CASE NO. 09-2276
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE MOUNTAIN UTE TRIBE

Plaintiff/Appellee,

vs.

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

Defendants/Appellants.

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

RESPONSE BRIEF OF APPELLEE UTE MOUNTAIN UTE TRIBE

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee ("Tribe" or "UMUT") does not request oral argument.

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

The following are parties to this litigation, including persons or other entities financially interested in the outcome of the litigation, but not revealed by the caption on appeal, *see* 10th Cir. R. 46.1(C), and attorneys not entering an appearance in this court who have appeared for any party in prior trial or administrative proceedings sought to be reviewed, or in related proceedings that preceded the subject action in this court:

None.

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STATEMENT OF RELATED CASES

The Tribe is not aware of any related cases.

JURISDICTIONAL STATEMENT

The Tribe does not dispute the jurisdictional statement submitted by Defendants-Appellants ("Homans").

ISSUES PRESENTED

Homans presents this Court with ten legal issues for review. (Opening Br. 2-4.) After reviewing the text of Homans' Opening Brief, the Tribe can identify only three issues relevant for review[1]:

1. May Homans tax oil and gas production on tribal trust lands on the Ute Mountain Ute Reservation when the State of New Mexico provides no services to the Reservation?

2. Is Homans' regulation of the off-reservation natural gas transportation infrastructure for intrastate and interstate consumption a sufficient basis for taxation of Reservation oil and gas production?

3. How is this case different from Cotton Petroleum Corp. v. New Mexico, 493 U.S. 163 (1989)?

[1] In identifying these three issues, the Tribe notes that Homans has already agreed to the District Court's 311 findings of fact (Opening Br. 20) and recognizes the applicability of the "particularized inquiry" preemption analysis developed in Cotton Petroleum 493 U.S. 163 and its predecessors White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); and Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982). (Opening Br. 34, n. 5 (stating, "Thus, [Homans] did not (and does not) take the position that the Bracker interest-balancing test is inapplicable.").)

STATEMENT OF THE CASE

The Tribe does not dispute the Statement of the Case submitted by Homans.

STATEMENT OF FACTS

The Ute Mountain Ute Reservation lies within both the States of Colorado and New Mexico in the Four Corners Region. The New Mexico portion of the Reservation ("the New Mexico Lands") was set aside for the Tribe by an 1895 Act of Congress. 28 Stat. 677. [RP 175, Finding 9.] All of the New Mexico Lands are held by the United States in trust for the Tribe. [RP 176, 185, Findings 15, 103.] Currently, no one resides on the New Mexico Lands; they are used by the Tribe for livestock grazing and oil and gas development. [RP 176, Findings 16-17, 19.] The State of New Mexico provides no services on the Reservation. [RP 177, 199, Findings 28, 245.]

There are slightly more than 2,000 members of UMUT, 38.5 percent of whom lived below the poverty line at the time of the 2000 census. [RP 175, 206, Findings 3, 308.] The *per capita* income of tribal members was $8,159.00 during the 2000 census, approximately half the average for the residents of Montezuma County, Colorado, and San Juan County, New Mexico. [RP 205-06, Findings 305-06.] In 2000 the unemployment rate among tribal members was 11.3 percent, as compared to a range of 2.7 percent to 5.5 percent in the corresponding counties and states. [RP 206, Finding 307.]

Oil and gas leasing of the New Mexico Lands began in the 1950s. [RP 186, Finding 114.] Leases were originally entered into pursuant to, the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396a-396g. [RP 185-186, Finding 113.] Currently most of the mineral development agreements the Tribe negotiates and enters into are mineral development agreements pursuant to the Indian Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. § 2101 et seq. [RP 186, Finding 115.] These agreements expand the Tribe's opportunity to be an active participant in mineral development of its lands. [RP 186-87, Findings 119-24.] All leases and agreements require the approval of the Secretary of the Interior, whose authority has been delegated to the Bureau of Indian Affairs ("BIA"). [RP 187, Findings 125, 129-30.] Surface management, including the granting of easements and oversight of cultural resources, is the responsibility of the BIA and the Tribe. [RP 189, Findings 148-49, 155.] Under federal law (25 U.S.C. § 396d and regulations promulgated pursuant thereto) all oil and gas operations ("downhole") are supervised by the Bureau of Land Management ("BLM"), in cooperation with the BIA and the Tribe. [RP 188-89, Findings 138-45, 150-55.] BLM approves Applications for Permits to Drill ("APD"), oversees the disposal of produced water, protects the mechanical integrity of the wells, and oversees the abandonment and plugging of wells, among other operational activities on the Ute Mountain Ute Reservation. [RP 189-90, Findings 142, 158-65.] After BLM

approves permits, it forwards the applicable form to BIA and the New Mexico Oil Conservation Division ("NMOCD"). [RP 189, Finding 157.] There is no provision in federal or tribal law for state approval of any oil and gas activities on the Ute Mountain Ute Reservation, and the District Court found to be *de minimis* the economic value of New Mexico's services to oil and gas operators on the New Mexico Lands. [RP 201, Finding 264.] The District Court also concluded that federal regulation of oil and gas operations on the Ute Mountain Ute Reservation is exclusive. [RP 228.]

There are 186 active wells on the New Mexico Lands, out of 23,000 active oil and gas wells in the New Mexico portion of the San Juan Basin, a geologic formation, and over 50,000 active wells in the entire state. [RP 181-82, 200, Findings 71-73, 256.] NMOCD is responsible for the regulation of oil and gas operations in the State of New Mexico.[2] That includes protection of the public from the adverse environmental effects of petroleum production. However, except

[2] Pages 13-15 of the Statement of Facts in Homans' Opening Brief describe the mission, policies, and procedures of the NMOCD with few references to the District Court's findings. The Tribe does not dispute these descriptions, except for any inference that the legal authority of NMOCD extends to the New Mexico Lands or that NMOCD exercises concurrent jurisdiction over UMUT oil and gas operations with BLM—propositions which Homans unsuccessfully sought to prove at trial. The Tribe submits that numerous findings of fact support the District Court's conclusion that the economic value of NMOCD regulation of oil and gas operators on the New Mexico Lands is *de minimis*. In view of the statement in Homans' Opening Brief that Appellant does not take issue with any of the District Court's findings, the Tribe offers only a short summary of the court's findings pertaining to the role of NMOCD. (Opening Br. 20.)

for two citizen complaints of hydrogen sulfide ("H_2S") originating from wells on the New Mexico Lands, no evidence was introduced to show that wells operated on the New Mexico Lands have caused any actual or potential adverse environmental effects, including groundwater contamination or effects on wildlife, on any lands adjoining the Ute Mountain Ute Reservation. [RP 191, Findings 171-82.]

Historically, BLM has generally adopted well-spacing and setback requirements set by state agencies. [RP 194, Finding 203.] In 1995 and 1996 BLM issued two orders, called Ute Mountain Ute #1 and #2, respectively. These orders establish well spacing for wells for certain of the most active formations on the Reservation. The BLM presented its plan at hearings scheduled by NMOCD and the Colorado Oil Conservation Division. [RP 250, 266.] For each formation named, specific drilling and spacing units were established. The purpose of developing this programmatic scheme was to protect the correlative rights of all parties concerned, to prevent drilling of unnecessary wells, and to promote conservation of UMUT oil and gas resources. [RP 192-93, Findings 183-91.]

In addition, Ute Mountain Ute #1 permitted commingling of several of the newly designated formations. [RP 193, Finding 191.] It also allowed BLM officers to authorize exceptions when topographical, surface hazards, and archaeological sites presented themselves. [RP 255.]

The BLM retained the authority for the granting of permits for non-standard spacing and infill wells. [RP 192, Finding 189.] In 1999 BLM and NMOCD entered into a Memorandum of Understanding ("MOU") pursuant to which NMOCD issued draft orders for Indian lands, including UMUT lands, and the BLM would review such orders and make an independent decision on whether to approve them. [RP 193-94, Findings 192-202.] The MOU expired in 2004 [RP 194, Finding 202], and was not renewed at the election of NMOCD [TR 395-97].

Since 1992 the Tribe has barred NMOCD officials from entering the Reservation without permission. [RP 194, Finding 207.] A 2002 publication from the website of the New Mexico Department of Energy, Minerals, and Natural Resources (of which NMOCD is a part), states: "The State of New Mexico does not have jurisdiction [over energy and minerals development] on Indian reservation … lands." [RP 285.] That publication was withdrawn from the website prior to the trial in this case, and NMOCD continues to require operators on the New Mexico Lands to fill out forms and to seek approvals for activities already approved by BLM. [RP 180-81, Findings 62, 64.] Under regulations promulgated on December 1, 2008, NMOCD requires those operators to use BLM forms for permit applications and various reports, but NMOCD still requires its approval after BLM approval. [RP 180, Finding 62.] When an operator does not follow NMOCD regulations or fill out the required forms, NMOCD may revoke

the operator's authority to transport natural gas or oil within the State of New Mexico, making it difficult for the operator to continue operations on the New Mexico Lands. [RP 180-81, Finding 64.]

All oil and gas operators on the New Mexico Lands pay royalties to the Tribe, and the federal Minerals Management Service ("MMS") performs royalty accounting and auditing in conjunction with the Tribe's own program. [RP 187, Findings 133-34.] Royalties are based on the value of the natural gas produced at the wellhead. [RP 201, Finding 267.][3] In 2007 UMUT oil and gas royalties totaled $4,426,741.00, mostly from the New Mexico Lands. [RP 201, Finding 271.] They are distributed to tribal members on a *per capita* basis. [RP 201, Finding 270.] Since 1983 the Tribe has also imposed taxes on Reservation oil and gas development, and the Tribe uses this revenue to defray its costs of providing basic governmental services to tribal members. [RP 202, Findings 272-78.]

The State of New Mexico imposes five taxes on oil and gas development on the New Mexico Lands: an Oil and Gas Severance Tax, an Oil and Gas Conservation Tax, an Oil and Gas Emergency School Tax, an Oil and Gas Ad Valorem Production Tax, and an Oil and Gas Ad Valorem Production Equipment

[3] The Statement of Facts in the Opening Brief contains a lengthy footnote 2 asserting that oil and natural gas produced on the Reservation "has no discernible value" until it is processed off of the Reservation. (Opening Br. 8.) However, no finding of fact of the District Court supports that proposition, and as explained in Section IV(C)(2) of the Argument below, this assertion is untrue.

Tax. [RP 195, Finding 213.] The revenues from these taxes go variously to meet the State's debt obligations, are put into the General Fund, are allocated to local governments (not including UMUT), and are used to pay for plugging abandoned wells.[4] [RP 196-97, Findings 222, 224, 227, 229, 232.] The State offers tax credits for wells drilled on tribal lands since July 1, 1995. [RP 197-98, Findings 234-39.] Under the Intergovernmental Production Tax Credit, if the Tribe increases its tax rate, the State reduces the operator's credit by the amount of the tribal tax increase. [RP 198, Finding 243.] For the years 2002-2007 the aggregate of the five New Mexico taxes on oil and gas production on the New Mexico Lands totaled $8,052,449.00, or a yearly average of over $1.3 million. [RP 204, Finding 293.]

The District Court found that these five taxes impose an economic burden on the Tribe and its members in a number of respects. [RP 206, Finding 310.] Without the New Mexico tax, oil and gas operators could seek to increase production on the New Mexico Lands by discovering new sources of oil and gas, by drilling infill wells on existing pools, or by bringing back into production wells that are not profitable under the current taxes. [RP 205, Finding 299.] The increase in production through discovery of new sources of oil and gas would increase UMUT revenue from royalties and the current taxes. [RP 205, Finding

[4] NMOCD offers to plug abandoned wells on the New Mexico Lands but there is no evidence it has ever done so. [RP 199, 200, Findings 247, 259.]

300.] Increased production through infill or reopening closed wells on pools that lie within the New Mexico Lands would also increase UMUT revenue. [RP 205, Finding 301.] And if the Tribe were to impose the taxes which the State now imposes on Reservation oil and gas operators, as authorized by Council Resolution No. 3874 [RP 271], it would gain at least $1.3 million per year, which would increase tribal revenue from all sources ($16,052,092.00 in 2007 [RP 205, Finding 304]) by over 8 percent, or if that additional revenue were distributed *per capita*, the average annual income of tribal members would increase by $650.00. [RP 204, Finding 297.]

The District Court also found, "[O]ther than opening its courts to the UMUT,[5] and offering plugging of abandoned wells, New Mexico provides no services directly to the UMUT [and] [t]here is no evidence in the record that members of the UMUT make use of services provided by New Mexico …" [RP 199, Findings 248-49.]

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[5] The only example of this given by the District Court is the Tribe's intervention in the San Juan River Basin general stream adjudication, New Mexico ex rel. State Engineer v. United States, Civil No. 75-184 in State District Court in San Juan County. [RP 199, Finding 246.] But the Tribe's intervention was necessitated by the Supreme Court ruling that state courts have jurisdiction to adjudicate Indian reservation water rights by suing the United States pursuant to the McCarran Amendment, 43 U.S.C. § 666. C. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Unless an Indian tribe intervenes to protect its own water rights, they will be adjudicated anyway, and "the right to refuse to intervene" is thus "dubious at best." Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 567 n. 17 (1983).

SUMMARY OF ARGUMENT

The Ute Mountain Ute Tribe asserts that the State of New Mexico is preempted from taxing the non-Indian oil and gas operators producing on the New Mexico Lands. The New Mexico Lands are uninhabited, and the District Court found the State of New Mexico provides no services on the New Mexico Lands.

In accordance with Supreme Court precedent, the courts engage in a "particularized inquiry" to determine whether state taxation of non-Indian operators on tribal lands is permissible. In carrying out this particularized inquiry the courts weigh the competing federal, tribal, and state interests. While courts may look at multiple factors, three factors have been given primary importance in the particularized inquiry: the comprehensiveness of federal regulation, economic harm to the tribe, and services provided by the state.

In its brief, the Ute Mountain Ute Tribe will demonstrate that the District Court correctly held that the taxes are preempted because the federal regulatory scheme is comprehensive, the five New Mexico taxes economically harm the Tribe, and the State of New Mexico provides no services that would justify this taxation. New Mexico's only interest in the New Mexico Lands is a desire to raise revenue.

ARGUMENT

I. STANDARD OF REVIEW.

Both Homans and the Tribe accept the District Court's 311 findings of fact. (Opening Br. 20.) These findings may only be set aside if they are clearly erroneous. Fed. R. Civ. P. 52(a) (6); Four Sons Bakery Inc. v. Dulman, 542 F.2d 829, 832 (10th Cir. 1976); Cf. F.W. Hempel & Co., Inc v. Metal World, Inc., 721 F.2d 610, 611 n. 1 (7th Cir. 1983) (stating that, when neither party challenges a finding of fact, there is no reason for the reviewing court to deem it clearly erroneous). Appellate review of the District Court's conclusions of law is *de novo*. Cortez v. McCauley, 478 F.3d 1108, 1115 (10th Cir. 2007).

II. HISTORICAL BACKGROUND

The Ute Mountain Ute Tribe has a long-standing relationship with the United States. The Ute Mountain Ute Tribe today consists of one band of Ute Indians, the Weeminuche Band. Since the first treaty in 1868[6] with the Confederated Utes, the tribal lands were reduced to where the Tribe is today.[7] [RP 175, Finding 4.] The New Mexico Lands were set aside for the Tribe by the Act of

[6] Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, March 2, 1868, 15 Stat. 619. [RP 175, Finding 4.]

[7] Brunot Agreement, Act of April 29, 1874, 18 Stat. 37, and Act of June 15, 1880, 21 Stat. 199.

Congress in 1895. 28 Stat. 677. [RP 175, Finding 9.] The Tribe is a "domestic dependent nation" of the United States, Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), and as such, enjoys the powers of self-governance free from state interference, including state taxation. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 170-171 (1973). Congress has the exclusive power to regulate commerce with Indian tribes, id. at 172, and the United States Supreme Court has frequently recognized Congress' authority to protect tribal immunity from state taxation. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 473 (1976). Only in very narrow circumstances may a state tax tribal commerce, such as oil and gas development, on tribal lands.

As discussed below, New Mexico imposes five state taxes on operators who, with the consent of the Tribe and the United States, sever oil and gas from the New Mexico Lands as part of the Tribe's efforts to develop its oil and gas resources. Although the Tribe respects New Mexico's sovereign authority to tax activities over which it has jurisdiction, the taxes in dispute are for activities occurring entirely within the boundaries of the Ute Mountain Ute Reservation and substantially interfere with the Tribe's sovereign right to protect, utilize, and develop its resources.

III. UNITED STATES SUPREME COURT PRECEDENT ESTABLISHES A FLEXIBLE PREEMPTION ANALYSIS FOR DETERMINING WHETHER STATES MAY TAX NON-INDIANS DEVELOPING RESERVATION-CREATED RESOURCES.

The controlling legal standard for assessing whether states may tax non-Indians engaging in on-reservation economic activities is set out in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); and adhered to in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). In Bracker, the United States Supreme Court determined that the proper legal assessment of state taxation of non-Indian, on-reservation activity is to undertake a unique, federal Indian law preemption-based analysis. 448 U.S. at 144-45. This analysis is not "dependent on mechanical or absolute conceptions of state or tribal sovereignty," but instead, looks at the important backdrop of tribal sovereignty and requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." Id. at 145. See [RP 209].

The Bracker Court used this "particularized inquiry" analysis to determine whether the State of Arizona could impose a motor carrier license tax and an excise fuel tax on a non-Indian company participating in the development of timber resources on the Fort Apache Reservation. Id. at 145-46. During the particularized inquiry analysis, the Bracker Court assessed the federal interest in reservation timber and roads, the White Mountain Apache Tribe's interest in

making productive use of its timber, and Arizona's interest in the timber production. See id. at 145-151. [RP 209.] It first determined that the White Mountain Apache tribal timber development was governed by comprehensive federal regulations. Id. at 148. [RP 209.] Next, it determined that the economic burden of the state tax on the White Mountain Apache Tribe would interfere with the federal objective of providing the tribe with the benefits of its resources. Id. at 148-50. [RP 209.] Third, it determined that Arizona provided no regulatory function or service to the White Mountain Apache Tribe. Id. at 148-49. [RP 209.] Finally, it concluded that the state had only a "generalized interest in raising revenue" from the on-reservation economic activity. Id. at 150. [RP 209.] Thus, even though the Bracker Court acknowledged that the economic burden of the Arizona taxes was relatively small, it held that the balance of the interests favored the federal preemption of Arizona's taxes. See id. at 154 (Stevens, J., dissenting). [RP 209.]

Two years later, the Supreme Court expanded and clarified the Bracker particularized inquiry analysis to determine whether New Mexico could impose a gross receipts tax on a non-Indian construction company that was building a school for Indian children on reservation lands. Ramah, 458 U.S. 832. Again, the Court used the particularized inquiry analysis to balance the federal interests in promoting self-sufficiency in Indian education, the tribal interests in Indian

education, and the state interests in regulating and taxing federally-funded schools. See id. at 838. [RP 210.] In Ramah, New Mexico faced a history of extensive federal regulation of Indian educational facilities and express federal policy of encouraging self-sufficiency in Indian education. Id. at 839-42. To overcome the lack of State investment in and oversight of the Navajo schools, New Mexico argued that the services it provided to the construction company off the reservation and other, unrelated services it provided to the Navajo Nation were substantial and justified the imposition of the tax. Id. at 843-45. [RP 210.] The Ramah Court rejected both arguments, and held that, because New Mexico's only interest in the school construction was a general desire to raise revenue, the tax was preempted. Id. at 844-45 n. 9-10. [RP 210.]

Importantly for this case, in 1989 the United States Supreme Court upheld and applied the Bracker particularized inquiry analysis in the setting of New Mexico's oil and gas production taxes imposed on the Jicarilla Apache Indian Reservation. Cotton, 490 U.S. at 176 (confirming that the Supreme Court has "applied a flexible preemption analysis sensitive to the particular facts and legislation involved"). In Cotton—a Commerce Clause case brought not by a Tribe but by a producer seeking to free itself from both state and tribal taxes—the Supreme Court's examination confirmed that a traditional statutory preemption analysis alone is not appropriate without an examination of competing interests on

the reservation commerce in question. See id. Presented with a particular set of facts developed by the New Mexico state courts, the Cotton Court determined that, upon balancing the competing state, tribal, and federal interests, the state taxes were not preempted on the Jicarilla Apache Reservation. See id. at 185 (stating: "The factual findings of the New Mexico District Court clearly distinguish this case from both Bracker, supra, and Ramah Navajo School Bd., supra" and applying those factual findings to the law).

These cases set out the baseline for the flexible, particularized inquiry analysis used today to determine whether states may tax non-Indians engaging in on-reservation economic activities. In general, the first step in undertaking the particularized inquiry is to determine whether there is a comprehensive federal framework for regulation and management of the on-reservation activity and a strong history of active tribal participation within that framework. Ramah, 458 U.S. at 839-43; Bracker, 448 U.S. at 145-50; Cotton, 490 U.S. at 181-82 (analyzing the federal framework for Executive Order reservation oil and gas development). If so, that presence will demonstrate both strong federal and tribal interests and a strong backdrop of tribal sovereignty in the area of the taxed economic activity. See id.

Second, the state asserting its taxation jurisdiction must demonstrate a specific, legitimate regulatory interest in the reservation activity and must provide

substantial services related to that activity to justify any on-reservation taxation activity. Ramah, 458 U.S. at 843-45; Bracker, 448 U.S. at 150. Importantly, in this analysis, state provision of off-reservation services does not justify on-reservation taxation. Ramah, 458 U.S. at 844 n. 9. Finally, if the only state interest in the on-reservation activity is a general desire to raise revenue, that interest will be insufficient to overcome a comprehensive federal and tribal management scheme. Ramah, 458 U.S. at 845; Bracker, 448 U.S. at 150-51.

This particularized inquiry analysis has been consistently affirmed by the United States Supreme Court and the federal circuit courts since 1989. See, e.g., Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-02 (2005) (confirming that, while taxes placed on non-Indian, on-reservation activity can be preempted under the Bracker interest balancing test, a different test should be applied to off-reservation activity); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-43 (1983) (applying the Bracker analysis to preempt state regulation and licensing of on-reservation hunting and fishing); Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 581-82 (10th Cir. 2000) (referencing Bracker but applying the off-reservation taxation analysis).

Cotton shows how a fundamentally different set of facts on a different reservation in New Mexico can result in a different legal conclusion; it does not control the outcome of the particularized inquiry as applied to taxation of non-

Indian oil and gas operators on the New Mexico Lands. Instead, the clear factual differences between this case and Cotton fully support the District Court's painstaking development of the uncontroverted findings of fact and its proper application of those facts to applicable federal law.

IV. UNDER THE BRACKER PREEMPTION ANALYSIS, HOMANS IS PRE-EMPTED FROM ASSESSING THE FIVE OIL AND GAS TAXES.

Under the Bracker preemption analysis, there are three reasons that Homans should be preempted from assessing the five oil and gas taxes. First, there is a strong background of Ute Mountain Ute Tribal sovereignty in the area of oil and gas regulation that has been carried forward into the comprehensive and exclusive scheme of federal and tribal regulation that exists on the New Mexico Lands today. Second, the five oil and gas taxes result in economic harm to the Tribe and its impoverished members and interfere with federal interests in the Tribe's oil and gas development. Finally, despite Homans' assertions, New Mexico does not provide the substantial services necessary to justify taxation of on-reservation activity. Thus, under the Bracker balancing test, the significant federal and tribal interests outweigh the state's *de minimis* on-reservation and off-reservation interests.

A. Federal And Tribal Regulation Of Oil And Gas On The Ute Mountain Ute Reservation Is Comprehensive And State Regulation Is Unnecessary.

1. There Is A Comprehensive Scheme Of Federal And Tribal Regulation On The Ute Mountain Ute Reservation.

(a) There Is A Strong Backdrop Of Tribal Sovereignty From State Taxation Authority Over Oil And Gas Development On The New Mexico Lands.

Homans argues that there is "no tradition" of Ute Mountain Ute Tribal independence necessary to support the proposition that New Mexico state taxation of oil and gas operations have been preempted. (Opening Br. 44-45.) In short, Homans disagrees with the District Court's conclusion that "[i]n this case, unlike in Cotton Petroleum, the historical backdrop of the UMUT's tribal sovereignty is significant." [RP 225.] The principal basis for Homans' argument is that Congress long ago imposed state taxation on the Ute Mountain Ute Reservation. Homans argues:

> 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.

(Opening Br. 2, 46-47.) That statement is flatly wrong, and the District Court did not so hold. Indeed, if Homans is correct that Congress "explicitly" authorized New Mexico state taxation of oil and gas production on Indian lands, then there

would have been no point in the Supreme Court's particularized inquiry in Cotton, as Congressional intent would have been explicit.[8]

On their face, none of the statutes cited above apply to oil and gas leases on the New Mexico Lands. The tax provision of the 1927 Act, 25 U.S.C. § 398c (discussed in Cotton), applies only to "oil and gas wells … upon lands within Executive Order Indian reservations," which the Ute Mountain Ute Reservation is not. The 1924 Act, 25 U.S.C. § 398, is limited to 10-year mining leases on "[u]nallotted land on Indian reservations … [under section 3 of the Act of February 28, 1891]…" The 1891 Leasing Act (25 U.S.C. § 397), referenced in the 1924 Act, applies by its terms only to lands "occupied by Indians who have bought and paid for the same, and which are not needed for farming or agricultural purposes…" This does not include the Ute Mountain Ute Reservation.

The New Mexico Lands were set aside by an Act of Congress on February 20, 1895, as part of the Ute Mountain Ute Reservation. 28 Stat. 677. [RP 175, Finding 9.] There was no oil and gas development on the Ute Mountain Ute

[8] When Congress explicitly authorizes state taxation of mineral development on Indian lands, rather than leaving that issue for courts to decide, it knows how to do so. See, e.g., Section 3 of the Act of May 10, 1928, 45 Stat. 495, which states:

> That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma…

Reservation until the 1950s [RP 186, Finding 114], by which time the omnibus authorization of the IMLA had long been in place. As the Supreme Court held in Cotton, the IMLA neither authorized nor immunized oil and gas development on Indian lands from state taxation. Cotton, 490 U.S. at 177. But Homans argues that the Tribe "knew" when it began its oil and gas leasing program in the 1950s that state taxation was "explicitly authorized" by the 1924 Act. (Opening Br. 46-47.) For this assertion, Homans relies on British-American Oil Producing Co. v. Bd. of Equalization, 299 U.S. 159 (1936). That case involved an oil and gas lease on the Blackfeet Reservation, and the lease document itself recited that it was made pursuant to the 1891 Act. Id. at 161. Forty years later the Department of the Interior viewed the suggestion in British-American that the 1891 Act applied to all treaty reservations as *dicta*, noting that there was no dispute over the applicability of the 1891 Act to the pertinent oil and gas lease on the Blackfeet Reservation. 84 Interior Decisions 905, 906-08 (1977). In fact, there are no such leases on the Ute Mountain Ute Reservation, and no authority can be offered to show that the 1891 Act or the 1924 Act have any applicability to UMUT leases.[9]

In reality, Homans is making the ultimate bootstrap argument: that there is no tradition of tribal independence at the Ute Mountain Ute Reservation because

[9] Thus, it is irrelevant whether the taxation authorization in the 1924 Act expired with the enactment of the IMLA in 1938, as stated in the Memorandum Opinion below [RP 225], and New Mexico's argument to the contrary is also irrelevant.

the State of New Mexico began taxing oil and gas production in the 1950s. He can find no support for such taxation in applicable federal statutes. As mentioned, the IMLA did not speak to the issue. More recently, Congress has affirmatively endorsed tribal control over reservation mineral resources. In the IMDA, Congress authorized Indian Tribes to enter into joint venture and production-sharing agreements to develop their mineral resources. 25 U.S.C. § 2102(a). Tribes are thus no longer passive lessees awaiting their royalty payments. Indeed, the policy favoring tribal control is so strong that Congress placed an explicit "burden" on the Secretary of the Interior to justify any disapproval of a minerals agreement made pursuant to the IMDA. 25 U.S.C. § 2103(d). In 1994 the BIA promulgated regulations implementing the IMDA, which were

> intended to ensure that Indian mineral owners are permitted to enter into minerals agreements that will allow the Indian mineral owners to have more responsibility in overseeing and greater flexibility in disposing of their mineral resources, and to allow development in the manner which the Indian mineral owners believe will maximize their best economic interest and minimize any adverse environmental or cultural impact resulting from such development.

25 C.F.R. § 225.1(a). Further, Section 6 of the IMDA provides that agreements made thereunder are "not subject to the [IMLA or] any other law authorizing the

development or disposition of the mineral resources of an Indian or Indian tribe." 25 U.S.C. § 2105.[10]

Then in 2005 Congress enacted the Indian Tribal Energy Development and Self Determination Act of 2005 in Title V of the Energy Act, 25 U.S.C. §§ 3501-3504. The Act promotes the integration of energy resources on Indian lands by facilitating the construction of pipelines, electrical transmission facilities, refineries, and power plants thereon. Both the Secretary of the Interior and the Secretary of Energy are authorized to conduct grant and loan programs to assist tribes in achieving energy independence. Section 503 of the Energy Act specifically authorizes the making of grants to tribes "for (i) the development and enforcement of tribal laws (including regulations) relating to tribal energy resource development; and (ii) the development of technical infrastructure to protect the environment under applicable law …." 25 U.S.C. § 3503(b)(1)(C). It is under the auspices of this broad congressional mandate that the federal agencies and the

[10] The District Court cited language from a House Report, noting the Committee's rejection of a proposed amendment to the IMDA submitted by the Governor of Montana which would have explicitly authorized state taxation of non-Indian activities in connection with mineral development under the IMDA, and the Committee's reaction deferring to the U.S. Supreme Court's "development of this area of the law." [RP 221.] From that the District Court concluded that the IMDA did not "differ in any significant way from the IMLA." [RP 221.] We disagree. The language of the Act itself makes it clear that the enactment of the IMDA was a step in the direction of tribal self-determination, freeing Indian tribes from the shackles of the anachronistic statutory authorizations of the past. That should weigh heavily in any Indian preemption analysis.

UMUT have developed a comprehensive regulatory scheme for oil and gas activities on the New Mexico Lands. It is in this spirit that the Tribe goes about developing its mineral resources, seeking true independence for its people.

(b) The Current Regulatory Scheme On The New Mexico Lands Is Comprehensive And Exclusive.

Under the federal Indian mineral leasing statutes, the federal government has enacted an extensive regulatory regime for oil and gas activities on Indian lands, and under this regulatory regime oil and gas development on the New Mexico Lands is a joint effort of the federal government and the Tribe. Recognizing this comprehensive regulatory scheme, the District Court correctly found that, when considered as a mixed question of law and fact, it is clear that the State of New Mexico does not regulate oil and gas operations on the New Mexico Lands, and that the federal regulations are therefore exclusive. [RP 228.] Homans' assertions that over the decades New Mexico has built and maintained an elaborate regulatory infrastructure and that this case is comparable to Cotton are incorrect. (Opening Br. 30, 52-54.) This Court should uphold the District Court's opinion which is supported by the regulations, the case law, and the facts, as discussed below.

As a preliminary matter, it is important to note that the federal regulations have been significantly enhanced since Cotton, which was decided in 1989. In 1994 the BIA promulgated the first set of regulations implementing the IMDA, an important new authorization of Indian mineral development that was not discussed

by the Supreme Court in Cotton, 59 Fed. Reg. 14971 (March 30, 1994); 25 C.F.R. Part 225.[11] Subsequently, in 1996 the BIA produced what it claimed were the first comprehensive regulations covering oil and gas leasing in 58 years. 61 Fed. Reg. 35634 (July 8, 1996). Further, in 2001 BLM added regulations focusing on drainage protection. 66 Fed. Reg. 1893 (January 10, 2001). Finally, on March 10, 2008, the BIA promulgated regulations in 25 C.F.R. Part 224 (73 Fed. Reg. 12808), implementing the Indian Tribal Energy Development and Self-Determination Act of 2005. These regulations "[e]stablish procedures by which a tribe, at its discretion, may enter into and manage leases, business agreements, and rights-of-way for purposes of energy resource development on tribal land …" 25 C.F.R. § 224.10. These new regulations continue to expand the regulatory role of the federal agencies and the Tribe, making the current regulatory regime significantly different than the regulatory regime in Cotton. Accordingly, while the technical downhole instructions have largely remained in place over the past 25 years, Congress and the Department of Interior have deliberately placed in tribes ever greater authority over how oil and gas production is to be modeled.

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[11] Homans erroneously cites the 25 C.F.R. Part 225 regulations for the proposition that these were the same regulations which the Supreme Court reviewed in Cotton. (Opening Br. 56.) These regulations are not an "iteration" of old regulations, as asserted by Homans; they implement a new Act of Congress. The Opening Brief also states that these regulations "do not purport to be exclusive." (Opening Br. 56.) That is also erroneous. Nothing in Part 225 mentions any state regulatory role. It does, however, cross-reference pertinent BLM and MMS regulations and functions, 25 C.F.R. §§ 225.4, 225.6.

Now, as detailed in 25 C.F.R. Parts 211 and 225, 43 C.F.R. Part 3160 and 30 C.F.R. Parts 202 and 206, the Tribe, BIA, BLM, and MMS work collaboratively to regulate every aspect of oil and gas development on the New Mexico Lands. While the entire regulatory scheme outlined in the Code of Federal Regulations is relevant to this case and demonstrates the extensiveness of federal and tribal regulation over oil and gas activities on Indian lands, a discussion of a few of the regulations combined with the relevant findings of fact validates the District Court's determination that the federal regulatory scheme is exclusive and distinguishes this case from Cotton.

The federal government has oversight over all pre-drilling activities. The BIA (in coordination with the Tribe) has authority to approve leases and authorize the operator to survey the land and create a survey road. [RP 187, Findings 129-30, 136.] 25 C.F.R. §§ 211.20, 225.22, 225.32. After obtaining UMUT consent for the survey, the BIA informs the BLM that the BIA has approved the survey. [RP 188, Finding 137.] After the operator has completed its survey, the operator submits an APD to the BLM. [RP 188, Finding 138.] Under federal law, the BLM and BIA share exclusive responsibility for approval of an APD; the BLM has final authority, but does not approve an APD until it has received a letter of concurrence from the BIA. [RP 188, Finding 142.] 43 C.F.R. § 3162.3-1.

In contrast to Cotton, where the state regulated well spacing, the BLM retains full authority over spacing on the New Mexico Lands. 493 U.S. at 186. [RP 229 (BLM exercises primary authority over well spacing on the New Mexico Lands).] The federal regulations provide that the BLM regulates well spacing on the New Mexico Lands. See 43 C.F.R. § 3162.3-1(a) (well shall be drilled in conformity with an acceptable well-spacing program that has been approved by the authorized officer after appropriate environmental and technical reviews). Accordingly, the BLM issued two orders (Ute Mountain Ute No.1 (1995) and Ute Mountain Ute No. 2 (1996)) setting well-spacing and pooling units for wells on the Ute Mountain Ute Reservation. [RP 192, Findings 183, 190.][12] While the BLM did adopt an historic New Mexico state spacing standard when it entered into a now-expired MOU with the State of New Mexico, the BLM never relinquished regulatory authority over spacing on the New Mexico Lands. Since the expiration of the MOU the BLM has continued to determine spacing and drilling sites in accordance with Ute Mountain Orders No. 1 and No. 2.

In contrast to Cotton, where the district court found that the state regulated mechanical integrity, in this case the BLM regulates the mechanical integrity of

[12] The BLM found that the specified well spacing would "prevent the waste of oil and gas," "protect the correlative rights of all parties concerned," and "insure proper and efficient development and promote conservation of the oil and gas resources of the [UMUT]." See [RP 192, Finding 186] (quoting Ute Mountain Ute Order No. 1).

wells on the New Mexico Lands. 490 U.S. at 185-86. The federal regulations authorize the BLM to regulate the mechanical integrity of wells. 43 C.F.R. § 3162.3-2 requires BLM approval before commencement of operations that could potentially impact the mechanical integrity of the well (such as re-drilling, deepening, or perform casing repairs). This regulation is important because it confers broad authority to the BLM to ensure the mechanical integrity of the wells. In addition to 43 C.F.R. § 3162.3-2 there are many other regulations that help ensure well safety and prevent contamination of fresh water aquifers. See e.g., 25 C.F.R. § 211.47, 43 C.F.R. §§ 3161.2, 3162.1, 3162.5-1, 3162.5-2, 3162.5-3.

The regulations also ensure that well development and drilling is carried out with due regard for the prevention of waste and injury. The comprehensive federal regulatory framework is designed to protect correlative rights, the resource, and the environment. 43 C.F.R. § 3162.1 (requiring the operator to assure maximum economic recovery of oil and gas by minimizing waste and adverse effects on ultimate recovery of other mineral resources); 43 C.F.R. § 3162.3-1(e) (each drilling plan should describe expected hazards, and proposed mitigation measures to address such hazards); 43 C.F.R § 3162.5-1 (operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality). The federal regulations discussed above, in conjunction

with the case law and the District Court's findings of fact, establish that New Mexico plays no substantive regulatory role on the New Mexico Lands.

(c) The Case Law Establishes That Federal Government Has A Mechanism To Resolve Disputes.

The District Court's holding that the federal regulatory scheme is exclusive is also supported by Interior Board of Land Appeals ("IBLA") case law. Homans asserts that the State provides a process for resolving disputes. (Opening Br. 52.) However, the IBLA has already confirmed that BLM regulations provide a mechanism for resolving disputes and that, under the modern regulatory regime, it is the BLM that retains authority over spacing decisions on Indian lands.

In San Juan Citizens Alliance et al., 129 I.B.L.A. 1 (1999), an oil and gas company with a lease on tribally-owned lands within an Indian Reservation filed an application with the Colorado Oil and Gas Commission ("COGC") for a change of the existing spacing. The COGC denied the application. After reviewing the evidence presented before the COGC, the Associate State Director of the Colorado BLM issued a decision approving the application. An environmental group appealed the State Director's approval. The IBLA found that, in accordance with 43 C.F.R. 3162.3-1(a)[13], the BLM makes the final pronouncement on the spacing

[13] 43 C.F.R. § 3162.3-1(a) provides that an oil and gas well shall be drilled "in conformity with an acceptable well-spacing program." The regulation further provides in relevant part that such program is either "one which conforms with a spacing order or field rule issued by a State Commission or Board and accepted by

of oil and gas wells on Indian lands and that BLM's authority included the ability to overrule the COGC's spacing order. 129 I.B.L.A. at 3-5.

The IBLA also confirmed that the BLM's administrative review procedures permit a party aggrieved by either approval of a well-spacing application or approval of an APD to appeal that decision to the IBLA and that an aggrieved party could include environmental groups or others concerned about the potential impacts to air and groundwater quality. Id. at 4-5.

2. Federal and Tribal Regulation Of Oil And Gas Development On The Reservation Leaves No Room Or Necessity For State Regulation Or Interference.

Despite the District Court's determination that New Mexico does not regulate oil and gas operations on the New Mexico Lands and that the federal regulations are therefore exclusive [RP 228], Homans makes several assertions to the contrary. These assertions are addressed below.

(a) NMOCD's Dispute Resolution Process Is Unnecessary.

One of the regulatory functions Homans claims to offer operators on the New Mexico Lands is access to New Mexico's administrative process for resolving disputes between operators. (Opening Br. 52.) However, the District Court found that there is no evidence that operators have used the NMOCD hearing process to resolve disputes concerning extraction on the New Mexico Lands. [RP 200,

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the authorized officer" or "any other program established by the authorized officer."

Finding 252.] Further, as noted by the District Court, NMOCD's administrative efforts are unnecessary for resolving disputes over oil and gas development on the New Mexico Lands because the BLM already has an adjudicative process to resolve such disputes, including the right to administrative review and appeal. [RP 190, Findings 168-70.] [RP 230.] The District Court's findings are supported by the decision in San Juan Citizens Alliance et al and the federal regulations which specifically allow for such appeal. 43 C.F.R. §§ 3160.0-1; 3160.0-2; 3162.3-1(a); 3165.4(a).

(b) New Mexico's Hearing Process Is So Rarely Utilized That It Cannot Support A Finding That New Mexico Materially Contributes To The Success Of The Tribe's Oil And Gas Program.

Homans also notes that New Mexico holds administrative hearings and approves requests for commingling and non-standard locations. (Opening Br. 52.) While the District Court did find that NMOCD has approved requests for non-standard locations and commingling [RP 200, Finding 253] when asked to by operators—and never the Tribe or the BLM—these hearings have been minimal. At trial New Mexico was only able to present six orders for the period of 1996-2006. [RP 602-05, 629-32, 717-19, 807-16, 847-52, 901-04, 999-1003.] Further, Mr. Hammond, Energy Director for the Tribe, testified that between 1950 to 2009, a period of 59 years, he was only able to locate a total of 25 hearing orders which purported to address production on the New Mexico Lands. [TR 48]. Finally,

NMOCD admits that the hearings rarely involve the appearance of a party disputing the request. [TR 376]. The minimal number of hearings over the years shows that New Mexico does not provide the valuable regulatory function of eliminating waste and protecting correlative rights.[14]

(c) NMOCD Is Not A Regulatory Partner with the BLM.

Homans asserts that the sharing of publicly available documents with BLM and the text of four[15] federal regulations creates a cooperative regulatory relationship between the BLM and NMOCD. (Opening Br. 56-57.) Homans states that New Mexico has a long-standing cooperative regulatory relationship with BLM, in recognition of their joint interests. (Opening Br. 56.) In support of this proposition, Homans notes first that the BLM initially processes APDs on the New Mexico Lands, and then sends the forms on to NMOCD for its approval; second, that relevant federal regulations invoke state law and remind the operator of the need to comply with state law; and third, that the BLM has reminded the Tribe of

[14] Importantly, if excessive on-reservation drilling were to occur, New Mexico's expert testified that it would be easy for New Mexico to work with off-reservation operators to drill new offset wells to assure that correlative rights are protected. [TR 388.]

[15] The regulations cited by New Mexico include 43 C.F.R. § 3162.3-4. This regulation regards well abandonment and contains no references to the state or state law. New Mexico provides no discussion of why it believes this regulation invokes state law. Because New Mexico does not explain why it believes this citation is relevant, and the Tribe can discern no obvious connection to the argument, it will not be discussed further.

the availability of NMOCD's service of plugging and abandoning wells without charge. (Opening Br. 56- 57.) Each of these statements is refuted below.

As discussed above, by federal law only the BLM may approve an APD. 43 C.F.R § 3162.3-1. Further, after several days of trial where New Mexico frequently contended it had to approve APDs, the District Court concluded that the BLM sends an APD to NMOCD only after BLM has already approved it. [RP 189, Finding 157.] The findings of fact also establish that it is the BIA, BLM, and the Tribe that consult regarding issues raised by APD applications. [RP 189, Finding 150.] While New Mexico can consult with operators and can engage the BLM in a technical discussion, it has no regulatory role.

Homans also asserts that relevant federal regulations invoke state law and remind the operator of the requirement to comply with the law. (Opening Br. 57.) However, this assertion is incorrect. For instance, 43 C.F.R. § 3162.2-2 addresses uncompensated drainage of federal or Indian mineral resources and provides that BLM will consider federal, state, and tribal rules, regulations, and spacing orders when determining what action to take. Similarly, 43 C.F.R. § 3162.3-1 provides that each well must be drilled in conformity with an acceptable well-spacing program for a surveyed well location approved or prescribed by the authorized officer who may consider spacing orders or field rules issued by a State Commission or Board. In these examples, the BLM is not required to follow state

regulations and orders, and may disregard them entirely. Consideration of state regulations and the option of adopting state spacing standards is simply not the same as invoking state law and reminding the operator of the need to comply with the law.

Finally, 43 C.F.R. § 3162.5-3 provides that compliance with health and safety requirements prescribed by the authorized officer shall not relieve the operator of the responsibility for compliance with other pertinent health and safety requirements under applicable laws or regulations. Compliance with the authorized officer's orders does not nullify or supersede other federal laws and regulations, and the applicability of state law would have to be made on a case-by-case basis depending on the state's jurisdiction.

In regards to plugging and abandoning, although New Mexico utilizes a modest portion of the tax revenues obtained from tribal oil and gas development for the plugging and abandoning of wells, NMOCD has never actually plugged an abandoned well on the New Mexico Lands. [RP 199, Finding 247.] Because the only state expenditure that is ever committed for a particular well is the expense for plugging that well [RP 200, Finding 259], NMOCD cannot identify any specific expenditure related to the wells on the New Mexico Lands. New Mexico's offering of a service that has never been utilized fails to support its assertion of a joint cooperative regulatory relationship with the BLM.

(d) Both The Findings Of Fact And Federal Law Demonstrate That BLM And The Tribe, Not New Mexico, Regulate Environmental Issues On The New Mexico Lands.

Homans raises several environmental issues in an attempt to assert that New Mexico has a regulatory interest on the New Mexico Lands. In the Opening Brief, Homans notes that oil and gas operations can cause groundwater contamination and can disrupt the surface, which may cause environmental effects. (Opening Br. 17.) However, the District Court found that in this case there is no evidence in the record of actual or potential contamination of groundwater or potential environmental effects on adjoining private, state, federal, or tribal lands from oil and gas operations on the New Mexico Lands. [RP 191, Findings 178, 180.] Indeed, as discussed above, the federal regulations provide specific authority for the BLM to act to protect groundwater and the environment. 43 C.F.R. §§ 3162.5-1, 3162.5-2, 3162.3-2.

Despite these findings and regulations, New Mexico notes that BLM has recently approached NMOCD to discuss a potential problem with H_2S gas. (Opening Br. 58 n. 6.) However, Congress has delegated BLM, not New Mexico, the authority to require operators to perform operations and maintain equipment in a safe and workmanlike manner, and this authority allows BLM to address any potential problems with H_2S gas. 43 C.F.R. § 3162.5-3. Further, mere

consultation with the state is not equivalent to delegation of regulatory authority from the federal government to the state.

Next, Homans states that New Mexico has built and maintained an elaborate regulatory infrastructure, including environmental clean-up. (Opening Br. 52.) It is true that on one occasion in the late 1980's NMOCD became involved in one clean up on the New Mexico Lands and that NMOCD's involvement included having the operator cleanup a spill to NMOCD standards and inspecting the site to confirm the work. [RP 181, Finding 66.] However, in recent times, the Tribe's Department of Energy has assumed responsibility for detecting spills: once a spill is detected, the Department asks the operator and the BLM to cleanup the spill [RP 181, Finding 67], and the Tribe generally does not make use of New Mexico's environmental cleanup and site inspection [RP 199, Finding 250].

The federal regulations authorize the BLM to take actions to prevent environmental harm on the New Mexico Lands and to address environmental issues as they arise. The district court's opinion reflects that the BLM and the Tribe are in fact managing environmental issues on the New Mexico Lands without the assistance of NMOCD. [RP 233.] The findings of fact and the federal regulations simply do not support the State's assertion that it has an environmental regulatory interest, or in any way contributes to environmental regulation, on the New Mexico Lands.

(e) Administrative Paperwork Provided By BLM And Operators To NMOCD Does Not Endow NMOCD With Regulatory Authority.

Finally, Homans asserts that operators must comply with New Mexico's regulatory statutes and administrative regulations. Homans states that operators make all required filings and avail themselves of the hearing and administrative processes offered by NMOCD, and that if a given operator were to become non-compliant NMOCD would have the power to enforce its regulations without going onto the Reservation. (Opening Br. 53.)

Because New Mexico has no contact with the BIA and limited contact with the BLM and the Tribe [RP 189, 194-95, Findings 156, 207, 209], it is left to contend that it regulates the New Mexico Lands by policing operators under state rules that cannot reach the Ute Mountain Ute Reservation. As stated in the District Court opinion, if BLM chose to ignore a New Mexico regulation or order and enforce its own regulation or order and NMOCD tried to enforce its conflicting regulation or order, NMOCD would immediately run afoul of the Supremacy Clause. "Although NMOCD has a certain amount of power over the operators, it cannot use that power to acquire jurisdiction over the New Mexico lands." [RP 230.]

In conclusion, when taken as a mixed question of law and fact, New Mexico simply fails to demonstrate that it plays any regulatory role on the New Mexico

Lands. In this case, unlike Cotton, there is simply no regulatory role for the State. Therefore, this Court should uphold the District Court's determination that the federal regulatory scheme is exclusive and that the five New Mexico taxes are therefore unjustified. As discussed below, these unjustified taxes result in significant harm to the Tribe.

B. The New Mexico Taxes Result In Economic Harm To The Tribe And Interfere With Federal Interests.

In carrying out the Bracker preemption analysis, courts have previously recognized that state taxation that results in economic harm to the Tribe interferes with federal objectives. Bracker, 448 U.S. at 149-50. In this case, the District Court found that the Tribe and its members suffer economic harm as a result of the imposition of the five New Mexico taxes. [RP 206, Finding 310.] This economic harm interferes with the federal purposes of promoting tribal exploitation of on-reservation oil and gas resources and increasing tribal revenues. Cotton, 190 U.S. at 187; Kenai Oil and Gas, Inc. v. Dep't of Interior, 671 F.2d 383, 384 (10th Cir. 1982). Homans trivializes the District Court's findings by accusing the Court of applying a simplistic "quantitative" test for purposes of determining if the State's five taxes caused economic harm to the Tribe. (Opening Br. 48.)

The District Court's finding of economic harm is supported by both the Tribe's and Homans' expert economists. Both Dr. Duffield, the Tribe's expert economist, and Dr. Tysseling, Homans' expert economist agreed that New

Mexico's taxes injure the Tribe and its members. Dr. Tysseling testified that he agreed that, in the absence of Resolution No. 3874, ridding the Ute Mountain Ute Reservation of the five New Mexico taxes would induce greater production. [TR 176, 431-32.] Dr. Tysseling further acknowledged that all things being equal the tax revenues paid to the State would otherwise go to the Tribe. [TR 430-31.] This concurs with Dr. Duffield's testimony that the state taxes "squeeze the profit that remains for the tribe to exploit." [TR 184.] Further, Dr. Duffield concurred with Dr. Tysseling in finding that a decrease in taxes would increase production. [TR 176.]

The District Court also found that, if New Mexico taxation ceases, the Tribe could increase its tax rate, as authorized by Resolution No. 3874 [RP 271], or maintain its tax rate in order to stimulate production [RP 204-05, Findings 292, 298]. The District Court found that, if the New Mexico taxes were found unlawful, the market for oil and gas remained stable, and Resolution No. 3874 was implemented, the Tribe could receive at least $1,300,000 per year in additional revenue. [RP 204, Finding 297.] This amount would substantially enhance tribal revenues, which total approximately $16 million per year from all sources. [RP 205, Finding 304.] Finally, the District Court found that increased production through discovery of new sources of oil and gas or through infill or reopening of closed wells would increase the Tribe's revenues. [RP 205, Findings 300-01.]

In response to the District Court's findings and the expert testimony, Homans posits that the Tribe cannot have suffered sufficient harm from the taxes because the tax rate imposed on the operators on the New Mexico Lands is "slightly lower" than the rate imposed on Cotton Petroleum when it challenged the same taxes over 20 years ago. (Opening Br. 3.)[16] This ignores the fact, discussed infra at IV(C), that, unlike Cotton, the State of New Mexico provides *de minimis* services on the New Mexico Lands. Further, with this argument Homans is inviting this Court to engage in the same kind of "quantitative analysis" that Homans faults in the Opening Brief. (Opening Br. 48-49.)

Indeed, Homans argues that the tax rate is "slightly lower" because the State Legislature enacted tax credits available for wells drilled on tribal lands after July 1, 1995, but this assertion fails to account for another of the District Court's important factual findings.

> Under the Intergovernmental Production Tax Credit, if the UMUT increases its taxes on operators extracting oil and natural gas from the New Mexico lands, the State of New Mexico credit to those operators will be reduced by the amount of the UMUT tax increase…

[RP 198, Finding 243.] Thus, for wells drilled after July 1, 1995, the Intergovernmental Production Tax Credit offered by New Mexico actually

[16] The decision below does not contain a finding of fact to this effect, but it does discuss the tax credits, enacted after the Supreme Court's ruling in Cotton Petroleum, which evidently account for the "slightly lower" tax rate. [RP 197-99, Findings 234-44.]

penalizes Indian tribes who seek to increase revenue from oil and gas production, since a tribal tax increase would result in a concomitant reduction in the Intergovernmental Production Tax Credit available to operators on the New Mexico Lands. This imposes multiple burdens on tribal governments. Because increased production would result in increased revenue for the Tribe, this effect is a *direct* economic burden on the Tribe [RP 205-06, Findings 300, 310], and is a disincentive to all new drilling on the New Mexico Lands, as found by the District Court.

Homans also asserts that the Tribe can increase its taxes while still burdened with state taxes without adversely affecting on-reservation oil and gas development. (Opening Br. 50.) Homans supports this assertion by citing to Cotton. (Opening Br. 50.) However, Homans does not put this reference to Cotton in its proper context, and in the process overlooks a crucial distinction between this case and Cotton. In Cotton, the Supreme Court noted that the district court found that no economic burden fell on the Jicarilla Apache Tribe by virtue of the state taxes and that the Jicarilla Apache Tribe could in fact increase its taxes without adversely affecting on-reservation oil and gas development. 490 U.S. at 172-73. In this case, as discussed above, the District Court found that there was an economic burden on the UMUT, and both expert economists concurred. Further, as noted in the District Court's opinion, the Jicarilla Apache Tribe was not a party

in Cotton, and the lessee, Cotton Petroleum, only presented evidence of the economic burden on it, and no evidence of the economic burden on the Jicarilla Apaches. In fact, Cotton Petroleum's multiple taxation and Commerce Clause claims, which depended on the burden being on the lessee, would have been weakened by presentation of evidence showing the taxes were passed on to the Jicarilla Apaches. [RP 226-27.] 490 U.S. at 169.

In conclusion, while Homans characterizes the District Court's findings as "quantitative," the District Court's multiple findings of economic harm are much more detailed than that, and are supported by both economists.

C. The District Court Correctly Refused Homans' Arguments That Off-Reservation Record-Keeping And Regulation Of State Infrastructure Amount To Provision Of Substantial Services That Would Justify Taxation.

Homans spends a significant portion of the Opening Brief rehashing stale arguments that New Mexico provides substantial services related to the oil and gas production on the New Mexico Lands. (Opening Br. 52-57.) First, Homans argues that this Court should reverse the District Court's *de minimis* on-reservation services finding of fact. (Opening Br. 53.) Second, Homans argues that the off-reservation services provided to the operators should have been factored into the District Court's preemption analysis. (Opening Br. 54.) However, these arguments were already soundly rejected by the District Court on the basis of both the well-analyzed findings of fact and well-settled principles of federal law. [RP

233-34.] In addition, these arguments inappropriately request this Court to eviscerate the Bracker preemption analysis. This section will address each faulty argument in turn.

1. Homans Provides Only *De Minimis* Services To Oil And Gas Operators On The New Mexico Lands.

As Homans recognizes, the District Court issued a finding of fact that the economic value of the services provided by New Mexico to operators on the New Mexico tribal lands is *de minimis*. (Opening Br. 53.) [RP 201, Finding 264.] This issue was thoroughly briefed and considered at the trial level, and this finding is well-supported by the record and other findings of fact. [RP 199-200, Findings 245-54.] This Court should uphold the District Court's finding of *de minimis* on-reservation services.

(a) Homans Is Precluded From Challenging The District Court's Findings Of Fact.

At the outset, Homans is precluded from challenging finding of fact 264 and the other relevant findings of fact because he stipulated to all of the District Court's 311 findings of fact in the Opening Brief. (Opening Br. 20 ("The appellant [Homans] does not take issue with the trial court's findings of fact.").) That stipulation alone can end this Court's inquiry into the *de minimis* services finding.

Nonetheless, Homans attempts to circumvent finding of fact 264 by trying to re-litigate the magnitude of the services it provides on the New Mexico Lands.

Here, Homans first argues that taxation of the operators should be justified by the "elaborate regulatory infrastructure" of hearing and administrative processes, the state's publicly available records, and the state's environmental cleanup and site inspection services. (Opening Br. 52.) As more fully explained above in Section IV(A)(2), this argument directly contradicts the uncontroverted findings of fact that there is no evidence that either the Tribe or the BLM have used the hearing processes, the records, or the environmental cleanup and site inspection services. [RP 199, 200, Findings 245, 250, 252-54.] See also [RP 229-33].

Homans also argues that NMOCD's paperwork requirements are a service provided by the State to the operators. (Opening Br. 54.) Again, as more fully explained above, these overlapping and unwelcome paperwork requirements do not demonstrate NMOCD has authority over the New Mexico Lands, and they cannot be characterized as state services that contribute in any way to the Tribe's oil and gas development. Section IV(A)(2), supra.

(b) Homans' Theoretical Services Argument Is Contrary To Well-Settled Federal Law.

Homans makes another attempt to reverse the *de minimis* finding by arguing that the State services are not measured by the *actual* services provided on the New Mexico Lands, but rather by some theoretical willingness to provide these services. (Opening Br. 55.) To support this, Homans inaccurately cites to the Commerce Clause analysis in Cotton Petroleum, and not to any applicable preemption

analysis. (Opening Br. 55 (citing Cotton Petroleum, 490 U.S. at 190).) Homans has not provided any other case law support for this novel "theoretical services" argument (and indeed, it cannot do so because such support does not exist).

Homans has no case law support because the "theoretical services" argument would eviscerate the balancing test set out in Bracker. The Bracker analysis is a factually-sensitive analysis that forces the reviewing court to assess and balance the actual interests and services at stake for the particular federal, tribal, and state entities involved. See, e.g., Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1190 (9th Cir. 2008) (noting the factual sensitivity of the test); Ramah, 458 U.S. at 843 (holding that the State's actual declination to educate Indian children precluded it from imposing a burden on the comprehensive federal scheme); Cotton, 490 U.S. at 172 n. 7 (analyzing the actual State services provided to the Jicarilla Apache Tribe). If any state were able to tip the balancing test in its favor simply by offering services or regulation on reservation lands, the Bracker analysis would be turned on its head. In this factual context, any state offer to use its state-wide procedures on a reservation would nullify the presence of the relevant federal regulation and tribal in-house oil and gas regulation.

As it is, the Bracker analysis is a flexible but concrete analysis that is intended to assess the actual extent of competing management practices and

interest on tribal land. Accordingly, Homans' far-reaching argument that theoretical services justify on-reservation taxation is groundless.

2. Homans' Regulation Of Off-Reservation Natural Gas Transportation Infrastructure Does Not Provide A Sufficient Basis For State Taxation Of Oil And Gas Production On The New Mexico Lands.

Homans also attempts to circumvent the District Court's *de minimis* finding of fact by asserting that off-reservation regulation of the natural gas transportation and processing infrastructure provides a sufficient basis for the imposition of its on-reservation taxes. (Opening Br. 52-54, 57-59.)

(a) Well-Settled United States Supreme Court Precedent Precludes Homans' Off-Reservation Benefits Argument.

The first flaw in Homans' off-reservation benefits argument is a purely legal one: as the District Court correctly recognized, Homans' argument has already been conclusively precluded under well-settled United States Supreme Court precedent. See Ramah, 458 U.S. at 844 (stating that provision of off-reservation services is "not a legitimate justification for a tax whose ultimate burden falls on the tribal organization."); Mescalero Apache, 462 U.S. at 336 (stating that the exercise of state authority is based on "functions or services performed by the State in connection with the on-reservation activity"). See also [RP 234]. Homans suggests that this view has changed with the Supreme Court's decision in Cotton, where the Court observed 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." 490 U.S. at 189. However, the "relevant services" in that discussion pertained to Cotton Petroleum's argument that the multiple tax burden violated the Commerce Clause, which is not at issue here. The quote is taken out of context, and the proposition that the rule of Ramah is no longer good law is incorrect.

(b) Homans' Off-Reservation Argument Is Factually Inaccurate.

The second flaw in Homans' argument is found in his interpretation of the District Court's finding that "[w]ithout an off-reservation infrastructure in New Mexico to transport oil and gas, the economic value of the oil and gas produced on the New Mexico lands would be substantially less." [RP 201, Finding 262.] Homans mischaracterizes this finding by stating that without the off-reservation infrastructure the oil and gas has "no discernable market value." (Opening Br. 8, n. 2.) Of course, most Indian tribes are dependent upon the processing, transportation, and sale of their resources outside of their reservations because they have not had self-sustaining economies since colonization. If the value of off-reservation marketing and processing is relevant, then virtually *any* economic activity on an Indian reservation may be taxed by a state, but that has not been factored into the Supreme Court's preemption analyses. Off-reservation benefits are simply irrelevant to a preemption analysis.

As for the assertion that the unprocessed oil and gas resources have "no discernible market value," the federal regulations recognize that these resources *do* have significant value to the Tribe at the point of production on the New Mexico Lands. 30 C.F.R. Part 206. For instance, regardless of the actual price received for gas by a producer, the Tribe's royalties are based upon a national index published by MMS that represents the average of sales within the region. This index value is applied to the volume of gas at the wellhead in order to determine the royalty value. As a result, the value of the gas for royalty purposes is not dependent on sale, and royalties can be assessed using the production volume, the MMS published index based value, the applicable royalty rate, and any allowable deductions per the regulations. The Tribe's severance tax can be similarly assessed. Homans' assertion that the oil and gas on the New Mexico Lands do not have value until processed is incorrect.

(c) Homans Can Recover The Cost Of Its Off-Reservation Services Through Its Off-Reservation Taxation Authority.

The Tribe recognizes the District Court's finding that the off-reservation services to the operators are of substantial value to the Tribe. [RP 201, Finding 265.] Although the Tribe notes that Homans exaggerates the importance of these services (after all, Homans' role is to regulate, and not to build or maintain the oil and gas processing infrastructure), it recognizes Homans' right to tax them. Under Ramah, the proper way for Homans to collect revenues for off-reservation services

is to tax those off-reservation activities. Ramah, 458 U.S. at 845 n. 9 (stating "Presumably, the state tax revenues derived from [contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides to [contractor]."). See also [RP 234.]

Of course, New Mexico can impose taxes on the operators' off-reservation activities. See, e.g., Gross Receipts and Compensation Tax, N.M. Stat § 7-9-1 et seq.; the Income Tax, N.M. Stat. § 7-2-1 et seq.; the Oil and Gas Proceeds Withholding, N.M. Stat. § 7-3A-1 et seq.; and the Natural Gas Processors Tax, N.M. Stat. § 7-33-4 et seq. These off-reservation taxes, like the taxes in Ramah, presumably reimburse New Mexico for the cost of the off-reservation services.

D. The District Court Correctly Balanced The Relevant Federal, Tribal, And State Interests Under Bracker.

Homans' characterization of this case as "Cotton Petroleum revisited" ignores the Bracker preemption analysis. Homans attempts to shoehorn this case into the balancing test *conclusion* reached in Cotton by asserting, "[t]he 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." (Opening Br. 30.) However, this argument ignores the flexible, factually-sensitive preemption analysis developed in Bracker (and carried forth in Ramah, Mescalero Apache, and Cotton) and the District Court's

painstaking work to analyze and balance the competing federal, tribal, and state interests at stake on the New Mexico Lands.

In both Bracker and Ramah, the Supreme Court found that the federal government had a significant interest in the tribal activity being taxed. Similarly, in this case, the federal government has a significant interest in the development of oil and gas resources on the New Mexico Lands. The federal government not only has a *responsibility* to regulate oil and gas production under the comprehensive scheme of federal regulations, but it *actually* implements that scheme effectively and exclusively on the New Mexico Lands. See Section IV(A)(1), supra. In contrast, in Cotton there was no finding of exclusivity; NMOCD conducted mechanical integrity inspections and protected correlative rights through an active well-spacing program. 490 U.S. at 185-86.

Here, unlike the Jicarilla Apache Tribe in Cotton, the Ute Mountain Ute Tribe has a strong history of tribal sovereignty in the area of oil and gas activity. See Sections II, IV(A)(1), supra. The Tribe has carried this history forward by working with the BLM, the BIA, and MMS to regulate oil and gas activities on the New Mexico Lands and to generate much-needed revenue for its impoverished membership. See Section IV(A)(1), supra. The success of the federal-tribal program has simply left no room (or need) for any state regulation or services. See

Section IV(A)(2), supra. In addition, the state taxes in this case (unlike the Cotton taxes) do cause economic harm to the Tribe. See Section IV(B), supra.

In this case, the District Court also recognized that the State has a relatively weak interest in the Tribe's on-reservation oil and gas development. Here, like Bracker and Ramah, Homans is providing no meaningful or substantial services, such as regulating spacing and mechanical integrity, on the New Mexico Lands. See Section IV(C), supra. As such, Homans' only real interest in the on-reservation oil and gas development activity is a general desire to raise revenue. Balancing this weak interest against the strong federal and tribal interests in oil and gas development on the New Mexico Lands, the District Court properly held that Homans' state taxes should be preempted.

V. CONCLUSION

As sovereigns and as "domestic dependent nations," Indian tribes have historically enjoyed immunity from state taxation of tribal activities. However, this protection is not absolute, and in some cases non-Indian operators assisting tribes in on-reservation oil and gas development have been subject to state taxation. When applying the Bracker particularized inquiry test to the five New Mexico taxes assessed against operators assisting the Ute Mountain Ute Tribe in development of the Tribe's oil and gas resources, Homans' only interest is to collect revenue and the taxes are unlawful.

The State provides no benefit to the Ute Mountain Ute Reservation and State regulation of Tribal oil and gas development is not necessary; the federal regulatory scheme is comprehensive and is adequate to protect Tribal and non-tribal interests, the Tribe has a history of utilizing this federal regulatory scheme and opposing State interference, the State taxes burden the federal and Tribal interest in oil and gas development activities, and the services provided by the State that may justify the taxes are *de minimis*. For these reasons, the decision of the District Court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionately spaced, in 14-point, Times New Roman pitch, and contains 11,381 words, including footnotes. I relied on my word processor to obtain this count, and it is MS Word 2003. I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Peter Ortego
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of February, 2010, the foregoing Brief of Plaintiff/Appellee was served on the following in the manner indicated:

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