IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 94-151

CROW TRIBE OF INDIANS, in its own right and on behalf of Tribal members, Plaintiff/Appellee,

vs.

TIM GREGORI, Manager, and BIG HORN COUNTY ELECTRIC COOPERATIVE, Defendants/Appellants.

Decision Entered April 2, 1998

[Cite as 1998 CROW 2]

Before: Birdinground, C.J., Stewart, J., and Watt, J.

OPINION

¶1 This case primarily involves the Crow Tribe's power to regulate the manner in which a rural electric cooperative may pass a Tribal ad valorem tax through to its customers on the Crow Reservation. We affirm the Tribe's inherent sovereign authority to so regulate the cooperative, and that the utility failed to comply with the Tribe's lawful regulation when it passed the Crow utility tax directly through to certain Reservation customers in 1994.

I. Factual and Procedural Background

¶2 Defendant Big Horn County Electric Cooperative, Inc. (the "Co-op"), is a Montana non-profit membership corporation organized in 1939 pursuant to the Rural Electrification Act of 1936, 7 U.S.C. § 901, *et seq.*, and the Montana Rural Electric and Telephone Cooperative Act, Mont. Code Ann. § 35-18-101, *et seq.* The Co-op's principal offices are located in Hardin, Montana, and it has also long maintained an office in Lodge Grass on the Crow Reservation.

¶3 The Co-op provides retail electric utility service to more than 3,000 customers in the rural areas of Big Horn County, Montana (Gregori Aff. Exh. D). The Co-op also provides electric utility service to approximately 250 customers in northern Wyoming. The Co-op's service area includes all of the 2.3 million-acre Crow Indian Reservation, except for 400-500 consumers in the Pryor area that are served by Yellowstone Valley Electric Cooperative (May 1994 Hearing Transcript at 107, hereinafter "Tr."). The Co-op also serves a portion of the Northern Cheyenne Reservation (Tr. 24).

¶4 "A consumer cooperative is a non-profit enterprise, owned and controlled by the people it serves." *Glossary of Electric Utility Terms,* Edison Electric Institute (1991) at 13. The Co-op's customers are members of the Co-op, and enter into membership agreements as a condition of receiving service (Bylaws Art. I § 1; *see also* Tribe's Supp. Brief App. Tab 5). The Crow Tribe is a member of the Co-op, and Crow Tribal members make up approximately half of the Co-op's total

membership (Tr. 22; Dec. 1994 Oral Argument Transcript at 12). The Co-op is governed by a 9-person Board of Trustees elected by its member-customers from separate geographical districts within the Co-op's service area (Bylaws, Art. II § 7 and Art. III). In turn, the Board employed Defendant Tim Gregori as the Co-op's Manager.

¶5 According to the Co-op's financial statement for calendar year 1993, the Co-op had gross revenues of $3.2 million and a "net margin" of $318,514 (Complaint Exh. 5; Co-op's Hearing Exh. 5). The book value of the Co-op's assets was $11.2 million, including 1,200 miles of utility lines and more than $2.2 million in current assets, while the Co-op's debt totaled approximately $7.5 million. The Co-op reported having paid $92,099 in taxes during 1993. No Tribal utility taxes were accrued in 1993 or included in that figure (Tr. 89).

¶6 Following the decision in *Burlington Northern Railroad Company v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), the Crow Tribal Council in January, 1993, enacted a Railroad and Utility Tax Code. Resolution No. 93-19A (Complaint Exh. 1). As amended by Resolution No. 93-23 in April, 1993 (Complaint Exh. 2), Section 203 of the code imposes a 3% tax on the assessed value of "utility property" located on "tribal lands" within the Reservation (including the "ceded strip"), as those terms are defined in the code. While the primary purpose of the tax is to "defray the costs of providing governmental services," seventy-five percent of the taxes collected from rural electric and telephone cooperatives are to be placed in a special fund for defraying the hookup fees or other charges to connect Tribal members with lines necessary to receive telephone or electric service (preamble; Section 216).

¶7 The code provides for appointment of a Tax Commissioner for assessing and collecting the tax, along with an Advisory Committee which includes representatives of the railroad and utility industries subject to the tax (Sections 206 and 207). Cross-defendant Denis Adams, a certified public accountant and former director of the Montana Department of Revenue, is the Tax Commissioner appointed by the Tribal Chairman pursuant to the code (Tr. 28).

¶8 Section 219 of the utility tax code, which is the focus of this dispute, contains specific provisions limiting how the taxpayer can recover the cost of the tax from its customers. At the time the present dispute arose, section 219(A) provided as follows:

> The tax imposed by this Code shall be considered an embedded cost or revenue requirement system wide and may not be assessed to or passed on to any special class of customers or users. Any attempt to charge Crow Tribal Members or any other customers on Tribal land or trust lands a higher charge or fee because of this tax shall be considered discrimination and shall be null and void.

Section 219 also grants jurisdiction to the Tribal Court to enjoin discriminatory charges and to award to consumers a penalty for violations equal to three times the attempted charge. According to the Tribe, the provisions of Section 219 were enacted specifically in response to comments made by Mr. Gregori during the 1992 hearings on the proposed tax, that any new Tribal tax on utility property located on trust lands would be passed through only to persons receiving service on the trust lands. Complaint pp. 8-9; *see also*, Tr. 55; Exh. 4 to Tribe's Memorandum in Support of Summary Judgment (hereinafter "Tribe Mem.").

¶9 The record includes correspondence from Gregori to Adams during July, 1993, conveying certain information requested for the purpose of assessing the tax (Tribe Mem. Exh. 6). Adams sent the first property tax statement to the Co-op in December, 1993 (Tribe Mem. Exh. 5). The amount of the tax assessed for 1993 was $39,699, based on an assessed value of line mileage, meters and transformers totaling approximately $1.3 million. The tax was payable in two equal installments due January 3 and May 31, 1994. The statement also informed the Co-op that if it disagreed with the proposed tax it could request a hearing before the Tax Commissioner, but that the tax had to be paid first and a refund claim filed in order to maintain any appeal rights. The Co-op paid the first installment in the amount of $19,834.50 by check dated January 3, 1994 (Tribe Mem. Exh. 7).

¶10 During this same time, the Co-op was also facing increases in its wholesale power costs totaling $105,575 annually (8% overall) which occurred on September 15, 1993 and January 1, 1994 (Gregori Aff. Exh. D). In November, 1993, the Co-op filed an application with the Wyoming Public Service Commission for authority to recover a portion of those costs from its Wyoming customers. That application was prepared and filed before the Co-op received the Tribe's tax assessment on December 5, 1993 (Gregori Aff. p. 5). On January 20, 1994, the Wyoming Public Service Commission issued a Notice and Order granting the Co-op the authority to pass on $8,100 of the wholesale power cost increases to its Wyoming customers. In keeping with its customary business practice of maintaining the same basic rates for all its customers, the Co-op implemented a rate increase for its all customers in both Montana and Wyoming effective on January 20, 1994 (Gregori Aff. p. 6).

¶11 In February, 1994, the Co-op's counsel requested further specifics from the Crow Tax Commissioner on how the tax had been assessed (Tribe Mem. Exh. 8). Later that month, the Co-op filed an action in U.S. District Court to enjoin Commissioner Adams from enforcing the tax code (Complaint ¶ 12). That action was later dismissed on June 14, 1994, without prejudice and in the interest of comity pending exhaustion of Tribal remedies. *Big Horn Electric Cooperative, Inc. v. Adams,* CV 94-25-BLG-JDS (Mem. Order and Judgment, June 14, 1994). In the meantime, the Wyoming PSC informed the Co-op by letter dated April 14, 1994, that in light of the pending federal court litigation it would not allow a pass-through of the Crow utility tax to the Co-op's Wyoming customers until the validity of the tax was reviewed by the

courts (Co-op Hearing Exh. 4).

¶12 The Co-op began passing through the Crow utility tax in its customer bills sent out in April and May, 1994. The tax was passed through to all the Co-op's Montana customers who received service in December, 1993, and were still receiving service when the pass-through billing began (Tr. 69, 140-141). The pass-through was calculated based on each of these customer's pro-rata share of the Co-op's total kilowatt hour usage in 1993 (Tr. 68, 135). The amount added to each of these customers' monthly bills was sufficient to recover the first installment of the tax over six months.

¶13 The bills included a separate itemized charge labeled "Crow Utility Tax." Predictably, the addition of the Crow utility tax resulted in a flurry of complaints about the tax from Tribal members as well as non-members (Tr. 70-71).

¶14 On May 9, 1994, the Crow Tribe filed an informal complaint and motion for a temporary restraining order to enjoin the Co-op from passing the tax through to Tribal members in violation of Section 219 of the utility tax code. At the same time, Commissioner Adams sent a detailed letter to Gregori explaining the Tribe's objections to the way the Co-op had passed through the utility tax (Tribe Mem. Exh. 10). The Tribal Court issued an order to show cause and subpoenaed the Co-op's representatives to a preliminary injunction hearing on May 13, 1994.

¶15 The Tribe filed its full complaint with the Tribal Court on the day of the hearing. Tracking the objections outlined in Adams' May 9th letter to Gregori, the Complaint sought declaratory and injunctive relief preventing the Co-op's pass-through of the utility tax on the grounds that: (a) the Co-op failed to give the REA 90 days' notice of the pass-through as required by the Co-op's Bylaws; (b) the pass-through violated Section 219 of the Tribal utility tax code because it discriminated against certain classes of customers, the utility tax was not treated as an "embedded cost" for purposes of determining the total amount of the pass-through, and the Tribal tax was not treated the same as other similar taxes; and (c) the allocation of the tax to customers based on their kilowatt-hour usage in 1993 placed an unfair burden on non-agricultural residential consumers and on the Co-op's most steady customers. The Tribe also sought recovery of its attorneys' fees and costs, along with the treble damages penalty authorized by Section 219 in the amount of $118,997.

¶16 The Tribal Court (Arneson, J.) conducted an extensive evidentiary hearing on the Tribe's request for a preliminary injunction on May 13, 1994. Commissioner Adams testified on behalf of the Tribe. Testifying on behalf of the Co-op were Mr. Gregori, Mr. John Young, the president of its board of trustees, and Mr. Terry Holzer, the general manager of Yellowstone Valley Electric Cooperative.

¶17 At the close of the hearing, the Tribal Court made a preliminary finding that the Co-op did not treat the utility tax as an "embedded cost" as required by Section 219, and issued a preliminary injunction against the Co-op collecting any further amounts of money from its customers relating to the tax.

¶18 The Co-op filed its Answer in June, 1994, admitting the Tribe's allegations as to personal and subject matter jurisdiction in the Tribal Court (Answer ¶ 1), but denying that the Co-op's pass-through of the Tribal utility tax discriminated against Tribal members or otherwise violated Section 219 or any other legal requirement. The Co-op also asserted counterclaims against the Tribe seeking declarations: (a) that the provision of Resolution No. 93-23 requiring a rebate of State property taxes collected from Tribal members in the past was null and void because it exceeded the Tribe's inherent sovereign powers and was an ex post facto law in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302(9); (b) that Section 210 of the Tribal utility tax code allowed inconsistent methods of assessment which could include all of a utility's property on the Reservation, including that located on non-Indian fee lands, exceeding the Tribe's authority; and (c) that Section 219 of the tax code governing the pass-through of the tax amounted to an assertion by the Tribe of regulatory jurisdiction over the Co-op, exceeding the Tribe's authority.

¶19 The Tribe filed a motion for summary judgment on August 31, 1994, on the issue of whether the Co-op's pass-through violated Section 219 of the utility tax code. The parties briefed the issues extensively, with the Co-op taking the position that summary judgment was not appropriate because of the limited opportunity for submitting evidence. On September 6, the Co-op filed a motion to amend its Counterclaim to join Commissioner Adams as a cross-defendant in order to avoid the potential defense of Tribal sovereign immunity. The Tribal Court granted the Co-op's motion without objection at oral argument on the Tribes' summary judgment motion in November, 1994.

¶20 In the meantime, the Tribal Council enacted clarifying amendments to Section 219(A) in July, 1994, so that the current version reads as follows:

> The tax imposed by this Code shall be considered an embedded operating cost and may not be assessed to or passed on to any class of customers or users in a different manner than ad valorem taxes assessed by the State of Montana or its political subdivisions. Any attempt to charge Crow Tribal members or any other customers on tribal or trust lands a higher charge or fee because of this tax or to separately identify this tax on the customers bill shall be considered discrimination and shall be null and void.

Resolution No. 94-32 (emphasis added) (Tribe Mem. Exh. 12).

¶21 Following oral argument, the Tribal Court on November 16, 1994, issued an Order including findings of fact and

conclusions of law, and disposing of the entire case. Based upon the testimony at the May 13 hearing, the Tribal Court found that the Co-op's method of passing through the Crow utility tax to its Montana customers, including Tribal members, violated Section 219 of the utility tax code because it was not treated as an embedded cost system wide, was not based on revenue requirements as measured by the Co-op's "TIER" (Times Interest Earned Ratio), and treated the Tribal tax in a clearly discriminatory manner as compared with other cost increases, including the Co-op's wholesale power costs and taxes paid to the State. Order at 4-7. The court further found that the Co-op acted in a discriminatory manner by not seeking the approval of the Tribal Public Utilities Commission (apparently authorized in January, 1994) for any pass-through of the Tribal tax (Order at 6). Based upon these findings, the Tribal Court declared the Co-op's attempt to pass through the Tribal utility tax to be null and void, and it permanently enjoined the Co-op from passing through the tax without first obtaining permission of the Tribal PUC (Order at 7). In light of these holdings, the court found it unnecessary to rule on the Tribe's other claims.

¶22 The Tribal Court's order also disposed of the Co-op's counterclaims by finding that they did not present justiciable cases or controversies (Order at 7-8). The court held that there was no case or controversy concerning Resolution 93-23's call for a rebate of past state taxes passed through to Tribal members, because the Tribe was not actually seeking such a rebate. The court held that no case or controversy existed with respect to the Co-op's claim that the tax code permitted taxation of utility property on non-Indian fee lands, because the Tribal utility tax was limited by its terms to trust or tribal lands located within the Reservation. The Tribal Court further held that the Co-op's claim based on improper regulation of off-reservation activities presented no case or controversy, because the Tribe never sought to tax utility property located outside the Reservation.

¶23 Finally, with respect to the Tribe's request to assess the treble damages penalty, the Tribal Court found that it appeared the Co-op was liable for the penalty based on its violation of Section 219, but the court denied the request because payment of the penalty may indirectly adversely impact Tribal members, who are also members of the Co-op and provide its funding (Order at 8).

¶24 It is from this Order that the Co-op and Mr. Gregori appealed to this court on the issues of (a) whether, as a matter of federal law as set forth in *Montana v. United States*, 450 U.S. 544 (1981), the Tribe has authority to regulate the Co-op's activities in connection with providing electric utility service within the Crow Reservation through Section 219 of the utility tax code; and (b) whether the Tribal utility tax code permits taxation of the Co-op's property located on fee land within the Reservation, and thus exceeds the Tribe's inherent sovereign authority. Appellants' Brief at 2.

¶25 On appeal, for the first time, the Co-op has also asserted that the Tribal courts lack jurisdiction of this case, except for the opportunity to determine the extent of our own jurisdiction pursuant to *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985). The Tribe has conceded, as it must, that the issue of subject matter jurisdiction may be raised at any time. *See Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992), *citing Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). Thus, the Co-op's admission of Tribal Court jurisdiction at the outset does not prevent it from later challenging the Tribal courts' jurisdiction in this appeal.

¶26 The parties briefed the issues on appeal, and presented oral arguments during June, 1996. In June, 1997, this Court requested supplemental briefs on jurisdictional issues in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. ___, 117 S. Ct. 1404 (1997). At that time, and in a telephone status conference conducted December 31, 1997, we also requested the parties to supplement the record with undisputed public documents that would further inform our inquiry into the jurisdictional issues.

II. Preliminary Considerations

¶27 Before examining federal-law issues concerning subject matter jurisdiction, it is important to clarify what this case is *not* about. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

A. The Tribe's Taxation Authority.

¶28 This is not a dispute about the Crow Tribe's authority to tax the Co-op's property located on Indian trust lands or fee lands owned by Crow Tribal members, or on easements and rights-of-way across those lands. The Co-op recognizes the Tribe's inherent sovereign authority, as a matter of federal law, to tax property located on Reservation trust lands. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); Appellants' Supp. Brief at 11. Likewise, in this appeal, the Tribe has maintained that it only seeks to tax utility property located on the aforementioned lands (including easements across the same). Thus, consistent with the Tribal Court's findings, this case presents no dispute in principle between the parties on what property is lawfully subject to the Tribal utility tax.

¶29 However, the Co-op on appeal continues to press its claim for declaratory relief on whether Section 210 of the utility tax code allows the Tribal tax commissioner the option to assess all utility property within the Reservation boundaries, including that located on non-Indian fee lands where the majority of the Co-op's facilities are located. The Tribe in this appeal has disclaimed any intent to tax property on non-Indian fee lands, but agrees that the record has not been sufficiently developed as to the identification of specific property subject to the tax, in part due to a lack of information from the Co-op. In addition to these questions, this court takes judicial notice based on our independent

inquiry of Tribal public records that the definition of "Tribal Lands" in Section 202(F) of the utility tax code has been subsequently amended to include "all lands located within the exterior boundaries of the Crow Indian Reservation, notwithstanding the issuance of any patent." In contrast, the definition at the time this action was instituted (and which is consistent with the Tribe's position on appeal) limited "Tribal Lands" to "all lands owned, whether in trust or in fee, by the Crow Tribe or any of its members . . . [including] all easements or rights-of-way over or through [such] land[.]" *See* Tribe Mem. Exh. 1 (Section 202.F).

¶30 Even though some further controversy is bound to exist or arise between the parties on the specific property subject to the tax or the amount of the assessment, we hold that the Tribal Court lacked jurisdiction of the Co-op's counterclaim at issue in this appeal as a matter of Tribal law. Section 218 of the utility tax code specifically prohibits suits for the purpose of restraining the assessment or collection of the tax, and directs that "the remedies provided in Section 211 through Section 215 *shall be exclusive*" (emphasis added). In turn, Sections 212 and 215 provide for challenging a tax assessment in Tribal Court, but only after the taxpayer has been denied relief pursuant to the administrative procedures prescribed by the code.

¶31 Section 215 of the utility tax code provides a 5-year period for seeking a refund of taxes erroneously or illegally collected. The taxpayer must file a claim with the Tax Commissioner, who may conduct a hearing pursuant to Section 212, and all appeal procedures apply. Refunds are payable with interest at the same rate as the federal IRS pays on refunds of individual income taxes. For any payments of the Crow utility tax not made under protest, this refund procedure remains available to the Co-op in lieu of its counterclaim filed in the present case.

¶32 At the time the present case was commenced, Section 212 provided that any aggrieved taxpayer could request a hearing before the Tax Commissioner, and the administrative decision was then appealable to the Tribal Court by filing a notice of appeal within 30 days. The current version of Section 212 adopts the similar hearing and appeal procedures set forth under Chapter 3 of the general Administrative Provisions promulgated under the Tribal Taxation Code.

¶33 Chapter 3, Section 3.09 of the administrative rules provides appeal and hearing rights for deficiency assessments, which are not at issue in this case. Section 3.10 specifies the information required for a refund claim, and provides that the Tax Commission may hold an administrative hearing and must in any event notify the petitioner of its decision in writing. Section 3.11 provides for expedited hearing rights by paying any tax under protest. The taxpayer must provide written notice of the grounds for the protest to the Tax Commissioner, state the amount that is protested, and request a hearing before the Tribal Tax Commission. The Tribal Tax Commissioner, in turn, is to set the matter for hearing "as soon as practicable." In order to invoke the appeal procedure, the taxpayer must pay the current and all future assessments before the delinquent dates.

¶34 Section 3.12 of the administrative rules provides that the final determination of the Tax Commission, on either a refund claim or payment under protest, may be appealed by filing an action in the Tribal Court within 30 days. In turn, the Tribal Court's judgment is appealable to the Crow Court of Appeals within 30 days, and the Court of Appeals' decision is deemed final. Maintenance of these appeals is conditioned on making subsequent tax payments as they come due.

¶35 The requirement for a formal administrative denial of a tax challenge before proceeding in the courts of the taxing jurisdiction is not unusual. See, e.g., Parker v. Agosto-Alicea, 878 F.2d 557 (1st Cir. 1989) (Puerto Rico treasury secretary issued requisite refund claim denial after oral argument in federal court appeal). There is no evidence in this case of the Co-op having pursued any administrative remedies prior to filing its counterclaim, nor any evidence of an administrative determination having been made in response to a claim by the Co-op. On the other hand, the Co-op's administrative remedies for challenging the tax assessment have not been foreclosed.

¶36 In *Strate*, the Supreme Court carefully distinguished its holding on the Tribe's lack of civil regulatory and related adjudicatory jurisdiction in that case from the earlier cases recognizing tribes' broader powers to tax non-member commercial activities on the reservation. *Strate*, *supra*, 117 S.Ct. at 1415 (discussing *Montana*'s list of cases fitting within its first exception), *citing Morris v. Hitchcock*, 194 U.S. 384 (1904), *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), and *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 152-154 (1980). We are not aware of any other controlling federal law that would prevent the Tribal authorities, subject to review by the Tribal courts, from interpreting the Tribal utility tax code, determining precisely what property is lawfully subject to the tax, and assessing the value of that property, all as prescribed in the Tribal utility tax code.

¶37 Thus, any disagreement relating to the amount of tax assessed, including the property subject to tax, must first be taken up with the Tribal Tax Commission, after paying the tax assessed, and only after exhaustion of these Tribal administrative remedies do the Tribal courts have jurisdiction to review the administrative decision. Although based on a different rationale, we have reached the same conclusion as the Tribal Court and must affirm its dismissal of the Co-op's counterclaim for lack of subject matter jurisdiction as a matter of Tribal law.

B. State Regulation of the Co-op.

¶38 This case also does not present an issue of whether any regulatory authority possessed by the Tribe excludes the

State from also regulating the Co-op's activities on the Reservation. The Tribe does not assert authority to control rates charged to the Co-op's Wyoming customers and, as discussed below, the State of Montana does not regulate the Co-op's rates or the manner in which it recovers tax costs from its customers.

¶39 Montana Code Annotated Title 35, Chapter 18, provides a framework for organizing and incorporating rural utility cooperatives. Section 35-18-104, which has not been amended since its adoption in 1939, expressly provides that "Cooperatives . . . shall be exempt in all respects from the jurisdiction and control of the public service commission of this state." In the 1994 hearing, the Co-op acknowledged that is was exempt from regulation by the Montana PSC (Tr. 50). However, the Co-op argues that Mont. Code Ann. § 35-18-104 merely evidences the State's policy decision not to exercise its exclusive authority to regulate rural electric cooperatives.

¶40 The Co-op points to the "Territorial Integrity Act," Mont. Code Ann. § 69-5-101, *et seq.,* as an example of regulatory authority being asserted by the State of Montana. As amended in 1997, that legislation gives electric service providers (including rural electric cooperatives) the right to continue to serve their existing customers, and a presumptive right to serve new customers closest to their lines. The act provides for PSC approval of agreements setting up different geographical service areas, and an injunctive remedy in state district court. However, it does not deal with rate-making, and it does not expressly override the disclaimer of PSC jurisdiction in Mont. Code Ann. § 35-18-104.

¶41 The Co-op further argues that the "Electric Utility Industry Restructuring and Customer Choice Act" of the 1997 Montana legislature evidences the State's recent decision to assert regulatory control over rural electric cooperatives. Ironically, the primary purpose of that legislation was to open up the utility industry to competition. Mont. Code Ann. § 69-8-102. Public utilities are required to allow other electricity suppliers to use their distribution lines, in order to provide consumers with a choice of suppliers. *Id.* The Public Service Commission would eventually no longer regulate the prices charged for electricity, although it would continue to regulate public utilities' distribution and transmission services and their rates.

¶42 A close examination of the provisions of that act reveal that rural electric cooperatives are essentially exempt from any pertinent mandatory provisions. For example, the act specifically withholds any authority of the PSC to "regulate cooperative utilities in any manner other than reviewing certification filings," and exempts cooperatives from the licensure requirements. Mont. Code Ann. §§ 69-8-403(10) and 404(7). Also, unlike "public utilities," cooperatives may elect *not* to open their distribution facilities to other electricity suppliers by filing a notice with the Montana PSC by May 1, 1998. Mont. Code Ann. §§ 69-8-301(1) and -311. Even if a cooperative does elect to open its distribution system and adopt a transition plan, it has the option of not functionally separating its supply, transmission and distribution services, and the act leaves to the Co-op's board of trustees the discretion to set the rates for those services and as well as transition costs. Mont. Code Ann. §§ 68-3-303, 304, 308, 309, and 310(5).

¶43 Furthermore, under the 1997 state legislation, rural electric cooperatives are exempt from the Montana PSC's rules on how and when electricity service may be discontinued for nonpayment, and the procedures for getting reconnected. Mont. Code Ann. § 69-8-409 (2). Also pertinent to the present case, rural electric cooperatives are exempt from the act's requirements for disclosing various components of the electrical bill (e.g., separating the cost of the power itself from distribution and transmission charges). Mont. Code Ann. § 69-8-404(1) and (3). Under state law, the local cooperative boards retain the authority for setting their policies on both these matters. *Id.*

¶44 The only provision of the 1997 act that appears to be mandatory for rural electric cooperatives is the requirement effective January 1, 1999, for funding "universal system benefits programs" such as energy conservation, renewable resources, and low-income energy assistant[1] at 2.4% of each utility's 1995 retail sales revenue in Montana, which may be recovered by assessing each local utility customer at the meter. Mont. Code Ann. § 69-8-402(2). However, utilities receive credit for their internal programs and activities that promote these programs, so it is not clear whether the Co-op would ever end up having to actually pay money into the fund. In addition, special provisions allow rural electric cooperatives to collectively pool their credits statewide, and their annual reports of activities are not required to be submitted to the PSC. Mont. Code Ann. § 69-8-402(3) and (8).

¶45 From the above analysis, it is clear that Montana law expressly disavows any regulation of the rates charged by the Co-op, or its billing practices. In general, Montana's regulatory scheme is tailored to accommodate the existence of rural electric cooperatives, rather than to affirmatively regulate them. In the absence of any conflict between the State and Tribal law, we need not express any opinion on whether the State has any power to regulate the manner in which the Crow utility tax is passed-through to the Co-op's member-customers, or whether any Tribal regulatory authority is exclusive of the State's.

C. The Co-op's Ability to Pass Costs Through to Tribal Members

¶46 There is also no dispute in this case about whether Tribal members may end up indirectly paying some of the Tribal utility tax through their utility bills. In this litigation, the Tribe has always recognized the Co-op's ability to charge Crow Tribal members higher utility rates in order to pay their fair share of any shortfall in the Co-op's operating margin after payment of the tax. The Tribe disclaims any intent to regulate the Co-op's rates charged to off-Reservation customers, and has acknowledged that the Co-op's pass-through of the tax to all its Montana customers did not

discriminate against Tribal members as a class. The Tribe has likewise acknowledged that the Co-op's failure to pass the tax through to its Wyoming customers did not violate the anti-discrimination provisions in the Tribal utility tax code. Accordingly, there is no dispute in this case about what classes of customers' rates were increased by the Co-op.

¶47 Rather, the dispute in this case is confined to the manner in which the Co-op calculated and implemented the pass-through to its Reservation customers of any additional charges necessary to enable it to pay the Tribal utility tax, and the authority of the Tribal legislative, administrative and judicial bodies to determine what is permissible in this regard.

III. Subject Matter Jurisdiction

¶48 The Tribal Court correctly found that it had jurisdiction of this matter under Tribal law. The Tribal Court premised its jurisdiction on "Sections 3-2-205, 3-2-203 and 3-2-216 [sic] of the Crow Tribal Tax Code." Section 3-2-205 of the Crow Tribal Code, which grants Tribal Court subject matter jurisdiction "over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation," and Section 3-2-203, which grants personal jurisdiction over "all persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian Reservation," generally confer Tribal Court jurisdiction over civil actions such as this.

¶49 Additionally, as described above, Section 219 of the Railroad and Utility Tax Code specifically grants the Tribal Court jurisdiction to enjoin violations of its restrictions on how the tax may be passed through, and to award damages. The Tribal Court's permanent injunction restraining the Co-op's ability to pass through the tax was based solely on its findings that the Co-op violated Section 219. We therefore affirm the Tribal Court's holding that it had jurisdiction, as a matter of Tribal law, of the Tribe's claims based on the Co-op's alleged violations of Section 219 of the utility tax code.

¶50 We must, of course, agree with the Co-op that the question of whether Section 219 of the Tribal utility tax code exceeds the limits of the Tribe's civil jurisdiction is ultimately a question of federal law, including the controlling decisional law of the federal courts. *See Strate v. A-1 Contractors*, 117 S.Ct. at 1411, *explaining National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985). Although federal law controls, it is the Tribal Court that ordinarily has "'a full opportunity to determine its own jurisdiction.'" *Id., quoting National Farmers,* 471 U.S. at 857. The Supreme Court has described the Tribal courts' broad jurisdictional inquiry as follows:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Strate, 117. S.Ct. at 1411, *quoting National Farmers*, 471 U.S. at 855-56.

¶51 *Strate* also explained that the Court's opinions in *National Farmers* and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987), "enunciate only an exhaustion requirement . . . based on comity[.]" *Strate*, 117. S.Ct. at 1431. Thus, the Court's often-quoted declaration in *Iowa Mutual*, 480 U.S. at 18, that "civil jurisdiction over such activities [of non-Indians on reservation lands] presumptively lies in the tribal courts," is limited in its application only to circumstances "where tribes possess authority to regulate the activities of nonmembers[.]" *Strate* at 1413. *Strate* went on to specifically hold that, as to non-Tribal members such as the Co-op in the present case, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 1413.

¶52 In this case, the Tribal Court based its jurisdiction solely on Tribal law.[2] Because a defect in subject matter jurisdiction may be raised at any time and may not be waived by the parties, it was error for the Tribal Court not to analyze its jurisdiction under federal law in a case involving claims against a non-Tribal member, even if the parties did not raise the issue.

¶53 This court must therefore decide all federal-law issues concerning subject matter jurisdiction *de novo*. We requested the parties to brief the jurisdictional questions raised by *Strate*, and allowed them the opportunity to supplement the record with public documents relevant to the jurisdictional inquiry.

¶54 Following the teaching in *Strate*, the question of whether the Tribal Court had jurisdiction to adjudicate the Co-op's alleged violation of Section 219 is the same as the analysis for whether the Tribal Council had legislative authority to enact Section 219 regulating the manner in which the Co-op may pass the Tribal utility tax through to members residing on Tribal lands.[3] Combining these analyses is appropriate in this case, in which the Tribal courts have been called upon to enforce the pass-through regulation in Section 219.

A. Treaties and Federal Statutes.

¶55 We begin our analysis by examining relevant federal treaties and statutes. On the one hand, a provision in a treaty or statute authorizing the Tribe to regulate the non-member conduct is controlling, and eliminates the necessity for analyzing the *Montana* rule and its exceptions. *Strate*, 117 S.Ct. at 1409. On the other hand, a treaty or federal statute

might preempt the field, or otherwise divest the Tribe of any inherent sovereign power to regulate the nonmember conduct in question. *See Baker Electric Cooperative, Inc., v. Chaske*, 28 F.3d 1466, 1476-77 (8th Cir. 1994). Following the Supreme Court's decision in *National Farmers*, this court conducted an extensive review of the treaties and federal statutes of general applicability to the Crow Tribe in *Sage v. Lodge Grass School District*, Civil No. 82-287 (Crow Ct. App. July 30, 1986) [1986 Crow App. 1]. The *Sage* court concluded that the fee land owned by the school district where the accident occurred was located "within the exterior boundaries of the Crow Indian Reservation." *Id.* at 11. The *Sage* court found "no special jurisdictional statutes or case decisions which would restrict the jurisdiction of this tribal court to a greater extent than general principles of federal Indian law which are applicable to Indian tribes in general." *Id.* at 13 (emphasis in original). Finding no special limitations on Crow Tribal Court jurisdiction, the court in *Sage* applied the *Montana* exceptions to the facts of that case in holding that the Crow Tribal Court had jurisdiction to adjudicate the Tribal member's tort claim against the school district which arose on non-Indian fee land within the Reservation.

¶56 In the present case, the Tribe has not pointed to any controlling provisions of treaties or federal statutes that expressly recognize or delegate Tribal authority to regulate rural electric cooperatives' activities on the reservation. However, the Co-op argues that the Rural Electrification Act, 7 U.S.C. 901, *et seq.*, and the Department of Energy Reorganization Act of 1977, 42 U.S.C. § 7101 *et seq.*, are clear expressions of Congressional intent that rural electric cooperatives are "subject to exclusive state regulation only, notwithstanding their operation within Indian reservation boundaries." Co-op's Supp. Brief at 2.

¶57 We do not find any indication in the materials relied on by the Co-op that Congress has ever considered the question of Tribal jurisdiction to regulate rural electric cooperatives on Indian reservations. Certainly, Congress has not acted to expressly divest the Tribe of any inherent sovereign power to do so. Nor do we read the federal statutes cited by the Co-op as impliedly divesting the Tribe of such power by recognizing an exclusive state power to regulate the cooperatives.

¶58 The purpose of the Rural Electrification Act of 1936 was to provide federal financing for "the furnishing of electric energy to persons in rural areas[.]" 7 U.S.C. § 902. The only reference to states in the REA legislation cited to this court is the provision in 7 U.S.C. § 904, that "no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained." This provision does not appear to affirmatively grant jurisdiction to states, but merely recognizes that some form of state authority may exist with regard to siting and construction of new generating capacity. It is not apparent from the record whether Big Horn County Electric Cooperative has ever financed or operated a generating plant so as to bring it within the scope of the provision.

¶59 Similarly, Public Law 95-91, which created the Department of Energy and the Federal Energy Regulatory Commission (FERC) in response to the energy crises of the 1970's, merely states that "[n]othing in this Act shall affect the authority of any State over matters exclusively within its jurisdiction[.]" 42 U.S.C. § 7113. Congress also declared that one purpose of that act was to "provide for the cooperation of Federal, State, and local governments in the development and implementation of national energy policies and programs[.]" 42 U.S.C. § 7112 (11). This type of statutory language is far from an express grant or recognition of exclusive State authority over rural electric cooperatives.

¶60 In fact, the "proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom." *Arkansas Electric Power Cooperative, Inc., v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983). In *Arkansas Electric*, the cooperative argued that the Federal Power Act and the Rural Electrification Act *preempted state regulation* of wholesale power rates charged to other in-state member cooperatives. With regard to the latter act, the cooperative, along with the United States as amicus, argued that state regulation may frustrate important federal interests because of the possibility that state-imposed rate limitations could threaten the security of REA loans. *Id.* at 385-86.

¶61 The Supreme Court disagreed, first affirming the Federal Power Commission's own determination that "the relevant statutes gave the REA exclusive authority among federal agencies to regulate rural power cooperatives." *Id.* at 384 (citation omitted). With regard to the REA, the Court observed that "the REA is a lending agency rather than a classic public utility regulatory body in the mold of either FERC or the Arkansas PSC," *id.*. at 386, and noted that the requirement for REA approval of rate increases had not always been strictly enforced. *Id.* at 387 n.12.[4] The Court also found the following statement in REA Bulletin 111-4 (1972) to be significant:

> Borrowers must, of course, submit proposed rate changes to *any regulatory commissions having jurisdiction* and must seek approval in the manner prescribed by those commissions.

Id. at 387-88 (emphasis added). Taking the "commissions" referred to in the bulletin to be state regulatory agencies, the Court found the REA's own position in the bulletin to be inconsistent with the claim of federal preemption based on the Rural Electrification Act. *Id.* at 388.

¶62 Although the Court in *Arkansas Electric* held that federal law did not preempt state PSC jurisdiction, it

specifically rejected the opposite argument made by the Co-op in the present case, that the Rural Electrification Act affirmatively authorized state rate regulation of rural electric cooperatives. *Arkansas Electric,* 461 U.S. at 389 n.15. Instead, the Court concluded that "it seems most likely that Congress and the REA intended no more than to leave in place state regulation otherwise consistent with the requirements of the Commerce Clause." *Id.* The Court recognized that the REA could probably change its policy to disallow state rate regulation, and that a state PSC "can make no regulation affecting rural power cooperatives which conflicts with particular regulations promulgated by the REA." *Id.* at 389. The Court further recognized the possibility that a particular rate limitation which seriously compromised a cooperative's ability to repay its REA loans would be implicitly preempted by the Rural Electrification Act. *Id.* In the case before it, however, the Court declined to "assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all." *Id.* at 389.

¶63 Unlike this case, *Arkansas Electric* involved a cooperative's wholesale power sales to other member cooperatives, rather than retail sales to the ultimate consumers. However, *Arkansas Electric*'s other principal holding overruled a previous line of cases that had established a "bright line" distinction between wholesale and retail electric power sales, with the former previously being subject only to federal regulation and the latter being subject to exclusive state regulation as beyond the reach of federal power under the Commerce Clause. *Arkansas Electric,* 341 U.S. 390-93, *overruling Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.* , 273 U.S. 83 (1927). Instead, the Court adopted a more modern balancing test between "legitimate local public interests" and the burden imposed on interstate commerce. *Arkansas Electric,* 461 U.S. at 393-94. Although this holding made it possible to affirm state regulatory jurisdiction of wholesale rates in that case, "the reasoning of the case equally implies that state regulation of *retail* sales is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence[.]" *General Motors v. Tracy*, 117 S.Ct. 811, 820 n.8 (1997) (emphasis added) (explaining *Arkansas Electric).* And, again, the Court recognized that a particular rate structure required by the state PSC might be so unreasonable as to offend the Commerce Clause, but would not allow such a hypothetical possibility to thwart the state's "mere assertion of regulatory jurisdiction."

¶64 From the foregoing discussion, several general principles emerge that are relevant to this case: (1) the REA is the sole federal agency with regulatory authority over the Co-op, and the Rural Electrification Act is the controlling federal statutory law applicable to this case; (2) the Act makes no reference to Indian Tribes, and there is no evidence that Congress has ever considered the potential interplay among federal, state and Tribal jurisdiction; (3) the Act does not completely preempt state, local or Tribal regulation of rural electric cooperatives; (4) the Act does not affirmatively authorize state regulation of cooperatives, but merely leaves state regulation "in place" to the extent it does not interfere with REA policy, regulations and the cooperative's ability to repay its REA loans; and (5) after *Arkansas Electric*, states' regulation of retail electric power rates is not an exclusive province of state regulation, but is instead subject to the general analysis balancing "local interests" against the federal interest in controlling interstate commerce.

¶65 From these general points, we conclude that the Crow Tribe's assertion of jurisdiction in this case to regulate how the Co-op passes through the Tribal utility tax does not conflict with any provision of the controlling federal statute, the Rural Electrification Act. The federal policy of allowing state regulatory schemes to remain in place does not perforce displace Tribal regulation, particularly in this case where Montana has no regulatory scheme "in place" that applies generally to the Co-op or specifically to the pass-through at issue in this case. Indeed, the Tribal Court's enforcement of Section 219 is consistent with longstanding REA policy expressed in Bulletin 111-4, requiring cooperatives to obtain approval for proposed rate changes from "any regulatory commissions having jurisdiction."[5] Tribal regulation is also consistent with the other long-standing federal policy of supporting Tribal self-government and self-determination. *National Farmers*, 471 U.S. at 856.

¶66 Tribal regulatory authority is, of course, limited by the same practical constraints as state regulation, so that a particular Tribal regulatory action could conceivably so seriously jeopardize the Co-op's ability to repay its REA loans that it would be preempted by the Act. However, it is not necessary or appropriate to "assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all." *Arkansas Electric*, 461 U.S. at 389.

¶67 Thus, our review of treaties and federal statutes does not reveal any particular provision that either grants or recognizes the Tribe's power to regulate the Co-op's pass-through of the Crow utility tax, or divests the Tribe of any inherent sovereign authority it would otherwise have to do so. Our conclusion is not inconsistent with the other cases cited by the parties in which the federal courts have considered questions involving Tribal regulation of reservation utilities. *See Arizona Public Service Co. v. ASPAAS,* 77 F.3d 1128, 1134 (9th Cir. 1996) (any inherent sovereign power to regulate was waived in contract by Navajo Nation); *Baker Electric Cooperative, Inc., v. Chaske,* 28 F.3d 1466, 1476-77 (8th Cir. 1994), *on remand sub nom Devils Lake Sioux Tribe v. North Dakota Public Service Comm'n,* 896 F. Supp. 955, 960 (D.N.D. 1995) (Tribal authority to regulate cannot be predicated upon a treaty or later congressional acts).

¶68 Having concluded that no substantive federal law controls in this case, we turn to the no-less-intricate task of determining whether the Tribe retains inherent sovereign power to regulate the Co-op under the "general principles of federal Indian law which are applicable to Indian tribes in general."

B. Retained Inherent Sovereignty.

¶69 The first step in analyzing the Crow Tribe's inherent sovereign authority in this case concerns whether the Co-op's activities being regulated (and adjudicated) take place on land owned by the Tribe or its members, or on alienated, non-Indian fee lands or the equivalent. The *Strate* Court affirmed that it "'can readily agree' . . . that tribes retain considerable control over non-member conduct on tribal land." *Strate*, 117 S.Ct. at 1413, *quoting Montana*, 450 U.S. at 557. On the other hand, "subject to . . . the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'" *Strate*, 117 S.Ct. at 1413, *quoting Montana*, 450 U.S. at 565.

¶70 At the time this action was commenced, the Crow utility tax code provided: "Any attempt to charge Crow Tribal Members or any other consumers *on tribal lands or trust lands* a higher charge or fee because of this tax shall be considered discrimination and shall be null and void." Crow Tribal Tax Code, Title XIII, Chapter 2, Section 219 (emphasis added). Section 202(F) in turn defined "Tribal Lands" as all Reservation land held in trust or in fee by the Crow Tribe or any of its members, including rights-of-way or easements over such land, "unless the entire fee estate of the land was granted at the time of the grant of the right-of-way or easement[.]"

¶71 The Tribe argues that controlling the Co-op's pass-through is coincident with its taxing authority over lands held in trust or owned in fee by Tribal members, including rights-of-way over those lands, relying on *Burlington Northern Railroad Co. v. Blackfeet Tribe,* 924 F.2d 899 (9th Cir. 1991). The Co-op, while conceding the Tribe's power to tax its facilities on those rights-of-way, argues that the Tribe does not have the power to regulate its activities on those rights-of-way. According to the Co-op, the grants of those "Right-of-Way Easements" pursuant to 25 U.S.C. § 323, 62 Stat. 17 (1948), "for rural electric distribution line purposes without limitation," make them the "equivalent, for nonmember governance purposes, to alienated, non-Indian land" under the analysis in *Strate*, 117 S.Ct. at 1413.

¶72 The court does not agree with either of the parties' characterizations of the location of activities being regulated. Indeed, this case illustrates the practical difficulties involved in drawing a meaningful distinction in all cases between whether a non-member's Reservation commercial activities occur on Tribal lands or non-Indian fee lands.

¶73 On the one hand, strictly construing the utility tax code as it existed in 1994, the activity being expressly regulated by the Tribe, *i.e.,* the pass-through of the tax to customers on trust or Tribal lands, does not occur on the easements themselves, but on the portion of the trust land where the customer resides.[6] Therefore, the *Strate* Court's analysis of whether the Co-op's easements have become the equivalent of non-Indian fee land is not relevant. Under this characterization of the location of the activity being regulated, which we believe is quite plausible under the utility tax code's original language, the Tribe would retain "considerable control" over the activities of the nonmember Co-op on Tribal lands, and the *Montana* test would not be implicated.

¶74 On the other hand, forbidding the charging of a higher rate for customers on Tribal land could be said to indirectly control the amount that the Co-op must pass through to all other Reservation customers in order to recover the cost of the tax. (This is the converse of the situation in *Attelboro, supra*, 273 U.S. 83 (1927), in which Rhode Island argued that only local interests were involved in its regulation of Attelboro's wholesale rates charged to a Massachusetts utility, because the regulation was necessary to protect Attelboro's Rhode Island customers from unfair burdens.) Viewed in this way, Section 219 would amount to an assertion of regulatory jurisdiction over the Co-op's activities on *all* Reservation lands. Thus, the Tribe's ability to regulate on trust lands, clearly recognized in principle, would be moot as a practical matter if the Tribe did not also have the power to regulate on non-Indian fee lands within the Reservation.

¶75 Subsequent amendments to the Tribal utility tax code raise further questions about the location of the activity being regulated. In its current version, the utility tax code defines "Tribal Lands" as all lands located within the exterior boundaries of the Reservation, "notwithstanding the issuance of any patent, and including rights-of-way through the Reservation." Although this expanded definition was undoubtedly intended to apply to the location of the facilities being taxed, it is not entirely clear that the Tribal Council also intended to expand the definition of "tribal or trust lands" in Section 219 on which pass-throughs are regulated. Nevertheless, in light of this amended definition and the discussion above, we believe that it is prudent and appropriate to apply the *Montana* analysis in order to determine if the Tribe and the Tribal Court had subject matter jurisdiction in this case.

¶76 The case of *Montana v. United States,* 450 U.S. 544 (1981), continues to have a profound effect on the ability of the Crow Tribe to govern its own Reservation. The first part of the opinion, holding that the State of Montana acquired the bed and banks of the Bighorn River upon its admission to the Union, *Montana*, 450 U.S. at 556-57, is not directly relevant to our inquiry. The second part of the opinion, striking down the Crow Tribe's right to regulate hunting and fishing on non-Indian fee lands within the Reservation, set forth the general rule and exception which have made it the "pathmarking case concerning tribal civil authority over nonmembers. " *Strate*, 117 S.Ct. at 1409. The pertinent language from the *Montana* opinion is quoted in full below:

> Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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 dealing, 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.

Montana, 450 U.S. 565-66 (footnotes and citations omitted). Thus, unless (1) the Co-op has entered into consensual relationships with the Tribe or its members, or (2) its conduct threatens the Tribe's political integrity, economic security, or health or welfare, we will be compelled to hold that the Tribe lacks jurisdiction to regulate the Co-op's pass-through of the Crow utility tax.

¶77 1. Consensual Relationships. The Tribe points to three types of transactions which it argues constitute "consensual relationships" between the Co-op and the Tribe and its members: (a) the 30 or so right-of-way agreements between the Co-op and the Tribe or its members for transmission and distribution lines, including a 1956 right-of-way across several Tribal members' lands for a 69 kilovolt transmission line (*see* Tribe's Supp. Mem. Tabs 1 and 2; Co-op's clarifying Affidavit); (b) easements across Tribal and individual trust lands to serve Tribal members' homes (Tribe's Supp. Mem. Tab 4; Co-op's Supp. Brief App. 4); and (c) membership agreements between the Co-op and the Tribe and its members (*see* Tribe's Supp. Mem. Tab 5 (Little Big Horn Casino)).

¶78 In response, the Co-op argues that as the exclusive provider of electric utility service within its territory on the Reservation, it is required by the non-discrimination provisions of federal law to serve all who request it, whether or not they are Tribal members. Consequently, it also has no choice but to acquire the rights-of-way necessary to serve customers who request it. Therefore, according to the Co-op, its relations with the Tribe and its members "lack implicit consent, do not contain the normal voluntary and commercial aspects of consensual contractual or business relationships." Appellants' Brief at 16.

¶79 We can find little difference between business of the Co-op, having voluntarily decided to establish itself to distribute and sell electricity on the Reservation, from that of a nonmember who decides to set up a mercantile business on the reservation. *See, e.g., Williams v. Lee,* 358 U.S. 217 (1959) (exclusive Tribal court jurisdiction of non-Indian's suit to collect from Tribal members for goods sold by general store on Navajo Reservation, cited as first example of consensual relationship in *Montana*, 450 U.S. at 565). Neither can deny service as a matter of federal law just because a customer is a Crow Indian. And similar to the merchant, the Co-op's trustees have exercised substantial discretion on the terms of the Co-op's consent to serve Reservation residents by setting the price of the service, setting the fee and terms of the membership agreements, determining the routing of transmission lines across trust lands, and establishing policies on discontinuation of service and reconnections. Moreover, apart from selling power to the Tribe and its members each and every day, the Co-op has employed Tribal members on the Reservation, and undoubtedly has engaged in other sundry commercial transactions with the Tribe or its members by virtue of its Lodge Grass office and its line crews working throughout the Reservation.

¶80 The Co-op has exercised a substantial degree discretion in its transactions with Tribal member households, as well as with the Tribe itself. Contrary to the Co-op's argument, it would appear that the Co-op has had the greater control over the terms of its commercial contractual relationships with the Tribe and its members than have the latter. We therefore reach the unremarkable conclusion that the utility company that has served most of the Crow Reservation for more than 50 years has qualifying "consensual relationships with the tribe or its members" under the first *Montana* exception.

¶81 This case is clearly distinguishable from the highway accident in *Strate.* In *Strate*, the plaintiff was a non-Indian widow of a Tribal member, and was injured in an accident on a state highway by a non-Indian employee of a non-Indian company that was doing work for a Tribal corporation. *Strate*, 117 S. Ct. at 1405. In applying the first *Montana* exception, the Court found it to be dispositive that the plaintiff was not a party to A-1's subcontract with the Tribes, and "'the [T]ribes were strangers to the accident.'" *Strate*, 117 S.Ct. at 1415, *quoting* the Eighth Circuit's opinion, 76 F.3d at 940.

¶82 In this case, however, both the Tribe who seeks to regulate the Co-op's pass-through, and all the Tribal members served by the Co-op (who are parties plaintiff in this litigation as a result of the Tribe's representational standing) are also parties to membership agreements and most of the other commercial arrangements with the Co-op. In turn, the subject matter of those agreements and arrangements is the same as the activity being regulated and adjudicated. Thus, in the present case there is complete identity between the parties to the consensual relationships and the parties to the regulation and adjudication. Under this rationale, the easement agreements themselves are probably sufficient to form a consensual relationship. Burlington Northern Railroad Company v. Blackfeet Tribe, 924 F.2d 899, 904 n.7 (1991) (Tribes' consent to right of way and railroad's voluntarily applying for rights of way).

¶83 The district court's holdings in *Devil's Lake Sioux Indian Tribe v. North Dakota Public Service Commission,* 896 F.Supp. 955 (D.N.D. 1995), cited by the Co-op, do not conflict with our conclusion upholding the Tribe's regulatory jurisdiction in this case. *Devil's Lake Sioux* involved two local rural electric cooperatives' challenges to the Tribe's contract with an investor-owned utility to provide power to certain Tribal facilities, and a subsequent Tribal code asserting exclusive regulatory control over all electric service within the reservation. *See Baker Electric Cooperative, Inc.*

v. Chaske, 28 F.3d 1466, 1468-70 (8th Cir. 1994).

¶84 On remand, the district court disposed of what it regarded as the essential issue in the case by holding that the Tribe's inherent sovereignty gave it the power to contract with whomever it wanted to supply power to the Tribal industries, and that the state PSC lacked authority to approve rates or otherwise regulate the provision of power to Tribal businesses on Tribal or trust lands. *Devils Lake Sioux*, 896 F. Supp. at 957, 961. Complying with the appeals court's directives on remand, the district court went on to hold that the Tribe lacked inherent sovereign authority under the *Montana* test to exclusively regulate all electric utility service on the reservation. *Id.* at 961-62. However, as discussed above, the present case does involve the Tribe's assertion of an exclusive, comprehensive regulatory scheme that would oust the state's historic regulatory activities. Rather, the Crow Tribe in this case has asserted the power only to regulate how its tax is passed through. This Tribal regulation does not conflict with any state rules because electric cooperatives have always been exempt from regulation by the Montana PSC.[7]

¶85 The present case is also different than *Arizona Public Service Co. v. ASPAAS*, 77 F.3d 1128 (9th Cir., 1995), in which the Navajo Nation sought to regulate hiring practices at the Four Corners Power Plant by invalidating the plant's anti-nepotism policy. The court in that case assumed for purposes of argument that the Tribe had inherent sovereign authority to regulate, but held that the Tribe had expressly waived its authority in the lease for the powerplant. *Id.* at 1134-35. No such waiver is alleged in the present case.

¶86 This court holds that the first *Montana* exception based on consensual relationships between the Co-op and the Tribe or its members applies in this case, and the Tribe has inherent sovereign authority to regulate the manner in which the Co-op passes through the Crow utility tax to consumers located on the Crow Reservation.

¶87 2. Political Integrity, Economic Security, and Health and Welfare of the Tribe. Having sustained Tribal jurisdiction based on the consensual relationships between the Co-op and the Tribe and its members, we do not reach the second *Montana* exception. In addition, the record in this case is not sufficiently developed to properly analyze the second *Montana* exception. In principle, however, such an analysis would appear to reinforce our holding in favor of Tribal jurisdiction.

¶88 The regulation at issue was enacted directly in response to statements by defendant Gregori that the Co-op would pass through the Crow utility tax only to those customers receiving service on the Tribal or trust lands (Tr. 54-55). This type of pass-through could have resulted in some Tribal members bearing essentially the entire burden of the Tribal tax, in effect converting the ad valorem tax into a sales tax on Tribal members' electricity purchases. This direct taxation of Tribal members was obviously not the Tribe's intent when it was considering enacting a property tax on railroad and utility companies doing business on the Reservation.

¶89 The Supreme Court has forcefully described the nature and importance of the Tribal taxation powers as follows:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). Section 219 of the utility tax code responded to a threatened interference with the Tribe's exercise of an "essential attribute" of sovereignty by ensuring that revenues for governmental purposes would be raised in such a way that the burden of the tax would be spread across all the enterprise's economic activities on the Reservation. The conduct being regulated would thus appear to constitute the type of serious, direct peril to the political integrity and economic security of the Tribe as a whole so as to fall within the second *Montana* exception.

¶90 It also seems apparent that the provision of electric utility service to the great majority of Crow Tribal members living on the Reservation "has some direct effect on the . . . health or welfare of the Tribe" and its members, *Montana*, 450 U.S. at 566, and for that reason alone is subject to regulation by the Tribe. However, concerned that this part of the exception might swallow the rule, the Court in *Strate* apparently limited its application in a manner that we frankly don't understand.

¶91 The *Strate* court held that even though careless drivers on public highways running through a reservation jeopardize the safety of tribal members, the second *Montana* exception did not apply in that case because Tribal jurisdiction over the highway accident was not necessary to preserve "'the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 117 S.Ct. at 1416, *quoting Williams v. Lee,* 358 U.S. at 220. Applying *Strate*, the Ninth Circuit in another highway accident case observed that "[i]f the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot." *Wilson v. Marchington,* 127 F.3d 805, 815 (9th Cir. 1997) (noting that a dispute involving a county tax on only one

particular property owned by a Tribal member was also insufficient to invoke the second *Montana* exception in *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996)).

¶92 It seems to the members of this court that being able to regulate serious health hazards to Tribal members on the Reservation, regardless of the sources of the hazards, is an essential aspect of the Crow Indians' inherent sovereign right to "make their own laws and be ruled by them." The same is true of economic interests that have pervasive effects on the general welfare of Reservation residents. In any event, the extent to which the provision of essential and otherwise-unregulated utility services affects the health and welfare of the majority of Reservation Tribal members, day in and day out, would appear to be distinguishable from the Tribal self-government interests at stake in adjudicating state highway accidents which may or may not involve Tribal members.

¶93 We also note that the *Montana* opinion cited *Williams v. Lee* under the second exception, as well as the first. *See Strate*, 117 S. Ct. at 1415. Consistent with our discussion above on the consensual relationships exception, we see little difference in importance between the Tribal interests at stake in having the exclusive authority to adjudicate the collection of monies due a merchant from a Tribal member, as was upheld in *Williams v. Lee* and reaffirmed in *Montana*, and the Tribal interests at stake in regulating the billing practices of the exclusive provider of utility services for most of the Reservation.

¶94 The record in this case does not support any further analysis of the second *Montana* exception. This court rests its holding sustaining Tribal jurisdiction on the consensual relationships exception, based on our assumption that the regulation at issue extends to non-Indian fee lands on the Reservation.

IV. The Merits

A. Standard of Review.

¶95 The Tribal Court granted summary judgment in favor of the Tribe on the merits of the Tribe's claims that the Co-op violated Section 219 of the Tribal utility tax code when it began passing through the tax in April, 1994 (Order at 4).

¶96 The Tribal Code has adopted Ruled 56 of the Federal Rules of Civil Procedure, as amended, as the law of summary judgment applicable in the Tribal Court. *See* Rule 19(a) of the Crow Rules of Civil Procedure. In order to grant summary judgment under the federal rule, the Tribal Court must find that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, consistent with federal procedural law, the Tribal Court may not weigh evidence or resolve factual disputes, and must view all the evidence in the light most favorable to the non-moving party, which in this case was the Co-op. *See MAI Systems Corp v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993); *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2435 (1991).

¶97 With respect to the standard of review on appeal, there is some authority for applying a "clearly erroneous" test to the lower court's findings of fact when, as in this case, they are entered after a full evidentiary hearing in a nonjury case. *See, e.g., Kreisner v. City of San Diego*, 988 F.2d 883, 887 n.3 (9th Cir. 1993). However, following the more conservative path, this court will review the Tribal Court's grant of summary judgment in this case de novo, including its findings of fact. *See Morrison v. Char,* 797 F.2d 752, 755 (9th Cir. 1986); *Hoeck v. City of Portland,* 57 F.3d 781, 784 (9th Cir. 1995). In other words, viewing the evidence in the light most favorable to the Co-op, this court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.; see also, United States v. Williams*, 994 F.2d 646, 648 (9th Cir. 1993). This court may affirm the Tribal Court on any ground supported by the evidence. *Id.*

B. Crow Public Utilities Commission.

¶98 The Tribal Court made several findings related to the Crow Public Utilities Commission. The court found that the Tribal PUC was established in January, 1994, that it regulated all utilities on the Reservation, that the Co-op should have sought permission for any pass-through of the tax from the Tribal PUC, and that its failure to do so was discriminatory. Findings of Fact Nos. 11, 12, and 13 (Order at 6). Based on these findings, the Tribal Court permanently enjoined the Co-op from passing through the tax "without first complying with the Tax Code which includes obtaining the permission of the Tribal Public Service Commission."

¶99 Except for the Tribe's proposed findings of fact and a brief discussion during oral argument in December, 1994 (*see* Oral Argument Transcript at 27-30), the record below does not contain any evidence to support the Tribal Court's findings with regard to the Tribal PUC. No Tribal Council ordinance or code establishing the Tribal PUC was provided to the Tribal Court on the record, or has been provided to this court on appeal.

¶100 The only other reference to the Tribal PUC properly before this court is in the current, amended version of Section 219(B) of the utility tax code, of which we have taken judicial notice, and which provides as follows: "Before any utility company attempts to pass through any of its operating costs to the Crow Tribal Members or any other consumers within

the exterior boundaries of the Crow Reservation or within the ceded strip, the utility must apply first to the Crow Utilities Commission for approval to do so." On its face, this provision would tend to support the Tribal Court's findings and order.

¶101 However, at oral argument, counsel for the Tribe conceded that this court need not affirm the Tribal Court's findings regarding the Tribal PUC because the Commission is apparently not yet prepared to process rate applications. In the absence of a fully functioning Tribal Public Utilities Commission, the Co-op and other Reservation utilities would be effectively deprived of the right to seek any rate relief from Reservation consumers to cover the cost of the Tribal tax.

¶102 This court is therefore compelled to vacate the Tribal Court's findings related to the Tribal Public Utilities Commission, as well as the requirement in the Tribal Court's injunction that the Co-op seek permission from the Tribal PUC before passing through any of the Tribal utility tax. Until the Co-op has received formal notice that a duly constituted Tribal utilities commission is prepared to process rate applications in a timely manner, along with the procedures for filing and processing such applications, it cannot be required to submit proposed rate changes to the Tribe for approval.[8]

¶103 In the meantime, the administration of Section 219 falls to the Tribal courts through the adjudicatory process. The provision granting Tribal Court jurisdiction of attempted discriminatory cost pass-throughs has remained unchanged from the version in effect at the time this action was commenced. *See* Utility Tax Code Section 219(C) (formerly 219(B)). We therefore turn to the final task of interpreting Section 219(A), as it applies to the undisputed facts in this case.

C. Violations of Section 219.

¶104 The Tribal Court held that the Co-op's pass-through of the Tribal utility tax violated Section 219 of the Tribal utility tax code in three ways. First, the Tribal Court found that the Co-op did not treat the Tribal tax as an "embedded cost" as required by Section 219. Finding Nos. 4, 7 and 8 (Order at 5-6). Second, the Tribal Court found that the dollar-for-dollar pass-through of the Crow utility tax was not based upon a "revenue requirement" as specified in Section 219 that was necessary for the Co-op to maintain its financial viability. Finding Nos. 4, 14 and 15 (Order at 5-6). Third, the Tribal Court found that the Co-op treated the Crow utility tax in a clearly discriminatory manner compared to the way it treated other costs, including wholesale power cost increases and property taxes that it paid to the state. Finding Nos. 4, 9, and 16 (Order at 5, 7). We will review each of these grounds for the violations of Section 219 in turn.

¶105 In finding that the Co-op failed to treat the tax as an "embedded cost," the Tribal Court gave great weight to the testimony of Tribal Tax Commissioner Denis Adams (Order at 5). Commissioner Adams has significant experience with REA accounting procedures, having audited several rural electric cooperatives as a CPA for a national accounting firm (Tr. 37-40).

¶106 However, two of the Co-op's witnesses who had many years' experience managing rural electric cooperative finances testified that the Co-op in this case *did* treat the Crow utility tax as an embedded cost when it began passing through the tax in April, 1994. *See* Tr. at 72, 88, 102 (Gregori); 109-110, 115 (Holzer). The Tribal Court also noted that the Edison Electric Institute's definition of "embedded cost," on which both sides relied, could be interpreted to support either side's argument (Order at 5).[9]

¶107 We certainly agree with this last observation by the Tribal Court. As the Tribe argues, it appears that the concept of "embedded cost" relates to a utility's "historic average cost" which, in a rate-setting context, would be compared to total revenues to determine what overall increase, if any, must be allowed in order to maintain reasonable margins. On the other hand, the EEI definition specifically discusses adjusting the utility's embedded cost based on a new item that would "increase [the utility's] costs by a known amount" compared to the prior period. This adjustment example in the EEI definition lends support to the Co-op's contention that a dollar-for-dollar pass-through of the Tribal utility tax was not inconsistent with treating the tax as an "embedded cost."

¶108 Therefore, on this record, we cannot say that the Co-op did not treat the Crow utility tax according to a reasonable understanding of the industry's definition of "embedded cost" at the time the Co-op made its decisions on passing through the Tribal utility tax. Regardless of the true meaning of "embedded cost," summary judgment was not appropriate in light of the conflicting testimony by qualified expert witnesses on both sides. In ruling on a motion for summary judgment, the Tribal Court may not weigh evidence and resolve factual disputes in favor of the moving party A genuine issue of material fact existed with respect to whether or not the Co-op handled the pass-through as an embedded cost, thereby precluding summary judgment based solely on that ground.

¶109 However, even viewing all the evidence in the light most favorable to the Co-op, the record supports the Tribal Court's other findings with respect to the Co-op's violation of Section 219.

¶110 The Tribal Court was correct in finding that the Co-op's need for increasing its overall revenue based on its declining TIER was not supported by passing through "exactly the same amount as the tribal tax payment of 1994." Order at 6 (emphasis in original). Mr. Gregori's rolling 12-month summary of conditions and ratios showed that as of the

end of April, 1994, the Co-op had earned $35,833 in excess of the margin it needed to maintain a "times income earned ratio" or "TIER" of 1.6 during that period. *See* Co-op's Hearing Exh. 3; Tr. 133. The 1.6 TIER was established by policy of the Co-op's board (Tr. 131). The REA requires cooperatives to maintain a TIER of at least 1.5 (Tr. 59, 138).

¶111 Mr. Gregori's records also showed that the Co-op's margin had fallen by more than $62,000 between December 1993 and April 1994, of which $27,000 was attributable to the costs of refurbishing a substation transformer at Crow Agency (Tr. 131-32). Another part of the reduction in the Co-op's TIER resulted from the Board's decision to absorb some of the wholesale power increase which began in September, 1993, by deferring the rate increase and instead decreasing the Co-op's margins (Tr. 132). In addition, weather was an uncontrollable factor that could reduce the Co-op's TIER (Tr. 131). Considering all these diverse factors affecting the Co-op's financial ratios during the Spring of 1994, the Co-op's "revenue requirement system wide" as used in Section 219 cannot be said to have justified a rate increase of exactly the same amount as the Crow utility tax.

¶112 The foregoing examples also illustrate that the Crow utility tax was treated differently than the Co-op had ever treated any other cost increase, which was the remaining ground for the Tribal Court's holding that the pass-through violated Section 219. Mr. Young, the Co-op's chairman and 20-year board member, testified that in all his time on the board he was not aware of a rate increase based solely on a state or county tax, or on any single cost item (Tr. 52). The Co-op did not directly pass through the increase in its 1993 Montana and Big Horn County property taxes (Tr. 95-96). Even the Co-op's wholesale power cost increase was not passed through directly to the Co-op's customers on a dollar-for-dollar basis (Tr. 132).

¶113 The record reflects that the Co-op treated rate increases for other costs and property taxes in the same manner as Yellowstone Valley Electric Cooperative.[10] According to its general manager, Yellowstone had also experienced a wholesale power cost increase which it would be including in a rate increase on a deferred basis later in 1994 (Tr. 108). Yellowstone considered its state and local property taxes part of its embedded costs or operating expense, and like Big Horn, recovered its costs for these other property taxes by considering them as part of its overall operating expenses on an annual basis (Tr. 112-113; *compare* Tr. 53). Mr. Holzer testified that he considered the Crow property tax to be the same as the property taxes collected by the State of Montana and disbursed to the counties (Tr. 113).

¶114 Unlike Big Horn, though, Yellowstone did not plan to treat the Crow utility tax differently than its other property taxes and operating expenses. Yellowstone would not be considering an increase based solely upon the Crow tax (Tr. 112). Rather, Mr. Holzer testified that Yellowstone would be blending the Crow tax with its other property taxes and passing it on to its customers just as any other operating expense (Tr. 108-109). After adding the Crow tax into its other operating expenses, including the wholesale power increase, Yellowstone would be considering a single rate increase later in 1994 based on its overall revenue requirements to maintain a sufficient TIER (Tr. 108, 112, 114). This was the type of non-discriminatory approach required by Section 219 of the utility tax code.

¶115 Hearing testimony also revealed other ways in which Big Horn's contrary approach of separately passing through the Crow tax resulted in the tax being allocated among its customers differently than any other cost. Because the allocation formula was based solely on kilowatt hours used during 1993 (Tr. 135, 141), it did not take into account the different rates per kilowatt hour paid by different types of customers (Tr. 103, 127). Thus, the tax was not allocated among residential, commercial and irrigation consumers in the same proportion as the Co-op's other charges (or its capital credits, which are based on what the patron pays to the Co-op, not the number of kilowatt hours the person uses, Tr. 127). And although the Co-op decided not accrue any of the Crow tax for 1993, it decided to pass the first half-payment through only to current customers who had received service in 1993 (Tr. 140-142). Thus, customers who were new in 1994 were not subject to the itemized pass-through of the Crow tax beginning in April 1994, and the tax pass-through could not be billed to 1993 customers who no longer received service. In fact, the tax was only billed to customers who were in the same location as of May 1, 1994 that they were in on December 31, 1993 (Tr. 69). There is no logical justification in the record for the Co-op's adoption of this unique and unprecedented method for passing through the Crow utility tax.

¶116 Mr. Gregori likened Big Horn's separate itemization of the Tribal utility tax to its treatment of the Wyoming sales tax (Tr. 70, 74). However, the Tribal utility tax was enacted as a property tax, not a direct sales tax based on the amount of each customer's transactions with the utility. Section 219 clearly did not permit the Co-op to collect the Crow utility tax from its customers as if it were a sales tax.

¶117 No material factual issues prevented the Tribal Court from properly concluding that the Co-op's dollar-for-dollar pass-through of the Tribal utility tax was not based on overall revenue requirements, and was not implemented in the same manner as the Co-op's rate increases for other types of operating expenses, including state and local property taxes. It is on these grounds that we affirm the Tribal Court's judgment that the Co-op's pass-through of the Tribal utility tax in April-May, 1994 violated Section 219 of the Crow utility tax code.

D. Form of Relief

¶118 The Tribal Court declared the Co-op's pass-through in April-May, 1994 to be null and void (Order at 7). It did not require a refund of the initial amounts collected by the Co-op (see Tr. 151), and denied the Tribe's request for an award of

the treble damages penalty under Section 219 (Order at 8). The Tribe has not cross-appealed these last two rulings, so no monetary relief is at issue in this appeal.

¶119 The Tribal Court also granted equitable relief in the form of a permanent injunction, from which the Co-op has appealed. As discussed above, the Tribe has not urged this court to affirm the portion of the Tribal Court's order requiring the Co-op to get permission from the Tribal public service commission before passing through the tax in any way (this is also stated as a requirement in Section 219(B), as amended). Stripped of this requirement, the remainder of the Tribal Court's permanent injunction is nothing more than a general command to obey the law as set forth in Section 219. In view of the Co-op's expressed intent to strictly comply with applicable Tribal law (Tr. 71, 101), this court sees no reason to further maintain the general injunctive relief ordered by the Tribal Court.

¶120 Thus, subject to the formal assertion of jurisdiction by a Tribal regulatory body, the Co-op is free to recover the assessed amounts of the Tribal utility tax from Reservation customers in the same manner as it recovers other operating costs, including the property taxes of other jurisdictions, based on overall revenue needed to maintain a prudent TIER level. As interpreted by Yellowstone Valley Electric Cooperative, that was the simple and straightforward requirement of Section 219 when it was enacted, and it remains so in the current, amended version of Section 219 quoted in Part I above.

¶121 Section 219(A) was amended in 1994 to clarify that the Crow utility tax may not be passed on to customers "in a different manner than ad valorem taxes assessed by the State of Montana or its political subdivisions[.]" When properly viewed as an operating expense rather than a separate sales tax, including the Crow tax along with Montana and Wyoming property taxes in the Co-op's total operating expenses should not offend the Wyoming PSC or amount to an impermissible extension of the Crow Tribe's taxing jurisdiction beyond the Reservation boundaries. After all, in the interest of simplicity and uniformity, the Co-op in the past has been indirectly passing through some of its Montana property taxes to Wyoming customers, some of its Wyoming property taxes to Montana customers, and both these other jurisdictions' taxes to Tribal member customers on the Crow and Northern Cheyenne Reservations.

¶122 This court does not interpret the amended Section 219(A) as requiring the Co-op to continue including the Crow tax in its rate base for customers in other jurisdictions. It only requires that the Crow tax be treated in the same manner as Montana ad valorem taxes. Thus, if the Co-op decides to allocate the cost of the Tribal tax only to customers within the Reservation, it must also allocate Montana property tax costs between Reservation and off-Reservation customers. The particulars of such hypothetical tax allocations are beyond the scope of this case, except to affirm that any resulting disagreements would be subject to adjudication in the Tribal Court.

¶123 As amended in 1994, Section 219(A) also prohibits Reservation utilities from separately identifying the Tribal utility tax on customer bills. This prohibition was not in effect in April 1994 when the Co-op began separately itemizing the Crow utility tax as part of its dollar-for-dollar pass-through methodology,[11] and was not one of the bases for the Tribal Court's judgment which is subject to this appeal. From the discussion above, however, it should be clear that if the Co-op properly combines the Tribal tax with its other operating costs in determining its overall revenue requirements and rates, it will not be possible to accurately state only the amount of the Crow tax that is included in the rate or in any customer's bill. Rather, the only way to accurately portray the contribution of the Crow tax to the customers' rates would be to list all the costs and other items that make up the rates, including excess margins and patronage capital credits (*see* Tr. 133-34). In this latter context, the prohibition in Section 219 may run afoul of the right of free speech guaranteed by the Indian Civil Rights Act, 25 U.S.C. § 1302(1), but this court need not address that hypothetical situation when the Co-op's practice in the past has been to not separately itemize any costs except the Crow utility tax.

Conclusion

¶124 The Tribal Court's order dismissing the Co-op's counterclaim regarding the property subject to the Crow Tribal Railroad and Utility Tax is AFFIRMED. The dismissal is without prejudice, so the Co-op may instead pursue the administrative remedies provided by the Crow Taxation Code, and may then appeal any final administrative decision by filing an action in the Tribal Court. Until that procedure has been followed, the Tribal courts lack subject matter jurisdiction of such claims as a matter of Tribal law.

¶125 The Tribal Court's determination that it had subject matter jurisdiction of the Tribe's claims related to the Co-op's violations of Section 219 of the Crow utility tax code is AFFIRMED. This court further holds that, as a matter of federal law, Section 219 is a lawful exercise of the Tribe's inherent authority to regulate the Co-op's activities on the Crow Reservation, and the Tribal courts have subject matter jurisdiction of the dispute involving Section 219 in this case.

¶126 The Tribal Court's judgment that the Co-op's dollar-for-dollar pass-through of the Tribal utility tax in 1994 violated Section 219 is AFFIRMED on the grounds described in this opinion. Based on the Tribe's position in this appeal, the Tribal Court's judgment granting a permanent injunction is REVERSED, and the permanent injunction is hereby VACATED in its entirety. No costs.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45	¶50	¶55	¶60	¶65
¶70	¶75	¶80	¶85	¶90	¶95	¶100	¶105	¶110	¶115	¶120	¶125	Endnotes

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Endnotes

[1] We note that this purpose of the State programs (low-income energy assistance) is similar to the purpose of the special fund authorized by Section 216 of the Crow utility tax code (75% of tax collected from rural electric cooperatives for hookup fees and charges to connect lines necessary for electric service).

[2] The Tribal Court's decision was issued before the Court's opinion in *Strate v. A-1 Contractors*. It also appears from the record that the Co-op did not contest the Tribal Court's jurisdiction in the proceedings below. *See* Answer ¶ 1.

[3] The Tribe maintains that this case implicates only the Tribe's taxing powers on trust lands, which have been clearly recognized under federal law and by the Co-op. However, because the merits of the present dispute focus on terms like "embedded cost", "system-wide revenue requirements," and "TIER" in connection with the Co-op's rate increase to recover its cost of the Tribal utility tax, we believe that subject matter jurisdiction in this case is best analyzed in terms of the federal-law principles governing regulatory jurisdiction, including those enunciated in *Strate*.

[4] The Tribal Court did not reach the Tribe's alternative claim that the Co-op violated its own bylaws by failing to give the REA 90 days' written notice of the change in rates before it passed through the Tribal utility tax. (Order at 7). The Co-op denied that its pass-through of the Tribal tax was the type of change in rates for which written notice to the REA is required (Answer ¶¶ III and IV). In the May, 1994 hearing, Mr. Gregori testified that he had recently reviewed the need to increase revenue to offset the Tribal utility tax with Mr. Neil Schlaeppi, the REA's field representative, and that Mr. Schlaeppi supported that position (Tr. 61, 65).

[5] Although the *Arkansas Electric* Court assumed that this policy could only be referring to state regulatory commissions, it is apparent that the Court never gave any consideration to the existence of Tribal regulatory bodies.

[6] It is not at all clear in any event that the Co-op's easements are equivalent to the non-Indian fee land as was the highway right-of-way in *Strate*. Among other distinguishing characteristics, the utility easements were not conveyed to another governmental entity, and are not open to the general public.

[7] In any event, the district court's analysis of the Tribe's general utility regulatory scheme in *Devil's Lake Sioux* is not controlling or persuasive. The district court obviously considered its analysis under the *Montana* test to be superfluous, characterizing the issue as a "rather esoteric question of tribal sovereignty" requiring a "specific tap dance" in order to "provide the Circuit the material upon which to seek error[.]" *Id.*, 896 F. Supp. at 956, 960, 961. The district court also failed to analyze the "consensual relationship" exception under *Montana*, upon which this court has relied in affirming Tribal subject matter jurisdiction. *Id.* at 960-62.

[8] Of course, pending formation of the Tribal PUC, nothing in this Opinion would prevent the Co-op and other Tribal officials (e.g., the Tax Commissioner) from reaching agreements on pass-through mechanisms so as to avoid litigating rate changes in the Tribal Court.

[9] "**Embedded Cost.** Monies already spent for investment in plant and operating expenses [i.e., a utility's historic average costs, as shown on its books, in contrast to its marginal cost (defined herein)]. Embedded cost may be adjusted or normalized on the basis of known changes that occurred during the past test period. For example, a new labor contract executed during the test period would further increase labor costs by a known amount On the other hand, where it is known that certain test year expenses will not recur in the future, those expenses would not be considered embedded costs." *Glossary of Electric Utility Terms*, Statistical Committee of the Edison Electric Institute (1991) at 21.

[10] Yellowstone's principal office is located in Huntley, Montana. It serves 400-500 consumers on the Crow Reservation near the town of Pryor, including both Tribal members and non-members. The Tribal utility tax assessed to Yellowstone was $9,600, compared to its gross revenue of $8.5 million. Tr. 107-109.

[11] The reasons given by the Co-op for separately itemizing the Crow utility tax were so that it could develop a database

to facilitate customer refunds in the event the Co-op was successful in challenging the Tribal tax in the federal courts, and so that it could maintain uniform rates in all the jurisdictions it serves save for the Wyoming sales tax and the Crow utility tax (Tr. 69-70). That reasoning is not consistent with the Co-op's position that the methodology for calculating the pass-through has nothing to do with whether it is actually itemized on each customer's bill (Tr. 88). It also misapprehends the nature of the tax, which is a property tax on the utility rather than a sales tax charged directly to each customer. If the Co-op simply treated the Tribal utility tax like its other property taxes, the Co-op would still be able to maintain a uniform rate structure for all its customers.
