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Easements on Tribal Sovereignty

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COMMENT

EASEMENTS ON TRIBAL SOVEREIGNTY

*Todd Miller**

I. Introduction

There are more than fifty million acres of Indian trust lands in the United States, with the bulk of them located in the western half of the country.[1] Thousands of miles of easements cross over Indian lands for one purpose or another. These easements include rights-of-way for highways, railroads, electric transmission lines, oil and gas pipelines, and various communication facilities. They are an essential part of the nation's infrastructure. Because of the unique legal status of tribes, the laws that apply to these easements are different in some respects from common property law. There is a complex statutory and regulatory scheme that pertains to obtaining an easement across Indian lands.[2] The legal status of these easements is critical to the tribes and the various entities that hold the easements.

Recently the Ninth Circuit Court of Appeals held that easements on Indian lands are the equivalent of fee simple lands.[3] In *Big Horn County Electric Cooperative v. Adams* (*Big Horn*), the Court held that the easements obtained for the Cooperative's power lines are equivalent to fee simple lands, and as such are beyond the scope of tribal power to impose an ad valorem tax.[4]

The Crow Tribe had enacted a utility tax calling for a 3% ad valorem tax on all utility property located on tribal trust lands. The Act required that the subject utilities treat the tax as an embedded cost and not pass the tax directly on to the ratepayers. Big Horn County Electric Cooperative (the Cooperative) is the principle supplier of electrical service on the Crow Reservation. The Cooperative ignored the act's provision and included the tax as a separate item on its bills. The Tribe brought suit in tribal court to enjoin the billing practice and the Cooperative counterclaimed that the Tribe did not have the authority

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1. C.E. Willoughby, *Native American Sovereignty Takes a Back Seat to the "Pig in the Parlor:" The Redefining of Tribal Sovereignty in Traditional Property Law Terms*, 19 S. ILL. L.J. 593, 601(1995).
2. 25 U.S.C. §§ 323-328 (1994); 25 C.F.R. § 169 (2000).
3. Big Horn County Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. 2000).
4. *Id.*

to impose the property tax. This counterclaim was brought to the district court, which provided summary judgment for the Cooperative and ordered all funds collected under the tax returned.[5] On appeal, the Ninth Circuit upheld the summary judgment, but the district court's order to return all money collected was reversed.[6]

Both holdings were based on the Supreme Court's recent extension of the *Montana* line of cases in *Strate v. A-1 Contractors*.[7] The *Strate* case involved a jurisdictional question in a tort action resulting from a traffic accident between two nonmembers of the tribe. The accident occurred on a state highway that runs through the Fort Berthold Indian Reservation. In a unanimous decision the Court held that the highway easement granted to the state was the equivalent of non-Indian fee land and that under the *Montana* line of cases the tribal court could not maintain jurisdiction over the tort claim.[8] The Court proclaimed that its reasoning would also apply to regulatory authority.[9]

The Ninth Circuit decision in *Big Horn* extended the reasoning in *Strate* to apply to tribal taxation of power line easements held by a private cooperative.[10] The holding in *Big Horn* is a direct attack on the Tribe's ability to govern, because the Tribe's ability to raise taxes is central to tribal sovereignty.[11] This ruling represents a serious threat to tribal sovereignty, and shows the proliferation of the confused state of Indian law. The Tribe decided to restructure the utility tax to fit the exception articulated in the opinion, rather than pursue a challenge to the opinion.[12]

This comment will examine the *Big Horn* case by discussing the *Montana* line of cases and the resulting standard that ties tribal sovereign powers to land ownership. It will then examine a tribe's authority to tax nonmembers and the implications of a recent Supreme Court holding that has extended the reasoning in *Montana* to include tribal taxation.[13] This is followed by an analysis of basic concepts of property law regarding easements and a breakdown of the statutory and regulatory scheme pertaining to obtaining easements on tribal

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5. Big Horn County Elec. Coop. v. Adams, 53 F. Supp. 2d 1047 (D. Mont. 1999).

6. *Big Horn*, 219 F.3d at 955.

7. 520 U.S. 438 (1997). The *Montana* line of cases includes *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); and *South Dakota v. Bourland*, 508 U.S. 679 (1993).

8. *Strate*, 520 U.S. at 454-55.

9. *Id.* at 453.

10. Big Horn County Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. 2000).

11. "The power to tax is an essential attribute of Indian Sovereignty because it is a necessary instrument of self-government to raise revenues for its essential services." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

12. Telephone Interview with Lead Counsel for the Crow Tribe, Elk River Law Office (Jan. 15, 2001) (stating that the Tribe has decided to change the tax from a property-based tax to an activity-based tax).

13. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

lands. This analysis will show that the decision in *Big Horn* is erroneous and that the Crow Tribe should have petitioned for certiorari to allow the Supreme Court an opportunity to clarify this important aspect of Indian law.

II. The Property Theory of Sovereignty

A. Inherent Sovereignty

Tribal sovereignty is inherent, and the modern understanding of the extent of tribal sovereignty finds its origins in the Constitution and in a set of early Supreme Court decisions known as the *Cherokee* cases.[14] In these cases the Indian tribes were recognized as domestic dependant nations that possessed all the attributes of sovereign nations, subject to the power of Congress to limit tribal authority.[15] Chief Justice Marshall reasoned that the relationship between the tribes and the Federal Government was that of ward and guardian.[16] The tribes were independent nations that had been conquered by the European nations. As the successor to the conquerors, the United States took fee title to the tribal lands, but the tribes retained the exclusive right to use and occupy portions of these lands.[17] This formed a trust relationship between the tribes and the Federal Government and diminished tribal sovereignty by placing restrictions on the tribes' ability to alienate their lands and preventing the tribes from making treaties with foreign nations.

The courts and the other branches of the Federal Government have recognized the inherent sovereignty of Indian tribes to govern tribal members and nonmembers within the boundaries of tribal trust lands. The executive branch has fostered a policy of government-to-government relations with the tribes[18] and in some regulatory capacities the tribes are given the same status as states.[19] Most courts recognize inherent tribal sovereignty and their analysis of tribal regulation or jurisdiction will depend on whether any act of Congress has divested a tribe of those powers.[20]

It is clear that tribes have sovereign power over tribal members, but problems arise when those powers are imposed on nonmembers. The

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14. U.S. CONST. art. II, § 2 (President's power to make treaties); U.S. CONST. art. I, § 8 cl. 3 (Indian Commerce Clause); Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

15. John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 365-66 (1999).

16. *Cherokee Nation*, 30 U.S. at 17.

17. Willoughby, *supra* note 1, at 598.

18. William J. Clinton, Government-to Government Relations with Native American Tribal Governments, Memo for Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (Apr. 29, 1994); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

19. Under some environmental statutes tribes are given the same status as states. *See* City of Albuquerque v. Browner, 97 F.3d 415, 422-23 (10th Cir. 1996) (holding that the Tribe's status is that of a state for purposes of the Clean Water Act).

20. *See* Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

underlying concern for limiting tribal control over nonmembers is based on equal protection, because the nonmembers have no voice in tribal government. The counter argument to this concern is that a noncitizen in any country is subject to the sovereign powers of that country.[21]

The Supreme Court has held decisively that tribes do not have criminal jurisdiction over nonmembers,[22] but the extent to which tribal sovereign powers, other than criminal jurisdiction, can be imposed on nonmembers is unclear. These powers are often lumped together, but it is important to remember that they are distinctive and some are more essential than others. Tribal sovereign powers should be broken down into three distinct groups: jurisdiction, regulation, and taxation. Recent Supreme Court decisions have applied a bright line rule that does not distinguish between these different sovereign powers.[23]

B. The Montana Rule

The challenge of determining the extent of tribal powers over nonmembers is compounded by the checker boarding of tribal trust lands that resulted from the various allotment acts passed for each reservation arising from the General Allotment Act of 1887.[24] In these allotment acts trust lands were allotted to individual tribal members and could be alienated after a number of years. Reservations that were subjected to allotment have become a mixture of tribal trust land and land held in fee by nonmembers. This has led courts to apply a property ownership standard for determining tribal jurisdiction and regulatory powers.[25] If the property in question was owned by a non-tribal member, state law applied; if the property in question was owned by the tribe or a tribal member, tribal law applied. The weakness of this standard is apparent when considering such things as zoning regulations. When neighboring parcels are subject to the regulatory powers of different governments, the purpose of zoning regulations is defeated.[26] With sovereign powers tied to property ownership there is a burden placed on any entity considering a business transaction with a tribe, because it is unclear which laws will apply.

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21. Willoughby, *supra* note 1, at 628; *see also* Wambdi Awanwicake Wastewin, *Strate v. A-1 Contractors: Intrusion into the Sovereign Domain of Native Nations*, 74 N.D. L. REV. 711, 729-30 (1998).

22. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

23. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001).

24. General Allotment Act of 1887, 25 U.S.C. §§ 331-357 (1994), *amended by* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1994).

25. Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

26. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

Due to the broken nature of several tribes' property holdings, it would benefit all concerned to have a standard that conforms to the exterior boundaries of Indian lands rather than the current disconnected standard. Allowing tribal sovereign powers to extend to the exterior boundaries of a reservation is supported by the definition of Indian Country found in Title 18 of the U.S. Code: "Indian Country, as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[27] This would alleviate the regulatory and jurisdictional confusion that the current disconnected property ownership standard has imposed.[28] Tribes and nonmembers would know which laws apply through out Indian Country.

The Court initiated the property ownership standard in *Montana v. United States*.[29] The main rule established in *Montana* is that "a tribe's inherent sovereign powers do not extend to the activities of nonmembers of the tribe."[30] The Court recognized two exceptions to its main rule, which would allow tribal powers to apply to non-Indian fee lands within a reservation.

> A tribe may regulate, through taxation, licensing, or other means the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.
>
> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (citations omitted)[31]

The application of the *Montana* rule has hinged on whether the property concerned in a given case is held in trust for the tribe, or held in fee by a nonmember.[32] The exceptions to the main rule have been narrowly construed.[33]

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27. 18 U.S.C. § 1151 (1994). The definition also extends to all dependant Indian communities and all Indian allotments that have not been extinguished.

28. The Supreme Court was unwilling to accept this rational in *Atkinson Trading Co.*, stating that "section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Co.*, 532 U.S. at 653 n.5.

29. 450 U.S. 544 (1981).

30. *Id.* at 565.

31. *Id.* at 565-66.

32. *See* South Dakota v. Bourland, 508 U.S. 679 (1993) (stating that the Tribe lost power to regulate hunting and fishing on lands that were alienated for a dam and reservoir project); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (stating that the tribal court did not have jurisdiction over accident on highway easement held by the State).

33. *See infra* notes 87-104 and accompanying text.

The issue in *Montana* was the Crow Tribe's power to regulate hunting and fishing within the exterior boundaries of the reservation. The Crow Reservation is a typical example of the fractured land ownership resulting from allotment. Trust lands comprise about 70% of the reservation, while 28% of the reservation is held in fee by nonmembers.[34] The focus of the case was on regulatory control of the Big Horn River, which runs through the middle of the reservation. The State of Montana brought a quiet title action to establish regulatory jurisdiction over the river. The Tribe relied on several canons of treaty construction, which establish that treaties should be interpreted as the Indians would have understood them; treaties must be liberally construed in favor of the tribe; and ambiguities must be resolved in favor of the tribe.[35] But the Court ignored these basic canons of treaty construction to find that the river did not pass to the Tribe under the treaty that set aside the reservation. The *Montana* Court reasoned that the United States had held the riverbed in trust and that it passed to the state under the equal footing doctrine.[36]

The Tribe's authority to regulate hunting and fishing on nonmember fee lands was also at issue in *Montana*. The Court crafted the *Montana* rule to bar tribal regulation of hunting and fishing on state-owned lands and fee lands owned by nonmembers. This construction has led other courts to use the property ownership status of land as the threshold question for deciding if the *Montana* rule applies in a particular case.[37] Problems have arisen when the *Montana* rule is extended to cover other issues, and subsequent holdings have shown that the exceptions to the *Montana* rule are subject to multiple interpretations.

C. The Confusion of Applying the Montana Rule

The *Montana* rule appears rather clear, but the lower courts have been unable to apply it consistently. In addition, the Supreme Court's plurality holding in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[38] shows that the Court itself could not decide on the proper application of the *Montana* rule. In that case the issue concerned tribal zoning regulations

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34. Specifically, the ownership of Crow Reservation lands is broken down as follows:

> Roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

Montana, 450 U.S. at 548.

35. Fredericks, *supra* note 15, at 369; *see Montana*, 450 U.S. at 569 (Blackmun, J., dissenting). These canons of treaty construction should also apply to statutory interpretation.

36. *Montana*, 450 U.S. at 551-52.

37. "The threshold question in this appeal is whether *Montana's* main rule applies, that is, whether the property rights at issue are such that the land may be deemed alienated to non-Indians." Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1062-63 (9th Cir. 2000).

38. 492 U.S. 408 (1989).

as applied to two separate tracts of land owned in fee by nonmembers. One of the tracts was in an open section of the reservation, which included a mixture of nonmember fee lands and tribal allotments held in trust. The other tract was in a closed area surrounded by lands held in trust for the Tribe, and subject to strict tribal regulation. The Tribe's zoning regulation prohibited the owners from pursuing their development plans, and the nonmembers claimed that county zoning regulations should apply to their lands. The Court had a decisive split on the application of the *Montana* rule. Four of the Justices, led by Justice White, held that the Tribe did not have regulatory authority over nonmembers and that neither *Montana* exception applied.[39] On the other hand Justice Blackmun, joined by Justices Brennan and Marshall, contended that the Tribe's zoning authority was inherent and that *Montana's* second exception should be broadly construed to include any nonmember activity that has a direct effect on the Tribe's political integrity, economic security, or health and welfare.[40] But the actual holding of the Court was a compromise written by Justice Stevens and joined by Justice O'Connor. Stevens reasoned that the Tribe's strict regulation of the closed area was sufficient to allow tribal zoning of nonmember lands, but that the character of the open area was such that county zoning regulations should prevail.[41] As to the property in the closed area, Stevens concurred with Justice Blackmun, but in reference to the property in the open area, he concurred with Justice White. This case demonstrates that the *Montana* rule is anything but clear.

The Blackmun opinion in *Brendale* pointed out that prior to *Montana* the Court's only holding that had restricted tribal sovereignty was *Oliphant v. Suquamish Indian Tribe*, barring criminal jurisdiction over nonmembers.[42] Prior to *Montana* the Court had exercised a presumption of tribal sovereignty over reservation lands, and to reconcile *Montana's* reversal of this presumption, Justice Blackmun argued that the *Montana* exceptions should be interpreted liberally.[43]

In the cases that followed *Brendale* the reversed presumption of *Montana* has generally been applied, and most courts have followed Justice White's approach of construing the *Montana* exceptions narrowly. One exception to this was the Ninth Circuit's holding in *Burlington Northern Railroad Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation*.[44] In this case the circuit court upheld the Tribe's inherent sovereign power to impose a utility property tax on the railroad easement that crossed the reservation. The Court did not use a *Montana* analysis, because it found that the railroad easement was not

39. *Id.* at 421-33.
40. *Id.* at 448-67.
41. *Id.* at 433-48.
42. *Id.* at 453.
43. *Id.* at 456-59.
44. 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992).

nonmember fee land.[45] Instead the Court based its holding on *Merrion v. Jicarilla Apache Tribe*[46] and found that the railroad benefited from tribal services, making it subject to tribal taxation.[47] *Blackfeet Tribe* was expressly overruled in *Big Horn*.[48]

The Supreme Court revisited the *Montana* rule in *South Dakota v. Bourland*.[49] This case had a fact pattern similar to *Montana*, and the Court held that acts of Congress creating a reservoir on tribal lands divested the Tribe of the right to regulate hunting and fishing by nonmembers on the reservoir. Two different statutes affected the land at issue, the Cheyenne River Act and the Flood Control Act of 1944.[50] The Eighth Circuit considered the effect on the Tribe's regulatory authority based on the intent of Congress expressed in each statute. The circuit court concluded that the majority of the lands under the reservoir were taken under the Cheyenne River Act, and there was no congressional intent in the Act to divest the Tribe of its regulatory authority.[51] The Supreme Court reversed this holding and stressed that the lands were alienated by the Act and that in itself was enough to abrogate the Tribe's power to regulate.[52] The Court reasoned that the Tribe lost the power to exclude nonmembers and the Tribe's regulatory authority was tied to the power to exclude.[53]

This case enforced the distinction between tribal trust lands and nonmember fee lands. In cases that question tribal sovereign powers it is essential for nonmembers to establish that the land is not held in trust for the tribe. This will allow for the application of the *Montana* rule with its narrow exceptions.

This land base requirement led to the strange holding in *Strate v. A-1 Contractors*,[54] which was extended in *Big Horn*. In *Strate* the Court had to find that the Tribe had alienated the land underlying the highway right-of-way to fit the case into the nonmember fee property model that would allow for the use of the *Montana* rule. The *Strate* Court was able to find that, because the highway right-of-way was equivalent to nonmember fee land, the tribal courts lacked jurisdiction. A basic premise running through these cases is that tribes retain their sovereign powers subject to abrogation by Congress. The Court has

45. *Id.* at 902-04.

46. 455 U.S. 130 (1982).

47. *Blackfeet Tribe*, 924 F.2d at 904.

48. "Because the result in Blackfeet Tribe was based upon the classification of the right-of-way as Indian land, and that status has been subsequently altered by Strate, Blackfeet Tribe is no longer good law." Big Horn County Elec. Coop. v. Adams, 219 F.3d 944, 953 (9th Cir. 2000).

49. 508 U.S. 679 (1993).

50. Cheyenne River Act, 68 Stat. 1191 (setting the amount paid to the tribe for 104,420 acres of trust lands flooded by the reservoir). Another 18,000 acres was taken from nonmember fee owners under the Flood Control Act of 1944, 16 U.S.C. § 460d (2000).

51. South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991).

52. *Bourland*, 508 U.S. at 689.

53. *Id.*

54. 520 U.S. 438 (1997).

found that the lands were alienated through an act of Congress, and that alienation implicitly abrogated a tribe's sovereign powers. The act of Congress in *Strate* was the legislation passed in 1948 that authorized the Secretary of Interior, with the consent of the proper tribal officials, to grant rights-of-way across tribal lands.[55] The Court saw this delegation as an affirmative act by Congress to divest the Tribe of its jurisdictional authority over the highway right-of-way.[56]

The lower court cases that have followed *Strate* employ the same pattern of showing that the land was alienated and the tribes' sovereign powers over the land implicitly taken away. In *Montana Department of Transportation v. King*[57] the Ninth Circuit found tribal employment regulations inapplicable to state highway maintenance workers doing a job on the state highway that crossed the reservation.[58] In another recent case, *Burlington Northern Railroad Co. v. Red Wolf*,[59] the Ninth Circuit found that the Crow Tribal Court did not have jurisdiction over a personal injury suit that was based on an accident between tribal members and a train, because the accident occurred on the railroad right-of-way through the Crow Reservation.[60] Interestingly this case distinguished the Tribe's power to tax from its regulatory and jurisdictional powers. The Tribe relied on *Blackfeet Tribe* to argue that because it had the power to tax the railroad easement, it should also have civil jurisdiction over the easement. The Court rejected this argument, stating "because a tribe's taxation power is broader than its civil adjudicatory jurisdiction over nonmembers, the Tribe's authority to tax the right-of-way is not dispositive."[61] It is also important to note that this Ninth Circuit panel included retired Supreme Court Justice White, who authored the portion of the plurality opinion in *Brendale* that was against all tribal zoning regulation.

The holdings in *Montana*, *Brendale*, and *Bourland* abrogated tribal regulatory authority over nonmembers. The holding in *Strate* abrogated the Tribes' civil jurisdiction and extended the definition of fee lands to include easements. Following *Strate* the only tribal sovereign power that remained relatively intact was a tribe's ability to tax nonmembers within the boundaries of the reservation.[62] The tragedy of the *Big Horn* decision is that it abrogates

55. *Id.* at 454-55; 25 U.S.C. §§ 323-328 (2000).

56. *Strate*, 520 U.S. at 456 (quoting *Bourland*, 508 U.S. at 689) ("Tribe's loss of 'right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others.'")

57. 191 F.3d 1108 (9th Cir. 1999).

58. *Id.* The purpose of the regulation was to give tribal members preferential treatment for jobs contracted on the Reservation. The Court recognized the importance of these regulations, but determined that the Tribe did not meet either exception under *Montana*.

59. 196 F.3d 1059 (9th Cir. 1999).

60. *Id.*

61. *Id.* at 1064.

62. The power to tax nonmembers within the boundaries of tribal trust land was severely

this last vestige of tribal sovereignty and it does so by relying on bad property law.

III. Tribal Taxation of Nonmembers

A. Foundations of the Taxing Power

The power to tax is at the core of all sovereign power, because without the revenue raised through taxation the sovereign is unable to carry out any of its other functions. The courts have recognized this fact and have consistently upheld a tribe's power to tax nonmembers. In an early Supreme Court case, *Morris v. Hitchcock*, the nonmembers argued that the Chickasaw Tribe's tax on livestock grazed by nonmembers on the reservation was unconstitutional.[63] The Court held that the Tribe's right to control the presence of intruders in its territory was recognized in the treaty and sanctioned by Congress. The Secretary of Interior had approved the tax and the Court held that the Secretary had the authority to enforce it.[64]

An early Eighth Circuit opinion, *Buster v. Wright*, was the first to address the issue of tribal taxation of nonmembers on fee lands.[65] This case involved a business permit tax imposed by the Creek Tribe on all nonmember businesses within their reservation. The plaintiffs were owners in fee of lots in recently designated town sites within the reservation. The Court held that the purchase of these lots by nonmembers did not remove them from the jurisdiction of the tribal laws. This case made a strong statement for setting the limits of tribal sovereignty based on the outer boundaries of a reservation.[66]

In more recent cases the Supreme Court has upheld the tribal taxation power. Just prior to establishing the *Montana* rule, the Court upheld a tribe's power to tax nonmembers in *Washington v. Confederated Tribes of the Colville Indian Reservation*.[67] The Court held that the Tribe may tax nonmembers engaged in trade with the Tribe or residing on tribal lands, and recognized that taxation is "a fundamental attribute of sovereignty."[68]

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limited by the Court's recent holding. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

63. Morris v. Hitchcock, 194 U.S. 384 (1904).

64. *Id.* at 389.

65. Buster v. Wright, 135 F. 947 (8th Cir. 1905).

66. "But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by title to the land which they occupy in it, or by the existence of municipalities therein endowed with the power to collect taxes for city purposes . . . ." *Id.* at 951. "They [the Tribe] still exist as a nation, and they still continue to occupy that country, notwithstanding the fact that those who are noncitizens of their tribe hold the title to and occupy isolated lots and tracts of land therein." *Id.* at 952.

67. 447 U.S. 134 (1980). The tax at issue was a cigarette tax imposed on nonmembers making purchases on the reservation.

68. *Id.* at 152. The Court went on to state that no federal statute had divested the Tribe's power to tax nonmembers in cases where the Tribe has a significant interest in the subject matter, and "tribal powers are not implicitly divested by virtue of the tribes' dependent status." *Id.* at 153.

Six days after the Court issued its opinion in *Montana*, the Court heard oral arguments for *Merrion v. Jicarilla Apache Tribe*.[69] This case was a challenge to a severance tax imposed on the production from oil and gas wells located on the reservation. The Jicarilla Apache Tribe had executed oil and gas leases with the plaintiffs that encompassed a substantial portion of the reservation. These leases produced rents and royalties for the Tribe for a number of years, and then as an additional charge the Tribe imposed the severance tax. The plaintiffs claimed that the tax was unjust, because it was not part of the lease contracts. The Court distinguished between the Tribe's role as commercial partner that granted the leases, and the Tribe as a sovereign government capable of imposing the tax.[70] The Tribe did not waive its power to tax by contracting with the plaintiffs. The plaintiffs also argued that tribal authority to tax nonmembers came from the Tribe's power to exclude, and because the leases removed this power to exclude, the Tribe no longer had the power to impose the tax. The Court relied on *Buster* and stated, "the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government."[71]

The Court upheld the Tribe's power to impose a tax on nonmembers when the Tribe has a substantial interest in the nonmember's activity or if the nonmembers are availing themselves of tribal services. Recognizing that the power of tribes to tax is well established, the Court stated: "the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services."[72] There are some constraints on a tribe's ability to tax nonmembers. The power can be taken away by the federal government and the tax must be approved by the Secretary of Interior before it can take effect. These constraints insure that the tribes will not impose unfair taxes and that the tax is in line with national policy.[73]

It is interesting to note that the Court did not cite *Montana* anywhere in its *Merrion* opinion. This would imply one of two things. *Montana* did not apply because the leases did not alienate tribal lands, or *Montana* does not apply to taxation. In *Merrion* the Court did set a standard for deciding if a nonmember is subject to tribal taxation. As stated above, if a tribe has a substantial interest

69. 455 U.S. 130 (1982).

70. *Id.* at 145-46.

71. *Id.* at 144. The Court did go on to give an alternative rationale. If the power to tax is derived from the power to exclude, the Tribe still retains the power to condition the nonmember's right to remain on the reservation.

72. *Id.* at 140.

73. *Id.* at 141; *see also* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (holding that the Navajo Tribe did not need consent from the Secretary of Interior prior to imposing a tax, because it was not required under the Navajo Constitution and no other statute requires the consent).

in the nonmember's activity or the nonmembers benefit from tribal services, tribal taxation is valid. This was the test used by the Ninth Circuit in *Blackfeet Tribe*, upholding the utility tax on the railroad right-of-way. In that case the Tribe's substantial interest was that the railroad crossed tribal lands and the benefits received by the railroad were police and fire protection, and the intangible benefits of civilized society.[74]

If the Ninth Circuit had applied the *Merrion* standard in *Big Horn*, the Court would have sustained the Tribe's power to tax the Cooperative. The Tribe has a substantial interest in its supply of electricity. The benefits received by the Cooperative are the same as in *Blackfeet Tribe* and most of the Cooperative's customers are tribal members. The Court did not address these benefits and it discounted *Merrion* and *Confederated Tribes* as only applying to tribal trust lands.[75] Instead, the Court followed *Strate*, and applied the *Montana* rule to the Cooperative's easements.

B. The Tenth Circuit's Attempt to Balance Merrion and Montana

A complete contrast to *Big Horn* was the Tenth Circuit's holding in *Atkinson Trading Co. v. Shirley*,[76] decided two months before the issuance of the *Big Horn* decision. The *Atkinson* dispute involved a hotel occupancy tax imposed by the Navajo Tribe on all hotels within the reservation. An 8% tax was imposed on hotel guests. Atkinson Trading Company challenged the tax, claiming that as a nonmember with its property held in fee, it was beyond the Tribe's taxing authority. In a split decision the circuit court held that Atkinson's guests were subject to the taxing power of the Tribe, because the Tribe provided police, fire, and emergency services for the property, and the "establishment of civilized society."[77]

The opinion recognized that *Montana* and *Strate* are in conflict with *Merrion*, and the circuit court attempted to reconcile these cases by employing a case-by-case balancing test.[78] This balancing test weighs "the impact of the nonmember's conduct against the severity of the tribal regulations."[79] The

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74. Burlington N. R.R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991).

75. Big Horn County Elec. Coop. v. Adams, 219 F.3d 944, 952 (9th Cir. 2000).

76. 210 F.3d 1247 (10th Cir. 2000), *rev'd*, 532 U.S. 645 (2001).

77. *Id.* at 1262.

78. The Tenth Circuit found that the intent of the Supreme Court was to create a case-by-case test:

> This case-by-case approach seems clearly to have been the result the *Montana* Court intended when it held on the one hand that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," but on the other hand that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, *even on non-Indian fee lands*."

Id. at 1257 (emphasis added) (citations omitted).

79. *Id.* at 1256-57.

Tenth Circuit applied the *Montana* rule, but it relied on *Brendale* and *Buster* to decide that the fee status of the land was a factor, "but not *the* determining factor" in the balancing test.[80] The tax was imposed on the hotel guests, so the court analyzed the guest's relationship to the Tribe. Using the *Montana* framework, the court found that the first exception to the rule applied, because the hotel guests had formed an implied consensual relationship with the Tribe by deciding to spend the night on the reservation and availing themselves of tribal services.[81] The Supreme Court reversed this holding in a unanimous decision that does not allow for a balancing test and construes the *Montana* exceptions narrowly.[82]

The Supreme Court focused on the fact that *Merrion* involved nonmember use of tribal lands and therefore it did not "exempt taxation from *Montana's* general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[83] The Court admitted "[t]here are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority," but the Court restricted its reading of Merrion to hold that "[a]n Indian tribe's sovereign power to tax — whatever its derivation — reaches no further than tribal lands."[84] Based on this interpretation of *Merrion* the Court applied *Montana* to the facts in *Atkinson* and thus required the Tribe to fit the hotel occupancy tax into one of the *Montana* exceptions.[85] The Court interpreted the exceptions narrowly and did not accept the Tenth Circuit's finding that a consensual relationship existed based on the hotel guest's decision to stay within the exterior boundaries of the reservation. The Court held that the consensual relationship, of *Montana's* first exception, required more than "a nonmember's actual or potential receipt of tribal police, fire, or medical services."[86] With this narrow interpretation of the *Montana* exceptions, the hotel occupancy tax imposed on nonmember fee lands was held to be beyond tribal authority.

The holdings in *Big Horn* and *Atkinson* followed the trend of the courts towards constricting tribal sovereignty. The Crow Tribe passed up the opportunity to take the *Big Horn* decision to the Supreme Court. This leaves bad precedent in the Ninth Circuit that affects all tribes, because it extends *Strate* to cover all kinds of easements and limits tribes' power of taxation. The

80. *Id.* at 1256.

81. *Id.* at 1261-63.

82. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

83. *Id.* at 653.

84. *Id.* It is interesting to note that the phrases the Court quoted from *Merrion* were part of the argument advanced in *Merrion* to show that the sovereign power to tax is based on more than the power to exclude. In *Merrion* the taxing power was tied to nonmembers availing themselves of tribal service, but the *Atkinson* Court refused to recognize any tribal taxing power beyond tribal lands. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136-44 (1982).

85. *Atkinson*, 532 U.S. at 653.

86. *Id.*

Court's holding in *Atkinson* hinders any attempt to impose tribal taxes on nonmembers, and tribal sovereignty will be shackled by these decisions. The facts in *Big Horn* were better for the Tribe than those presented to the Court in *Atkinson*. It may have been easier to get the narrow interpretation of the Ninth Circuit reversed, then to have the Court uphold a new balancing test and a broad interpretation of the *Montana* exceptions in *Atkinson*. If the Crow Tribe had petitioned for certiorari in *Big Horn* the case would have presented better facts to the Court, and the Court may have limited *Strate* and recognized the importance of a clearer interpretation of the *Montana* exceptions.

C. The Montana Exceptions

The *Montana* exceptions appear to be clear and easy to apply, but most courts have struggled with the exceptions and there has been a tendency to look for ways to narrow the exceptions.[87] The first exception, as discussed above, applies to consensual relationships. The *Montana* Court provided examples of these relationships such as "commercial dealings, contracts, leases, or other arrangements."[88] This would seem to call for a broad interpretation, which encompasses most transactions between a tribe and a nonmember. However, most courts have required that the consensual relationship be ongoing and that there be a direct nexus between the consensual relationship and the issue before the court. In *Red Wolf* the first exception was discarded by reasoning that the right-of-way was granted by tribal consent, but this was a property transfer and not an ongoing consensual relationship.[89] In *Strate* the defendant, A-1 Contractors, was engaged in subcontract work for the Tribe, but the Court held that the traffic accident at issue in the case did not have a direct nexus to the subcontract.[90] The *Montana* opinion lists *Williams v. Lee*,[91] *Hitchcock*, *Buster*, and *Colville* as examples of consensual relationships.[92] The

87. Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1219-20 (9th Cir. 2000) ("Noting the tribes' 'diminished status as sovereigns,' the Montana Court pointed to two narrow exceptions to its general rule.") ("Although broadly framed, [the second Montana] exception is narrowly construed") (quoting County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998)).

88. Montana v. United States, 450 U.S. 544, 565 (1981).

89. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999); *see* Montana Dep't of Transp. v. King, 191 F.3d 1108, 1113-14 (9th Cir. 1999) (stating that transfers of property interests between government entities create property rights; they generally do not create continuing consensual relationships.").

90. Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997). Strate did not have a consensual relationship with the Tribe and A-1's agent was simply driving the highway at the time of the accident. The Court noted in its fact statement that the record did not show whether A-1's agent was engaged in the subcontract work at the time of the accident, and this is not addressed in the opinion. *Id.* at 438. If he were engaged in subcontract work at the time of the accident the nexus between the consensual relationship and the accident would have been stronger.

91. 358 U.S. 217 (1959) (holding that tribal courts have jurisdiction over disputes between tribal member and nonmember merchant operating a store on a reservation).

92. *Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 457 (citing Morris v. Hitchcock, 194 U.S. 394 (1904)) (discussing nonmember cattle grazing on tribal lands); Buster v. Wright, 135

Tenth Circuit opinion in *Atkinson* relied on the reference to *Buster* in both *Montana* and *Strate* as an example of a consensual relationship, and liberally construed the first exception to include an implied consensual relationship.[93] The Supreme Court's *Atkinson* opinion stated that it has never endorsed the Eighth Circuit holding in *Buster*, other than to provide guidance for what may constitute a consensual relationship for the first *Montana* exception.[94] The only thing clear about *Montana's* first exception is that its application is open to a variety of interpretations.

The second exception could also be broadly construed, but has been limited by concern that the exception could swallow the rule.[95] The exception recognizes that tribes may retain inherent authority over nonmember's conduct "on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[96]

In *Strate* the Tribe claimed that highway safety has a direct effect on the Tribe's health and welfare. The Court held that this broad of an interpretation of "the exception would severely shrink the rule."[97] Instead the Court elaborated on the context of the *Montana* exceptions and held that the second exception only applies if the inherent power "is necessary to protect tribal self-government or to control internal relations."[98] This same reasoning was applied in *Red Wolf*, holding that the fact that the injured plaintiff is a tribal member was not enough to invoke the second exception.[99] In *Big Horn* the Tribe argued that its economic security, health, and welfare are affected by its ability to tax and raise revenues to support important tribal services. The Court used the "exception swallowing the rule" argument and reasoned that if this logic were followed "virtually any tribal tax would then fall under the second exception," and this was unacceptable.[100]

The second exception has been used sparingly, and only a few cases have turned on the exception. In *Montana v. EPA*[101] the Ninth Circuit recognized the Flathead Tribe's interest in water quality as fitting within the exception. The State challenged the EPA's decision to grant the Tribe regulatory status

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F. 947, 950 (8th Cir. 1905) (dealing with a business permit tax imposed on all nonmembers doing business inside the exterior boundaries of the Reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-53 (1980) (nonmembers entering Reservation to purchase cigarettes).

93. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1255-56 (10th Cir. 2000), *rev'd*, 532 U.S. 645 (2001).

94. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.4 (2001).

95. *Strate*, 520 U.S. at 458.

96. *Montana*, 450 U.S. at 566.

97. *Strate*, 520 U.S. at 458.

98. *Id.* at 459 (quoting *Montana*, 450 U.S. at 564).

99. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064-65 (9th Cir. 1999).

100. Big Horn County Elec. Coop. v. Adams, 219 F.3d 944, 951 (9th Cir. 2000).

101. 137 F.3d 1135 (9th Cir. 1998).

under the Clean Water Act. The Court upheld the EPA's finding "that the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential."[102] The Eighth Circuit recognized the second exception in *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation.*[103] This case did not address the merits of the exception, but the Court reversed a summary judgment by the district court because the lower court did not analyze the applicability of the exception.[104]

The *Big Horn* opinion gave both *Montana* exceptions short shift, but a good argument can be made that both exceptions apply to the Tribe's utility tax. In *Big Horn* the Court conceded that there was a consensual relationship between the Cooperative and the Tribe, but the Court hyper-analyzed the language in *Montana* and determined that the consensual relationship exception did not apply to a property tax. The Court focused on the reference in *Montana's* first exception to "the activities of nonmembers who enter [into] consensual relationships." From this language the Court held that the Tribe's ad valorem tax was a property tax rather than a tax on an activity and therefore was not covered by the first exception.[105] The Court's parsing of participles ignored the preceding language in *Montana*: "A tribe may regulate through taxation, licensing, or other means . . . ."[106] The *Montana* exception did not specify the kind of tax a tribe may impose, and a property tax is a basic form of taxation.[107]

The *Big Horn* decision left open the possibility that the Tribe could restructure the tax, so as to tax an activity rather than property, and this would meet the *Montana* exception.[108] If the tribe imposed a tax on the amount of power delivered by the Cooperative, this would appear to be an activity, and it would be on all fours with the tax in *Merrion* imposed on the amount of oil and gas produced. The Tribe has decided to rely on this possibility and is changing the structure of the utility tax to fit the Ninth Circuit's interpretation

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102. *Id.* at 1141; *see also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981).

103. 27 F.3d 1294 (8th Cir. 1994).

104. *Id.* at 1299. The Tribe had imposed a 1% property tax on all real and personal property used in business or for profit within the Reservation. The lower court had held that homesteading had diminished the section of the Reservation on which the plaintiff operated its business. The circuit court reversed this and the case was remanded for a *Montana* analysis.

105. *Big Horn*, 219 F.3d at 951 (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

106. *Montana*, 450 U.S. at 566.

107. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (upholding a 3% tribal tax on possessory interests of mineral leaseholds.) This case did not employ a *Montana* analysis, but this case and *Blackfeet Tribe* approved tribal property taxes. Burlington N. R.R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991).

108. *Big Horn*, 219 F.3d at 951.

of the *Montana* exception.[109] The Court's interpretation was misguided, because property taxes are a valid measure of the Cooperative's activity on the reservation. Without the easements the Cooperative would not have any activity on the reservation. The *Big Horn* Court relied on the reasoning in *Red Wolf* to extend *Strate* and show that a *Montana* analysis was proper, but the Court ignored the distinction between taxation and adjudicatory jurisdiction made in *Red Wolf*.[110] Again, this was based on *Strate* and the requirement that all tribal sovereign powers come from property ownership.[111] No other cases have found a consensual relationship and still denied the tribe's right to exercise its sovereign power. In addition, the Cooperative has a continuing relationship with the Tribe, because tribal consent is required for all expansion of electric service. Also, the rights-of-way were only granted for a term of fifty years, and tribal consent is required to renew the term.[112] All of this suggests that the Tribe still retains some control over the rights-of-way and it follows that a property tax is reasonable.

The only second exception argument addressed in the *Big Horn* opinion is that tax revenues are necessary for tribal government functions.[113] Another possible second exception argument is based on the necessity of electricity. As the only electric service provider on the Crow Reservation, the Cooperative has a direct effect on the Tribe's political integrity and economic security, and if the electric service is not reliable there is a direct threat to the Tribe's health and welfare. Some control over the Cooperative is necessary for the Tribe to maintain its self-government and to control internal relations. Both *Montana* exceptions could have applied in *Big Horn*, but this analysis was not necessary if common property law was applied to the rights-of-way, and the intent of Congress in providing for the establishment of the rights-of-way is considered.

IV. The Nature of the Easements

A. Common Law Understanding of Easements

The basic contention in *Strate*, *Red Wolf*, and *Big Horn* is that the rights-of-way granted by the Secretary of Interior, with the consent of the Tribes, are the equivalent of nonmember fee land.[114] This is a misinterpretation of basic property law.

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109. *See supra* note 12.

110. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1063-64 (9th Cir. 1999).

111. *Big Horn*, 219 F.3d at 950 ("Furthermore, the Supreme Court pronounced in *Strate* that legislative and adjudicative jurisdiction are coextensive, so there is no merit to the contention that *Red Wolf* and *Strate* are inapplicable because they fixed only the limits of adjudicative jurisdiction.").

112. 25 U.S.C. §§ 323-328 (2000); 25 C.F.R. § 169 (2001).

113. *Big Horn*, 219 F.3d at 951.

114. *Id.* at 950; Strate v. A-1 Contractors, 520 U.S. 438, 454-56 (1997); Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1062-63 (9th Cir. 1999).

The grants for these rights-of-way state explicitly that they are easements for the purpose of a designated use.[115] According to Thompson on Real Property:

> The right in land held by an easement owner differs from the fee interest or even the leasehold interest in that it is a "use" interest, but not a "possessory" interest in the land. Thus the easement holder has neither the permanent possession of even a single molecule of the land itself, nor the exclusive time-bound possession granted by a lease. Instead the easement holder has the right to make or control a particular use of the land that remains owned by another.[116]

The easements granted in all these cases were only use interests and no possessory interest was passed to the nonmember grantees.

An easement has many characteristics that distinguish it from a fee simple. The easement holder can only *use* the land, and only the fee owner can occupy or *possess* the land.[117] The easement is only for a specified purpose, and the easement holder can only use the easement to the extent that is reasonably necessary for the specific purpose. This is contrasted against a fee owner, who can make any use of the land not specifically prohibited.[118] An easement can be abandoned, while a possessory interest can never be abandoned.[119] The Department of Interior regulation pertaining to Indian trust land easements states that a right-of-way may be terminated for: "(a) Failure to comply with any term or condition of the grant or the applicable regulation; (b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted; [or] (c) An abandonment of the right-of-way."[120]

Another distinguishing characteristic of an easement is that the possessory owner and the easement holder can use the land simultaneously. "The person who holds the land burdened by a servitude is entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement . . . ."[121] For example, a tribe can graze cattle on an electric power line easement, or the tribal

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115. Strate, 520 U.S. at 455; 25 C.F.R. § 169.18 (2001).

116. DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 60.02(c), at 393 (1994) [hereinafter THOMPSON ON REAL PROPERTY]; *see also* RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 1.2, at 12 (2000) ("An easement creates a nonpossessory right to enter and use land in the possession of another."); JON W. BRUCE & JAMES W. ELY JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.01, at 1-2 (1995) ("An easement is commonly defined as a nonpossessory interest in land of another.").

117. BRUCE & ELY, *supra* note 116, ¶ 1.01, at 1-2.

118. RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 1.2, at 15.

119. *Id.*

120. Termination of Right-of-Way Grants, 25 C.F.R. § 169.20 (2001).

121. RESTATEMENT (THIRD) OF PROPERTY SERVITUDE § 4.9, at 582.

members can travel on the public highway easement.[122] In addition fee owners receive some substantive and procedural rights unavailable to an easement holder.[123]

Some cases raise the issue of whether a grant conveys an easement or a possessory interest in land. The language in the granting clause may clearly state that it is an easement, but in many cases the courts must determine the intent of the parties. As a general rule most courts have held that a grant "of a 'right-of-way' creates only an easement."[124] The Department of Interior regulation explicitly states that "all rights-of-way granted under the regulations in this part 169 shall be in the nature of easements."[125] There is no doubt that the rights-of-way granted across tribal lands are easements.[126] If there are any ambiguities in the grants a court should remember the canons of construction, and decide the ambiguity in favor of the tribes.[127] As easements, the tribes retain the underlying possessory interest in the rights-of-way, contrary to the assertions of the Supreme Court in *Strate*.[128]

B. Statutes and Regulations

Easements are clearly distinguishable from fee lands and Congress has passed several statutes that provide special procedures for creating an easement across tribal trust lands. Starting from the primary premise that the whole purpose of trust lands is to prevent unauthorized alienation, easements across land held in trust for a tribe cannot be obtained through prescription or by necessity.[129] The only way to obtain these easements is by the procedures set out in the statutes and detailed in the regulations. This requires approval from the Secretary of Interior and written consent from the appropriate tribal officials.[130] Public entities with the power of eminent domain can not condemn easements across tribal trust lands, because the statutes require tribal consent and this "is the very antithesis of the exercise of the power of eminent domain."[131]

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122. 25 C.F.R. § 169.5(k) (2001) (requiring that the easement holder not interfere with any use by the possessory owner that does not impair the specific use of the easement).

123. BRUCE & ELY, *supra* note 116, ¶ 1.06, at 1-37.

124. *Id.* ¶ 1.06[1], 1-39; *see* THOMPSON ON REAL PROPERTY, *supra* note 116, § 60.03(a)(7)(i), at 417 ("Deeds that in the granting clause state they are conveying a right of way over, across or upon certain lands generally are construed to grant an easement. Terms such as right of way, road or roadway bring a strong, almost conclusive, indication that the interest conveyed is an easement.") (internal quotations and cites omitted).

125. 25 C.F.R. § 169.18 (2001).

126. Strate v. A-1 Contractors, 520 U.S. 438, 455 (1997) ("In the granting instrument, the United States conveyed to North Dakota 'an easement for a right-of-way . . . .'").

127. *See supra* note 35.

128. *Strate*, 520 U.S. at 454-56.

129. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 (9th Cir. 1991).

130. 25 U.S.C. §§ 323-324 (2000).

131. Southern Pac. Transp. Co. v. Watt, 700 F.2d 550, 553 (9th Cir. 1983); *see also*

Congress passed several different statutes regarding tribal easements as settlement and technology advanced, and the need arose. Originally there was a separate statute for each type of easement: railroads, highways, pipelines, etc.[132] Each statute empowered the Secretary of Interior to grant easements subject to such requirements as he deemed necessary, but the provisions of each statute were slightly different. Only some of the statutes referred to allotted trust lands and the different statutory requirements imposed a great burden on the Department of Interior. For certain types of easements the Department had to get an easement deed signed by all owners of an allotted parcel. This could be next to impossible, because the interests in the allotments had been spread out through a couple generations of inheritance.[133] In 1948 Congress passed an act that clarified and consolidated the various statutes.[134] The Act directed the Secretary to proscribe regulations and required tribal consent. Providing a uniform statute relieved the administrative burden, and an exception was provided for consent in cases where the owners of allotted land could not be located.

The Secretary promulgated comprehensive regulations stating the requirements for obtaining approval for a right-of-way and setting the terms and conditions attached to each type of right-of-way.[135] The regulations specify that the party seeking an easement must acquire written consent from the proper tribal official prior to applying for approval.[136] Some of the terms addressed in the regulations are: consideration for the right-of-way ("shall be not less than but not limited to the fair market value of the rights granted");[137] tenure of an approved grant (is left to the discretion of the secretary, but the term is set at fifty years for most types of easements);[138] renewal of right-of-way grants (written tribal consent and consideration is required for a renewal);[139] and termination of the right-of-way.[140] The regulations also provide specification for the extent of each type of easement.[141] This elaborate regulatory scheme leaves no doubt that the rights-of-way are

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Nebraska Pub. Power Dist. v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956 (8th Cir. 1983).

132. 25 U.S.C. §§ 312-318 (2000) (rights-of-way for railroads, telegraph, and telephone lines, and town-site stations, enacted 1899); 25 U.S.C. § 311 (2000) (opening highways, enacted 1901); 25 U.S.C. § 321 (2000) (rights-of-way for pipe lines, enacted 1904); 43 U.S.C. § 961 (1994) (rights-of-way through public lands, Indian, and other reservations for power and communications facilities, enacted 1911).

133. S. REP. NO. 80-823 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1033, 1036.

134. 25 U.S.C. §§ 323-328 (2000).

135. 25 C.F.R. §§ 169.1-169.28 (2001).

136. 25 C.F.R. § 169.3 (2001).

137. 25 C.F.R. § 169.12 (2001).

138. 25 C.F.R. § 169.18 (2001).

139. 25 C.F.R. § 169.19 (2001).

140. *See supra* note 120.

141. 25 C.F.R. §§ 169.22-169.28 (2001).

easements and the possessory interest remains held in trust by the Federal Government for the tribes. When the Department of Interior is applying these regulations, they must do so in the tribes' best interest, in order to fulfill their fiduciary duty to the tribes.

Several courts have upheld these statutes and regulations in the context of challenges to the necessity for tribal consent.[142] The one exception going against the tribes is that a distinction has been carved out for allotted lands. The 1948 Act explicitly stated that it did not repeal any existing laws pertaining to rights-of-way over Indian lands.[143] This was done to avoid any possible confusion and to preserve the existing statutory authority.[144] A law that was passed during the allotment era allows for the condemnation of allotted lands "in the same manner as land owned in fee."[145] Courts have reconciled this by holding that easements across allotted trust lands can be obtained by either a condemnation proceeding or by following the requirements of the 1948 Act.[146] In *Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston* the allotment owners avoided this result by deeding their remainder interest to the Tribe and retaining a life estate. The Eighth Circuit held that the Tribe's remainder interest in the land was sufficient to require that only the 1948 Act would apply to the easement.[147] The easements at issue in *Big Horn* cross a mixture of tribal trust lands and allotted lands, but they were all granted under the procedures of the 1948 Act.[148]

C. Strate Application of Statutes and Property Law

In *Strate* the grant to the state for the public highway conveyed "an easement for a right-of-way for the realignment and improvement of North Dakota State highway No. 8 over, across and upon [specified] lands." The state's "easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose . . . specified."[149] Obviously the right-of-way was an easement, and it was granted in 1970 pursuant to the 1948 Act.[150] The *Strate*

142. Blackfeet Indian Tribe v. Montana Power Co., 838 F.2d 1055 (9th Cir. 1988); Southern Pac. Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1983); Coast Indian Cmty. v. United States, 550 F.2d 639 (Ct. Cl. 1977).

143. 25 U.S.C. § 326 (2000).

144. S. REP. NO. 80-823 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1033, 1036.

145. 25 U.S.C. § 357 (2000).

146. Yellowfish v. City of Stillwater, 691 F.2d 926, 930 (10th Cir. 1982); Southern Cal. Edison Co. v. Rice, 685 F.2d 354, 357 (9th Cir. 1982); Nicodemus v. Washington Water Power Co., 264 F.2d 614, 618 (9th Cir. 1959).

147. Nebraska Pub. Power Dist. v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956, 962 (8th Cir. 1983).

148. Big Horn County Elec. Coop. v. Adams, 219 F.3d 944, 948 (9th Cir. 2000); *see supra* note 34 (referring to property ownership on the Crow Reservation).

149. Strate v. A-1 Contractors, 520 U.S. 438, 455 (1997).

150. *Id.* at 454-55.

Court emphasized that the only right the Tribe reserved in the granting instrument was the right "to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupan[cy] of the premises affected by the right-of-way."[151] The Court reasoned that the Tribe had not reserved any other right to exercise control over the easement. The Tribe did not reserve these rights in the grant, because prior to the *Strate* decision all parties concerned understood that an easement only granted a right of use and the possessory interest retained all other rights that were not inconsistent with the use.[152] By requiring an express reservation of control the Court ignored basic property law and invalidated the Tribe's sovereign powers.

The Court expanded this misinterpretation by attaching the Tribe's sovereignty to the right to exclude, as stated in *Bourland*. The right to exclude was lost, because the right-of-way is open to the public and "[the Tribe] retained no gatekeeping right."[153] This is a nonsensical requirement, because by definition the possessory interest can not retain a gatekeeping right over an easement. As stated previously, tribal sovereign powers are based on more than the power to exclude.[154] It is interesting to note that the *Strate* opinion did not evaluate the 1948 Act.[155] The statute and legislative history show that Congress did not intend for the Act to be used as a tool for alienating trust lands or divesting tribal sovereignty.[156]

V. Reasons Why Big Horn Should Have Been Reversed

A. Contrasting Big Horn to Strate

The *Big Horn* decision relies on the *Strate* Court's holding that a right-of-way on tribal lands is equivalent to nonmember fee lands for purposes of the *Montana* rule.[157] The *Big Horn* opinion listed five factors considered in *Strate*:

> (1) the legislation creating the right-of-way; (2) whether the right-of-way was acquired with the consent of the tribe; (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; (4) whether the land was open to the

151. *Id.* at 455.

152. *See supra* note 116.

153. *Strate*, 520 U.S. at 456.

154. *See supra* note 71; *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982).

155. *Strate*, 520 U.S. at 454-55 (stating that the easement was granted under 25 U.S.C. §§ 323-328, but not evaluating the meaning or intent of the statute).

156. There is no indication in the statute or its legislative history to suggest that Congress intended the Act to alienate tribal lands or have an adverse effect on tribal sovereignty. To the contrary, the statute empowers the tribes by requiring tribal consent for all types of easements. 25 U.S.C. §§ 323-328; S. REP. NO. 80-823 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1033, 1036.

157. *Big Horn*, 219 F.3d at 949-50.

public; and (5) whether the right-of-way was under state control.[158]

The Court went on to acknowledge that the Cooperative's easements only meet the first three criteria, because the power line rights-of-way are not open to the public and they are not controlled by the state.[159] As for the first criterion, neither *Big Horn* nor *Strate* examined the legislative intent of the 1948 Act.[160] Regarding the second criterion, consent is necessary to obtain any easement, but the Tribe did not consent to give up its taxing authority. The third criterion was discussed in the previous section. There was no reason for the Crow Tribe to think that it would need to specifically reserve its rights to govern in a contract providing for a power line easement.

In *Merrion v. Jicarilla Apache Tribe* the Court distinguished between a tribe's power to govern and a tribe's power to contract, and held that by agreeing to a contract for rents and royalties the Tribe did not contract away its sovereign power to impose taxes. "A tribe's power to tax is not surrendered, unless the contract explicitly states that it is in terms that allow for no other reasonable interpretation."[161] As to the Crow's power to impose a new tax, the Cooperative's easements are not distinguishable from the oil and gas leases that were at issue in *Merrion*.[162] "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."[163]

The *Big Horn* opinion rationalizes the fact that only three of the *Strate* elements are present by referring to *Red Wolf*, which was also missing the forth and fifth elements. The Court held that the decisive factor in both *Red Wolf* and *Big Horn* was the Tribe's failure "to reserve its right to exercise 'dominion or control over the right-of-way.'"[164] This is directly opposed to the holding in *Merrion*.

In *Strate* and *Red Wolf* the issue was the extent of tribal court jurisdiction, while in *Big Horn* the issue was tribal taxation. The *Big Horn* Court discounted this distinction by referring to the Supreme Court's pronouncement in *Strate* stating "that legislative and adjudicatory jurisdiction are

158. *Id.* at 950 (citing to *Strate*, 520 U.S. at 454-56; Montana Dep't of Transp. v. King, 191 F.3d 1108, 1113 (9th Cir. 1999)).

159. *Id.* at 950.

160. *See supra* note 156.

161. *Merrion*, 455 U.S. at 145-48.

162. There are many similarities between easements and profit a pendre. *See* RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 1.2(2), at 12 (2000) ("A profit a pendre is an easement, that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another.").

163. *Merrion*, 455 U.S. at 147.

164. *Big Horn*, 219 F.3d at 950.

coextensive."[165] The *Strate* Court made this pronouncement in order to discount the distinction between adjudicatory jurisdiction at issue there and the regulatory jurisdiction that was at issue in *Montana*, *Brendale*, and *Bourland*. None of these cases dealt with taxation. The *Big Horn* Court ignored the distinction noted in *Red Wolf*, that the taxing power is broader than tribal court jurisdiction.[166]

Big Horn is also distinguishable from *Strate* based on the type of easement that is at issue. The land under a public highway easement is not useful to the servient estate, except for possible mineral rights. In contrast the land underneath a power line can be used for grazing and other agricultural pursuits. Under the Department of Interior's regulations the applicant for a right-of-way must expressly agree "that the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted."[167] The Cooperative had to expressly agree to the stipulations in the regulations when it obtained its easements.

The regulations distinguish highway rights-of-way from other types of easements covered by the statutes, in that state laws apply to highway rights-of-way.[168] This is based on the original statute that authorized the Secretary of Interior to grant highway rights-of-way.[169] The courts have interpreted this to allow for improvements within pre-existing highway rights-of-way without approval by the Secretary, as long as the improvements comply with state law.[170] There are no provisions in the statutes or the regulations for applying State law to power line rights-of-way. It is also worth noting that the highway grant in *Strate* contained no term limit, while the Cooperative's grants have a fifty-year term.

The last distinction between *Strate* and *Big Horn* is the tribe's interest in the subject matter and in the sovereign power that the Courts are extinguishing. The tribal courts are an important part of tribal self-government, but the *Strate* Court's limitation on the extent of their jurisdiction is not crucial to the Tribe's survival. On the other hand, tribal self-government depends on the ability to

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165. *Id.* (referring to *Strate*, 520 U.S. at 453).

166. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1063-64 (9th Cir. 1999). The *Atkinson* decision would seem to clearly state that the taxing power is no greater than other regulatory authority, but this was not clear at the time of the *Big Horn* decision, and it may still be disputed in cases where the property is not clearly held in fee by a nonmember. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

167. 25 C.F.R. § 169.5(k) (2001).

168. 25 C.F.R. § 169.28 (2001).

169. 25 U.S.C. § 311 (1994).

170. United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 210-11 (1943); United States v. Mountain States Tel. & Tel. Co., 434 F. Supp 625 (D. Mont. 1977) (stating that a telephone line could be buried in a pre-existing highway right-of-way without following the requirements of 25 U.S.C. §§ 323-328).

tax and raise revenues for essential functions.[171] The *Big Horn* decision strikes at the very heart of tribal sovereignty. The Tribe has a legitimate interest in regulating its sole provider of electricity and the ad valorem tax was an appropriate way to raise revenue.

B. Big Horn Sets a Bad Precedent

The Ninth Circuit's holding in *Big Horn* overextends the *Montana* rule and is in direct conflict with the current Indian policy of government-to-government relations. While Congress and the Executive branch of the Federal Government are working to promote tribal self-government and independence, the courts have consistently taken away the attributes of self-government.[172] The usual canons of construction have been ignored and the presumptions that once favored the tribes have been turned against them.[173] *Big Horn* defies the basic definition of inherent tribal sovereignty.

Another reason why the *Big Horn* decision was misguided is that, despite the Court's holding in *Strate*,[174] easements are not substantially the same as fee lands. Congress' intent in passing the 1948 Act was to simplify the process for obtaining easements across tribal trust lands.[175] The statute recognized tribal self-government and established requirements similar to those that would pertain to two neighbors negotiating an easement. The grantee cannot condemn the grantor's land, and instead he must receive consent. Both parties understand that only the right of use will pass with the easement. There is nothing in the statute to suggest that the grantor will lose other substantial rights.

The Tribe should have challenged the *Big Horn* decision, because, the Supreme Court had consistently treated taxation differently from other tribal sovereignty issues prior to its holding in *Atkinson*.[176] The Court emphasized the importance of taxation in *Merrion* and, until the *Atkinson* decision, upheld tribal taxes every time that it ruled on the issue .[177] The *Montana* opinion did refer to taxes, but the *Big Horn* opinion overanalyzed *Montana* when it claimed that the Tribe could only tax the activities of nonmembers and not their

171. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); *see supra* note 11.

172. In general the Supreme Court has progressively narrowed the scope of tribal sovereignty since the late 1970s. The Justices that advocated for tribal rights, Blackmun, Brennan, and Marshall, are no longer on the Court. The *Strate* decision was unanimous and shows a complete shift in the Court's understanding of Indian law. *See* Fredericks, *supra* note 15, at 380-83, 400-02.

173. *See supra* Parts II.B, II.C; Montana v. United States, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 456-59 (1989).

174. *See supra* notes 116, 117.

175. *See supra* note 156.

176. Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001).

177. *See supra* Part III.A; *Merrion*, 455 U.S. at 137-39 ("Viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government.").

property interests.[178] The Tenth Circuit's balancing test applied in *Atkinson* was a fair reconciliation of *Montana* and *Merrion*,[179] but the Supreme Court chose to simplify Indian sovereignty and apply a bright line test of property ownership.[180] Nonmembers that do not receive a benefit from a tribe should not be taxed, but if there is a benefit bestowed upon the nonmember a balancing test is appropriate.

If the Crow Tribe had pursued a petition for certiorari, the Court could have reversed the Ninth Circuit's holding without overturning *Strate*. *Big Horn* fits squarely in *Montana's* first exception.[181] The Tribe and the Cooperative have an ongoing consensual relationship and a 3% ad valorem tax is an appropriate form of taxation. In the alternative, the Court could have reversed *Big Horn* based on the second *Montana* exception. Electricity is an essential commodity, and the conduct of the Cooperative "has a direct effect on the Tribes political integrity, economic security, and health and welfare."[182]

All these arguments show that *Big Horn* was a poor decision and this suggests that the Tribe should have challenged the decision. It is understandable that with the current make up of the Supreme Court, the Tribe felt that its chances for success were slim, but *Big Horn* would have given tribal sovereignty interests a better chance than they faced under *Atkinson*.

Conclusion

The *Atkinson* decision was another serious reversal for tribal sovereignty, because the power to tax activity within the reservation is essential to self-government. The *Big Horn* decision was a flawed interpretation of property law and the *Montana* exceptions, and it is a threat to the stability of tribal relations with nonmembers. The status of tribal easements is crucial to both tribes and nonmembers. Many of the existing easements on tribal trust lands are nearing the end of their term and holders of these easements will need to negotiate with the tribes for the required consent to renew the grants. The uncertainty about what a tribe is consenting to will drive up the price of that consent. In the energy field there is a drastic need for more transmission capacity. This means more power line easements across tribal lands and the current uncertainty in the law will translate into delays and higher prices.

The tribes are free to negotiate for the best possible deal for their consent. The regulations state that the consideration for consent "shall not be less than but not limited to the fair market value of the rights granted."[183] In several

178. *See supra* Part III.C; *see Big Horn*, 219 F.3d at 951.

179. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1256-57 (10th Cir. 2000), *rev'd*, 532 U.S. 645 (2001).

180. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001).

181. *See supra* Part III.C.

182. *See supra* Part III.C; Montana v. United States, 450 U.S. 544, 565-66 (1981).

183. 25 C.F.R. § 169.12 (2001).

cases the starting point for these negotiations has been the cost benefit to the applicant for building the project across tribal lands, as opposed to using an alternative route.[184] Using this approach the fair market value of tribal lands increases dramatically. With *Big Horn* as law in the Ninth Circuit, tribal sovereignty will be on the negotiating table every time a new easement is sought or a party renews an existing easement. What is the fair market value of sovereignty?

184. United States v. Pend Oreille County Pub. Util. Dist. No. 1, 135 F.3d 602, 608-09 (9th Cir. 1998) (setting out a formula for computing the most valuable alternative for compensating a tribe for the use of its lands).