NO. 09-2276

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE MOUNTAIN UTE TRIBE,

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

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

DEFENDANTS'/APPELLANTS' BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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None.

PRELIMINARY STATEMENT OF THE GROUNDS FOR JURISDICTION

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

STATEMENT OF THE FACTS[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

ARGUMENT

I. STANDARD OF REVIEW

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

II. THE TRIAL COURT MISCONSTRUED *COTTON PETROLEUM*

A. *Cotton Petroleum v. New Mexico*

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

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

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

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

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

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

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

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

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

Id. at 175-176.

***Cotton Petroleum* and Preemption**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 191.

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

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

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

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

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

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

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

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

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

C. The Trial Court's Legal Analysis

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

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

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

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

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

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

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

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

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

The Court Misinterpreted *Montana v. Blackfeet Tribe*

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

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

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

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

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

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

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

471 U.S. at 767.

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

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

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

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

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

Continuing, the *Cotton Petroleum* court said this:

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

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

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

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

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

490 U.S. at 183 n.14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[RP 225.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court's Quantitative Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

ORAL ARGUMENT STATEMENT

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

DISTRICT COURT'S DECISION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ John B. Pound
JOHN B. POUND

CERTIFICATE OF DIGITAL SUBMISSION

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

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

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/s/ John B. Pound
JOHN B. POUND

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UTE MOUNTAIN UTE TRIBE,

Plaintiff,

vs. No. CIV 07-772 JP/WDS

RICK HOMANS, Secretary of Taxation and Revenue Department for the State of New Mexico,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION

Background

The State of New Mexico levies five taxes on oil and gas operations throughout New Mexico, including operations on the Ute Mountain Ute Reservation, that lies partly within the State of New Mexico along New Mexico's border with Colorado. On August 10, 2007, the Ute Mountain Ute Tribe ("UMUT") filed a Complaint (Doc. No. 1) against the Secretary of the Taxation and Revenue Department for the State of New Mexico. The Complaint is divided into three claims for relief. Under the First Claim for Relief, the UMUT alleged that the imposition of the state taxes violates federal common law, the federal right of the UMUT to self-determination, and the Supremacy Clause of the United States Constitution. In the Second Claim for Relief, the UMUT asserted that the State of New Mexico's imposition of an *ad valorem* property tax on oil and gas production equipment violates the Fourteenth Amendment and the Enabling Act of June 20, 1910 in which the State of New Mexico disclaimed any taxing jurisdiction over lands held by the United States of America for the benefit of tribes. In the Third Claim for Relief, the UMUT sued under 42 U.S.C. § 1983 claiming that the State of New

Mexico taxes deprive individual Ute Mountain Ute Tribal members of their "property rights and the privileges and immunities secured to them under federal law and the Constitution." The UMUT seeks an injunction prohibiting the State of New Mexico from imposing the five state taxes on operations on UMUT's lands in New Mexico.

In a Memorandum Opinion and Order (Doc. No. 15) filed February 4, 2008, the Court denied Defendant's Motion to Dismiss (Doc. No. 7) as to the First Claim for Relief and the Second Claim for Relief, but granted the Motion to Dismiss as to the Third Claim for Relief and, therefore, dismissed with prejudice the UMUT's Third Claim for Relief under 42 U.S.C. § 1983 and its accompanying claim for attorney's fees under 42 U.S.C. § 1988.

On May 6 through May 8, 2009, the Court held a non-jury trial on the UMUT's remaining claims. Following the presentation of all evidence, the Court issued proposed Findings of Fact based on the evidence introduced at trial. Counsel were permitted to and did submit written comments and suggestions on the Court's proposed Findings of Fact. After taking the comments and suggestions into account, the Court provided counsel with the Court's final Findings of Fact (which were not docketed at the time). The Court then permitted counsel to submit briefs on the law as it related to the Court's final Findings of Fact. The parties have now submitted briefs on the law, which the Court found to be helpful and which the Court has taken into account.

In accordance with FED. R. CIV. P. 52(a), the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

The UMUT and Its Reservation

1. The UMUT is a federally recognized Indian Tribe.

2. A person is eligible to be an enrolled member of the UMUT if the person is at least 50% Ute Mountain Ute by blood.

3. There are currently slightly more than two thousand enrolled members of the UMUT.

4. A reservation for the UMUT ("Reservation")–and reservations for other Ute Indians–were first established by treaty in 1868. Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, Mar. 2, 1868, 15 Stat. 619; *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1158 (D. Colo. 1998) (Weminuche band of Ute Indians now known as UMUT).

5. The Reservation was decreased in size by the Brunot Agreement, which Congress ratified in 1874, Act of Apr. 29, 1874, 18 Stat. 37, and again by a second agreement ratified by Congress in 1880, Act of June 15, 1880, 21 Stat. 199.

6. The Reservation is a hybrid treaty/statutory reservation; it is not an executive reservation.

7. The Reservation lies mainly in the State of Colorado, but also lies partly in the State of Utah and partly in the State of New Mexico.

8. The headquarters of the UMUT are in Towaoc, Colorado.

9. The present eastern and southern boundaries of the New Mexico portion of the Reservation ("New Mexico lands") were fixed by Congress in 1895. Act of Feb. 20, 1895, 28 Stat. 677.

10. The New Mexico lands are bounded on the north by the New Mexico-Colorado state line.

11. The present western boundary of the Reservation in New Mexico was fixed in a quiet title action in the United States District Court for the District of New Mexico between the UMUT and the Navajo Tribe. Navajo-Ute Boundary Dispute Act of 1968, Pub. L. 90-256

(Feb. 14, 1968) (giving district court jurisdiction over the action); *Ute Mountain Tribe of Indians v. Navajo Tribe of Indians*, 409 U.S. 809 (1972) (affirming judgment of the district court).

12. The New Mexico lands consist of all sections in Townships 31 and 32 North in Ranges 14 and 15 West of the New Mexico Principal Meridian, and the easternmost two-thirds of the sections in Townships 31 and 32 North in Range 16 West of the New Mexico Principal Meridian.

13. The New Mexico lands are unallotted. Act of Feb. 20, 1895, 28 Stat. 677.

14. No part of the New Mexico lands is held privately in fee.

15. The New Mexico lands are held in trust for the UMUT by the United States.

16. No member of the UMUT resides in the New Mexico lands.

17. No other person resides in the New Mexico lands.

18. Tribal members can choose to reside in the New Mexico lands, subject to approval by the UMUT.

19. The only economic activities on the New Mexico lands are grazing and extraction of oil and natural gas.

20. The only roads in the New Mexico lands are unpaved roads.

21. There is no other transportation infrastructure, such as rail lines or air strips, on the New Mexico lands.

22. Members of the UMUT use the unpaved roads in the New Mexico lands for gathering wood and running livestock; and oil and gas operators use the unpaved roads for survey and for access to their wells and equipment.

23. Access to the unpaved roads is primarily from New Mexico state roads.

24. The UMUT and the Bureau of Indian Affairs ("BIA") share jurisdiction over the roads in the New Mexico lands.

25. The roads in the New Mexico lands are maintained in part by the UMUT and in part by the oil and gas operators.

26. Before an oil and gas operator creates a new unpaved road on the New Mexico lands for survey purposes, the operator must have approval from the BIA.

27. Before an oil and gas operator creates or modifies a road on the New Mexico lands for drilling or maintenance purposes, the operator must have approval from the Bureau of Land Management ("BLM").

28. The State of New Mexico plays no part in the creation, maintenance, or approval of roads on the New Mexico lands.

Oil and Gas Operations in General

29. Oil and natural gas lie in reservoirs underneath the surface of the earth.

30. In many circumstances, multiple distinct operators have a leasehold or other property interest that grants them the right to extract oil and/or natural gas from the same reservoir.

31. In that circumstance, the rights are correlative: one operator's exercise of its right to extract oil or natural gas affects the amount and location of the resource in the reservoir and as a result affects the rights of the other operators in the same reservoir.

32. In the absence of constraints on production, multiple operators extracting oil or natural gas from a common reservoir will race to extract the resource as quickly as possible.

33. This race to extract can cause economic waste of the oil or gas resource, either from depressed market prices or from storage costs.

34. This race to extract can also cause physical waste of the oil or gas resource by decreasing pressure in the reservoir or by causing the resource to flow into other areas, making extraction impossible or inefficient.

35. Defects in well design or integrity can also cause waste of the resource by allowing escape of the resource or by allowing water into the reservoir.

36. Historically, waste has been addressed through private agreements or statutory provisions, known as pooling or unitization, that treat a reservoir as a common resource and constrain the operators extracting oil or gas from it.

37. The constraints are typically in the form of well spacing, setbacks, and limits on the rate of production from a well.

38. In addition to addressing waste, these constraints allow each operator to receive the operator's just and equitable share of the reservoir.

39. Statutes may provide for compulsory or forced pooling where the operators are unable to come to agreement.

40. Pools can grow or shrink as new resources are discovered or existing ones are depleted.

41. Two pools can become connected through discovery of resources between them.

42. Extraction of oil and gas often involves extraction of groundwater as a by-product, known as "produced water."

43. Produced water is typically alkaline and not usable for municipal or agricultural purposes; it is also potentially a pollutant.

44. Operators often dispose of produced water by injecting it into wells.

45. Injection of produced water can make oil remaining in a reservoir easier to extract.

46. If produced water is not injected correctly, a formation or a zone can be fractured, resulting in waste of the resource or contamination of groundwater.

47. When revenues from a producing well have repaid the expense of drilling it, the well is said to have reached "payout," a term used later in these Findings of Fact.

New Mexico Regulation of Oil and Gas

48. The Oil and Conservation Division of the New Mexico Energy, Minerals, and Natural Resources Department ("NMOCD") is responsible for regulation of oil and gas operations in the State of New Mexico.

49. The primary mission of NMOCD is to prevent waste and to protect correlative rights; in regulating oil and gas operations, NMOCD also seeks to protect public safety and health.

50. NMOCD does so in part by defining oil and gas pools and setting well spacing and well setbacks.

51. When operators are not able to agree on pooling or spacing, NMOCD sometimes issues an order forcing pooling after a public hearing in which the affected operators had the opportunity to participate.

52. NMOCD also seeks to prevent waste by regulating production and transportation of oil and natural gas.

53. Operators may request approval from NMOCD for commingling, which includes extracting oil or gas in a single well from multiple strata.

54. Commingling can cause production issues where, for example, natural gas in one stratum contains much more hydrogen sulfide or water than natural gas in another stratum.

55. NMOCD approval for commingling may be given in an administrative order or may be decided at a hearing.

56. Operators may request approval from NMOCD for infill, which is adding a second or third well to a spacing unit in order to drain the unit more efficiently.

57. Operators may request approval from NMOCD for non-standard well locations.

58. NMOCD hearings are conducted by administrative law judges, who can require evidence to be produced.

59. In NMOCD hearings, geologic evidence is usually presented by the operators, but may also be presented by other interested parties.

60. NMOCD sets standards for casings, the steel pipe and surrounding cement used to construct a well.

61. Casing defects can cause problems that include blowout of a reservoir, mixing of flow from other zones with a reservoir, contamination of groundwater, and escape of hydrogen sulfide.

62. NMOCD requires operators in New Mexico, including operators extracting oil and gas on the New Mexico lands, to file forms for applications for permits to drill, for sundry notices, for plugging abandoned wells, and for various reports on wells, including well completion or recompletion reports. Under December 1, 2008 amendments to NMOCD regulations the operators on federal, public, or tribal lands must use BLM forms for these purposes, but the forms remain subject to NMOCD approval. N.M. Admin. Code § 19.15.7.11.

63. Since 2008, NMOCD also requires operators to file applications for “pit permits” under the “pit rule.”

64. When an operator fails to comply with NMOCD regulations, including the failure to file required forms, NMOCD may revoke the operator’s authority to transport natural gas or

oil in the State of New Mexico, making it economically impossible for the operator to continue operations.

65. On one occasion in the early 1990's, the NMOCD cancelled the authority to transport of an operator on the New Mexico lands who had injected produced water into a well under a U.S. Environmental Protection Agency permit but who failed to comply with NMOCD regulations.

66. On one occasion in the late 1980's, NMOCD required an operator on the New Mexico lands to cleanup a spill to NMOCD standards; NMOCD later inspected the site to confirm the work.

67. More recently, the UMUT's Department of Energy assumed responsibility for detecting spills; once a spill is detected, the Department asks the operator and the BLM to cleanup the spill.

68. NMOCD has general authority to plug and abandon a well when an operator fails to do so, but the UMUT does not allow NMOCD officials to plug wells on the New Mexico lands.

69. NMOCD maintains publicly available geologic records, including records of the geology of the New Mexico lands.

70. NMOCD maintains publicly available records of production of oil and gas by operators, including records of production by operators who extract oil and gas from the New Mexico lands.

Oil and Gas Underlying the New Mexico Lands

71. The New Mexico lands lie in the San Juan Basin, a geologic region consisting of sedimentary formations containing reservoirs of oil and natural gas.

72. There are more than 23,000 active oil and gas wells in the New Mexico portion of the San Juan Basin.

73. There are 186 active oil and gas wells on the New Mexico lands.

74. Four oil and gas bearing sedimentary formations underlie the New Mexico Lands: the Gallup, the Dakota, the Morrison, and the Paradox (from shallowest to deepest).

75. The Paradox Formation consists of four geologic stages: Barker Creek, Akah, Desert Creek, and Ismay.

76. Several oil and gas pools which at least partly underlie the New Mexico lands have been established: the Horseshoe Gallup, the Many Rocks Gallup, the Verde Gallup, the Straight Canyon Dakota Gas, the Basin Dakota, the Ute Dome Morrison Gas, the Ute Dome Dakota Gas, the Ute Dome Paradox Gas, the Barker Creek Dakota, the Barker Dome Paradox Gas, the Barker Dome Akah/Upper Barker Creek, the Barker Dome Desert Creek, and the Barker Dome Ismay.

77. Oil and gas pool names have a geographic component–the name of the field, derived from a geographic location–and a stratigraphic component–the name of the geologic formation that contains the oil or gas.

78. A pool in one formation may overlie another pool in a deeper formation.

79. The Horseshoe Gallup pool lies partly under the southwest corner of the New Mexico lands, partly under the Navajo Reservation, and partly under split-estate lands with private surface ownership and federally-owned and BLM-managed subsurface mineral rights.

80. The Horseshoe Gallup pool has very low production.

81. There have been no operator conflicts or complaints of drainage on the Horseshoe Gallup pool.

82. The Many Rocks Gallup pool lies primarily under the Navajo Reservation, but also lies partly under the New Mexico lands.

83. The Verde Gallup pool lies primarily under the New Mexico lands, but also lies partly to the south of the New Mexico lands under mostly federally-owned lands but also under one and one-half sections of privately-owned lands.

84. The Straight Canyon-Dakota Gas Pool, which is obsolete, lies entirely under the New Mexico lands.

85. The Basin Dakota Pool is a San Juan Basin-wide pool for all oil and gas in the Dakota formation that is not in another, more geographically specific Dakota pool.

86. The Ute Dome Morrison Gas Pool lies entirely under the New Mexico lands.

87. There is only one exploratory well on the Ute Dome Morrison Gas Pool and no production from that Pool.

88. The Ute Dome Dakota Gas Pool lies almost entirely under the New Mexico lands, but also underlies two sections with federally-owned subsurface mineral rights, one quarter-section of which is in private surface ownership.

89. The Ute Dome Paradox Gas Pool lies almost entirely under the New Mexico lands, but also underlies one section of federally-owned (both surface and subsurface) land.

90. The Barker Creek Dakota Pool and all of the Barker Dome pools lie partly under the New Mexico lands and partly in the State of Colorado; no part of these pools lies in New Mexico outside the New Mexico lands.

91. The Verde Gallup Pool is the only pool that includes private subsurface oil and gas rights.

92. No pool underlies state land or includes state-owned subsurface oil and gas rights.

93. The Barker Dome and Ute Dome pools account for 85% of the production of natural gas on the New Mexico lands.

94. Oil removed from wells on the New Mexico lands is transported by truck through New Mexico to refineries outside the New Mexico lands, including a refinery in Bloomfield, New Mexico.

95. No processing of oil takes place on the New Mexico lands.

96. Natural gas wells on the New Mexico lands are connected by gathering pipelines to main lines that transport the gas to processing plants outside the New Mexico lands, primarily to a plant near Kirtland, New Mexico.

97. There are a few compressor stations for natural gas pipelines on the New Mexico lands.

98. The only processing of natural gas that takes place on the New Mexico lands is removal of condensate, a form of oil.

99. Natural gas is the primary resource extracted on the New Mexico lands, and oil is a secondary resource.

100. The above mentioned pools were mostly created by NMOCD in the 1940's and 50's, with the exception of one or two unitization agreements.

101. NMOCD initially set the well spacing in the above mentioned pools.

102. The last change in spacing and setbacks was made in 1995 on the Ute Dome Dakota pool after an application by XTO Energy, supported by the UMUT, was approved by NMOCD.

Leasing of Oil and Gas on the New Mexico Lands

103. The United States holds title in trust for the UMUT to all subsurface mineral rights–including oil and gas–on the New Mexico lands.

104. Operators on the New Mexico lands take title to gas or oil when it is severed (removed from the ground).

105. In almost all cases, the UMUT does not own any of the physical facilities or equipment used to extract oil and gas on the New Mexico lands; however, the UMUT's agreement with BIYA Operators, Inc. ("BIYA") is an example of an exception, under which the operator leases equipment from the UMUT.

106. Natural gas operators construct, maintain, and own the gathering pipelines that transport gas to main pipelines outside the New Mexico lands.

107. Oil operators construct and maintain the roads used to transport oil to refineries outside the New Mexico lands.

108. Oil and gas operators construct and maintain the roads used to service oil and gas wells.

109. There are twelve different oil and gas operators that operate wells on the New Mexico lands.

110. All of the oil and gas operators on the New Mexico lands are non-Indian.

111. The two largest operators–Burlington Resources and XTO Energy–are responsible for approximately 90% of the natural gas extracted on the New Mexico lands.

112. Extraction of natural gas on the New Mexico lands is a small percentage of Burlington Resources' and XTO Energy's total extraction of natural gas in New Mexico.

113. Although the United States holds title to the natural gas and oil in trust for the UMUT, it is the UMUT that negotiates and enters into leases with oil and gas operators

under the authority of the Indian Mineral Leasing Act of 1938 ("IMLA").

114. Most of the existing leases on the New Mexico lands were entered into in the 1950's, 60's, and 80's.

115. The UMUT also negotiates and enters into development agreements with oil and gas operators under the authority of the Indian Mineral Development Act of 1982 ("IMDA").

116. There are at least three development agreements between the UMUT and an operator: one with Elk San Juan, Inc.; one with BIYA Operators Inc.; and one with Texakoma Oil and Gas Corp.

117. Typically, in the leases and development agreements the operator is required to be qualified to do business in the State of New Mexico.

118. Typically, in the leases and development agreements the operator is required to provide worker's compensation to employees of the operator working on the New Mexico lands.

119. Some development agreements, such as the BIYA agreement, include a forfeiture clause if the operator does not develop the mineral resource.

120. Some development agreements, such as the Texakoma agreement, include an option for the UMUT to take a working interest in a well after payout.

121. Some development agreements, such as the Texakoma agreement, cap the combined UMUT tax and royalty revenue at 30%.

122. Some development agreements, such as the Elk San Juan agreement, provide the UMUT an option to enter into a joint venture with the operator after payout; under the joint venture the UMUT would acquire a working interest, would invest in developing the site, and would have joint control with the BLM over the number and location of wells.

123. As of the date of trial, the UMUT had not entered into any joint ventures.

124. Some development agreements, such as the BIYA agreement, give the UMUT control over the number of wells and their spacing and location.

125. Leases and agreements are subject to approval by the BIA.

126. The BIA acts as trustee for the UMUT.

127. The BIA and the BLM are both subagencies of the Department of Interior.

128. The UMUT Energy Department works with the BIA on leases and agreements.

129. BIA authority to approve leases is granted by § 1 of the IMLA, 25 U.S.C. § 396a, and implemented in regulations at 25 C.F.R. Part 211.

130. BIA authority to approve agreements is granted by § 3 of the IMDA, 25 U.S.C. § 2102, and implemented in regulations at 25 C.F.R. Part 225.

131. The BIA performs site inspections to ensure compliance with lease or agreement terms.

132. Approval of a lease or agreement by the BIA is a federal action that may fall within the scope of the National Environmental Policy Act ("NEPA").

133. The Minerals Management Service ("MMS") in the Department of Interior is responsible for accounting for royalties on the leases and agreements.

134. The UMUT Energy Department works with MMS on accounting for royalties and on audits.

135. Leases and agreements on the New Mexico lands are not subject to approval by the State of New Mexico.

Drilling on the New Mexico Lands

136. Before an operator with a lease or agreement for the New Mexico lands can drill, the operator must first get permission from the BIA to survey the land, including creating survey roads, and the BIA must then get consent from the UMUT for the survey.

137. After obtaining UMUT consent for the survey, the BIA informs the BLM that the BIA has approved the survey.

138. After the operator has completed its survey, the operator submits an Application for Permit to Drill ("APD") to the BLM on a standard BLM form (No. 3160-3) used for all APDs.

139. The operator must attach to the APD the following: 1) a well plat certified by a registered surveyor; 2) a drilling plan; 3) a surface use plan; 4) a bond to cover operations, unless an existing bond covers the operations; and 5) the operator's certification.

140. An operator must use surveyors registered by a State.

141. Operators typically use NMOCD form C-102 for the well plat.

142. Under federal law, the BLM and BIA share 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.

143. BLM authority over oil and gas operations by lessees is granted by § 4 of the IMLA, 25 U.S.C. § 396d, and implemented by regulations at 43 C.F.R. Part 3160.

144. BLM authority over oil and gas operations by agreement holders is granted by the IMDA and implemented by regulations at 43 C.F.R. Part 3160.

145. Under federal law, the BLM is responsible for subsurface ("downhole") issues raised by an APD.

146. Subsurface issues can include impacts to reservoirs that may be drilled into or through and impacts to groundwater.

147. Under federal law, the BLM and BIA share responsibility for surface issues raised by an APD.

148. The BIA is responsible for surface issues related to cultural resources, endangered species, and air and water quality.

149. The BIA is responsible for granting easements to the oil and gas operators for roads and pipelines.

150. If a well location proposed in an APD creates a surface issue, the BIA, BLM, and the UMUT consult to resolve the well location issue.

151. After an APD has been approved, the operator may request a non-standard location if the approved location causes problems due to the topography or geology of the site.

152. Normally, the operator requests a non-standard location through a sundry notice to the BLM; the BLM then forwards the sundry notice to NMOCD or requires the operator to do so.

153. On some occasions, an operator on the New Mexico lands has requested approval for a non-standard location from NMOCD.

154. Representatives of the BIA, BLM, and the UMUT meet yearly to discuss oil and gas operations on the Reservation.

155. The UMUT Energy Department works with the BIA on surface issues and with the BLM on downhole issues.

156. As to matters on the New Mexico lands, the BIA has no interaction with NMOCD.

157. After the BLM approves an APD, it forwards the form to NMOCD.

158. Once a well is in operation, the operator must provide sundry notices to the BLM as events happen, such as plugging of the well.

159. The BLM sends copies of the sundry notices to BIA and NMOCD.

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160. Under federal law, disposal of produced water by an operator is subject to approval by the BLM. 43 C.F.R. § 3162.5-1.

161. When an operator does not want to operate a well any longer, it is the operator's responsibility to plug the well and abandon it and to reclaim the surface.

162. Under federal law, the operator's plans to plug and abandon a well and to reclaim the surface must be approved by the BLM and/or the BIA.

163. The BLM has enforcement authority to plug and abandon a well when an operator fails to do so.

164. The BIA may work with the BLM on a decision to plug and abandon a well.

165. After an operator has completed reclamation of the surface, the BIA issues a notice of completion to the BLM and the BIA releases the bond it holds for the well.

166. The BIA has no adjudicative process to resolve disputes between operators.

167. In general, an action by the BIA is subject to judicial review in federal district court under the Administrative Procedure Act.

168. The BLM has adjudicative processes to resolve disputes relating to resources over which BLM has oversight, and, in general, an action by a field office of the BLM is subject to administrative review by the corresponding BLM State Director and then by the Department of Interior Board of Land Appeals ("IBLA").

169. The IBLA often hears cases involving Indian trust responsibilities.

170. In general, after the IBLA has administratively reviewed an action by a field office of the BLM, the action is subject to judicial review in federal district court under the Administrative Procedure Act.

Environmental Effects of Oil and Gas Operations

171. Unprocessed natural gas, including that found on the New Mexico lands, can contain hydrogen sulfide (H_2S).

172. Hydrogen sulfide is a corrosive and toxic gas.

173. Hydrogen sulfide can corrode equipment and pipelines.

174. Hydrogen sulfide can present a threat to human health.

175. Hydrogen sulfide is heavier than air.

176. On two occasions, residents of La Plata, New Mexico, a town east of the New Mexico lands, complained to NMOCD about hydrogen sulfide, which originated from stuck valves on the New Mexico lands.

177. In general, oil and gas operations can cause groundwater contamination.

178. There is no evidence in the record of actual or potential contamination of groundwater in adjoining private, state, federal, or tribal lands from oil and gas operations on the New Mexico lands.

179. In general, oil and gas operations disrupt the surface, which may cause environmental effects.

180. There is no evidence in the record of actual or potential environmental effects on adjoining private, state, federal, or tribal lands from surface disruption on the New Mexico lands.

181. In general, oil and gas operations can affect wildlife, including endangered or threatened species.

182. There is no evidence in the record of actual or potential effects on wildlife from oil and gas operations on the New Mexico lands.

Relationship of BLM, NMOCD, and the UMUT

183. On June 9, 1995, the BLM issued an order–Ute Mountain Ute No. 1–setting well spacing for wells on Reservation lands extracting natural gas from the Barker Dome Paradox Formation.

184. The BLM used the hearing processes of NMOCD and the Colorado Oil and Gas Conservation Commission for notification and public hearing on the order for the reasons stated in the order.

185. The BLM issued the Ute Mountain Ute No. 1 order because there was no "cooperative agreement between the [UMUT], the BLM, [and] the states of Colorado and New Mexico[] governing establishment of spacing on [UMUT] lands."

186. In the order, 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]."

187. The BLM considered "geologic and engineering data" in setting well spacing so that the wells could "efficiently and economically drain the gas and associated hydrocarbons" from the geologic stages in the Paradox Formation.

188. The BLM approved commingling in some of the wells.

189. The BLM retained authority to grant permits for non-standard well locations and infill wells.

190. On October 9, 1996, the BLM issued a second order–Ute Mountain Ute No. 2–setting spacing for wells on Reservation lands extracting oil and gas from the

Ute Dome Dakota Formation.

191. Ute Mountain Ute No. 2 was substantially similar to Ute Mountain Ute No. 1, with the exception that no commingling was approved in Ute Mountain Ute No. 2.

192. In July 1999, the BLM and NMOCD entered into a memorandum of understanding ("MOU") regarding well spacing on Indian lands.

193. BLM's purpose in entering into the MOU was to provide familiar, consistent procedures for oil and gas operators and to avoid duplication of effort by the two agencies.

194. Under the MOU, the BLM adopted the NMOCD standards for well spacing and setbacks as the standards for Indian lands.

195. The BLM also used the NMOCD hearing process for notification and participation in decisions on well spacing matters on Indian lands, including setting of spacing, approval of non-standard well locations, approval of non-standard spacing units, and forced pooling.

196. Under this process, the NMOCD did not issue final binding orders on well spacing matters on Indian lands; instead, NMOCD issued draft orders to be considered by the BLM in making an independent decision based on the record.

197. Under the MOU, when the BLM agreed with NMOCD's draft order, the BLM could issue a final order through a letter of concurrence.

198. Under the MOU, when the BLM differed with NMOCD's draft order, the BLM was required to issue its own order, setting forth "the differences between the ... orders, the reasoning behind those differences, and why the [BLM's] decision [was] consistent with [its] trust responsibilities."

199. The MOU left in effect all existing decisions of the NMOCD involving Indian lands, except those dealt with in Ute Mountain Ute Orders Nos. 1 and 2.

200. Under the MOU, when a party was adversely affected by the BLM's final order, and the matter involved only Indian lands, the party could appeal only to the BLM's Colorado or New Mexico State Director and then to the IBLA.

201. Under the MOU, when a party was adversely affected by the BLM's final order, and the matter involved partly Indian and partly non-Indian lands, the party could appeal either 1) to the BLM State Director and IBLA, in order to have review of the order as applied to Indian lands, or 2) through a BLM hearing using the NMOCD process, in order to have review of the order in its entirety.

202. The MOU expired in July 2004.

203. Historically, the BLM has generally adopted well spacing and setbacks set by state agencies.

204. In 2008, NMOCD promulgated the "pit rule," regulations for the disposal of waste fluids and produced water from oil and gas operations in temporary pits.

205. In 2009, BLM entered into an MOU with NMOCD adopting the pit rule for federal lands and certain tribal lands in New Mexico.

206. The 2009 MOU did not adopt the pit rule for the New Mexico lands.

207. Since 1992, the UMUT has barred NMOCD officials and employees from entering the New Mexico lands without permission, because the UMUT does not recognize the authority of NMOCD over oil and gas on the New Mexico lands; instead, it takes the position that authority is shared by the UMUT, the BLM, and the BIA to the exclusion of NMOCD.

208. NMOCD has abided by the UMUT's policy.

209. On a few occasions, the UMUT has granted permission to NMOCD to enter the New Mexico lands.

New Mexico's Taxes on Oil and Gas Operations

210. Defendant Rick Homans is the Secretary of the Taxation and Revenue Department of the State of New Mexico.

211. The Taxation and Revenue Department of the State of New Mexico collects taxes imposed by the State.

212. The State of New Mexico imposes no tax on the UMUT, its real property, or any UMUT organizations.

213. The State of New Mexico imposes five taxes on oil and gas operators in the State, including operators who extract oil and gas on the New Mexico lands: the Oil and Gas Severance Tax, the Oil and Gas Conservation Tax, the Oil and Gas Emergency School Tax, the Oil and Gas Ad Valorem Production Tax, and the Oil and Gas Ad Valorem Production Equipment Tax.

214. No oil and gas operator, including any operator extracting oil and gas on the New Mexico lands, is a party to this lawsuit.

215. The same five taxes, as imposed on non-Indian operators extracting oil and gas on the Jicarilla Apache Reservation in New Mexico, were at issue in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

216. Similar taxes are imposed by the State of Colorado on operators extracting oil and gas from the portion of the Reservation lying in Colorado.

217. Four taxes–the Oil and Gas Severance Tax, the Oil and Gas Conservation Tax, the Oil and Gas Emergency School Tax, and the Oil and Gas Ad Valorem Production Tax–are assessed against the taxable value of the oil or natural gas severed.

218. Severance is the taking from the soil of oil or natural gas in any manner whatsoever.

219. For three taxes–the Oil and Gas Severance Tax, the Oil and Gas Conservation Tax, and the Oil and Gas Emergency School Tax–the taxable value of oil or natural gas severed is the actual price received by the operator for the oil or natural gas minus royalties to the UMUT and the reasonable expense of getting the oil or natural gas to the first place of market.

220. The Oil and Gas Severance tax is imposed on oil and natural gas that is severed and sold in the State of New Mexico.

221. The Oil and Gas Severance tax is assessed at 3.75% of the taxable value of the oil or natural gas severed.

222. Revenues from the Oil and Gas Severance Tax are partly used to meet the State's debt obligations and partly put into the State's general fund.

223. The Oil and Gas Conservation Tax is assessed at 0.18 – 0.19% of the taxable value of the oil or natural gas severed.

224. Revenues from the Oil and Gas Conservation Tax are partly used by the NMOCD to survey and plug abandoned, unplugged or improperly plugged wells and are partly put into the State's general fund.

225. The Oil and Gas Emergency School Tax is a business privilege tax on operators severing oil and gas in the State.

226. The Oil and Gas Emergency School Tax is assessed for oil at 3.15% of the taxable value and for natural gas at 4.0% of the taxable value.

227. Revenues from the Oil and Gas Emergency School Tax are put into the State's general fund.

228. The Oil and Gas Ad Valorem Production Tax is levied against an assessed value equaling 50% of the product value, at the property tax rate of the corresponding local governmental unit.

229. Revenues from the Oil and Gas Ad Valorem Production Tax are primarily allocated to local governments.

230. The Oil and Gas Ad Valorem Production Equipment Tax is imposed on operators' equipment used in the extraction of oil and natural gas.

231. The Oil and Gas Ad Valorem Production Equipment Tax is levied against an assessed value of the equipment equaling 9% of the product value, at the property tax rate of the corresponding local governmental unit.

232. Revenues from the Oil and Gas Ad Valorem Production Equipment Tax are primarily allocated to local governments.

233. For each of the five taxes, the taxable event takes place at least partly on the Reservation.

234. The State of New Mexico offers a tax credit, the Intergovernmental Production Tax Credit, to operators who extract oil and gas on UMUT lands and who are subject to the four New Mexico severance taxes.

235. The Intergovernmental Production Tax Credit is 75% of the lesser of the aggregate severance taxes imposed by a Tribe or the aggregate of the four New Mexico severance taxes.

236. The Intergovernmental Production Tax Credit applies only to wells drilled on or after July 1, 1995.

237. The State of New Mexico offers a tax credit, the Intergovernmental Production Equipment Tax Credit, to operators subject to the Oil and Gas Production Equipment Ad Valorem Tax.

238. The Intergovernmental Production Equipment Tax Credit is 75% of the lesser of the amount of any Tribal equipment tax or the amount of the Oil and Gas Production Equipment Ad Valorem Tax.

239. The Intergovernmental Production Equipment Tax Credit applies only to wells drilled on or after July 1, 1995.

240. The UMUT does not impose an oil and gas equipment tax.

241. Because the UMUT does not impose an oil and gas equipment tax, the operators who extract oil and gas on the New Mexico lands do not receive the Intergovernmental Production Equipment Tax Credit.

242. The net effect of the New Mexico tax credits has been an average reduction (over the years 1999-2007) of approximately 1.14% in the yearly aggregate tax rate of the five New Mexico taxes on operators extracting oil and gas on the New Mexico lands; the reduction is increasing as new wells come into production and old wells are shut down.

243. 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 on wells drilled on or after July 1, 1995. NMSA 1978 § 7-29C-1(F).

244. If the State of New Mexico is barred from imposing the five taxes on oil and gas operators on the New Mexico lands, the Intergovernmental Production Tax Credit and the Intergovernmental Production Equipment Tax credit lose all value to the operators, as the credits are specifically applied against the five taxes as levied on wells on the New Mexico lands drilled on or after July 1, 1995.

New Mexico's Services to the UMUT, Its Members, and Oil and Gas Operators

245. The State of New Mexico provides no physical services or infrastructure on the New Mexico lands to the UMUT, its members, or the oil and gas operators.

246. The UMUT is an intervener in a New Mexico state court case involving the general adjudication of water rights in the San Juan River Basin, *State of New Mexico ex rel. Reynolds v. United States et al.*, Civ. No. 75-184-1.

247. Using revenues from the Oil and Gas Conservation tax, NMOCD offers the service of plugging abandoned wells on the New Mexico lands, but NMOCD has never actually plugged an abandoned well on the New Mexico lands.

248. Other than opening its courts to the UMUT and offering plugging of abandoned wells, New Mexico provides no services directly to the UMUT.

249. There is no evidence in the record that members of the UMUT make use of services provided by New Mexico off the New Mexico lands.

250. The services New Mexico provides to oil and gas operators on the New Mexico lands are the following: a hearing process for resolving disputes between operators, publicly available geologic records, publicly available production records, and records of sales and transfers. NMOCD also offers–but the UMUT does not make use of–environmental cleanup and site inspection.

251. Because it is in New Mexico's governmental interest to do so, New Mexico would continue to provide these services to the operators extracting oil and gas on the New Mexico lands even if the State were not able to impose the five taxes on them.

252. There is no evidence that the NMOCD hearing process has been used to resolve a dispute between operators concerning extraction on the New Mexico lands.

253. The NMOCD administrative and hearing orders regarding wells on the New Mexico lands have approved requests for non-standard locations and commingling.

254. There is no evidence that the operators who extract oil and gas on the New Mexico lands make use of the publicly available geologic records or the publicly available production records.

255. The NMOCD budget for the 2007 fiscal year was $11,132,531.00.

256. There are 50,225 active oil and gas wells in the State of New Mexico.

257. The average expenditure statewide by NMOCD on an active well in 2007 was approximately $221.65.

258. It is not possible to separately determine NMOCD expenditures for wells on the New Mexico lands.

259. The only expenditure that can be identified for a particular well is an expense for plugging that well; NMOCD has not plugged a well on the New Mexico lands since 1992, and there is no evidence it plugged a well on the New Mexico lands before then.

260. After operators take title to oil produced on the New Mexico lands by severing it, they transport the oil to refineries on roads in New Mexico which are constructed and maintained by the State of New Mexico.

261. After operators take title to gas produced on the New Mexico lands by severing it, they transport the gas through gathering pipelines in the New Mexico lands to main lines in New Mexico.

262. Without 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.

263. The State provides substantial services by regulating the off-reservation infrastructure that makes transport of oil and gas possible.

264. The economic value to the UMUT of services provided by the State of New Mexico on the New Mexico lands to oil and gas operators is *de minimis*.

265. The economic value to the UMUT of services provided by the State of New Mexico off the New Mexico lands to oil and gas operators is substantial.

The UMUT's Royalties and Taxes on Oil and Gas Operations

266. The UMUT receives a royalty from all operators extracting oil and gas from the New Mexico lands.

267. The royalty is assessed based on the wellhead value of the oil or gas.

268. The percentage of the royalty is specified in the lease or agreement.

269. On average, the UMUT receives 13.1% of the wellhead value in royalties.

270. Royalties received by the UMUT are distributed to enrolled members of the UMUT on a per-capita basis.

271. Total UMUT royalties in 2007 were $4,426,741.00, almost all of which came from the New Mexico lands; only a small part came from wells in Colorado.

272. Since 1987, the UMUT has imposed a tax on possessory interests in UMUT lands, including leases and agreements.

273. Oil and gas lessees and agreement holders are subject to the possessory interest tax.

274. The UMUT possessory interest tax is assessed at the rate of 6% of the market value of the lease or agreement, including improvements and equipment on the lease parcel.

275. Revenues from the UMUT possessory interest tax are used to defray the costs of providing essential UMUT governmental services and for other UMUT governmental purposes. Ute Mountain Ute Tribe Ordinance No. 3334 § 18, Nov. 24, 1987.

276. Since 1983, the UMUT has imposed a severance tax on oil and gas operators on the New Mexico lands.

277. The UMUT severance tax is assessed at the rate of 5% of the wellhead value of the oil or gas severed on the New Mexico lands and sold or transported off the Reservation.

278. Revenues from the UMUT severance tax are used to defray the costs of providing essential UMUT governmental services and for other UMUT governmental purposes. Ute Mountain Ute Tribe Ordinance No. 3659 § 22, Apr. 6, 1990; Ute Mountain Ute Severance Tax Ordinance § 10, Apr. 20, 1983 (severance tax fund monies to be transferred to general fund).

279. The net effect of the UMUT severance tax and the UMUT possessory interest tax has been, on average, a 9.5% tax on the gross wellhead value of oil and gas extracted on the New Mexico lands.

Economics of the State and UMUT Taxes

280. The UMUT has no economic ability to affect the market price of oil or natural gas.

281. The oil and gas operators have no economic ability to affect the market price of oil or natural gas.

282. The operators are free to choose to extract oil and gas outside the New Mexico lands.

283. The UMUT is free to negotiate leases or agreements with other oil and gas operators.

284. The three development agreements–Elk San Juan, BIYA, and Texakoma–were negotiated in the last five years (2004 – 2008); during negotiations, the operators were aware that New Mexico would impose the five taxes on them.

285. To the extent that they can do so without making other operators more attractive to the UMUT, the operators who negotiate leases and agreements with the UMUT take into account the cost of the five New Mexico taxes in reaching terms with the UMUT.

286. The leases and agreements do not directly pass the cost of the five New Mexico taxes on to the UMUT.

287. The UMUT has resolved that, in the event the five New Mexico taxes are found unlawful, the UMUT severance tax will be increased by the amount of the five New Mexico taxes. Ute Mountain Ute Tribal Council Resolution No. 3874, Feb. 13, 1992.

288. Unless specifically surrendered in unmistakable terms in an existing lease or agreement, the UMUT has the authority to increase severance taxes on existing leases and agreements it has entered into with operators, or to enact a third UMUT tax, regardless of the status of New Mexico taxes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

289. The only leases or agreements under which the UMUT has surrendered–at least to an extent–its authority to increase severance taxes are the recent agreements that cap UMUT revenues at 30%.

290. Even in agreements that specifically and unmistakably cap total UMUT revenues from an operator at 30%, UMUT revenues in those agreements are currently substantially below 30% and an increase of UMUT revenue to 30% would be significant.

291. The operators with existing leases or agreements have no preference between being taxed an equal amount by the State or by the UMUT and would continue to extract oil and gas from the New Mexico lands if the New Mexico taxes were replaced by equivalent UMUT taxes.

292. If the five New Mexico taxes were found unlawful, the UMUT would have the options of: 1) implementing UMUT Council Resolution No. 3874 and increasing the severance tax as stated in the Resolution; or 2) rescinding Resolution No. 3874; or 3) increasing the severance tax, but not to the extent stated in Resolution No. 3874.

293. For the years 2002 – 2007, the aggregate of the five New Mexico taxes totaled $8,052,449, an average of $1,342,074.83 per year.

294. The total wellhead value of all oil and gas extracted on the New Mexico lands has not changed significantly since the UMUT started entering into development agreements.

295. Total UMUT revenue from development agreements, including those agreements which cap UMUT revenue at 30%, is not a substantial part of UMUT revenue from oil and gas development.

296. The much greater part of UMUT revenue comes from leases without any cap on UMUT revenues.

297. In the event that the UMUT implemented Resolution No. 3874–and the market for oil and gas remained stable–the UMUT would receive at least $1,300,000 per year in additional revenue from the severance tax, an increase of approximately $650 per enrolled UMUT member per year.

298. In the event that the UMUT rescinded Resolution No. 3874, oil and gas production on the New Mexico lands would become more attractive to oil and gas operators relative to oil and gas production elsewhere in New Mexico.

299. Oil and gas operators could seek to increase production on the New Mexico lands by discovering new sources of oil and gas 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.

300. Increased production through discovery of new sources of oil and gas on the New Mexico lands would increase UMUT revenue from royalties and the current taxes.

301. Increased production through infill or reopening of closed wells on pools that lie entirely or almost entirely within the New Mexico lands would increase UMUT revenue from royalties and the current taxes.

302. Increased production through infill or reopening of closed wells on pools that lie substantially outside the New Mexico lands would have an unpredictable outcome for UMUT revenue, due to the creation of an incentive to operators outside the New Mexico lands to increase their production correspondingly.

303. There is insufficient evidence to quantify the return to the UMUT if it were to rescind Resolution No. 3874.

304. Total UMUT revenue for 2007 was $16,052,092.00.

305. The average per capita income of UMUT members at the time of the 2000 census was $8,159.

306. The average per capita incomes at the time of the 2000 census at corresponding state and county levels were as follows: $17, 261 for New Mexico in general, $14,282 for residents

of San Juan County, New Mexico, $24,049 for Colorado in general, and $17,003 for residents of Montezuma County, Colorado.

307. The unemployment rate of UMUT members at the time of the 2000 census was 11.3%; the rate at the corresponding state and county levels ranged from 2.7% to 5.5%.

308. The percentage of UMUT families living below the poverty level at the time of the 2000 census was 38.5%; the percentage at the corresponding state and county levels ranged from 10.2% to 18%.

309. If the five New Mexico taxes were replaced by an equivalent UMUT severance tax, UMUT governmental services or UMUT distributions to members would be increased by at least $650 per year per member, an increase of almost 8% of the average per capita income of UMUT members.

310. The five New Mexico taxes impose an economic burden on the UMUT and its members, the extent of which is laid out above in these Findings of Fact.

311. There is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the UMUT's ability to govern itself.

CONCLUSIONS OF LAW AND MEMORANDUM OPINION

To decide this case, the Court must first review the law governing state taxation of activities on tribal lands and the law governing leasing and development of tribal oil and gas resources. The Court initially notes that jurisdiction is proper: "a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in [] district court under [28 U.S.C.] § 1362 despite the general ban in 28 U.S.C. § 1341 against seeking federal injunctions of such laws." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 762 n.2 (1985).

State Taxation of Tribal Activities

Stated most simply, the issue presented here is whether the State of New Mexico may assert jurisdiction to tax non-Indians engaged in transactions with the UMUT on the part of the Reservation that lies in New Mexico. In 1832, the Supreme Court announced a clear rule: States had no jurisdiction at all within the boundaries of a reservation. *Worcester v. Georgia*, 6 Pet. 515, 561 (1832) (Marshall, J.); *see also The Kansas Indians*, 72 U.S. 737 (1867) (state has no power to tax Indian lands); *The New York Indians*, 72 U.S. 761 (1867) (same). One hundred and twenty-seven years later, after "adjust[ing] [the rule] to take account of the State's legitimate interest in regulating the affairs of non-Indians," the Court articulated a new standard: "[A]bsent governing Acts by Congress, the question [is] whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Thus, Congress may expressly authorize state jurisdiction; but if Congress has not, tribal sovereignty predominates the analysis of whether the state may assert jurisdiction. *See id.* at 222.

The Supreme Court subsequently developed a second, more nuanced preemption-based approach to questions of state jurisdiction in Indian country. *McClanahan*, 411 U.S. at 172. The approach is unlike that for standard federal-state preemption. *Compare Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983)(describing the three traditional approaches to federal-state preemption analysis) *with White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)(recognizing the different approach to tribal preemption and finding that application of traditional federal-state preemption principles is unhelpful in the tribal context). For example, tribal sovereignty is "a backdrop against which the

applicable treaties and federal statutes must be read."[1] *Id.* In *McClanahan*, a Navajo Indian "whose entire income derive[d] from reservation resources" challenged application of Arizona's state income tax to her. *Id.* at 165. Instead of evaluating the tax's effect on "Platonic notions of tribal sovereignty," the Court examined federal law–the United States' 1868 treaty with the Navajo Nation, the Arizona Enabling Act, the Buck Act, and Public Law 280–with the backdrop of tribal sovereignty in mind. *Id.* at 174-78. Although federal law neither expressly allowed nor prohibited Arizona's taxation, when that law was interpreted under the canon that ambiguities in treaties and federal statutes are to be resolved in favor of tribes, no authority remained for Arizona to impose its taxes. *See id.* The "backdrop of tribal sovereignty" acted essentially as a thumb on the scales in favor of the Navajo Nation. *See also Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965) (preemptive effect of federal regulation of Indian traders on state tax).

Similarly, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Supreme Court considered state taxation of non-Indians engaged in activities on a reservation. A non-Indian logging company had contracted with a White Mountain Apache tribal enterprise to log timber on the White Mountain Apache Reservation and transport it to the tribal enterprise's mill. *Id.* at 138-39. Tribal timber operations as a whole "accounted for over 90% of the Tribe's total annual profits." *Id.* at 138. The company operated its logging trucks entirely within the reservation, partly on state roads and partly on BIA and tribal roads. *Id.* at 139-40. Because its activities were limited to the reservation, the company challenged the State of Arizona's

[1] Although the Defendant has cited to cases recognizing the different tribal preemption analysis, Defendant failed to discuss the important consideration of the "backdrop of tribal sovereignty," and instead focused on the federal-state relationship. This oversight leads the Court to believe that Defendant misapprehends the nature of the preemption analysis applicable in this case and thus, did not accord importance to the UMUT's sovereignty in making its arguments.

imposition of its motor carrier license tax and its excise fuel tax on the company. *Id.* at 140. The company conceded that it was liable for a *pro rata* share of the tax in proportion to its use of state roads, but contested any tax for its use of BIA and tribal roads. *Id.*

As in *McClanahan*, the Supreme Court rejected an approach based in "mechanical or absolute conceptions of state or tribal sovereignty." *Id.* at 145. Instead, to determine whether "a State [may] assert[] authority over the conduct of non-Indians engaging in activity on [a] reservation," a court must make "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 144-45. In so doing, "traditional notions of Indian self-government ... provide an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *Id.* at 144 (citing *McClanahan*, 411 U.S. at 172).

In applying that standard, the Supreme Court then looked to the three interests at stake: the federal interest in reservation timber and roads, the Tribe's interest in making use of its timber, and Arizona's interest in taxing the company's activities. The Supreme Court found that logging on the reservation and use of the BIA and tribal roads were governed by comprehensive federal regulations, *Bracker, 448 U.S.* at 146-48, that the economic burden of the state tax on the Tribe would interfere with the federal objective of providing the Tribe with the benefit of its timber resources and with "the Tribe's ability to comply with the sustained-yield management policies imposed by federal law," *id.* at 149-50, and that Arizona's interest was nothing more than "a general desire to raise revenue" without providing any relevant service to the Tribe, *id.* at 150. As a result, the balance of interests favored preemption of Arizona's taxes. *Id.* at 152. The Supreme Court noted that an economic burden on the Tribe, standing alone, would not suffice to invalidate the taxes. *Id.* at 151 n.15. However, even a small burden–as noted by the dissent, "$5,000-$6,000 or less than 1% of the total annual profits"–was unacceptable in these circumstances. *Id.* at 149-50; *id.* at 159 (Stevens, J., dissenting).

In its first application of *Bracker* balancing, the Supreme Court struck down New Mexico's imposition of a tax "on the gross receipts that a non-Indian construction company receive[d] from a [T]ribal school board for the construction of a school for Indian children on the reservation." *Ramah Navajo School Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 834 (1982). The Tribal school board had solicited competitive bids for the project, and the bidders "included the state gross receipts tax as a cost of construction in their bids." *Id.* at 835. Thus, the tax imposed an indirect burden on the board. *Id.* at 836. As in *Bracker*, "[f]ederal regulation of the construction and financing of Indian educational institutions [wa]s both comprehensive and pervasive." *Id.* at 839. Furthermore, New Mexico did not assist in any way in "provid[ing] adequate educational facilities for [the Tribe's] children" and therefore lacked "any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax." *Id.* at 843, 844 n.7. Services the State provided to the construction company off the reservation failed as a justification for the state tax for two reasons. First, off-reservation services could not justify imposing a burden on the Tribe for its activities on the reservation. *Id.* at 844. Second, "the state tax revenues derived from the [construction company's] off-reservation business activities [we]re [presumably] adequate to reimburse the State for the services it provide[d] to [the company]." *Id.* at 844 n.9. Furthermore, services provided by the State to the Tribe but unrelated to construction of schools could not be considered part of the analysis. *Id.* at 845 n.10. Consequently, "[t]he State's ultimate justification for imposing this tax amount[ed] to nothing more than a general desire to increase revenues," an insufficient justification for burdening the "comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education." *Id.* at 845.

In a separate line of cases, the United States Supreme Court upheld State taxes on sales of cigarettes within a reservation to non-Indians. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In *Colville*, the Supreme Court rejected a Tribe's argument that the imposition of State taxes would impair the Tribe's ability to impose its own taxes on cigarettes. *Id.* at 154. The Supreme Court reasoned, "the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 155.Thus, the taxes did not "infringe the right of reservation Indians to 'make their own laws and be ruled by them'." *Id.* at 156 (quoting *Williams v. Lee*, 358 U.S. at 220). Moreover, federal law, "even when given the broadest reading to which [it is] fairly susceptible, [could not] be said to pre-empt Washington's sales and cigarette taxes." *Colville, 447 U.S.* at 155.

In a subsequent case outside the taxation context, the Supreme Court distinguished the *Moe/Colville* line of cases. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In *Mescalero Apache Tribe*, the Supreme Court considered whether the State of New Mexico could assert concurrent jurisdiction with the Mescalero Apache Tribe over non-Indians hunting and fishing on the Mescalero Apache Reservation. *Id.* at 325, 336-37. The Supreme Court first reasoned that, due to the State's general powers over non-Indians within its borders, "[c]oncurrent jurisdiction would empower New Mexico wholly to supplant" the Tribe's regulation of hunting and fishing. *Id.* at 338. Consequently, hunting and fishing would take place under two potentially inconsistent schemes that would make it difficult for the Tribe to manage its resources. *Id.* at 339-40. This difficulty would "threaten to disrupt the federal and tribal regulatory scheme, [and] also threaten Congress' overriding objective of encouraging tribal

self-government and economic development." *Id.* at 341. The Tribe's economic development of its natural resources was "far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*." *Id.* (citing *Colville*, 477 U.S. at 154-59). "The Tribal enterprise in this case clearly involve[d] 'value generated on the reservation by activities involving the Tribe'." *Id.* (quoting *Colville*, 477 U.S. at 156-57).

On the other hand, "[t]he State [] failed to identify 'any regulatory function or service that would justify' the assertion of concurrent regulatory authority." *Mescalero Apache Tribe*, 462 U.S. at 341 (quoting *Bracker*, 448 U.S. at 148). The Supreme Court noted that, for example, if the State had shown that game migrated and caused specific effects off the reservation but within the State, that could justify regulation by the State. *Mescalero Apache Tribe*, 462 U.S. at 342 (citing *Puyallup Tribe v. Wash. Game Dept.*, 433 U.S. 165, 174 (1977)). Nor could the State show it contributed to the activity the State wanted to control: "The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government." *Mescalero Apache Tribe*, 462 U.S. at 342. Thus, the only interest the State had was in collecting funds derived from the sale of hunting and fishing licenses, an interest insufficient to avoid preemption of its authority. *Id.* at 342-43.

More recently, the Supreme Court has attempted to lay down bright-line rules for when *Bracker* balancing is appropriate in taxation cases. The rules depend on the "who" and "where": who is taxed and where that person is taxed. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 100 (2005). First, a court must determine on whom the legal incidence of the tax falls. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). The legal incidence does not necessarily fall on the entity bearing the economic burden of the tax, *id.* at 459-60; instead, it is determined by who has the legal obligation to pay under "a fair interpretation of the taxing statute

as written and applied." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam). Second, a court must determine where the "taxable event" occurs. *Wagnon*, 546 U.S. at 107. If the legal incidence of the tax falls on an Indian person or entity and the taxable event occurs on the reservation, then there is a categorical bar: the tax is invalid unless Congress has expressly given the State authority to tax. *Chickasaw Nation*, 515 U.S. at 459. If the legal incidence falls on a non-Indian person or entity and the taxable event occurs on the reservation, then *Bracker* balancing applies. *Wagnon*, 546 U.S. at 112. Finally, if the taxable event occurs off the reservation, there is no balancing and traditional rules of federal preemption apply. *Id.*

Here, it is undisputed that the legal incidence of the New Mexico taxes fall on the oil and gas operators, who are non-Indian. Four of the taxes are imposed when the oil or gas is "severed and sold," while one is imposed when it is merely "severed." *Wagnon* is silent as to the test to be applied when the taxable event is a compound one, one part of which may take place on a reservation and the other off.[2] However, Defendant has not contested the application of *Bracker* balancing to oil and gas that is severed on the New Mexico lands but sold off of the lands in New Mexico. Furthermore, the record does not indicate where the oil and gas is sold, but it makes clear that the gas is severed on the New Mexico lands. Given these circumstances, the Court determines that under the *Wagnon* test, *Bracker* balancing applies.

Indian Mineral Leasing Statutes

There are two types of oil and gas leases at issue in this case. The first leases were executed under the Indian Mineral Leasing Act of 1938. The second leases were executed under

[2] In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Supreme Court held that, for a *tribal* severance tax assessed on resources severed on the reservation and "sold or transported off the reservation," the taxable event occurred on the reservation, because the tax became due at the time of severance. *Id.* at 156 n.22.

the Indian Mineral Development Act of 1982. In addition, the "historical backdrop" of Indian mineral leasing plays a part in the analysis and is therefore reviewed.

In 1891, Congress authorized mineral leasing on lands "bought and paid for" by Indians. Act of Feb. 28, 1891, c. 383, § 3, 26 Stat. 795 (codified at 25 U.S.C. § 397). "Bought and paid for" lands were held to include treaty reservations, under the reasoning that such lands were "bought" by Indians through "surrender of other lands." *Strawberry Valley Cattle Co. v. Chipman*, 45 P. 348 (Utah 1896); *accord* 25 Pub. Lands Dec. 408 (Nov. 17, 1897); *British-American Oil Producing Co. v. Bd. of Equalization of Mont.*, 299 U.S. 159 (1936). In 1924, Congress authorized the Secretary of Interior, with approval from the appropriate tribal council, to auction mineral leases on "unallotted land on Indian reservations . . . subject to lease for mining purposes for a period of ten years under [the 1891 Act]." Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398). In addition, the 1924 Act authorized states to tax "production of oil and gas ... on such lands." *Id.* Because it was unclear whether the 1891 Act applied to executive reservations–reservations created by Executive Order, not by treaty nor Act of Congress–it was equally unclear whether the 1924 Act applied to them. Congress resolved the ambiguity with the Indian Oil Act of 1927, which provided express authority for leases on executive reservations and state taxation of oil and gas revenues generated under those leases. Indian Oil Act of 1927, 44 Stat. 1347 (codified at 25 U.S.C. § 398a).

In *British-American Oil Producing*, a non-Indian-owned company with an oil and gas lease on the Blackfeet Reservation sued to invalidate a gross production tax and net proceeds tax imposed by Montana. *British-American Oil Producing*, 299 U.S. at 161. The company argued that the lease, approved by the Secretary of Interior in 1934, was executed under a 1919 Act specifically authorizing the Secretary to lease minerals on the Reservation and therefore not

subject to the taxation provision in the 1924 Act. The Supreme Court first noted that the Blackfeet Reservation was not an executive reservation and therefore the 1924 Act was potentially applicable. *Id.* at 162-63. The Supreme Court then harmonized the 1919 and 1924 Acts, holding that the lease was subject to both the specific provisions in the 1919 Act and the general provisions in the 1924 Act. *Id.* at 165-66. As a result, the Supreme Court held that the lease was subject to Montana's taxes. *Id.* at 166.

In 1938, two years after the Supreme Court decided *British-American Oil Producing*, Congress passed the Indian Mineral Leasing Act ("IMLA"). Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g). In enacting the IMLA, Congress had three goals: creating uniform law for mineral leases on tribal land; "bring[ing] all mineral-leasing matters in harmony with the Indian Reorganization Act," and "ensur[ing] that the Indians receive the greatest return from their property." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985).

In *Blackfeet Tribe*, Montana had imposed severance taxes on the "Blackfeet Tribe's royalty interest in oil and gas leases issued [under the IMLA] to non-Indian lessees" on unallotted lands within the Tribe's reservation. *Id.* at 761. The taxes were assessed on the pre-royalty value of production and were paid by the non-Indian lessees, who then deducted those fees from the royalties they paid to the tribe. *Id.* at 761. Montana argued that the 1924 Act remained in force and authorized the taxes, even on leases executed under the IMLA. *Id.* at 765. The IMLA was silent as to state taxation; however, it contained a general repealer clause stating, "All Act[s] or parts of Acts inconsistent herewith are hereby repealed." *Id.* at 764, 766-67.

In analyzing the IMLA, the Supreme Court applied two canons of Indian law. "[F]irst, the States may tax Indians only when Congress has manifested clearly its consent to such taxation."

Id. at 766.[3] "[S]econd, statutes are to be construed liberally in favor of the Indians, with ambiguous provision interpreted to their benefit." *Id.* The Supreme Court noted that the IMLA "contain[ed] no explicit consent to state taxation" and "no indication that Congress intended to incorporate implicitly in the [IMLA] the taxing authority of the 1924 Act." *Id.* at 766-67. Under the two canons, "the general repealer clause of the [IMLA] [could not] be taken to incorporate" the taxation provision of the 1924 Act, even if the taxation provision were consistent with the IMLA. *Id.* at 767. Furthermore, "even applying ordinary principles of statutory construction," the taxation provision of the 1924 Act explicitly appliepd solely to leases executed under the 1891 Act and therefore not to leases executed under the IMLA. *See id.* The Supreme Court ended by stating: "When the statute is liberally construed in favor of the Indians, it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment." *Id.*

Oil and gas leases executed under the IMLA by the Jicarilla Apache Tribe have been the subject of two United States Supreme Court cases. In the first—less central but still important to this case—the Supreme Court held that the Jicarilla Tribe had the inherent power to impose severance taxes on those leases, even though it was also the lessor. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In so doing, the Supreme Court dismissed New Mexico's argument that the Indian Oil Act of 1927–which applied because the Jicarilla Apache's home is an executive reservation–divested the Tribe of their power to tax. *Id.* at 150-51. Hence, the Supreme Court did not reach an issue raised by the Tribe: whether the IMLA repealed the authority granted in the 1927 Act to tax oil and gas operations on executive reservations. *Id.* at 151 n.17. The

[3] The Court's opinion did not mention that the pass-through of the severance taxes to the Tribe was provided for not in the leases but by the Montana statutes imposing the taxes. *Blackfeet Tribe of Indians v. State of Mont.*, 507 F. Supp. 446, 448 (D. Mont. 1981). Thus, under "a fair interpretation of the taxing statute as written and applied," the legal incidence fell on the Tribe.

Supreme Court also rejected the State's position that the taxes violated the dormant Commerce Clause. *Id.* at 153-58. The State argued that the imposition of tribal taxes on top of the State's taxes created a multiple taxation issue. The Supreme Court noted that there was no doubt that the Tribal taxes were within the scope of what the Tribe's contact with the activity could justify: after all, the mining took place on the reservation. *Id.* at 158 n.6. The Supreme Court then speculated that, on the other hand, New Mexico's taxes might be vulnerable to a similar objection if they were heavier "than the State's contact with the activity would justify." *Id.*

In the second United States Supreme Court decision—central to this case—the Supreme Court reached the issue it deferred in *Merrion*. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In *Cotton Petroleum*, a non-Indian oil and gas holder of IMLA leases operating on the Jicarilla Apache Reservation sued in state district court to challenge New Mexico's severance taxes. Taking a cue from *Merrion*, the lessee "contended that state taxes imposed on reservation activity are only valid if related to actual expenditures by the State in relation to the activity being taxed." *Id.* at 170. The lessee "presented evidence at trial ... that the amount of tax it paid to the State far exceeded the value of services that the State provided to it and that the taxes paid by all nonmember oil producers far exceeded the value of services provided to the reservation as a whole." *Id.* The lessee "did not, however, attempt to prove that the state taxes imposed any burden on the Tribe." *Id.* Notably, the Jicarilla Tribe was not a party to the suit, although it did file an amicus brief arguing that the taxes imposed economic burdens on it. *See id.* App. to Juris. Statement 14-15 ¶¶ 1, 10 (findings of fact of state district court). The lessee also claimed that the state taxes violated its right to due process and were preempted by federal law. 490 U.S. at 170.

In reaching its decision, the state district court made a number of factual findings eventually important in the United States Supreme Court's opinion. The district court found, "No economic burden falls on the tribe by virtue of the state taxes." *Id.* App. to Juris. Statement at 15 ¶ 10. More specifically, in the state district court's view, the taxes did not affect the Jicarilla Tribe's ability to impose its own severance and privilege taxes and did not affect production of oil and gas. *Id.* at 16-17 ¶¶ 18, 19. The state district court also found that "New Mexico provides substantial services to both" the Jicarilla Tribe and the lessee, including "the benefits of living in an organized society." The state district court valued "[t]he amount of state expenditures on the reservation" at "approximately three million dollars per year." *Id.* at 16 ¶ 12. Finally, the state district court found that NMOCD "regulate[d] spacing and mechanical integrity of wells located on the Jicarilla Reservation as it d[id] all other wells within the state." *Id.* ¶ 17. The state district court then rejected the lessee's preemption, commerce clause, and due process clause challenges. *Id.* at 17-19. The New Mexico Court of Appeals affirmed the state district court's decision and the New Mexico Supreme Court eventually declined to review the case. 490 U.S. at 172-73.

The United States Supreme Court in *Cotton Petroleum* first framed the preemption question as "whether Congress has acted to grant the Tribe [] immunity [to the State's taxation], either expressly or by plain implication." *Id.* at 174-75. The Supreme Court then examined the purposes of the IMLA and decided that Congress intended to "provide Indian tribes with badly needed revenue" but did not "intend[] to remove all barriers to profit maximization." *Id.* at 178-79. Legislative language, cited by the Supreme Court in *Blackfeet Tribe*, stating that the Act sought to give Tribes "the greatest return from their property," had to be understood in context: Congress wanted to free Tribal leases from certain disadvantages they suffered relative to leases on public lands and put the Tribal leases on equal footing. *Id.* As there was no doubt at the time

of enactment of the IMLA that leases on public lands were subject to state taxation, the Supreme Court inferred that Congress would have understood Tribal leases to be equally subject to state taxation. *Id.*

To this point in its *Cotton Petroleum* opinion, the Supreme Court had engaged in standard statutory interpretation. It then recalled the *McClanahan* precept that such interpretation should be conducted against a historical "backdrop" of tribal sovereignty. The Supreme Court chose to view this precept not as a thumb on the scales in favor of the Tribe, but rather as an invitation to review the history of state taxation of oil and gas leases on executive reservations. *Id.* at 180-82; *see also Bracker*, 448 U.S. at 145 n.12 (reviewing history of Indian timber rights); *Ramah*, 458 U.S. at 839-40 (reviewing history of federal concern for education of Indian children). As there was no authority for oil and gas leasing on executive reservations until enactment of the Indian Oil Act of 1927, which also authorized state taxation, "at least as to Executive Order reservations, state taxation of nonmember oil and gas lessees was the norm from the very start." *Id.* at 182. "There [was], accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read." *Id.*

The Supreme Court then considered whether the general repealer clause in the IMLA applied to repeal the express grant of authority to tax in the 1927 Act. *Id.* The Supreme Court noted that its doctrine of intergovernmental tax immunity, in force in 1927, had been overruled by 1938. *Id.* Thus, it was not necessary for Congress in 1938 to expressly permit state taxation. *Id.* Therefore, an implied Congressional intent to allow state taxation in the IMLA was not inconsistent with its express grant of the right of state taxation in the Indian Oil Act of 1927.[4] *Id.* at 182-83.

[4] Peculiarly, the United States Supreme Court stated that its decision in *Blackfeet Tribe* was not to the contrary. *Id.* at 183 n.14. At issue in *Blackfeet Tribe* was the interaction of the IMLA with the 1924 Act, not with the Indian Oil Act of 1927, as the *Cotton Petroleum* opinion stated. *Blackfeet Tribe*, 471 U.S. at 763. The distinction matters here.

Next, the Supreme Court in *Cotton Petroleum* turned to the *Bracker* analysis. Based on the factual findings of the state district court, the Supreme Court distinguished *Bracker* and *Ramah*. Both *Bracker* and *Ramah* "involved complete abdication or noninvolvement of the State in the on-reservation activity." *Id.* at 185. In both cases, the economic burden of the tax fell on the Tribes. *Id.* And in both cases, federal and tribal regulations excluded state regulation. *Id.* at 186. In contrast, the state district court in *Cotton Petroleum* found that "New Mexico provide[d] substantial services to both the Jicarilla Tribe and [the lessee]," that "no economic burden f[ell] on the tribe by virtue of the state taxes," and that " the State regulates the spacing and mechanical integrity of wells located on the reservation," indicating that the federal regulations were merely "extensive" and not "exclusive." *Id.* at 185-86. Thus, the "particularized inquiry" in *Cotton Petroleum* was based on a situation that was the polar opposite of the situations in *Bracker* and *Ramah*.

The Supreme Court acknowledged that, despite the finding of the state district court, the taxes might have some impact on the Tribe. *Id.*; *see also id.* at 208 (Blackmun, J., dissenting) (analyzing the economic impact on the Tribe). Importantly, the Supreme Court noted that "the primary burden of the state taxation f[ell] on the non-Indian taxpayers." *Id.* at 186 n.17 (majority opinion). "Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, [was] simply too indirect and too insubstantial to support [the lessee's] claim of pre-emption." *Id.* at 187. Finally, in another section not relevant to the issues here, the Supreme Court rejected the lessee's multiple taxation claim. *Id.* at 187-93.

In 1982, Congress enacted the Indian Mineral Development Act ("IMDA"). Pub. L. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101-08). The purpose of the IMDA was threefold:

to allow for longer exploratory periods than possible under the IMLA; to avoid problems with the IMLA's application of oil and gas concepts to hard-rock mining; and to give Tribes greater return on their resources and enhance their self-determination by giving them greater flexibility in negotiating mineral development agreements. H.R. Rep. No. 97-746, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3463, 3464. Thus, under the IMDA, Tribes can enter into joint ventures, production sharing agreements, and leases for periods other than the ten years prescribed by the IMLA. 25 U.S.C. § 2102. After a Tribe negotiates an agreement, it is subject to approval by the Secretary of the Interior after finding that the agreement is in the best interests of the Tribe. *Id.* § 2103. No federal court has considered the possible preemptive effect of the IMDA on state taxation of IMLA agreements. The House Committee on Interior and Insular Affairs declined to recommend an amendment proposed by the Governor of Montana to explicitly authorize "State taxation of the non-Indian portions of, or activity under, Minerals Agreements." H.R. Rep. No. 97-746, at 8. Instead, the Committee thought it appropriate to defer to the United States Supreme Court's development of this area of the law. *Id.* at 8-9.

Although the *Cotton Petroleum* opinion did not mention the IMDA–as no leases in that case were executed under it–the Court did consider other statutes that "evidence[d] to varying degrees a congressional concern with fostering tribal self-government and economic development." *Cotton Petroleum*, 490 U.S. at 183 n.14 (quoting *Colville*, 477 U.S. at 155). The Supreme Court concluded that such concerns did not suffice to show intent to preempt state taxation. *Id.* By extrapolation, the IMDA does not, at least in the first step of the *Cotton Petroleum* analysis, differ in any significant way from the IMLA.

Application of Cotton Petroleum to This Case

An initial question is whether *Cotton Petroleum* modified the *Bracker* analysis. The New Mexico Supreme Court concluded that it did, to the extent that it removed the requirement stated

in *Ramah* that state services, to be relevant to the analysis, must be related to the activity taxed. *Blaze Const. Co., Inc. v. Taxation and Revenue Dept. of State of N.M.*, 118 N.M. 647, 652; 884 P.2d 803, 808 (N.M. 1994). However, the Court of Appeals for the Ninth Circuit concluded otherwise and detected no such change. *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 660-61 (9th Cir. 1989) (stating that *Cotton Petroleum* "reaffirmed" *Bracker* and *Ramah* and applying the relatedness test to the state's services). The *Blaze Construction* decision rests on shaky grounds, because it takes language from the section of the *Cotton Petroleum* opinion that rejected the lessee's multiple taxation claim and grafts that language to the United States Supreme Court's *Bracker* analysis of the lessee's preemption claim. It is likely that the United States Supreme Court in *Cotton Petroleum* did not consider the issue simply because the state district court in its findings of fact failed to distinguish between related and unrelated state services. In any case, this issue need not be decided here. It does not matter whether all state services should be included, as the State of New Mexico offers no significant services to the UMUT other than those related to oil and gas operations.

Another supposed modification recognized by the New Mexico Supreme Court in *Blaze Construction* must also be rejected. The New Mexico Supreme Court stated that, in *Cotton Petroleum*, "the Supreme Court held that indirect, insubstantial, or marginal burdens on tribal interests do not support a claim that a state tax is preempted." *Blaze Construction*, 118 N.M. at 653; 884 P.2d at 809. While that may be true as to insubstantial or marginal burdens, it is incorrect as to indirect ones. In fact, the indirect burden placed on the tribes in *Blaze Construction*–imposition of a gross receipts tax on a construction company building roads on

reservations, *id.* at 804–squarely matches that in *Ramah*, which remains good law.[5] The *Cotton Petroleum* opinion merely states that the burden in that case was "*too* indirect and *too* insubstantial." *Cotton Petroleum*, 490 U.S. at 187 (emphasis added). There is simply no categorical rule that *any* indirect burden cannot be a basis for preemption.

A more important issue is how to treat a case that falls between *Bracker* and *Ramah* on one hand and *Cotton Petroleum* on the other. The United States Supreme Court in *Cotton Petroleum* described the situations in *Bracker* and *Ramah* as involving "special factors." *Cotton Petrleum*, 490 U.S. at 187. Although the Supreme Court did not specify what those special factors were, they can be inferred from the Supreme Court's earlier discussion: 1) "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity," *id.* at 185; 2) in both, the economic burden fell on the Tribes, *id.*; and 3) in both, the federal and tribal regulations were "exclusive," *id.* at 186. On the other hand, in *Cotton Petroleum,* the Jicarilla Apache Tribe failed to assert any interest, suffered no economic burden, and allowed the State to regulate wells on its lands. In any case, to infer from *Cotton Petroleum* that *Bracker* balancing applies only where there is a "complete abdication" by the State would be to effectively overrule *Bracker*. Under *Bracker*, there must be "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 144-45. If this inquiry is to take place only where there is no state interest at all, then there is no need for the inquiry: a balancing test is then replaced by a categorical rule. The Court concludes that *Bracker* balancing applies even when a case falls somewhere between *Bracker* and *Cotton Petroleum*.

[5] It should be noted that the Supreme Court of the United States upheld a similar Arizona tax, but on the basis that *Bracker* balancing should not apply to state taxation of private federal contractors. *Ariz. Dept. of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32, 36-38 (1999). That is not the situation here.

Similarly, in this case the Court must consider whether *Cotton Petroleum* should be construed broadly as holding that states may always impose a severance tax on non-Indian extraction of oil and gas on reservations. In *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998), a case discussing *Cotton Petroleum*, certain introductory language supports a broad construction. *Id.* at 710 (stating that in *Cotton Petroleum*, "this Court held that both State and Tribe may impose severance taxes on on-reservation oil and gas production by a non-Indian lessee"). That language is belied by a close reading of *Cotton Petroleum* itself, and by the later, more detailed discussion in *Crow Tribe*. For example, later in *Crow Tribe* the Supreme Court clarified the holding of *Cotton Petroleum* more specifically by saying, "the IMLA did not preempt New Mexico's nondiscriminatory severance taxes on the production of oil and gas on the Jicarilla Apache Reservation by Cotton Petroleum, a non-Indian lessee." *Id.* at 714. According to the *Crow Tribe* opinion, "*Cotton Petroleum* clarified that neither the IMLA, nor any other federal law, *categorically* preempts state mineral severance taxes imposed, without discrimination, on all extraction enterprises in the State, including on-reservation operations." *Id.* (emphasis added); *see also id.* at 712 ("similar state taxes are *not always* preempted") (emphasis added). Since *Cotton Petroleum* did not create a categorical rule, the *Bracker* analysis continues to apply to state severance taxes imposed on non-Indians extracting oil and gas on reservations.[6]

The discussion now turns to the details of the analysis, following the sequence taken by the United States Supreme Court in *Cotton Petroleum*. First, the IMLA and the IMDA will be

[6] It should also be noted that the district court, in an earlier stage of the *Crow Tribe* litigation, made several findings of fact that distinguish the situation there from the facts in this case. For example, the coal mining at issue in *Crow Tribe* took place on a strip of land ceded by the Crow Tribe over which state and local governments exercised jurisdiction but the Crow Tribe did not at all. *See Crow Tribe of Indians v. United States*, 657 F. Supp. 573 (D. Mont. 1985). As a result, the state and local governments provided almost all services on the strip, while the Tribe provided almost none. *See id.* at 579-81.

considered under ordinary principles of statutory interpretation. Next, the "historical backdrop" of relevant tribal sovereignty will be reviewed. Finally, *Bracker* balancing will be carried out, taking into account the three factual areas deemed important by the *Cotton Petroleum* Court: the State's involvement in the activity, the economic burden of the tax, and the extent of federal and tribal regulation.

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

As a result, the historical backdrop of tribal sovereignty in this case differs significantly from that in *Cotton Petroleum*. Oil and gas leases on treaty or statutory reservations were completely immune from state taxation for 33 years, from 1891, when leases were first authorized, to 1924, when Congress expressly authorized taxation of the leases. However, that congressional authorization expired under its own terms 14 years later in 1938 when Congress replaced 1924 leases with the new regime of the IMLA. After 1938, state taxation of leases was neither expressly authorized by Congress nor prohibited under the Supreme Court's doctrine.

In this case, unlike in *Cotton Petroleum*, the historical backdrop of the UMUT's tribal sovereignty is significant.[7] As noted in the findings of facts, the UMUT had a reservation as far back as 1868 and rights to the New Mexico lands no later than 1895. The period of complete immunity clearly applied to the UMUT. Thus, there is an "important backdrop" of Tribal sovereignty here

[7] *Compare Cotton Petroleum*, 490 U.S. at 182 ("There is [] simply no history of tribal independence from state taxation" of lessees on *executive* reservations), *with Bracker*, 448 U.S. at 145 n.12 (shifting federal policies on tribal timber sufficing to demonstrate tribal sovereignty).

that acts as a thumb on the scales in favor of the UMUT that the United States Supreme Court in *Cotton Petroleum* did not afford the Jicarilla Apache Tribe, perhaps due to the lack of a corresponding historical backdrop.

Next, keeping in mind the important backdrop of the UMUT's sovereignty, the Court will address the three factual areas important to the *Bracker* analysis: 1) the economic burden of the taxes, 2) the extent of federal and tribal regulation, and 3) the state's involvement with and interest in the activity.

The Economic Burden of the Five State Taxes

The economic burden of the five New Mexico taxes falls primarily on the UMUT. Although it is not entirely clear how the taxes are currently taken into account by the parties when the UMUT negotiates new leases or agreements, there is at least evidence that some of the agreements impose a cap on UMUT revenue. However, the much more important effect is on existing leases, under which the great majority of oil and gas development on the New Mexico lands has occurred. For those leases, the evidence shows that the taxes impair, in practically one-to-one proportion, the ability of the UMUT to impose additional taxes. This conclusion follows from the simple facts that neither the UMUT nor the operators have the power to affect the market price of oil and gas, but the operators have the power and ability to go to places other than the New Mexico lands to extract oil and gas if the UMUT imposes an additional tax.

The opposite result reached by the state district court in *Cotton Petroleum* can be fairly easily explained. First, the Jicarilla Apache Tribe was not a party in *Cotton Petroleum*. Second, the lessee, Cotton Petroleum, only presented evidence of the economic burden on it, but no evidence of the economic burden on the Jicarilla Apaches. In fact, the lessee's (Cotton Petroleum's) multiple taxation claim–which depended on the burden on the lessee–would have

been weakened had Cotton Petroleum shown that the taxes were passed on in some way to the Jicarilla Apache Tribe. It should be noted that Cotton Petroleum, the lessee, seemed to regard the multiple taxation claim as its stronger one. *See Cotton Petroleum*, 490 U.S. at 170. It was the Jicarilla Apache Tribe–which only participated as an *amicus*–that pushed the preemption theory. *See id.* at 170-71. In any case, the factual finding of the state district court in *Cotton Petroleum* does not bind the UMUT or this Court. As to the economic burden, this case fits squarely with *Bracker* and *Ramah*.

Taking a cue from *Cotton Petroleum*, Defendant argues that the burden on the UMUT is too insubstantial to support preemption. However, in *Bracker* the state taxes imposed a burden of less than 1% on tribal timber profits but were still found invalid by the Supreme Court. In the present case the burden is of a greater magnitude.

As noted in the Findings of Fact, in the absence of the five New Mexico taxes, the UMUT could implement Resolution No. 3874 to increase its severance tax and—assuming the market for oil and gas remained stable—raise an additional $1,300,000 in revenue, an increase of approximately $650 per enrolled member per year. While an additional $650 per member may not appear significant to the average New Mexico resident, that money would represent an almost 8% increase in the average per capita income of UMUT members. Likewise, even if the UMUT rescinded Resolution No. 3874, oil and gas production on the New Mexico lands would become more attractive relative to oil and gas production elsewhere in New Mexico, which would result in increased production through discovery of new sources of oil and gas on the New Mexico lands. That increased production would increase UMUT revenues from royalties and the current taxes. In short, the five New Mexico taxes impede UMUT revenue and result in an economic burden on UMUT members. Thus, in view of the significantly different facts in this case, Defendant's "insubstantial burden" argument is unpersuasive.

The Extent of Federal and UMUT Authority over Oil and Gas Operations

In *Cotton Petroleum*, the United States Supreme Court stated that federal and tribal regulation of oil and gas operations, although admittedly extensive, was not exclusive. In so doing, the Supreme Court did not engage in a *de novo* review of the federal and tribal regulations. Instead, it relied on the state district court's factual finding that New Mexico regulated well spacing and mechanical integrity. As with the economic burden issue, the state district court's factual finding regarding lack of federal or Jicarilla Apache tribal regulation does not bind the Ute Mountain Utes or this Court.

When considered as a mixed question of law and fact it is clear that New Mexico does not regulate oil and gas operations on the New Mexico lands and that the federal regulations are therefore exclusive. This conclusion follows after carefully examining the areas NMOCD purports to regulate. First, though, the federal regulations must be generally described.

For unallotted lands, such as the UMUT Reservation, the Bureau of Indian Affairs ("BIA") has implemented the IMLA in a set of regulations at 25 C.F.R. Part 211. For the IMDA, the BIA's implementing regulations are at 25 C.F.R. Part 225. The bulk of the regulations are concerned with leases and agreements themselves, an area NMOCD does not purport to regulate on the New Mexico lands. For the area that NMOCD does purport to regulate–oil and gas operations–the BIA has adopted BLM regulations and has given BLM authority to enforce them. 25 C.F.R. §§ 211.4 (IMLA leases), 225.4 (IMDA agreements). The BLM regulations, codified at 43 C.F.R. Part 3160, apply to all oil and gas operations on both federal public lands and tribal lands. 43 C.F.R. § 3161.1(a). Generally speaking, the BLM has authority to do, among other actions, the following: 1) "to approve, inspect and regulate" oil and gas operations; 2) "to require compliance ... with the regulations" in Title 43; 3) "to require ... protect[ion] of other natural resources and the environmental quality"; 4) to require "protect[ion] of life and property"; 5) to

ensure "the maximum ultimate recovery of oil and gas with minimum waste"; 6) "to enter into cooperative agreements with States [] and Indian tribes relative to oil and gas development and operations"; and 7) to "issue written and oral orders to govern specific lease operations." *Id.* § 3161.2.

The federal regulations will now be compared to the specific areas that NMOCD purports to regulate. First, NMOCD purports to regulate well spacing and non-standard well locations. However, the federal regulations make clear that the BLM exercises primary authority over these matters. Before an oil and gas operator can drill on tribal lands, the operator must submit an APD to the BLM. *Id.* § 3161.3-1(c). "Each well shall be drilled in conformity with an acceptable well-spacing program at a surveyed well location approved or prescribed by the [BLM] after appropriate environmental and technical reviews." *Id.* § 3161.3-1(a). Acceptable well-spacing programs include not only ones which conform with State rules and orders–when approved by the BLM–but "any other program established" by the BLM. *Id.* Thus, should NMOCD impose a well spacing or location that the BLM disfavors, the BLM is free to ignore it by establishing its own program. It cannot be said in any meaningful sense that NMOCD regulates well spacing and non-standard locations. Instead, on the New Mexico lands, NMOCD well spacing and location regulations and orders serve merely as guidelines or suggestions–albeit ones from acknowledged experts in the area–that the BLM finds convenient and efficient–for itself, for the operators, and for the Tribe–to adopt. And the 1999 Memorandum of Understanding displays the BLM's power to enter into agreements with the State on well spacing and simultaneously retain its jurisdiction on Indian lands. *See* Amended Memorandum of Understanding Between the Colorado and New Mexico Bureau of Land Management and the New Mexico Oil Conservation Division Regarding Well Spacing on Indian Lands ("Well Spacing MOU") at 1.

Nonetheless, NMOCD argues that it has the power–which, as noted in the Findings of Fact, it has used–to enforce its regulations and orders in regard to the New Mexico lands by revoking an operator's permission to transport oil and gas within the State. This revocation power does not demonstrate that NMOCD, instead of the federal government or the UMUT, has authority over the New Mexico lands. If BLM chose to ignore an NMOCD regulation or order and enforce its own regulation or order, while the NMOCD tried to enforce its own conflicting regulation or order, the NMOCD would immediately run afoul of the Supremacy Clause. U.S. Const. art. VI, § 2. Although NMOCD has a certain amount of power over the operators, it cannot use that power to acquire jurisdiction over the New Mexico lands. *Cf. Mescalero Apache Tribe*, 462 U.S. at 338 (state's power to regulate hunters and fishermen outside reservation if imposed on reservation would inevitably cause conflict with tribal regulation on reservation). On the New Mexico lands, NMOCD regulations and orders serve at the pleasure of BLM and the UMUT were it to enact its own oil and gas regulations.

NMOCD also argues that the BLM lacks the power to adjudicate disputes between operators. The Well Spacing MOU proves otherwise. Although no longer in force, it provided for appeal of "setting of oil and gas well spacing, approval of exception locations for wells, approval of non-standard spacing units and compulsory pooling" on the New Mexico lands to the BLM State Director and then to the IBLA. *See* Well Spacing MOU at 2, 5-6.[8] Indeed, the IBLA has reviewed the decision of a BLM State Director to set well spacing on Southern Ute lands in Colorado. *San Juan Alliance et al.*, 129 I.B.L.A. 1 (1994). The IBLA specifically rejected a challenge that it lacked "authority to review BLM decisions involving oil and gas operations on

[8] More precisely, the Well Spacing MOU provided for an initial, non-binding hearing before NMOCD and a draft order from NMOCD subject to approval by the BLM State Director. Well Spacing MOU at 4-5. This provision is another example of BLM's use of the expertise of NMOCD while retaining jurisdiction over oil and gas operations.

Indian lands." *Id.* at 4. The IBLA noted that BLM regulations explicitly provide for appeal of decisions of a State Director to the IBLA. *Id.* (citing 43 C.F.R. §§ 3160.0-1, .0-2, .3-1(a), 3165.4(a)).

Finally, NMOCD argues that the BLM, in light of its trust responsibilities to the UMUT, could not serve as a neutral arbiter in any dispute between operators on the New Mexico lands. However, NMOCD failed to present any evidence of bias in BLM adjudications. In fact, *San Juan Alliance* displays the contrary: the challenge rejected by the IBLA was brought by the Southern Utes. *Id.* The IBLA noted, "The Board has long asserted jurisdiction in cases arising from BLM decisions involving Indian lands." *Id.*; *see also Burlington Resources Oil & Gas Co.*, 146 I.B.L.A. 272 (1998) (appeal of decision of BLM State Director in dispute between two operators on Southern Ute lands). More generally, due process in administrative appeals requires only that the actual decisionmakers, not the agency, be unbiased. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 495-96 (1976).

Similar reasoning applies to the other areas NMOCD purports to regulate. For example, the scope of the New Mexico "pit rule" falls within the BLM authority to order operators to "conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality." 43 C.F.R. § 3162.5-1(a). NMOCD regulation of well casings also falls within BLM authority to "protect the mineral resources [and] other natural resources." *Id.* NMOCD regulations designed to prevent and mitigate the release of hydrogen sulfide fall within BLM authority to require operators to "perform operations and maintain equipment in a safe and workmanlike manner." *Id.* § 3162.5-3. There is no area that NMOCD purports to regulate that it in fact regulates on the New Mexico lands. "It is well established that [a State commission] has no jurisdiction over lands held in trust by the Federal Government for Indian tribes or individual Indians." *Assiniboine & Sioux Tribes*, 85 I.B.L.A. 39, 42 (1985), *rev'd on other grounds*,

Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of the State of Mont., 792 F.2d 782 (9th Cir. 1986) (implicitly accepting that jurisdiction rests solely in the BLM).

In sum, NMOCD does not regulate any oil and gas matter on the New Mexico lands. Instead, BLM does, and it does so often by adopting NMOCD decisions. The BLM's sensible approach makes use of NMOCD's undoubted expertise in oil and gas matters but retains BLM's jurisdiction as the law requires. As the next section discusses, though, even use of NMOCD's expertise fails to justify the imposition of the five taxes.

State Involvement and Interest in Oil and Gas Operations on the New Mexico Lands

Although in theory NMOCD provides several services for oil and gas operations on the New Mexico lands, practice shows that the benefit conferred is minimal. Despite NMOCD's argument that only NMOCD can provide a neutral forum for a dispute between operators, there is no evidence that such disputes occur on the New Mexico lands. Similarly, due to the lack of actual conflict and the dominance of oil and gas development on the New Mexico lands by just two companies, NMOCD setting of well spacing and approval of non-standard locations (as adopted by BLM) provides minimal benefit to the operators. And, as the oil and gas pools lie almost exclusively under the New Mexico lands, NMOCD's interest in preventing waste and protecting correlative rights outside the New Mexico lands fails to justify NMOCD's purported regulation of wells inside the lands. *See Mescalero Apache Tribe*, 462 U.S. at 342 (state interest less where activity causes no spillover effects outside reservation). Furthermore, the UMUT does not make use of NMOCD's site inspection service.

NMOCD also fails to show an actual interest in environmental effects on the New Mexico lands. Defendant provided evidence of only two minor incidents of hydrogen sulfide leaks there. And Defendant presented no evidence that NMOCD's general interest in protecting groundwater

translated into protection of specific aquifers lying at least partly outside the New Mexico lands. Similarly, there was no evidence that the localized surface environmental degradation that the "pit rule" seeks to prevent could somehow spread off the Reservation. Although NMOCD offers services such as plugging abandoned wells, NMOCD has not plugged wells on the New Mexico lands and the evidence shows the UMUT is able to manage environmental problems without NMOCD's assistance.

Finally, Defendant presented no evidence that the records NMOCD makes available are actually used with respect to the New Mexico lands. In sum, the State's involvement with and interest in oil and gas operations on the New Mexico lands is minimal.

State Provision of Services Outside of the New Mexico Lands

Defendant argues that the State's involvement with and interest in the transport of oil and gas outside of the New Mexico lands is important and affords significant benefits to the UMUT. After all, the economic value of the oil and gas would be substantially less without a physical infrastructure – state roads and pipelines in New Mexico – to transport it, an infrastructure in which the State necessarily takes an interest. Similarly, the State contends that it provides indirect services and benefits to the UMUT through its off-reservation regulation and maintenance of oil and gas operations, for instance by plugging wells in Eddy County, on the opposite end of the State. Accordingly, the State argues that exempting the oil and gas operators on the New Mexico lands from the five taxes would be tantamount to allowing wealthy corporate and individual taxpayers to claim exemption from State taxes if they could prove that their wealth made them non-consumers of government services or to demand that their tax dollars be traceable to services provided directly to them. The State's arguments in this regard are without support in the law.

Ramah instructs that services provided outside a reservation are not to be taken into account in *Bracker* balancing. *Ramah*, 458 U.S. at 844. As in *Ramah*, the revenues from taxing the activities of operators extracting oil and gas outside the New Mexico lands are presumably enough to recompense the State for its provision and regulation of the infrastructure. *Id.* at 844 n.9. In *Bracker*, the economic value of tribal timber would likely have been minimal in the absence of Arizona state roads outside the White Mountain Apache Reservation to transport the timber to market, but those state roads played no part in the analysis. *See Bracker*, at 146-52. Here, the physical infrastructure and services off the New Mexico lands provided and regulated by the State of New Mexico should similarly play no part in the analysis.

Conclusion

The District Court must confront the intriguing and interesting problem of choosing precedent from the United States Supreme Court that most closely fits the facts of this case, which fall neatly between the facts underlying Supreme Court decisions that go in opposite directions. This case falls much closer to *Bracker* and *Ramah* than to *Cotton Petroleum*. First, there is a significant backdrop of tribal sovereignty. Second, although the State of New Mexico is not absolutely uninvolved in oil and gas operations on the New Mexico lands, its involvement is minimal. Third, the economic burden falls heavily on the Tribe. Fourth, to the extent that State of New Mexico regulations are adopted by the BLM, the BLM does so for its own purposes; it cannot be said that the State of New Mexico in fact regulates oil and gas operations on the New Mexico lands. The Ute Mountain Ute Tribe should be given the relief it seeks: an injunction against imposition of the five taxes on non-Tribal operators extracting oil and gas on the New Mexico lands.

James A. Parker

SENIOR UNITED STATES DISTRICT JUDGE