NO. 09-2276

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE MOUNTAIN UTE TRIBE,

Plaintiff/Appellee,

v.

RICK HOMANS, SECRETARY OF THE NEW MEXICO TAXATION & REVENUE DEPARTMENT AND NEW MEXICO TAXATION & REVENUE DEPARTMENT,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable James A. Parker, District Court Judge
District Court No. 07-CV-00772 JAP/WDS

DEFENDANTS'/APPELLANTS' BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Supreme Court Cases:

Federal Jurisdictions:

Statutes:

Rules:

PRIOR OR RELATED APPEAL:

None.

PRELIMINARY STATEMENT OF THE GROUNDS FOR JURISDICTION

The case was filed in the United States District Court, District of New Mexico, pursuant to 28 U.S.C. § 1331 and § 1362. The District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion, constituting one document, were filed on October 2, 2009. The Final Judgment was entered in the United States District Court on October 30, 2009. This appeal was seasonally filed on November 3, 2009. The Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Is this case so closely parallel to *Cotton Petroleum Corp. v. New Mexico* as to be controlled by it?

2. In 1924 and 1927 Congress, in two separate statutes, explicitly pronounced that the production of oil and gas on Indian lands such as the Ute Mountain Ute tribal lands may be taxed by the state in which such lands are located. 25 U.S.C. § 398 and § 398a. In 1983, Congress passed the Indian Mineral Development Act, 25 U.S.C. § 396a-g. Does the IMDA impliedly repeal 25 U.S.C. § 398 or § 398a? If not, does the express language in 25 U.S.C. §§ 398 and 398a foreclose the Tribe's contention that the New Mexico taxes in question here are preempted?

3. Is there a tradition of Ute Mountain Ute tribal independence from federal or state regulation of its mineral lessees?

4. In a case of this sort, where the question to be answered is whether the State may lawfully assess its oil and gas severance taxes against non-tribal lessees of tribal minerals, does a court's inquiry into evidence of State services rendered to the operators stop at the border of the reservation, or is it appropriate for the court to consider State services directly related to the operator's economic activity and delivered outside the boundaries of the reservation but within the State?

5. Is there a history of "complete abdication or non-involvement" of the State of New Mexico in the non-tribal lessees' on-reservation activities?

6. Where the State taxes in question are assessed against the non-tribal operators and are not passed on to the Tribe by the operators, and the total tax rate is slightly lower than it was in *Cotton Petroleum v. New Mexico*, is it possible to conclude that the indirect burden of the taxes on the Tribe is so great as to infringe on tribal sovereignty?

7. Is there a quantitative economic burden test that can be gleaned from *Cotton Petroleum* and related Supreme Court cases, *i.e.* is there a particular sum of money the State collects from non-tribal mineral lessees which represents the crossover from non-interference to interference with tribal sovereignty? If so, what is that amount and was the line of separation crossed in this case? If a quantitative test is to be adopted, does a fair reading of *Cotton Petroleum* give the District Courts the power to develop their own formulae on a case-by-case basis?

8. Can a tribal sovereign divest a State of its governmental interest in regulating the conduct of oil and gas extractive activities by non-Indians within the exterior boundaries of the State by informing State authorities that they will not be allowed on tribal lands without prior consent? If a particular tribe takes such a tact, can it avoid the rule in *Cotton Petroleum* by doing so?

9. Are federal regulations dealing with extraction of oil and gas from Indian lands, in substance, more extensive today than they were in 1989, when *Cotton Petroleum* was decided? Whether they are or not, are the federal regulations exclusive?

10. If there has been no need for specific on-site State services in a particular tribal locale in the recent past, such as the plugging of a gas well or dealing with an environmental problem, does this speak against the existence of an ongoing State governmental interest in extractive activities on the land in question?

STATEMENT OF THE CASE

This is a case in which the Ute Mountain Ute Tribe sought and obtained prospective injunctive relief in connection with the State of New Mexico's assessment of five oil and gas taxes against non-tribal lessees conducting extractive operations on Ute Mountain Ute lands in New Mexico.

The Tribe pursued three separate claims for relief. It alleged that the imposition of the state taxes against its lessees violates federal common law, the Tribe's right to self-determination and the Supremacy Clause of the United States Constitution. The Tribe also contended that the State's imposition of one of the five taxes, the Ad Valorem Property Tax on oil and gas production equipment, violates the Fourteenth Amendment and the Enabling Act of June 20, 1910, in which New Mexico disclaimed any taxing jurisdiction over lands held by the federal government for the benefit of Indian tribes. In the third claim for relief, the Tribe invoked 42 U.S.C. § 1983, claiming that the five New Mexico taxes deprived individual members of the Tribe of their property rights and the privileges and immunities secured to them under federal law and the Constitution. The Tribe also sought to recover its attorney fees pursuant to 42 U.S.C. § 1988, as an adjunct to its § 1983 claim.

In a Memorandum Opinion and Order filed February 4, 2008, the district court denied the State's motion to dismiss the first and second claims for relief, but granted the motion as to the third claim, based on 42 U.S.C. §§ 1983 and 1988.

Prior to trial, both parties filed cross-motions for summary judgment. The court denied those motions.

The case went to trial in May 2009. As the only claims surviving were for injunctive and declaratory relief, trial was to the Court (the Honorable James A. Parker) sitting without a jury.

The Court entered its Findings of Fact, Conclusions of Law and Memorandum Opinion on October 2, 2009. The Final Judgment was entered in the United States District Court on October 30, 2009. This appeal was filed on November 3, 2009.

STATEMENT OF THE FACTS[1]

The significant facts in this case, as found by the trial court, are these:

The New Mexico portion of the Ute Mountain Ute Reservation (referred to by the trial court as the "New Mexico lands") are held in trust for the Tribe by the United States. [RP 176, Doc. 80, filed 10/02/2009, Finding 15.] The only economic activities on the tribal lands are grazing and the extraction of oil and gas. [RP 176, Finding 19.] Going back to the 1950s, the Tribe has leased its oil and gas rights to private, non-tribal (and non-Indian) operators. [RP 185-186, Findings 110; 114.] Under these various agreements, the operators take title to the oil and gas at the wellhead. [RP 185, Finding 104.] The operators construct, maintain and own the gathering lines that transport natural gas to main pipelines off of the Reservation but located in New Mexico. [RP 184-185, Findings 96; 106.] There are twelve different oil and gas operators involved. The two largest operators are Burlington Resources and XTO Energy. [RP 185, Findings 109; 111.] The leases and development agreements require the operators to be qualified to do business in New Mexico and to provide Worker's Compensation Insurance to their employees. [RP 186, Findings 117; 118.]

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[1] The appendix to the appeal includes the relevant pleadings and trial exhibits, sequentially numbered, and the trial transcript, which was independently paginated by the Court Reporter. References to the pleadings and trial exhibits shall be denoted "RP ("Record Proper") _____." References to the Trial Transcript shall be denoted "TR _____."

The Tribe receives a royalty from all operators extracting oil and gas from the New Mexico lands. The royalty is assessed based on the wellhead value of the oil or gas. On average, the Tribe receives 13.1% of the wellhead value in royalties. [RP 201, Findings 266; 267; 269.][2]

Since 1983, the Tribe has imposed a severance tax on oil and gas operators on the New Mexico lands. The tribal severance tax is assessed at the rate of 5% of the wellhead value of the oil or gas severed on the New Mexico lands and sold or transported off the Reservation. Since 1987, the Tribe has imposed a tax on possessory interests in Ute Mountain Ute tribal lands, including leases and agreements. The tribal possessory tax is assessed at the rate of 6% of the market

[2] In its Finding of Fact No. 267 [RP 201], the trial court stated that "the [Tribe's] royalty is assessed based on the wellhead value of the oil or gas." As a matter of industry semantics, this is correct. It should be pointed out, however, that unprocessed oil and natural gas has no discernible market value. Thus, the Tribe's taxes and royalties, like the State's taxes, are assessed against the value of the oil and natural gas downstream, at the point where these substances are the equivalent of oil and natural gas produced by others and are marketable. The Tribe's tax resolutions, lease agreements and mineral development agreements make this clear. *See, e.g.* Trial Exhibit B, p. 4, sections 3(E) and (F), 4 and 5 [RP 529]; Trial Exhibit C, p. 3, sections 12 and 13 [RP 542]; Trial Exhibit P-1, p. 7, Article 5 [RP 1261]; Trial Exhibit P-2, p. 18, Article 9 [RP 1301]; Trial Exhibit P-3, p. 2 [RP 1373]. *Also see* 30 C.F.R. § 206.172, which is incorporated by reference in the Tribe's Indian Mineral Development agreements and 30 C.F.R. § 206.170, *et seq.* (Indian gas) and 30 C.F.R. § 206.50, *et seq.* (Indian oil). In other words, the Tribe's royalty is measured against the amount of money the oil and natural gas fetch in the marketplace. *See, generally, FINA Oil & Chemical Co. v. Norton*, 332 F.3d 672 (D.C. Cir. 2003); the trial testimony of John Tysseling, Ph.D. [TR 408-429]; and Dr. Tysselling's report [RP 1428].

value of the lease or agreement, including improvements and equipment on the lease parcel. Revenues from these tribal taxes are used to defray the costs of providing essential tribal governmental services. [RP 202, Findings 274-278.]

The net effect of the tribal severance and possessory interest taxes has been, on average, a 9.5% tax on the gross wellhead value of oil and gas extracted on the New Mexico lands. [RP 202, Finding 279.]

The Ute Mountain Ute Tribe has no economic ability to affect the market price of oil or natural gas. Neither do the oil and gas operators. [RP 202-203, Findings 280-281.]

The Tribe is free to negotiate leases or agreements with other oil and gas operators. Three development agreements, with Elk San Juan, BIYA and Texahoma, were negotiated within the last five years. During negotiations, the operators were aware that New Mexico would impose the five taxes. To the extent they can do so without making other operators more attractive to the Ute Mountain Ute Tribe, the operators who negotiate leases and agreements with the Tribe take into account the cost of the five New Mexico taxes in reaching terms with the Tribe. [RP 203, Findings 283-285.]

The leases and agreements do not directly pass the cost of the five New Mexico taxes on to the Tribe. [RP 203, Finding 286.]

The Tribe has resolved that, in the event the five New Mexico taxes are found unlawful, the tribal severance tax will be increased by the amount of the five New Mexico taxes. [RP 203, Finding 287.]

Unless specifically surrendered in unmistakable terms in an existing lease or agreement, the Tribe has the authority to increase severance taxes on existing leases and agreements it has entered into with operators, or to enact a third tribal tax, regardless of the status of the New Mexico taxes. [RP 203, Finding 288.] The only leases or agreements under which the Tribe has surrendered, at least to an extent, its authority to increase severance taxes are the recent agreements which cap tribal revenues at 30%. Even in these agreements, however, the tribal revenues in those agreements are currently substantially below 30% and an increase in tribal revenue to 30% would be significant. [RP 203-204, Findings 289-290.]

Total tribal revenue from development agreements, including those agreements which cap tribal revenue at 30%, is not a substantial part of tribal revenue from oil and gas development. The much greater part of tribal revenue comes from leases without any cap on tribal revenues. [RP 204, Findings 295-296.]

In the event that the Tribe implemented its resolution (see above), the Tribe would receive at least $1,300,000.00 per year in additional revenue from the

severance tax, an increase of approximately $650.00 per enrolled tribal member per year. [RP 204, Finding 297.]

The five New Mexico taxes impose an economic burden on the Ute Mountain Ute Tribe and its members "the extent of which is laid out above in these Findings of Fact." [RP 206, Finding 310.] There is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the Ute Mountain Ute Tribe's ability to govern itself. [RP 206, Finding 311.]

The leases and agreements are subject to BIA approval. [RP 187, Finding 125.] Before an operator with a lease or agreement for tribal lands can drill, it must first get permission from BIA to survey the land, including creating survey roads, and BIA must then get consent from the Tribe for the survey. [RP187, Finding 136.] Operators typically use the State of New Mexico's form for the well plat. [RP 188, Finding 141.] Normally, the operator requests a non-standard location through a sundry notice to BLM. BLM then forwards the sundry notice to the New Mexico State Oil Conservation Division or requires the operators to do so. On some occasions, an operator on the New Mexico lands has requested approval for a non-standard location from NMOCD. After BLM approves a permit to drill, it forwards the form to NMOCD. [RP 189, Finding 157.] Once a well is in operation, the operator must provide sundry notices to BLM as events happen. BLM sends copies of the sundry notices to NMOCD. [RP 189, Finding 159.]

The BIA has no adjudicative process to resolve disputes between operators. [RP 190, Finding 166.][3] BLM has adjudicative processes to resolve disputes relating to resources over which BLM has oversight. In general, an action by a field office of BLM is subject to administrative review through mechanisms established in the Department of Interior Board of Land Appeals. [RP 190, Finding 167-168.]

Unprocessed natural gas, including that found on Ute Mountain Ute tribal lands, can contain hydrogen sulfide (H_2S). Hydrogen sulfide is a corrosive and toxic gas which can corrode equipment and pipelines and present a threat to human health. On two occasions, residents of La Plata, New Mexico complained to NMOCD about hydrogen sulfide, which originated from stuck valves on Ute Mountain Ute tribal lands. [RP 191, Findings 171-176.]

Oil and gas operations can cause groundwater contamination and can disrupt the surface, which may cause environmental effects. [RP 191, Findings 177; 179.]

During a period of time when there was a memorandum of understanding in effect between BLM and NMOCD, BLM adopted NMOCD standards for well spacing and setbacks as the standards for Indian lands, and used NMOCD hearing processes for notification and participation in decisions on well spacing matters on Indian lands, including setting of spacing, approval of non-standard well locations,

[3] As trustee for the Tribe, BLM would be in an awkward position if it could be called upon to adjudicate a dispute between operators. [TR 330; 335-336.]

approval of non-standard spacing units and forced pooling. Under this process, NMOCD did not issue final binding orders on well spacing matters on Indian lands; instead, NMOCD issued draft orders to be considered by BLM in making an independent decision based on the record. [RP 193, Findings 194-196.] Historically, BLM has generally adopted well spacing and setbacks set by state agencies. [RP 194, Finding 203.] For example, the current pattern of well spacing on Ute Mountain Ute tribal lands was established by the State of New Mexico, NMOCD. [RP 184, Finding 101.] The natural gas pools in question were mostly created by NMOCD in the 1940s and 1950s, with the exception of one or two unitization agreements. [RP 184, Finding 100.]

Since 1992, the Tribe has barred NMOCD officials and employees from entering the New Mexico lands without permission, because the Tribe does not recognize the authority of NMOCD over oil and gas on the New Mexico lands. Instead, it takes the position that authority is shared by the Tribe, BLM and BIA, to the exclusion of NMOCD. [RP 194, Finding 207.] NMOCD has abided by the Tribe's policy although, on a few occasions, the Tribe has granted permission to NMOCD to enter the New Mexico lands. [RP 195, Findings 208-209.]

NMOCD is responsible for regulation of oil and gas operations in the State of New Mexico. NMOCD's primary mission is to prevent waste and to protect correlative rights. In regulating oil and gas operations, NMOCD also seeks to

protect public safety and health. It does so in part by defining oil and gas pools and setting well spacing and well setbacks. When operators are not able to agree on pooling or spacing, NMOCD sometimes issues an order forcing pooling after a public hearing in which the affected operators had the opportunity to participate. NMOCD also seeks to prevent waste by regulating production and transportation of oil and natural gas. Operators may request approval from NMOCD for comingling, which includes extracting oil or gas in a single well from multiple strata. NMOCD approval for comingling may be given in an administrative order or may be decided at a hearing. Operators may request approval from NMOCD for infill, which is adding a second or third well to a spacing unit in order to drain the unit more efficiently. Operators may request approval from NMOCD for non-standard well locations. NMOCD hearings are conducted by administrative law judges, who can require evidence to be produced.

NMOCD sets standards for casings, *i.e.*, the steel pipe and surrounding cement used to construct a well. Casing defects can cause problems that include blow-out of a reservoir, mixing and flow from other zones with a reservoir, contamination of groundwater and escape of hydrogen sulfide.

NMOCD requires operators in New Mexico, including operators extracting oil and gas on Ute Mountain Ute tribal lands, to file forms for applications for permits to drill, for sundry notices, for plugging abandoned wells, and for various

reports on wells, including well completion or recompletion reports. Under December 1, 2008 amendments to NMOCD regulations, the operators on federal, public or tribal lands must use BLM forms for these purposes, but the forms remain subject to NMOCD approval. When an operator fails to comply with NMOCD regulations, including the failure to file required forms, NMOCD may revoke the operator's authority to transport natural gas or oil in the State of New Mexico, making it economically impossible for the operator to continue operations. NMOCD has general authority to plug and abandon a well when an operator fails to do so, but the Ute Mountain Ute Tribe does not allow NMOCD officials to plug wells on the New Mexico lands. [RP 179-180, Findings 48-58.]

NMOCD maintains publicly available geologic records, including records of the geology of the Ute Mountain Ute tribal lands. NMOCD also maintains publicly available records of production of oil and gas by operators, including records of production by operators who extract oil and gas from the New Mexico lands. [RP 181, Findings 69-70.]

There are presently 186 active oil and gas wells on the Ute Mountain Ute tribal lands. The pools associated with these wells were mostly created by NMOCD in the 1940s and 1950s. NMOCD initially set the well spacing. [RP 73; 184, Findings 73; 100-101.]

New Mexico imposes five taxes on oil and gas operators in the state, including operators who extract oil and gas on Ute Mountain Ute tribal lands: the Oil and Gas Severance Tax, the Oil and Gas Conservation Tax, the Oil and Gas Emergency School Tax, the Oil and Gas Ad Valorem Production Tax and the Oil and Gas Ad Valorem Production Equipment Tax. The same five taxes, as imposed on non-Indian operators extracting oil and gas on the Jicarilla Apache Reservation in New Mexico, were at issue in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) . For each of the five taxes, the taxable event takes place at least partly on the Reservation. [RP 197, Finding 233.]

The State of New Mexico offers a tax credit, the Intergovernmental Production Tax Credit, to operators who extract oil and gas on Ute Mountain Ute tribal lands and who are subject to the five New Mexico severance taxes. The net effect of the New Mexico tax credits has been an average reduction (over the years 1999-2007) of approximately 1.14% in the yearly aggregate tax rate of the five New Mexico taxes on operators extracting oil and gas on the Ute Mountain Ute tribal lands. The reduction is increasing as new wells come into production and old wells are shut down. [RP 197, Finding 234.]

The services New Mexico provides to oil and gas operators on Ute Mountain Ute tribal lands include a hearing process for resolving disputes between operators, publicly available geologic records, publicly available production records and

records of sales and transfers. NMOCD also offers, but the Ute Mountain Ute Tribe does not make use of, environmental clean-up and site inspection. The NMOCD administrative and hearing orders regarding wells on the New Mexico lands have approved requests for non-standard locations and comingling. [RP 200, Finding 253.] There is no evidence that the NMOCD hearing process has been used to resolve a dispute between operators concerning extraction on the New Mexico lands. [RP 200, Finding 252.]

After operators take title to oil produced on the New Mexico lands by severing it, they transport the oil to refineries on roads in New Mexico which are constructed and maintained by the State of New Mexico. After operators take title to gas produced on the tribal lands by severing it, they transport the gas through gathering pipelines on the tribal lands to main lines in New Mexico. [RP 200-201, Findings 260-261.]

Without an off-Reservation infrastructure in New Mexico to transport oil and gas, the economic value of the oil and gas produced on Ute Mountain Ute tribal lands would be substantially less. The State provides substantial services by regulating the off-Reservation infrastructure that makes transport of oil and gas possible. [RP 201, Findings 262-263.] The economic value to the Ute Mountain Ute Tribe of services provided by the State of New Mexico on tribal lands to the Tribe's oil and gas operators is *de minimus*. [RP 201, Finding 264.] The economic

value to the Ute Mountain Ute Tribe of services provided by the State of New Mexico off of tribal lands, to the oil and gas operators, is substantial. [RP 201, Finding 265.]

The imposition of the five New Mexico taxes does not substantially interfere with the Ute Mountain Ute Tribe's ability to govern itself. [RP 206, Finding 311.]

SUMMARY OF THE ARGUMENT

This is a federal preemption case. It turns on the judicial interpretation of *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), as compared to the findings of fact entered by the trial court. The Plaintiff/Appellee is the Ute Mountain Ute Tribe. The Tribe contends that five New Mexico oil and gas severance-type taxes, historically assessed against its non-tribal oil and gas lessees, constitute an infringement on tribal sovereignty and are therefore preempted by federal law. The New Mexico Taxation and Revenue Department, which is the effective Defendant/Appellant, contends that there is no substantive difference between this lawsuit and *Cotton Petroleum*, and the state taxes in question, therefore, are valid. The trial court ruled otherwise. In this opening brief, TRD shall parse *Cotton Petroleum*, attempting to distill the elements which constitute the *ratio decendi* of the case. TRD will next demonstrate that the learned trial judge, in his exhaustive effort to plumb the depths of *Cotton Petroleum*, erroneously elevated a number of generic policy considerations to the status of governing principles, none of which, individually or in tandem, remove this case from *Cotton Petroleum's* ambit.

ARGUMENT

I. STANDARD OF REVIEW

The appellant does not take issue with the trial court's findings of fact. Accordingly, appellate review is *de novo* without deference. *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007); *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405 (10th Cir. 1984). *See, also, Fisher v. U.S.*, 402 F.3d 1167, 1173 (Fed. Cir. 2005).

II. THE TRIAL COURT MISCONSTRUED *COTTON PETROLEUM*

A. *Cotton Petroleum v. New Mexico*

In 1976, the Jicarilla Apache Tribe enacted a tribal ordinance imposing a severance tax on any oil and natural gas severed, saved and removed from tribal lands. In 1985, the Jicarillas enacted a privilege tax to go along with the severance tax. *Cotton Petroleum*, 490 U.S. at 167-168. The Jicarilla taxes assessed against Cotton Petroleum amounted to about six percent (6%) of the value of production (*id.* at 168). In addition, Cotton Petroleum paid the Jicarillas a ground rental and a 12.5 percent royalty. *Id.*

Cotton Petroleum Corporation paid the same five State production taxes which are in question in the instant litigation. These New Mexico taxes amounted to about eight percent of the value of Cotton's production. *Id.* In *Cotton Petroleum*, then, the total tax burden on oil and gas wells outside the Jicarilla

reservation was eight percent (8%), while Cotton's wells on the Jicarilla reservation were taxed at a total rate of fourteen percent (8% by the State and 6% by the Tribe). *Id.* at 168-169.

The plaintiff in *Cotton Petroleum* was the taxpayer itself. Cotton contended that the state taxes imposed on reservation activity are only valid if related to actual expenditures by the state in relation to the activity being taxed. Cotton presented evidence at trial "tending to prove that the amount of tax it paid to the State far exceeded the value of services that the state provided to it and that the taxes paid by all non-member oil producers far exceeded the value of services provided to the reservation as a whole." *Id.* at 170. After trial, the court granted the Jicarilla Apache Tribe's motion for leave to participate as *amicus curiae*. Thus, the issues for resolution expanded into the realm of tribal rights. The Jicarillas argued that a decision upholding the state taxes would substantially interfere with the Tribe's ability to raise its own taxes and would diminish the desirability of on-reservation oil and gas leases. The case went to the New Mexico Court of Appeals and on to the United States Supreme Court, embodying the same tribal-centric claims advanced now by the Ute Mountain Ute Tribe.

After laying out the material evidence, the *Cotton Petroleum* court proceeded to analyze the applicable law. Its first step was to provide an historical overview of the court's approach to the question whether a state may tax on-

reservation oil production by non-Indian lessees. The court explained that up until 1938, the judge-made "intergovernmental immunity" doctrine, exemplified by *Gillispie v. Oklahoma*, 257 U.S. 501 (1922), held sway. According to the intergovernmental immunity doctrine, a state tax on non-tribal producers was invalid unless expressly authorized by Congress. The thinking behind the doctrine was that a tax upon the profits of a non-tribal producer was "a direct hamper upon the effort of the United States to make the best terms that it can for its wards." *See Cotton Petroleum*, 490 U.S. at 173-174.

The doctrine gradually eroded in the first third of the twentieth century until, in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), the court squarely overruled *Gillispie*. So, after *Helvering*, and up through the present, "oil and gas lessees operating on Indian reservations were subject to non-discriminatory state taxation as long as Congress did not act affirmatively to preempt the state taxes." *Cotton Petroleum*, 490 U.S. at 175.

Having laid the jurisprudential groundwork, the court laid out the task before it:

> The question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication. In addition, we must consider Cotton's argument that the "multiple burden" imposed by the state and tribal taxes is unconstitutional.

Id. at 175-176.

***Cotton Petroleum* and Preemption**

The Court began its analysis by pointing out that while preemption is "primarily an exercise in examining Congressional intent," questions of preemption concerning state taxation of lessees of Indian land are "not controlled by mechanical or absolute conceptions of state or tribal sovereignty," and that each such case requires "a particularized examination of the relevant state, federal and tribal interests." *Id.* at 176. (Citing *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); and *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).)

Cotton's first preemption theory was that the federal and tribal governments, as empowered by the Indian Mineral Leasing Act of 1938 ("IMLA"), "exercised comprehensive regulatory control over the non-Indian lessee's on-reservation activity, and that New Mexico's responsibilities, in contrast, were 'significantly limited.'" Weighing the respective state, federal and tribal interests, Cotton made the same argument employed by the Ute Mountain Ute Tribe here, *i.e.*, that the New Mexico taxes unduly interfere with the federal interest in promoting tribal economic self-sufficiency and are not justified by an adequate state interest. *Id.* at 177.

The Court emphasized that in any preemption exercise, the key is to identify Congressional intent. *Id.* at 177-178. Since there is no express statement by Congress of an intention to preempt state taxation of non-tribal producers, the Court looked for evidence that Congress has impliedly reached that conclusion. Looking at the statutory history, the Court noted that by 1938, when the IMLA was enacted, it was already established that oil and gas lessees of public lands were subject to state taxation (citing *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45 (1925)). Since Congress knew this when it enacted the IMLA, and said nothing that can be construed as disapproval, the Court concluded that the 1938 Act does not impliedly preempt state taxation.

Digging deeper into legislative history, the Court noted that in the early part of the twentieth century, there was confusion on the question whether Executive Order reservations, such as the Jicarilla reservation, were subject to leasing under the Mineral Lands Leasing Act of 1920. *Id.* at 181 (n.12). At the time, the Court explained, *Gillispie* was the prevailing law and, therefore, the state could not impose severance taxes on oil produced on Indian reservations unless Congress expressly waived *Gillispie* immunity. In 1924, two years after *Gillispie* was decided, Congress did just that by expressly authorizing state taxation of non-Indian production on tribal lands. *See* 25 U.S.C. § 398. Three years after that, to clear up any confusion, Congress also expressly waived immunity from state

taxation on Executive Order Reservations. 25 U.S.C. § 398(a). So, since 1924, and continuing through the present, federal statutory law has affirmatively stated that the states may tax oil and gas production by non-Indians on treaty and statutory reservations. *Id.* at 181-182. *See U.S. v. Southern Pacific Transportation Co.*, at 687 [the reference in 43 U.S.C. § 398 to "any Indian reservation" includes Executive Order reservations"].

Rounding out its discussion, the *Cotton Petroleum* court surveyed relevant statutes enacted after 1938, concluding that none of them evinced Congressional intent to prohibit state taxation of non-Indian oil and gas producers, and adding that a 1980 law, 26 U.S.C. § 4994(d), reflects an affirmance of state taxation by Congress. *Id.* at 183.

In going through this review, the Court conflated two topics, preemption and interference with tribal economic self-sufficiency. It reasoned that since Congress explicitly approved of state taxation of non-Indian lessees, it necessarily follows that Congress does not believe that such taxation interferes with the congressional goal of tribal self-sufficiency. ["If Congress was of the view that taxing non-Indian lessees would interfere with the goal of promoting tribal economic self-sufficiency, it seems unlikely that it would have imposed this additional tax on these lessees."] *Id.*

Cotton's next argument shifted to the case law. The company contended that the decisions in *White Mountain Apache Tribe v. Bracker* and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico* had the effect of pushing the preemption envelope farther out than before. In *Bracker*, the non-Indian logging company was not regulated by the State of Arizona while doing its work on tribal land. It harvested Indian trees and used its trucks on Indian land as part of the process. The State was unable to identify any regulatory function or service it performed that would justify the assessment of Arizona's Motor Carrier License and Use Fuel Taxes. In addition, as the *Cotton Petroleum* court pointed out, the economic burden of the taxes was passed on to the tribe by the logger. *Id.* at 184. The Tribe effectively paid the tax.

In *Ramah*, New Mexico attempted to tax two non-tribal construction firms hired by the Navajo Nation to build a school on tribal land. The school was not in the New Mexico state school system and was not regulated by the state. As in *Bracker*, the state tax was passed on to the Navajo Nation. And as with the logging operations on Indian lands, the federal government had sole responsibility for education of the students at Ramah Navajo High School. *Id.* at 185. The *Cotton Petroleum* court found *Bracker* and *Ramah* distinguishable.

Anticipating this, Cotton made a quantitative argument. The company compared the value of the services the state provided to it (about $18,000 per year)

to the $458,000 per year in taxes the state collected from it during the same period, and, from this premise, urged the Court to conclude that the significant difference produced a *Bracker/Ramah* "lack of state interest" outcome. The Court rejected the invitation to adopt a quantitative test, pointing out that *Bracker* and *Ramah* were decided as they were because "both cases involved complete abdication or non-involvement of the state in the on-reservation activity" and that a quantitative test is "antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector" (citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937)). *Id.* at 185-186.

Folding the concept of economic burden on the tribe into the broader issue of federal preemption, the Court went on to point out that only an indirect economic burden fell on the Jicarilla Apache Tribe by virtue of the state taxes (which, as stated, were assessed against the operators, not the tribe), and that the tribe could increase its taxes without adversely affecting on-reservation oil and gas development. The Court noted that the state regulated the spacing and mechanical integrity of wells located on the reservation, which it viewed as another piece of evidence that "although the federal and tribal regulations in this case are extensive, they are not exclusive as were the regulations in *Bracker* and *Ramah Navajo School Board*." *Id.* at 185-186 and 191.

On this latter point, the *Cotton Petroleum* court provided a sample list of federal regulations, showing the extensive regulatory authority of the federal government over oil and gas operations on Indian lands, including federal regulations which address the "spacing, drilling and plugging of wells" and the imposition of "reporting requirements concerning production and environmental protection." *Id.* at n.16.

The Court in *Cotton Petroleum* concluded that federal law, even when given the most generous construction, does not preempt New Mexico's oil and gas severance taxes. It suggested that, for preemption to apply, the evidence would need to show that "the state has had nothing to do with the on-reservation activity, save tax it." Another way a state tax could be preempted, the Court said, would arise if the tax in question imposed a substantial burden on the tribe. *Montana v. Crow Tribe*, 484 U.S. 997 (1988), was used to illustrate such a taxing regimen. In that case the state taxes (32.9 percent) "had a negative effect on the marketability of coal produced in Montana" and were "extraordinarily high." *Id.* at 187, n.17. The point the Court made was that the five New Mexico taxes at issue do not fall in that category.

Cotton next argued that the New Mexico taxes imposed an unlawful multiple tax burden on interstate commerce. Rejecting the contention, the Court noted that "the relevant services provided by the state include those that are available to the

lessees and the members of the tribe off the reservation as well as on it." *Id.* at 189-191.

The Opinion concluded with the observation that, for a state tax regimen to offend the Indian Commerce Clause (the Interstate Commerce Clause being irrelevant), it would have to have an "adverse affect on the tribe's ability to attract oil and gas lessees":

> Cotton, in effect, asks us to divest New Mexico of its normal latitude because its taxes have "some connection" to commerce with the Tribe. The connection, however, is by no means close enough. There is simply no evidence in the record that the tax has had an adverse effect on the Tribe's ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases – just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements – but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943); *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

Id. at 191.

Cotton's Commerce Clause theory was rejected and the judgment of the New Mexico Court of Appeals was affirmed.

B. The Factual Differences Between *Cotton Petroleum* and the Case Presently on Appeal

The only factual differences of significance between the instant case and *Cotton Petroleum* stem from the fact that the portion of the Ute Mountain Ute Reservation which is in New Mexico is unpopulated. All of the Tribe's members live on the Colorado side. [RP 176, Finding 16.] As a result, common state services are not delivered on the Reservation, *e.g.*, there are no state roads or schools. [RP 176, Findings 19-20.] Other than some occasional grazing of tribal cattle and wood gathering, human activity on the New Mexico portion of the Reservation is restricted to oil and gas exploration and extraction. All of this activity is conducted by the twelve non-tribal oil and gas companies.[4]

Since no tribal members live in New Mexico, the only state agencies with significant, ongoing involvement with the New Mexico portion of the Reservation are those dedicated to activities conducted by the extractive industry, the most obvious of which is the New Mexico Oil Conservation Division ("NMOCD"). In 1992, the Ute Mountain Ute Tribe informed NMOCD, in writing, that its employees and agents could not come onto tribal lands without obtaining prior consent from the Tribe. [RP 194, Finding 207.] NMOCD, after consulting with the Governor of New Mexico, decided to avoid a confrontation and complied with the Tribe's instruction. [TR 238; 324.] Thus, from that time to this, NMOCD has

[4] Oil production on the Ute Mountain Ute lands is relatively insignificant. [TR 23.]

not had a meaningful physical presence on Ute Mountain Ute tribal lands. This enabled the Tribe to point out that NMOCD's current regulation of the producers does not include visitations by NMOCD personnel to well sites on Ute Mountain Ute tribal lands.

The Ute Mountain Ute Tribe also passed a tribal resolution in 1992. In that document, the Tribe stated its then-existing intention to increase the Tribe's own severance taxes to the extent of any future reduction in state taxation of the operators. [RP 271.] Current practice is to divide revenues from tribal severance taxes amongst the members of the Tribe. [TR 446.] Doing the math, the trial court determined that if the five state taxes were to be declared invalid, and the Tribe followed through with its stated intention to increase its taxes proportionately, this would result in an additional $650.00 in annual income to each tribal member, based on current data. [RP 204, Finding 297.] The court concluded that this is evidence of a type and quality not seen in *Cotton Petroleum* and, specifically, is evidence that the state taxes impose a substantial burden on the Tribe. [RP 227.]

We find no indication in *Cotton Petroleum* that a similar mathematical exercise was undertaken there, by the parties or the court, to determine the per-member impact of the state taxes on the Jicarillas. The background information provided by the *Cotton Petroleum* court, however, makes it possible to perform the calculation. The State of New Mexico collected on average about $458,791.00 per

year in taxes from the Cotton Petroleum Corporation, based on production on Jicarilla Apache tribal lands in the years 1982-1986. *Cotton Petroleum*, 490 U.S. at 185. There were about 2500 members of the Jicarilla Apache Tribe at that time. 490 U.S. at 167. Thus, if the State of New Mexico had not collected the taxes from Cotton Petroleum and the Jicarilla Apache Tribe had increased its own tax rates to make up the difference, each member of the Jicarilla Tribe would have seen an additional $184.00 in annual income, assuming the Jicarilla Apache Tribe had passed the money on to its members. Or, to say it another way, the governing body of the Tribe would have received an additional $184.00 per member per year to devote to tribal services.

C. The Trial Court's Legal Analysis

In *Cotton Petroleum* the Supreme Court developed a test which addresses the doctrines of federal preemption and tribal sovereignty in one, unified approach. At bottom, the ultimate question in cases of this type is preemption – has Congress preempted the state taxes? Because tribal sovereignty is to be preserved, a subset of this test is whether application of a particular state tax, in a particular situation, violates tribal sovereignty. If it does, the tax is invalid because the courts will not assume that Congress intended such an outcome. Thus, the *Bracker/Ramah/Cotton Petroleum* interest balancing test is a species of preemption analysis. 490 U.S. at 175-176.

The court below began its analysis by tracing the history of state taxation of non-Indians conducting business on Indian lands, concluding that "Congress may expressly authorize state jurisdiction; but if Congress has not, tribal sovereignty (*i.e.* the question whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them) predominates the analysis of whether the state may assert jurisdiction. [RP 207.]

The court invoked a canon of construction which appears to have driven its decision, pointing out that "tribal sovereignty is a 'backdrop against which the applicable treaties and statutes must be read,'" and that this backdrop of tribal sovereignty acts essentially as a "thumb on the scales in favor of the tribe in question." [RP 208.] It then reviewed the factual settings in *Bracker* and *Ramah*.

Bracker and *Ramah* predate *Cotton Petroleum*. *Cotton Petroleum* is similar on its facts to the case presently on appeal. The trial court's disposition of this case, perforce, had to be grounded on material factual differences with *Cotton Petroleum*. The court recognized this and devoted the balance of its memorandum opinion to the identification of such differences.

The court acknowledged that in the case before it "it is undisputed that the legal incidence of the New Mexico taxes fall on the oil and gas operators, who are

non-Indian. Thus, there is no "categorical bar" to the tax. It concluded that *Bracker* balancing applies. [RP 213.][5]

The trial court turned to the Indian Mineral Leasing statutes. It pointed out that some of the mineral leases in question, *i.e.* those which came into existence prior to 1982, were created during the statutory regime of the Indian Mineral Leasing Act of 1938. A second group of leases, denominated Indian Mineral Development Agreements, came into existence during the statutory regime of the IMDA of 1982, 25 U.S.C. § 2101-2108. The court felt this was significant because the leases in question in *Cotton Petroleum* were solely creatures of the 1938 Act.

Laying out relevant statutory history, the court acknowledged that Congress expressly authorized state taxation of the production of oil and gas on unallotted Indian reservations in 1891, 1924 and 1927. (*See* 25 U.S.C. §§ 397, 398 and 398(a).) [RP 214.]

[5] In *Wagnon v. Prairie Bank of Potawatomi Nation*, 546 U.S. 95 (2005), the Supreme Court said "the *Bracker* interest-balancing test applies only where 'a state asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" *Wagnon*, 346 U.S. at 99. And, of course, the *Bracker* balancing test was applied in *Cotton Petroleum.* 490 U.S. at 175-176. We are dealing here with the same dynamics the Supreme Court dealt with in *Cotton Petroleum*. Thus, TRD did not (and does not) take the position that the *Bracker* interest-balancing test is inapplicable.

The Court Misinterpreted *Montana v. Blackfeet Tribe*

This set the stage for the court's statutory preemption analysis. The trial judge noted that the Supreme Court, in *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985), ruled that "the general repealer clause of the [IMLA] [could not] be taken to incorporate" the taxation provision of the 1924 Act. [RP 216.]

Montana v. Blackfeet Tribe involved a Montana state tax on royalties the *tribe* earned from its own minerals. The first sentence in the opinion made that clear:

> This case presents the question whether the State of Montana may tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the IMLA of 1938. . . .

Montana v. Blackfeet, 471 U.S. at 761.

The Supreme Court's conclusion, not surprisingly, was that "nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit states ***to tax tribal royalty income*** generated by leases issued pursuant to that Act." *Montana v. Blackfeet,* 471 U.S. at 766 (emphasis added). This led to the Court's statement referred to by the trial court below:

> The statute [the 1938 Act] contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act. Contrary to the State's suggestion, under the applicable principles of statutory construction, the general repealer clause of the 1938 Act cannot be taken to incorporate consistent provisions of earlier laws. The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. Nor would the State's

> interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians.

471 U.S. at 767.

The trial court attached considerable significance to the last two sentences quoted immediately above. [RP 215-216.] It interpreted *Montana v. Blackfeet Tribe* as standing for the general proposition that the 1924 Act only applies to "those leases executed under the 1891 Act and its 1924 amendment," [RP 216] and cited the case as standing for the general proposition that "even applying ordinary principles of statutory interpretation, the express authority for state taxation in the 1924 Act was repealed by IMLA."

The court in *Montana v. Blackfeet Tribe* did indeed say, in *obiter dictum*, that, considering the congressional purpose behind the 1938 Act, the tax proviso in 25 U.S.C. § 398 "reaches only those leases executed under the 1891 Act and its 1924 amendment." 471 U.S. at 767-768. But this was in the narrow context of determining whether Congress had intended to authorize direct state taxation of Indians. Four years later, in *Cotton Petroleum*, when the court was faced with the precise question involved in this appeal, that *dicta* was placed in its intended perspective:

> . . . it is well settled that, absent express congressional authorization, a state cannot tax the United States directly. It is also clear that the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust. Under current doctrine, however, a state can impose a non-discriminatory tax

> on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe. Although a lessee's oil production on Indian lands is therefore not "automatically exempt from state taxation," Congress does, of course, retain the power to grant such immunity. Whether such immunity shall be granted is thus a question that "is essentially legislative in character.

Cotton Petroleum, 490 U.S. at 175 (internal citations omitted).

Continuing, the *Cotton Petroleum* court said this:

> . . . Cotton argues that the 1938 Act embodies a broad congressional policy of maximizing revenues for Indian tribes. Cotton finds support for this proposition in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). That case raised the question whether the 1938 Act authorizes state taxation of a tribe's royalty interests under oil and gas leases issued to nonmembers. Applying the settled rule that a tribe may only be directly taxed by a state if "Congress has made its intention to [lift the tribe's exemption] unmistakably clear," we concluded that "the state may not tax Indian royalty income from leases issued pursuant to the 1938 Act." In a footnote we added the observation that direct state taxation of Indian revenues would frustrate the 1938 Act's purpose of "ensur[ing] that Indians receive 'the greatest return from their property.'"

Cotton Petroleum, 490 U.S. at 178 (some internal citations omitted).

Then, in a footnote, the court firmly placed *Montana v. Blackfeet Tribe* in its narrow confine:

> Our decision in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), is not to the contrary. In that case we considered the distinct question whether the 1938 Act, through incorporation of the 1927 Act, expressly authorized direct taxation of Indian royalties. In concluding that it did not, we made clear that our holding turned on the rule that Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is "lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at

> 765. We stressed that the 1938 Act "contains no explicit consent to state taxation," and that the reverse implication of the general repealer clause that the 1927 waiver might be incorporated "does not satisfy the requirement that Congress clearly consent to state taxation."

490 U.S. at 183 n.14.

The case presently on appeal, unlike *Montana v. Blackfeet Tribe*, does not involve state taxation of the Ute Mountain Ute Tribe's royalties or any other tribal revenue. *Montana v. Blackfeet Tribe* has no bearing here. TRD realizes that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." There is an important limitation to this general interpretive aid, however. In *Rice v. Behner*, 463 U.S. 713 (1983), the Court said ". . . [w]e have consistently refused to apply such a canon of construction when application would be tantamount to a formalistic disregard of congressional intent." 463 U.S. at 732-733 (citing earlier Supreme Court precedent). The canon, of course, was not applied in *Cotton Petroleum*.

The Dates When Congress Enacted the Statutes Allowing State Taxation Do Not Have *Bracker* Significance

The trial court thought it "peculiar" that the *Cotton Petroleum* court found its earlier decision in *Blackfeet Tribe* to be consistent with "an implied congressional intent to allow state taxation in the IMLA." [RP 219.] The court based this reaction on its impression that the issue in *Blackfeet Tribe* "was the

interaction of the IMLA with the 1924 Act, not with the Indian Oil Act of 1927, as the *Cotton Petroleum* opinion stated." [RP 219.]

As TRD reads this portion of the district court's memorandum opinion, the court is saying that since the Jicarilla Apache Tribe occupies an Executive Order reservation, the court in *Cotton Petroleum* should have removed its gaze from the 1924 Act altogether, and focused solely on the 1927 Act. The tacit suggestion is that, had the *Cotton Petroleum* court done so, it would have embraced the mode of analysis adopted by the district court in the case at bar, *i.e.* the *Cotton Petroleum* court would have concluded that since the Jicarilla Apache reservation dates to the late 1800s, and the relevant federal statute allowing state taxation was enacted in 1927, the historical backdrop reflects several decades of tribal immunity from state taxation.

The *Cotton Petroleum* court, though, did not approach the exercise this way. It did not assign *Bracker* significance to the dates when 25 U.S.C. § 398 and § 398(a) were enacted. This, no doubt, was due to the court's awareness that the Congress is empowered to change federal policy, such as by authorizing state taxation, whenever it chooses to do so, and that a statute reflecting such a change in policy renders consideration of prior federal policy an irrelevant exercise. ["Although a lessee's oil production on Indian lands is therefore not automatically

exempt from state taxation, Congress does, of course, retain the power to grant such immunity."] *Cotton Petroleum*, 490 U.S. at 175.

Montana v. Blackfeet Tribe, given its narrow parameter, is not on point. But the trial court apparently saw the *dicta* in *Blackfeet Tribe* as a viable "thumb on the scales" in its workup of the historic backdrop. The relevant exercise is to see how the Supreme Court applied *Bracker* in *Cotton Petroleum*. The district court went there next.

In its study of *Cotton Petroleum*, the court saw significance in several things. It pointed out that the Cotton Petroleum Corporation, which was the plaintiff in the case, did not attempt to prove that the state taxes imposed any burden on the Jicarilla Apache Tribe. [RP 217.] The court also noted that the state district court had found that "New Mexico provides substantial services to both the Jicarilla Tribe and the lessee, including 'the benefits of living in an organized society,'" and that the state spent approximately $3 million per year on the Jicarilla reservation. [RP 218.] The court assigned importance to the fact that NMOCD "regulated spacing and mechanical integrity of wells located on the Jicarilla reservation as it did all other wells within the state." [RP 218.]

Bringing the reader back to the legal focal point, preemption, the trial judge noted that the Supreme Court "examined the purposes of the IMLA and decided that Congress intended to 'provide Indian tribes with badly needed revenue' but

did not 'intend to remove all barriers to profit maximization.'" This, of course, is correct – the *Cotton Petroleum* court concluded that since "there was no doubt at the time of enactment of the IMLA [1938] that leases on public lands were subject to state taxation, it was to be inferred that Congress would have understood tribal leases to be equally subject to state taxation." [RP 218-219.]

While it is true the Cotton Petroleum Corporation did not argue at trial that the New Mexico taxes imposed an economic burden on the Jicarilla tribe, the Jicarillas did, as *amici curiae.* [RP 218-219.]; 490 U.S. at 170. The tribe contended that a decision upholding the state taxes would substantially interfere with its ability to raise its own tax rates and would diminish the desirability of on-reservation oil and gas leases. In the Supreme Court, following the Jicarilla tribe's lead, Cotton argued that the state taxes were invalid because of the impact they had on the tribe. The court acknowledged that the state taxes, by their very nature, have a negative economic impact on the tribe, but concluded that the resulting burden was not of a magnitude to implicate tribal sovereignty. 490 U.S. at 186-187; 191.

The *Cotton Petroleum* court did not devise a quantitative test for determining when the adverse effect of state taxes on an Indian tribe constitutes such an economic burden as to insult the tribe's inherent sovereignty. It did note

that the kind of "extraordinarily high" state taxes in question in *Montana v. Crow Tribe*, 484 U.S. 997 (1998) [32.9%] falls in the forbidden zone. 490 U.S. at 187.

We know that the New Mexico taxes in question here fell on the other side of the line in *Cotton Petroleum*, and that the impact those taxes have on the Ute Mountain Ute Tribe is slightly less today than it was in 1989, when *Cotton Petroleum* was decided, thanks to New Mexico's Intergovernmental Production Tax Credit Act. [*See* RP 198, Finding 242.] We know that these state taxes do not prevent the Ute Mountain Ute Tribe from increasing its tribal taxes and do not prevent non-Indian operators from seeking lease agreements with the Tribe. [RP 203-204, Findings 284; 289-290.] And we know that "there is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the Ute Mountain Ute Tribe's ability to govern itself," the ultimate iteration of the tribal sovereignty test. [RP 206, Finding 311.] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The trial judge addressed the question he had so thoroughly staged: does the IMDA of 1982 preempt the five New Mexico taxes? After reviewing the stated purpose of the IMDA, he concluded that "the IMDA does not, at least in the first step of the *Cotton Petroleum* analysis, differ in any way from the IMLA." In other words, neither Act preempts the State taxes. [RP 221.] TRD agrees with that conclusion.

The court's qualifying clause suggests that it identified another route by which the IMDA might preempt the state taxes. That route was laid out in the pages which followed. It begins with the supposition that *Montana v. Blackfeet Tribe* stands for the proposition that "the express authorization for state taxation in the 1924 Act (25 U.S.C. § 398) was repealed by the IMLA":

> Of course, the Supreme Court in *Cotton Petroleum* already analyzed the IMLA under ordinary principles of statutory interpretation and found no Congressional intent to prohibit state taxation. As discussed above, a similar analysis finds no Congressional intent to prohibit – or to allow – state taxation of IMDA agreements. On the other hand, "even applying ordinary principles of statutory interpretation," the express authorization for state taxation in the 1924 Act was repealed by the IMLA. *Blackfeet Tribe*, 471 U.S. at 767.

[RP 225.]

From that premise, one which recognized the ruling in *Cotton Petroleum* but simultaneously invoked the *dicta* in *Blackfeet Tribe* the *Cotton Petroleum* court jettisoned, the court reasoned that "as a result, the historical backdrop of tribal sovereignty in this case differs significantly from that in *Cotton Petroleum*." Specifically, the court concluded that since the Ute Mountain Ute Tribe had rights to the New Mexico portion of its Reservation prior to 1895, there was a period in its history (1895-1924) when the doctrine of intergovernmental tax immunity would have invalidated any New Mexico severance taxes assessed against non-tribal operators. [RP 225-226.] This "historic backdrop" was seen by the court to

add fuel to the *Bracker* balancing test – fuel the court felt was lacking in *Cotton Petroleum*.

With due respect to the trial court, TRD believes the Memorandum Opinion is based on a misreading of *Blackfeet* Tribe and misapprehension of the *Bracker* interest balancing test. As the Supreme Court explained, the *Gillispie* intergovernmental immunity doctrine was law until it began "a long path in decline," marked principally by the decision in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938) (*see* the Court's discussion at 490 U.S 174-175). The Jicarilla Apache Reservation was created by an Executive Order signed by President Cleveland in 1887. Its boundaries were defined in the nineteenth century in Executive Orders issued by Presidents Cleveland and Taft. (490 U.S. at 166-167.) Thus, the Jicarillas, like the Ute Mountain Utes, were insulated by the intergovernmental immunity doctrine for several decades. If the mere existence of a changeable common law doctrine was meant to be part of the "historic backdrop" mentioned in *Bracker*, in the sense that it could be a "thumb on the scales," the *Cotton Petroleum* court would have said so and would have analyzed that case accordingly.

But the court did just the opposite. It pointed out that Congress took the step of allowing state taxation of non-Indian mineral lessees in 1924 and that its decision in *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S.

159 (1936) applied the 1924 Act to uphold state taxes imposed on the Blackfeet Reservation, which was created in 1888. 490 U.S. at 181-182 (and *see British-American*, 299 U.S. at 162).

The trial court focused on too narrow a point – taxation. The court's reference should have been to the question whether there is a "history of tribal independence in the field at issue," *i.e.*, oil and gas development. *See Cotton Petroleum*, 490 U.S. at 176. There is no such tradition. The federal government, through statutes, has closely controlled oil and gas development on Indian lands from 1891, when it was first permitted, to the present. The Congress can make changes in oil and gas policy, and Indian law generally, as it relates to Indian lands, as it sees fit ["the sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and ***is subject to complete defeasance***."] *Rice*, 463 U.S. at 719 (emphasis the Court's). In *Rice*, which dealt with the evolving federal approach to liquor regulation on Indian lands, the court noted that ". . . because of the lack of a tradition of self-government in ***the area of liquor regulation***, it is not necessary that Congress indicate expressly that the state has jurisdiction to regulate the licensing and distribution of alcohol." 463 U.S. at 731 (emphasis added). In *Ramah*, the Court focused on "the Federal Government's concern with education of Indian children." 458 U.S. at 839-840. In *Bracker*, the Court's focus was on the comprehensiveness

of the federal government's "regulation of the harvesting of Indian timber." 448 U. S. at 145.

In the trial court's view, the state taxes were only properly collectible from 1924, when 25 U.S.C. § 398 was enacted, until 1938 "when Congress replaced 1924 leases with the new regime of the IMLA." [RP 225.] But the court had already acknowledged *Cotton Petroleum's* holding that the IMLA did not preempt state taxation of non-Indian operators. [RP 221.] The court's particularized inquiry into the historic backdrop, therefore, would be skewed even if the comparison of dates was germane. Because of federal common law (*Gillispie/Helvering*), all reservations in existence prior to 1924 could have successfully attacked a state tax on their mineral lessees. Since 1924, such taxes have been valid, *i.e.* not preempted. *Cotton Petroleum*. The fact that there was an earlier period of time when no such congressional expression was made does not trump federal statutes which expressly authorize state taxation. *Cotton Petroleum*; *see, also, Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (1st Cir. 2006) (*en banc*) [tribe's prior history of independence from state process abrogated by federal statute].

The Ute Mountain Ute Tribe did not begin to lease its minerals until the 1950s. [RP 186, Finding 114.] When the Tribe started to lease its oil and gas lands, an act of Congress explicitly allowed the state to assess taxes against the

mineral lessees. The Tribe decided to negotiate oil and gas leases, therefore, knowing that such taxes could be assessed.

A "particularized inquiry" into the historical backdrop is a "flexible ***preemption*** analysis sensitive to the particular ***facts*** and ***legislation*** involved." 490 U.S. at 176 (emphasis added). When the court below seized on the *dicta* in *Blackfeet Tribe*, it drifted from the principle that the *Bracker* interest balancing test is a subset of preemption analysis, *i.e.* the test helps inform the determination of whether Congress intends that the non-Indian operators be immune from the New Mexico taxes. Whether such immunity shall be granted is a question that is "essentially legislative in character." *Cotton Petroleum*, 490 U.S. at 175.

The Tribe's real-world experience with oil and gas leasing, and, therefore, the historical backdrop of that element of its economic past, *i.e.*, the "facts and legislation involved," all falls in the period governed by 25 U.S.C. § 398. It is not possible to conclude, based on that history, that Congress intended the Ute Mountain Ute Tribe's lessees to be immune from state taxation, any more than it was possible to reach such a conclusion with regard to the Jicarillas in *Cotton Petroleum*.

As the trial court saw it, the fact that the Ute Mountain Ute Reservation existed prior to 1924 helped to take the case out of *Cotton Petroleum's* orbit. The court referred to the case as falling "between *Bracker* and *Ramah* on one hand and

Cotton Petroleum on the other." [RP 223.] Fortified by its interpretation of *Montana v. Blackfeet* Tribe, the court detected that it was liberated to some degree from *Cotton Petroleum, i.e.* that it was empowered to make a number of policy decisions in resolving the case.

The Court's Quantitative Analysis

In his analysis, the learned trial judge created a ledger of sorts, with the financial impact of the state taxes on one side and the value of state services on the other. The court chose to place heavy emphasis on the lack of meaningful state services delivered directly to the Tribe, but to assign no weight to the "substantial" state services it found were delivered to the Tribe's oil and gas lessees. The court acknowledged that the same five taxes imposed an indirect burden on the Jicarilla Apache Tribe in *Cotton Petroleum*, but then applied a quantitative test of its own devising not found in *Cotton Petroleum*. ["The *Cotton Petroleum* opinion merely states that the burden in that case was '***too*** indirect and ***too*** insubstantial.' There is simply no categorical rule that ***any*** indirect burden cannot be a basis for preemption."] [RP 223.] (emphasis the court's; internal citation omitted).

The court's quantitative test is not authorized by *Cotton Petroleum*. Even if it was, the outcome of the test, *viz*, the placing of the court's thumb on the scales in favor of the Tribe, is not supported in the record.

The court found significance in the fact that the impact of the five taxes on the Ute Mountain Ute Tribe is about $650 per-member-per-year. It noted that an extra $650 per year in income for tribal members would be meaningful, given the relative poverty of the Ute Mountain Ute Tribe. [RP 227.] This is true, without a doubt. But the *Cotton Petroleum* analysis is not so simplistic. The court in *Cotton Petroleum* focused on the overall economic picture, taking the value of the oil and gas leases and the value of living in an organized society into account. 490 U.S. at 191. The Supreme Court's conclusion was that a state tax would have to be in an entirely different echelon to impose the kind of burden the Congress would be assumed to condemn. 490 U.S. at 187 n. 17.

Perhaps the trial court's feeling was that *Montana v. Blackfeet Tribe* permits a judge to apply a sliding scale and to decide as a matter of judicial policy when a given tribe's poverty justifies departure from *Cotton Petroleum's* reasoning. There is no language in *Cotton Petroleum* suggesting this. The assumption of such authority by a trial judge is fraught with the danger of arbitrariness. The outcome of state tax cases would be driven by the philosophical leanings of individual jurists. One of the most important factors in a case would be the identity of the judge to whom it is assigned. The trial court's quantitative approach is obviously well-intentioned. Its paternalistic roots, however, cannot be found in *Bracker*, *Ramah*, *Cotton Petroleum* or their progeny.

The Other Factors Considered by the Court Are Virtually Identical to those in *Cotton Petroleum*

The Court attached significance to the fact that neither the Tribe nor the operators have the power to affect the market price of oil and gas, but that the operators have the power and ability to go places other than Ute Mountain Ute lands if the Tribe imposes an additional tax. [RP 226.]

The production of oil and gas on Ute Mountain Ute tribal lands would have to be enormous, to the point of dominating the national/international market, to give the Tribe or its lessees the power to determine market price. But the same was true of the Jicarilla Apache Tribe in *Cotton Petroleum*. In both instances, the operators had the ability to pull up stakes if the tribal taxes became onerous. In the case at bar, the court found that the operators willingly accepted their leases and signed their Indian Mineral Development Agreements knowing that they would be paying both state and tribal taxes. [RP 203, Findings 284; 285.] The court found that there is at least one agreement which sets a cap of 30% on tribal revenues, but that the total tribal revenues do not approach that threshold. [RP 204, Finding 290.] This is another way of saying that the Tribe can, in fact, increase its taxes without adversely affecting on-reservation oil and gas development. *See* 490 U.S. at 185. The court went on to find that total tribal revenue from development agreements, including those which cap revenue at 30%, is not a substantial part of Ute Mountain Ute revenue [RP 204, Finding 295] and that the much greater part of

tribal revenue comes from leases with no such cap. [RP 204, Finding 296.] In short, there is no distinction at all on these points between *Cotton Petroleum* and the case presently on appeal.

The trial court also assigned importance to the fact that the Ute Mountain Ute Tribe is not itself a direct consumer of state services.

For a state tax to be valid, it must be related to services rendered by the state. *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 843; *Cotton Petroleum*, 490 U.S. at 185. *See also Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (2008) ["The Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: 'the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax.'"] (citing *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995) and *see Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112 (9th Cir. 1997) [emphasizing the state's provision of substantial services to the non-Indian taxpayer].) We find no rule in the cases involving taxation of non-Indian extractors that the Tribe itself, or its members, must be the direct recipients of such services.

The members of the Ute Mountain Ute Tribe, as individuals, do not consume state services to a meaningful degree. They live in Colorado. But the Tribe's oil and gas operators do. It was NMOCD which established the oil and gas pools from which the operators extract these substances. [RP 184, Finding100.] Over the decades, New Mexico has built and maintained an elaborate regulatory infrastructure, including a hearing process for resolving disputes between operators, an administrative process for approving requests for such things as non-standard locations and comingling, publicly available geologic records, production records and records of sales and transfers, and environmental clean-up and site inspection. [RP 199-200, Findings 250; 253.] The court found that "***because it is in New Mexico's governmental interest***, the state would continue to provide these services to the Ute Mountain Ute Tribe's operators even it if was not able to assess the taxes in question." [RP 200, Finding 251; TR 309; 367-368.] (emphasis added)

The gas and oil extracted by the Tribe's operators is essentially without value until it is processed. [RP 201, Finding 262.] Processing takes place in New Mexico but off of the reservation. In order to refine the oil and process the gas, the Tribe's operators use roads and gas transmission lines regulated by the state. [RP 200-201, Findings 260; 261.] The trial court found that "the state provides substantial services by regulating the off-reservation infrastructure that makes

transport of oil and gas possible," and that "the economic value ***to the Ute Mountain Ute Tribe*** of services provided by the State of New Mexico off the New Mexico [Ute Mountain Ute] lands ***to oil and gas operators*** is substantial." [RP 201, Findings 263; 265 (emphasis added).] In making these findings, the court was acknowledging that the Tribe's royalty and tax income is a direct function of the financial success of its oil and gas lessees, who utilize the "substantial" State services. *See* the uncontroverted testimony of John Tysseling, Ph.D., [TR 408-419; 428-429.]

The court also found that "the economic value to the Ute Mountain Ute Tribe of services provided by the State of New Mexico ***on the New Mexico [Ute Mountain Ute Tribe] lands*** is *de minimis*. [RP 201, Finding 264 (emphasis added).] But this is because the Tribe has chosen not to permit employees and agents of NMOCD to come onto tribal lands, and New Mexico has chosen to comply with the Tribe's wishes. The operators, however, comply with New Mexico's regulatory statutes and administrative regulations. They make all required filings and avail themselves of the hearing and administrative processes offered by NMOCD. (*See, e.g.*, Trial Exhibits E, F, H, O, Q and R [RP 565-1005; 1006-1224; 1230-1254; 1380-1392; 1393-1394].) If a given operator were to become non-compliant, NMOCD would have the power to enforce its regulations without going onto the reservation. [TR 233; 361-362.] Representatives of the Ute

Mountain Ute Tribe and BLM attend and participate in NMOCD administrative hearings when the Tribe feels it may have an interest in the subject matter. [RP 643; 647; 680; 734; 748; 379; 874; 879; 923-925; 971-972; 987.]

The evidence funnels down to the trial court's finding that the economic value to the Tribe of the off-reservation services the state provides to its operators is substantial. Without those state services, as the court itself found, the oil and gas that generates the Tribe's royalties and its own tax income would be worth "substantially less." [RP 201, Finding 262.] The economic reality in this case, as in *Cotton Petroleum*, is that New Mexico has a legitimate governmental interest in participating, with BLM, in the protection of these exhaustible natural resources. The tribe cannot eradicate this interest by refusing to permit a state's oil and gas authority to enter its tribal lands. *Cotton Petroleum* does not suggest that Congress would expect non-Indian operators to escape their state tax obligation if the tribe from whom they lease closes its gates to state regulators. This is particularly true where the operators are the beneficiaries of the full range of state services aimed directly at their industry. *See Cotton Petroleum* at 188 [". . . [A]ll of Cotton's leases are located entirely within the borders of the State of New Mexico and are also within the borders of the Jicarilla Apache Reservation. Indeed, they are also within the borders of the United States. There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-

Indian wells."] *Generally, see Yavapai-Prescott Indian Tribe v. Scott*, [the courts look at economic reality, regardless of unilateral acts by the tribe having possible state tax implications].

The trial court noted that some of the services offered to operators by New Mexico have not been needed in recent years, or have not been taken advantage of. (*See* [RP 199, Finding 247] (NMOCD has not actually plugged an abandoned well on Ute Mountain Ute lands) and [RP 200, Finding 252] (there has not been an actual dispute between operators concerning extraction on Ute Mountain Ute lands).) The salient point is that these services are available if and when needed. The fact that the Tribe's operators have not needed to have a dispute resolved does not mean that this will always be the case. More fundamentally, an operator cannot avoid payment of a state tax by showing that it has not been a consumer of a particular service financed by tax revenues. *See* the discussion in *Cotton Petroleum* at 490 U.S. 190.

The court closed out its analysis by considering the involvement of BLM and NMOCD in oil and gas operations on Ute Mountain Ute tribal lands. [RP 228-233.] One of the elements in the *Bracker* interest-balancing test is the determination whether federal law "imposes a comprehensive regulatory scheme." *Cotton Petroleum*, 490 U.S. at 184-185. The question for resolution, therefore, is whether the federal regulatory scheme is so pervasive as to lead to the conclusion

that Congress, by authorizing the federal regulations, impliedly preempted the New Mexico taxes or, to put it another way, impliedly repealed 25 U.S.C. § 398 insofar as the Ute Mountain Ute Tribe is concerned.

In *Cotton Petroleum*, the court found that the federal regulatory scheme, although extensive, was not exclusive. 490 U.S. at 186. In making this point, the court reviewed federal regulations which dealt with spacing, drilling, the plugging of wells, reporting requirements and environmental protection. (*See* 490 U.S. at 186, n.16.) Those same federal regulations, in their current iteration, exist today. (Generally *see* 25 C.F.R. Part 225.) They do not purport to be exclusive.

The evidence at trial shows, without contradiction, that NMOCD has a long standing cooperative regulatory relationship with BLM, in recognition of their joint interests. [TR 223-229.] BLM initially processes applications to drill on Ute Mountain Ute tribal lands, then sends the forms on to NMOCD for its approval. [Exhibit Q-3, RP 1296; 1301-1302.] Various BLM forms are printed with both federal and state regulatory input in mind. [*See, e.g.* RP 460 ("NMOCD approval not yet granted.").] Federal and state regulators cross-copy each other on relevant correspondence. [*See, e.g.* RP 380; 423-430; 478.] Operators copy the state, BLM and the Tribe on matters involving locations on the reservation. [*See, e.g.*, RP 477.] NMOCD's electronic database is heavily utilized by BLM. [TR 236.] BLM has reminded the Tribe of the availability of NMOCD's service of plugging

abandoned wells without charge. [RP 1307.] Relevant federal regulations invoke state law and remind the operator of the need to comply with state law. *See, e.g.* 43 C.F.R. § 3162.2-2, § 3162.3-1, § 3162.3-4, § 3162.5-3. Permits to drill issued by BLM sometimes incorporate NMOCD compliance requirements. [*See, e.g.* RP 391-392; 420-421.]

In short, the interplay between federal and state regulations is no different today than it was in 1989.

The trial judge saw significance in a single sentence in the *Cotton Petroleum* decision in which the court noted that New Mexico actively regulated the spacing and mechanical integrity of wells on Jicarilla Apache tribal lands. [RP 228]; *see Cotton Petroleum*, *id.* at 189. Because the Ute Mountain Ute Tribe has denied NMOCD access to the reservation, the state was unable to demonstrate current on-site mechanical integrity inspections. The spacing of wells on Ute Mountain Ute lands was established by the State years ago. The court acknowledged that New Mexico has a governmental interest in oil and gas activities on the reservation. [RP 200, Finding 251.] That interest does not begin or end at the reservation border. The court found that off-reservation State services are substantial. It also found that the extractive work done by oil and gas operators has environmental

implications, such as the loosing of toxic gases and potential contamination of ground water. [RP 191.][6]

The language the court referred to in *Cotton Petroleum* does not suggest that a state's regulatory body has to be currently active on an Indian reservation to demonstrate the kind of governmental interest referred to in the *Bracker* interest-balancing test. New York, for example, has a legitimate interest in regulating tobacco sales on Indian reservations within its borders even if nothing has actually happened which would trigger active involvement. (*See Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61 (1994).)

The bottom line is this: the portion of the Ute Mountain Ute reservation which is located in New Mexico contains oil and gas. The oil and gas, therefore, is in New Mexico. *Cotton Petroleum*, 490 U.S. at 188. New Mexico has a governmental interest in regulating non-Indian oil and gas operators who conduct their activities in the state. The Supreme Court eschews quantitative analysis of the state's interest. *Cotton Petroleum*; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937). It is the overall economic picture to which *Bracker's* balancing test is applied. In the case at bar, both the operators and the

[6] In Finding of Fact No. 180, the court found that "There is no evidence in the record of actual or potential environmental effects on adjoining private, state, federal or tribal lands from surface disruption on the New Mexico lands." While this is technically true, the witness Frank Chavez (NMOCD) testified that BLM had recently approached NMOCD to discuss a potential problem with H_2S gas at a particular well site. [TR 302-303.]

Tribe substantially benefit from off-reservation services provided by New Mexico. Without those services, the Tribe's royalties and taxes from the operators' sale of the oil and gas would be substantially impaired. This is not a case, therefore, in which the state has "nothing to do with on-reservation activity, save tax it." 490 U.S. at 186.

As in *Cotton Petroleum*, and unlike *Bracker* and *Ramah*, the primary burden of the state taxes falls on the non-Indian operators. As in *Cotton Petroleum*, the Ute Mountain Ute Tribe can increase its own taxes without adversely affecting on-reservation oil and gas development. As in *Cotton Petroleum*, and unlike *Bracker* and *Ramah*, the federal regulations are extensive, but not exclusive.

The factual distinctions between *Cotton Petroleum* and this case are legally insignificant. This is not a case that falls somewhere between *Cotton Petroleum* on the one hand and *Bracker/Ramah* on the other. It is *Cotton Petroleum* revisited.

CONCLUSION

For the reasons stated, the judgment entered by the district court should be reversed.

ORAL ARGUMENT STATEMENT

Defendant-Appellant requests oral argument. This appeal involves an important question concerning the reach of *Cotton Petroleum* and, specifically, the ability of a State government to apply its taxes to non-Indian extractive businesses which operate in the State and are beneficiaries of State services directly applicable to the industry. The case could have implications beyond these parties and beyond New Mexico.

DISTRICT COURT'S DECISION

A true copy of the district Court's Findings of Fact, Conclusions of Law and Memorandum Opinion is attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January, 2010 I filed the foregoing **Defendant-Appellant's Brief in Chief** electronically through the CM/ECF system. I ALSO CERTIFY that Daniel Israel, Timothy Vollman and Peter Ortego are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I FURTHER CERTIFY that I mailed a copy of the foregoing brief to Daniel H. Israel, 1315 Bear Mountain Drive, Boulder, CO 80305; Peter Ortego, One Mike Walsh Road, P. O. Box 128, Towaoc, CO 81334; and Timothy A. Vollmann, 3301-R Coors Road NW, #302, Albuquerque, NM 87120.

/s/ John B. Pound
JOHN B. POUND

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No privacy redactions were necessary. Therefore, the document submitted in digital form is an exact copy of the written document filed with the Clerk. In addition, the digital submission has been scanned for viruses with the most recent version of Marlwarebytes Version 2775 and, according to the program, is free of viruses.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,764 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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