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

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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.

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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

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# BRIEF OF *AMICI CURIAE*, NEW MEXICO OIL & GAS ASSOCIATION AND COUNCIL OF ENERGY RESOURCE TRIBES, IN SUPPORT OF APPELLEE UTE MOUNTAIN UTE TRIBE

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February 25, 2010

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**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.

## ISSUES PRESENTED

I. DOES *COTTON PETROLEUM* PERMIT NEW MEXICO TO TAX OIL AND GAS OPERATORS' ACTIVITIES ON INDIAN TRUST LAND IN A NARROW CASE WHERE, AS HERE, "THE STATE HAS HAD NOTHING TO DO WITH THE ON-RESERVATION ACTIVITY, SAVE TAX IT"?

II. WHERE NEW MEXICO PROVIDES ONLY *DE MINIMIS* GOVERNMENTAL SERVICES TO OPERATORS ON THE RESERVATION AND NO DIRECT SERVICES TO THE TRIBE, DOES *COTTON PETROLEUM* SUPPORT STATE TAXATION ON INDIAN LANDS SOLELY BECAUSE OPERATORS RECEIVE OFF-RESERVATION BENEFITS FROM THE STATE ATTRIBUTABLE TO SUBSTANTIAL OFF-RESERVATION TAXES ELSEWHERE IN NEW MEXICO?

## INTERESTS OF AMICI CURIAE

The amici curiae are the New Mexico Oil & Gas Association ("NMOGA") and the Council of Energy Resource Tribes ("CERT"). NMOGA and CERT respectfully request leave to file this brief because this appeal raises critical questions as to the permissible scope of state taxation of oil-and-gas operators' activities on Indian trust land.

Headquartered in Santa Fe, NMOGA is a non-profit association representing oil and gas exploration and production companies and related enterprises operating in the state of New Mexico. New Mexico currently ranks sixth in the United States in oil production and second in natural gas production. New Mexico's petroleum industry, as represented by NMOGA and its members and supporting organizations, contributed more than $1.3 billion in direct taxes, royalties and lease bonuses to the state's general fund budget in fiscal year 2001.

CERT is a Denver-based non-profit organization that represents 58 U.S. energy-producing Indian tribes and nations, including the Ute Mountain Ute Tribe, and four Canadian First Nation treaty tribes. CERT's member tribes account for roughly 60 percent of all Native Americans living on Indian lands in the United States. CERT's mission is to strengthen tribal self-determination and economic growth through traditional and renewable energy development. Since its inception in 1975, CERT has been directly involved in the public policy-making process

relating to federal mining and mineral-leasing on Indian lands, environmental regulation, energy taxation, and related jurisdictional issues at the federal, state and tribal levels. The Ute Mountain Ute Tribe is a founding member of CERT.

The amici share an interest in encouraging the environmentally-responsible and economically-viable development of oil and gas resources on Indian trust lands. If this Court affirms Judge Parker's ruling and halts New Mexico's continued imposition of the five taxes on oil and gas enterprises operating on the trust lands at issue in this case, the Ute Mountain Ute Tribe ("the Tribe") would have two options. First, the Tribe could replace New Mexico's severance tax scheme with an equivalent tax that captures the entire revenue stream that previously went to the state. This would either increase the Tribe's governmental services to members or cash distributions to them by at least $650 per year – an 8 percent increase in per-capita income on a reservation where 38.5 percent of families currently live below the official poverty level. [RP 297, 308].

Alternatively, the Tribe could impose a Tribal tax the effective rate of which is lower than the current combined tribal-state tax, thereby increasing the competitiveness of oil and gas development on the Ute Mountain Ute Reservation as compared to other Indian lands elsewhere in New Mexico where dual taxation still applies. [RP 298]. The record is undisputed that "[o]il and gas operators could seek to increase production on the New Mexico lands, by drilling infill wells

on existing pools, or by bringing back into production wells that are not profitable under the current taxes." [RP 299]. This, in turn, could increase revenue to the Tribe from taxes and royalty payments. [RP 301].

Either way, for this Court to uphold the absence of state taxing authority on Indian trust lands in instances where states provides only *de minimis* value to Indian tribes and oil and gas operators is critically important to NMOGA and CERT as their members plan and structure their energy development activities.

## SUMMARY OF ARGUMENT

New Mexico imposes substantial severance taxes on private oil and gas enterprises operating on certain Indian lands in New Mexico, but delivers only marginal services to them and no direct services to the Ute Mountain Ute Tribe ("the Tribe"). This is a unique and very narrow case dealing with a remote and uninhabited corner of the Ute Mountain Ute Indian Reservation ("the Reservation") where the predominant economic activity – oil and gas production – is regulated exclusively by the federal government and officials from the Ute Mountain Ute Tribe ("the Tribe"). [RP 17, 19, 155]. The Tribe itself is largely impoverished and substantially burdened by New Mexico's taxes, but receives no direct governmental services of any kind from the state apart from the same access to its court system that citizens of other states or countries also enjoy. [RP 248].

*Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163 (1989), controls this case. In discussing the limits of state taxation on Indian lands, the Court expressly distinguished the case at hand from the one before it, in which it permitted the state to tax, and holding taxation inappropriate where "the State has nothing to do with the on-reservation activity, save tax it." *Id*. at 186. The same five taxes at issue in *Cotton Petroleum* are at issue here, but unlike the evidence presented and arguments made in *Cotton Petroleum*, New Mexico does not provide even basic

governmental services on the Reservation, such as roads or schools – or indeed *any* direct services to the Tribe at all, apart from the availability of access to New Mexico state courts. [RP 25, 28, 155, 248]. Given *Cotton Petroleum* and all other controlling precedent, New Mexico lacks taxing authority because the uncontested record shows "complete abdication or non-involvement of the state in the on-reservation activity." 490 U.S. at 185.

Nor can the state justify taxing operators' activities on the Tribe's lands merely because New Mexico provides substantial governmental services to them beyond the Reservation's boundaries. The same operators are already paying substantial taxes in connection with their activities elsewhere in New Mexico. Unlike the scenario in *Cotton Petroleum*, which addressed New Mexico's regulation of operators' oil and gas activities, the state here provides only *de minimis* value to operators' on-reservation activities and, moreover, does not provide the Tribe or its members with any of the services it delivers off-reservation.

*Cotton Petroleum* limited, but did not overrule, the Court's prior decisions *in White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Navajo Ramah School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). That New Mexico benefits the Tribe in common with all citizens by regulating operators' off-reservation activities is not a sufficient basis, in and of itself, to justify state taxation under *Bracker* and *Ramah*. Moreover, *Cotton Petroleum*

expressly distinguishes narrow scenarios in which a state is not involved in operators' on-reservation activities but nonetheless seeks to tax them.

## ARGUMENT

### I. *COTTON PETROLEUM* CONTROLS THIS CASE.

#### A. *Cotton Petroleum* Distinguished Narrow Cases Such as This Where the State Imposes Substantial Taxes on Indian Lands but Provides Minimal if any Governmental Services.

In *Cotton Petroleum,* the Court affirmed New Mexico's taxing authority where the state was providing substantial governmental services on that reservation to tribal members and private operators. The District Court had found that the state was delivering a range of services and programs on the reservation – in excess of $3 million per year – to the Jicarilla Apache Tribe and Cotton Petroleum Corp., 490 U.S. at 185-86. So extensive was New Mexico's on-reservation involvement that the actual per-capita state expenditures for Jicarilla members were equal to or greater than the per-capital expenditures for non-Indian citizens. *Id.* at 189-90.

In reaching its decision, the Court first analyzed the limits of state taxing authority, and carefully distinguished its ruling from other, very different scenarios in which states have minimal or no involvement in the on-reservation activity they

seek to tax.[1] Chief among those earlier cases were *Bracker*, 118 U.S. 136, *and Ramah*, 458 U.S. 832.

*Bracker* addressed the question whether Arizona could impose its motor carrier license and use fuel taxes on a non-Indian logging company's use of roads located solely within the Fort Apache Indian Reservation. *Ramah* involved a similar factual scenario in which New Mexico closed the only public high school serving the reservation, then later sought to tax two non-Indian construction firms hired by that tribe to build a new school. Importantly, *Cotton Petroleum* reaffirmed the so-called *Bracker* balancing test used in both cases to determine that federal law preempted the state's regulatory authority. The Court characterized that test as "a flexible one sensitive to the particular state, federal and tribal interests involved." 490 U.S. at 184 (citing *Bracker*, 118 U.S. at 145, and *Ramah*, 458 U.S. at 838).

Applying the *Bracker* test, the *Cotton Petroleum* Court noted that the factual findings before it "clearly distinguish this case from both *Bracker* and *Ramah*." *Id.* at 185. "Both cases," the Court continued, "involved complete abdication or noninvolvement of the State in the on-reservation activity;" the trial judge had

[1] *Cotton Petroleum* reaffirmed other limits on state taxing authority as well, notably including its summary affirmance of the Ninth Circuit's decision invalidating Montana's "unusually large" severance tax on coal mined on trust lands of the Crow Nation on federal preemption grounds. 490 U.S. at 187 n. 17

found that "[n]o economic burden falls on the tribe by virtue of the state taxes;" and New Mexico "regulates the spacing and mechanical integrity of wells located on the reservation." *Id.* at 185-86.

1. New Mexico is either not involved or has completely abdicated its authority to regulate operators' activities on the Reservation.

This case presents precisely the scenario that the *Cotton Petroleum* Court warned it was *not* deciding in upholding dual taxation in the very different factual context of the Jicarilla Apache Reservation.

Judge Parker thus correctly concluded that the factual scenario now before this Court "falls much closer to *Bracker* and *Ramah* than to *Cotton Petroleum*." [RP 234]. This is a case that the *Cotton Petroleum* Court warned about "in which the State has had nothing to do with the on-reservation activity, save tax it." 490 U.S. at 186. It is essential closely to review the trial record to balance these competing interests, and in understanding why federal law here preempts the same five New Mexico taxes that were upheld in *Cotton Petroleum*.

First, the unique aspects of this geographically-isolated and uninhabited portion of the Ute Mountain Ute Reservation must be considered. All the lands at issue are held in trust for the Tribe by the federal government; there are no allotted or fee lands. [RP 13-14]. There is no evidence that oil and gas operations on the

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(citing *Montana v. Crow Tribe*, 484 U.S. 997 (1988), *summarily aff'g* 819 F.2d 895 (1987)).

Reservation – the predominant economic activity on these lands – have any actual or potential environmental, or indeed any other impacts whatsoever, on neighboring lands in New Mexico. [RP 178-82].

Second, in sharp contrast to *Cotton Petroleum*, the state does not provide governmental services or programs, or build and maintain roads, schools or other facilities or institutions on the Reservation. [RP 25, 28, 155, 248]. Indeed, Judge Parker found that the state provides no services directly to the Tribe, "[o]ther than opening its courts" – the same access provided to litigants from out of state or from foreign countries – and "offering plugging of abandoned wells," a service the Tribe does not use because the federal government already works with the Tribe to provide that service. [RP 247-48]. Nor is there any indication that Tribal members make use of services provided by New Mexico off-reservation. [RP 249]. The District Court also determined that the economic value New Mexico provides to oil and gas operators on the Reservation is *de minimis*. [RP 264].[2]

Perhaps symbolizing the complete void of state regulatory authority, it appears that New Mexico's own Indian Affairs Department does not even

[2] Moreover, oil and gas production on the Ute Mountain Ute Reservation is limited to just 186 wells – a tiny fraction of those at Jicarilla and the 50,225 total wells in New Mexico. [RP 73, 256]. As of 1997, more than 2,700 oil and gas wells had been drilled on the Jicarilla Apache Reservation. *See* Guide to Tribal Energy: Atlas of Oil and Gas Plays, U.S. Department of Energy *http://www1.eere.energy.gov/tribalenergy/guide/pdfs/jicarilla_apache.pdf* (viewed Feb. 20, 2010).

officially recognize or acknowledge the Tribe. Even *after* the state filed its Opening Brief appealing Judge Parker's decision, its leaders still referred to "the 22 tribes, nations and pueblos in New Mexico" – ignoring the twenty-third tribe, the Ute Mountain Ute Tribe, whose lands, since at least 1895, have extended into New Mexico as well as Colorado and Utah. *See, e.g*, "Tribal and State Leaders Celebrate 23rd Annual American Indian Day at Legislature and Unveil First Annual State-Tribal Collaboration Report," press release of Alvin H. Warren, cabinet secretary, Indian Affairs Department, Feb. 5, 2010, *http://www.iad.state.nm.us/docs/IndianDay2010PressRelease.pdf* (viewed Feb. 20, 2010).[3]

2. The taxes that New Mexico imposes on the operators' Reservation activities are substantial and inflict a considerable economic burden on the Tribe and its members.

The undisputed record also reveals that the tax burden New Mexico imposes on operators' on-reservation activities – and the resulting economic impact to the Tribe and its members – is substantial, and significantly affects Tribal revenues, the competitiveness of operators' oil and gas activities on the Reservation, or both. [RP 285, 292]. For the years 2002 – 2007, the aggregate of the five New Mexico taxes on the Tribe's lands totaled $8,052,449, an average of $1,342,075 per year. [RP 293]. That amounts to roughly $650 per enrolled Tribal member per year, or

[3] For its part, the Tribe has distanced itself from the state, to the point that its practice since 1992 is to bar any New Mexico officials from visiting its lands without permission. [RP 207].

about 8 percent of each member's total annual income. [RP 297, 309]. The average per capita income of Tribal members at the time of the 2000 Census was just $8,159. [RP 305]. This compares to an average per capita income of $17,261 for New Mexico in general. [RP 306].

In his factual findings, Judge Parker noted that if New Mexico were to cease imposing the five taxes on oil and gas enterprises operating on the Reservation, the Tribe would have at least two options. First, the Tribe could replace New Mexico's severance tax scheme with an equivalent tax that captures the entire revenue stream that previously went to the state. This would either increase the Tribe's governmental services to members or cash distributions to them by at least $650 per year – an eight percent increase in per-capita income on a reservation where 38.5 percent of families currently live below the official poverty level. [RP 297, 308].

Alternatively, the District Court found that the Tribe could impose a Tribal tax whose effective rate is lower than the current combined Tribal-state tax. The would reasonably be expected to enhance the competitiveness of oil and gas development on the Reservation as compared to other Indian lands elsewhere in New Mexico where dual taxation applies. [RP 298]. The judge explained that "[o]il and gas operators could seek to increase production on the New Mexico lands, by drilling infill wells on existing pools, or by bringing back into production

wells that are not profitable under the current taxes." [RP 299]. This, in turn, could increase revenue to the Tribe from taxes and royalty payments. [RP 301].

Both options identified by the District Court illustrate the substantial burden that New Mexico's severance taxes impose on oil and gas operators and ultimately on the Tribe itself. These facts are directly at odds with the factual scenario *in Cotton Petroleum*. Even in that case, the Court found that the company's "most persuasive argument" was based on "the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole." *Cotton Petroleum*, 490 U.S. at 189. The case before this Court is much more compelling, however, because *Cotton Petroleum* itself explicitly distinguishes scenarios in which the state is imposing substantial tax burdens on operators' on-reservation activities – at their and the Tribe's expense – but is not involved with those activities except to tax them.

### B. Oil and Gas Operators Are Already Paying Substantial Taxes for the Services New Mexico Provides Them Off-Reservation, and the State's Provision of Those Services Is Not a Sufficient Basis to Justify On-Reservation Taxation.

New Mexico's attempt to justify taxing operators' on-Reservation activities merely because the state provides substantial governmental services to them off-Reservation must fail under *Cotton Petroleum*, *Bracker* and *Ramah*. Unlike *Cotton Petroleum*, in which New Mexico provided various services and programs to operators on the Reservation itself, including oil and gas regulation through the Oil

and Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department, the state here provides only *de minimis* value to operators' on-Reservation activities and does not provide the Tribe or its members with any of the services it delivers beyond the Reservation.[4]

While New Mexico substantially benefits the Tribe in common with all citizens by regulating operators' activities beyond the boundaries of its Reservation, this is not a sufficient basis to protect state taxation from federal preemption. *Ramah* expressly holds that the substantial off-reservation benefit that New Mexico provides "is not a legitimate justification for a tax whose ultimate benefit falls on the tribal organization," and which is imposed on private business activities on tribal lands pursuant to a contract between a tribe and a non-Indian enterprise. *Ramah*, 458 U.S. at 844. *Cotton Petroleum*, in turn, explicitly distinguished factual scenarios such as this one, in which a state is not involved in operators' on-reservation activities but nonetheless seeks to tax them.

The bottom line is that the same operators are already paying substantial taxes in connection with their activities elsewhere in New Mexico – taxes that are "presumably enough to recompense the State for its provision and regulation" of services and infrastructure beyond the Reservation's boundaries. [RP 234]. The

[4] It also bears emphasis that oil and gas production on the Reservation is limited to just 186 wells – far less than the extensive oil and gas development at Jicarilla at

petroleum industry is the state's largest civilian employer and provides New Mexico public schools, roads and facilities with more than $2.5 billion in funding each year, according to the New Mexico Oil & Gas Association. This includes an estimated $1.3 billion in direct taxes, royalty and lease bonuses to the state's general fund budget alone in fiscal year 2001. *See* "Industry Impact," New Mexico Oil and Gas Association *http://nmoga.org/industry.asp?CustComKey=361961&CategoryKey=361962&pn=Page&DomName=nmoga.org* (viewed Feb. 20, 2010).

In applying *Ramah* and *Bracker*, the District Court held that "the physical infrastructure and services off the [Reservation] provided and regulated by the State of New Mexico should similarly play no part in the analysis." [RP 69]. This reasoning is sound and gains added force because *Cotton Petroleum* distinguished cases in which the state taxes operators' on-Reservation activities but is not involved in regulating them.

## CONCLUSION

The facts before this Court differ dramatically from the scenario in *Cotton Petroleum* in which the "burdensome consequence" of dual taxation "is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction." *Cotton Petroleum*, 490 U.S. at 189.

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issue in Cotton Petroleum, and a tiny fraction of the 50,225 total wells in New

*Cotton Petroleum* explicitly reaffirmed that state governments' taxing authority over oil and gas operators' activities on Indian lands is not absolute or open-ended. Dual taxation on Indian lands is impermissible where, as here, the state has so thoroughly removed itself from providing governmental services that its only connection to with operators' on-reservation activity is to tax it. *Id*. at 186. In the final analysis, "[t]he State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues." *Ramah*, 458 U.S. at 845. This is simply not enough under *Cotton Petroleum* to justify New Mexico's continued taxation on the lands of a largely impoverished Indian tribe by a virtual absentee state regulator.

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Mexico. *See* footnote 2 *supra*.

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 3,136 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/Troy A. Eid*
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of February, 2010, the foregoing Brief of *Amici Curiae*, New Mexico Oil & Gas Association and Council of Energy Resource Tribes, in Support of Appellee Ute Mountain Ute Tribe was served on the following in the manner indicated:

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