

Opinion of SOUTER, J.

SUPREME COURT OF THE UNITED STATES

No. 96–1829

MONTANA, ET AL., PETITIONERS v. CROW TRIBE OF
INDIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 18, 1998]

JUSTICE SOUTER, with whom JUSTICE O’CONNOR joins,
concurring in part and dissenting in part.

The Court’s meticulous treatment of this exhausting litigation, including its discussion of the way *Cotton Petroleum Corp. v. New Mexico*, 490 U. S. 163, 186, n. 17 (1989), bears on *Crow Tribe v. Montana*, 819 F. 2d 895 (CA9 1987) (*Crow II*), summarily aff’d, 484 U. S. 997 (1988), shows the error of requiring disgorgement to the Tribe of all Montana taxes collected from Westmoreland based on coal mined from the ceded strip between 1976 and 1982. As the Court explains, *ante*, at 16–17, *Cotton Petroleum* makes clear that the taxes were objectionable not because the State was wholly disintitiled to tax the Tribe’s coal operation, but because the “‘extraordinarily high’” taxes affecting the marketability of the Tribe’s coal were simply excessive. 490 U. S., at 186–187, n. 17. Since Montana was free to levy and collect the portion of taxes below the threshold of excessiveness, I concur in the Court’s decision to vacate the judgment and remand for further proceedings.

If the Court stopped there, the Court of Appeals would be free to set the stage for the District Court to engage in serious weighing of a claim to partial disgorgement under

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the Tribe's complaint, which, as now amended, seeks disgorgement of all moneys "illegally collected." Although this request for relief was originally predicated on a reading of *Crow II* that *Cotton Petroleum* shows was too expansive, the Tribe's prayer naturally encompasses the lesser claim to disgorgement of any taxes in excess of the State's limit.

It would be open to the Court of Appeals, further, to indicate that nothing done either by the Department of the Interior or by the Tribe raised a dispositive bar to the Tribe's claim to pre-1983 revenues, contrary to what the District Court had suggested, App. to Pet. for Cert. 35–37, leaving that latter court free to determine what had been excessive and to reweigh the equities. After considering what the Tribe had already received, among the other relevant facts, the District Court might require disgorgement of all, some, or none of the excessive taxes for the period before 1983.

The Court impedes any such exercise of trial court discretion, however, if it does not entirely foreclose it. Although the Court says that it does not "foreclose the District Court from any course that the Federal Rules and that court's thorough grasp on this litigation lead it to take" when the case is returned to it, *ante*, at 21, the Court's conclusions effectively thwart application of one of the principal rules of restitution that should be brought to bear on this case. It is from the resulting truncation of the District Court's discretion that I respectfully dissent.

Although both Montana and the Tribe may tax the value of the coal on its extraction or severance from the land, *ante*, at 16, Montana may tax only to a certain economic point. Beyond that point, as between Montana and the Tribe, only the Tribe may add to the tax burden. When a

* In December 1990, the United States, as trustee for the Tribe, filed its own amended complaint seeking essentially the same relief.

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taxing authority like Montana has taxed unlawfully to the prejudice of another jurisdiction that should have received the revenue in payment of its own lawful tax, accepted principles of restitution entitle the latter government to claim disgorgement of what the former had no business receiving. At the most general level, a “person who has been unjustly enriched at the expense of another is required to make restitution to the other.” Restatement of Restitution §1, p. 12 (1937). At a more specific level, there is the rule that “[w]here a person has paid money . . . to another in the erroneous belief, induced by mistake of fact, that he owed a duty to the other so to do, whereas such duty was owed to a third person, the transferee . . . is under a duty of restitution to the third person.” *Id.*, §126(1) at 514. The Supreme Court of Montana has accordingly held, as the majority recognize, *ante*, at 17, that as between two jurisdictions claiming to tax the same transaction, one that collected taxes without lawful authority must surrender them to the other one, entitled to impose them, *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); see also, *e.g.*, *College Park v. Eastern Airlines, Inc.*, 250 Ga. 741, 742–744, 300 S. E. 2d 513, 515–516 (1983) (invoking “general equitable principles of restitution,” including §126(1), to hold that one municipality may recover taxes mistakenly paid to another); *Indian Hill v. Atkins*, 153 Ohio St. 562, 566–567, 93 N. E. 2d 22, 25 (1950) (citing §126(1) and authorizing suit by one town to recover taxes paid to another); *School Dist. No. 6 v. School Dist. No. 5*, 255 Mich. 428, 429, 238 N. W. 214, 215 (1931) (authorizing suit to recover taxes paid to wrong school district because “[t]hrough breach of the law, plaintiff and its taxpayers have been deprived of their just due, and defendant has money which in equity and good conscience belongs to plaintiff”); *Balkan v. Buhl*, 158 Minn. 271, 279, 197 N. W. 266, 269 (1924) (“[T]o permit defendant to retain any of the taxes wrongfully collected by it from its

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neighbor's territory, would be to permit it to benefit from its own wrong Such a result is so objectional as to require no discussion beyond its bare statement"). Under Montana's own law, then, reflecting accepted principles of restitution, the Tribe raises at least a facially valid claim when it seeks disgorgement of the excess taxes collected by the State in the period before 1983.

Although the Court seeks to differentiate this case from the ambit of *Valley County*, the proffered distinctions come up short. First, it is not to the point that in *Valley County* only one jurisdiction could validly tax, whereas here both may do so, *ante*, at 17. The remaining element of the Tribe's claim against Montana goes only to the state revenues that might be found to have exceeded the limit of valid state taxation; beyond the point at which state taxation became excessive the State had no authority, while the Tribe did. (It is true, of course, that in this case the respective spheres of the two taxing jurisdictions are bounded by an economic, not a geographic line. But that distinction does not affect the principle involved, and the Court does not argue otherwise.)

Second, *Valley County* is not distinguishable on the ground that the governmental claimant there had an enforceable licensing and revenue scheme in place, whereas the Tribe "could not have taxed lessee Westmoreland during the period in question, for the Interior Department (whether wrongly or rightly) had withheld the essential permission," *ante*, at 18. The District Court's original ruling, acknowledged in its most recent opinion and never challenged by Montana, was that the Tribe "at all relevant times . . . had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip." App. to Pet. for Cert. 36. After the Ninth Circuit's ruling in *Crow II* that the mineral estate beneath the surface of the ceded strip was a part of the Tribe's reservation, 819 F. 2d, at 898, the District Court observed that,

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“[t]his analysis of the Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland’s mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland’s mining of Crow Tribal coal. Accordingly, the Interior Department’s purported refusal to approve the tax as it might apply to any mining operation on the Ceded Strip was based on what the Ninth Circuit has found to be a mistaken interpretation of the applicable law.” App. 286

Thus, the Tribe’s provision must now be recognized as valid for the period in question, and there is no apparent reason why the Tribe should be disqualified from seeking to obtain the State’s excess revenues that should have gone to the Tribe under the Tribe’s own tax regulation. While the Tribe could not have enforced the Tax against Westmoreland without the Interior Department’s approval, that is neither here nor there as between the Tribe and the State. And although the Tribe failed to obtain judicial review of the Department’s refusal, that has no bearing on the equity of the State’s retention of money to which it never had a valid claim. That is, there is no apparent reason to hold that the originally unlitigated third-party mistake of the Interior Department should affect the restitution claim as between two rival taxing authorities, one of which was clearly entitled to tax but got nothing, the other of which was entitled to nothing by way of excess taxes, but has pocketed the money anyway.

Third, despite a suggestion in the Court’s opinion, *ante*, at 11, 15, *Valley County* is not rendered inapposite by the

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Tribe's 1982 agreement with Westmoreland. So far as it matters here, that agreement simply capped Westmoreland's tax burden at the limit imposed by Montana's then-current taxing scheme and did not purport to govern any claim the Tribe might have against the State.

To reject the Court's attempts to distinguish this case from *Valley County* is not, of course, to deny that any distinction exists. In fact, there is a significant difference between the two situations, and one that may prevent the door from closing entirely against the pre-1983 claim. In *Valley County* and the comparable cases, the disgorgement issue turned on the relative merits of the competing jurisdictions' claims of entitlement to impose a tax; neither rival government had any interest in the property or activity taxed except that of a taxing authority. In this case, however, that is not so, for the Tribe that sought to tax the extraction of the coal was also the owner of the coal before the extraction. Thus, any tribal taxation was merely a way to recover or retain some of the value of the Tribe's own property (a fact unaffected by the favorable terms of the Tribe's royalty agreement with Westmoreland, see *ante*, at 19); so, too, Montana's receipt of the excess taxation (passed on by Westmoreland) was an appropriation of the Tribe's own property, just as it was an invalid counterpart of the tax collection that would have been rightful by the Tribe. The Ninth Circuit recognized this when it found that "Montana made plain its intention to appropriate most of the economic rent" of the Tribe's coal. See *Crow Tribe v. Montana*, 650 F. 2d 1104, 1113 (1981). Because the Tribe's claim may properly be viewed in this light, we can put to one side any questions whether the Court is right, or I am, about the significance of the error by the Department of the Interior or the point-for-point applicability of *Valley County*. We may bypass the principles specific to claims between contending taxing authorities entirely and simply ask whether something in this

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record would in practical terms defeat the Tribe's claim to disgorgement of its own property taken in the form of excess taxes. The Court's answer to this question is uncertain. The Court endorses the view that some degree of disgorgement would have been "exorbitant," *ante*, at 18, and "compensatory damages" unjustified, *ante*, at 20, and it suggests that the District Court's previous award to the Tribe of all taxes paid into the registry after 1982 amounted to a windfall big enough to provide at least rough restitution for the excessive share of taxes collected in the preceding six years. *Ante*, at 18, 20. At the same time, the Court says it imposes no bar to the possibility of further remedial action in the trial court. Perhaps the Court sees the windfall only when it regards the Tribe as one of two rival taxing authorities, as distinct from the Tribe as a property owner that has suffered as such. I trust that this distinction is open for exploration and development upon remand. Whether the Tribe is equitably entitled to a penny more than it has now, I do not know, but I think it is clear that nothing in this record disentitles the Tribe at least to press for disgorgement of some or all of Montana's pre-1983 excess tax revenues.