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

UTE MOUNTAIN UTE TRIBE,

Petitioner/Plaintiff-Appellee,

vs.

DOROTHY RODRIGUEZ, Secretary, Taxation and Revenue Department for the State of New Mexico,

Defendant-Appellant.

NEW MEXICO OIL & GAS ASSOCIATION; COUNCIL OF ENERGY RESOURCE TRIBES,

Amici Curiae.

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

PETITION FOR REHEARING *EN BANC* BY PLAINTIFF-APPELLEE UTE MOUNTAIN UTE TRIBE

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Table of Contents

Table of Authorities

Page(s)

Cases

State Cases

Federal Statutes

Federal Rules

Federal Regulations

EN BANC REVIEW IS REQUESTED.

I. Federal Rule of Appellate Procedure 35 Statement[1]

While the Majority Decision and Dissent agree on the basic law that governs whether federal law preempts New Mexico's taxation of minerals produced on the Ute Mountain Ute Reservation, the Dissent appropriately disagrees with the standard of review that the Majority applies to the District Court's factual determinations. The Majority improperly substitutes its own version of the dispositive facts for District Court's entirely uncontested factual findings, then engages in a preemption analysis that is inconsistent with that required by controlling United States Supreme Court precedent. This inexplicable new "fact-finding," along with the Majority's pervasive misapplication of binding Supreme Court law, changes the outcome of this case. This result cannot stand.

Both the Majority Decision and Dissent recognize – as the District Court did – that *Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163 (1989), controls this case. In discussing the limits of state taxation on Indian lands, the District Court expressly distinguished *Cotton Petroleum* from the instant case based on 311 separate findings of fact determined at the conclusion of a trial. The District Court properly considered these findings in light of *Cotton Petroleum*, which permitted New Mexico to tax on-reservation

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[1] Pursuant to 10th Cir. R. 35.2(B) and 40.2, a copy of the Majority Decision, followed by Judge Lucero's Dissenting Opinion, are attached as Exh. 1. A copy of the District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion is attached as Exh. 2.

production of minerals but held such taxation would be inappropriate where "the State has nothing to do with the on-reservation activity, save tax it." 490 U.S. at 186.

Petitioner likewise agrees with the legal parameters recognized by both the Majority Decision and the Dissent: Supreme Court precedent requires consideration of four factors in order to determine when federal law preempts a state government's taxation powers on Indian lands. Majority Decision at 21-23; Dissent at 2. Those factors are: (1) the historical backdrop of tribal sovereignty in the area taxed; (2) the extent of the federal regulatory scheme; (3) the tribe's sovereign and economic interest; and (4) the state's interest reflected by the services it provides. Dissent at 2 (referencing *Cotton Petroleum*, 490 U.S. 163, 177, 182, 184-186 (1989)). Indeed, the same five taxes at issue in *Cotton Petroleum* were at issue here, but the District Court found that, unlike the evidence presented and arguments made in *Cotton Petroleum*, the evidence presented at trial demonstrated that New Mexico does not provide even the most basic or rudimentary governmental services on the Reservation, or indeed *any* direct services to the Tribe at all, apart from the availability of general access to New Mexico state courts. [R. 177, 189, 199]. These entirely uncontested factual findings led Judge Parker to conclude that the sovereign and economic interests of the Ute Mountain Ute Tribe ("the Tribe") and the state's interests, as reflected by the *de minimus* services it provides, required a finding that New Mexico's taxes are preempted on the Tribe's Reservation.

The Dissent explains how the Majority inexplicably substitutes its own fact-finding for that of the district court's: ". . . the Majority seems to have elevated an undisputed fact found by a New Mexico trial court over twenty years ago to a principle of

law that binds all tribes indirectly burdened by state taxation. I would leave such fact-finding to the trial courts." Dissent at 6. After "finding facts" that are not in the record, the Majority fails to accurately consider the required *Cotton Petroleum* factors, thereby misapplying the Supreme Court's time-tested federal preemption analysis as articulated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and progeny. The result is a new preemption analysis for federal Indian law, based on what amounts to a rewrite of the District Court's uncontested record, that veers impermissibly from what the Supreme Court requires in such cases.

Review of the Majority Decision *en banc* is necessary in order to apply the proper standard of review of the District Court determinations of fact and to conform with the binding precedent of the Supreme Court. Indeed, if the exception identified in *Cotton Petroleum* is not to be read out of the law, as it is by the Majority, it *must* be applied given the facts of this case. Allowing the Majority Decision to stand would radically reinvent the federal preemption standard for other cases in this Circuit.

II. Issues Presented for *En Banc* Review

1. Whether the Majority Improperly Substituted Its Own Fact-Finding for That of the District Court in Violation of Controlling Precedent.

2. Whether the Majority's New "Indirect Economic Burden" Analysis Conflicts with Supreme Court's Holdings in *Warren Trading Post Co. v. Ariz. State Tax Comm.*, 380 U.S. 685 (1965); *Bracker*, 448 U.S. 136; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); and *Montana v. Crow Tribe*, 484 U.S. 997 (1988).

3. Whether the Majority's Consideration of Off-Reservation Benefits Contradicts the Supreme Court Holding in *Ramah*, 458 U.S. 832, and specifically whether the Majority's Attempts to Distinguish This Case From *Ramah* Creates New Legal Tests and Standards that Conflict with

Well-Established Precedent in *Ramah*, *Bracker*, 448 U.S. 136 (1980), and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

4. Whether States Acquire a "Cooperative Regulatory Relationship" with the United States Under Indian Mineral Development Authorities When Federal Regulations Grant Authorized Officials Discretion to Consider Use of State Oil and Gas Development Protocols.

5. Whether the Majority Misapplied the Correct Legal Standard for Determining the Tribe's Sovereignty Interest as Required by *Bracker*, 448 U.S. 136; *Ramah*, 458 U.S. 832; *Montana*, 484 U.S. 997; and *Cotton Petroleum*, 490 U.S. 163.

III. Argument

A. The Majority Improperly Displaced Numerous Findings of Fact by the Trial Court Without a Showing That Such Findings Were Clearly Erroneous.

Despite the Majority's acknowledgement that an analysis of whether the state taxes in this case are preempted must be flexible and must be sensitive to the particular facts,[2] the Majority rejected many of the District Court's key findings and limited its own focus to questions of law, resulting in a conclusion entirely different than Judge Parker's. The District Court carefully delineated its findings of fact derived from three days of trial, and although none of the findings has been contested by the parties, the Majority, without explaining how any of the findings constituted clear error, reversed findings dispositive to the case. Specifically, the Majority rejected Judge Parker's findings of fact that: (1) the federal regulations are exclusive;[3] (2) the New Mexico taxes imposes an economic burden on the Tribe;[4] and 3) the state's on-reservation services are *de*

[2] Majority Decision at 15, citing *Bracker*.
[3] R. at 228-32; Majority Decision at 35, n28, (saying that as a matter of law the district court's finding "would *likely* be erroneous" (emphasis added)) and 47.
[4] R. 206; Majority Decision at 39, 44, and 46-47.

minimus.[5] In each instance, the Majority inexplicably disregarded the facts found by Judge Parker, on which his preemption analysis was based, in favor of an almost entirely *different* set of facts before a New Mexico trial court decades ago in the early proceedings of *Cotton Petroleum*. The Dissent recognized this error and noted that fact-finding is the province of the trial courts. Dissent at 6.

The Dissent is correct and strongly supported by both Supreme Court and Tenth Circuit precedent. The 'clearly erroneous' standard of review is a deferential standard, and if the district court's account of the evidence is plausible in light of the record, the Majority may not reverse it. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855-856 (1982) (appellate court is bound by 'clearly erroneous' standard when reviewing trial court's findings); *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985); *Amedeo v. Zant*, 486 U.S. 214, 223 (1988) (appellate court must give due regard to trial court's evaluation of the credibility of witnesses and assignment of weight to evidence); *see also Hodgson v. Okada,* 472 F.2d 965 (10th Cir. 1973) (not the function of the court of appeals to infer material facts, nor may it make controlling inferences which the trial court did not make). The Majority did not identify any evidence from the record that supports a conclusion that Judge Parker made any clear error. Indeed, the central disputes the Majority has with the District Court – but which the Dissent would properly leave alone – are entirely factual, namely the Tribe's sovereign and economic interests and the state's interest based on the *de minimus* services it provides. Those

[5] R. at 201, Majority Decision at. 40-41.

determinations, made following the lengthy trial held by Judge Parker, should have been left undisturbed by the Majority absent any showing of clear error by the trial judge.

B. The Majority's Imposition of a New "Indirect Economic Burden" Analysis Conflicts with the Economic Burden Test Set Forth by the Supreme Court in *Warren Trading Post*, *Bracker*, *Ramah* and *Montana*.

The Majority's new economic burden test improperly restricts judicial evaluation of a contested tax to the narrow question of whether the Tribe directly pays the tax or reimburses the non-Indian operator conflicts with the economic burden test set forth by the Supreme Court in the *Bracker* line of cases. The Supreme Court has clearly stated that an Indian tribe suffers the economic burden from state taxation even when the tribe does not directly or ultimately pay the state tax at issue when such taxes create a disincentive to further reservation mineral development. *See, e.g., Ramah,* 458 U.S. at 836-37, 844 n.8 (declining to allow the state to impose taxes "even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation"); *Montana*, 484 U.S. 997; *Warren Trading Post Co.*, 380 U.S. at 691.

In *Montana*, the Supreme Court affirmed the Ninth Circuit's explicit rejection of an argument that tribal reimbursement of state taxes paid by non-Indian entities was required for a finding of preemption. 484 U.S. at 899.[6] Contrary to this authority, the Majority attempts to divine too much from the fact patterns in *Bracker*, *Ramah*, and *Cotton Petroleum* and improperly narrows the test applied in *Montana* to whether the

[6] The Ninth Circuit had considered several "economic aspects and practical effects" of the state taxation, including, among others, the impacts of state taxes on the cost of production, the royalty to the tribe, and the demand for the goods produced. *See id.* at 899-900.

Tribe reimbursed non-Indian operators for the tax liability. Majority Decision at 35-37. Mired in details not adduced from the evidence before the District Court, the Majority, without explanation, fails to acknowledge Judge Parker's proper consideration – under *Montana* and *Cotton Petroleum* – of the significant evidence presented by the Tribe of "economic aspects and practical effects" that result in economic harm to the Tribe from the state taxes. Majority Decision at 38-39.

C. The Majority's Consideration of Off-Reservation Benefits Contradicts Supreme Court Precedent in *Ramah*, and the Majority's Attempts to Distinguish This Case From *Ramah* Creates New Legal Tests and Standards that Conflict with Well-Established Supreme Court Precedent.

As the Majority acknowledges, the District Court held that *Ramah* "prohibits any consideration of the off-reservation infrastructure in the [preemption] analysis." Majority Decision at 43 (citing R. at 201). In overturning Judge Parker, the Majority read the relevant language in *Ramah* so narrowly as to craft an entirely new legal test, identifying three threshold factors when considering off-reservation services: (1) the indirect economic burden of the taxes; (2) the relation of the off-reservation services to the taxed activity; and (3) economic value added by the off-reservation services to the taxed activity. Majority Decision at. 43-47. The Majority's new test does not square with binding Supreme Court authority.

1. The Majority's Off-Reservation Analysis Conflicts with *Ramah*.

In *Ramah*, the Supreme Court prohibited consideration of off-reservation state services provided to non-Indians conducting business on tribal lands in Indian tax preemption cases. 458 U.S. at 844. The Majority failed to give effect to this *Ramah* rule

and improperly limited *Ramah*'s preemption instruction to cases where the "ultimate" burden falls on the tribal organization. Majority Decision at 43-44. This limitation imposed by the Majority is inconsistent with the full analysis provided in *Ramah*, which, by its plain language, applies more broadly to taxes imposed on non-Indian entities conducting business on tribal lands. 458 U.S. at 844. The Majority also fails to recognize *Ramah's* prescription for the limited import of off-reservation state benefits (explained by states' ability to receive compensation for off-reservation services by taxing off-reservation activities). 458 U.S. at 844, n.9. The Majority's recasting of *Ramah* has no support whatsoever in subsequent cases, including *Cotton Petroleum* (where the Court did not allow consideration of off-reservation services provided by the state to the non-Indian mineral producers). *See* Dissent at 8.

2. The Majority's Attempt to Distinguish This Case from *Ramah* Creates New Legal Tests that Conflict with Supreme Court Precedent and Which Have No Support in Existing Law.

In its effort to distinguish this case from *Ramah*, the Majority creates whole-cloth new legal tests that contradict the applicable Supreme Court and Circuit Court precedent. In addition to its unsupported consideration of the "ultimate" burden of the tax discussed in Section C(1) above, Majority also erred with its creation of a new test allowing consideration of off-reservation services so long as those services are connected in some manner to the taxed activity. Majority Decision at 44-45. In doing so, the Majority incorrectly displaced the *Ramah* rule by stating that *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), "could also be read to permit the consideration of state services or functions as long as they are *connected to* the on-reservation activity in some

substantial way," (emphasis in original) and citing *Barona Band of Mission Indians v. Yee,* 528 F.3d 1184 (9th Cir. 2008) for the same proposition. Neither case should be read to support the Majority's conclusion.[7]

The Majority's most significant error in distinguishing this case from *Ramah* is its creation of a test evaluating whether the off-reservation state services add substantial economic value to the on-reservation activity being taxed. Here, Judge Parker found that the economic value to the Tribe of off-reservation services provided by the state was substantial,[8] but properly relied on *Ramah*'s instruction that states can impose off-reservation taxes to recover the cost of state services provided off the reservation.[9] The Majority rejected Judge Parker's reliance on *Ramah* and again created an entirely new test allowing for consideration of off-reservation services in the preemption analysis *so long as the services add economic value to the on-reservation taxed activity.* Majority Decision at 46-47. This distinction, which contravenes *Ramah* and all later cases, is meaningless and open-ended. Any off-reservation services potentially add value to the on-reservation taxed activity. The Supreme Court surely did not miss that reality when it crafted the *Ramah* rule and precluded consideration of off-reservation benefits. Although

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[7] In *Mescalero*, the Supreme Court was clear that it analyzed state government services provided "in connection with hunting and fishing *on the reservation* by nonmembers," 462 U.S. at 342 (emphasis added). Likewise, the *Barona* court explicitly distinguished the case from the *Bracker* line of cases, 528 F.3d at 1191, and thus provides no support for consideration of services provided off-reservation.

[8] R. at 201 (Finding of Fact 265).

[9] R. at 234. That is exactly the case here. New Mexico cannot justify taxing operators' activities on the Tribe's lands merely because New Mexico provides substantial governmental services to them beyond the Reservation's boundaries. The same operators are already paying substantial taxes in connection with their activities elsewhere in New Mexico to account for the off-reservation services New Mexico provides.

the Majority grounds its new test on the facts underlying the *Bracker* case, *Bracker* does not support this new test.

The Majority incorrectly distinguished this case from *Bracker* by indicating that, unlike the Ute Mountain Ute Tribe whose taxed producers utilize off-reservation infrastructure, the tribe in *Bracker* did not utilize any off-reservation infrastructure in harvesting its timber, thus warranting a distinction in preemption findings between the cases. Majority Decision at 46-47. In doing so, the Majority neglected to address the evidence contained in the Arizona Court of Appeals' opinion that timber operations were not entirely self-contained within the reservation and some trees harvested on reservation were chipped and transported off the reservation which was presumably subject to Arizona state regulation and taxation. *See White Mountain Apache Tribe v. Bracker*, 585 P.2d 891, 894, 899-900 (Ariz. Ct. App. 1978) (describing off-reservation processing operations).[10] The distinguishing basis for the Majority's decision is infirm.

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[10] Until the Majority Decision, Indian tax preemption cases were generally divided into two categories: cases that involved the sale of goods whose value was derived off the reservation (such as cigarette sales) and cases that involved the sale of goods whose was value derived on the reservation (such as natural resources). *See, e.g., Mescalero*, 464 U.S. at 343; *Montana*, 819 F.2d at 899 (explaining the distinction between the two categories); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 n.7 (9th Cir. 1986). Cases involving development of Indian mineral resources have consistently been characterized as cases where the value of the goods is derived on the reservation. *See e.g., Mescalero*, 464 U.S. at 343; *Montana*, 819 F.2d at 899 (placing mineral development as an activity deriving value on the reservation); *Squaxin Island* 781 F.2d at 720 n.7 (listing mineral leases as activities involving value generated within reservation boundaries). The Majority's new test for the locus of added economic value blurs the line between the two categories of cases and opens the door for argument that *any* value added in the stream of commerce justifies the taxation of on-reservation natural resource production.

The new test articulated by the Majority drastically alters the *Bracker* preemption analysis by requiring tribes to show that they are economic islands (or that their entire natural resource extraction, refining, marketing, and sale occurs on reservation) to avoid the economic burden visited by state taxation predicated on state provision of *de minimus* off-reservation services provided far down the stream of commerce and financed by other taxation of off-reservation activity. This is impossible as a practical matter and eviscerates the Supreme Court's preemption analysis. Neither the Supreme Court nor any Circuit Court reviewing a tribal/state tax preemption case has required such a showing, despite a bevy of cases presented with similar facts and issues. The Majority Decision should be reheard *en banc* and vacated because it conflicts with the off-reservation services analysis provided in *Ramah* and because the Majority's attempt to distinguish this case from the purview of *Ramah* are all contrary to *Ramah* and other Supreme Court and Circuit case law.

D. The Majority Improperly Diminishes the Pervasiveness of Federal Oil and Gas Regulations.

In determining the extent of federal regulation with regard to oil and gas operations on Indian reservations, the Majority incorrectly concludes that because the federal regulations of well-spacing and setbacks allow, but do not require, the Secretary to adopt programs that are similar to state regulations, the state is part of a "cooperative regulatory scheme" that ultimately diminishes the federal regulatory authority such that the federal regulations are not "so pervasive as to preclude the additional burdens sought to be imposed [by the state law]." Majority Decision at 34, n.28 (quoting *Bracker*, 448

U.S. at 148). This is yet another example of the Majority supplanting the District Court's undisputed factual findings and then misapplying the Supreme Court's own rules of decision.

The Majority misapplies the test for exclusivity as established in *Bracker*, *Ramah*, and *Cotton Petroleum*. Unlike *Bracker* and *Ramah*, the *Cotton Petroleum* Court found the federal scheme regulating oil and gas operations on the Jicarilla reservation to be "extensive" but not "exclusive" because the state regulated spacing and mechanical integrity of wells located on the reservation *and* the state trial court found that the state had provided *substantial* services to both the Jicarilla Tribe and Cotton Petroleum totaling about $3 million per year. 490 U.S. at 185. Although the analysis of the federal scheme in *Cotton Petroleum* considered both the law and the facts, the Majority improperly disregards the factual findings of the District Court[11] and concludes that the federal regulations leave room for state regulatory authority. The implications of this error are drastic and the Majority Decision should be reviewed *en banc*.

The Majority finds that the state has a "cooperative regulatory relationship" with the Bureau of Land Management with regard to mineral development on the reservation because the federal regulations at issue require that wells drilled on Indian reservations conform to well-spacing programs approved by the Secretary of Interior and that such programs may, but are not required to, conform with state well-spacing rules and orders. Majority Decision at 6. It is correct that the Secretary may rely on state oil and gas

[11] State services on the Tribe's reservation are "*de minimis*." [R. at 201 (District Court Finding No. 264)].

protocols.[12] But the permissive environment presented to the Secretary of the Interior by oil and has regulations stands in stark contrast to the mandatory regulatory environment that yields a "cooperative regulatory relationship" between the state and the federal government in the Wild and Scenic River Act,[13] wherein rivers designated by a state as wild and scenic *must* be included in the national scenic rivers system. None of the Indian mineral leasing laws impose such mandatory cooperative authority. Petitioner submits that the Majority stretched the application of the federal government's permissive uses of state regulations here too far to yield the cooperative regulatory relationship created by dissimilar mandatory statutes and regulations. To the contrary, the law and facts in this case weigh heavily in favor of finding that the federal regulatory scheme is "so pervasive as to preclude the additional burdens sought to be imposed [by the state law]." *Bracker*, 448 U.S. at 148.

E. The Majority Misapplied the Supreme Court's Legal Standard for Determining the Tribe's Sovereignty Interests in Federal Preemption Cases.

The Majority mistakenly asserts that New Mexico and other states have been expressly empowered by Congress to assess taxes on tribal mineral operators since 1924, "in complete contrast to the previous era of tax immunity." Majority Decision at 29.

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[12] *See e.g.* 43 C.F.R 3161.1 (granting federal authority over "all wells and facilities on State or privately-owned mineral lands committed to a unit or communitization agreement which affects Federal or Indian interests, notwithstanding any provision of a unit or communitization agreement to the contrary"); 43 C.F.R 3161.3(b) ("Any cooperative agreement, delegation or contractual arrangement [authorized by this section] shall not be effective without concurrence of the Secretary..."); 43 C.F.R 3162.2-2 (BLM will *consider* relevant state regulations); 43 C.F.R 3162.3-1 (acceptable well-spacing programs *may* conform to similar state programs).

[13] 16 U.S.C. 1273 (a).

That is incorrect and skews the preemption analysis required by *Cotton Petroleum* by undervaluing the Tribe's sovereign and economic interests and inflating those of the state.

Specifically, the May 29, 1924 Congressional Act ("the 1924 Act") *never* granted states a broad waiver to tax mineral operations on leased Indian lands. Rather, the 1924 Act expressly allowed states to tax *only* the *royalty interests* derived from minerals on tribal lands. This makes a crucial difference to the balancing required by *Cotton Petroleum* preemption analysis. Far from being a sweeping waiver of the traditional doctrine of inter-governmental immunity that precluded states from taxing mineral production within Indian reservations, the 1924 Act was exceedingly narrow. It waived state taxation of the Indian royalty interest *only*, as the Supreme Court has itself recognized. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 765-767 (1985) (states may only tax the Indian royalty interest arising from leases issued under the 1924 Act).

Thus, what the Court sees as "[t]his era of waived immunity" was in fact anything but. Majority Decision at 29. The advent of the Indian Mineral Leasing Act in 1938, which "neither expressly permits state taxation nor expressly precludes it," *must* be interpreted against the consistent and expansive backdrop of Congressional *protection* of Indian tribal lands against state taxing powers. *Cotton Petroleum*, 490 U.S. at 177. The District Court properly recognized this, consistent with the Supreme Court's holding in *Blackfeet Tribe*. Judge Parker held that the longstanding immunity of treaty and statutory tribes from state taxation provides an "'important backdrop' of tribal sovereignty [that] acts as a thumb on the scales in favor of the Tribe that the United States Supreme Court

in *Cotton Petroleum* did not afford the Jicarilla Apache Tribe." Majority Decision at 30 (citing R. 196-197). In contrast, the Majority rejects the District Court's conclusion – "we do not find that this 'backdrop' weighs heavily in favor of a finding of preemption" – only after creating an "era of waived immunity" between 1924 until 1938 that never existed. Majority Decision at 31.[14]

As Judge Parker correctly recognized, there is a long history of "tribal independence from state taxation of [oil and gas] lessees" on the Tribe's treaty-created reservation. *Cotton Petroleum*, 490 U.S. at 182. That history provides no justification for the Majority's conclusion that the scales are not tipped significantly in the Tribe's favor. Majority Decision at 31. The Majority Decision improperly reviewed the District Court's analysis of the history of tribal sovereignty under *Cotton Petroleum*.

CONCLUSION

While the Majority properly identified the criteria for determining whether New Mexico taxes imposed on oil and gas operators severing minerals from the Ute Mountain Ute Reservation are preempted by federal law, it inappropriately substituted its judgment on the facts for Judge Parker's and entirely uncontested by the parties. The Majority also repeatedly misapplies controlling Supreme Court authority and rewrites federal preemption law in Indian law cases in an extreme and unjustified way. Accordingly, *en banc* rehearing is appropriate and the Majority Decision should be vacated.

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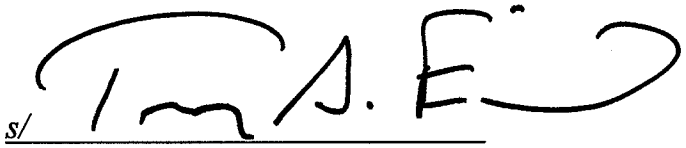
[14] Although the Majority correctly concludes that "neither the IMDA nor any other federal statute has materially altered the relevant taxation landscape since that time." Majority Decision at 30.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

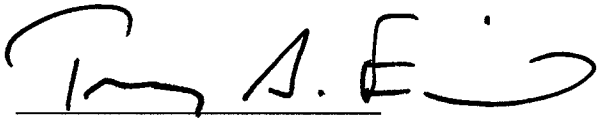
This Petition complies with the type-volume limitation of Fed. R. App. R. 35(b)(2) because the Petition does not exceed 15 pages, excluding the parts of the Petition exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and 10th Cir. R. 32(a). This brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 (11.8328.8333) SP 3. in 13 font size and Times New Roman Style.

I further certify that all required privacy redactions have been made, and with exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk and the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program, McAfee VirusScan Enterprise + AntiSpyware, version 8.8.0 (8.8.0.777), scan engine version (32-bit) 5400.1158, DAT version 6432.0000, last update was 8/8/11 and according to the program, are free of viruses.

Dated: August 10, 2011

Respectfully submitted,



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of August 2011, the foregoing Petition for Rehearing *En Banc* by Petitioner/Plaintiff-Appellee Ute Mountain Ute Tribe was served on the following in the manner indicated:

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