did that claim finally come
20 out?

21 MR. SMITH: That claim, Your Honor, was
22 eventually dismissed with prejudice as a result of a
23 settlement in 1991.

24 QUESTION: A settlement between the State and
25 Westmoreland?

1 MR. SMITH: That's correct, Your Honor.

2 QUESTION: Could I ask, about that settlement --
3 it really puzzles me. They had a claim for millions of
4 dollars, as I remember it, and they settled for \$50,000.
5 Was there some other consideration given to Westmoreland
6 in that settlement, other than \$50,000? It seems very
7 strange.

8 MR. SMITH: No -- there was no other
9 consideration given, Your Honor.

10 The -- Westmoreland at that point in time had a
11 claim that from the petitioner's view and I believe from
12 Westmoreland's view had zero value, because at that point
13 in time it had long since passed any -- bypassed any
14 opportunity to challenge the State taxes under State law.

15 QUESTION: Well, the State statute of
16 limitations in effect had run on its ability to recover.

17 MR. SMITH: That's correct.

18 QUESTION: I see.

19 MR. SMITH: And so the \$50,000 from its
20 perspective was approximately \$50,000 more than its claim
21 was worth.

22 QUESTION: What is the State's procedure? Must
23 you protest within a certain amount of time, or --

24 MR. SMITH: Excuse me. I'm sorry.

25 QUESTION: What did Westmoreland fail to do that

1 made its claim, as you say, worthless?

2 MR. SMITH: Your Honor, under State law -- first
3 of all, there are two taxes involved in this question, in
4 this case, a gross proceeds tax and a severance tax, and
5 there are actually different protest procedures for each
6 of those taxes, but generally speaking for each tax the --
7 Westmoreland was required within a specific period of time
8 to file a protest and then with respect to the gross
9 proceeds tax and the severance tax for a period of time to
10 initiate a lawsuit in State district court. It failed to
11 do that.

12 The State procedures for protest with respect to
13 the severance tax changed in 1983 retroactive to 1981,
14 which provided for a protest procedure and then
15 administrative review by the Department of Revenue and a
16 lawsuit if the -- if Westmoreland was dissatisfied with
17 the resolution of its claim.

18 So again, the -- by the time the settlement
19 agreement was entered into in 198 -- in 1991,
20 Westmoreland's claim had, I think from its perspective,
21 zero value.

22 QUESTION: Mr. Smith, may I ask you about a
23 possibly different way of looking at the case or
24 characterizing the claim?

25 Up to this point we've been doing it in terms of

1 basically a competition between two taxing sovereigns.
2 One taxed when it shouldn't. The other one could have and
3 in effect wants the money that the first one wrongfully
4 took.

5 But there's another way, I think, to look at
6 this, and that is to emphasize what I take is not subject
7 to dispute either as a matter of the record or as a matter
8 of economics, and that was that what the State of Montana
9 took through its taxation was a very substantial
10 percentage of the economic value of the coal. They
11 were -- the tribe was able to keep, or Westmoreland was
12 able to keep on selling it with the tax added, but in fact
13 the ultimate party losing was the party that owned the
14 coal.

15 So that if we look at it that way, what we have
16 here is a contest between a Government which, through its
17 taxation, took a substantial interest in the property of
18 the tribe. Now the tribe, whether you call it a taxing
19 authority or simply the owner of the coal, wants that
20 wrongfully taken portion of its economic value back.

21 The State of Montana does not have a legal leg
22 to stand on as the taxing authority. That's behind us.
23 We know that the tax was in fact an invalid tax, so as
24 between the State of Montana, which took this substantial
25 economic value, and the owner of the property, the owner

1 of the value which was taken, why isn't it fairly clear
2 that the owner of the value taken, the tribe, ought to get
3 it back?

4 MR. SMITH: Your Honor, I think there are two
5 reasons why a negative answer is appropriate. First, the
6 State of Montana did not take value during the period
7 we're really concerned with, 1976 through 1982, from the
8 tribe. It took value from Westmoreland Resources in terms
9 of Westmoreland's taxes.

10 Now, at that point in time, the district court
11 found, and we believe the record supports the factual and
12 legal conclusion that Westmoreland simply would not have
13 paid the 19 -- paid taxes under the 1976 Tribal Taxation
14 Code, so it was not as if the State of Montana --

15 QUESTION: Well, it wouldn't have because
16 Westmoreland couldn't have passed it on, either as a
17 matter of the utilities law or as a matter of economics.

18 What, as I understand it, Westmoreland was doing
19 with respect to the Montana tax was simply passing it on
20 to its customers.

21 MR. SMITH: That's correct, Your Honor, and --

22 QUESTION: Yes. So Westmoreland was getting the
23 same profit on its contract that it would have been
24 getting if it had, in fact, not been subject to Montana
25 tax.

1 MR. SMITH: That's correct.

2 QUESTION: Okay.

3 MR. SMITH: Because, again, the economic
4 incidence of this tax was passed contractually through to
5 Westmoreland's utility customers.

6 QUESTION: But the fact that the coal was still
7 saleable at Westmoreland's price, plus the 35 percent, is
8 an indication of the value that was in the coal and
9 ultimately that value belonged to the owner of the coal
10 who was selling it, and that was the tribe, wasn't it?

11 MR. SMITH: Your Honor, the -- we would suggest
12 that the value of the coal was the value -- from the
13 tribe's perspective was the value that it received under
14 its 1974 lease agreement with Westmoreland.

15 QUESTION: Well, maybe they didn't make a good
16 lease agreement. I have no idea. But the fact is, even
17 if they didn't make a good lease agreement, it doesn't
18 follow that the State of Montana is entitled to take what
19 they should have been getting for themselves. As between
20 the State of Montana and the tribe, I don't see why the
21 tribe's claim is not the obviously prevailing one, if
22 that's a proper way of looking at the case.

23 MR. SMITH: Well, Your Honor, again, I think
24 that the issue in this case is whether the tribe has a
25 legal entitlement to recovery of those taxes, even when

1 the taxpayer itself does not.

2 QUESTION: Well, we're in the position of
3 fashioning a remedy for what was, in fact, a violation of
4 Federal law, and I'm not sure that I agree with you that
5 we are necessarily bound by categories of common law
6 remedial practice in fashioning that remedy.

7 MR. SMITH: Your Honor, if we depart from common
8 law tradition in this regard, one must ask him or herself
9 the question of why the tribe as opposed to Westmoreland,
10 or for that matter Westmoreland's customers, is more
11 entitled to these moneys.

12 Westmoreland, through the legal incidence, and
13 Westmoreland's customers through the economic incidence,
14 actually bore the burden of this tax.

15 QUESTION: But Mr. Smith, why -- I'm not
16 following this colloquy between you and Justice Souter.
17 It seems -- was the coal contracted for and the price
18 fixed between the tribe and Westmoreland before the taxes
19 were imposed?

20 MR. SMITH: They were, Your Honor.

21 QUESTION: So at that point, it seems to me, the
22 value of the coal to the tribe was no more and no less
23 than what it had contracted to sell it for.

24 MR. SMITH: That's correct.

25 QUESTION: Period. I mean, it might be worth

1 more in the abstract, but if it made a bad contract its
2 value to the tribe at that point is simply what it
3 contracted to sell it for, I assume.

4 MR. SMITH: That's correct and, Your Honor,
5 indeed, the tribe did not make a bad contract.

6 QUESTION: Well, I guess the tribe is saying,
7 though that, but for the subsequently enacted tax, that
8 Westmoreland would have taken more coal out and been able
9 to sell more and they would have gotten more royalties and
10 what's more maybe there was some other land they could
11 have leased out for coal removal, but because of Montana's
12 tax they weren't able to do it.

13 But that doesn't equate automatically with the
14 amount of Montana's tax, it seems to me. I still think we
15 need to pursue what really is the injury to the tribe in
16 terms of dollars.

17 MR. SMITH: Your Honor, I agree, and the injury
18 to the tribe in terms of dollars would, at least in
19 theory, have been best quantified through a compensatory
20 damages kind of claim and, as I've said before, that is
21 not the kind of claim that has ever been maintained in
22 this action and, indeed, it is the kind of claim that the
23 tribe and the United States disclaimed any interest in
24 pursuing. The --

25 QUESTION: You say that remedy was unavailable

1 because it had not been sought. Is that your position
2 here?

3 MR. SMITH: Yes.

4 QUESTION: When you say common law authority,
5 what common law authority? That is, I found -- I thought
6 restitution authority is you're supposed to do basically
7 what's just, and if person A takes the property of person
8 B and puts it to a use whereby he makes some money out of
9 it, that money -- you know, person A wrongfully takes the
10 property of B and makes some money out of its use, and
11 that money finds its way into the hands of C, I would have
12 thought restitution would give it back to the original
13 owner of the property.

14 MR. SMITH: And --

15 QUESTION: I mean, I didn't think there was some
16 general, technical thing. I thought you're supposed to do
17 basically what's fair.

18 Here they had some property, and it was put to
19 some use, and it ended up generating some money, and the
20 money ends up in the hands of a person who has no right to
21 it whatsoever, but they might have gotten it out of the
22 property. Why shouldn't restitution or equity come back
23 and put it where it belongs?

24 MR. SMITH: Your Honor, in fact the petitioners
25 did not receive any property of the tribe. The tribe

1 conferred no benefit on the --

2 QUESTION: But they got \$58 million which was
3 tax, which tax was generated through the use of some coal
4 that started out belonging to the tribe, and that coal
5 generated some money that was used to pay a tax that went
6 into the hands of a person who has no right to it.

7 MR. SMITH: Your Honor, but following that --

8 QUESTION: I mean, is there some common law
9 authority that says you couldn't do that, bring it back?

10 MR. SMITH: Your Honor, we believe there is, and
11 we believe that the common law authority is United States
12 v. California.

13 QUESTION: Well --

14 QUESTION: If the tribe had executed its leases
15 and the -- and with the royalty agreements, and after the
16 execution of those mining agreements or leases had then
17 imposed a tax, would that have been inconsistent with the
18 contract documents?

19 MR. SMITH: I think Westmoreland, Your Honor,
20 would have said was -- it wasn't consistent, because
21 Westmoreland saw the 1974 lease amendment as the complete
22 economic settlement between the parties.

23 QUESTION: So it's not at all clear that the
24 tribe could have imposed its tax if it had chosen to do so
25 after executing the agreements.

1 MR. SMITH: Well, the record shows the tribe in
2 fact did attempt to impose their tax, but was prevented
3 from doing so by the Department of Interior.

4 QUESTION: That's what I thought.

5 MR. SMITH: Because the Department had doubted
6 the authority of the tribe to tax off-reservation
7 transactions, and the ceded strip is outside --

8 QUESTION: Well, was that a matter of the
9 tribe's sovereign authority, or was part of that decision
10 motive, it was one of the reasons offered in denial of the
11 permission to tax, the fact that the tribe had already
12 made a contract?

13 MR. SMITH: No, Your Honor. It was based solely
14 on the tribe's constitution and the Department's
15 interpretation that it did not permit off-reservation
16 taxation.

17 QUESTION: And there was a subsequent district
18 court decision saying that in fact it was part -- the
19 ceded land was part of the reservation and the tribe did
20 have the power to tax, isn't that right?

21 MR. SMITH: Yes, Your Honor, that's correct, but
22 that was in 1988, long after --

23 QUESTION: Right.

24 MR. SMITH: -- the events we're concerned with
25 occurred, and that decision was thereafter reconsidered by

1 the district court in its 1994 decision, and in essence
2 the district court stated that it was not intended to
3 speak to any obligation that Westmoreland may have had
4 under the 1976 Tribal Taxation Code.

5 QUESTION: But quite apart from the tribe's
6 sovereign authority, Westmoreland might have had an
7 argument that this -- that the imposition of the tax was
8 inconsistent with its contract negotiations.

9 MR. SMITH: It did and, indeed, Westmoreland
10 made that argument, but that is not the argument that the
11 Department of Interior relied upon in disapproving the
12 ordinance.

13 QUESTION: Mr. Smith, in your answer to Justice
14 Breyer's question a moment ago, your reliance on
15 California and, I gather, in your answer to me, you're
16 assuming that one -- I think one of the things you're
17 assuming is that in the question of, as it were, the value
18 of the property to the tribe and what the tribe may
19 properly claim as value taken from it, the tribe's
20 contract with Westmoreland is in fact a limitation on what
21 the tribe can claim. Why should that be a limitation as
22 between the tribe and Montana?

23 MR. SMITH: Your Honor, it should be a
24 limitation between the tribe and Montana because the
25 respondents are seeking a very specific remedy,

1 Westmoreland's taxes. That is the remedy they have sought
2 for the last 10 years.

3 QUESTION: Thank you, Mr. Smith. I think you've
4 answered the question.

5 Mr. Pelcyger, we'll hear from you.

6 ORAL ARGUMENT OF ROBERT S. PELCYGER

7 ON BEHALF OF THE PRIVATE RESPONDENTS

8 MR. PELCYGER: Mr. Chief Justice Rehnquist, and
9 may it please the Court:

10 I'd like to start by addressing some of the
11 questions that were raised by the Court to Mr. Smith.
12 First, I'd like briefly to refer to Rule 54(c) of the
13 Federal Rules of Civil Procedure, which states that every
14 final judgment shall grant the relief to which the party
15 in whose favor it is rendered is entitled, even if the
16 party has not demanded such relief in the party's
17 pleadings. That's quoted at page 24 and footnote 18 of
18 our brief.

19 I'd also like to bring the Court's attention to
20 the district court's 1990 interlocutory decision, also
21 quoted in that same footnote. It's in the petitioner's
22 appendix at pages 74 to 76.

23 QUESTION: Which footnote is it in your brief,
24 Mr. Pelcyger?

25 MR. PELCYGER: Footnote 18, page 24, Mr. Chief

1 Justice, in which the district court denied the motion --
2 this was in 1990, long before the trial in this case, in
3 which the district court denied Montana's motion to
4 dismiss, stating that the current phase of this case was
5 an extension of the district court's previously invoked
6 equity jurisdiction and that, once violations of
7 significant tribal interest were established, the district
8 court had "broad equitable powers" that refers -- broad
9 equitable powers to construct a remedy that refers to
10 State law and is not defeated by it, so it was known
11 throughout this litigation what this case was about, and
12 this is not a pleading case.

13 QUESTION: Well, Mr. Pelcyger, why shouldn't the
14 remedy be tailored to the damages suffered by the tribe?
15 In other words, the loss to the tribe of royalties that it
16 otherwise would have had if more coal had been taken by
17 Westmoreland and sold, or other revenues that it might
18 have derived if other people had not been discouraged by
19 the amount of Montana's unlawful tax from making lease
20 arrangements with the tribe?

21 I don't see why the measure of damages should
22 automatically be the amount of the taxes collected by
23 Montana. I think it should be directed to the tribe's
24 injuries.

25 MR. PELCYGER: Let me say first that that's not

1 the question that's presented. The question presented
2 was --

3 QUESTION: I'd like you to answer that question.

4 MR. PELCYGER: I would be glad to answer that
5 question and I'm glad you asked it.

6 The court of appeals held twice, both in Crow II
7 and in Crow IV, that Montana's illegal coal taxes, quote,
8 took revenues that would otherwise go towards supporting
9 the tribe and its programs.

10 That was with reference to the coal that was
11 actually mined, not the coal --

12 QUESTION: I don't understand what that means.
13 I mean, what does that mean, that would otherwise go?

14 MR. PELCYGER: It means that Westmoreland --

15 QUESTION: Because the tribe would have taxed
16 it?

17 MR. PELCYGER: The tribe would have taxed it.

18 QUESTION: The tribe couldn't have taxed it.

19 MR. PELCYGER: Well, the tribe could have taxed
20 it, Your Honor, and let me also say in response to Justice
21 Kennedy's question that this Court held in the case of
22 Hickory Apache Tribe -- *Marian v. Hickory Apache Tribe*
23 that in the absence of an expressed waiver of the
24 sovereign right to tax, the tribe could go back -- the
25 circumstances there were virtually identical and the tribe

1 could go back and impose taxes after entering into a
2 mineral lease, so that issue was resolved by this Court.

3 QUESTION: But there they had the consent of the
4 Secretary of Interior.

5 MR. PELCYGER: They had the consent of the
6 Secretary of Interior, that's correct.

7 QUESTION: Which is a little different than this
8 one.

9 MR. PELCYGER: Well, that's a -- perhaps a
10 complicating factor or a distraction, depending on how
11 it's viewed.

12 But what the record shows here clearly and
13 unmistakably, the first thing, Justice O'Connor, that
14 needs to be looked at is what has actually happened in the
15 absence of the State tax. The State tax was held invalid
16 in 1987 in Crow II, summarily affirmed by this Court in
17 1988.

18 Since that time, the tribe has, in fact,
19 received 100 percent of the State -- of taxes measured
20 precisely by the amount of the State severance and gross
21 proceeds taxes, so the best evidence of what would have
22 happened but for the State taxes is what actually did
23 happen.

24 QUESTION: I don't follow that. They didn't
25 have permission from the Department of Interior for those

1 years, and at least Mr. Smith took the position that --
2 both on brief and before us that, even if Montana hadn't
3 tried to tax any part of this, the tribe could not without
4 the Secretary's permission, which it didn't have in those
5 years.

6 MR. PELCYGER: Well, this is not a case between
7 the tribe and Westmoreland. This is a case -- this is --
8 in order to recover against the State -- Westmoreland's
9 not the wrongdoer. The State is the wrongdoer. We're
10 seeking to recover not against Westmoreland. We're
11 seeking to recover against the State of Montana. I see no
12 reason why recovery against the State --

13 QUESTION: Well, why shouldn't it be measured by
14 your injury? I would appreciate your answering that
15 question before we go on to other things.

16 MR. PELCYGER: I'm trying to -- I'm trying to
17 answer -- I'm trying to answer the question.

18 The record shows that Montana -- and this is
19 clear by the testimony of Montana's president, and it's
20 clear by a 1976 letter that is in the record in the joint
21 appendix at page 87 where Westmoreland says, and it's
22 position from the beginning was that it was willing to pay
23 one tax, not two, it didn't matter to Westmoreland who it
24 paid the taxes to, and that Westmoreland was willing to
25 pay the tribe any additional payments that the tribe was

1 exempt from by virtue of its status and by virtue of its
2 sovereignty.

3 And that is exactly what the Ninth Circuit held
4 below, relying on that 1976 letter which was quoted in the
5 court of appeals decision.

6 QUESTION: You mean, Westmoreland would have
7 paid it without the Department of Interior permission on
8 the part of the tribe?

9 MR. PELCYGER: I can't speak for Westmoreland,
10 but --

11 QUESTION: No. Don't you think they'd be liable
12 to their stockholders if they did something like that?

13 MR. PELCYGER: Your Honor, the record shows, and
14 again it's very clear on this point, Westmoreland
15 recognized what the traffic bore for Montana coal after
16 1975. Westmoreland recognized that one way or another it
17 was going to have to pay, whether in the form of increased
18 royalties or taxes, that additional amount of money.

19 QUESTION: That's all very true. They didn't
20 care who they paid the taxes to.

21 MR. PELCYGER: Right.

22 QUESTION: But that still doesn't settle the
23 question of whether the tribe could have imposed the tax.

24 MR. PELCYGER: Well, but again the question is,
25 why -- the Secretary of Interior made a mistake. Assume

1 the Secretary of the Interior made a mistake. Now, in
2 fact the tax was approved as to reservation coal and it
3 was subsequently determined that this coal was reservation
4 coal.

5 QUESTION: Well, not only that, the tribe's tax
6 was 25 percent, Montana's was 35 percent, so even if the
7 tribe could have taxed, it wasn't going to tax it the same
8 amount.

9 MR. PELCYGER: Well, under --

10 QUESTION: I mean, this -- we're just addressing
11 what the injury is.

12 MR. PELCYGER: Well, Montana, of course, was
13 free to defend on that ground, that there was a disparity
14 and, indeed, the law of restitution recognizes that if
15 there is a gross disparity between the unlawful gain and
16 the amount -- restitution does not exist in order to give
17 plaintiffs an unjust enrichment, and Montana was free to
18 argue that.

19 In fact, they did not argue that, not at all.
20 What Montana argued was that we provided services to all
21 the Crow members, the same services they would have
22 received in the absence of this --

23 QUESTION: Well, I suppose it's not too late.
24 We have to look now in this case at whether the remedy of
25 disgorgement of all of the taxes and handing it over to

1 the tribe is correct as a matter of Federal law. Maybe
2 it's not. Maybe it ought to be sent back so we can look
3 at what the injury to the tribe was.

4 MR. PELCYGER: The critical question here is
5 what would have happened in the absence of the State's
6 unlawful taxes, and whether or not the tribe might have
7 been able to recover against Westmoreland is beside the
8 point. The question is, what would have happened but for
9 the State taxes, and the record --

10 QUESTION: May I ask in that connection, assume
11 that Westmoreland had not been tardy in making its claim
12 for a refund and it had promptly filed a claim for a
13 refund and all of the money had been refunded to
14 Westmoreland, would you still be able to maintain
15 precisely the same claim that you're now maintaining?

16 MR. PELCYGER: Of course, that's not our
17 situation.

18 QUESTION: I understand.

19 MR. PELCYGER: But I believe yes, we would, Your
20 Honor, and the reason is that the Court's -- the remedial
21 powers of this Court should be guided primarily here by
22 the purposes of the statute that was violated, but the
23 purposes of the statute here were not to benefit
24 Westmoreland. It was not to give Westmoreland a
25 competitive advantage vis-a-vis other coal producers.

1 QUESTION: What was violated was the Commerce
2 Clause of the Constitution, wasn't it?

3 MR. PELCYGER: No. What was violated -- and the
4 Commerce Clause of the Constitution was not violated. In
5 fact, this Court in Commonwealth-Edison specifically
6 upheld this same tax as applied to Federal coal.

7 What was violated here was the tribe's
8 sovereignty and the Indian Mineral Leasing Act under which
9 the tribe's minerals are leased, not the Federal minerals,
10 or not other people's minerals.

11 So this is unique to the tribes, and the
12 purpose -- this is a very, very unique tax, because the
13 tax -- sorry. This is a very unique statute under which
14 the tax was held invalid, because the purpose of the
15 statute was not to protect the taxpayer. The purpose of
16 the statute was to protect the tribe.

17 Westmoreland, the taxpayer, was a bystander,
18 caught in a big conflict, in the middle of a conflict
19 between three sovereigns, Federal, State, and tribal.

20 QUESTION: It wasn't exactly a bystander when it
21 got back all the money in escrow.

22 MR. PELCYGER: No, but it was -- no. Well, it
23 didn't get back -- no, the tribe got the money that was in
24 escrow, Your Honor, not Westmoreland.

25 QUESTION: Oh, that's right. That's right.

1 MR. PELCYGER: So --

2 QUESTION: They did get a -- didn't they get
3 something back, Westmoreland?

4 MR. PELCYGER: No. Westmoreland just got the
5 \$50,000 that you referred to.

6 QUESTION: Okay.

7 MR. PELCYGER: So you have to look at the
8 purpose of the Federal statute. The purpose of the
9 Federal statute was not to confer a benefit on the
10 taxpayer.

11 Ordinarily, when taxes are held invalid the
12 automatic assumption is, the taxes were held invalid, the
13 taxpayer gets to get the money back because the taxes were
14 invalid, but here the sole and exclusive intended
15 beneficiary of the laws that were violated was the tribe,
16 it wasn't Westmoreland, and for Westmoreland to escape
17 with no taxes whatsoever would not be a result that is
18 consistent with the purposes of the statute and would not
19 effectuate the purposes of the statute --

20 QUESTION: Mr. -- I'm sorry.

21 Mr. Pelcyger, I want to ask whether the terms of
22 the lease might have a bearing on the answer to Justice
23 O'Connor's question.

24 Assume the following. Assume that at a given
25 time the Secretary of the Interior said, you may not tax.

1 Assume that Westmoreland says, as it did, I don't care who
2 I pay the money to. I can sell the coal at this price,
3 and you guys fight it out.

4 If the tax at that point had been declared
5 invalid, as it was, could the tribe -- did the tribe have
6 a right under its lease agreement simply to demand a
7 renegotiation of the price at which it would sell so that
8 it could have gotten as its lease price what the
9 Department of the Interior was not allowing it to get by
10 way of taxation?

11 MR. PELCYGER: There was not -- there was a
12 provision for renegotiation of royalties, but on specific
13 dates. I think the first one was 10 years after the
14 original lease, not in 1975.

15 QUESTION: Okay.

16 MR. PELCYGER: Because the lease was entered
17 into in 1974, Your Honor.

18 QUESTION: Are you going to be able to show --
19 are you going to be able to show that if the Montana
20 tax -- everybody had known from the very beginning that
21 they couldn't have done it, everybody would have known
22 that you -- that the tribe could have gotten more
23 royalties from Westmoreland?

24 MR. PELCYGER: Well, I --

25 QUESTION: It's the same pile of money. I mean,

1 it's a pile of money that's traceable --

2 MR. PELCYGER: That's right, and Westmoreland
3 testified it didn't make any difference. They passed on
4 both the royalties --

5 QUESTION: I know from West -- we're talking
6 about the damages, and what I'm interested in is whether
7 you think you'd be able to show that in the absence of
8 this unlawful tax, everybody knew it was unlawful.
9 Everybody knew from the year 1800 that they couldn't do
10 it.

11 Now, if they had known that all in advance,
12 would the tribe have been able, even if the Secretary of
13 the Interior made the mistake about the tax, they say,
14 okay, you're right, we can't tax you, Westmoreland, but
15 what we can do is increase our royalties, and we will.

16 Now, do you think that you can show that that's
17 what would have happened?

18 MR. PELCYGER: I can't predict what would have
19 happened under those circumstances. What I can say is
20 that the record before this Court --

21 QUESTION: Wasn't the price set -- wasn't the
22 price set before the tax was imposed? The --

23 MR. PELCYGER: The royalty was set --

24 QUESTION: Yes.

25 MR. PELCYGER: -- before the tax was imposed.

1 QUESTION: Yes, but at that time -- that's what
2 I wonder, you see. At that time when they set the
3 royalty, what was in the air? What did --

4 MR. PELCYGER: Well, that was --

5 QUESTION: I mean, I can understand my -- to
6 reveal what I'm thinking, I'm thinking that if this money
7 can be traceable really to the sale of the coal, which is
8 the tribe's, it is rather like somebody unlawfully taking
9 my car and use it to sell pizzas, and earns money for it,
10 and I should get it.

11 MR. PELCYGER: Yes.

12 QUESTION: But if you can't show that, it might
13 be different.

14 MR. PELCYGER: Well, let me just say, the record
15 leaves no doubt that but -- and this is clear from
16 Westmoreland's testimony, that but for the State taxes
17 they would have paid the same amount of money to the
18 tribe. They were not looking -- Westmoreland was not
19 looking to try to get something cheaper than the market
20 conditions.

21 QUESTION: I thought the tribe's position was
22 that had there been no heavy Montana tax, that
23 Westmoreland would have been able to take and sell more
24 coal, which would have generated more royalties to the
25 tribe.

1 MR. PELCYGER: That's part of the position, Your
2 Honor. There are two different discrete claims of injury
3 here, both of which were found by the lower courts.

4 The first discrete claim relates to the coal
5 that was actually produced and sold, and there the claim
6 is the tribe was deprived of its fair share of the
7 economic rent.

8 In addition to that, there's a claim with regard
9 to -- or an injury with regard to the coal that was not
10 sold because the price was too high because of the State's
11 tax.

12 There's no damages sought now on the basis of
13 that second category, but the first category is what we're
14 talking about, and that's what the focus is on.

15 Now, let me just say one other thing. There's
16 no reason --

17 QUESTION: But as to that -- as to that, the
18 tribe had entered into an agreement before there were any
19 taxes by either Montana or the tribe, or the amount of the
20 royalties it wanted and would accept, and so it's hard to
21 understand how the subsequent imposition of a tax which
22 was passed on to the consumers by Westmoreland alters
23 that.

24 MR. PELCYGER: Well, again, the lease just dealt
25 with royalties. The tribe is both the owner of the coal

1 and the sovereign.

2 Let me just make one thing real clear. There's
3 no reason --

4 QUESTION: Well, at a time -- at a time when the
5 tribe was not permitted to impose its own tax, it's hard
6 to equate that with the direct injury.

7 MR. PELCYGER: Well, the reason -- the tribe was
8 permitted to impose its own tax. The Secretary made a
9 mistake, because the Secretary didn't realize at the time
10 that the ceded strip coal was part of the reservation.

11 Now, the question is, why should the benefit of
12 that mistake inure to the wrongdoer? The tribe --

13 QUESTION: It was the reality, whether it was a
14 mistake or not. It's not a question of why should --

15 MR. PELCYGER: No, but the question is, this is
16 a claim of the tribe versus the wrongdoer. This is a
17 claim for violation of the tribe's federally secured
18 rights.

19 QUESTION: Thank you, Mr. Pelcyger.

20 Mr. Lamken, we'll hear from you.

21 ORAL ARGUMENT OF JEFFREY A. LAMKEN

22 ON BEHALF OF THE FEDERAL RESPONDENTS

23 MR. LAMKEN: Mr. Chief Justice, and may it
24 please the Court:

25 QUESTION: Mr. Lamken, sometime in the course of

1 your argument I'd appreciate your saying why this case
2 isn't controlled by California v. United States. It's
3 been suggested that California did not involve a Federal
4 cause of action, and here it does, a violation of a
5 Federal right, but as I read the California opinion, the
6 Court's reasoning didn't turn on that fact. If you'll
7 just address that sometime in your argument.

8 MR. LAMKEN: Yes, Your Honor. Why don't I begin
9 with that.

10 California involved a claim that the -- the
11 question was whether there was a Federal common law cause
12 of action in the United States against the State of
13 California where California had not violated Federal law
14 and it had not invaded any sovereign right of the United
15 States. The only reason the United States was in the case
16 was it had voluntarily agreed to indemnify a third party
17 that had paid the tax potentially in violation of State
18 law.

19 This Court held that the United States could not
20 use its voluntary indemnification of that third party to
21 create a Federal common law cause of action out of what
22 was in essence a State law cause of action. In essence,
23 the Federal Government did not obtain any greater rights
24 than the third party that had indemnified had to begin
25 with.

1 Here, in contrast, there is a Federal cause of
2 action. Montana violated not State law, but it violated
3 Federal law, and it did not violate the law -- the rights
4 of a third party.

5 QUESTION: Well, you say a Federal cause of
6 action. The United States v. California came up through
7 the Federal courts, didn't it?

8 MR. LAMKEN: Certainly, and --

9 QUESTION: So there must have been -- the United
10 States must have had a right to go into court to make the
11 assertion that it should recover. I wonder if your
12 denominated cause of action is right, or whether you don't
13 mean that your argument is there was a violation of a
14 Federal right.

15 MR. LAMKEN: Cause of action can be -- the
16 phrase, cause of action, can be used two ways. One is in
17 the sense of a valid stated claim on which relief can be
18 granted. The other one is the question of whether the
19 litigant is within the category of potential plaintiffs
20 who are entitled to bring that sort of claim.

21 Regardless of which sense it is, it was -- you
22 use the word, it was clear in the United States v.
23 California case that the United States could not bring
24 that cause of action, and here it's clear that we are.

25 The United States in this case did not only

1 bring a case, it prevailed. It obtained permanent relief
2 based on its claim, so here there is a cause of action.

3 In California the substantive holding was there
4 was no cause of action. Accordingly, the claim by the
5 United States should have been dismissed, and it should
6 not have been in Federal court to begin with. It simply
7 was not a proper party to bring that case.

8 QUESTION: As I understand your theory, if
9 California taxed a corporation that was doing business in
10 California and Nevada and the corporation said, you know,
11 really, this is interstate commerce, you can't tax our
12 income, and settled with California, under your theory I
13 guess Nevada could say, we don't have a corporate income
14 tax, but you know, you took the tax that really should
15 have been ours, so we'll sue you, State of California. I
16 suppose under your theory Nevada would prevail.

17 MR. LAMKEN: No, Your Honor, I don't believe
18 that that case could be brought, and I think this is in
19 part a response to Justice O'Connor's question, and that
20 is that the purpose of a remedy such as restitution is to
21 restore the parties to the position they would have
22 occupied had Federal law been respected to begin with.

23 Restitution begins that process by forcing the
24 defendant to disgorge its unlawful gains.

25 Now, it's important in tax cases to start with a

1 disclosure and then let defendant --

2 QUESTION: Well, under that, Nevada says, you
3 know, this money must belong to somebody. The company's
4 settled. California, it's not yours. It should be ours.

5 MR. LAMKEN: Well, the next step, however, in
6 the analysis, Your Honor, is, where there's a gross
7 disparity between the two -- between the injury to the
8 plaintiff and the unjust gain to the defendant, the court
9 can deny restitution because the restitution would not --
10 the enrichment was not unjust vis-a-vis the plaintiff.

11 Another way of looking at it is simply, if the
12 plaintiff has no injury whatsoever it cannot seek
13 restitution.

14 QUESTION: Their point is that, that I take it
15 that the, Montana's point is that in the absence of this
16 unlawful tax of the \$58 million, or whatever, the tribe
17 couldn't have gotten the money.

18 It couldn't have gotten the money through a
19 royalty because it had long previously signed a definite
20 contract. It couldn't have gotten the money through a tax
21 because the Secretary of the Interior had said you can't
22 tax.

23 So in the absence of their having taken the
24 money, the tribe could never have seen a penny of it,
25 regardless, and therefore they are not a proper person to

1 give the money back to.

2 Now, I take it that that's basically their
3 point, as I've understood it, and so what is your response
4 directly to that?

5 MR. LAMKEN: Our response to that is the same
6 response that the court below had, which is, it's not
7 supported by the evidence, and there's two reasons why --

8 QUESTION: And what does -- and fine, so what
9 is -- what does the evidence support, in your view?

10 MR. LAMKEN: First, the evidence supports that
11 in the absence of the Montana tax, Westmoreland is willing
12 to pay additional royalties to the tribe whether by way of
13 tax or by way of royalty agreements in any amount that it
14 saved from the Montana tax. In other words, any reduction
15 in the Montana tax would have been -- Westmoreland was
16 willing to pay that to the tribe.

17 QUESTION: Is that right? I mean, is that
18 really credible? I mean, the tribe would have come and
19 said, you know, this tax is unlawful, and we know we can't
20 get any more royalties from you, we have a deal, and we
21 know we can't tax you because we've been told by the
22 Secretary of the Interior he won't give permission, and
23 Westmoreland says, oh, that's okay, I'll give you the \$38
24 million instead of the State. That's fine with us.

25 MR. LAMKEN: There's a letter from Westmoreland

1 to the tribe in joint appendix page 87, and during that it
2 says that we have previously negotiated regarding
3 additional royalties. However, any additional payments to
4 you will have to be in lieu of the State tax and not in
5 addition to.

6 And in addition, at joint appendix pages 397 and
7 400 there are statements by Westmoreland to the effect
8 that they were willing -- any reduction in Montana tax
9 that the tribe could obtain through its use of its
10 governmental or sovereign authority --

11 QUESTION: That's a quite different statement,
12 any additional payments to you will have to be in lieu of
13 instead of in addition to, and you characterize that as a
14 sort of volunteering to give you the money that we save
15 from the tax?

16 MR. LAMKEN: In light of the negotiations that
17 had occurred, that is what it means, and on page 397 and
18 400 of the joint appendix, again there is testimony that
19 they're willing to share any savings that the tribe could
20 obtain from the Montana tax for them through use of its
21 governmental authorities with the --

22 QUESTION: Oh, so now they're willing to share
23 it. That's a deal that I think the company might cut.
24 That is plausible. If you get Montana off our back, we'll
25 give you \$19 of the \$38 million.

1 MR. LAMKEN: That's correct, Your Honor.

2 QUESTION: That's more plausible, but you've
3 already cut your claim by 50 percent now.

4 MR. LAMKEN: Your Honor, it's not -- I don't
5 think there is a precise one -- necessarily a proven
6 precise one-to-one correspondence between the loss to this
7 tribe in this case and the amount of restitution awarded
8 by the court of appeals.

9 QUESTION: Well, exactly.

10 QUESTION: Well -- yes.

11 QUESTION: I mean, that's the whole point, and
12 why shouldn't this be sent back to determine what was the
13 injury to the tribe?

14 I -- this business of equating it automatically
15 with the amount of tax I just don't understand.

16 MR. LAMKEN: Well, I think Your Honor, equity
17 starts -- restitution starts with the unlawful gain to the
18 defendant, and the reason it starts there -- and I'll go
19 to how it can get reduced.

20 The reason it starts there is an important
21 protection for the State. If it were simply a damages
22 action the State's liability would not be limited to the
23 amount of its unjust gain. It would --

24 QUESTION: On that theory, I take it you
25 disagree with your colleague on the same side, is that if

1 Westmoreland had recovered all the tax itself, then the
2 tribe would not be able to get any money.

3 MR. LAMKEN: If Westmoreland had recovered the
4 money, under the doctrines of benefits conferred the claim
5 would no longer be against Montana but upon -- the
6 beneficiary of the tax would be Westmoreland, so the
7 tribe's action would have to run against Westmoreland and
8 not the State of Montana.

9 QUESTION: You mean they would have been able to
10 recover this money from Westmoreland if Westmoreland had
11 recovered it from Montana?

12 MR. LAMKEN: The answer is potentially yes, and
13 this is --

14 QUESTION: But what -- why was Westmoreland a
15 wrongdoer? I mean, they have to have done something wrong
16 to give up several million dollars, don't they?

17 MR. LAMKEN: Yes, Your Honor, and that would
18 depend on the validity of the 1976 tax. The 1976 tax,
19 although initially the Secretary declined to approve it,
20 the Secretary did approve the tax --

21 QUESTION: The tribal tax.

22 QUESTION: The amount of the --

23 MR. LAMKEN: Excuse me.

24 QUESTION: The amount of the tribal tax is not
25 equal to the amount of the --

1 MR. LAMKEN: That's correct.

2 QUESTION: -- the Montana tax.

3 MR. LAMKEN: That's correct, and when there
4 is -- and if Westmoreland objected on that basis a trial
5 court would be justified in rolling back the
6 restitutionary remedy and saying, well, the goal here is
7 to return the parties to the position they would have
8 occupied if Federal law had been obeyed. I think the --

9 QUESTION: The same would be true for Montana,
10 then, too, wouldn't it?

11 MR. LAMKEN: That's true.

12 QUESTION: Okay.

13 MR. LAMKEN: If Montana had raised and proven
14 through evidence that the damages were grossly
15 disproportionate, got much lower than the restitution or
16 remedy, a court would be justified in rolling back the
17 restitution or remedy.

18 QUESTION: No, but isn't it clear on the record
19 that if the criterion of what the tribe gets looks to the
20 position that the tribe would have been in but for the
21 tax, even on that criterion, the tribe, based on the
22 record we've got, would not have gotten all that Montana
23 took.

24 MR. LAMKEN: I think, Your Honor, the starting
25 point is always the gain to the defendant. At that point,

1 it's the defendant's obligation to come forward and say,
2 assert and prove that this inherent restitutionary remedy,
3 based on its gain, is inequitable --

4 QUESTION: Well, is this --

5 MR. LAMKEN: -- because it overcompensates the
6 plaintiff.

7 QUESTION: Excuse me. Are you making this turn
8 basically on procedure, that although there is indication
9 in the record that the tribe in fact would not have
10 received, either by lease negotiation or by taxation, what
11 dollar-for-dollar Montana took, that somehow Montana
12 nonetheless has got to give it all back because Montana
13 did not go through some procedure of proving that, even
14 though we've got evidence in the record that indicates
15 that? Is that your position?

16 MR. LAMKEN: Yes, Your Honor. The position is
17 that if it's not grossly disproportional, a little bit of
18 difference between the restitutionary measure and the
19 damages measure does not make a difference.

20 QUESTION: Well, it sounds -- this --

21 QUESTION: You're writing all of this from
22 cases, moreover, in which the restitution is being made to
23 the person from whom the money was taken.

24 In this case, it would have been the corporation
25 and not the tribe, and I think to simply use the same

1 burden of proof rules in this very different situation is
2 unreasonable.

3 It is, indeed, reasonable to presume that the
4 whole amount of wrongfully acquired money goes back to the
5 person whom you took it from, and the burden would be on
6 Benvenuto Cellini to show that in fact he gave added value
7 to the lump of gold that he had stolen. That's very
8 reasonable.

9 But where you're asking us to give the money to
10 a third party, not to the person from whom it was taken,
11 it seems to me the burden of proof should be on that third
12 party to show that I was injured by this taking from
13 somebody else. Don't you -- doesn't that seem reasonable
14 to you?

15 MR. LAMKEN: In the abstract --

16 QUESTION: You want us to assume automatically
17 that the tribe was injured \$38 million worth.

18 MR. LAMKEN: The cases run exactly that way.
19 Even where the money is not obtained directly from the
20 plaintiff, it is the defendant's obligation to come
21 forward and show that restitution would be unjust or --

22 QUESTION: Mr. Lamken, something happened in the
23 district court, and the district court thought, I'm
24 supposed to do something equitable, and that seems to have
25 been forgotten by everybody, that here was a district

1 judge, he said, I'm going to consider the factors on both
2 sides.

3 And one of the things that he said he thought
4 might be relevant -- I hope I remember this correctly --
5 was from day one the tribe could have stopped Montana
6 because the tribe is not blocked by the Anti-Injunction
7 Act, so he's kind of mixing all the equities.

8 So -- but he did take into account a lot of the
9 things that we have been talking about. Where did he go
10 wrong if we don't buy your theory that you start with
11 every penny that Montana got and then, if we don't buy
12 that, what's wrong with what the district judge did?

13 MR. LAMKEN: The first error the district court
14 committed, Your Honor, is the district court failed to
15 consider additional royalties as a possible source of gain
16 to the tribe.

17 The district court looked simply at the
18 possibility of a tax, and even there the district court
19 had conflicting holdings. On the one hand it held that
20 the district court had not been approved by the Secretary,
21 so Westmoreland wouldn't have paid it. On the other hand,
22 it held that the tax had been approved by the Secretary
23 because the ceded strip is part of the reservation and the
24 tax was approved as to the -- excuse me, the coal under
25 the ceded strip was part of the reservation and the tax

1 had been approved as to the reservation.

2 Accordingly, under that holding, if Westmoreland
3 had not paid the money to the State of Montana instead,
4 the tribe would be proceeding against Westmoreland for the
5 money.

6 QUESTION: But that was much, much later.

7 In the years that we're talking about, '75 to
8 '82, none of that was settled.

9 MR. LAMKEN: The district court's holding was
10 from 1990, that's correct, but the court of appeals had
11 the same holding back in 1982 in Crow I.

12 QUESTION: Even '82 was the end of this period.
13 We're talking about '75 to '82.

14 MR. LAMKEN: That's correct, Your Honor, but I'm
15 not sure why it would make any difference, because the
16 point of the matter is, if the tax was valid the tribe
17 could go after Westmoreland for the tax. It's not doing
18 so here because Westmoreland was not the party --

19 QUESTION: Well, if the United States didn't
20 give the tribe permission to tax in '75, could a decision
21 by a court saying, oh, United States, you should have
22 authorize the tax, that the tribe meant to reach back 7
23 years and say, taxpayer, now cough up?

24 MR. LAMKEN: Actually, the court -- the district
25 court didn't say you should have given permission. It

1 said that you in fact did.

2 You may not have intended to, but the moment you
3 said the tax is approved as to the reservation, a fortiori
4 it applied to the coal in the ceded strip, because that is
5 part of the reservation, so when the Secretary wrote down
6 the words, approved --

7 QUESTION: And where does it say that
8 Westmoreland would have been bound to pay the tribe
9 because all those years later a court said, gee, we got it
10 wrong the first time, or the Secretary got it wrong?

11 MR. LAMKEN: There is no district court holding
12 on that point, Your Honor.

13 QUESTION: What about the Tax Injunction Act,
14 that the tribe is in an advantageous position with respect
15 to that, it can do what others can't do? It didn't. Why
16 at no point didn't the United States and the tribe think
17 about enjoining Montana from collecting this unlawful tax?

18 MR. LAMKEN: It did, Your Honor. The suit was
19 filed in 1978. The only reason they didn't get an
20 injunction until 1982 was the claim was dismissed for
21 failure to state a claim.

22 Until the Ninth Circuit reversed that dismissal
23 there's no chance whatsoever of our -- of obtaining an
24 injunction against the tax.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lamken.

1 The case is submitted.

2 (Whereupon, at 11:10 a.m., the case in the
3 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

MONTANA, ET AL., Petitioners v. CROW TRIBE OF INDIANS, ET AL.
CASE NO: 96-1829

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Federico-----

(REPORTER)