MINUTES OF THE MEETING
FINANCE AND CLAIMS COMMITTEE
MONTANA STATE SENATE

February 11, 1983

The fifth meeting of the Senate Finance and Claims Committee met on the above date in room 108 of the State Capitol. The meeting was called to order at 5:10 p.m. by Chairman, Senator Himsl and roll was called.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL 243: Representative Asay, district 50 and chief sponsor of House Bill 243 said this bill has to do with the Indian Jurisdiction project, to pay for legal fees that are incurred and are being incurred in settling the court cases we have had with the Indian Tribes in Montana; and most of it (at least the largest case) has to do with coal. He said there is about $10 million tied up, about $1½ million in gross proceeds tax are also tied up, as a result of the Crow Tribe challenging Montana's right to impose a coal severance tax and gross proceeds tax on the Crow Reservation. From this Big Horn County collects about $1½ million a year in gross proceeds tax.

Representative Asay said the second suit was with the Northern Cheyenne Tribe and was in regard to water rights; the third was with the Blackfeet in regard to oil and gas taxes applied to production on the reservation; and the fourth largest was with the Assiniboine and Sioux on new car and motor vehicle property taxes. He said this latter was a sales tax on various goods and mentioned some of the costs in regard to printing and the $136,000 to be paid to the counsels within the tribes.

MR. DAVE WANZENRIED, Governor's office, gave testimony in written form, it is attached as exhibit 1.

HELENA S. MACLAY, Office of the Governor, said that she and Deirdre Boggs are the two attorneys contracted for since 1978. She said the state has no choice in the matter and they cannot choose the cases the Indian Tribes decide to litigate. She said one of the most important fiscally was the Crow Tribe of Indians V. Montana challenging the coal proceeds tax being collected from the Westmorland mine on the ceded strip, where they are requesting a refund on the taxes paid to the State of Montana. This amounts to about $10 million a year and Westmorland paid about $2,200,000 as a quarterly payment into a trust fund since that is what the Court ordered until the case is settled. If they win the state would have to refund about $58 million that has been collected from that mine so far. She said because of the extent of work and the legal printing, etc. the Governor has appointed another council in Billings to help with this.

She said the water adjudication cases began with the Tongue and Big Horn cases in 1975 and the Federal Circuit Court has held that Montana does not have jurisdiction on Indian lands. She showed some documents that the United States Supreme Court demands the State publish and said that the Montana copies were printed at $8,000 and Wyoming paid $15,000 for the same thing. Book attached, exhibit 2.

Ms. MaClay said the Blackfeet arose in 1975 and and she passed out copies of the paper filed in Dec. of 1982 which was the No. 81-3041, D.C. No. CV 78-61-GF, OPINION. This is attached as exhibit 4.

Ms. MaClay said the amount of legal work is extensive and that Ray Randolph an attorney in Washington D. C. will be paid $17,500 for his expenses on helping Montana. He has worked with the Attorney General's office and we believe he would complement the cases in Montana since he knows the Supreme Court judges, etc.

TERRY COHEA, OBPP, said the supplemental request is for about $149,000. The immediate costs had to be born out of the Governor's appropriation. $4,000 to MaClay Law Firm, $8,000 for printing for the water adjudication bill and $900 on the Namen case. 2. This is the project from now until June and totals about $136,100. This includes MaClay at $26,000, Boggs, $11,000; Retained council in Billings that is handling the Crow Case, $60,000; Printing, travel and telephone, $18,000; Randolph (Adsit), $17,500 and last is the Agency cost in coordinating information from the Crow cases for $3,000.

There were no further proponents, no opponents, and the Chairman asked if there were questions from the Committee.

SENATOR SMITH: Our Legislative Finance Committee was approached for that money for the Crow Tribes and it was taken from the Common Wealth Edison cash. Is it included in the $65,000 used so far? That money was line itemed.

DAVE WANZENRIED: That issue is an important one. During Special Session in '81 Legislature appproved a continuation of $50,000 to cover the expenses. There was some disparity as to whether this meant just the Common Wealth Edison Case or also for the Coal Severance Tax in general. We made a request from the Attorney General's office for money associated with Common Wealth Edison. We have covered costs from the Coal Severance Tax. I am not sure if the question was ever resolved. These costs do show the costs incurred including those costs.

SENATOR SMITH: That is included in the $698,000?

WANZENRIED: No, it is not. The $65,000 was the appropriated amount. $82,000 was the total amount which includes the

funds transferred from the Department of Justice.

SENATOR HIMSL: What is, and where is, the budget for the future expenses?

WANZENRIED: It is in the budget and is expected to be transferred to the Attorney General. The transfer was approved by subcommittee about two weeks ago.

SENATOR HIMSL: What about the funds for the future?

WANZENRIED: Transferred after June 1.

SENATOR AKLESTAD: Was the Attorney General allocated money to do this?

WANZENRIED: $50,000 in the special session in '81.

SENATOR THOMAS: Who is the council for the Indians? Is it a Montana firm or who?

HELENA MACLAY: Most of them are from Washington D. C. or the Natural American Indians Counsel from Colorado. They are quite expensive. It was indicated on the Flathead case they had spent $10 million over the period.

SENATOR SMITH: Do they get funding from the BIA or raise it themselves?

MACLAY: I don't know.

REPRESENTATIVE ASAY said the only closing remarks he had were that without this funding the states presence will not be in the court room.

DISPOSITION OF HOUSE BILL 243: MOTION by Senator Dover that House Bill 243 BE CONCURRED IN. Voted, passed, and unanimous by all members present.

Senator Himsl said since Senator Graham was on the bill he would carry it, but if he so desired he would either help him or carry the bill.

The meeting was adjourned at 5:45 p.m.

Senator Himsl, Chairman

ROLL CALL

FINANCE AND CLAIMS COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 2-11-83

NAME	PRESENT	ABSENT	EXCUSED
Senator Etchart, VC	✓		
Senator Dover	✓		
Senator Keating	✓		
Senator Smith	✓		
Senator Thomas	✓		
Senator Van Valkenburg	✓		
Senator Stimatz	✓		
Senator Story	✓		
Senator Ochsner	✓		
Senator Haffey	✓		
Senator Jacobson	✓		
Senator Regan	✓		
Senator Lane	✓		
Senator Aklestad	✓		
Senator Hammond	✓		
Senator Tveit	✓		
Senator Boylan	✓		
Senator Himsl, Chairman	✓		

DATE _____

COMMITTEE ON _____ BILL NO. _____

VISITOR'S REGISTER

NAME	REPRESENTING	Bill # H 243	Check One: Support	Check One: Oppose
Helena S. MacLay	Governor's Office of the Governor			
Deirdre Boggs				

(Please leave prepared statement with Secretary)

OFFICE OF THE GOVERNOR
BUDGET AND PROGRAM PLANNING
TED SCHWINDEN, GOVERNOR
CAPITOL BUILDING
STATE OF MONTANA
(406) 449-3616
HELENA, MONTANA 59620

February 1, 1983

MEMORANDUM

To: Representative Tom Assay

From: JanDee May
Budget Analyst

Re: BREAKDOWN OF COSTS FOR THE INDIAN LEGAL JURISDICTION SUPPLEMENTAL

As you requested, I have listed the indivudual costs of the Indian Legal Jurisdiction Program along with a brief explanation.

Immediate Costs -	$12,900	
Maclay -	$ 4,000:	outstanding bills for Nov. 17 - Dec. 31, 1982
Printing -	$ 8,000:	cost to print the brief and appendix for a water adjudication case
Roth (Namen Case) -	$ 900:	last payment on the Flathead Lake case which the State had agreed to pay 1/2 the costs (started in 1973)
Total	$ 12,900	

January - June 30 -	$136,100	
Maclay -	$ 26,000:	extension of contracts for the two lawyers in Missoula They would continue to assist on Crow Coal Case and continue work on other Indian cases.
Boggs -	$ 11,600	

*Retained Counsel - for Crow Coal Case	$60,000:	When the Crow Coal Case was remanded to district court, a Billings law firm (Anderson) was hired to take over the case and carry it to completion.
Operating Expenses -	$18,000:	printing, travel, telephone,etc.
Randolph (Adsit) -	$17,500:	Mr. Randolph is assisting MT lawyers in how to argue the water adjudication cases in front of the U.S. Supreme Court. Having worked for the Solicitor General in arguing cases before Supreme Court, his experience is invaluable.
Agency Legal Services -	$ 3,000:	will assist the Anderson Law Firm in the discovery process at $35/hr. Currently agency Legal Services employs a lawyer who worked for Indian Legal Jurisdiction and is familiar with Indian law.
Total	$136,100	
Grand Total	$149,000	

I hope this information helps you.

*Because of the tremendous amount of time required to prepare this case, Maclay and Boggs would probably had to have relocated to Billings, which they were unwilling to do. That, along with their desire to stay active in the other cases, is why the Anderson Law Firm was hired.

NB 243 2/11/83 Exhibit #2

Nos. 81-2147 and 81-2188
(Consolidated)

In The

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA, et al.,
Petitioners,
vs.
SAN CARLOS APACHE TRIBE OF ARIZONA, et al.,
Respondents.

STATE OF MONTANA, et al.,
Petitioners,
vs.
NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

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

BRIEF FOR PETITIONERS STATE OF MONTANA et al. in No. 81-2188

MICHAEL T. GREELY
Attorney General for
the State of Montana
*HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440
Counsel for State of Montana
(*counsel of record for all petitioners)

(additional counsel on inside cover)

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

EX #2 McCue HB 243 2/11/83

INDIAN JURISDICTION PROJECT

I. WHAT IS IT?

The Indian jurisdiction project was to established to provide the State of Montana with expert legal advice and representation in matters involving Indian law. The Indian law area is so complex and unique that it is extremely difficult for non-specialists to adequately assist and defend the state.

This Indian law resource provided to state agencies has served two primary functions; the first and most significant function is to serve as a litigation unit in the event that the state is named as a defendant in a lawsuit. The litigating attorneys are intimately familiar with both Indian law and federal court practice. The second function is to provide legal advice to state agencies about their routine contacts with Indian reservations. This legal service provides advice to agencies that is useful in avoiding confrontation and litigation.

The project is composed of two contract attorneys, the Chief Counsel, and a staff attorney from the Governor's Office, and an attorney from the Attorney General's office.

The four major cases in which the project has been actively involved and an issue summary of those cases are set forth below:

(1) CROW TRIBE OF INDIANS V. MONTANA

The Crow Tribe is challenging Montana's right to impose the coal severance tax and gross proceeds tax on the Crow Reservation and ceded strip which includes the Westmoreland Resources mining operation. The state collects about $10 million per year in coal severance tax from this mine and Big Horn County collects about $1.5 million per year in gross proceeds tax. While this case began in 1978, the costs grew sharply as a result of a U.S. Supreme Court action in October, 1982. The court sent the case back to the federal district court for a full hearing.

On January 6, 1983, the Federal District Court granted the Crow Tribe an injunction enjoining defendants State of Montana and Department of Revenue from taking any action to enforce or collect the Montana coal severance tax from Westmoreland Resources, Inc., to the extent that the tax is imposed on coal produced on the ceded strip. The Court ordered all tax payments to be made to the Court in the interim.

(2) NORTHERN CHEYENNE TRIBE OF INDIANS V. ADSIT

This case involves seven different suits brought in Federal District Court by the United States and various Indian tribes against the State of Montana and thousands of individual water users within the State. Three suits were filed in 1975, and four more were added in April of 1979. The Jurisdiction Project entered the cases as attorney of record in the 1979 cases, and assumed responsibility for the 1975 cases at the same time. The

Federal District Court dismissed all seven cases on November 29, 1979, in deference to the Montana Water Use Act (Senate Bill 76), and five different appellants appealed to the Ninth Circuit. The Project filed Montana's Appellee Brief on July 24, 1980.

The case was argued on July 15, 1981, and the decision was issued on February 22, 1982. The Court held that Montana could not adjudicate Indian water rights in state courts. The Project filed a petition for certiorari in the Supreme Court on May 24, 1981. This petition for review was granted by the U.S. Supreme Court in October of 1982. The Project filed its brief in November, 1982 and will file another brief in January. The case will probably be argued in March of 1983.

(3) BLACKFEET TRIBE V. MONTANA

The Blackfeet Tribe has challenged the application of five state oil and gas taxes to production on the reservation. The case was filed in November, 1978 in Federal Disrict Court in Great Falls. In January of 1981, the judge granted summary judgment for the state. In December of 1982, the Ninth Circuit affirmed. The Blackfeet may petition the United States Supreme Court for review. The Project will oppose this petition. If the court grants review, however, the Project will brief the matter and attend the oral argument in Washington, D.C.

(4) THE ASSINIBOINE & SIOUX TRIBES V. MONTANA

This case involves a tribal challenge to Montana's new car sales tax and the motor vehicle property tax. The Jurisdiction Project on behalf of the state made a motion to dismiss or, in the alternative, motion for summary judgment. Plaintiff's made a motion for partial summary judgment. Oral arguments were made on April 30, 1982, in Federal District Court in Great Falls. A decision is pending.

II. Funding for the 1983 Biennium

The Indian Legal Jurisdiction Project's budget for FY 83 was $65,698. As of today the entire budget has been committed. In addition, the Governor has agreed to pay from his budget, $12,900 for immediate and necessary expenses including attorneys' fees and printing costs incurred prior to January 1, 1983.

Immediate Costs

Maclay	$4,000
Printing	8,000
Roth (Namen Case)	900
	$12,900

Remaining costs of $136,000 will be incurred in the remaining six months of FY 83.

Jan - June 30.

Maclay	$26,000
Boggs	11,600
Retained Counsel for Crow Coal Case	60,000
Operating Expenses	18,000
Randolph (Adsit)	17,500
Agency Legal Services	3,000
TOTAL	$ 136,100

III. Supplemental Request

In order for the state to continue to defend its right to impose the coal severance and gross proceeds tax on the Crow Reservation and ceded strip, a supplemental of $149,000 is requested.

This supplemental fund will allow the Governor's Office to continue to contract with the retained counsel to prepare and present the state's position in this case and pay other associated costs. The supplemental will also allow the Project to continue its efforts in the cases involving (1) adjudication of Indian water rights (Adsit), and (2) payment of state taxes on reservations such as the new car sales tax (Assiniboine) and oil and gas taxes (Blackfeet).

Without this additional funding, the state will be unable to continue its defense of its positions.

HB 243
exh 4
2/4/83
McClay

FILED
DEC 14 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE BLACKFEET TRIBE OF INDIANS, Plaintiff-Appellant,	No. 81-3041
vs.	D.C. No. CV 78-61-GF
WILLIAM A. GROFF, Director, Montana, Department of Revenue, STATE OF MONTANA; GLACIER COUNTY, Montana; and PONDERA COUNTY, Montana, Defendants-Appellees.	OPINION

On Appeal from the United States District Court
for the District of Montana
The Honorable Paul G. Hatfield, District Judge, Presiding
Argued and submitted February 3, 1982

Before: SNEED, ANDERSON, and REINHARDT, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The Blackfeet Tribe of Indians (the "Tribe") filed suit seeking equitable relief against state taxation of oil and gas production undertaken by the Tribe's non-Indian lessees on the Blackfeet Reservation. Named as defendants were William Groff as Director of the Montana Department of Revenue, the State of Montana, Glacier County, Montana, and Pondera County, Montana (all simply the "State"). The district court, the Honorable Paul G. Hatfield presiding, granted the State's motion for summary judgment.[1/] We affirm.

I. BACKGROUND

The Blackfeet Tribe, under the supervision of the Department of the Interior, is the lessor of 125 parcels of tribal land for oil and gas mining purposes. The Tribe is the beneficial owner of the mineral rights in issue. The United States holds the legal title in trust for the Tribe.

12/17/82

The lessees (or "producers") are not Indian or Indian-owned entities. The Tribe receives royalty payments based on the amount of oil and gas produced. Oil and gas leasing on the reservation began in 1932 and has continued until the recent past.

Four Montana taxing statutes are at issue.[2/] One has been in force at all times relevant to this action. Two were enacted in the 1970's and the other in 1953. All four statutes tax different aspects of the production of the oil and gas extracted by the non-Indian lessees. The Tribe admits it has not paid any of these taxes directly to the State; the producers have paid the taxes. The Tribe asserts, however, that the producers have deducted the Tribe's share of taxes from the royalty payments.

The Tribe brought this action in 1978. Both the Tribe and the State moved for summary judgment. The district court granted summary judgment in favor of the State.

II. DISCUSSION

District Judge Hatfield based his grant of summary judgment on the belief the 1924 Act authorized state taxation of reservation oil and gas production; because the 1924 Act authorized the taxes at issue, it was unnecessary to reach the issue of whether the legal incidence of the tax is on the Tribe. The Tribe argues on appeal that the 1924 Act is no longer in effect and the incidence of the tax adversely impacts its inherent right of sovereignty. As this appeal is from a summary judgment, our review is the same as that of the trial court. National Industries, Inc. v. Republic National Life Ins. Co., 677 F.2d 1258, 1265 (9th Cir. 1982). Few, if any, facts are in dispute. Virtually all issues are legal and involve the often difficult questions of jurisdiction in Indian Country.

A. Congressional Authorization to Tax

A state's power to tax transactions arising in Indian Country is severely limited. This is especially true when Indian interests are affected. Thus, it was early established that the states could not tax Indian trust property. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867). More recently, it has been held that the states may not tax the income earned by tribal members on the tribe's reservation, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), the personal property of tribal members, Bryan v. Itasca County, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976), or sales involving tribal members, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976), and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

State jurisdiction over the affairs of non-Indians in Indian Country often presents more difficult issues. Such jurisdiction must usually be analyzed in terms of federal preemption and/or the Tribe's limited right of sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 65 L.Ed.2d 665, 672, 100 S.Ct. 2578 (1980). If the state taxation of non-Indians in Indian Country is not preempted, Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), it may be upheld if the state's interest in taxing the non-Indians is substantial and outweighs the sovereignty interest of the tribe. See Confederated Colville Tribes, supra, 447 U.S. 134, 65 L.Ed.2d 10.

The major exception to the limited power of the states to tax Indian or non-Indian interests in Indian

Country is when there is an express authorization by Congress for the tax. See Bryan v. Itasca Country, supra, 426 U.S. 373, 48 L.Ed.2d 710, and McClanahan v. Arizona State Tax Commission, supra, 411 U.S. 164, 36 L.Ed.2d 129. The district judge found, and the State argues, such authorization exists. Our task, then, is to determine whether Congress has evinced its consent to the taxes at issue.

We have little difficulty finding such consent in the Act of May 29, 1924, 43 Stat. 244 (the "1924 Act"). This statute, currently codified at 25 U.S.C. § 398, amended the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397.[3/] The 1891 Act authorized the leasing of tribal property for grazing and mining purposes, within certain specified regulations. The 1924 Act includes a specific procedure for oil and gas leasing and provides in part:

> That the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands. . . .

The 1924 Act's authorization of state taxation of oil and gas production and net proceeds under tribal leases on the Blackfeet Reservation was upheld in British-American Oil Prod. Co. v. Board of Equalization of Montana, 299 U.S. 159, 81 L.Ed. 95, 57 S.Ct. 132 (1936).

B. Effect of the Act of 1938

The Tribe contends the 1924 Act's tax authorization was abrogated by the Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g (the "1938 Act").[4/] The 1938 Act did not expressly repeal the 1924 Act.[5/] While we recognize the 1938 Act was an attempt to provide uniformity in an area which has been described as a "patch-work state,"

F. Cohen, Handbook of Federal Indian Law, 328 (1942 Ed.), we cannot agree with the Tribe that this act impliedly repealed the 1924 Act's tax authorization.[6/]

At the outset, we note the opinion in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982), while not dispositive, offers support for our conclusion the 1938 Act did not repeal the 1924 Act. In Merrion, the Court upheld the right of the Jicarilla Apache Tribe to tax oil and gas production on its reservation. New Mexico had in existence its own oil and gas production taxes pursuant to the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-e. The 1927 Act's main purpose was to extend the 1924 Act's coverage to executive order reservations. See, F. Cohen, Handbook of Federal Indian Law, 534 (1982 Ed.) The Court noted in Merrion that it was not deciding the issue whether the state could tax oil and gas production through leases entered under the 1938 Act. 455 U.S. at ____, 71 L.Ed.2d at 38, fn. 17. Nonetheless, the Court treated the 1927 and 1938 Acts as a composite whole and made no indication the state lacked the authority to tax. We believe a similar analysis should apply to the 1924 and 1938 Acts.

The 1938 Act attempts to make uniform the law governing the leasing of tribal (unallotted) lands for mineral purposes. Letter from Charles West, Acting Secretary of the Interior, to the House Committee on Indian Affairs, June 17, 1937, reprinted in H. R. Rep. No. 1872, 75th Cong., 3d Sess. (1938); S. Rep. No. 985, 75th Cong., 1st Sess. (1937). It does so by regulating the leasing of all minerals, not solely certain types of mineral leasing. 25 U.S.C. § 396a. It also regulates the procedures for entering a lease and allows the Department of Interior to issue rules to that effect. 25 U.S.C. § 396d. The legislative history also makes it clear the 1938 Act was designed

to further the purposes of the Indian Reorganization Act of 1934; 25 U.S.C. §§ 461-479. Letter from Charles West, supra. The Reorganization Act was quite clearly an effort to reverse the assimilation policies of the Allotment Acts and to encourage Indian self-government. See Fisher v. District Court, etc., 424 U.S. 382, 387, 47 L.Ed.2d 106, 111 96 S.Ct. 943 (1976). The 1938 Act furthers these goals by giving tribes more control over the decisions to lease and by streamlining the leasing process to secure a higher economic return to the tribes.

Against the policy and scope of the 1938 Act, we must balance the long-recognized rule that repeals by implication are strongly disfavored. Morton v. Mancari, 417 U.S. 535, 549, 41 L.Ed.2d 290, 300, 94 S.Ct. 2474 (1974); Posadas v. National City Bank, 296 U.S. 497, 503, 80 L.Ed. 351, 355, 56 S.Ct. 349 (1936). As explained by the Supreme Court in Posadas:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest . . . .

296 U.S. at 503, 80 L.Ed. at 355 (Emphasis added).

We see no "irreconcilable conflicts" in the language of the 1924 Act and the 1938 Act. There is no doubt the two statutes are capable of coexistence. The 1938 Act primarily uses and expands the oil and gas leasing procedures outlined in the 1924 Act and applies them to all leases. Section 1 of of the 1938 Act, 25 U.S.C. § 396a, reiterates much of the language of the 1924 Act regarding

tribal council consent, BIA approval, and a general ten-year durational limit on the leases. Section 2 of the 1938 Act, 25 U.S.C. § 396b, expands on the 1924 Act's public auction requirements. The 1938 Act is silent regarding taxation. The language of the statutes does not evince a clear indication that repeal of the taxing authorization was intended. On its face, taxation of oil and gas production is quite compatible with the 1938 Act.

Nor does the legislative history supply the necessary showing of intent. It is true, as the Tribe argues and we have noted, the 1938 Act was an effort to make uniform the leasing laws and to bring them into harmony with the policies of the Indian Reorganization Act. The terms of the 1938 Act make it evident, however, it was the intent of Congress to supply uniformity by placing the leasing of mineral rights other than oil and gas within a statutory framework similar to that provided for in the 1924 Act. See Letter from Charles West, supra. Also, to bring leasing into harmony with the Reorganization Act, the drafters of the 1938 Act attempted to create a system which would provide the tribes with the "greatest return on their property." Id. Apparently, the drafters of the bill believed the new act would streamline the leasing process and thereby increase the availability of leases for all types of minerals.[7/] The streamlined process, however, was substantially derived from the 1924 Act. Neither the language of the statute nor the legislative history persuades us that there is an irreconcilable conflict or repugnancy between the 1924 and 1938 Acts.

The only possible conflict between the 1924 and the 1938 Acts involves the Reorganization Act's self-determination and self-sufficiency policies. Arguably, these policies conflict with the continued authorization of state

taxation which might tend to reduce tribal income. This possible conflict, however, must be viewed in light of another Reorganization Act policy which was the desire to encourage tribes "to enter the white world on a footing of equal competition." Statements of Rep. Howard, 78 Cong. Rec. 11732, quoted in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 36 L.Ed.2d 114, 121, 93 S.Ct. 1267 (1973); see also Fort Mojave Tribe v. San Bernadino County, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983, 52 L.Ed.2d 377, 97 S.Ct. 1678 (1977). State taxation is one of the realities of an equal footing. We do not believe this possible policy conflict rises to the level of irreconcilability required to constitute an implicit repeal.[8/]

Even though the 1938 Act is a more comprehensive and general statute than the 1924 Act, a fact which sometimes will lead to a finding of an implied repeal of the earlier act, Posadas, supra, 296 U.S. at 503, 80 L.Ed. at 355, we still do not find there to be the requisite conflict. This conclusion is supported by the rule that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." Morton, supra, 417 U.S. at 550-551, 41 L.Ed.2d at 301.

The Tribe argues the canon of construction which provides that ambiguities in statutes are to be resolved in favor of the Indians applies to this case. See, e.g., Bryan v. Itasca County, supra, 426 U.S. at 392, 48 L.Ed.2d at 723. We cannot agree. The 1924 Act's tax authorization is unambiguous. This "canon of construction is not a license to disregard clear expressions of . . . congressional intent." DeCoteau v. District County Court, 420 U.S. 425, 447,

43 L.Ed. 300, 315, 95 S.Ct. 1082 (1975); Andrus v. Glover, 446 U.S. 608, 619, 64 L.Ed.2d 548, 558, 100 S.Ct. 1905 (1980). Nor does the 1938 Act create any ambiguity. It is silent on the repeal of the 1924 Act. The Tribe's use of this canon of construction would have us amend the 1938 Act to include an express repeal of the 1924 Act. That, however, would be going beyond a liberal interpretation of an ambiguous clause or phrase to the point of judicial legislating. This we will not do. See Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011, 54 L.Ed.2d 754, 98 S.Ct. 722 (1978).

Additionally and perhaps most importantly, there has been a long-term administrative interpretation upholding the right of states to tax oil and gas production on the reservations notwithstanding the silence of the 1938 Act. This, outside compelling reasons otherwise, is sufficient to support the continued validity of the 1924 Act. See Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th Cir. 1967), cert. denied, 389 U.S. 1046, 19 L.Ed.2d 838 (1968); Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978); Castillo-Felix v. Immigration and Naturalization Service, 601 F.2d 459, 465 (9th Cir. 1979). Beginning in 1943, the Department of Interior interpreted the 1924 Act to be of continued effectiveness despite the 1938 Act. Several supporting interpretations were made until a contrary interpretation was issued in 1977. See 84 Interior Dec. 905 (1977) and its references to the prior opinions. Generally, the construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the administrative interpretation. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 23 L.Ed.2d 371, 384, 89 S.Ct. 1794

(1969). The contrary interpretation by the Solicitor of the Department of Interior in 1977 does not change the result in this case. Unless the original interpretation of the statute by the Department was clearly wrong, which we do not believe to be true, it is not appropriate for the Department to reverse its long held construction of a statute. See United States v. Leslie Salt Co., 350 U.S. 383, 396, 100 L.Ed. 441, 451, 76 S.Ct. 416 (1956); Power Brake Equipment Company v. United States, 427 F.2d 163, 164 (9th Cir. 1970); Red Lion, supra, 395 U.S. at 381, 23 L.Ed.2d at 384. Furthermore, the presumption against repeal by implication, the long and consistent interpretation by the Department of Interior, and congressional acquiescence in that interpretation all lead to the conclusion the 1977 opinion is erroneous.

We hold, then, that the 1924 Act and its authorization to tax reservation oil and gas production was not implicitly repealed by the 1938 Act.

C. Leases Under the 1938 Act

The Tribe contends that even if the 1924 Act is not found to be repealed by the 1938 Act, 113 of the leases in question were entered pursuant to the 1938 Act; therefore, the 1938 Act controls and it does not contain an authorization to tax. For the following reasons, we reject this argument.

Most, if not all, of what has been said concerning the implied repeal of the 1924 Act applies with equal force to the Tribe's contention. Having found the 1924 Act to still be in force, we would be remiss to find it lacked any effect. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton, supra, 417 U.S. at 552, 41 L.Ed.2d at 301; Radzanower v. Touche Ross & Co., 426 U.S. 148, 48 L.Ed.2d 540, 96 S.Ct. 1989 (1976).

Furthermore, the fact the leases were made pursuant to the 1938 Act does not affect the State's power to tax. The critical aspect is the State's authorization to tax, not the statute under which the leases were made. In any event, both statutes purport to regulate leasing on the same lands--unallotted reservation property.[9/] It is not a strain on our reasoning to find the two acts have a concurrent, cumulative, and compatible effect. We hold, therefore, the 1924 Act's taxing authorization applies with equal force to leases made pursuant to the 1938 Act.

III. CONCLUSION

We find the 1924 Act to permit Montana to tax oil and gas production on the Blackfeet Reservation. The 1938 Act did not impliedly repeal the 1924 Act and its authorization for the taxes at issue.

The decision of the district court is AFFIRMED.[10/]

F O O T N O T E S

1/ The district court opinion is reported at 507 F.supp. 446 (D. Mont. 1981).

2/ The Montana taxing statutes are:

(1) The Oil and Gas Conservation Tax, § 82-11-131, M.C.A. (formerly § 60-145, R.C.M. 1947);

(2) The Resource Indemnity Trust Tax, § 15-38-104, M.C.A. (formerly § 84-7006, R.C.M. 1947);

(3) The Oil and Gas Severance Tax, § 15-36-101, M.C.A.

(4) The Oil and Gas Net Proceeds Tax, § 15-23-601, et seq., M.C.A. (formerly § 84-7201, et seq., R.C.M. 1947).

(3) The 1891 Act provides:

> SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: Provided, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

The 1924 Act states in full:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent

of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

4/ The 1938 Act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil-and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe. Such advertisements shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such lands or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act or parts of Acts inconsistent herewith are hereby repealed.

5/ The 1938 Act contains a general repealer. See Section 7 of the 1938 Act reproduced in footnote 4. Generally, the presence of a general repealer is not considered a strong indication that all prior law on the subject is meant to be repealed. 1A Sutherland Statutory Construction § 23.08 (4th Ed. 1972). In fact, a general repealer has been construed to imply "very strongly that there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79, 28 L.Ed. 927, 929, 5 S.Ct. 377 (1885); Sutherland, supra, § 23.08.

6/ But cf. Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (1982), cert. denied, 51 U.S.L.W. 3281 (10/12/82). In Crow Tribe, this court held the Tribe had stated a cause of action in its suit to enjoin state taxation of the Tribe's non-Indian lessees of coal rights. In so holding, the court stated in dictum the 1938 Act "probably" repealed the prior leasing statutes, apparently including the 1924 Act and its tax authorization. 650 F.2d at 1112, fn. 10. For two reasons, we refuse to follow that conclusion. First, the 1924 Act's tax authorization applies only to oil and gas leasing, not coal, so this issue was not before the court. Second, Crow Tribe is a pleading case and any statements beyond those necessary to sustain upholding the Tribe's statement of a cause of action are dicta.

7/ In addition to being in a "patch-work state," some leasing statutes mandated following the general mineral leasing laws used on public domain lands. This procedure created "long delay and quite an expense to an applicant for a lease." Letter from Charles West, supra.

8/ We believe this arguable policy conflict in the 1938 and 1924 Acts is found primarily through the benefit of hindsight. While the intent of the 1938 Act makes clear the belief the tribes would be able to secure revenue through mineral leasing, we doubt Congress or the Department of Interior had any idea mineral resources on reservations would rise to the level of importance they have today. It is the current import of those resources which makes taxation such a critical issue at present. In our analysis of the 1938 Act, however, our primary emphasis must focus on the intent of Congress at that time, not on the present.

9/ While the 1924 Act, through its predecessor the 1891 Act, does not use the same language to describe the lands to which it applies as the 1938 Act, the 1924 Act has been construed to have had the same coverage as the 1938 Act. British-American Oil Prod. Co., supra, 299 U.S. at 164.

10/ Judge Reinhardt concurs in the result, but was unable to participate in the preparation or approval of this Opinion.

STANDING COMMITTEE REPORT

February 11 19 83

MR. MR. PRESIDENT

We, your committee on Finance and Claims

having had under consideration House Bill No. 243

Asay (Graham)

Respectfully report as follows: That House Bill No. 243

BE CONCURRED IN

~~DO PASS~~

STATE PUB. CO.
Helena, Mont.

Senator Himsl Chairman.